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Democracy and Criminal Discovery Reform After Connick and Garcetti

Janet Moore†

INTRODUCTION

The nondisclosure of information beneficial to criminal defendants causes wrongful convictions, wasteful litigation, and uncertainty in criminal adjudications.⁠¹ Prosecutors are required to disclose this information under Brady v. Maryland² and related cases,³ criminal discovery rules,⁴ and codes of

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

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

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8 N.C. GEN. STAT. §§ 15A-903 to -910 (2012); id. § 15A-1415(0); see Mosteller, supra note 5, at 307-16 (discussing fairness and efficiency enhancements under full open file discovery statutes).
9 Connick, 131 S. Ct. at 1355; Thompson v. Connick, 553 F.3d 836, 842-43, 865 (5th Cir. 2008), aff'd by divided en banc opinion, 578 F.3d 293 (5th Cir. 2009), rev'd, 131 S. Ct. 1350 (2011).
11 Connick, 131 S. Ct. at 1355.
12 Id.
13 Id. at 1355-56.
jury found that Orleans Parish District Attorney Harry Connick had been deliberately indifferent toward the need to train line prosecutors on their *Brady* discovery duties.14

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

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

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

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14 Id. at 1356.
15 Id. at 1356, 1366.
17 Connick, 131 S. Ct. at 1370 (Ginsburg, J., dissenting).
19 Id. at 416, 421-22.
20 Id. at 426.
have not unpacked *Garcetti's* full significance on that point. In part, this neglect is understandable. With few exceptions,22 *Garcetti* has been analyzed on its terms, as clarifying First Amendment doctrine regarding government employee speech.23 Closer analysis reveals a previously unremarked due process shield that should have protected Richard Ceballos from retaliation for *Brady* compliance. At a deeper level, the silence on *Garcetti's* implications for constitutional criminal discovery is emblematic of the short shrift often accorded to the enforcement of prosecutors' constitutional discovery obligations.

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

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

23 See id. at 2176 & n.5 (citing scholarly commentary).
24 *Connick's* wink-and-nod was not undone by the terse majority opinion granting *Brady* relief in the Orleans Parish case of *Smith v. Cain*, 132 S. Ct. 627, 630-31 (2012), nor by the remarkable suggestion during oral argument that the prosecutor consider forfeiting the case. See Lyle Denniston, Disaster at the Lectern, SCOTUSBLOG (Nov. 8, 2011, 4:51 PM), http://www.scotusblog.com/?p=131456. The governing doctrine invited diverse views on the materiality of the undisclosed evidence, as was demonstrated by Justice Thomas's close analysis of the evidence, *Smith*, 132 S. Ct. at 631-41 (Thomas, J., dissenting), by the state trial judge who rejected Smith's *Brady* claim on the merits after hearing witness testimony over the course of four days, Respondent's Brief at 20, *Smith*, 132 S. Ct. 627 (No. 10-8145), and by the numerous Louisiana appellate judges who voted (apparently unanimously) to deny Smith's petitions for discretionary review, see id. and State v. Smith, 45 So. 3d 1065 (La. 2010). For discussion of the practical and doctrinal problems that lead to such disparate assessments of *Brady-line* duties, see infra Part II.
26 Id. § 15A-903(a)(1)(c).
violations. Available empirical evidence shows significant success in the statutes' implementation and expansion, yet full open file discovery remains a rarity in the United States. And like the precise due process disclosure duty at issue in *Garcetti*, this cutting-edge development in criminal procedure has received scant scholarly attention.

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

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

27 Id. § 15A-903(d).
28 For examples of other relatively broad criminal discovery provisions, see MINN. R. CRIM. P. 9.01 (2010); N.J. COURT R. 3:13-3(a)-(c) (2011).
Parts I and II set the stage for in-depth examinations of Connick and Garcetti as examples of Brady's weak enforceability and for discussion of the litigation and legislation that generated the full open file reform alternative. Part I excavates the roots of due process discovery doctrine to identify core meanings and principles. Part II summarizes intractable doctrinal and practical problems that weaken enforceability of constitutional criminal discovery rights and duties. Part III examines Connick and Garcetti as recent exemplars of those problems. Part IV contrasts Connick and Garcetti as examples of the Brady regime's complexity and costs with the simplicity and efficiency of full open file discovery. This part surveys reported case law, available legislative history, and observations from some frontline participants as the most readily accessible evidence of full open file discovery's implementation and expansion.

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

I. DUE PROCESS DISCLOSURE DUTIES

Brady doctrine requires prosecutors to disclose certain beneficial information to the defense. Smith v. Cain, 132 S. Ct. 627, 630 (2012). It is helpful to excavate the historical roots of these duties, if only to counteract shorthand citations that elide or misstate core principles and holdings of Brady-line cases. See, e.g., Connick v. Thompson, 131 S. Ct. 1350, 1378-82 (2011) (Ginsburg, J., dissenting) (citing Orleans Parish prosecutors' admitted ignorance of core Brady-line discovery duties); see also Cookie Ridolfi, New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices: External Regulation, 31 CARDozo L. REV. 1961, 2030 n.83 (2010) (distinguishing Brady duties from ethics rules on the basis that the latter require no defense request to trigger disclosure duty); but see United States v. Bagley, 473 U.S. 667, 682 (1985) (eliminating defense request requirement from due process discovery doctrine). In designing and
grounded in the prosecutorial mandate to speak truth and seek justice. The duties encompass two types of evidence. The first tends to reduce the defendant's culpability with respect to guilt or sentencing. Examples include witness statements that corroborate an alibi defense. The second category comprises impeachment evidence. A deal between a witness and a prosecutor to exchange testimony for leniency on a pending charge, for example, may support an inference that the witness is less credible due to pro-prosecution bias.

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

These core principles of Brady doctrine began to emerge in 1935, when Thomas Mooney obtained Supreme Court review of his capital murder case. Mooney was a workers' rights activist. He was sentenced to death in 1917 for a San Francisco bombing that killed ten people. Mooney fought his conviction for eighteen years before the Supreme Court accepted his petition for federal habeas review. In Mooney v. Holohan, the Court held—for the first time—that the Fourteenth Amendment's Due Process Clause forbids prosecutors from implementing training programs for defense counsel, I have often found comparable misunderstanding or misstatement of criminal discovery rights and duties.

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36 Id.
37 For thoughtful analysis of the duty to disclose impeachment evidence, see R. Michael Cassidy, Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures, 64 VAND. L. REV. 1429, 1431 (2011).
obtaining convictions through the knowing use of perjured testimony. The constitutional values at issue were fairness and reliability in contests between concentrated government power and the individual.

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

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

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

44 Mooney, 294 U.S. at 112-15.

45 295 U.S. 78, 78 (1935).

46 Id. at 88.

47 Id.

48 Id.

49 Id.

50 Id.

51 Id. at 89; see Dye v. Hofbauer, 546 U.S. 1, 4 (2005) (per curiam) (interpreting Berger's holding as sounding in due process).
cumulative-prejudice analysis has remained a core component of constitutional criminal discovery doctrine.\(^{52}\)

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

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

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


\(^{53}\) Kansas v. Pyle, 57 P.2d 93, 96-98 (Kan. 1936).

\(^{54}\) The murder victim's brother committed suicide after testifying against Pyle, "apparently because of the aftereffects of the torture" the defendants had inflicted upon him. \textit{Id.} at 98.

\(^{55}\) 317 U.S. 213, 216 (1942).

\(^{56}\) \textit{Id.} at 215-16.

\(^{57}\) \textit{Id.} (emphasis added).


\(^{59}\) 355 U.S. 28, 28-32 (1957) (per curiam).

\(^{60}\) \textit{Id.} at 30-32.
challenge the credibility of a prosecution witness.61 The *Napue*
Court reasoned, "A lie is a lie, no matter what its subject, and,
if it is in any way relevant to the case, the district attorney has
the responsibility and duty to correct what he knows to be false
and elicit the truth."62

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

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

62 *Id.* The prosecutor elicited the same lie on redirect examination. Instead of
holding the elicitation of that perjured testimony an independent due process violation
under *Mooney*, the Court, instead, took it as proof of prejudice from the due process
violation that occurred when the prosecutor suppressed the truth during cross-
examination. The prosecutor proved the lie's significance, the Court held, by
deliberately eliciting the same lie on redirect. *Id.*
64 *Id.* at 87.
65 *Id.*
66 *Id.*
67 *Id.* at 84.
68 *Id.* at 87.
69 *Id.* at 87-88.
70 See *id.* at 84.
71 *Id.* at 89.
72 *Id.* at 88-91. The state resentenced Brady to life eight years later. *Brady v. Superintendant, Anne Arundel Cnty. Detention Ctr.*, 443 F.2d 1307, 1309-10 (4th Cir. 1971).
After *Brady*, the Court clarified that due process disclosure duties encompass all material impeachment evidence. But the Court took another twenty-two years to define the term *material*. In crafting that definition in *United States v. Bagley*, the Court borrowed from new jurisprudence governing the Sixth Amendment right to effective assistance of counsel. *Bagley* grafted the prejudice definition from the ineffective assistance test onto due process doctrine governing prosecutors’ duty to disclose evidence beneficial to the defense. Therefore, to prove that undisclosed evidence is material, defendants must show “a reasonable probability” of a different result in the case had the undisclosed evidence been available to the defense. A “reasonable probability [is] a probability sufficient to undermine confidence in the outcome.” A decade passed before the next significant refinement in due process disclosure doctrine. In *Kyles v. Whitley*, the Court undertook a detailed assessment of the alleged disclosure violations. Such detail was necessary, according to the concurring Justices, because prosecutors serving under Orleans Parish District Attorney Harry Connick, Sr. committed “blatant and repeated violations of a well-settled constitutional obligation” to reveal favorable evidence. Ordering a new trial, the Court clarified due process disclosure doctrine in several important ways. First, *Kyles* expanded on the key *Brady* holding that prosecutors’ good or bad faith regarding undisclosed evidence is irrelevant.*Kyles* reiterated the longstanding

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75 *Id.* at 682-83 (citing Strickland v. Washington, 466 U.S. 664, 668 (1984)).
76 *Id.*
77 *Id.* at 682. In another key holding, *Bagley* eliminated the “demand” requirement of *Brady*’s due process discovery doctrine, imposing a disclosure duty upon prosecutors even in the absence of any defense request for the information. *Id.*
80 *Kyles*, 514 U.S. at 421.
81 *Id.* at 433, 437-38.
principle that prosecutors are responsible for disclosing evidence in their own files as well as evidence held by other prosecutors in the same office.82 But Kyles also explained that prosecutors must obtain and disclose evidence held by case investigators that is materially beneficial to the defense, whether or not prosecutors know the evidence exists.83

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

Kyles also clarified the distinction between Brady materiality and Strickland prejudice, on one hand, and the test for sufficiency of the evidence, on the other.88 The latter test is governed by Jackson v. Virginia.89 Under Jackson, the defense must prove that no reasonable juror would vote for conviction when the evidence is viewed in a light most favorable to the prosecution.90 The Kyles Court held that the demanding Jackson standard is inappropriately onerous, in the context of prosecutors' due process duties, to ensuring that defendants receive fair trials resulting in verdicts that reliably warrant public (and judicial) confidence.91 In the constitutional discovery and ineffective assistance settings, therefore, courts must weigh the strength and weakness of all the evidence that is presented by both parties in both the trial and postconviction proceedings.92
Finally, Kyles emphasized the significant responsibility that accompanies prosecutors' authority to make discretionary decisions about disclosing Brady-line evidence. The Court cautioned that "a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence."93

II. DUE PROCESS TAKES A DIVE

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

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

93 Id. at 439. Kyles spent more than a decade on Louisiana's death row before the Supreme Court ordered a new trial. Id. at 421. After three subsequent trials ended in hung juries, Connick's office dismissed the charges. JED HORNE, DESIRE STREET: A TRUE STORY OF DEATH AND DELIVERANCE IN NEW ORLEANS 317-21 (2005). In July 2010, Kyles was charged with the first-degree murder and second-degree kidnapping of Crystal St. Pierre, arising from an alleged dispute over the value of a food stamp card. See Alan Powell II, Curtis Kyles May Have Killed Woman over Food Stamp Card, TIMES-PICAYUNE (July 7, 2010, 4:18 PM), http://www.nola.com/crime/index.ssf/2010/07/curtis_kyles_may_have_killed_w.html; see also If Kyles Killed..., JEDHORNE.COM, http://jedhorne.com/2010/06/19/kyles-killed/ (last visited July 3, 2011).
94 Kyles, 514 U.S. at 439.
97 See supra note 1; see infra note 100.
98 There is near unanimity among courts and commentators that enforceability of Brady-line disclosure duties has remained problematic from the outset. Johns, supra note 5, at 516-21; Daniel Medwed, Brady's Bunch of Flaws, 67 WASH. & LEE L. REV. 1533 (2010); Ridolfi, supra note 32, at 2030-31 (existing disclosure rules "are not doing enough because they are inadequate and sometimes not enforced at all"); Stephanos Bibas, Brady v. Maryland: From Adversarial Gamesmanship Toward the Search for Innocence?, in CRIMINAL PROCEDURE STORIES 129 (Carol Steiker ed., 2006). For an expression of judicial frustration with the development of Brady doctrine, see United States v. Oxman, 740 F.2d 1298, 1309-11 (3d Cir. 1984).
defense for timely use at trial.\textsuperscript{99} Discovery violations required
new trials in seventeen of those cases.\textsuperscript{100} In the most recent case, \textit{Smith v. Cain}, the Court vacated a quintuple-murder conviction.\textsuperscript{101}

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


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

\textsuperscript{101} 132 S. Ct. at 630. By an 8-1 vote, the majority tersely rejected Justice Thomas's conclusion, based on a detailed assessment of the evidence, that the defendant failed to satisfy \textit{Brady}'s materiality standard. Instead, the Court emphasized conflicts between the pretrial statements and trial testimony of the lone eyewitness to link the defendant to the murders.
impact of evidence beneficial to the defense would have created a reasonable possibility of a different result if it had been disclosed to the defense in time to be used during the investigation and litigation of the original proceeding.\textsuperscript{102}

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

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

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\item \textsuperscript{102} \textit{Kyles}, 514 U.S. at 437 ("[T]he prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of [materiality] is reached."); United States v. Agurs, 427 U.S. 97, 108 (1976) ("[T]he significance of an item of evidence can seldom be predicted accurately until the entire record is complete."), overruled on other grounds by United States v. Bagley, 473 U.S. 667, 682 (1985); see Cassidy, supra note 37, at 1437-45.
\item \textsuperscript{103} \textit{Kyles}, 514 U.S. at 439 ("[T]he character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record.").
\item \textsuperscript{105} Baker v. McCollan, 443 U.S. 137, 145-46 (1979). Several circuits have distinguished \textit{Baker}. See Ewerson v. Leis, 556 F.3d 484, 498-99 (6th Cir. 2009) (arresting officer must consider both "inculpatory and exculpatory evidence" in determining whether there is probable cause to arrest); Russo v. City of Bridgeport, No. 05-4302-CV, 2007 U.S. App. LEXIS 16171, at *23-30 (2d Cir. Feb. 27), cert. denied, 552 U.S. 818 (2007) (allowing civil rights claim to proceed under Fourth Amendment where arresting officers detained plaintiff while failing to investigate readily available exculpatory evidence) (collecting cases and correcting Russo v. City of Bridgeport, 479 F.3d 196 (2d Cir. 2007)); see also Fisher, supra note 4, at 1399-1401 (describing police duty to investigate exculpatory evidence under England's "tough on crime" Criminal Procedure and Investigation Act 1996, ch. 25 (Eng.).
\item \textsuperscript{106} Youngblood v. West Virginia, 547 U.S. 867, 869-70 (2006) (per curiam) ("[B]rady suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor.'" (quoting \textit{Kyles}, 514 U.S. at 438)). On remand, the West Virginia Supreme Court ordered a new trial over heated dissents. State v. Youngblood, 650 S.E.2d 119, 132-33 (W. Va. 2007) (Davis, C.J.); id. at 134-36 (Benjamin, J., dissenting); id. at 137-40 (Maynard, J., dissenting).
prove bad faith. At a practical level, when law enforcement does obtain and preserve *Brady* evidence, economic realities undercut the enforceability of prosecutors’ constitutional disclosure duties. Heavy caseloads create an independent hurdle to compliance, as prosecutors are charged with identifying and disclosing *Brady* material held by all prosecutorial staff and their agents, including law enforcement. Political pressure can be a factor as well. Prosecutorial elections are often dominated by “tough on crime” ideologies, which tend to be unsympathetic toward procedures that help defendants avoid or reduce punishment.

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

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108 *Youngblood*, 547 U.S. at 869-70. The Supreme Court has not ruled on the question whether law enforcement officers may face civil liability under 42 U.S.C. § 1983 for deliberately suppressing or otherwise failing to disclose *Brady* material. For a canvassing of divided opinions on this issue in the federal courts of appeals, see *Moldowan v. City of Warren*, 578 F.3d 361, 377-81 (6th Cir. 2009), cert. denied, 130 S. Ct. 3504 (2010); id. at 401-04 (Kethledge, J., dissenting in part); see also Smith v. Almada, 640 F.3d 931, 939 (9th Cir. 2011) (explaining that police may face liability under 42 U.S.C. § 1983 (2006)).


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

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

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

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

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

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

III. DUE PROCESS SUBMERGED

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

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

John Thompson was twenty-two years old when he and codefendant Kevin Freeman were arrested for the murder of Raymond T. Liuzza, Jr., in New Orleans. Liuzza was shot to death in early December, 1984, during a robbery outside his home. "Because Liuzza was the son of a prominent executive,
the murder received a lot of attention."\textsuperscript{122} Three weeks after Liuzza’s murder, the three children of a man named LaGarde fought off a carjacking attempt near the Superdome.\textsuperscript{123} After Thompson and Freeman were arrested in January for Liuzza’s murder, Thompson’s photo was published in the \textit{Times-Picayune}.\textsuperscript{124} LaGarde showed the photo to his children. They agreed that Thompson was the man who had tried to rob them.\textsuperscript{125}

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

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

\textsuperscript{122} Thompson, 553 F.3d at 843.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Id.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Connick v. Thompson, 131 S. Ct. 1350, 1374 & n.7 (2011) (Ginsburg, J., dissenting).
\textsuperscript{131} Id. at 1356 (majority opinion).
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 1372-73 & n.5 (Ginsburg, J., dissenting).
\textsuperscript{134} Id.
\textsuperscript{135} Id. at 1356 (majority opinion).
blood swatch. At the time, Deegan was just out of law school and had worked in Connick's office for less than a year.

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

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

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136 Id.
137 Id. at 1372 n.3 (Ginsburg, J., dissenting).
138 Id. at 1371.
139 Id. at 1374.
140 Id. at 1371.
141 Id.
142 Id.
143 Id. at 1371-72.
144 Id. at 1374.
145 Id.
146 Id.
147 Id. at 1355 (majority opinion); Thompson v. Connick, 553 F.3d 836, 842, 865 (5th Cir. 2008).
LaGarde robber had type B blood. The defense tested Thompson's blood. It was type O. The report proved Thompson innocent of the attempted robbery conviction that had kept him from testifying in his own defense at the murder trial and had helped the prosecution argue for his execution.

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

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

151 Id.
152 Id.
153 Id. at 1356 & n.1.
154 Id.
155 Id. at 1374-75 (Ginsburg, J., dissenting).
156 Id.
158 Id.
159 Id.
160 Id. at 557-58.
161 Id. at 557.
163 Id.
B. Deliberate Indifference

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

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

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164 Id. at 1376.
165 Id. at 1357 & n.3 (majority opinion).
166 Id. at 1358-66 (citing Canton v. Harris, 489 U.S. 378 (1989); Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978)). The majority did not cite the unanimous 2009 decision in Van de Kamp v. Goldstein to apply absolute immunity to petitioners despite being urged to do so, Petitioner's Brief on the Merits at 18, Connick, 131 S. Ct. 1350 (No. 09-571); Amicus Curiae Brief of the Orleans Parish Assistant District Attorneys in Support of Petitioners at 7-8, Connick, 131 S. Ct. 1350 (No. 09-571); Brief of Amicus National District Attorneys Association at 16, Connick, 131 S. Ct. 1350 (No. 09-571). Van de Kamp granted absolute immunity to prosecutors sued in their individual capacities for damages caused by their failure to sufficiently train and supervise their deputy district attorneys in preventing the nondisclosure of material impeachment evidence. Van de Kamp v. Goldstein, 555 U.S. 335, 339 (2009). On remand, the plaintiff settled for monetary damages from the city of Long Beach, Goldstein v. City of Long Beach, CV 04-9692, 2010 U.S. Dist. LEXIS 111195 (C.D. Cal. Aug. 13, 2010), after the District Court expressed "little doubt that Plaintiff w[ould] succeed in proving" that the withheld evidence satisfied Brady and sketched the likely jury instructions regarding the prosecutors' violations of their due process disclosure duties. Id. at *8-11.
167 Connick, 131 S. Ct. at 1361-63.
168 Id. at 1374-75, 1383 (Ginsburg, J., dissenting). Justices Scalia and Alito joined in a concurring opinion taking issue with Justice Ginsburg's analysis. Id. at 1366-70 (Scalia & Alito, JJ., concurring).
to fulfill the training requirements necessary to prevent due process disclosure violations in his office.\footnote{169}

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

1. \textit{Canton-izing} Cumulative Review

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

\footnote{169} \textit{Id.} at 1380-81, 1385-86 & nn.21-22 (Ginsburg, J., dissenting).
\footnote{170} See \textit{Laurin, supra} note 108, at 1058-72.
\footnote{171} \textit{Connick}, 131 S. Ct. at 1357-60.
\footnote{172} \textit{Id.} at 1360. At least two other Orleans Parish defendants sought \textit{Brady} relief after prosecutors failed to disclose lab reports documenting test results on biological samples; in both cases, courts held the undisclosed evidence to fail \textit{Brady}'s materiality test. Joseph \textit{v. Whitley}, No. 92-2335, 1992 U.S. Dist. LEXIS 17385, at *5-12 (E.D. La. 1992); State \textit{v. Walter}, 675 So. 2d 831, 833-35 (La. Ct. App. 1996).
\footnote{173} \textit{See supra} note 21.
\footnote{174} \textit{Compare Connick}, 131 S. Ct. at 1357 & n.3 (majority opinion), \textit{with id.} at 1369-70 (Scalia & Alito, JJ., concurring).
\footnote{175} \textit{See Laurin, supra} note 108, at 1059-61.
must be assessed cumulatively. The majority subordinated that principle in favor of a 42 U.S.C. § 1983 remedial rule pulled from dicta in Canton v. Harris. To fit Canton’s Procrustean bed, the Connick majority trimmed Orleans Parish prosecutors’ acts and omissions down to a “single Brady violation” or a “single-incident.”

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

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

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

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

178 Id. at 1356, 1361.


180 Id.

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

182 Id. (“[A] prosecutor must disclose a crime lab report to the defense, even if the prosecutor does not know the defendant’s blood type: ‘Under the law it qualifies as Brady material. Under Louisiana law we must turn that over. Under Brady we must..."
Connick's sworn admission grounds a reasonable inference, apparently reached by the federal jury, that he had ample notice of the need to train his line prosecutors on Brady compliance. Connick's admission on the lab report expressly references a prior Brady allegation directly on point in Thompson's civil rights case. The admission weighs in favor of incorporating the core cumulative prejudice principle into the section 1983 analysis and weighs against the majority's subordinating that principle to Canton's single-incident doctrine.

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

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

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

184 See supra notes 138-44 and accompanying text.

185 Thompson, 825 So. 2d at 557.

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

187 Id.
This is so because the swatch, on its own, would have alerted the defense to the need to check Thompson's blood type.\(^{188}\)

On this point, and of the remaining highlighted aspects of the majority and concurring opinions, perhaps the most powerful evidence of *Brady*\(^{1}\)'s anemic enforceability is the conclusion of Justices Scalia and Alito regarding the lab report. Their concurring opinion reasoned that the failure to disclose the lab report revealing the blood type of the LaGarde robber was probably not a *Brady* violation because prosecutors did not know John Thompson's blood type.\(^{189}\) Notably, the opening lines of the relatively terse majority opinion also emphasized the absence of proof that prosecutors tested Thompson’s blood or "knew what his blood type was."\(^{190}\) Justices Scalia and Alito went further. They denied awareness of any Supreme Court case law supporting what they described as the dissent's "*sub silentio* expansion of the substantive law of *Brady*" to encompass a duty to reveal "untested" evidence that could exonerate a defendant.\(^{191}\)

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

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

\(^{189}\) Id. at 1369 (Scalia & Alito, JJ., concurring).

\(^{190}\) Id. at 1356 (majority opinion).

\(^{191}\) Id. at 1369 (Scalia & Alito, JJ., concurring).


\(^{194}\) *Connick*, 131 S. Ct. at 1369.
In fact, prosecutors' disclosure duties were not squarely at issue in Youngblood. The case did not involve prosecutors' deliberate suppression of biological evidence or nondisclosure of potentially exculpatory lab reports. The problem in Youngblood was the inability to test the biological evidence at issue (semen samples) because one set of samples was too small and investigators failed to preserve another sample for testing.\footnote{488 U.S. at 53-54 (discussing trial court's denial of state's motion to test defendant's blood and saliva because semen sample was inadequate for valid comparison); cf. State v. Youngblood, 734 P.2d 592, 595-96 (Ariz. Ct. App. 1986), rev'd, 488 U.S. 51 (1988) ("This is not a case where the samples were available for defendant's examination."). }\footnote{Youngblood, 488 U.S. at 58.} The Court's chief concern in Youngblood was to avoid burdening the nation's myriad law enforcement offices by imposing a due process duty to preserve potentially exculpatory evidence in all cases.\footnote{Norman C. Bay, Old Blood, Bad Blood, and Youngblood: Due Process, Lost Evidence, and the Limits of Bad Faith, 86 WASH. U. L. REV. 241, 243-44 nn.5-7 (2008).}

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

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

The concurrence failed to mention another reason that Youngblood supports rather than refutes Thompson's position: Youngblood was innocent. Like Thompson, he was imprisoned for years before evidence of his wrongful convictions led to his release.\footnote{Id.} In Youngblood's case, it took fifteen years before advances in DNA technology allowed testing on the remnants of the biological evidence.\footnote{Id.} Those tests led authorities to
identify and convict the child sex offender who had kidnapped and sodomized the ten-year-old victim.\textsuperscript{199} The silence of the \textit{Connick} concurrence on the full story of \textit{Youngblood} tracks the corresponding subordination by both the majority and the concurring opinions of the prosecutors' core due process duties, developed from \textit{Mooney} through \textit{Kyles}, to speak truth and seek justice. The strained reasoning in those opinions with respect to the blood swatch, the lab report, and the undisclosed impeachment evidence significantly weakens \textit{Brady} enforceability. The majority's wink-and-nod to due process disclosure violations highlights the same majority's elision of constitutional discovery duties in \textit{Garcetti}.

\textbf{C. Garcetti v. Ceballos: Riding the Rims to the Junkyard Gate}

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

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

\begin{footnotesize}
\textsuperscript{199} Id.
\textsuperscript{201} Id. at 238.
\textsuperscript{202} Id. at 257 (where court asked whether the property was a "junkyard," one deputy demurred, "every man, it's his castle," but agreed "there were car parts on that property, there were birds, there were animals, there were refrigerators . . . all kinds of stuff," including what "looked like an alligator . . . ").
\textsuperscript{203} Joint App'x Vol. I at 28, Garcetti, 547 U.S. 410 (No. 04-473), 2005 WL 1620385.
\textsuperscript{204} Joint App'x Vol. III at 497, Garcetti, 547 U.S. 410 (No. 04-473), 2005 WL 1620386.
\textsuperscript{205} Id. at 498.
\textsuperscript{206} Id.
\end{footnotesize}
deputies also seized some firearms.\textsuperscript{207} Cuskey, Longoria, and a third defendant named Ojala were charged with felony drug and weapon possession offenses.\textsuperscript{208} Ojala pleaded guilty and began serving a one-year jail sentence.\textsuperscript{209}

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

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

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

\textsuperscript{207} Id.
\textsuperscript{208} Id. at 406.
\textsuperscript{209} Id. at 496.
\textsuperscript{210} Id. at 499.
\textsuperscript{211} Id.
\textsuperscript{212} Id.
\textsuperscript{213} Id.
\textsuperscript{214} Id. at 500.
\textsuperscript{215} Joint App’x Vol. I, \textit{supra} note 203, at 48; see \textsc{Cal. Penal Code} § 1539 (1985) (providing for hearing on motion controverting facts in warrant).
\textsuperscript{216} Joint App’x Vol. I, \textit{supra} note 203, at 48.
\textsuperscript{217} Id.
\textsuperscript{218} Id.
\textsuperscript{219} Id. at 39.
\textsuperscript{220} Id. at 37.
they had made up the fact that they had seen these tire tracks.” Ceballos later told Wall that the charges would likely be dismissed because of the affidavit’s “grossly inaccurate” description of the road.

Wall then made a crucial admission. He told Ceballos that he had spoken to the deputies. He said that the affidavit should be “modified.” He wanted to change “tire tracks” to “tire gouges,” caused by the rims of the stolen truck scraping along the roadway.” Ceballos asked when the officers decided to modify the affidavit. Wall did not answer.

Ceballos wrote a memorandum recommending dismissal of the charges based on the misrepresentations and omissions in the affidavit. He cited Franks v. Delaware in support.

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

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221 Id.
223 Id. at 503.
224 Id.
225 Id.
226 Id. The issue arose a few months after the Rampart investigation revealed large-scale corruption, including perjury, evidence planting, drug dealing, violent crimes, and other misconduct by the Los Angeles police department’s anti-gang unit. Erwin Chemerinsky, An Independent Analysis of the Los Angeles Police Department’s Board of Inquiry Report on the Rampart Scandal, 34 LOY. L.A. L. REV. 545, 547-53 (as revised 2005). As the district court put it in ruling on Ceballos’s subsequent civil rights claim:

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

227 Joint App’x Vol. III, supra note 204, at 503 (citing Franks v. Delaware, 438 U.S. 154 (1978)).
228 Id.
229 Franks, 438 U.S. at 156.
230 Id. at 168.
deliberately or recklessly false statement, were to stand beyond impeachment."\(^{231}\)

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

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

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

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


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


\(^{235}\) *Id.* at 113-18.

\(^{236}\) *Id.* at 49.

\(^{237}\) *Id.* at 117-18. Another supervisor reviewed the affidavit and the results of Ceballos's investigation. He agreed that the affidavit contained "obvious material misrepresentations and omissions per *Franks v. Delaware.*" Joint App'x Vol. III, *supra* note 204, at 411-12. After the meeting, Ceballos confronted his supervisor about "kowtowing to the sheriff's department, of ignoring the fact that these deputy sheriffs had lied, and of setting aside his obligations simply to appease the sheriff's captain and lieutenant." Joint App'x Vol. I, *supra* note 203, at 23.
the defense. He also insisted that he would have to testify for the defense if subpoenaed. His immediate supervisor warned that if he kept “thinking...[and] talking like that” he would get “in trouble.” Ceballos interpreted this warning as an attempt to dissuade him from testifying and as a threat to retaliate if he did so. He received the defense subpoena and decided that “regardless of the consequences” he was going to “tell the truth” at the suppression hearing.

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

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

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

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239 Id. at 57.
240 Id.
241 Id. at 58.
242 Id. at 58-59.
244 Joint App’x Vol. I, *supra* note 203, at 60.
245 Joint App’x Vol. II, *supra* note 200, at 349 (“emergency tires...on the right front and left rear...a white spoke type wheel with a Sonic brand...on the left front...a Firestone...on the right rear”).
246 Id. at 348-49.
247 Id.
248 Id.
250 Id. at 13.
D. Brady Duties in the Pretrial Context

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

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

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

253 Garcetti, 547 U.S. at 414.
254 Joint App’s Vol. III, supra note 204, at 503.
255 Id. at 411-12 (memorandum of Deputy District Attorney Michael Grosbard, concluding that Franks required disclosure of investigators’ “obvious material misrepresentations and omissions’’); Kyles v. Whitley, 514 U.S. 419, 439 (1995) (“[A] prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence.’”).
257 Ceballos v. Garcetti, 361 F.3d 1168, 1179 (9th Cir. 2004).
258 Id. at 1189 & n.3 (O’Scannlain, J., concurring in the judgment).
(as it appears) the lawyers and judges were relying on the four corners of the Supreme Court's *Brady*-line jurisprudence as the basis for Ceballos's constitutional disclosure duty, they were overreaching. From *Mooney* through *Kyles*, the Supreme Court has consistently emphasized that constitutional criminal discovery duties and rights protect interests in a fair trial.259 None of the Supreme Court's *Brady*-line cases impose a constitutional disclosure duty upon prosecutors in the pretrial setting.

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

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

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

261 427 U.S. at 107.
on the summary judgment motions in Ceballos's case, the Supreme Court granted certiorari in another Ninth Circuit case, *United States v. Ruiz.* That case raised the question whether *Brady* requires disclosure of impeachment evidence during plea bargaining. A few months later, and nearly two years before the Ninth Circuit ruled in Ceballos's case, a unanimous Court held that no such duty exists. Since *Ruiz* arguably had implications for prosecutors' pretrial disclosure duties beyond the plea bargaining context—potentially weakening Ceballos's civil rights claim—one would reasonably expect to see some evidence that those implications were considered, had the litigants or judges done so.

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

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

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265 *Id.* at 630-33. Specifically, the *Ruiz* Court held that due process does not bar requirements that defendants waive their rights to impeachment evidence as a condition of accepting a plea bargain; such a waiver does not render the plea involuntary. *Id.* at 630, 633.
266 *Id.* at 995 F.2d 931, 935 (9th Cir. 1993); *cf.* *Mays v. City of Dayton,* 134 F.3d 809, 816 (6th Cir. 1998) (where a *Franks* challenge alleges omission of disputed facts from warrant affidavit, defendants must make "a strong preliminary showing that the affiant with an intention to mislead excluded critical information from the affidavit, and the omission is critical to the finding of probable cause"). But see *United States v. Stott,* 245 F.3d 890, 902-03 & n.9 (7th Cir. 2001) (applying plain error analysis and finding no clear rule that *Brady* applies to suppression hearings; collecting cases).
267 995 F.2d at 932.
268 *Id.*
269 *Id.*
that statement. He argued that only marijuana plants with glandular trichomes emit any odor.270 Had his plants been preserved, he urged, he could have impeached the detectives with evidence that his plants had no glandular trichomes and were therefore odorless.271

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

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

E. Discovery Duties Diminished

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

270 Id. at 933.
271 Id.
272 Id. at 936.
273 Id. at 934-35 (citing Franks v. Delaware, 438 U.S. 154, 156, 168 (1978)).
274 Id. at 935.
employee.\textsuperscript{276} I will not recanvass the abundant commentary\textsuperscript{277} on what even the apparently lone scholarly supporter of \textit{Garcetti} concedes to be the opinion's undertheorized treatment of First Amendment workplace rights for government employees.\textsuperscript{278} The majority's reasoning is formalistic and syllogistic. Ceballos recorded the \textit{Brady} information in a charge disposition memorandum. Ceballos conceded that it was part of his job duties to produce charge disposition memoranda. The First Amendment does not protect communications that are part of a government employee's job duties. Therefore, the First Amendment did not protect Ceballos from retaliation for writing his memorandum.

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

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

\footnotesize{277} See Tarkington, supra note 22, at 2176 & n.5 (citing scholarly commentary).

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

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

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

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

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281 *Ceballos*, 547 U.S. at 425.
282 *Id.* at 425-46.
283 *Id.* at 442 & n.13 (Souter, J., dissenting) (citing *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 255 (1986)).
284 *Id.* at 426-27 (Stevens, J., dissenting).
285 *Id.* at 431 (Souter, J., dissenting).
286 *Id.* at 419-20 (majority opinion).
287 *Id.* at 435 (Souter, J., dissenting).
could entail something more than the First Amendment interest of “any citizen.” Ceballos’s job was “to enforce the law by constitutional action” and “to exercise the county government’s prosecutorial power by acting honestly, competently, and constitutionally.”288 Justice Souter’s dissent also cited Ceballos’s allegation that Brady required him to disclose the memorandum to the defense as exculpatory evidence.289 Finally, this opinion noted, Ceballos’s “claim relating to [his own] truthful testimony in court must surely be analyzed independently [of the other aspects of his claim] to protect the integrity of the judicial process.”290 These statements marked a path toward relief for Ceballos on remand.291

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

288 Id. at 437.
289 Id. at 442.
290 Id. at 444. Justice Souter’s opinion stated that Ceballos’s testimony at the motion hearing “stopped short of his own conclusions” that the deputies lied. Id. at 442. This was so because the judge sustained the prosecution’s objections to that testimony. Joint App’x Vol. III, supra note 204, at 298-303.
291 The case settled shortly after the Supreme Court remanded the case. Ceballos v. Garcetti, No. CV 00-11106 AHM (AJWx), 2002 U.S. Dist. LEXIS 28039 (C.D. Cal. Jan. 30, 2002). Orly Lobel reported that, although the terms of the agreement are not public, “the settlement may have been very favorable for Ceballos.” Orly Lobel, Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations, 97 CALIF. L. REV. 433, 454 & n.125 (2009).
292 Garcetti, 547 U.S. at 446-47 (Breyer, J., dissenting).
293 Id.
With respect to the professional speech prong of Justice Breyer's test, Margaret Tarkington has supplied much of the doctrinal analysis missing from his cursory dissenting opinion.294 Tarkington also is one of the few scholars to discuss the facts and law that gave rise to Ceballos's disclosure duties. Her work points to the core piece of Brady evidence in the case: Ceballos's two conversations with “the police affiant for the warrant” mentioned in the majority opinion.295

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

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

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

296 See supra notes 220-28 and accompanying text.

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

298 On the correlation of duties and rights, see generally, Osborn v. Bank of United States, 22 U.S. 738 (1824) ("It is not unusual for a legislative act to involve
this duty given such short shrift by the Justices and the
majority of commentators?

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

Nor does it solve the puzzle to insist that the case is
really about government employee speech under the First
Amendment and not about due process discovery duties. On
that point, it is noteworthy that the *Garcetti* majority did not
adopt the view of the District Court and the Court of Appeals'
concurring opinion*302 that Ceballos had no protectable interest
in his communication precisely because his speech was required

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

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


302 *See supra* notes 256-58 and accompanying text.
by due process disclosure doctrine. That logic, like the Supreme Court majority's, was syllogistic—but more sweeping.

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

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

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

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

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

IV. **FULL OPEN FILE DISCOVERY AS A MODEL FOR REFORM**

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

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

307 See supra note 298.
308 See supra note 255.
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agencies to disclose information beneficial to the defense.\textsuperscript{310} Providing defendants with information obtained through government's superior investigative resources levels the playing field. Fact finders make better decisions when adversaries present their strongest admissible evidence in the most compelling manner. The finality of reliable verdicts increases public confidence in the transparency and accountability of adjudicatory systems. Finality and reliability also reduce the significant costs resulting from alleged and actual error in criminal cases—costs borne by defendants, crime victims and survivors, their families, and the taxpayers who support prosecutors, public defenders, courts, and prisons.\textsuperscript{311}

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

\begin{itemize}
\item \textsuperscript{310} See supra notes 1-5 and accompanying text.
\item \textsuperscript{311} For data on prison costs alone, see, for example, Justice Reinvestment: Facts and Trends, JUSTICE REINVESTMENT, http://justicereinvestment.org/facts_and_trends (last visited Jan. 27, 2012).
\item \textsuperscript{312} N.C. GEN. STAT. § 15A-903 (2012).
\item \textsuperscript{313} Id. § 15A-903(a)(1). Particularly as modified by the 2011 amendments, the unique combination of provisions in the North Carolina statutes qualify that state's reform as "full" open file discovery. Mosteller, supra note 5, at 263.
\item \textsuperscript{315} Shannon, 642 S.E.2d at 525 (interpreting N.C. GEN. STAT. § 15A-904 and quoting JOHN RUBIN, N.C. INST. OF GOVT, ADMINISTRATION OF JUSTICE 8 (2006)).
\item \textsuperscript{316} N.C. GEN. STAT. §§ 15A-905 to -906 (2012).
\item \textsuperscript{317} Id. § 15A-908.
\item \textsuperscript{318} Id. § 15A-903(d).
\end{itemize}
The readily available empirical evidence—including case law, legislative history, and observations of some key stakeholders—demonstrates that full open file discovery reform can succeed. The history of full open file reform also illustrates that litigation and legislation are viable strategies for regulating prosecutors’ discretionary decision making.319 That evidence is significant because full open file reform can help prevent debacles like John Thompson’s convictions and incarceration, protect prosecutors like Richard Ceballos from retaliation for complying with disclosure duties, and increase the fairness, finality, and efficiency of criminal litigation.320

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

Full open file discovery reform also has received little scholarly attention.324 Commentators have generally followed the courts in deferring to prosecutors, and any internal administrative changes they may choose to make in governing their own discretionary decision making, as the optimal prophylaxis against improper nondisclosure and its attendant costs. In its strongest recent iteration, this trend expressly despair of litigation and legislation as effective avenues for criminal justice reform, at least with respect to the prosecutorial function. Miller and Wright’s Black Box325 is
exemplary. Miller and Wright argue that development of internal data collection protocols is the best, if not the only mechanism for regulating prosecutorial discretion. They cite Orleans Parish District Attorney Harry Connick, Sr. as an example of such internal reform.

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

326 Id. at 128-30.
327 Id. (citing Ronald Wright & Marc Miller, The Screening/Bargaining Tradeoff, 55 STAN. L. REV. 29, 30-36 (2002)); id. at 186-87 (anticipating opportunities for increasing "external" transparency through internal agency data collection and assessment).
328 REINHOLD NEIBUHR, THE IRONY OF AMERICAN HISTORY (1958); Wright & Miller, supra note 29, at 59 ("New Orleans would probably not appear at the top of most lists of progressive criminal justice systems.").
329 Morrison v. Olson, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting) ("Only someone who has worked in the field of law enforcement can fully appreciate the vast power and the immense discretion that are placed in the hands of a prosecutor with respect to the objects of his investigation."); Erik J. Luna & Marianne Wade, Prosecutorial Power: A Transnational Symposium: Prosecutors as Judges, 67 WASH. & LEE L. REV. 1413, 1415 (2010) ("In many (if not most) American jurisdictions, the prosecutor is the criminal justice system. For all intents and purposes, he makes the law, enforces it against particular individuals, and adjudicates their guilt and resulting sentences."); Stephanos Bibas, Prosecutorial Regulation Versus Prosecutorial Accountability, 157 U. PA. L. REV. 959, 960 (2009) ("No government official in America has as much unreviewable power and discretion as the prosecutor."); William J. Stuntz, The Pathological Politics of Criminal Law, 100 MICH. L. REV. 505, 509 (2001) ("Law enforcers, not the law, determine who goes to prison and for how long."); see generally DAVIS, supra note 109.
330 Miller & Wright, supra note 29, at 155, 193-95; see also Janet Moore, Causes, Consequences, and Cures of Racial and Ethnic Disproportionality in Conviction and Incarceration Rates, 3 FREEDOM CTR. J. 35 (2011) (introducing and moderating panel discussion with Wayne McKenzie, founding Director of the Prosecution & Racial Justice Program at the Vera Institute of Justice).
Moreover, it was during Connick's nearly thirty-year tenure as District Attorney of Orleans Parish that John Thompson became one of several prisoners, including other death row inmates, whose cases were tainted by Brady violations. Until Thompson's case was decided, Kyles v. Whitley was the leading national exemplar of Brady violations. This was due in part to the sheer scope of the "blatant and repeated" due process discovery violations by prosecutors in Connick's office. More recently, the Court held that the latest Brady violation from Orleans Parish required a new trial on quintuple-murder charges for a due process violation that at least one Justice considered so egregious as to warrant asking the prosecutor during oral argument whether she had considered forfeiting the case.

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

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

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334 Id. at 455 (Stevens, J., concurring); see supra notes 98-100 and accompanying text.
335 See supra note 24.
336 Miller & Wright, supra note 29, at 129-33.
337 Id. at 128-29.
offer managerial blueprints for internal agency reform.  

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

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

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

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339 Bibas, supra note 329, at 978.
342 Wright, supra note 104, at 1998.
344 See supra note 329.
constitutional doctrine has prioritized deference to prosecutorial discretion over enforceability. Case after case underscores the weakness of *Brady*-line authorities as enforceable mechanisms for criminal discovery reform and the prevention of wrongful convictions. In this context, *Connick* and *Garcetti* comprise the most recent illustration of the doctrinal subordination of prosecutorial disclosure duties, the related due process and fair trial rights of defendants, and the broader interests of criminal justice stakeholders in convictions and sentences that are worthy of confidence.

B. The Birth of Reform and the Presumptuousness of Despair

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

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

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346 Devine, supra note 345.

347 Cf. JULES LOBEL, SUCCESS WITHOUT VICTORY: LOST LEGAL BATTLES AND THE LONG ROAD TO JUSTICE IN AMERICA 1-10 (2003).
reform. Moreover, it was precisely the type of dogged investigation and litigation that led to the Connick and Garcetti rulings—and discontent inspired by similar examples of the Brady model’s failures—that motivated full open file reform. In this broader view, the Connick-Garcetti duo may open a new chapter in the reform story. To appreciate that possibility, one must consider the irony surrounding the advent of full open file discovery statutes.

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

McDowell, a black man, was convicted of capital murder by a North Carolina jury in 1979. After his appeal was denied, his lawyers learned that the prosecution had failed to disclose evidence at trial that indicated, among other things, that the assailant was white. The dogged investigation and litigation of McDowell’s Brady claim included multiple rounds of petitions for review to the United States Supreme Court. In 1990, after eleven years of court proceedings, McDowell

348 Mosteller, supra note 5, at 262-64.
349 Email communications with Staples Hughes, N.C. Appellate Defender; Malcolm “Tye” Hunter, Dir., Ctr. for Death Penalty Litig., Durham, N.C.; and Robert Mosteller (on file with the author). I served as an Assistant Appellate Defender under the leadership of Hunter and Hughes, respectively, between 1998 and 2005.
350 Id.
352 Id.
355 Upon discovering the Brady information, postconviction counsel filed a motion seeking a new trial. After a hearing, the trial judge granted the motion. State v. McDowell, 310 S.E.2d 301, 303-05 (N.C. 1984). The state Supreme Court reversed. Id. at 303. On federal habeas, the United States Court of Appeals for the Fourth Circuit ordered relief on that claim. Dixon, 858 F.2d at 951. Although McDowell’s case appears to be missing from a 2006 assessment of Fourth Circuit habeas decisions, he is among a small minority of petitioners to prevail in a Circuit whose rates of habeas relief are “significantly lower than in any other circuit.” Sheri Lynn Johnson, Wishing Petitioners to Death: Factual Misrepresentations in Fourth Circuit Capital Cases, 91 CORNELL L. REV. 1105, 1150-51 & nn.373-79 (2006).
received a new trial and a conviction on the lesser, noncapital charge of second-degree murder.356

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

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

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

357 Mosteller, supra note 5, at 263.
358 Id. at 263 & n.17 (citing State v. Bates, 497 S.E.2d 276, 280 (N.C. 1998)).
359 Bates, 497 S.E.2d at 280-82.
360 Mosteller, supra note 5, at 261 & n.11 (citing cases). Brady claims led to new trials in these cases only after significant expenditure of time and resources on direct appeal, during which the office of the state Attorney General represented the prosecution. See, e.g., State v. Gell, 524 S.E.2d 332 (N.C. 2000) (new trial awarded on post-conviction Motion for Appropriate Relief, Bertie County Superior Court Docket No. 95 CRS 1884, Dec. 9, 2002); State v. Hamilton, 519 S.E.2d 514 (N.C. 1999) (same, Richmond County Superior Court Docket No. 95 CRS 1670, Apr. 23, 2003); State v. Hoffman, 505 S.E.2d 80 (N.C. 1998) (same, Union County Superior Court Docket No. 95 CRS 15895, Apr. 30, 2004); State v. Bishop, 472 S.E.2d 842 (N.C. 1996) (same, Guilford County Superior Court Docket Nos. 93 CRS 20410-20423, Jan. 10, 2000); State v. Womble, 473 S.E.2d 291 (N.C. 1996) (same, Columbus County Superior Court Docket Nos. 93 CRS 1992-1993).
families, taxpayers, defendants, and public confidence in the criminal justice system.

By this point, about half of the state prosecutors had implemented some form of open file discovery. Subsequent media coverage and public pressure led to the first major expansion of the 1996 full open file statute in 2004. That amendment created the broadest criminal discovery rights and duties in the nation. As discussed below, subsequent amendments in 2007 and 2011 continued the trajectory toward increasingly expansive and enforceable discovery duties.

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

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

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362 Mosteller, supra note 5, at 264-76. Discontent over the perceived mildness of sanctions for nondisclosure also led to expanded duties under the governing disciplinary rules. Id.
363 Id. at 274-76.
365 Id.
366 Id.
367 Id. § 15A-904(a).
368 Id. § 15A-908(a). The new provision for ex parte protective orders required notice to opposing counsel of the order's existence, but "without disclosure of the subject matter." Id. A subsequent amendment requires any "affidavits or statements" supporting such an ex parte order to be sealed for appellate review. N.C. GEN. STAT. § 15A-908(b) (2012).
discovery statute, the Court again held that the legislature meant what it said: "The plain, unambiguous meaning of this requirement is that ‘statements’ need not be signed or adopted before being subject to discovery." The panel majority also rejected the state’s objection that the requirement to reveal all recorded witness statements trenched too far upon work product privileges. The Court held that the amendment adequately protects prosecutors’ “mental processes while allowing the defendants access to factual information collected by the state.”

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

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

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


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

373 § 15A-903(a)(1), 2007 N.C. Sess. Laws 377 § 1. The amendment eliminated the recordation requirement when prosecutors interview a witness without a third party present unless the witness says something “significantly new or different” from prior recorded statements. Id. The Shannon dissent had noted the inefficiencies resulting from the previous double-recordation requirement. 642 S.E.2d at 524, 526 (McCulough, J., dissenting in part). After obtaining agreement on the 2007 amendments, the state dropped its appeal of the Shannon majority’s decision. State v. Shannon, 654 S.E.2d 246 (N.C. 2007).
cases\textsuperscript{374} and to new concerns raised by both prosecutors and defense lawyers. Prosecutors protested that unwarranted disciplinary charges were being filed against them when other agencies hindered compliance by failing to give prosecutors the information they needed to satisfy their discovery duties.\textsuperscript{375} In response, the legislature redefined the term \textit{prosecutorial agencies} to accommodate prosecutors' limited ability to sanction nondisclosure by investigators. But the amendments also expanded the statutes' scope. \textit{Agencies} was redefined to include "any public or private entity that obtains information on behalf of a law enforcement agency or prosecutor's office in connection with the investigation... or prosecution" of a case.\textsuperscript{376} The legislature also clarified that all testing data must be disclosed, "including, but not limited to, preliminary tests or screening results and bench notes."\textsuperscript{377}

In addition, these recent amendments tightened the mandate for disclosure by law enforcement or other investigative agencies of the complete investigative file to the prosecution.\textsuperscript{378} The legislature added criminal penalties for willful noncompliance with disclosure duties by investigative agencies.\textsuperscript{379} Finally, the revised statutes require that a prosecutor's "reasonably diligent inquiry" to comply with disclosure duties triggers a presumption that he or she acted in good faith.\textsuperscript{380} The Governor signed these amendments into law on June 23, 2011.\textsuperscript{381}

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

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\textsuperscript{374} See Mosteller, \textit{supra} note 5, at 285-306.
\textsuperscript{379} N.C. GEN. STAT. § 15A-903(d).
\textsuperscript{380} \textit{Id.} § 15A-910(c)-(d).
\textsuperscript{381} H.B. 408 Bill Tracking Report, \textit{supra} note 375.
}
convictions that can ensue. Additional evidence of full open file discovery's success includes the rarity of court challenges or other significant litigation arising from the statutes in the reported cases; the judiciary's plain-language resolution of those claims; and the legislature's accommodation of prosecutors' concerns as they arise while maintaining and strengthening full open file rights and duties.

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

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

382 Mosteller, supra note 5, at 276-309.
383 Telephone Interviews with Brad Bannon and Professors Jim Drennan, Jeff Welty, and Jessica Smith, supra note 375; Telephone Interview with Kimberly Overton, supra note 361.
384 See sources cited supra note 383.
385 See sources cited supra note 383.
386 See sources cited supra note 383.
388 See sources cited supra note 383.
recordation will include any redactions or edits made to any of the information contained in the file. 389

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

D. Research and Reform Opportunities for the Future

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

389 See sources cited supra note 383.
390 Cassidy, supra note 37, at 1477; Medwed, supra note 98, at 1557-66.
continued vitality of litigation and legislation as necessary complements to internal agency reform in the context of discretionary prosecutorial decision making. Additional research should test for any influence of full open file discovery reform on plea and conviction rates and pretrial or postconviction litigation over discovery issues. Further research should also identify the conditions that foster such reform in some jurisdictions and impede it in others. With respect to North Carolina's expansion of full open file discovery from capital postconviction cases to all felonies, Professor Mosteller summarizes the accomplishment in half-a-dozen words: "The adversaries hammered out a deal."392

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

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

392 Mosteller, supra note 5, at 272 & n.76.
393 See generally CONSTITUTION PROJECT, supra note 113.
394 See supra note 343 and accompanying text.
396 Telephone Interviews with Brad Bannon and Professors Jim Drennan, Jeff Welty, and Jessica Smith, supra note 375; Telephone Interview with Kimberly Overton, supra note 361.
397 Id.
capacities allowed negotiators to tailor solutions to the specific problems at issue, and to build trust essential to the resolution of future problems. As I have discussed in a different doctrinal context, such capacities are central to the exercise of moral imagination within a discourse model of political ethics. Ideally, they will be brought to bear at the national level, through exploration of the full open file statutes as a model for a uniform criminal discovery code encompassing misdemeanors as well as felonies.

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

398 Id.
400 See supra note 30.
402 See supra notes 225-27 and accompanying text.
403 MALCOLM M. FEELEY & AUSTIN D. SARAT, THE POLICY DILEMMA: FEDERAL CRIME POLICY AND THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, 1968-78, at 4 (1980) (noting that legislation that created LEAA adopted a block grant approach, in which fighting crime would remain a state and local function, and federal government’s primary role would be to provide revenues and ideas allowing states to develop programs for their own use); NANCY E. MARION, A HISTORY OF FEDERAL CRIME CONTROL INITIATIVES, 1960-93, at 56-58 (1994) (noting LEAA’s block grant design was supported by Republicans and Southern Democrats in Congress, who felt that federal government should not involve itself directly in local police efforts); Paul Hoffman, The Feds, Lies, and Videotape: The Need for an Effective Federal Role in Controlling Police Abuse in Urban America, 66 S. CAL. L. REV. 1453, 1530-31 nn.286-97 (1993) (urging conditional grants of federal funds to curb police misconduct).
CONCLUSION

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

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

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404 Miller & Wright, supra note 29, at 195.
In a like vein, crises in state and local budgets have led legislatures to accompany new criminal justice statutes with fiscal note and racial impact assessment requirements. Such benchmarks can help check the massive and virtually unregulated investment of increasingly scarce tax dollars in what too often becomes a rapidly-spinning set of revolving doors into and out of local, state, and national criminal justice systems.

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

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

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408 See generally Alexander, supra note 343.