TIMING BRADY
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Criminal discovery reform has accelerated in recent years, triggered in part by the detection of Brady *violations, in which prosecutors have failed to abide by their constitutional obligation to disclose exculpatory evidence. Practitioners and academics, disillusioned by the Supreme Court's hands-off approach, have sought reform along three axes: legislatively expanding criminal discovery's scope; increasing the degree and likelihood of prosecutorial sanctions; and altering the organizational dynamics that encourage prosecutors to withhold exculpatory evidence.*

None of these approaches, however, addresses the issue of timing and its effect on prosecutors. Over the course of a prosecution, incentives to withhold evidence develop, and temptations to withhold evidence recur. Accordingly, popular reform efforts such as mandatory "open file" discovery remain incomplete. Just like Brady*, these well-intentioned reform efforts are destined to fall short of their goals so long as they fail to address criminal discovery's temporal dimension.*

This Article inquires how timing affects the prosecutor's decision to disclose or withhold exculpatory evidence in advance of a criminal trial. After laying out timing's importance, the Article then explores its policy and design implications for criminal discovery reform. By consciously addressing timing, reformers across state and federal jurisdictions can better guarantee the defendant's access to exculpatory evidence.

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INTRODUCTION

Criminal discovery reform is ascendant.[1] The strong law-and-order coalition that defended limited disclosure for nearly a century has all but disappeared. State legislatures are increasingly adopting more generous discovery regimes, many of which impose earlier and more rigorous disclosure requirements on prosecutors.[2] So-called "open file" laws now require the prosecution to disclose the bulk of its files in advance of trial, and sometimes much earlier than that.[3] Federal criminal discovery, although still comparatively narrow, has already been subject to periodic bi-partisan proposals for reform.[4] Finally, across broad and narrow discovery jurisdictions alike, district attorneys and lead prosecutors have publicly acknowledged criminal discovery's importance in ensuring a fair and efficient criminal justice system.[5]

The impetus for this revolution has been the Innocence Movement's painstaking documentation of over 200 instances in which prosecuting authorities have wrongfully convicted innocent individuals of serious crimes.[6] As researchers have combed the case histories of these

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[1] *See, e.g.,* Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1623 (2005).

[2] *See, e.g.,* Press Release, Office of Governor Rick Perry, *Governor Perry Signs Senate Bill 1611, The Michael Morton Act* (June 12, 2013) (describing adoption of new "open-file" discovery regime in Texas). S. 1611, 2013 Leg., 83rd Sess. (Tex. 2013) (signed into law May 16, 2013; effective January 1, 2014), available at http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=83R&Bill=SB1611.

[3] *See* discussion *infra* Part I(b).

[4] Although reformers have yet to succeed in expanding federal criminal discovery, they continue to press for broader disclosure rights. For accounts of previous efforts to alter federal criminal discovery rules, see Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Evidence*, 64 VAND. L. REV. 1429, 1445-1452 (2011) (describing proposals intended to ensure disclosure of impeachment evidence prior to defendant's entry of guilty plea); Bruce Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639, 641-42 (2013) (describing bill proposed by Senator Lisa Murkowski and noting that the DOJ was so concerned by the bill that it "dispatched its second highest ranking representative … to testify against the bill").

[5] A remarkable Symposium hosted by the Benjamin N. Cardozo School of Law to "explore and identify the best practices" in criminal discovery included "representatives from state and federal prosecutors' offices, defense lawyers, judges" and experts from numerous fields. *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 Cardozo L. Rev. 1961, 1961 (2010). Members of the working group on Prosecutorial Disclosure Obligations and Practices "took as a given that prosecutorial disclosure is necessary to promote the public interest in achieving fair trials and reliable outcomes in the criminal justice system." *Id.* at 1964.

[6] *See, e.g.,* Brandon Garrett, *Judging Innocence,* 108 COLUM. L. REV. 55 (2008)

exonerations, they have observed repeated instances in which prosecutors failed to disclose exculpatory evidence.[7] Along with other well-publicized instances of nondisclosure, these findings have led researchers to conclude that the disclosure framework the Supreme Court erected in its landmark case, *Brady v Maryland*, is ineffective and in need of reform.[8]

Derived from the due process clauses of the Fifth and Fourteenth Amendments, *Brady* and its progeny require prosecutors to disclose material, exculpatory evidence to the defense in time for use at trial or sentencing, regardless of whether the defense has requested such evidence.[9] Scholars and practitioners widely view *Brady's* disclosure requirement as fundamental to "promoting the fairness of the criminal process."[10] Nevertheless, since its inception, the doctrine has attracted sharp criticism. It establishes the defendant's right to receive exculpatory evidence, but safeguards that right by delegating it to the prosecutor, the defendant's adversary.[11]

In the half-century that has elapsed since the Supreme Court decided *Brady,* its critics have grown in number and volume.[12] Defense practitioners and academics cite instances in which prosecutors have intentionally and negligently withheld exculpatory evidence, and portray these known violations as a small portion of a larger, more intractable non-

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(examining first 208 cases in which defendants were ultimately exonerated through DNA evidence). Garrett expounds further on his findings, and their implications for criminal justice reform in CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011).

[7] "Studies have pinpointed the suppression of exculpatory evidence as a factor in many documented wrongful convictions later overturned by post-conviction DNA testing." Daniel Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1540 (2010). For more on the innocence movement and its effect on procedural reform, see, e.g., Daniel S. Medwed, *Innocentrism*, 2008 U. ILL. L. REV. 1549, 1549 (2008) (explaining rise of Innocence movement and addressing criticisms directed at movement);); BARRY SCHECK *ET AL*., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (2003) (offering first-person historical account of how Innocence Projects evolved).

[8] 373 U.S. 83 (1963).

[9] *See* discussion *infra* Part I(a).

[10] NEW YORK CITY BAR ASSOCIATION, REPORT BY THE CRIMINAL COURTS COMMITTEE AND CRIMINAL JUSTICE OPERATIONS COMMITTEE RECOMMENDING THE ADOPTION OF A BRADY CHECKLIST, 1 (2011) [hereinafter BAR ASSOCIATION REPORT].

[11] *See, e.g.*, Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643 (2002).

[12] Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn from Their Lawyers' Mistakes?*, 31 CARDOZO L. REV. 2161, 2164-5 (2010) (describing doctrine's lack of clarity regarding "materiality" and other terms that define the prosecutor's *Brady* obligations).

disclosure epidemic among prosecutors offices.[13]

Whether *Brady* violations are as pervasive as critics contend is an empirical question that eludes definitive answer.[14] There is, however, little doubt that *Brady* transgressions have become salient.[15] They have arisen in both state and federal prosecutions,[16] and have infected white collar and street crime prosecutions alike. No wonder, then, that calls for criminal discovery reform have enjoyed bipartisan support.[17]

To date, reform has proceeded along three axes. First, scholars and practitioners have focused on expanding the *scope* of the prosecution's discovery obligation, in some cases seeking rules that require the prosecutor to hand over everything – or at least nearly everything – in her files.[18] This solution has earned the label, "open file discovery," although the openness of the file depends greatly on the jurisdiction implementing it.[19]

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[13] *See, e.g.*, Garrett, *supra* note 8 at 168-70 (observing that *Brady* violation splayed prominent role in a number of exonerations and likely plays an even larger role in wrongful convictions); Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2090 (2010) (contending that Brady violations constitute "one of the most common types of prosecutorial misconduct"); Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 722 (2006) ("[P]rosecutors have increasingly sought to avoid and subvert the requirements of *Brady*.").

[14] As Garrett argues, "suppression of exculpatory evidence is difficult to uncover. Absent discovery of the police and prosecution files, even after exoneration potential Brady violations may not come to light." Garrett, *supra* note 8 at 111.

[15] In a widely discussed dissent to a petition for rehearing *en banc*, Judge Kozinski declared that *Brady* violations had reached an epidemic level that "only judges" could stop. *United States v. Olsen,* 737 F.3d 625, 626 (9th Cir. 2013). Judge Kozinski's opinion was joined by four Ninth Circuit judges.

[16] For discussions of recent federal *Brady* violations, see Christopher R. Smith, *I Fought the Law and the Law Lost: The Case for Congressional Oversight Over Systemic Department of Justice Discovery Abuse in Criminal Cases*, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 85, 91-96 (2010).

[17] The Michael Morton Act, *supra* note 2, was supported and signed by Governor Rick Perry, and a 2012 bill proposing federal discovery reform, discussed in Green, *supra* note 4, was introduced by Senator Lisa Murkowski, the Republican Senator for the state of Alaska.

[18] *See* JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW 2 (2007) [hereinafter "JUSTICE PROJECT"], *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Death_penalty_reform/Expanded%20discovery%20policy%20brief.pdf (advocating open file discovery in order to "best protect a defendant's right to due process and improve the system's ability to efficiently resolve cases").

[19] *New Perspectives on Brady*, *supra* note 5, at 1968 (acknowledging that the "concept requires elaboration and does not fully capture what ought to be disclosed").

Second, reformers have attempted to increase the degree and likelihood of *sanctions* for prosecutorial discovery violations. This effort has encountered mixed results: although a few individuals have been severely penalized for violating *Brady* and its progeny, most prosecutors and their offices remain fairly insulated from the prospect of liability.

Finally, reformers have sought to improve *organizational dynamics* within prosecutors' offices.[20] This growing area of reform recognizes the organizational theory's role in improving compliance by individual prosecutors. Office structure, internal training, formal policies and informal norms all affect the low-level "line" prosecutor's daily decision-making. Accordingly, reforms of this type emphasize internal checklist procedures, professional ethics training, and the need for better cooperation between prosecutors and defense attorneys.[21]

Missing from all of these discussions, however, is a sustained analysis of timing and its effect on prosecutors. No doubt, reformers have long sought rules commanding early discovery, as early disclosure of the government's case aids defendants in assessing the strength of their cases, bargaining for better plea terms, and developing their defenses in advance of trial.[22] Nevertheless, reformers have failed to consider timing's overall effect on prosecutors and their compliance with *Brady*. How does a prosecutor's recognition or receipt of exculpatory evidence later in the game affect her likelihood of handing it over and complying with her obligations? Moreover, are prosecutorial preferences static or dynamic, and if the latter, what does that mean for criminal discovery reform?

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[20] *See, e.g., New Perspectives*, *supra* note 5, at 1984-94 (training and supervision) and 1995-2010 (systems and culture), and 2011-29 (internal regulation and audits). *See also* Christina Parajon, Comment, *Discovery Audits: Model Rule 3.8(d) and the Prosecutor's Duty to Disclose*, 119 YALE L. J. 1338 (2010) (advocating a system of internal discovery audits for federal prosecutors' offices).

[21] See discussion *infra* Part I.c.

[22] Early discovery "provides defense lawyers an opportunity to investigate and to prepare the defense more effectively as well as to advise their clients against pleading guilty when impeachment material exposes unexpected weaknesses in the government's proof." Green, *supra* note 4, at 650-51; Russell Covey, *Plea Bargaining Law after Lafler & Frye*, 51 DUQ. L. REV. 595, 617 and 614-16 (2013). Reformers have been particularly insistent on earlier discovery within the federal criminal justice system. *See e.g.,* Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 HASTINGS L. J. 1321, 1337-42 (2011) (identifying timing of disclosure as "the most significant disclosure issue in the federal criminal justice system" because late disclosure undermines "a fair and effective criminal process"); Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2043-48 (2006) (advocating advances in pre-plea discovery within federal system).

Drawing upon both economic and behavioral literatures, this Article constructs an account of the "hyperbolic prosecutor," an individual with dynamic and inconsistent preferences.[23] This temporally inconsistent prosecutor does not harbor stable preferences throughout the life of a criminal case. Rather, her absolute incentives to withhold evidence evolve over time, and her relative temptations to cheat recur intermittently throughout the course of the prosecution.[24] For these reasons, the moment *when* this prosecutor discovers or receives exculpatory evidence strongly impacts *whether* she will in fact disclose it.

Even the most ethical prosecutor perceives a difference between producing exculpatory discovery in the earlier and later stages of a given case. At the beginning of an investigation, there is little reason for a prosecutor to hang on to one case if she can move quickly and easily to a better prospect.[25] But as a particular case proceeds from the investigatory stage to trial, switching becomes more difficult and the prosecutor's personal costs of disclosure increase. When viable substitutes disappear and the costs of disclosure become too steep, the prosecutor will withhold exculpatory evidence, and, in the process, subvert the criminal justice system.[26]

Absolute costs are bad enough. Cognitive psychology adds an additional gloss: some individuals register extremely strong reactions to costs or benefits that arise in the immediate or near term. As a result, these individuals perceive present-value costs and benefits much more keenly than they expected to back when they first foresaw them. Researchers refer to this tendency as "present-bias" or "hyperbolic discounting."[27] Everyone

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[23] *See* discussion *infra* at Part II.

[24] *Id*.

[25] *See* Ellen Yaroshefsky, *Why Do Brady Violations Happen? Cognitive Bias and Beyond*, CHAMPION, May 2013 at 12.

[26] *See* discussion *infra* Part II.

[27] For a discussion of present bias and its effect on would-be criminals, see Richard H. McAdams, *Present Bias and Criminal Law*, 2011 U. ILL. L. REV. 1607, 1614–28. Present bias is not the same thing as simply valuing the present over the future; the "bias" causes the decision-maker to apply a much higher discount factor in imminent periods, and a weaker rate in later ones. "Stable, time-consistent preferences require a constant exponential discount factor; hyperbolic discounting generates time-inconsistent preferences, sometimes described as present bias." Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 NW. U. L. REV. 1033, 1043 (2012). For more on the concept of hyperbolic discounting and a mathematical model of the bias, see Manuel A. Utset, *Hyperbolic Criminals and Repeated Time-Inconsistent Misconduct*, 44 HOUS. L. REV. 609, 623–25,

values the present over the future, but the hyperbolic discounter places an extremely strong premium on imminent or near imminent changes in welfare. Thus, disclosing evidence in the distant future may not appear particularly costly, but the cost of that disclosure suddenly spikes in intensity when it becomes imminent. The same is true of benefits: a guilty plea proceeding or even a trial verdict slated to occur in the future appears far less valuable in some future time period than when a prosecutor perceives it occurring right *now*. Accordingly, like any other temporally inconsistent individual, the hyperbolic prosecutor is periodically subject to strong temptations. If she falls prey to those temptations, she may well violate certain rules or laws. On the way to breaking those laws, she may overindulge in behavior that promises up-front benefits, or she may procrastinate the commencement of a project that carries up-front costs.[28]

Present-bias becomes most problematic when costs and benefits arise in different time periods.[29] By nature, criminal investigations and prosecutions are "inter-temporal": they unspool in stages, over a period of time, and they frequently separate costs and benefits.[30] For example, at certain predictable chokepoints – at or near the conclusion of a hearing, prior to the entry of a guilty plea, or a few days before the commencement of a trial – the benefits of closing out or winning a case become tantalizingly imminent. In contrast, the costs of engaging in wrongdoing appear contingent and temporally remote. These are the very moments at which the prosecutor's temptation to engage in misconduct spikes precipitously.[31]

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659 (2007).

[28] On the (imperfect) overlap between hyperbolic discounting and willpower failures, see Lee Anne Fennell, *Willpower Taxes*, 99 GEO. L.J. 1310, 1378-79 (2011). *See also* Drew Fudenberg & David K. Levine, *A Dual-Self Model of Impulse Control*, 96 AM. ECON. REV. 1449, 1449–51 (2006) (explaining "dual self" model whereby long-term self's desires clashes with short-term self's immediate need for gratification).

[29] McAdams, *supra* note 27, at 1615 (explaining that present bias has its "main effect" when costs and benefits register in different time periods).

[30] Inter-temporal decisions are ones "in which the timing of costs and benefits are spread out over time." George Loewenstein & Richard H. Thaler, *Anomalies: Intertemporal Choice*, J. ECON. PERSP., Fall 1989, at 181. For more technical treatments of temporal inconsistency, see generally David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 Q.J. ECON. 443 (1997) and R.H. Strotz, *Myopia and Inconsistency in Dynamic Utility Maximization*, 23 REV. ECON. STUD. 165 (1956).

[31] "[F]or many people, preferences between logically identical sets of choices may reverse in a predictable direction as the temporal context of the choice changes." Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1120 (2000).

In sum, timing matters, and it matters to prosecutors. Criminal discovery reform has changed remarkably since the 1960's, the decade *Brady* was decided. State and local jurisdictions permit defense attorneys broader, earlier and more generous access to the government's investigative files, and prosecutors' offices themselves have intoned a desire to implement training and adopt familiar compliance tools such as internal checklist procedures.[32] These reforms are bound to disappoint, however, insofar as they fail to recognize the prosecutor's dynamic preferences. Discovery's timing, and the persistent problem of evidence acquired later in the course of a prosecution, will always affect prosecutors, regardless of their office structure, their fears of professional sanctions, or the scope of the discovery obligation that prevails in their particular jurisdiction. Accordingly, criminal discovery reform can only improve by studying the growing literature on temporal inconsistency.

The remainder of this Article unfolds as follows: Part I examines conventional explanations for *Brady* violations and the three most popular areas of reform. Part II constructs a dynamic account of prosecutorial preferences and explores how timing affects the prosecutor's compliance with *Brady*. Part III revisits the question of *Brady* reform with this temporal lens in mind and critically analyzes the scope, sanction and organizational dynamics efforts that have become so popular among reformers.

Finally, Part IV explores the commitment device[33] literature and then embraces and further develops a reform that some have referred to as "automatic" or "mandatory early disclosure."[34] This regime would oblige prosecutors to disclose at the outset of a case the existence and location of

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[32] *See supra* note 5.

[33] The temporal inconsistency literature uses the terms "commitment" or "precommitment" interchangeably. *See* Michael Abramowicz & Ian Ayres*, Commitment Bonds,* 100 GEO. L.J. 605, 607 n.4 (2012)*, citing* JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 4 (2000). This Article employs the more popular of the two terms, "precommitment."

[34] Part IV references earlier proposals and explains how automatic disclosure, and to some degree similar proposals, can function as a precommitment device. *See* JUSTICE PROJECT, *supra* note 18, at 2 (recommending provisions requiring "automatic and mandatory disclosure" of evidence in criminal cases); Brown, *supra* note 1, at 1636-37 (recommending judicial review of prosecutor's investigatory file); Susan Klein, *Monitoring the Plea Process*, 51 DUQ. L. REV. 559, 564 (2013) (advocating mandatory pre-plea discovery conference between parties and court); Stephen D. Easton & Kaitlin A. Bridges, *Peeking Behind the Wizard's Curtain: Expert Discovery and Disclosure in Criminal Cases*, 32 AM. J. TRIAL ADVOC. 1, 7 (2001) (citing without elaboration the proliferation of "automatic disclosure" obligations across various jurisdictions).

key categories of evidence. The disclosure would take place in court and would require, as the case unfolded, the prosecutor's periodic attestation as to the truthfulness and completeness of her previous disclosures. As such, it addresses the *Brady* violation's twin temporal components: it forces the prosecutor to disclose information *early* in the case, when incentives are least likely to cause her to cheat, and it requires her to attest *often* to the accuracy of these disclosures in open court.[35] Finally, as discussed in the final sections of this article, the reform is valuable precisely because it permits differentiated levels of discovery among different jurisdictions. It can be used in narrow-scope discovery jurisdictions and it can supplement open-file regimes in broad discovery jurisdictions. What it universalizes is the temporal component of discovery, and in doing so, it commits the prosecutor to a course of disclosure before incentives and temptations raise their ugly heads.

I. BRADY VIOLATIONS: CONVENTIONAL EXPLANATIONS AND APPROACHES

The Supreme Court decided *Brady* in 1963, declaring that the prosecutor's failure to hand over materially exculpatory evidence in time for us at trial subverted the defendant's due process rights and required a new trial.[36] Although *Brady* has long been hailed as a landmark case that established the defendant's right to receive exculpatory evidence, it also left prosecutors in charge of collecting and distributing this crucial important evidence.[37]

The first half of this Part briefly summarizes the *Brady* framework and three conventional explanations for *Brady* violations. The second half of this Part examines the typical reforms that scholars and practitioners have sought in order to curb *Brady* violations. As I argue later in Part III,

[35] In addition, as I discuss in Part IV, *infra,* mandatory early disclosure permits differentiation among jurisdictions, a value that some reformers have either ignored or affirmatively resisted. For examples of calls for such uniformity, see Janet Moore, *Democracy and Criminal Discovery Reform after* Connick *and* Garcetti, 77 BROOK. L. REV. 1329, 1332-33 (2013) (arguing that open-file discovery should expand to all jurisdictions).

[36] 373 U.S. 83 (1963). For an in depth discussion of the case and its historical context, see Stephanos Bibas, *The Story of* Brady v. Maryland: *From Adversarial Gamesmanship Toward the Search for Innocence?*, in CRIMINAL PROCEDURE STORIES (Carol Steiker ed., 2005).

[37] "Brady represented a marriage of two somewhat disparate images of the prosecutorial function." Daniel Medwed, *Brady's Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533 (2010).

however valuable these reforms may be, they fail to adequately address timing's effect on prosecutors.

A. Brady's Framework

Brady and its progeny require the prosecution to disclose material evidence "favorable to the accused."[38] The obligation encompasses impeachment evidence, including "any understanding or agreement" between the prosecutor and a testifying witness regarding that witness' future prosecution.[39] Although *Brady* itself involved evidence that had been requested by the defendant's attorney, the obligation stands regardless of whether the defendant's attorney has requested it.[40] It covers evidence within the prosecutor's immediate possession, as well as evidence held by investigating agencies.[41] Moreover, the prosecutor's mental state is irrelevant: an unintentional failure to disclose materially exculpatory evidence is as much a violation as a purposive one.[42] As the Court made clear, the *Brady*'s rule's purpose is not to "puni[sh] society for misdeeds of a prosecutor," but instead remove the taint of unfairness from the defendant's conviction.[43]

Lower courts have held that exculpatory evidence need not be disclosed immediately, but rather, "in time for use" at trial.[44] This lax requirement conflicts with the ABA's Model Rule 3.8, which requires prosecutors to disclose all exculpatory information promptly and upon discovery.[45] As discussed, *infra*, the likelihood of a disciplinary proceeding on these grounds is quite low, particularly for federal prosecutors governed

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[38] *Brady*, 373 U.S. at 87 (declaring that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment).

[39] Giglio v. United States, 405 U.S. 150, 154, 155 (1972).

[40] United States v. Agurs, 427 U.S. 97, 107 (1976).

[41] Indeed, prosecutors harbor a duty to "learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Kyles*, 514 US at 437.

[42] *Brady*, 373 U.S. at 86-87 (failure to hand over material exculpatory evidence "violates due process … irrespective of the good faith or bad faith of the prosecution"); *Giglio*, 405 U.S. at 154 (observing that, "whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor").

[43] *Brady*, 383 U.S. at 87.

[44] In re United States (Coppa), 267 F.3d 132, 135 (2d Cir. 2001).

[45] MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (1983). *See* also Cassidy, *supra* 4, at 1452-60. Kirsten M. Schimpff, *Rule 3.8, The Jencks Act, and How the ABA Created a Conflict Between Ethics and the Law on Prosecutorial Disclosure*, 61 AM. U. L. REV. 1729, 1743-44 (2012).

by the Jencks Act, which permits prosecutors to delay disclosure of impeachment evidence until after a witness has testified.[46]

Brady's progeny does not explicitly require the prosecutor to turn over every piece of evidence that is arguably exculpatory, but only that evidence that is "material" to the defendant's case.[47] Evidence is material if there exists "a reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different."[48] Judged against the "whole" of the prosecutor's case,[49] the materiality standard all but invites prosecutors to delay disclosure while they assess the weight and likely effect of a given piece of evidence. As Professor Bruce Green points out, lower courts *could* have construed the "materiality" standard solely as a harmless error standard on appeal while explicitly preserving the state's obligation to produce all exculpatory evidence.[50] But, as Green and others lament, the doctrine has not developed in this manner. As a result, the strongest argument for prompt disclosure of exculpatory evidence (regardless of its supposed materiality) arises out of the prosecutor's ethical and professional obligations, as set forth in Model Rule of Professional Conduct 3.8(d), which establishes an "independent" standard that requires more of the prosecutor than *Brady*, but which often goes unenforced.[51]

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[46] *See* Schimpff, *supra* note 45, at 1737-38 (discussing how Jencks Act permits federal prosecutors to delay disclosure of witness statements). For an argument that the Jencks Act itself conflicts with *Brady*'s timely disclosure requirement, see Cara Spencer, *Prosecutorial Disclosure Timing: Does Brady Trump the Jencks Act?,* 26 GEO. J. LEGAL ETHICS 997 (2013).

[47] *Brady,* 373 U.S. at 87.

[48] United States v. Bagley, 473 US 667, 682 (1985).

[49] *Id*.

[50] "One could take the view that, like a 'harmless error' standard, materiality is only a standard of post-conviction review--that is to say, that prosecutors must disclose all favorable evidence in connection with a trial but that afterwards a conviction will not be overturned unless, in hindsight, the withheld evidence was material. Some lower courts read the Brady line of cases this way. But most lower courts interpret the Supreme Court decisions to permit prosecutors to withhold favorable evidence unless it is material." Green, *supra* note 4, at 646. *See also* Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 566 (critiquing lower courts' interpretation of materiality standard).

[51] *See* ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009). Model Rule of Professional Conduct 3.8(d), which has been enacted in some form by most states, requires the prosecutor to make "timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense". Model Rule of Prof'l Conduct R. 3.8(d) (2009). For a discussion of the Rule and its adoption by states, see Parajon, *supra* note 20, at 1342 and n.18. *See also* Barry Scheck & Nancy Gertner, *Combatting Brady Violations with an*

The irony is not lost on commentators that *Brady* applies primarily to the trial process, which most criminals never experience.[52] *Brady* itself is silent with regard to guilty pleas; courts are divided on whether it applies in advance of a defendant's guilty plea.[53] In *United States v. Ruiz,* the Supreme Court affirmed that defendants could validly waive their right to receive impeachment evidence prior to entering a guilty plea,[54] but the Court quizzically limited its discussion to "impeachment" evidence, even though it had previously abandoned any distinction between impeachment and exculpatory evidence in previous cases.[55]

If a court becomes aware of a *Brady* violation prior to conviction, it may exclude government evidence, interrupt the proceedings to enable the defense the opportunity to cross-examine a witness with newly discovered evidence, inform the jury of the government's failure to hand over certain evidence, declare a mistrial, or in rare circumstances, dismiss the government's indictment with prejudice.[56] If a *Brady* violation is uncovered in the post-conviction phase, the court will ordinarily vacate the conviction and order a new trial,[57] unless the suppressed evidence was

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'Ethical Rule' Order for the Disclosure of Favorable Evidence, Champion (May 2013) at 40 (explaining that "the ABA devised Rule 3.8 to be unambiguously broad" because *Brady* itself was narrow and confusing). For discussion regarding the conflict between the ABA's Formal Opinion in 2009 and the federal Jencks Act, which permits federal prosecutors to withhold witness statements until witnesses have testified, see sources cited *supra* at notes 45-46.

[52] "[C]riminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." Lafler v. Cooper, 132 S.Ct. 1376, 1388 (2012).

[53] Covey, *supra* note 22, at 601-02 (surveying courts).

[54] 536 U.S. 622 (2002).

[55] *See* Covey, *supra* note 22, at 604. There may be good reasons to treat evidence of factual innocence differently from impeachment evidence. *See* Cassidy, *supra* note 4, at 1431. For more on the circuit split on whether *Ruiz*'s approval of *Brady* waivers attaches only to "impeachment" evidence or in fact extends to evidence of actual innocence, see Klein, *supra* note 34, at 579-80 n.72 (citing United States v. Massaoui, 591 F.3d 263 (4th Cir. 2010)).

[56] United States v. Chapman, 524 F.3d 1073 (9th Cir. 2008); *see also* United States v. W.R.Grace, Cr 05-07-M-DWM, D.Mt. April 28, 2009 (surveying possible responses to government's failure to hand over exculpatory evidence). Kirk Johnson, *Judge Says Asbestos Case Can Proceed,* N.Y. TIMES, April 27, 2009 at A17, available at http://www.nytimes.com/2009/04/28/us/28grace.html?_r=2&ref=global-home&.

[57] "So long as favorable evidence could very well affect the jury's decision, prosecutors must disclose it. And when they fail to do so, courts have a duty to order a retrial, allowing a jury to consider the previously concealed evidence." United States v. Tavera, 719 F.3d 705, 708 (6th Cir. 2013) (also recommending that United States Attorney's Office for Eastern District of Tennessee investigate underlying causes of *Brady* violation).

already in the defendant's possession or otherwise discoverable by his attorney.[58]

Over the years, *Brady* has been widely panned by scholars and defense practitioners.[59] Despite establishing a so-called landmark right to exculpatory evidence, *Brady* and its progeny have effectively foreclosed its protection by trial and appellate courts, thereby watering down the right itself.[60] Even if the prosecutor possesses a stronger ethical obligation to disclose exculpatory evidence (and to do so promptly), defendants lack the resources and abilities to enforce that obligation.

B. Three Models of Misconduct

Much of the literature critiquing *Brady* presents an unspoken paradox. On one hand, the doctrine reportedly requires too little of prosecutors, forcing them only to turn over "material" evidence in time for trial. At the same time, stories abound of prosecutors who have either intentionally or negligently withheld material exculpatory evidence, often to the great detriment of defendants who have been wrongfully accused and convicted of serious crimes.[61] For all its inherent weaknesses and loopholes, *Brady*'s obligation is nevertheless tough enough that it inspires deliberate misconduct.

The bulk of *Brady* scholarship explains this misconduct through the use of one of three models: the "bad agent" prosecutor who favors himself at the expense of the citizen public; a boundedly rational prosecutor who cannot see the cracks in his case; and a dysfunctional, resource-deprived bureaucrat unable to perform his job.

i. The Bad Agent

The rational actor model views prosecutors as untrustworthy agents

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[58] For a thorough analysis and critique of what has been called the "defendant due diligence" rule, see Kate Weisburd, *Prosecutors Hide, Defendants Seek: The Erosion of* Brady *Through the Defendant Due Diligence Rule*, 60 UCLA L. REV. 138 (2013).

[59] *See, e.g.*, Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play,* 57 CASE W. RES. L. REV. 531 (2007); Medwed, supra note 37, at 1539-44; Susan Bandes, *The Lone Miscreant, The Self-Training Prosecutor and other Myths: A Comment on* Connick v. Thompson, 80 FORDHAM L. REV. 715 (2011) (criticizing *Brady* and the lack of an enforcement mechanism against offices that encourage prosecutors to withhold exculpatory evidence).

[60] Weisburd, *supra* note 58, at 163-64; Prosser, *supra* note 50, at 566.

[61] *See, e.g.,* Daniel Medwed, PROSECUTION COMPLEX 37 (2012) (contending that *Brady* violations "take place with regularity").

of the public; these "bad agents" favor their own personal and professional goals over the public's interest in securing justice. Prosecutors are thus like any other group of bad agents who subvert the wishes of their principals[62], and *Brady* violations represent simply another species of "agency costs" wherein the agent cheats in order to improve performance metrics and retain her job.[63] Among criminal procedure scholars, Professor Stephanos Bibas has been most explicit in employing the agency cost literature to explain prosecutorial (mis)conduct.[64] As Professor Bibas explains, "prosecutors want to ensure convictions. They may further their careers by racking up good win-loss records…. Favorable win-loss statistics boost prosecutors' egos, their esteem, their praise by colleagues, and their prospects for promotion and career advancement."[65]

Under Professor Bibas' framework, withholding exculpatory evidence from the defense is just one more way in which the "bad agent" prosecutor harms his "principal," the general public.[66] The familiar criticism that prosecutors are "overzealous" is simply another way of saying that prosecutors favor maximal convictions and sentences, often at the expense of accuracy and notions of just punishment.

Ironically, excessive zeal arises out of organizational efforts to combat its logical opposite, slacking off, which the agency cost literature refers to as "shirking."[67] If the overzealous prosecutor harms the public by

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[62] "[A]n 'agency problem'—in the most general sense of the term—arises whenever the welfare of one party, termed the 'principal,' depends upon actions taken by another party, termed the 'agent.'" Henry Hansmann & Reinier Kraakman, *Agency Problems and Legal Strategies*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE & FUNCTIONAL APPROACH 21, 21 (Reinier Kraakman *et al.* eds., 2004).

[63] For the seminal paper in the corporate context, see Jennifer Arlen and William Carney, *Vicarious Liability for Fraud on Securities Markets: Theory and Evidence,* 1992 U. ILL. L. REV. 691 (1992) (demonstrating how securities fraud is a type of corporate agency cost).

[64] "Prosecutors are agents who imperfectly serve their principals (the public) and other stakeholders (such as victims and defendants). This agency-cost problem resembles corporate employees' temptation to shirk or serve their self-interests at the expense of shareholders, customers, competitors, and other stakeholders." Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 963 (2005); *see also* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (2012)[hereinafter BIBAS, MACHINERY].

[65] Stephanos Bibas, *Plea Bargaining Outside the Shadow of the Trial,* 117 HARV. L. REV. 2463, 2471-72 (2004). Although Bibas was referring to the plea-bargaining process in general, the same conflict explains the prosecutor's noncompliance with *Brady* and other discovery obligations.

[66] For additional examples, see BIBAS, MACHINERY *supra* note 64, at 32-33.

[67] Within the agency cost literature, shirking comprises "any action by a member of a

doing too much, the shirking prosecutor harms the public by doing too little, often by favoring her own leisure over society's interest in solving and reducing the incidence of crime.[68] Shirking can arise when the principal sets the agent's compensation modestly and without regard to performance. To counteract this problem, the public elects and appoints politically ambitious head prosecutors, who seek high conviction rates and notable trial victories.[69] Head prosecutors, in turn, select lower level "line" prosecutors who are also ambitious, enjoy adversarial conflict, and embrace the government's law-and-order ethos.[70] People who derive pleasure and utility from winning cases and placing defendants "behind bars" are not likely to balk at spending late nights in the office preparing for trial, even if they otherwise receive modest salaries and benefits.[71]

As the foregoing discussion demonstrates, agency costs pose vexatious issues for policymakers. Mechanisms designed to reduce shirking simultaneously increase the risk of opportunistic behavior.[72] As several law and economics scholars have observed in regard to overly punitive police departments: "[I]n contrast to the problem of shirking …the agency problem here is likely to include the problem of *excessive zeal*."[73]

The agency cost model is elegant and intuitive. By design, however,

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production team that diverges from the interests of the team as a whole. . . . [It] includes not only culpable cheating, but also negligence, oversight, incapacity, and even honest mistakes." STEPHEN M. BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 73 n.94 (2008).

[68] "The sooner each pending case goes away, the earlier the lawyer or judge can go home to dine with their friends and family." BIBAS, MACHINERY, *supra* note 64, at 32-33.

[69] Presumably, prosecutors (like many other individuals) derive intrinsic pleasure from punishing others. For an analysis of how "altruistic punishment" affects the police, see Dhammika Dharmapala, Nuno Garoupa, & Richard H. McAdams, *Punitive Police? Agency Costs, Law Enforcement and Criminal Procedure*, (draft manuscript), available at SSRN, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2278597. For more on altruistic punishment generally, see Ernst Fahr & Simon Gächter, *Altruistic Punishment in Humans*, 415 NATURE 137 (2002). *See also* Paul Robinson, *Natural Law and Lawlessness: Modern Lessons from Pirates, Lepers, Eskimos and Survivors,* 2013 U. ILL. L. REV. 433, 458-59 (describing instances in which groups took time and effort to punish others, despite substantial costs involved in implementing punishment).

[70] *Cf*. Dharmapala, *et al*, *supra* note 56, at 3 ("Our specific claim is that individuals with relatively intense intrinsic motivations for punishment will self-select into policing.").

[71] *Id*. at 4 (observing that when agents "derive [intrinsic] utility from doing their jobs" they will accept a lower wage and may be less likely to ignore wrongdoing in exchange for outside bribes).

[72] "[P]unitive agents will operate with a lower threshold of doubt for convicting suspects." *Id.* (referring to punitive police).

[73] *Id.*

it declines to incorporate organizational variables such as office structure, level of experience, or case volume and resources.[74] Nor does it explain why *Brady* violations occur in some instances but not others. Presumably *all* prosecutors in *most* offices retain incentives to hide evidence and engage in corrupt practices, but few observers would contend that *all* prosecutors, in all positions and across all jurisdictions, are uniformly bad agents.[75] Accordingly, we need additional explanations.

ii. The Boundedly Rational Prosecutor

The behavioral psychology model also portrays the prosecutor as an imperfect agent, but attributes her mistakes to cognitive bias. Reformers who draw upon this literature contend that the average prosecutor is "boundedly rational": through years of experience and interaction with victims and policing institutions, she develops a form of tunnel vision that disables her from recognizing deficiencies in the case.[76] Additional cognitive mistakes, such as confirmation and *status quo* bias, cause her to adhere to just one version of events and to ignore or disclaim the importance of conflicting pieces of evidence, ultimately causing her to withhold information from the defense.[77] Under this narrative, the prosecutor withholds evidence either because she truly believes the evidence is not exculpatory, or because she believes that she is serving some greater good by ignoring *Brady*'s command.[78]

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[74] For a sophisticated analysis of three different offices and how their structures and employees' prior experience affect prosecutorial decision-making, see Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119 (2012) (reporting results of study comparing experience and structural differences across three different prosecutors' offices).

[75] The rational actor narrative also fails to explain why prosecutors hide evidence in white-collar and corporate criminal cases. If a prosecutor is rational, she ought to be more wary of hiding evidence when her opponents are more sophisticated and therefore more likely to uncover her misbehavior.

[76] *See, e.g.,* Alafair Burke, *Improving Prosecutorial Decision-Making: Some Lessons of Cognitive Science,* 47 WM. & MARY L. REV. 1587, 1603-12 (2006); Keith Findley & Michael Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L REV. 291, 351; Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Postconviction Claims of Innocence,* 84 B.U. L. REV. 125, 140 (2004).

[77] *See, e.g.,* Findley & Scott, *supra* note 76, at 395; Bandes, *supra* note 59, at 731. For a general discussion of the *status quo* bias and how it affects decision-making, see Adam S. Zimmerman, *Funding Irrationality,* 50 DUKE L. J. 1105, 1134-42 (2010).

[78] For similar discussions of this dynamic among police officers, see Anthony Bottoms & Justice Tankebe, *Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice*, 102 J. CRIM. L. & CRIMINOLOGY 119, 154 (2012) (describing "noble cause corruption" as a kind for reasoning wherein police officers "subscribe to the view that it is appropriate to manufacture evidence against a suspect because 'he is clearly guilty

The behavioral economics literature prescribes two types of remedies for cognitive bias. The first reduces bias by delegating the decision-making to a more neutral decision-maker.[79] The second attempts to "debias" the decision-maker of the various heuristics and cognitive mistakes that undermine her abilities.[80] Thus, scholars such as Professor Alafair Burke have argued that the Supreme Court should impose a prophylactic full-disclosure discovery rule on prosecutors because prosecutors as a group cannot be trusted to sort exculpatory evidence from the rest of the file.[81] Short of this rule, Burke suggests debiasing techniques for prosecutors' offices, whereby prosecutors would be made aware of their tendency to adopt "tunnel vision" or engage in confirmation bias, and then would be asked to engage in a series of exercises designed to reduce such bias.[82]

The bounded rationality model has its limitations. To begin with, a recent study undertaken by Professors Wright and Levine suggests that veteran prosecutors may be *less* hardened than their younger counterparts.[83] If their study is indicative of a larger phenomenon, it undermines the tunnel vision claim. Moreover, bounded rationality cannot possibly explain why some prosecutors disclose such exculpatory evidence, reduce charges, and

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anyway'"); Randall Grometstein & Jennifer M. Balboni, *Backing Out of a Constitutional Ditch: Constitutional Remedies for Gross Prosecutorial Misconduct Post Thompson*, 75 ALB. L. REV. 1243, 1244-65 (2012) (applying noble cause corruption theory to prosecutors).

[79] Christine Jolls & Cass Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 200 (2006).

[80] *Id.*

[81] Burke, *supra* note 69 at 1630-31.

[82] *Id*. at 1619-20. Burke envisions a regime requiring the prosecutor to generate competing plausible explanations for each piece of evidence. *Id*. at 1620. However reasonable Burke's debiasing exercise may sound in theory, it is difficult to envision its implementation. Generating a set of competing plausible explanations for each piece of evidence takes time, which is something prosecutors lack in highly pressured and fast-moving situations

[83] "Our data lead us to a striking conclusion: unlike police officers, state prosecutors ordinarily portray themselves as becoming more balanced, rather than more hardened over time." Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, Emory Legal Studies Research Paper No. 14-277, 3 (2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2405137 (discussing results of interviews and surveys conducted between 2010-2013 of over 200 state prosecutors in eight offices across the Southeast and Southwest United States).

Concededly, Wright and Levine's study demonstrates only that older prosecutors view *themselves* as becoming less hardened with age; it does not establish that they are actually less hardened.

dismiss cases when appropriate.[84] If bounded rationality causes noncompliance, why is it that some prosecutors and some offices "bend over backwards to comply"?[85] Presumably, other factors matter.

iii. The Dysfunctional Bureaucrat

The third and final model casts blame on the prosecutor's office: a resource-stricken and often dysfunctional bureaucracy encourages and presides over a host of ills, including its prosecutors' repeated and systematic failures to identify and disclose exculpatory evidence in advance of trial. The model envisions a prosecutor who is harried and lacks resources; or young and inexperienced; or simply untrained in the practical methods of securing evidence from multiple agencies, all while abiding by the legal obligations imposed by state or federal law.[86]

Professors Adam Gershowitz and Laura Killinger recently fleshed out this model in citing the drawbacks of large caseloads for prosecutors:

> The overarching story is fairly simple: when prosecutors carry excessive caseloads, they handle them in a triage fashion. Prosecutors do not look ahead to cases that will come to a boil in weeks or months; they live in the here and now. If evidence is lurking in a case file that will ultimately lead to a defendant's case being dismissed, it will linger there until the prosecutor has time to focus on the matter.[87]

Professor Ellen Yaroshefsky's survey of multiple prosecutors' offices across several jurisdictions confirms the portrait painted by Gershowitz and Killinger: "High caseloads and under-funding, notably in large urban jurisdictions, create an environment with insufficient documentation of witness statements, failure to follow up on police

[84] For an interesting study attempting to distinguish wrongful conviction cases from near misses, *see* Jon B. Gold, Julia Carrono, Richard A. Leo and Katie Hail-Jares, *Predicting Erroneous Convictions*, 99 IOWA. L. REV. 471 (2014) (identifying *Brady* violations as one of the factors predicting wrongful convictions).

[85] MEDWED, *supra* note 61, at 36 (conceding that "most" prosecutors and their offices "strive" to comply with *Brady*).

[86] *See, e.g.,* Prosser, *supra* note 50, at 552-53, 569. "Heavy workloads and inadequate training and supervision can exacerbate the danger, especially for young lawyers and for those with no or no recent defense experience." *New Perspectives on Brady*, *supra* note 5, at 1985.

[87] Adam Gershowitz & Laura Killinger, *The State (Never) Rests: How Excessive Prosecution Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 286 (2011).

evidence, and lack of attention to items of evidentiary value."[88]

The dysfunctional office's problems extend beyond having enough time to review one's files. Limited resources mean that prosecutors and investigators must constantly cut corners and spend less time checking sources and confirming the reliability of evidence.[89] Limited resources leave supervisors and chief prosecutors with fewer opportunities for formal training, which in turn leaves prosecutors less able to identify and comply with statutory and constitutional obligations.[90]

A separate gloss on this story is that some prosecutors also lack experience and savvy. Accordingly, even when she has time to focus on a case, the young and inexperienced prosecutor misunderstands her legal obligations and lacks the institutional knowledge necessary to secure evidence from the various law enforcement agencies that have worked on the case.[91]

Like the other two models, the bureaucratic dysfunction model provides a useful but incomplete portrait of *Brady* noncompliance. Bureaucratic dysfunction surely explains some delays, but it does not explain intentional nondisclosures of evidence. Moreover, the "inexperienced prosecutor" theory is problematic. To date, no empirical study has established that *Brady* violations cluster among younger prosecutors, and the more recent and celebrated cases of *Brady* noncompliance (the Duke lacrosse players wrongfully accused of rape, for example) included a number of mid and senior-level prosecutors and

[88] Yaroshefsky, *supra* note 25, at 13.

[89] "[R]esource constraints prompt [police and prosecutors] to shortchange investigations in other ways: interviewing some but not all witnesses; using quicker eyewitness identification procedures rather than burdensome but more reliable ones; employing unofficial informers (often with criminal records) rather than undercover law enforcement officers…." Brown, *supra* note 1, at 1604.

[90] "Further, a range of evidence-gathering practices reflect compromises with cost constraints. Investigators may not get necessary training, prosecutors may skip forensic analysis, and police may avoid the trouble and expense of taping undercover officers and informants or interrogations of suspects." *Id*. at 1604-05.

[91] "[I]t is reasonable to expect that some prosecutors, particularly those who are young and inexperienced, may not press the more experienced police agents too hard [for evidence]." Bennett Gershman, *Litigating* Brady v Maryland*: Games Prosecutors Play*, 57 CASE WESTERN L. REV. 531, 545-46 (2007). *But see* Daniel Richman, *Prosecutors and their Agents, Agents and their Prosecutors,* 103 COLUM. L. REV. 749, 817-818 (2003) (contending that *Brady* empowers the prosecutor to demand information from recalcitrant agents).

supervisors.[92]

C. Conventional Reforms

To reduce *Brady* violations, reformers have sought a number of changes in the criminal justice system. Although their details vary, the proposals themselves tend to fall within the following categories: (i) expanding the scope of materials included in the prosecutor's discovery obligation; (ii) increasing the likelihood and degree of sanctions for noncompliance and (iii) improving the internal processes and organizational dynamics of the offices in which prosecutors work. A brief survey of each follows:

i. Scope

A growing number of states, including North Carolina, Florida, Texas, Connecticut, and Alabama now require prosecutors to provide some form of "open-file" discovery.[93] An open-file regime typically requires the prosecutor to disclose both her own investigatory files and those belonging to the investigatory agencies that have assisted with the case.[94]

Open-file discovery permits earlier and more detailed disclosure of information contained in the prosecutor's files. Under a narrower discovery scheme, such as the one found in federal jurisdictions, the government need not hand over much more than the defendant's own statements, prior criminal record, and any evidence the prosecutor intends to offer in support of its affirmative case at trial.[95] By contrast, under a "full" open-file regime the prosecutor must disclose all relevant information – other than documents excluded by statute or protected by a court – that is contained in the prosecutor's file.[96] Moreover, open-file promises earlier disclosure of

[92] Prosser, *supra* note 50, at 569; *See also* Bennett Gershman, *Subverting* Brady v Maryland *and Denying a Fair Trial: Studying the Schuelke Report*, 64 MERCER L. REV. 683, 696-97 (2013) (describing backgrounds and experience of prosecutors who participated in criminal trial of Senator Ted Stevens).

[93] *See, e.g.,* Dan Simon, *More Problems in Criminal Trials: The Limited Effectiveness of Legal Mechanisms*, 76 LAW & CONTEMP. PROBLEMS, 167, 208-09 (2012) (recounting increase of more generous discovery systems throughout various states).

[94] Short of open-file discovery, some proposals would require prosecutors to hand over "all" exculpatory evidence immediately, as required by Model Rule 3.8. *See*

[95] "Before trial, the government has no obligation to tell the defense with whom the prosecution has spoken, who has relevant testimony, or who the prosecution will call as witnesses." Green, *supra* note 4, at 644. *See also* Fed. R. Crim Proc. 16; 42 USC 3500 (Jencks Act).

[96] *See generally* Robert Mosteller, *Exculpatory Evidence, Ethics and the Road to*

relevant materials, insofar as the defendant is no longer dependent on a prosecutor to identify and disclose materials that are either exculpatory or fall within legislatively defined categories.

Prosecutors' offices differ in how "open" their files actually are.[97] At one extreme, the state of North Carolina requires prosecutors to disclose "everything" in their files, including reports of witness interviews and memoranda.[98] Other states, however, exclude from discovery the prosecutor's "work product" or offer an informal version of the open-file system, whereby the files are provided solely as a matter of prosecutorial courtesy and not by any enforceable law.[99] Those states that currently employ the open-file system often permit prosecutors to seek protective orders to withhold the identities of witnesses and cooperating defendants.[100]

Although the Federal Rules of Criminal Procedure impose weak discovery obligations on government prosecutors, some United States Attorney's Offices have voluntarily adopted open file discovery, although here too, it is unclear just how "open" their procedures actually are.[101] In any event, "open file" is fully voluntary among United States Attorneys Offices and has not been enthusiastically embraced by the Department of Justice.[102]

Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery, 15 GEO. MASON L. REV. 257 (2008). One must consult the relevant statute to learn whether the "file" includes only the prosecutor's file or the files of all relevant investigative agencies. On the potential differences between various types of files, see Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes,* Brook. L. Rev. (forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2261242

[97] *See, e.g.,* Ion Meyn, *Discovery & Darkness*, 79 BROOK. L. REV. __ (forthcoming 2014) (distinguishing the prosecutor's "file" from files held by investigative agencies that may be excluded by an office's given open-file policy).

[98] Mosteller, *supra* note 96, at 263-64. *See also* Janet Moore, *Democracy and Criminal Discovery Reform after* Connick *and* Garcetti, 77 BROOK. L. REV. 1329, 1332-33 (2013).

[99] Prosser, *supra* note 50, at 594.

[100] Medwed, *supra* note 37, at 1560.

[101] *See* Prosser, *supra* note 50, at 594.

[102] *See, e.g.,* Ellen Podgor, *Criminal Discovery of Jencks Witness Statements: Timing Makes a Difference*, 15 GA. ST. U. L. REV. 651, 690-91 (1999). The 2010 memo to federal prosecutors from Deputy Attorney General David Ogden advises: "Prosecutors should never describe the discovery being provided as "open file." Even if the prosecutor intends to provide expansive discovery, it is always possible that something will be inadvertently omitted from production and the prosecutor will then have unintentionally misrepresented the scope of materials provided." David W. Ogden, Memorandum for Department Prosecutors (2010), *available at* http://www.justice.gov/dag/discovery-guidance.html

Reformers have advanced two sets of arguments for open-file discovery. The first is that broader discovery prophylactically ensures disclosure of exculpatory evidence.[103] Open file discovery "works" because it strips the prosecutor of the discretion to review and withhold evidence.[104] Moreover, it denies the prosecutor the ability to mask her intentional non-disclosures as a merely "innocent" or unintentional mistake.[105] Accordingly, the broad discovery rule ensures that the defendant receives the quantum of evidence to which he is constitutionally entitled, and then some.[106]

Other reformers contend that criminal defendants deserve access to all of the prosecutor's materials, period.[107] Under this lens, open-file discovery is not simply a prophylactic, but instead a pre-requisite for a fair criminal justice system.[108] Through the unquestioned disclosure of information, broad access levels the so-called playing field between powerful prosecutors and weakened defense counsel, thereby improving the defendant's opportunity for a fair outcome.[109]

This level-the-playing-field argument often includes comparisons of criminal to civil discovery, where parties liberally disclose information in advance of any adjudicative proceeding.[110] If the civil *plaintiff,* who seeks

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[103] *See* Ellen Yaroshefsky, *New Orleans Prosecutorial Disclosure in Practice After* Connick v. Thompson, 25 GEO. J. LEGAL ETHICS 913, 919 (2012). Alafair S. Burke, *Revisiting Prosecutorial Disclosure,* 84 IND. L. J. 481, 484, 488 (2009) (comparing proposed "prophylactic rule" to mandatory warning scheme announced by the Supreme Court in *Miranda*).

[104] For more on motivated reasoning and how it causes actors to justify their conduct as appropriate or legal, see Donald C. Langevoort, *Getting (Too) Comfortable: In-house Lawyers, Enterprise Risk and the Financial Crisis,* 2012 WIS. L. REV. 495, 512-14 (citing psychology literature establishing that we "tend to see what we want to see").

[105] Lawmakers adopt similar strategies in articulating criminal prohibitions: "If an actor takes steps to thwart the state from applying a rule to the actor, the state may face a choice of either abandoning pursuit of the actor or expanding the rule to reverse the effects of the actor's thwarting behavior, producing overbreadth in the rule." Samuel Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1494 (2008).

[106] Burke, *supra* note 103, at 488.

[107] "Providing defendants with information obtained through government's superior investigative resources levels the playing field." Moore, *supra* note 98, at 1372.

[108] *Id*. at 1334 (contending that open-file discovery should be a pre-requisite for "efficiency, fairness and finality in the resolution of criminal cases").

[109] Interestingly, this strand of argument in defense of broad discovery is inconsistent with the "harried bureaucrat" theory of *Brady* noncompliance.

[110] *See* Green, *supra* note 4, at 643-44 (comparing civil and criminal discovery); JUSTICE PROJECT, *supra* note 18, at 1 (denigrating difference between two systems as "nonsensical and unjust").

primarily the payment of money, must share his evidence in advance of a trial, then surely the *prosecutor,* who seeks the defendant's loss of liberty or life, ought to suffer the same obligations.

The above imbalance grows stronger when one considers that most defendants plead guilty and skip the information-forcing benefits of a criminal trial. Criminal defendants often know less about the government's case than the government itself, and their only means for determining the weakness of the government's case is by proceeding to trial.[111] Since most defendants lack the resources and fortitude to seek this option, criminal discovery's information asymmetry severely undermines the integrity and reliability of the plea-bargaining process.[112]

Professor Darryl Brown has written quite eloquently about the effective contraction in adjudicative protection for innocent defendants, and how that contraction supports the argument for broader discovery rights.[113] To balance the risk of abuse by zealous prosecutors and resource-deprived defense attorneys (and the attendant increase in wrongful convictions), Brown argues, defendants require enhanced tools to investigate the government's case and challenge its allegations.[114] Although Brown himself advances tools beyond open-file discovery, his argument roundly supports the argument for open-file discovery.[115]

In sum, open file discovery enjoys strong support among criminal defense attorneys and academics, both as a means of reducing *Brady* violations and as a component of broader criminal justice reform. More importantly, in comparison to the reform discussed in the following section,

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[111] *See, e.g.* Bibas, *supra* note 65, at 2495 (arguing that lack of information leaves defendants pleading "blindfolded"); Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes,* Brook. L. Rev. (forthcoming 2014) (criticizing discovery system that leaves defendants "litigating in darkness"), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2261242

[112] *See, e.g.,* Bibas, *supra* note 111; Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2043-48 (2006) (discussing discovery deficits in advance of pleading and ways in which changes to Rule 16 of the Federal Rules of Criminal Discovery would alleviate these deficits).

[113] "[E]very major component of criminal adjudication compromises fact-finding to serve competing commitments to government restraint, efficient case disposition, and law enforcement effectiveness." Brown, *supra* note 1, at 1613.

[114] "[B]road discovery partially compensates for restricted defense counsel; it helps make up for the deficiency in adversary process of constrained defense advocacy." *Id*. at 1624.

[115] Brown advocates a number of reforms, including judicial review of the prosecutor's file. *Id.*

open-file discovery has enjoyed, in the past decade, a fair amount of success.

ii. Sanctions

Whereas reformers have enjoyed some notable successes in expanding criminal discovery's scope, they have enjoyed far fewer victories in increasing the likelihood and degree of sanctions for nondisclosures of *Brady* material.[116]

Under *Imbler v Pachtman,* prosecutors who withhold *Brady* material are completely shielded from civil liability for constitutional tort claims.[117] Absolute immunity also shields their supervisors from claims premised on poor training or oversight.[118] Although prosecutors enjoy immunity, the municipality that employs them may be sued for *Brady* violations where those violations arise out of a formal policy or custom of withholding evidence.[119] Few government officials, however, are brazen enough to articulate a policy of ignoring or withholding *Brady* evidence. Demonstrating an informal but widely held custom is also difficult.

Although municipalities theoretically might be liable for failing to train prosecutors in recognizing their *Brady* obligations, a recent Supreme Court decision appears to have narrowed that avenue of relief.[120] In a divided 5-4 decision in *Connick v. Thompson*, the Supreme Court declared that a *Brady* violation was not the kind of violation so "obvious" to a prosecutor's office that it should trigger liability for single violation.[121] Moreover, the majority opinion went on to opine that disparate types of *Brady* violations (e.g., withholding forensic evidence in one case while failing to disclose an agreement with a cooperating witness in another) would not satisfy the pattern requirement.[122] Finally, in a concurring

[116] "Nationally, the lack of accountability for prosecutorial misconduct – either through disciplinary systems, court sanctions or civil liability – is glaring and a topic of ongoing concern." Yaroshefsky, *supra* note 103, at 920.

[117] Imbler v. Pachtman, 424 U.S. 409, 427-28 (1976).

[118] Van de Kamp v. Goldstein, 555 U.S. 335, 338-39 (2009). For criticisms of this opinion, see Erwin Chemerinsky, *Head in the Sand over Prosecutorial Misconduct*, Nat'l L.J. (Apr. 25, 2011).

[119] *See, e.g.,* Monell v Dept. of Servs. of New York, 436 U.S. 658, 690 (1978).

[120] Connick v. Thompson, 131 S.Ct. 1350, 1356, 1359-60 (2011).

[121] *Id.* at 1363-66.

[122] Jennifer Laurin argues that this portion of the Court's opinion was at best, *dicta*. Jennifer Laurin, *Prosecutorial Exceptionalism, Remedial Skepticism, and the Legacy of Connick v. Thompson*, at Part IV(A), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1934250.

opinion, Justice Scalia warned that even where such a pattern existed, the defendant would also be required to demonstrate that the municipality's failure to train actually *caused* an individual prosecutor to withhold evidence.[123] Given these high bars, the outlook for future litigants in this area has been described by at least one scholar as "grim."[124]

Notwithstanding the above setbacks, state and professional disciplinary authorities offer some possible recourse for victims of criminal discovery violations, as do perjury and obstruction of justice statutes.[125] Prosecutors who suborn perjury or obstruct justice can be prosecuted criminally or suffer a finding of criminal contempt,[126] although for most critics, criminal liability is far too rare to count as a true sanction.[127] State professional authorities theoretically can disbar or censure wayward prosecutors pursuant to their own version of Model Rule of Professional Conduct 3.8(d), which requires the prosecutors to hand over, in a timely fashion "all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."[128]

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[123] Connick, 131 S.Ct. at 1368. Thus, if a rogue prosecutor intentionally withheld evidence he knew to be exculpatory, the lack of training could not have caused the violation. *Id*.

[124] Laurin, *supra* note 124, at 1. *See also* Bandes, *supra* note 59, at 715-16 (citing criticism); Samuel Wiseman, *Brady, Trust and Error*, 13 LOY. J. PUB. INT. L. 447, 447-48 (discussing trend in Supreme Court cases that threaten to "ero[de] the *Brady* right and its remedies").

[125] *See* Cynthia Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM & CRIMINOLOGY 415, 437 n. 98 (2010) (citing statute provisions and one case in which a prosecutor was threatened by a federal court with sanctions).

[126] Paul J. Weber, *Ex-Prosecutor Ken Anderson Gets Jail for Wrongful Conviction,* HUFF POST, (Nov. 8, 2013 3:54 PM) http://www.huffingtonpost.com/2013/11/08/ken-anderson_n_4242431.html; The Associated Press, *Ex-Prosecutor in Texas is Punished for a Wrongful Conviction,* N.Y. TIMES (Nov. 9, 2013), http://www.nytimes.com/2013/11/10/us/ex-prosecutor-is-punished-for-a-wrongful-conviction.html?_r=0; The Editorial Board, *A Prosecutor is Punished*, N.Y. Times, (Nov. 8, 2013); Oklahoma Bar Association v. Miller, No. SCBD-5732, ¶¶30-31 (Okla. 2013); *see also* Terry Carter, *Misconduct in Two 1990s Death-Penalty Cases Gets Ex-Prosecutor Suspended,* ABA JOURNAL (Jun. 28, 2013 12:56 PM), http://www.abajournal.com/news/article/misconduct_in_two_1990s_death-penalty_cases_gets_ex-prosecutor_suspended/.; James Oliphant, *Ted Stevens' Charges Dismissed as Judge Excoriates Prosecutors,* L.A. Times, (April 8, 2009), *available at* articles.latimes.com/2009/apr/08/nation/na-stevens8.

[127] "Criminal liability for causing an innocent man to lose decades of his life behind bars is practically unheard of." *United States v. Olsen,* 737 F.3d 625, 630 (Kozinski, J.).

[128] MODEL RULES OF PROF'L CONDUCT R. 3.8 (d) (1983). For a thorough analysis of prosecutorial discipline, see Fred Zacharias, *The Professional Discipline of Prosecutors*, 79 N. C. L. REV. 721 (2001).

The problem, as reformers have often pointed out, is that state and professional authorities rarely enforce these provisions.[129] Even in recent years, only in the most egregious cases have prosecutors been publicly criticized, censured, or disbarred, leading some scholars to conclude that *Brady*'s primary enforcement mechanism is little more than a "paper tiger."[130] Thus, the most likely "sanctions" to follow a *Brady* violation (if it is in fact detected) are the professional and personal costs associated with an inquiry or formal investigation. Professor Gershowitz has proposed that courts should expand these "in-kind" sanctions by naming prosecutors in public documents so that prosecutors can be publicly shamed.[131] Perhaps this would alter the prosecutor's cost-benefit analysis in marginal cases, but it pales in comparison to the blockbuster, million-dollar verdicts that reformers sought, and initially achieved, in the *Connick* case.

iii. Organizational Dynamics

The third category encompasses a variety of proposals unified by their desire to alter the prosecutor's social and organizational context.[132] These proposals include, among others: (i) improvement in the informal social norms that guide the prosecutor's interaction with her adversary[133]; (ii) better training and the adoption of certain case-management tools to reduce unintentional violations[134]; (iii) more attention to structural factors – such as work assignments and oversight – that affect decision-making;[135] and finally, (iv) the implementation of formal, internal compliance programs to deter wrongdoing.[136]

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[129] Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987). Moreover, it is questionable whether a state bar association would censure a federal prosecutor for acting within the limits of federal statutes such as the Jencks Act, see Schimpff, *supra* note __ at __.

[130] *See, e.g.*, Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability,* 157 U. PA. L. REV. 959, 975-77 (2009).

[131] Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct,* 42 UC DAVIS L. REV. 1059 (2009) (criticizing widespread practice by courts of purposely not identifying prosecutors by name in opinions chronicling intentional misconduct). Although Gershowitz' argument is directed at a broad category of misconduct, it explicitly includes *Brady* violations. *Id*. 1075-80.

[132] For a helpful overview, see *New Perspectives on Brady*, *supra* note 5.

[133] *See, e.g.,* Lissa Griffin & Stacy Caplow, *Changes to the Culture of Adversaries: Endorsing Candor, Cooperation and Civility in Relationship Between Prosecutors and Defense Counsel*, 38 HASTINGS CONST. L.Q. 845 (2011).

[134] On the benefits of internal checklists, see *New Perspectives on Brady*, *supra* note 5 at 1974-78.

[135] *Id*. at 1992-94 (supervision), and 1996-97 (culture).

[136] Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2090 (2010). *See also* Parajon, *supra* 20 (proposing formal audits

The "better norms" camp seeks both to improve the prosecutor's relationship with her adversaries, and to improve the norms that prevail in her office. Cooperative relationships are valuable because they increase useful interaction between the prosecutor and defense counsel and thereby encourage a freer flow of information between the parties.[137] The adversarial process, unfortunately, subverts such cooperation.[138] The same process also reportedly encourages prosecutors to rationalize shortcuts that also interfere with the free flow of exculpatory information envisioned by *Brady*.[139] The adversarial system thus interferes with the development of both cooperative and law-abiding norms.

Other reformers attach socio-legal importance to the prosecutor's office, focusing on everything from its formal policies to its unstated practices and social dynamics. A growing literature of scholarly and trade articles urges prosecutors' offices to implement better training and guidance for new and current attorneys, particularly those who operate within large, case-intensive jurisdictions;[140] promote ethical cultures by discussing the prosecutor's ethical obligation during the interview process;[141] and celebrate instances of ethical compliance alongside trial victories.[142]

Even federal prosecutors' offices – famous for their stingy approach to discovery - have embraced various aspects of organizational reform.[143]

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and best practices guidelines).

[137] Laurie Levenson, *Discovery From the Trenches: The Future of* Brady, 60 UCLA REV. DISC. 74, 83-84 (2013) (lamenting lack of cooperation between prosecutors and defense counsel and effect of such noncooperation on the discovery process).

[138] Critiques of the adversarial process and its effect on prosecutor-defense counsel relations are not new. *See, e.g.,* Rosemary Nidiry, Note, *Restraining Adversarial Excess in Closing Argument,* 96 Colum. L. Rev. 1299, 1299 & n.1 (1996), *citing* Sheldon Krantz & Michael Ross, *A Decade of Litigating Dangerously: Time to Replace Rhetoric with Reason*, 9 Crim. Just. 36 (1994).

[139] Lissa Griffin & Stacy Caplow, *Changes to the Culture of Adversaries: Endorsing Candor, Cooperation and Civility in Relationship Between Prosecutors and Defense Counsel*, 38 HASTINGS CONST. L.Q. 845 (2011).

[140] *New Perspectives on Brady*, *supra* note 5, at 1989-92 (delineating different types of training).

[141] "Hiring is an early and often-overlooked opportunity to improve discovery practices." *Id.* at 1986, 1986-88.

[142] *Id.* at 1988 (suggesting presentation of awards that would "formally recognize police and prosecutors who do the right thing").

[143] Federal prosecutors are most resistant to expanding the scope of the prosecutor's discovery obligation. State prosecutors, however, have in some instances embraced open file discovery. *See New Perspectives on Brady*, *supra* note 5, at 1968 (observing that several members of the working group were prosecutors who worked in "open file" discovery jurisdictions and that they "expressed satisfaction with this approach").

Following the Ted Stevens scandal, in which it was revealed that federal prosecutors withheld exculpatory impeachment evidence, Attorney General Eric Holder robustly embraced training and enhanced processes within the United States Attorneys' offices.[144] Among other reforms, he created the role of "Brady czar" who would report to him; required each US Attorneys' Office to designate a *Brady* coordinator; and required each office to verify that it had trained its attorneys in *Brady* and its progeny.[145]

Finally, some have argued that prosecutors' offices should adopt internal governance and enforcement mechanisms that mimic those adopted by for-profit corporations.[146] In addition to supporting the training and guidance efforts discussed above, these "hard law" programs would monitor, investigate, punish (and presumably report) disclosure violations.[147] Unlike the norms-building and training-and-guidance proposals, the compliance approach has some real teeth: through the implementation of these compliance programs, wayward prosecutors might actually experience the very sanctions reformers seem unable to impose on them externally.[148] To that end, a formal, organization-based compliance regime is itself a hybrid: it plays upon an individual's external motivations to comply by threatening investigations and sanctions, and it builds up her internal motivations to comply by implementing guidance, training and norms-building exercises.[149] Hopefully, it tends to both sides of the equation – which is not an easy task.

Whether a compliance approach is truly feasible within a typical prosecutor's office is an interesting, but vexing question. For this Article's purposes, it is sufficient to point out its greatest shortcomings: Organizational compliance efforts work only when the organization is itself incentivized to investigate, punish and disclose violations. The reason for-profit corporations have developed sophisticated internal compliance

[144] For a discussion and critique of the training programs promulgated by Attorney General Holder in response to the overturning of Ted Stevens' conviction, see Green, *supra* note 4, at __.

[145] *Id*. at __

[146] On the use of compliance programs within prosecutors' offices, see Barkow, *supra* note 13, at 2105-07.

[147] *Id.*

[148] *Id.* at 2106 (arguing that prosecutorial compliance program can achieve improved deterrence if its efforts are "coupled with individual liability for those prosecutors who engage in wrongful conduct").

[149] On the distinction between improving an organization's ethical culture and instituting a system of punishment and rewards, see Gary Weaver, *Encouraging Ethics in Organizations: A Review of Some Key Research Findings,* 51 AM. CRIM. L. REV. 293, 302-07 (2014).

functions is that the law effectively requires them to do so through a complex combination of sticks and carrots.[150] Far fewer sticks and carrots are likely to guide prosecutors' offices, particularly as the Supreme Court forecloses office-wide Section 1983 liability for most *Brady*-related violations.

II. HOW TIMING AFFECTS PROSECUTORS

Part I explored both the conventional explanations for *Brady* noncompliance and then provided an overview of the three most popular areas of reform: scope, sanctions and organizational dynamics.

Underlying these reform strategies is the assumption that prosecutors hold static and stable preferences. The remainder of this Part challenges this assumption, explaining first how incentives to cheat *evolve* over time, and how temptations to cheat additionally *recur*. Thus, the prosecutor's *absolute* preferences for cheating not only increases between points A and B in time, but her *relative* preferences for cheating also change as she moves from point A to B. These evolving incentives and recurring temptations provide a richer understanding of why prosecutors withhold evidence.

A. Incentives Evolve

Prosecutions do not occur in an instant; rather, they unfurl over a period of time. Admittedly, that time period differs depending on the type of case. Nevertheless, for most felony cases, there exists a period of time between the first moment of investigation (in which the prosecutor may or may not participate), the charging of a case, and the negotiation of its disposition, and the entry of a guilty plea or swearing in of a jury for trial.[151]

Much of prosecutorial life revolves around the various stages of the criminal justice inquiry. Prosecutors participate in investigations; charge

[150] For a discussion of the various legal institutions that encourage and require corporations to adopt internal compliance programs, see Miriam H. Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 961-72 (2009) (discussing development of corporate "compliance regulation" in federal and state law).

[151] On the stages of a felony investigation and prosecution, see YALE KAMISAR, WAYNE LAFAVE, JEROLD H. ISRAEL, NANCY J. KING, AND ORIN S. KERR, MODERN CRIMINAL PROCEDURE (12th. Ed. 2008) 5-17. Admittedly, most of the analysis here applies more readily to felony cases rather than to misdemeanor cases, which often plead out at the moment of or shortly after arraignment on charges. *See* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012).

defendants and seek grand jury indictments; argue bail hearings and often seek the defendant's remand to prison while awaiting trial; present evidence and make legal and factual arguments at suppression hearings and in responses to motions to dismiss; and prepare witnesses and motions *in limine* in advance of trial. In addition, they respond to arguments at sentencing, and produce witnesses for sentencing hearings if necessary, and defend cases on appeal and respond to post-conviction motions.

Just as a prosecution itself unfolds over time, so too does the prosecutor's incentive to cheat by withholding evidence. The rational costs and benefits of withholding evidence at the investigatory stage are often quite different than the cost-benefit analysis that occurs on the eve of (or in fact during) trial. Moreover, to the extent the prosecutor suffers from the many biases explored in the bounded rationality model, these biases are far more likely to develop and during the middle and end stages of the case than at the very beginning of a case. Tunnel vision does not occur instantaneously, but rather, develops with time and effort.

Consider the prosecutor carrying a caseload of 75 felony cases. To the extent she wishes to improve her reputation and chances at promotion, she must maximize her overall conviction rate and her average length of criminal sentence.[152] Assume further that she has the ability either to hand the case off to someone else or throw it back into some general repository when the case appears overly weak.[153] Under these circumstances, the prosecutor's performance does not likely rise or fall on the outcome of a single case. Rather, she seeks to maximize her overall *portfolio* of cases. She knows that some of the cases in her caseload are duds, whereas others have the potential to make her a star. The key, then, is to figure out how to maximize her caseload's value. Assuming convictions and sentences reflect the strength of a case and amount of harm (admittedly weak

[152] "[P]rosecutors have their own incentives and ambitions. They tend to use their leverage to move cases through the system quickly and to maximize convictions, thus promoting deterrence and incapacitation." Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 403 (2013). In other writing, Bibas speculates that the prosecutor is more interested in the certainty of conviction than in its severity: "The prosecutor probably is not looking to maximize the overall punishment or sentence, but rather is seeking to guarantee a conviction and willing to trade off severity for certainty." Stephanos Bibas, *The Myth of the Rational Actor*, 31 ST. L. U. PUB. L. REV. 79, 80 (2011).

[153] Concededly, this assumption depends greatly on an office's overall structure. Whether a given jurisdiction – or office unit or subunit – can easily decline cases will depend on numerous factors. Researchers who study differences in office structure would do well to examine these differences in the future.

assumptions), the prosecutor's interests (spending time on the good cases and ignoring or summarily disposing of the weak ones) broadly intersect with the general public's.[154]

At this early stage of a prosecution, there is little benefit in spending much time on a case if the case against a defendant is slim or equivocal. (If the case, for some reason, already has gained notoriety, or if the defendant is a noted figure or celebrity, the analysis changes, as reputation and switching costs attach immediately. This may explain District Attorney Michael Nifong's egregious misbehavior despite the fact he received, fairly early on in the case, exculpatory evidence regarding the Duke lacrosse players he had charged with rape.).[155] When the case is young, and the prosecutor has done little to no work on it, it makes far more sense for the prosecutor to invest time and energy developing her strong cases, while leaving the weaker ones to age out on her desk or turn them over to to someone else.[156]

But prosecutors lack full information. Some cases, particularly early on, will look like blue chip stocks, but later on turn out to be sure losers. Imagine at some early point in the case, T_0, our prosecutor proceeds with a prosecution based on the information she has, believing that the evidence demonstrates beyond a reasonable doubt that a particular defendant committed a serious crime. Later on at T_1, the prosecutor encounters evidentiary problems with the case that either makes her doubt the defendant's guilt or that a jury will return a guilty verdict. How will the prosecutor behave?

If the prosecutor learns of this problem early enough in the course of the prosecution she can: (a) disclose the evidence and abandon the prosecution altogether or seek a different or weaker charge; (b) disclose and shift her investigation from one target to another; (c) disclose and seek evidence that establishes a different explanation of how D committed the crime; or (d) proceed with her prosecution and withhold the evidence.

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[154] With regard to so-called "minor cases," Professor Josh Bowers points out, "[P]rosecutors consistently function as conviction maximizers even if they only rarely operate as sentence maximizers." Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1152 (2008).

[155] For a description of Nifong's egregious behavior, see Mosteller, *supra* note 96, at 285-92.

[156] For a discussion of turnover in prosecutors' offices, see Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 83-89 (2005)

Now, some prosecutors may choose option (d) regardless of when they become aware of exculpatory evidence. Option (d) involves the least amount of work up front, but on the other hand promises the prosecutor some risk. After all, *some* cases are overturned when *Brady* violations become known, and *some* judges do in fact refer *Brady* violations to professional authorities or otherwise shame prosecutors publicly.

Options (a), (b) and (c), by contrast, require some upfront unpleasantness, but present none of the risks associated with withholding exculpatory evidence. Moreover, options (b) and (c) offer the prosecutor an positive way to salvage her situation. She can charge a different offender, charge a different crime, or devise an explanation as to why the defendant is still guilty of some charged offense. In other words, if exculpatory evidence surfaces at some early stage in the prosecution, the prosecutor can choose from a menu of options, most of which are legal and unlikely to cause her reputational or professional harm.

Now imagine the same evidence surfaces at some later point in the prosecution. Assume further that options (b) and (c) are unavailable due to the circumstances of the case. The evidence conclusively establishes the defendant's innocence, but does not point to another target and otherwise forecloses any other theory of liability. Accordingly, the prosecutor now faces a stark choice: disclose the evidence and drop the case (what I will refer to here as "disclose-and-drop"), or proceed with the prosecution and withhold the evidence while also accepting the risk that someone eventually will discover the evidence and possibly overturn the conviction ("proceed-and-withhold").[157]

When disclose-and-drop is more costly to the prosecutor than proceed-and-withhold, she will choose the latter option and violate *Brady,* notwithstanding any moral or norms-based qualms she may have about proceeding with a prosecution against a defendant she knows to be innocent or likely innocent. This in turn leads to the core question for policymakers seeking to reduce *Brady* violations: what are the personal costs of disclosing exculpatory evidence and terminating an already charged case?

[157] Keen readers will note that even if she proceeds with the prosecution, she still might offer the defendant a cheap plea, thereby reflecting the information regarding the weakness of the case. Although this might be a viable strategy at the beginning of the case, a cheap plea is problematic insofar as it signals – to defense counsel and possibly the court -- a problem with the prosecutor's proof. I therefore assume for the sake of simplicity that when the prosecutor chooses proceed-and-withhold, she makes no significant adjustment in her negotiation with opposing counsel.

Consider the several varieties of "switching costs" the prosecutor is likely to incur when she chooses disclose-and-drop. To begin with, there exist certain *administrative costs* such as filling out paperwork, seeking her supervisor's approval if necessary, appearing in court, and seeking the court's dismissal of an already indicted case.[158] There may be additional *cognitive costs* that inhere in jumping from a well-developed case to a new, unrelated matter. If the prosecutor has spent weeks immersing herself in the facts and legal doctrines pertinent to a complicated bank robbery case, she might find it quite difficult to put away her files and jump to a completely new matter the very next day. By contrast, if she has worked only one day on the bank robbery, she may find it much easier to put the old case out of her head and embrace a new investigation and prosecution.

More importantly, substantial *reputational* costs accompany the prosecutor's decision to dismiss or close an investigation or prosecution, particularly when that case has languished for a period of time. Internally, her supervisors and peers may conclude that she is inept, lazy, disorganized, overly intimidated by her adversaries, or simply unable to obtain criminal convictions. Externally, victims or the local press may question and criticize her decision to forego prosecution.

Even worse, the prosecutor's decision to disclose-and-drop may cause supervisors or outsiders to question previous decisions, regardless of how reasonable those decisions seemed at the time. Charging decisions, bail determinations, arguments at suppression hearings and numerous other decisions – all of which may have been reasonable at the time - suddenly become suspect when a prosecutor switches course in a way that suggests the defendant was innocent after all. Accordingly, the later in the process that a prosecutor decides to disclose-and-drop, the more likely it is that she will experience *linkage* costs, which are the costs the prosecutor bears in defending previous decisions regarding how she has prosecuted the case to date.[159]

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[158] On the procedures generally for seeking a "nol pros" or nolle prosequi after a defendant has already been indicted by a grand jury, see KAMISAR ET AL., *supra* note 151, at 976-77. Further, Professor Bowers observes that low-level prosecutors "often must obtain supervisory approval before dismissing cases…" Bowers, *supra* note 154, at 1128 and n. 42, *citing* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 64 n.42 (1968) ("[I]t [i]s easier to lose the case than to go through the bureaucratic obstacles preliminary to dismissal.").

[159] For more on how an offender's decision to engage in a crime "now" links to previous decisions, see Miriam H. Baer, *Linkage and the Deterrence of Corporate Fraud*, 94 VA. L. REV. 1295 (2008).

Finally, consider the *sunk costs* - fallacious but nevertheless sincerely felt – that most prosecutors are likely to consider when evidence appears late in process.[160] If prosecutors are human, when deciding how tot proceed, they will likely consider the amount of work they have already invested in a case and not just the costs likely to occur in the future. These historic costs therefore may play a large role in guiding the prosecutor's choice between disclose-and-drop and proceed-and-withhold.

None of these factors is constant. To contrary, their existence and severity may differ depending on the prosecutor's personal role in the case, her office structure, her employment history, and any number of additional variables. A District Attorney or United States Attorney who praises the prosecutor for catching a mistake and dropping a case can substantially reduce the line prosecutor's perception of the reputational costs associated with disclose-and-drop. By contrast, the lead prosecutor who demands high conviction rates makes the disclose-and-drop option appear far less palatable.

Notwithstanding the above cultural differences, we should expect disclose-and-drop's aggregate costs to be lower the earlier it arises in the life of a case. The case that is still in its infancy requires less administrative effort to wrap up. It attracts fairly little attention from the press and has yet to raise the expectations of witnesses and victims. It can morph and shift focus without incurring the oversight (or wrath) of one's supervisors if it occurs early enough and outside the public's eye. Indeed, at an early enough stage, disclose-and-drop can be disclose-and-charge-someone-else. When exculpatory evidence arises early in the game, the prosecutor can choose from a range of substitutes.

On the other hand, the costs associated with dropping a case late in the game are quite high. This is true, in part, because over time, an investigation and prosecution becomes identified with a particular prosecutor. Prior to charges being filed, bail being set and suppression hearings being argued, Case X is simply another case. But over time, Case

[160] "The sunk cost fallacy ("throwing good money after bad") emerges when people reason, after making a bad investment: I shouldn't stop now, because if I do, I will lose what I have already paid out." Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. REV. 962, 992 n.140 (2005). Professor Burke addresses sunk cost fallacies in the context of plea bargaining. *See* Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining,* 91 MARQ. L. REV. 183, 202 (2007).

X becomes the prosecutor's case. It affects the prosecutor's reputation for winning cases. Moreover, its outcome reflects back on all of the prosecutor's previous decisions. If Case X goes to trial and results in a conviction, then the prosecutor's aggressive stances with regard to filing charges, refusing to accede to bail conditions, or arguing various motions *in limine* will be viewed positively. Should Case X result in an acquittal or dismissal, the outcome will likely cast doubt on all of these previous decisions.

As noted earlier, in many instances prosecutors may have additional options besides the stark choice of disclose-and-drop or withhold-and-proceed. Nevertheless, the later the prosecutor learns of exculpatory evidence, the fewer options she will have and the starker her choice will appear.

For example, some exculpatory evidence might suggest that a defendant is innocent of a more serious charge, but still guilty of committing a lesser crime. The earlier this information comes to the prosecutor's attention, the easier it is for her to levy (or bargain for) a charge that corresponds with the defendant's guilt, thereby avoiding the administrative and reputational costs that would accompany a decision to drop the case altogether. Other evidence may simply demonstrate that a defendant is not guilty of committing a crime in a particular manner or on a particular occasion. If found early enough, such evidence might enable a prosecutor to revise her assumptions and locate better evidence of what actually occurred. If found much later in the course of a prosecution, the prosecution's ability to shift gears is substantially foreclosed.

As noted earlier, *Brady* and its progeny require not only the disclosure of evidence suggesting a defendant's innocence, but also the disclosure of evidence that would impeach a witness' credibility.[161] Some types of impeachment evidence, such as the fact that a prosecutor has offered the witness leniency in exchange for his testimony, should be well known to the prosecutor.[162] But others, such as an inconsistent witness statement to various investigatory authorities, may surface during later stages of the case. Impeachment evidence, if discovered early enough, need not upend a prosecutor's case. The fact that a key witness has made inconsistent statements is less than ideal, but hardly extraordinary. Skilled

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

[162] *Id.* at 154 (directing large prosecution offices to establish appropriate "procedures and regulations" to insure that all prosecutors are aware of promises to or agreements with witnesses).

prosecutors can "front" some of these issues during their direct examination and in their opening and closing statements to the jury. Additional corroboration can assure the jury that the witness is in fact telling the truth, or signal the need to revise charges or drop the case altogether. The prosecutor who learns of a key witness' inconsistent statement can legitimately rebut the inferences that arise from that inconsistency. But late discovery of impeachment evidence either eliminates these alternatives or renders them extremely expensive.

In sum, the discovery and disclosure of exculpatory and impeaching evidence during later stages of a case are highly expensive in comparison to earlier stages of a case. It is extremely difficult, mid-trial, to revise one's theory of how a defendant committed a given crime or find corroborating evidence for a witness whose testimony is spotty. It is exceedingly embarrassing, on the eve of trial, to drop the most serious charges against the defendant and proceed only with lesser charges.

On the other side of the ledger are the costs that will accrue if the withheld evidence is later found and then disclosed to a court by the defendant's attorney or some third party. From there, depending on the circumstances, a court might vacate a conviction, declare a mistrial, order a separate investigation of the prosecutor or her office, or publicly shame the prosecutor.[163] All of these actions impose direct and indirect costs on prosecutors and their offices, albeit costs likely to occur after a substantial passage of time.

Although the probability a prosecutor will incur monetary sanctions through *Brady* violations is indeed low, the same cannot be said with regard to informal or formal professional sanctions, which some courts have imposed, or the shame that accompanies a reversal of a conviction, or an investigation for prosecutorial misconduct.[164] Prosecutors may perceive a very low probability of detection and punishment, but it is doubtful that they perceive a *negligent* probability of detection and punishment. Moreover, *Brady* violations can impose political and litigation costs on an office, not to mention psychic costs on those prosecutors who maintain a strong conscience.

In any event, whatever probability of detection and punishment

[163] *See* discussion *supra* at Part Ia.

[164] For a recent examples of courts criticizing federal prosecutors for *Brady* misconduct, see *United States v. Jones,* 686 F.Supp.2d 147 (D.Mass. 2010) *and* 620 F.Supp.2d 163; United States v. Stevens, 593 F.Supp.2d 177, 182 (D.D.C. 2009).

prosecutors assign to withholding evidence, with the exception of the psychic "conscience costs" that strike immediately, all other penalties for withholding evidence occur sometime in the future, if at all. In contrast, the switching costs that accompany the disclosure of exculpatory evidence register almost immediately. As soon as she tells her superiors that she has found exculpatory evidence that threatens the life of her case, the prosecutor will experience a serious round of questioning as to why she found the evidence so late, why she failed to recognize its importance, and any number of additional questions. No wonder, then, that she may prefer to ignore, minimize or shelve the exculpatory evidence she discovers in during the latter course of the prosecution.

B. Temptations Recur

As discussed above, prosecutors have very real incentives to withhold later-discovered evidence due to the administrative and reputational costs that inhere in disclosing evidence, particularly when those disclosures occur during the later stages of a case and when those disclosures all but entail the dismissal of the case. Accordingly, it is fair to say that a rational prosecutor's *absolute* preferences change over time, and that the incentive to cheat increases as a prosecution progresses from some initial investigatory stage.

Timing's effect on prosecutorial compliance, however, does not end here. The prosecutor's *relative* preferences also change. That is, the prosecutor's preferences – would she rather give up the case, or forge ahead? -- change relative to a given point in time. When viewed in the future, the cost of losing a case may appear rather modest. When the future becomes "now," however, that cost may be viewed quite differently, even with no other change in circumstances.

The technical term for this concept is hyperbolic discounting. Hyperbolic discounting differs from the conventional model of "exponential" or rational discounting. Regardless of one's discount function, money received today is worth more than the same amount of money received tomorrow.[165] This truism reflects both the effects of inflation, as well as the fact that individuals are risk averse and prefer definite cash flows today to possible ones in the future.[166] The same

[165] *See, e.g.*, Robert J. Rhee, *The Application of Finance Theory to Increased Risk Harms in Toxic Tort Litigation*, 23 VA. INT'L L. J. 111, 130-31 (2004)(explaining basis for time value of money).

[166] *Id*.

analysis applies to intangible forms of utility. Things that we can enjoy now - prestige, happiness, power - are more valuable to us now than the same amount provided at some time in the future. Conversely, disutility experienced now is more painful than disutility experienced later. This is one of the reasons that deterrence is influenced not only by the size and likelihood of sanctions, but also by the swiftness with which they are imposed.[167]

Exponential discounting assumes a stable discount factor relative to a given point in time.[168] In other words, *the difference* in receiving a dollar today or tomorrow ought to be the same as the difference in receiving the same dollar a year from today and a year from tomorrow. Although the absolute values should differ (because I much prefer the dollar now to receiving it a year from now), the relative differences in utility ought to be the same, absent some external change in my situation.[169] In reality, however, individuals do in fact discount the two periods differently. That is, most of us see little difference between receiving a dollar one year from now and one year and a day from now, but we *do* contemplate a more significant decrease in utility when we are told we will receive the dollar tomorrow instead of today. Psychologists refer to this as "declining impatience."[170]

Hyperbolic discounting is problematic because it contributes to temporal inconsistency – or the tendency to switch preferences. When costs and benefits occur in different time periods, hyperbolic individuals are likely to switch – often unexpectedly – their preferences. Over the long term, you want to lose weight, but in the short term, you become tempted by a piece of chocolate cake and eat it (and later feel remorse).[171]

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[167] *See* Yair Listokin, *Crime and (with a Lag) Punishment: The Implications of Discounting for Equitable Sentencing*, 44 AM. CRIM. L. REV. 115 (2007); Christine Jolls et al., *Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1539-41 (1998).

[168] Manuel Utset, *Hyperbolic Criminals and Repeated Time-Inconsistent Misconduct,* 44 HOUS. L. REV. 609 (2007).

[169] "Economists almost always capture impatience by assuming that people discount streams of utility over time exponentially. Such preferences are *time-consistent*: A person's relative preference for well-being at an earlier date over a later date is the same no matter when she is asked." Ted O'Donohue and Matthew Rabin, *Doing It Now or Later*, 89 AM. ECON. REV. 103 (1999). *See also* JOLLS, SUNSTEIN & THALER *supra* note __ at 46 (describing hyperbolic discounting as a pattern whereby "impatience is very strong for near rewards (and aversion very strong for near punishments), but that each of these declines over time").

[170] *See* Yusuke Kinari, Fumio Ohtake, and Yoshiro Tsutsui, *Time Discounting: Declining Impatience and Interval Effect*, 39 J. RISK & UNCERTAINTY 87, 88 (2009).

[171] Some refer to this as a "dual self" problem whereby the long-term self is trumped

Legal scholars have erected a sophisticated set of models to explain hyperbolic behavior in numerous situations, including criminal behavior, corporate governance, poor retirement planning, and many other types of mistakes that laypersons refer to as "willpower" lapses.[172] Assuming prosecutors are human, one can see how the same problems plague prosecutors: Many prosecutors may embrace, at the very beginning of a case, the fairly abstract obligation to "do justice." They may sincerely believe in their obligation and duty to disclose exculpatory evidence in a timely manner, to the extent such evidence exists. As disclosure becomes imminent, however, the cost of disclosure suddenly spikes. Alternatively, as a benefit becomes imminent – such as a guilty verdict or plea – the cost of exculpatory disclosure spikes even more. Accordingly, a willpower-deprived prosecutor may at this point go back on her word and find some reason not to disclose the evidence.

If "present bias" and periodic spikes in utility cause nondisclosure, then neither the "agency cost" nor the "bounded rationality" narratives fully explain *Brady* violations. Unlike the faithless agent, the temporally inconsistent prosecutor retains a genuine, long-term desire to comply with her *Brady* obligations. And unlike the boundedly rational agent, she knows that the evidence is exculpatory, although she may well engage in motivated reasoning to reduce the conscience-related costs of withholding evidence.[173]

Unfortunately, temptations abound in criminal procedure. Temptations arise when prosecutors are on the verge of receiving certain benefits (a guilty plea, a conviction at trial or a positive judicial determination on a motion), and when prosecutors perceive imminent and embarrassing costs (a noisy dismissal, an acquittal or determination to overturn a conviction). Thus, reformer who wishes to incorporate timing must worry not only about the absolute costs of disclosing exculpatory evidence, but also the various chokepoints in which immediate costs or benefits will appear larger than they should.

III. TIMING'S IMPLICATIONS FOR CRIMINAL DISCOVERY REFORM

Timing affects prosecutors. It dictates whether there will be

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by the shot-term self's desire for gratification. *See, e.g.,* Fennell, *supra* note 28, at 1378 (describing challenge between individual's short and long-term perspectives).

[172] On willpower problems and their imperfect relationship to hyperbolic discounting, see Lee Anne Fennell, *Willpower Taxes*, 99 GEO. L.J. 1310, 1378-79 (2011).

[173] Langevoort, supra note 104, at 512-13.

substitutes for cheating and whether and how the prosecutor will perceive the costs of producing exculpatory evidence.

As laid out in Part II, the cost of disclosing exculpatory evidence is not a constant; rather, it increases over the life of an investigation and prosecution. The later the prosecutor discovers or receives exculpatory discovery, the fewer options she has at her disposal. As substitutes fall away, she is left with the stark choice of "disclose-and-drop" or "withhold-and-cheat." The up-front costs of the latter may appear slight compared to the up-front costs of the former.

Even worse, to the extent our prosecutor displays hyperbolic tendencies (i.e., she is human), she is likely to experience substantial temptations to cheat when up-front benefits are imminent. With these temporal challenges now in mind, we can better assess *Brady* itself and the conventional reforms that have grown in popularity among practitioners and scholars.

A. (One more of) Brady's Shortcomings

Part II's discussion illuminates one of *Brady*'s many failings, which is that it exacerbates the temporal components of prosecutorial noncompliance. Far from committing prosecutors to disclose information at the beginning of a case – when incentives and temptations to cheat are relatively low – the *Brady* line of cases permits prosecutors to wait until the eve of a trial or hearing, when incentives and periodic temptations are likely to be quite high. No wonder, then, that *Brady* violations proliferate, even though *Brady* itself imposes a relatively weak obligation on prosecutors. When evidence surfaces after a period of time and the costs of disclosure loom large, *Brady* disclosure suddenly appears overly burdensome, and consequently, some prosecutors cheat.

Rule 16 of the Federal Rules of Criminal Procedure fares no better under this analysis.[174] Critics often decry Rule 16's narrow scope[175], but its temporal characteristics are more problematic. First, prosecutors need not turn over prescribed materials until requested by the defendant's attorney.[176] Second, other than the defendant's own written, oral or recorded statements, prosecutors need not produce any physical piece of evidence unless they have decided either that they will use such evidence in their "case in chief"

[174] *See generally* Fed. Crim. Proc. 16.
[175] Green, *supra* note __ at __.
[176] See, e.g., Rule 16 (a) ("Upon a defendant's request, ….").

or that such evidence is "material to the preparation of the defense."[177] Thus, Rule 16, just like *Brady* itself, pushes the disclosure decision into the future, when prosecutors are far more likely to feel incentives and temptations to cheat.

Reformers have long decried *Brady* stingy discovery rules such as Rule 16 because they effectively keep pleading defendants in the dark regarding the strength of their opponent's case.[178] But as the foregoing discussion demonstrates, Rule 16 and *Brady* inherently encourage discovery delays, and in turn undermine the likelihood of prosecutorial compliance. By enabling prosecutors to sit on evidence and determine its "materiality" in regard to the "whole" of the prosecutor's case, *Brady* allows prosecutors to procrastinate evaluating and disclosing key pieces of evidence. Rule 16 is even worse, as it allows a prosecutor to sit on additional evidence until she decides whether she will use it in her "case in chief." Thus, the issue is not simply the bad agent's ability to "game the system," as Mary Prosser points out, but rather, the system's effect on fundamentally temptation-prone government servants.[179] Professional obligations and local policies may curb this problem somewhat, but even those rules requiring prosecutors to hand over "all" exculpatory evidence "promptly" place no obligation on the prosecutor to secure or collect such evidence. Accordingly, exculpatory evidence, if it shows up at all, appears late in the case.

Finally, the criminal justice system itself, with its strong emphasis on securing guilty pleas, contributes to this problem. If 95% of the criminal populace pleads guilty, then most prosecutors will delay at least some of their preparation for trial until they know for sure whether the defendant plans not to plead guilty. One would expect the same ordering of priorities among police and supporting agencies. Indeed, a number of state jurisdictions reflect this, in that they make the trial the "focal point" of certain exchanges in discovery.[180] Accordingly, not until plea-bargaining has failed will a prosecutor hunker down and review forensic evidence, re-interview her witnesses, and – finally – recognize the various weaknesses and inconsistencies in her case. If the economic and behavioral accounts set forth in Part II are even close to accurate, this is the moment society should *least* desire her to identify exculpatory evidence.

B. Sanctions

[177] Fed. Crim Proc. 16(a)(1)(e).
[178] JUSTICE PROJECT, *supra* note 18, at 2.
[179] Prosser, *supra* note 50, at __.
[180] Yaroshefsky, *supra* note 25, at 12.

The temporal approach also demonstrates the additional shortcomings of sanction-based reform, which in any event have largely failed. First, as Professor Rosenthal has already noted, it is far from clear that monetary sanctions would actually fall on wrongdoers as intended; if, as he surmises, sanctions would be externalized to the public through indemnification and insurance programs, they should have fairly little effect on prosecutorial noncompliance.[181]

More importantly, monetary – as well as criminal and professional - sanctions are not likely to deter prosecutorial misconduct because sanctions are notoriously contingent and inherently remote.[182] They apply in the future, after detection and following a significant amount of process (an evidentiary hearing and determination that sanctions are warranted, for example). Thus, were the Court to loosen its restrictive language in *Connick v. Thompson*, or remove prosecutorial immunity for intentional *Brady* violations, the prosecutor's incentives and temptations to cheat in any immediate period would likely subvert the deterrent effect of these later-period sanctions. Just as temporally remote sanctions fail to fully deter present-oriented *criminals*, so too would they fail to deter certain present-oriented *prosecutors*.[183]

This is not to suggest that reformers should abandon all efforts to sanction prosecutors who have wrongfully withheld exculpatory evidence, or those offices that have promoted or willfully ignored such misconduct. Sanctions serve purposes other than deterrence, such as the compensation of victims and communication of society's condemnation. Credible sanctions – particularly, those meted out by professional bar associations -- may in fact deter some "bad agent" prosecutors by shaming them, or spur organizational training and supervision by embarrassed district attorneys' offices.[184] Moreover, the threat of organizational liability may empower

[181] *See* discussion *supra* at Part I, and n. 139.

[182] Later-period sanctions will be particularly unhelpful in offices where turnover – at the top and mid-levels - is common. *See* Alexandra White Dunahoe, *Revisiting the Cost-Benefit Analysis Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45 (2009).

[183] On the difficulties of designing sanctions to deter hyperbolic criminals, see Utset, *supra* note 168. *See also* McAdams, *supra* note 27, at 1615 (hypothesizing that present-bias suggests a greater role for ex ante regulation and a lesser role for ex post sanctions because sanctions are less effective on present-biased individuals).

[184] Moreover, temporally consistent bad agents, because they *know* they will fail to adhere to their principal's wishes, pose a greater threat because they have advance notice of their tendency to do harm. Therefore, they will more likely evade detection by covering their tracks.

those assistant district attorneys who are already inclined to obey *Brady*. Nevertheless, where timing is concerned, sanctions exacerbate the hyperbolic prosecutor's tendency to favor the present over the future.

C. Norms and Organizational Dynamics

The study of timing demonstrates some of organizational reform's benefits. For example, insofar as internalized social norms impose an immediate psychic cost on misconduct, they can play a helpful role in counteracting temptation-driven misconduct.[185] If a rule-abiding norm tells a prosecutor to hand over evidence, then it triggers an intrinsic motivation to comply *regardless* of the likelihood of detection or sanctions.[186] To the extent an intrinsic motivation registers at the very moment one is poised to violate a rule, it solves the intertemporality problem present in most formal sanction systems.[187]

Social norms create not only internal motivations to comply with the law, but also external motivations.[188] For example, social opprobrium reduces misconduct because it imposes reputational and communal costs on those few individuals who violate the rules.[189] If reputational and communal costs register immediately or shortly after the commission of an offense, they too can provide a better check on bad behavior than formal sanctions, which almost always occur at some later point at time.

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[185] *See, e.g,* Miriam Baer, *Confronting the Two Faces of Corporate Fraud*, 66 Fla. L. Rev. 87, __ (2014) (arguing that norms-based reforms promote compliance by immediately confronting cheating temptations).

[186] On the sources and influences of norms on line prosecutors, see generally Marc L. Miller and Ronald F. Wright, *The Black Box*, 94 Iowa L. Rev. 125, 176-81 (2008) (identifying legislatures, public, courtroom "working group" and other sources of norms in prosecutor's offices).

[187] McAdams, *supra* note 26 at 1615.

[188] On the difference between external and internal motivations, see Yuval Feldman, *The Complexity of Disentangling Intrinsic from Extrinsic Compliance Motivations: Theoretical and Empirical Insights from the Behavioral Analysis of Law*, 35 WASH U. J. L. & POL'Y 11, 12 (2011). As Feldman explains later in his article, the distinction between the two sources of motivation is not so clear-cut. *Id.* at 18-20.

[189] *See, e.g.,* Eric Posner, *Law & Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781, 1789-90 (2000) (explaining that threat of communal stigma induces compliance). As Posner points out, stigma works only when the conduct itself is fairly rare. *Id.* Posner's account is grounded solely in an account of rational behavior (individuals comply with law because they prefer to avoid reputational costs). For an opposing view on communal disapproval's interaction with compliance, see Dan Kahan, *The Logic of Reciprocity: Trust, Collective Action and Law*, 102 MICH. L REV. 71 (2003) (arguing that individuals comply with rules when they see that others in their community are also, reciprocally, complying with such rules).

On the other hand, norms are difficult to gauge and take time to nurture.[190] It is difficult to promulgate a policy whose primary goal is "norm creation." Soft reforms such as education, debiasing and training can be beneficial, but will be very difficult to verify. Sorting the "real" reforms from merely cosmetic ones has become a recurring theme in the corporate compliance literature; there is little reason to believe that similar problems would not plague the prosecutorial context, where organizational processes are, by nature, more opaque and therefore more difficult to examine and compare.[191]

Moreover, hiring and training efforts confront a different problem, which is highlighted by the literature on present-bias and hyperbolic discounting. Unlike the person who maintains a consistently high discount rate and repeatedly seeks short-term gratification, the hyperbolic person shares the same long-term, pro-social desires as everyone else. In other words, he *wants* to abide by the rules; he just fails to do so when faced with temptation.[192] Assuming this long-term desire is genuine, there is no reason to believe that this person would not come off as sincere and law-abiding in hiring interviews, as well as in later training sessions. Accordingly, although these sessions might weed out the worst offenders, it seems unlikely that they would identify individuals particularly prone to temporal inconsistency.[193]

Harsher organizational reform, including internal monitoring and enforcement, also offer a mix of benefits and drawbacks. On one hand, internal oversight addresses temporal inconsistency by speeding up the organization's reaction to misconduct.[194] If a prosecutor knows her supervisor will review her files on a weekly basis and inquire why she has not handed over a piece of forensic evidence, then the internal compliance effort triggers what Richard McAdams has referred to as a "non-sanction

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[190] *See generally* Steven Shavell, *Law Versus Morality as Regulators of Conduct*, 4 AM. L. ECON REV. 222 (2002).

[191] *See* Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH U. L. Q. 487 (2003). For a similar argument regarding self regulatory efforts by prisons, see Van Swearingen, Comment, *Imprisoning Rights: The Failure of Negotiated Governance in the Prison Inmate Grievance Process*, 96 CAL. L. REV. 1353, 1381 (2008).

[192] *See* Utset, *supra* note __ at __. McAdams, *supra* note _- at __.

[193] For more on the difficulties of using proxies to identify hyperbolic behavior in hiring situations, see Miriam H. Baer, *Confronting the Two Faces of Corporate Fraud*, 66 FLA. L. REV. 87, __ (2014).

[194] McAdams, *supra* note 22, at 1618-20.

cost"; unlike a formal fine or prison sentence (which is both too contingent and remote), the cost of responding to a supervisor or internal investigation credibly counters the temptation to withhold evidence.[195] But spurring this type of oversight is difficult, particularly if the organization itself receives no benefit for self-identifying mistakes and bad behavior.[196]

Moreover, *excessive* oversight creates its own problems. It may, for example, undermine intrinsic motivations to comply with law or introduce feelings of procedural injustice among prosecutors who feel they have been unjustly treated by their units or offices.[197] Moreover, fine-grained case-by-case supervision might drive away the enjoyment one gets from developing a sense of judgment and responsibility in executing a job well done.[198] Accordingly, a micromanaged office might find itself with fewer seasoned veterans who are able or willing to speak up when they notice flaws in cases, or become aware of a supervisor's venal attempt to hide evidence. Other types of reforms– such as no-tolerance policies for unintentional

[195] *See, e.g.,* McAdams, *supra* note 27, at 1619-20 (explaining that "advancing" the costs of crime to an earlier point in time through undercover operations more effectively deters present-biased criminals).

[196] On the need to credit the organization for self-reporting wrongdoing, see Jennifer Arlen and Reinier Kraakman in Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes, 72 N.Y.U. L. Rev. 687 (1997) (arguing for a regime that mitigates liability for a corporate entity that attempts to prevent and report crimes to the government), and by Jennifer Arlen in The Potentially Perverse Effects of Corporate Criminal Liability, 23 J. Legal Stud. 833, 836 (1994) (explaining that a strict vicarious liability regime perversely increases the probability of punishment for crimes that corporate entities detect but fail to deter).

[197] On the crowding out phenomenon, see Feldman, *supra* note __ at 23-29 (discussing previous literature suggesting that monetary fines can crowd out internal motivations to comply with law); Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liability, Duties, and Protections for Reporting Illegality*, 88 Tex. L. Rev. 1151, 1179-81 (2010).

The scholar responsible for connecting compliance and an individual's notion that he has received procedural justice from his organization is Tom Tyler. See, e.g., TOM R. TYLER, WHY DO PEOPLE OBEY THE LAW (2006) (explaining and compiling empirical support for procedural justice theory of compliance with law). For applications to corporate organizations (from which the prosecutorial compliance literature has most recently borrowed), see, e.g., Tom R. Tyler, *Promoting Employee Policy Adherence and Rule Following in Work Settings: The Value of Self-Regulatory Approaches*, 70 Brook. L. Rev. 1287 (2005).

[198] Some of this effect will be determined by the office's "organizational shape": whether it is already hierarchical and whether its prosecutors are primarily veterans or novices. See Levine & Wright, *supra* note 74, at 1136-37 (observing that novice attorneys in busy "Metro" office still felt autonomous despite being assigned to highly supervised groups).

nondisclosures – may sow resentment and reduce employee morale.[199]

The final challenge for organization-based reform is path dependence. Chief prosecutors do not build prosecutors' offices from scratch. Rather, they work with the offices they already have in place.[200] Accordingly, an elected or appointed chief prosecutor may encounter practical and procedural limitations in altering the organization's internal structure (by, for example, creating or eliminating units) or hiring practices (by seeking experienced attorneys over newly graduated ones, or vice versa).[201]

D. Scope-Based Reform

The final reform discussed here is in the one that has enjoyed the most widespread support, and the one that appears most likely to succeed on a number of levels: scope. For many advocates, full open-file discovery is the *only* reform sufficient to protect defendants from an all too powerful state.[202] This urge for uniformity is misguided. Although every prosecutor's office should address and confront its prosecutors' incentives and temptations to violate *Brady,* it is not necessarily the case that every prosecutor's office should employ the same breadth of discovery, particularly an open-file system.[203]

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[199] This verification problem arises frequently in the corporate context. *See, e.g., See Guy Mundlak & Issi Rosen-Zvi, Signaling Virtue? A Comparison of Corporate Codes in the Fields of Labor and Environment*, 12 THEORETICAL INQUIRIES L. 603, 614 (2011).

[200] In their 2008 paper, Miller and Wright contended that the elected or chief prosecutor of a district attorney's office was uniquely positioned to affect norms within an office. "[I]n the radically decentralized prosecutorial services of the United States, it is the elected district attorney who contributes most to the norms that prosecutors pursue." Wright & Miller, *supra* note 186, at 177-78. In a later study of prosecutors, Wright, now writing with Kay Levine, offered a more nuanced account of the chief prosecutor's ability to change office norms, depending on its structure and the experience and background of its line prosecutors. *Prosecution in 3-D,* supra note 74, at 1173 (describing pushback chief prosecutor experienced in response to "efforts to impose more oversight after an initial laissez faire approach").

[201] On the challenges experienced by chief prosecutors in changing their offices, see, e.g., Yaroshefsky, *supra* note 103, at 916-17 (concluding, based on interviews with Orleans Parish attorneys, that newly elected district attorney's attempt to change "culture of disclosure" has been "a difficult and ongoing process"). Write and Levine's study further suggests that difficulties in imposing one's policies (particularly policies aiming at office-level consistency) may differ according to office structure and level of work experience among employees. *Prosecution in 3-D, supra* note 74, at 1172-73.

[202] Moore, *supra* note 35, at 1332-33.

[203] Some scope-based proposals require, in lieu of open-file discovery, the production of "all" exculpatory information, regardless of its admissibility or materiality. Professor Green has referred to this as a "middle ground" in discovery reform. Green, *supra* note __

As the remainder of this section explains, open-file discovery promises too little and too much at the same time. Although it promises *more* discovery, it does not inherently *commit* the prosecutor to a course of continuing discovery. Moreover, it imposes on certain categories of prosecutions some real but often unacknowledged costs. The remainder of this section divides in two; the first subsection addresses open-file's temporal blindness, whereas the second explores some of its potential costs.

i. Timing and the Open File Policy

Open-file regimes raise two related timing questions: First, when should the prosecutor *first* disclose the contents of her file? Second, how can a jurisdiction ensure that the prosecutor places in the literal and metaphorical file all the (mandated) information she receives, particularly later-acquired evidence?

An open file regime that explicitly requires disclosure early on in the case is helpful because it enables the defendant to review materials before the prosecutor has developed the knowledge or incentive to cheat. A regime that permits the first exchange of files later in the life of the case is inevitably less helpful.[204] It not only keeps the defendant's counsel in the dark, but it also exposes the defendant to greater risks of prosecutorial noncompliance. As Part II explained, the longer the case proceeds, the greater the incentive to withhold evidence.[205]

Apart from setting the date of first disclosure, open-file proponents must confront a more fundamental problem: prosecutors cannot and do not assemble an investigative file at a single point in time. Instead, evidence filters in fits and starts. Witnesses appear for interviews, remember additional facts, and recant earlier stories. Forensic and documentary evidence is assembled in bits and pieces. The prosecutor's general understanding of how the crime occurred changes over time. Accordingly, in all but the simplest cases, prosecutors will become aware of documents, testimony and important information after some initial disclosure date. Indeed, insofar as trial preparation requires the prosecutor to grill the state's

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at 650. Since most reform efforts appear to be converging on open-file policies, I focus here on those reforms that require the prosecutor to hand over "virtually all information from the prosecution file." Yaroshefsky, *supra* note __, at 1331.

[204] According to Ellen Yaroshefsky's survey of various state jurisdictions, the timing of criminal discovery disclosure largely varies by office and prosecutor. Yaroshefsky, *supra* note 25, at 14.

[205] *See* Part II *supra.*

witnesses and pick out even the most minor of inconsistencies, the production of impeachment evidence is all but guaranteed. For this later-acquired evidence, the question remains whether the prosecutor will decide to place a given document or witness statement "in the file" or procrastinate notifying her adversary of its existence; or use some form of motivated reasoning to convince herself that the information is not truly "part of the file"; or simply hide the evidence with full knowledge that she is contravening the legal obligation.

Readers will note the tension between these two problems. If a jurisdiction sets the first date of disclosure a week or so after charges have been filed, when the prosecutor's incentives to cheat are still low, there is greater likelihood she will include within the file everything within her possession. At the same time, an early first-date of disclosure all but ensures that additional evidence will filter in at some additional point, and the prosecutor will have to decide whether to alert her adversary of its existence.

By contrast, if the jurisdiction sets the first disclosure at some later date, it reduces the volume of later-acquired evidence, but increases the overall risk that the prosecutor develops both the incentive and opportunity to selectively prune her files before her first disclosure. Thus, open-file discovery poses something of a temporal Catch-22.

Aside from the problems discussed above, open-file discovery's supporters must contend with an additional problem, which is the distinct difference from *switching* to an open-file system and simply *having* an open-file discovery system. Open-file policies may be most valuable in detecting *Brady* violations that occurred under a previous regime. When a legislature switches from a narrow discovery rule to a broad one, it triggers an exogenous shock, causing prosecutors and police to disclose evidence that they initially did not expect to disclose.[206] For example, several jurisdictions have discovered *Brady* violations relatively soon after adopting open-file policies.[207] These discoveries, however, tell us less about open-file discovery than about the weaknesses of the systems that preceded them.

As prosecutors and police gain greater experience with open-file systems, however, either they – or the various investigative agencies with

[206] *Cf*. Yarofshefsky, *supra* note 103, at 1943 (observing that open file systems have not yet been subject to extended empirical analysis).

[207] Mosteller, *supra* note 96, at 307-08 (describing reversals in convictions that occurred due to open-file discovery that occurred post-conviction).

whom they work - may develop more sophisticated methods for avoiding detection. Accordingly, open-file's success in prophylactically ensuring the production of exculpatory evidence may fade over time.

In sum, open-file discovery improves the defendant's access to information, but, as reformers themselves have recognized, it is not foolproof.[208] Accordingly, defense counsel in so-called open-file jurisdictions must pay close attention, both to the timing of first disclosure, and to the provisions in place for ensuring the production of later acquired evidence. Finally, supporters of this reform may find its benefits slowly waning as prosecutors become more adept in deciding what goes in and what stays out of the vaunted "file."

ii. Scope-Based Reform's Costs

Not all jurisdictions have embraced broad, open-file discovery reforms. Some jurisdictions, most notably those within the federal government, continue to cling to narrow, category-based discovery rules.[209] One might view these jurisdictions as stubbornly recalcitrant. On the other hand, the federal government's resistance may highlight the need for diverse discovery practices. Open-file discovery may impose no real harm on a drunk-driving case prosecuted in the state system, but it might cause intractable problems for ongoing insider trading investigations in the federal system, where defendants are likely to be well represented by counsel and able to place subtle pressure on witnesses without explicitly suborning perjury or physically threatening them.[210] Moreover, if timing is the key culprit, then alternate reforms may deliver some of open-file discovery's benefits without its attendant costs.

Some reformers deny that open-file discovery poses *any* costs.[211] They contend either that such discovery provides an undeniable benefit for both the government and defense attorneys (since defendants plead guilty more quickly if they see the entire file as soon as possible)[212], or point to the

[208] *See, e.g.,* Yaroshefsky, *supra* note __; Moore, *supra* note 98, at 1384 (agreeing with others scholars' concession that open-file discovery is not a "cure-all").

[209] *See, e.g.,* Green, *supra* note 4.

[210] For more on such tactics, Kenneth Mann, DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK 6-8 (1985). *See also* Sam Buell, *Is the White Collar Offender Privileged*?, 63 DUKE L.J. 823, 885 (2014).

[211] *See, e.g.,* JUSTICE PROJECT *supra* note 18, at 2 (contending that open-file discovery will likely "save states potentially millions of dollars" by causing defendants to plead earlier and by eliminating discovery based litigation).

[212] *Id*.

various jurisdictions where open-file practices have been deployed and conclude that the system "works" because there have been no well-known instances of witness tampering, perjury or other problems that open-file opponents are wont to cite.[213]

To better address these claims, it is helpful first to compare the efficiency-based arguments for mandating *exculpatory* and *inculpatory* information.

Mandatory exculpatory disclosure enables a society to sort the innocent from the guilty.[214] The government bears the burden of proving its case, but it also has greater access to evidence (through its law enforcement powers) and in many cases, better resources (through taxpayer subsidies) than the defendant. Although society prefers not to punish the innocent, the prosecutor is an unreliable agent, subject to neither robust market checks nor adequate political oversight. Accordingly, to induce the prosecutor to hand over exculpatory evidence, the law makes disclosure mandatory, and backs it up with some (admittedly weak) sanction for disobeying that rule. This is the standard efficiency based argument for mandatory exculpatory disclosure. Without it, we run the risk that prosecutors will unduly increase the number of false convictions, which in turn undermine the public's respect for law and leaves it vulnerable to those lawbreakers the government has failed to apprehend.[215]

Now consider the argument for mandatory *inculpatory* discovery, which comprises more or less the entirety of the prosecutor's entire file.[216]

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[213] Simon, *supra* note 93, at 209.

[214] I am assuming, admittedly, that society benefits from *substantive* criminal law, and that it therefore benefits when it identifies and punishes those who have transgressed its democratically enacted laws. For arguments that society cannot possibly desire prosecutors to prosecute all technically guilty individuals, see Joshua Bowers, *Legal Guilt, Normative Innocence and the Equitable Decision not to Prosecute*, 110 COLUM. L. REV. 1655, 1658 (2010) (observing that, "Most people anticipate something approximating categorical enforcement of very serious felonies but anticipate nonenforcement of some nontrivial number of petty crime incidents.").

[215] For an oft-cited argument that wrongful convictions undermine deterrence, see Katherine Strandburg, *Deterrence and the Conviction of Innocents*, 35 CONN. L. REV. 1321 (2003).

[216] Presumably, some of the file's contents are truly irrelevant. In an interesting recent note, Brian Fox has argued that open-file discovery might harm defendants by encouraging prosecutors to flood resource-deprived defense attorneys with irrelevant materials and therefore "cause more harm than good." Brian P. Fox, *An Argument Against Open-File Discovery in Criminal Cases*, 89 NOTRE DAME L. REV. 425, 428 (2013). For examples of cases in which defendants unsuccessfully claimed as much, see United States. v. Warshak,

Whereas exculpatory disclosure unquestionably improves the criminal justice system's sorting function, inculpatory disclosure's effect is more ambiguous.

On one hand, inculpatory discovery can persuade recalcitrant defendants to concede their guilt quickly, thereby freeing up everyone's time for more contested cases.[217] Even the Department of Justice agrees that broad discovery can sometimes expedite guilty pleas: "Providing broad and early discovery often promotes the truth-seeking mission of the Department and fosters a speedy resolution of many cases."[218] The problem with this argument, however, is that it is overly broad. Discovery may well induce guilty pleas in some cases, but it will not produce expeditious guilty pleas in *all* cases.

A rational defendant confronted by a strong case of guilt can respond in various ways. She can concede her guilt, bargain with the prosecutor for a less onerous charge, offer cooperation in exchange for leniency, or – and this is the problem -- find ways to weaken the government's case.

Testing the holes in an otherwise meritorious case improves social welfare because it forces prosecutors to be more thorough and rigorous in their collection and analysis of evidence. Moreover, aggressive defense spurs prosecutors to avoid charging crimes or defendants when evidence is weak or marginal. Society does not benefit, however, when inculpatory disclosure enables the defendant to: commit or suborn perjury by others; intimidate or persuade witnesses not to testify; or manufacture patently false

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631 F.3d 266, 297-98 (6th Cir. 2010), quoting United States v. Skilling, 554 F.3d 529 (5th Cir.2009), vacated in part on other grounds, 130 S.Ct. 2896 (2010). In both cases, the respective appellate courts warned that an intentional attempt to hide exculpatory documents in a sea of irrelevant material would constitute "bad faith" and a violation of *Brady*. Both cases, it should be noted, involved complex white-collar corporate criminal conduct and both featured sophisticated and well paid defense counsel. Other types of criminal prosecutions are not nearly as likely to generate such voluminous discovery. Moreover, although Skilling and Warshak each lost their discovery motions, the courts in both cases indicated a willingness to demand relief where circumstances warranted it. Accordingly, it is difficult to imagine how the average defendant would prefer not to have the *opportunity* to at least look through the prosecutor's files.

[217] "[T]he moral justifications for permitting defendants access to prosecutors' files, combined with the cost savings for prosecutors make open-file discovery a 'win-win.'" Fox, *supra* note 216, at 430. *See also* JUSTICE PROJECT *supra* note18, at 9; Moore, *supra* note 98, at __.

[218] Ogden Memo, *supra* note __ at __.

explanations for the government's evidence.[219] All of these activities contribute to what Ronald Allen and Larry Laudan have referred to as "false acquittals": the failure to convict defendants who are in fact guilty.[220]

Although society might, as Blackstone famously stated, prefer the acquittal of the guilty to the conviction of the innocent, the degree of that preference is not infinite.[221] *At some point*, society desires a system that convicts guilty individuals, communicates society's condemnation of those who have harmed others, and deters those who might otherwise commit crimes.[222] Even if one is generally displeased with the breadth of the substantive criminal law; with the lack of mercy shown poverty-stricken defendants at sentencing; and with excessive incarceration of young minority offenders, one still should find discomfort in a system that produces an excessive number of false acquittals, since that system inevitably underenforces crime and reduces society's trust in law enforcement.[223]

These were some of the concerns motivating the Supreme Court majority in *Ruiz*, wherein the Court accepted the government's concern that extensive pre-plea disclosures might harm witnesses, undercover agents and informants, or otherwise undermine ongoing investigations.[224] Information that convinces a defendant to admit his guilt is valuable to society; information that enables him to establish his innocence falsely by lying and threatening others is not. And, on a final note, information that enables one defendant to warn his compatriots that they are investigative targets and thereby avoid apprehension also harms society. To the extent a prosecutor's file assembled in the prosecution of Defendant A contains

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[219] Whereas perjury and obstructive practices such as witness intimidation are illegal, the attorney's

[220] *See,* Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH. L. REV. 65, 75-77 (2008) (demonstrating how a 10:1 ratio would produce, out of a pool of 100 defendants, 9 false convictions, 90 false acquittals, and just 1 accurate conviction).

[221] *Id*.

[222] Indeed, members of the Innocence Movement have adopted a variant of this claim in arguing that wrongful convictions harm society by failing to incapacitate and punish actual offenders. "When innocents are convicted, the guilty go free. Offenders thus remain capable of committing new crimes and exposing untold numbers of additional citizens to continuing risk of victimization." James R. Acker, *The Flipside of Injustice: When the Guilty Go Free*, 76 Alb. L. Rev. 1629, 1631 (2013), *cited by* Supplemental Amici Curiae Brief of the Innocence Network and American Civil Liberties Union of Washington, *State v. Crumpton*, 2014 WL 414004 (Wash.).

[223] *See, e.g.* Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1717 (2006) (describing underenforcement's negative effects on communities).

[224] *Ruiz*, 122 S.Ct. at 2246

information relating to an ongoing investigation of (not as yet charged) Defendant B, society is not benefitted by Defendant B's advance notice that he is a target of an investigation.

Thus, inculpatory disclosure's value is ambiguous. Depending on the type of defendant, the strength of the case, and the defendant's counsel, disclosure may contribute to the criminal justice system's truth-seeking function or it may, as Darryl Brown and Robert Mosteller have separately recognized, subvert it.[225]

How should these concerns affect the growth of open-file discovery? Most open-file supporters advise that judicial protective orders can mitigate inculpatory disclosure's problems by protecting vulnerable witnesses or exempting disclosure for specific types of crimes.[226] This too, however, creates a new dilemma. As certain judges become more protective of ongoing cases and investigations, and prosecutors identify those judges who are more amenable to signing protective orders, open-file policies may well become something of a Potemkin village that offers defendants "open" discovery in name only.

Finally, some reformers observe the dearth of noticeable problems in states that have already adopted open-file discovery.[227] Putting aside the familiar problem that obstructive behavior is, by nature, hidden, this argument conveniently ignores our peculiarly redundant criminal justice system of overlapping state and federal jurisdiction.[228] One reason a particular state (such as Florida) can afford its defendants broad discovery rights (including the right to depose witnesses) is that the state (like every state in the nation) is home to *two* criminal justice systems. Whereas one of those systems (maintained by the state) endows defendants with broad discovery rights, the other (the federal criminal justice system) can just as easily impose narrow discovery rights. For crimes that can be charged interchangeably under federal or state law, prosecutors can proceed in federal court, thereby protecting sensitive information such as the identities

[225] Brown, *supra* note _- at __. "Realistically, [open file discovery] can also aid the clearly guilty by permitting fabrication of a defense or witness tampering." Robert Mosteller, *Potential Innocence: Making the Most of a Bleak Environment for Public Support*, 70 WASH & LEE L. REV. 1341, 1369 (2013).

[226] Prosser, *supra* note 50, at 595-96 (contending that judicial orders can protect witnesses in appropriate circumstances).

[227] Simon, *supra* note 93, at 209.

[228] *See, e.g.,* Daniel C. Richman, *Boundary Changes in Criminal Justice Organizations,* available at https://www.ncjrs.gov/criminal_justice2000/vol_2/02d2.pdf (describing overlap between state and federal criminal jurisdiction).

of witnesses, cooperating defendants, or connections with ongoing investigations and related cases.[229] If prosecutors are in fact engaging in such sorting, then the argument for universal open-file discovery fails, and criminal defendants may find their cases "going federal" more often, in many cases to their detriment.[230]

At bottom, open-file discovery functions as a risk-shifting device. It transfers the risk of nondisclosure from the defendant into a risk of disclosure to be borne by the government and its witnesses. Even when a court permits a prosecutor to redact the names of certain witnesses upon a showing of good cause (and one can easily envision litigation over this point alone), an open file system increases the likelihood that: (a) the identities of vulnerable victims and witnesses will be revealed, either because a prosecutor accidentally misses a redaction or a court decides that there is no good cause for withholding the name; and (b) defendants or their allies may pressure witnesses to recant their stories. Whatever the risk of (a) may be, it is not zero, and a single error could result either in the accidental leak of a confidential information or in a very salient case of witness tampering, thereby dampening the community's willingness to provide information in future cases.[231]

None of the foregoing is to deny the value of open-file policies. Where cases are fairly straightforward and evidence is relatively immune from alteration, prosecutors should freely disclose their files in order to reach quicker and more efficient settlements.[232] For some jurisdictions, most or all of the cases processed by the local prosecutors' office may look more or less like this prototype. For other jurisdictions, most notably federal criminal law, open-file is likely a political non-starter. And finally, for *all* of these jurisdictions, open-file fails to address the prosecutor's changing and inconsistent preferences.

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[229] Those researchers who study open-file systems might find it fruitful to study court filings in both systems prior to and following the enactment of a broader discovery regime..

[230] An extensive literature describes and critiques the "federalization" of criminal law. *See, e.g.,* Michael J. Zydney Mannheimer, *Cruel and Unusual Federal Punishments*, 98 Iowa L. Rev. 69, 74-78 (2012) (tracing growth of federal criminal law), *quoting* Sara Sun Beale, *Too Many and Yet Too Few: New Principles To Define the Proper Limits for Federal Criminal Jurisdiction*, 46 Hastings L.J. 979, 998 (1995) (identifying near overlap between federal and state drug laws).

[231] For instructive examples of retaliation, see Caren Myers Morrison, *Privacy, Accountability, and the Cooperating Defendant*: *Towards the New Role for Internet Access to Court Records*, 62 VAND. L. REV. 921, 956-58 and n.213 (2009) (citing retaliation efforts against cooperating defendants and "snitches").

[232] The Ogden memo itself suggests as much. *See* Ogden memo, supra note __ at -_.

IV. TYING THE PROSECUTOR TO THE MAST: THE TEMPORAL BENEFITS OF MANDATORY EARLY DISCLOSURE SCHEMES

As the discussion in Part III establishes, neither *Brady* nor conventional reform efforts fully address the absolute and relative timing challenges discussed in Part II. Moreover, the most promising and popular of these reforms – extremely broad disclosure regimes encapsulated by the "open-file" label – may impose costs on jurisdictions whose investigations are particularly vulnerable to interference and misconduct.

Accordingly, this Part embraces and highlights reforms that can be best tailored to address the prosecutor's dynamic and temporally inconsistent preferences. It begins first by reviewing the cognitive psychology literature, which recommends the "precommitment device" for those overly prone to act upon immediate desire for immediate gratification. Precommitment devices assist individuals in adhering to their socially desirable goals, even when short-term benefits tempt them to diverge from their original plans. They do this either by foreclosing options in advance of a known event, or by accelerating or delaying certain costs and benefits.

After examining the development and use of pre-commitment advises in the abstract, the Article's final section promotes a specific reform that is best poised to address criminal discovery's timing problem. This proposed reform – intentionally presented here only as a thumbnail sketch and intended as the beginning and not the end of a conversation – could be implemented either through a statute or, with regard to federal prosecutions, through the enactment of a Federal Rule of Criminal Procedure.

As explained in more detail below, the reform, similar in some respects to checklist-style reforms advocated elsewhere[233], would require the prosecutor to disclose at a very early stage in the prosecution the various *categories* and *repositories* of evidence that she has sought and expects to use at trial. In terms of scope, the disclosure itself would be somewhat narrow: the prosecutor would not have to *name* her confidential informants, but she would be required to disclose the *existence* of any confidential informants. Similarly, she would not have to disclose the names of her lay witnesses, but she at least would have to say if her investigators had interviewed such witnesses. Finally, she might not have to turn over the

[233] Although narrower, the proposal shares some attributes with the mandatory disclosure regime advocated by the ABA and Pew Trust. *See* JUSTICE REPORT, *supra* 18, at 2.

entire contents of the files contained by every investigative agency that had worked on the case, but she would be required to disclose the names of all agencies believed to possess information relevant to the prosecution and investigation of the case.

These disclosures, to be made in open court and updated as the case progressed through the criminal justice system, would be useful to jurisdictions that employed either broad or narrow discovery regimes. Indeed, this is perhaps the reform's greatest strength, as it would allow jurisdictions with widely different needs to tailor the scope of their prosecutors' discovery obligations, while adopting a uniform commitment device.

A. Temporal Reform in the Abstract: The Value of Pre-commitment

Individuals and organizations have, over the years, been quite adept at devising mechanisms that control and disable short-term urges and which "commit" them to following through on their more desirable long-term goals. These devices work either by devising penalties that occur at exactly the moment of temptation, or instead by foreclosing in advance certain options.

Consider the speed bump.[234] It does not remove a driver's ability to drive her car at significant speeds. It does, however, greatly increase her discomfort in driving at such speeds, and it threatens significant immediate damage to her car. To that end, it differs fundamentally from a sign that warns the driver they she may be subject to speeding fines. Whereas the driver discounts both the likelihood that a cop will single her out and pull her over, she does not discount the immediate cost – to herself and to her car – of driving too quickly over the speed bump.[235]

Other devices create commitment by foreclosing options.[236] Ulysses' mast-tying remedy is one of the most famous examples of pre-commitment, but many other examples exist across numerous contexts.[237]

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[234] *See* Leandra Lederman, *Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance*, 60 STAN. L. REV. 695, 696 (2007) (praising the speed bump's qualities in constraining speeding).

[235] Readers will note, however, that for the few drivers who decide to speed anyway, the likelihood of harm – to the driver and others – actually increases.

[236] For a non-technical discussion, see Daniel Akst, *The Odysseus Option*, Slate, Jan. 21, 2011, available at http://www.slate.com/id/2281854/

[237] 1 HOMER, THE ODYSSEY 445, 447 (A.T. Murray trans., Harvard Univ. Press 1919); *see also* John A. Robertson, "*Paying the Alligator": Precommitment in Law, Bioethics, and*

Christmas savings clubs, un-refundable gym memberships, retirement plans, and numerous other devices all force individuals to adhere to their long-term goals.[238]

If one looks intently enough, one can find commitment devices within our criminal justice system. The federal "Speedy Trial Act," requires the defendant's trial to proceed no more than seventy days from the date of the filing of an indictment or information, absent certain specific automatic and discretionary exceptions described in the Act.[239] We normally think of this statute as one that promotes judicial efficiency and protects defendants from excessively long waiting periods.[240] The Act, however, also counteracts the prosecutor's short-term inclination to delay the resolution of a case. If the Speedy Trial Act's "clock" starts ticking at the moment charges are filed, then prosecutors retain less ability to unilaterally seek repeated continuances.

The same can be said of a number of other procedural rules. Mandatory minimums and determinate sentencing schemes are presumed to prevent judges from sentencing defendants too leniently.[241] But one can also conclude that the same laws counteract the prosecutor's short-term desire to plead cases out too "cheaply."[242]

Readers no doubt have picked up on the fact that the foregoing devices benefit primarily the government's interest in processing cases quickly and securing high sentences. That they work in only one direction

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Constitutions, 81 TEX. L. REV. 1729, 1731 (2003). *See generally* JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS (2000) (examining the benefits of and philosophical justifications for precommitment devices). "Ulysses clogged the ears of his crew with wax so they would not respond to songs of the deadly Sirens, but ordered himself bound to the mast so he could enjoy them without physical power to stray from his predetermined course." Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 655–56 (2008).

[238] *See, e.g.*, Daniel Akst, *Commit Yourself*, REASON.COM (May 2011), http://reason.com/archives/2011/04/18/commit-yourself; Deborah M. Weiss, *Paternalistic Pension Policy: Psychological Evidence and Economic Theory*, 58 U. CHI. L. REV. 1275, 1307–1308 (1991) (describing Christmas savings clubs).

[239] 18 U.S.C. §§ 3161-3174.

[240] It also accords with the Sixth Amendment of the Constitution: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial…"

[241] *See, e.g.*, Erik Luna & Paul Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 11 (2010) (laying out supporting arguments for mandatory minimums).

[242] This is, of course, just one way of looking at mandatory minimums. I do not mean to ignore the voluminous criticism of this tool, or the more conventional claim that legislators enacted these statutes because they believed judges had sentenced offenders too leniently.

is undoubtedly a reflection of the political economy of criminal justice, which favors victims and witnesses more than defendants and would-be-offenders.[243]

One might conclude from the foregoing the implausibility of promulgating discovery-related precommitment devices for prosecutors since there exists no strong "market" demand for them. But public opinion suggests otherwise.[244] Prosecutors have been embarrassed, quite spectacularly, in a number of recent cases, and the innocence movement has deftly highlighted how *Brady* violations in particular can contribute to wrongful convictions. Head prosecutors themselves have at least voiced a greater interest in the use of regulatory mechanisms to encourage greater compliance with the law.[245] Moreover, pressure to adopt "open file" reforms in some jurisdictions may render prosecutors' offices more willing to experiment with other, commitment style reforms that are less burdensome than open-file discovery.

With this atmosphere conducive to reform in mind, the following section sketches a regime that mandates early disclosure of limited information upon filing of criminal charges. Concededly, numerous jurisdictions already require certain exchanges of information early on in the prosecution of a given case.[246] The proposal below, however, explicitly attempts to use early disclosure as a precommitment device, taking advantage of the prosecutor's early stage desire to abide by the rules.

B. Temporal Reform on the Ground: Mandatory Early Disclosure

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[243] *See generally* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780 (2006); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

[244] Klein, *supra* note 34, at 563 (citing "public sentiment" and changed views of wrongful convictions that might provide the "proper climate" for reform).

[245] Cardozo Law School's 2010 Symposium on wrongful convictions and *Brady* violations, at which Charles Hynes, the Kings County District Attorney was in attendance and spoke, perhaps demonstrates this changing attitude. *See generally* Symposium, New Perspectives on Brady and Other Disclosure Obligations: What Really Works?, 31 CARDOZO L. REV. 1943 (2010). Nevertheless, reformers continually cite repeated resistance among prosecutors to criminal discovery reforms. *See, e.g.* Bruce Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873 (2012).

[246] Brown, supra note 1, at 1623: "Nearly half of the states, in contrast to the federal rule, require pretrial disclosure of witness names, addresses, and prior statements …." Elsewhere, Brown cites checklist practices within certain prosecutor's offices, which may also undergird the regime proposed here. *See* Darryl Brown, *Defense Counsel, Trial Judges, and Evidence Production Protocols*, 45 TEX. TECH. L. REV. 133, 146-7 & n.85 (2012).

Consider a legislatively enacted obligation (either a statute or rule of criminal procedure) that commanded a prosecutor, immediately after the filing of a grand jury's indictment, to provide both the court and the defendant a written, certified description of: (a) the types of evidence already in the prosecutor's possession, including materials the prosecutor had not yet elected to use in her case-in-chief; (b) the names of government agencies and law enforcement agents known to possess relevant evidence or information regarding the case (c) the types of evidence sent out for forensic testing; and (d) the existence and number of lay witnesses with relevant information regarding the case. Why and how would this regime solve the timing problems explored in Part II of this Article?

Assume this regime – dubbed "mandatory early disclosure" – required the prosecutor to disclose the information listed above to the court as well as the defendant's attorney. The document, which would follow the prosecutor throughout the length of the case, would therefore function as a kind of "checklist," which a number of offices already use internally.[247] The process, however, would have two outside "checks": disclosure to the court, and to the defendant's attorney. According to the precommitment literature, the external oversight is essential. Christmas savings clubs, gym memberships and many other precommitment devices restrain short-term temptation, in part, because they recruit stronger parties to intervene short-term temptations appear likely to overwhelm genuine pro-social desires.[248] And now for a final protection: imagine further that failure to list one of these repositories of evidence on the form would result in a rebuttable presumption against the prosecutor's later introduction of such evidence in court. In other words, unless the prosecutor could show good cause for why she omitted a category of information from the initial form, she would be estopped from using such information later on in the prosecution of the case.

The above description of this regime is no more than a thumbnail sketch and would require substantial tweaking by drafters. Nevertheless, it provides the basic components of a precommitment regime in that it

[247] On the value of checklists generally, see Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO LAW REV. 2215, 2239-40 (2010); Lisa Griffin, *Pretrial Procedures for Innocent People: Reforming Brady*, 56 N.Y.L. SCH.L. REV. 969, 974 (2012).

[248] *See, e.g.,* Jon Elster, *Don't Burn Your Bridge Before You Come to It: Some Ambiguities and Complexities of Precommitment*, 81 TEX. L. REV. 1751, 1759 (2003) (explaining that through the adoption of a pre-commitment device, "the individual can enlist others in the effort to bind himself").

requires prosecutors to disclose information automatically and early, and it recruits the judiciary's oversight in a useful yet relatively narrow manner. It is one thing to say that courts should exercise greater oversight over the criminal discovery process. It is quite another to implement that desire in a way that leaves the court's workload manageable. One of the benefits of a mandatory early disclosure regime is that it channels the court's oversight; instead of asking the court generally to ensure that the prosecutor is not abusing her power, it offers the court a specific mechanism by which to ensure that the prosecutor is not purposely or negligently keeping the defendant from reviewing exculpatory evidence.[249]

The temporal inconsistency literature demonstrates that temptations to engage in wrongdoing recur, and recur frequently when costs and benefits arise in different time periods. Accordingly, one of mandatory early disclosure's benefits is that it can be adapted to respond to the prosecutor's recurring temptations to withhold exculpatory evidence. For example, this discovery regime might require the court to question – in advance of a guilty plea or suppression hearing - the accuracy and completeness of the prosecutor's discovery disclosures that were made upon the filing of the grand jury indictment.

The proposal would not mandate the disclosure of some quantum of evidence. Rather, it would compel, at a fairly early point in the prosecution, the disclosure of all known *repositories* of such evidence. The prosecutor must disclose the *type* of evidence in her files, and *the general location* of that evidence, be it the federal agency, or the state forensic laboratory. The repositories approach would enable the defense to challenge discovery practices as the case unfolded; to ferret out information independently; and to seek confirmation and support from the court where it appeared the prosecutor was dragging her feet on either the disclosures or the underlying discovery connected to said disclosures.

The early disclosure obligation is valuable precisely because it functions as a pre-commitment device. By eliciting information on-the-

[249] This proposed regime shares a number of the benefits that Darryl Brown attributes to various evidentiary and procedural "protocols." *See* Darryl Brown, *Defense Counsel, Trial Judges, and Evidence Production Protocols*, 45 TEX. TECH. L. REV. 133, 147 (2012). As Brown explains, protocols "specify best practices, remind individuals of multiple important actions they may otherwise overlook … and help to add cross-checks or redundancy into systems that are vulnerable to failures due to the lapses of a single actor." *Id.* Not all protocols, however, address the temporal issues explored in Part III. This proposal focuses specifically on the regime's ability to bind the prosecutor, early on, to a certain course of conduct.

record attestations from the prosecutor at an early stage in the prosecution, it forecloses the prosecutor's option of ignoring or hiding evidence as the case progresses. Having told the defense – and the court – that she had sought forensic analysis, or had made a request for historical files, or subpoenaed documents from a bank or credit card company – the prosecutor can no longer secrete these pieces of evidence when they surface months or weeks later.

In addition to providing early information that commits the prosecutor to later disclosures, mandatory early disclosure also counteracts the prosecutor's present bias by delaying gratification.[250] For example, a legislature might require that prior to accepting a guilty plea or sending a case to the jury, the court must question the prosecution on each of the categories of evidence she had listed in her mandatory early disclosure filing.[251] It might further require her to certify in open court that she had produced all exculpatory evidence within those categories. Her certification, in turn, could subject her to perjury and obstruction of justice charges.

Notice, then, how the regime specifically addresses the temporal aspects of the *Brady* violation: At a relatively early stage in the case, when she was least likely to harbor incentive to cheat, the prosecutor would provide information, in writing and certified under oath, to the court and to defense counsel. This alone would make it more difficult for the prosecutor to shirk her duty to collect exculpatory evidence from government parties, or hide government witnesses. The regime accordingly imposes a "nonsanction cost" on the prosecutor insofar as it requires her to experience the discomfort of lying to a judge and risking a contempt citation or worse.[252] At some later stage, when switching costs had increased and the

[250] On the value of devices that delay gratification and impose cooling off periods, see Steven M. Bainbridge, *Precommitment Strategies in Corporate Law: The Case of Dead Hand and No Hand Pills*, 29 J. CORP. L. 1, 4 (2003).

[251] Mandatory early disclosure can co-exist quite nicely with the proposals others have made for reforming the plea process. *See, e.g.,* Klein, *supra* note 34, at 564-68 (proposing mandatory "pre-plea conference" for federal criminal jurisdictions). It also sharpens proposals that others, such as Barry Scheck and Nancy Gertner have made regarding the use of pre-trial "ethical orders." Scheck & Gertner, *supra* note 51, at 40 (urging defense counsel to make, and judges to grant, a pre-trial "ethical order" that explicitly cites the prosecutor's obligation to adhere to that jurisdiction's version of Model Rule 3.8).

[252] Nonsanction costs are those costs that a criminal must pay up front before he receives the benefits of his crime (e.g., expending effort to avoid detection). Nonsanction costs are preferable to "ordinary" sanctions because they occur in the same time period as the benefits that an offender enjoys from a given type of misconduct. McAdams, *supra* note 27, at 1619-20.

prosecutor was more likely to yield to temptation, a new "targeted sanction" would appear in the form of a recurring certification requirement.[253] The certification requirement, in turn, would cause the prosecutor to incur a much greater non-sanction cost (making false statements to a court) and to delay the gratification of an imminent guilty plea or trial verdict.

As supporters (and critics) may quickly surmise, this sketch leaves unanswered the question of discovery's proper scope. This is intentional. Mandatory early disclosure standardizes the "when" question of criminal discovery but leaves the "what" question relatively untouched, except that prosecutors must identify – fairly early in the life of a case – information regarding where evidence is located, who has it, and who is expected to provide it in the near future.

Mandatory early disclosure's strength is that it can co-exist easily with broad or narrow discovery. For those jurisdictions that have already adopted open-file discovery, mandatory early disclosure addresses several of the timing issues left unanswered by scope-based reform. It takes account of the fact that prosecutors receive and develop evidence some time after some initial exchange of discovery, and it protects defendants in jurisdictions where the actual exchange of evidence occurs fairly late in the process. If the prosecutor has already disclosed that she has sought forensic testing of semen in a rape case, for example, she cannot as easily withhold such evidence from "the file" when it becomes available several weeks before trial. Thus, mandatory early disclosure supplements open-file discovery by forcing prosecutors to disclose information *early* and *often*, and by recruiting the courts to supervise and oversee such disclosures.

At the same time, mandatory early disclosure can co-exist nicely with jurisdictions that maintain narrower discovery rules. Accordingly, even if a jurisdiction rejects open-file discovery on the grounds that it may jeopardize the safety of its witnesses or the integrity of its ongoing investigations, that jurisdiction still can implement the type of early disclosure reform described in this section. Mandatory early disclosure enables jurisdictions to differentiate their underlying scope-based obligations, but still imposes a universal early commitment device on

[253] A targeted sanction is one that surfaces at exactly the moment the individual is tempted by a benefit. It is therefore different from the ordinary penalty that occurs at some later time, after an offense has been detected and proven. On the differences between "ordinary" and targeted sanctions and the distinction's importance for temporal inconsistency, see Miriam Baer, *Confronting the Two Faces of Corporate Fraud*, 66 FLA. L. REV. _, 23-24 (2014, forthcoming).

prosecutors.

CONCLUSION

We do not know how many *Brady* violations occur annually; indeed, we may never know. We do know, however, that the violation has reached a level of salience that shows little sign of subsiding. Politicians across multiple jurisdictions have begun to introduce and champion substantial alterations to regimes that previously imposed only the narrowest of disclosure obligations on prosecutors.

Although reformers seek a mix of changes, their most popular reform arises out of three models of prosecutorial behavior: agency costs, bounded rationality, and organizational dysfunction. There is much to learn from these models; collectively, they illuminate a lot of what is wrong with the criminal justice system. Still, they fail to incorporate the variable that researchers increasingly recognize as crucial to understanding misconduct and noncompliance within organizations: timing.

Timing helps us understand why some individuals obey rules, and why others do not. It explains changes in behavior and inconsistencies between what we say we want to do and what we actually do when faced with an immediate payoff or loss. It elucidates the success of some reforms and helps us predict the failures of others.

By examining timing's effect on prosecutorial compliance, this Article initiates new areas of analysis for scholars, empirical researchers and policymakers. Those who examine the empirical causes of *Brady* violations should include, to the extent possible, variables such as the timing of discovery and not just whether it occurred.[254] Those who study office structure and social differences might also wish to consider the various commitment devices various supervisors use in order to shore up low willpower among themselves and more junior employees.

Finally, reformers themselves should incorporate temporal analysis more firmly into their agendas for change. Temporal analysis focuses not just on when the defendant receives evidence (it is a given that defense

[254] This empirical component coincides nicely with a recent study that attempts to isolate the relevant predictors of wrongful convictions by matching wrongful conviction cases with an otherwise similar group of "near miss" cases. *See* Jon B. Gold, Julia Carrono, Richard A. Leo and Katie Hail-Jares, *Predicting Erroneous Convictions*, 99 IOWA. L. REV. 471 (2014).

counsel prefer disclosure as early as possible), but rather on timing's effect on prosecutorial compliance. To that end, temporal analysis may illuminate not just *Brady* violations, but other types of prosecutorial misconduct as well. Mandatory early disclosure represents but one method of ensuring early and constant disclosure by the prosecutor; it need not be the sole or primary device that performs this function. Outside the prosecutorial context, pre-commitment devices abound and cater to different tastes.[255] There is no reason to believe that society lacks either the will or ability to develop within the prosecutorial context a menu of effective commitment devices. To do that, however, prosecutors and reformers alike must pay closer attention to timing. The sooner we address this factor, the better off we will be.

[255] *See* notes 213-15, *supra.*