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INTRODUCTION

Over fifty years ago in *Brady v. Maryland*,[1] the United States Supreme Court rejected an entirely adversarial justice system.[2] In *Brady*, the Court mandated disclosure of evidence favorable to the defense that is material either to guilt or punishment, and thereby required the prosecution to disclose evidence that may otherwise never have seen the light of day.[3] This constitutionalizing of the discovery process held great promise for the criminal justice system by promoting accuracy in the truth determining process, and by helping to protect the defendant's closely related right to a fair determination of his guilt or innocence. The Supreme Court has explained the fundamental basis and import of due process discovery protections:

> Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed 'what might loosely be called the area of constitutionally guaranteed access to evidence.'[4]

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1. 373 U.S. 83 (1963).

2. *Id.* at 87 ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.").

3. *Id.* While *Brady* required disclosure of evidence that tends to exculpate, the Court, in Giglio v. U.S., 405 U.S. 150, 154 (1972), held that the due process obligation to disclose favorable evidence extends to impeachment material. *See also* United States v. Bagley, 473 U.S. 667, 682 (1985) (holding that prosecutors have an obligation to disclose evidence that would have a reasonable probability of changing the outcome of the procedings without any defense action).

4. California v. Trombetta, 467 U.S. 479, 485 (1984) (quoting United States v. Valenzuela-Bernal, 458 U.S. 858, 867 (1982)).

This article examines what the access to evidence rights and remedies should look like if the Court's rulings matched its rhetoric.[5] Unfortunately, the Court has shown a reluctance to require access to evidence necessary to ensure fundamental fairness.[6]

Part I examines two competing models of due process that the Court uses when considering criminal procedure rights. The first approach extends deference to state legislatures and historical traditions. The alternative approach, advocated here, recognizes due process as a vibrant, fluid source of rights that balances the equities of competing prosecutorial and defense interests, with the overarching goal of attaining accurate dispositions in criminal cases. The article proceeds to apply the second approach in determining the scope of the government's obligations to provide access to its evidence.

Part II suggests that the Court has failed to sufficiently provide constitutionally guaranteed due process access to evidence, and addresses three specific problems.

The first problem is the insufficient attention paid to disclosure obligations of persons other than prosecutors. Due Process is a state obligation. It should not matter whether the person who fails to meet constitutional disclosure obligations is a prosecutor, police officer or state scientist.

The second problem is the inappropriate, and inconsistently applied, requirement that a defendant demonstrate bad faith in order to establish an access to evidence violation. The mens rea of the officials responsible for non-disclosure or non-preservation should be irrelevant to the determination of due process violations. In *Brady*, the Supreme Court correctly held that the due process disclosure obligation is "irrespective of the good faith or bad faith of the prosecution."[7] However, mens rea has since gained center stage in the due process analysis of a defendant's right to access evidence that is not deemed to be *Brady* material.

The third problem is the view that the remedies available may define the rights of a defendant. The Court should separate its analysis of

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5. Access to evidence rights here refers to government evidence. This article focuses on the treatment of these issues in state courts where most criminal prosecutions occur. Issues concerning governmental conduct that may hamper a defendant's ability to present his own evidence are beyond the scope of this article. *See, e.g.*, U.S. v. Lovasco, 431 U.S. 783, 795–96 (1977) (holding no due process violation despite the loss of two potential defense witnesses alleged to be the result of a lengthy unnecessary delay in prosecution).

6. *Trombetta*, 467 U.S. 479 (1984), further discussed *infra* in notes 182–194 and accompanying text, and quoted above, is a glaring example of a ruling that fails to ensure fundamental fairness despite the Court's rhetoric.

7. *Brady*, 373 U.S. at 87.

rights and remedies. Governmental obligations should define the due process rights. By entangling its definitions of rights with a particular remedy, the Court has diluted the government's obligations. The *Brady* due process obligation now requires disclosure of favorable evidence only when there is a reasonable probability that the disclosure would affect the verdict.[8]

Part III argues for an expanded scope of the due process rights related to (1) evidence disclosure, (2) evidence preservation and testing, and (3) timing for disclosure. This is especially important given scientific advances in DNA testing, which frequently provides exculpatory evidence,[9] and recent heightened recognition by the Supreme Court, scientists, and commentators of the fallibility of forensic analysis.[10] Specifically, the due process rights I advocate are the following:

a. A right to disclosure of favorable evidence.

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8. *Bagley*, 473 U.S. at 682.

9. It was not until 1989 that DNA testing provided the first reported exoneration in the United States. Brandon L. Garrett, *DNA and Due Process*, 78 Fordham L. Rev. 2919, 2921 (2010). Since then there has been tremendous progress in analyzing smaller and older samples, and doing so with more sophisticated techniques. *See, e.g.*, District Attorney's Office v. Osborne, 557 U.S. 52, 62 (2009) ("Since its first use in criminal investigations in the mid-1980's, there have been several major advances in DNA technology, culminating in STR technology."); State v. DeMarco, 904 A.2d 797, 799, 803 (N.J. Super. Ct. App. Div. 2006) (granting DNA retesting in 1990 murder case, and noting that "it is undisputed that DNA testing has become more common and more reliable since the early 1990's").

10. The Court's recognition has primarily been in the Confrontation Clause context. *See infra* notes 202–213 and accompanying text. Many areas of forensic analysis both in theory and application have been shown to be of questionable validity. A 2009 National Academy of Sciences report concluded "[w]ith the exception of nuclear DNA analysis . . . no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source." NAT'L RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, *S*TRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD, 7 (2009). *See, e.g.*, Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 Va. L. Rev. 1, 8 (2009) (invalid forensic testimony shown to be a "worrisome problem"); Erin Murphy, *The New Forensics: Criminal Justice, False Certainty, and the Second Generation of Scientific Evidence*, 95 Cal. L. Rev. 721, 721 (2007) (arguing that the criminal justice system "previously relied too readily upon faulty forensic evidence like handwriting, ballistics, and hair and fiber analysis"); Paul C. Gianelli, *Forensic Science*, 34 J.L. Med. & Ethics 310, 311 (2006) (observing that there is a "lack of empirical support" for traditional forensic science techniques); Pamela R. Metzger, *Cheating the Constitution*, 59 Vand. L. Rev. 475, 491 (2006) ("The legal community now concedes, with varying degrees of urgency, that our system produces erroneous convictions based on discredited forensics.").

b. A right to disclosure of eyewitnesses and potentially exculpatory physical evidence.
c. A right to preservation and testing of potentially exculpatory physical evidence.
d. A right to preservation and testing of inculpatory physical evidence that the prosecution intends to introduce at trial.[11]

Additionally, to ensure adequate preparation time, the Court should explicitly hold that disclosure at trial is too late, and provide adequate guidance for what it considers to be timely disclosure.

Part IV addresses general considerations for fashioning remedies for rights violations. In other areas of the law, courts recognize that while remedies are ordinarily focused on redress for the individual litigant who has been harmed, deterrence is a separate vital concern.[12] While the Court has mistakenly applied a bad faith standard in defining evidence preservation rights, it has simultaneously undervalued the need to deter bad faith disclosure violations. The Supreme Court has inexplicably ignored the special need for deterrence of police, prosecutors, and scientists who intentionally or recklessly fail to provide constitutionally required discovery materials. Related to that failure is the Court's rigid approach to remedies. After fifty years, the Court still speaks of only one remedy, a new trial, when it considers *Brady* violations.[13] The Court should adopt a more nuanced approach, and it should provide more leeway to the states to fashion appropriate remedies.

Part IV also suggests specific remedies that should ordinarily be available depending on when the disclosure and preservation violations are discovered. Further, this article advocates specific enhanced remedies for the most egregious violations, while eschewing dismissal of the case as a remedy except in rare circumstances, given its ultimate anti-truth determining function.

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11. While these due process rights would be a significant expansion of those now recognized by the United States Supreme Court, they nevertheless fall far short of an open file requirement that would require the disclosure of all of the government's evidence. Much evidence that is inculpatory or "neutral" will still not need to be disclosed. The proposals are modest in that many jurisdictions already provide these rights with no apparent problems. *See infra* notes 79, 122, 136, and 179. What is debatable, of course, is my proposal to further constitutionalize the discovery process to require this government disclosure.

12. For example, deterrence is an important consideration in assessing punitive damages. *See infra* notes 231–236 and accompanying text.

13. No decision of the Court post-*Brady* has even discussed the possibility of dismissal of the case being an appropriate remedy for a particularly egregious violation. *See infra* notes 284–287 and accompanying text.

I. FUNDAMENTAL FAIRNESS AND CRIMINAL PROCEDURE DUE PROCESS

In addition to the specific criminal procedure protections afforded by the Bill of Rights, the federal and state governments are prohibited from denying life, liberty, and property "without due process of law."[14] The Court has repeatedly held that the Due Process Clause generally protects against governmental action that is "fundamentally unfair."[15] Thus, the Court has held that some procedural protections are so essential to fair treatment of the accused that they are guaranteed as a matter of due process. For example, due process provisions protect a defendant's right (1) not to have a statement obtained through torture,[16] (2) not to be tried unless competent,[17] and (3) not to be convicted without proof of guilt beyond a reasonable doubt.[18] Further, the Court has noted that it has long interpreted this standard of fundamental fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense.[19]

The Court has periodically ignored the vital role of the Due Process Clause to guarantee that criminal prosecutions comport with fundamental fairness, and has taken an unjustifiably limited approach in defining what constitutes a violation of procedural due process. Outside the criminal procedure protections enumerated in the Bill of Rights, the Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly."[20] In *Medina v. California*,[21] the Court held:

> The Bill of Rights speaks in explicit terms to many aspects of criminal procedure, and the expansion of those constitutional guarantees under the open-ended rubric of the Due Process Clause invites undue interference with both considered legislative

14. U.S. CONST. amend. V. (due process clause as applied to the federal government); U.S. CONST. amend. XIV, § 1(due process clause as applied to the states).

15. *See, e.g.*, Mabry v. Johnson, 467 U. S. 504, 511 (1984) (holding that no due process violation exists because criminal defendant "was not deprived of his liberty in any fundamentally unfair way"); Bearden v. Georgia, 461 U.S. 660, 673 (1983) (stating that "fundamental fairness [is] required by the Fourteenth Amendment"); Doyle v. Ohio, 426 U.S. 610, 618 (1976) (holding that prosecutor's conduct was "fundamentally unfair and a deprivation of due process").

16. Brown v. Mississippi, 297 U.S. 278, 285–86 (1936).

17. Drope v. Missouri, 420 U.S. 162, 172 (1975).

18. In re Winship, 397 U.S. 358, 364 (1970).

19. California v. Trombetta, 467 U.S. 479, 485 (1984).

20. Dowling v. United States, 493 U.S. 342, 352 (1990).

21. 505 U.S. 437 (1992).

> judgments and the careful balance that the Constitution strikes between liberty and order.[22]

However, the Court's own decisions demonstrate that the Bill of Rights guarantees do not provide anywhere near a complete system of requisite guarantees for a fair procedural system, and history shows that judicial expansion of rights beyond those specifically enumerated does not "invite undue interference" with state court judgments.[23] Thus, there is no basis for the Court to treat the Due Process Clause as a second-class guarantor of rights simply because it is less explicit than the specific provisions of the Bill of Rights that define the bounds of criminal procedure.[24]

In *Medina*, the Court addressed whether a state violates the Due Process Clause when it places the burden on the defendant to establish a lack of competency to stand trial.[25] The Court held that there was no due process violation.[26] While the holding is irrelevant here, the *Medina* Court's approach to procedural due process is significant because of its influence on future cases.[27]

Medina emphasizes that great deference must be shown toward state legislative enactments because legislatures have expertise in criminal procedural matters.[28] This emphasis on legislative judgment implies that more deference is owed to a legislature, despite the fact that the judiciary often defines criminal procedure rights for the states.[29] More im-

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22. *Id.* at 443.

23. *Id.*; *See* discussion in text accompanying notes 15–19.

24. Justice Frankfurter long ago explained the legitimacy of subjecting state criminal procedure rulings to Due Process Clause scrutiny, and noted that, "the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions." Rochin v. California, 342 U.S. 165, 169 (1952).

25. *Medina*, 505 U.S. at 439.

26. *Id.* at 452–53.

27. *See, e.g.*, District Attorney's Office v. Osborne, 557 U.S. 52, 68–70 (2009) (holding that there is no post-conviction due process right to DNA testing).

28. *Medina*, 505 U.S. at 443, 445–46.

29. *See, e.g.*, ALASKA CONST. art. IV, § 15 (West, Westlaw through 2013 1st Legis. Sess.); COLO. CONST. art. 6, § 21 (West, Westlaw through Nov. 2012 amendments); DEL. CONST. art. 4, § 13 (West, Westlaw through Jan. 2014); Fla. Const. art. 5, § 2 (West, Westlaw through Nov. 2012); HAW. CONST. art. VI, § 7 (West, Westlaw through 2013 2d Spec. Sess. Act 4); N.H. CONST. pt. 2, art. 73-a (West, Westlaw through 2013 Reg. Sess., Ch. 279); MD. CONST. art. 4, § 18 (West, Westlaw through 2013 Reg. Sess.); MO. CONST. art. 5, § 5 (West, Westlaw through 1st Extraordinary Sess.); N.J. CONST. art. 6, § 2, ¶ 3 (West, Westlaw through Nov. 2013 amendments); VT. CONST. Ch. 2, § 37 (West, Westlaw through 2012 Gen. Election); CONN. GEN. STAT. ANN. § 51-14 (West, 2014); IND. CODE ANN. § 34-8-2-1 (West 2013); PA. R. CRIM. P. 102; VA.

portantly, the excessive focus on legislative judgments avoids the ultimate constitutional question of whether the procedure is fundamentally unfair.

Moreover, the *Medina* Court's approach places too much emphasis on history as a basis for analyzing procedural due process. Although the Court gives significant weight to whether there is a settled tradition supporting the particular procedure at issue, history is of limited value in the due process analysis. Perceptions of what is fundamentally fair in the criminal justice system change over time.[30] Sometimes, the Court must declare a practice fundamentally unfair, regardless of whether there is historical support for such a decision.

Justice O'Connor's concurring opinion in *Medina* presents a better framework for rights analysis. Although Justice O'Connor agreed with the majority that there was no constitutional violation,[31] she advocated for an approach to due process that emphasizes that due process fairness is a fluid concept, not bound by history.[32] She noted that many of the Court's decisions recognizing criminal procedure rights did not exist at common law and were not dependent on specific explicit constitutional provisions.[33] Justice O'Connor suggested that procedural due process, as in the civil context, should be determined by a "balancing of equities."[34]

This alternative model for adjudicating procedural due process claims has on occasion had the support of a majority of the Court, as it did in *Ake v. Oklahoma*.[35] There, the Court properly acknowledged that

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CONST. art. 6, § 5 (West, Westlaw through 2013 Reg. Sess. And 2013 Spec. Sess. I); N.M. STAT. ANN. § 38-1-1 (West 2013).

30. *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68, 85 (1985) ("Shifts in all these areas since the time of *Smith* convince us that . . . we are not limited by it in considering whether fundamental fairness today requires a different result."); Rochin v. California, 342 U.S. 165, 171 (1952) ("To believe that this judicial exercise of judgment could be avoided by freezing 'due process of law' at some fixed stage of time or thought is to suggest that the most important aspect of constitutional adjudication is a function for inanimate machines and not for judges.").

31. *Medina*, 505 U.S. at 455 (O'Connor, J., concurring).

32. *Id.* at 454.

33. *Id.*

34. *Id.* at 453–54. This balancing of equities approach was adopted in Mathews v. Eldridge, 424 U.S. 319 (1976), for addressing civil procedural due process challenges. *Medina* explicitly rejected the *Mathews* approach. 505 U.S. at 442–45.

35. 470 U.S. 68 (1985). *Ake* explicitly adopted a balancing of interests approach. *Id.* at 77. *See* United States v. Ruiz, 536 U.S. 622, 631–33 (2002) (utilizing *Ake* balancing test, and concluding that impeachment material favorable to the defense need not be disclosed when a defendant pleads guilty). *Cf., e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 528–29 (2004) (utilizing the *Mathews* due process balancing test to evaluate the procedures for detaining an American citizen as an "enemy combatant"); United States v. Salerno, 481 U.S. 739, 746 (1987) (citing *Mathews* as requiring that govern-

in balancing equities to determine whether a procedure is entitled to constitutional protection, "[t]he private interest in the accuracy of a criminal proceeding that places an individual's life or liberty at risk is almost uniquely compelling."[36] In *Ake*, the due process issue was whether an indigent defendant has a right to an appointed psychiatrist when sanity is at issue at a capital trial or future dangerousness is at issue in a capital sentencing hearing.[37] The Court concluded that such an appointment would further "the compelling interest of both the State and the individual in accurate dispositions."[38] It then examined the state's interest in denying this procedural protection, and found it insubstantial.[39] It thus held that the defendant, on balance as a matter of due process, was entitled to the appointment of a psychiatrist.[40]

Ake, like *Brady*, recognizes that, in the pre-trial setting, the state may not interfere with the ability to fairly obtain evidence that may be important for the defense at trial. This is the right approach to defining due process rights for "guaranteed access to evidence," but the Court has fallen far short of actually affording the necessary protections.[41] It has repeatedly strayed from the essential due process task it has followed in many other areas—defining procedural rights by what process is due from the government to ensure fundamental fairness. The Court has diluted or failed to recognize clear defense rights and corresponding governmental obligations based on irrelevant considerations.

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ment action "be implemented in a fair manner," in assessing whether pre-trial detention statute comported with due process of law). *See also, e.g.*, Crane v. Kentucky, 476 U.S. 683, 691 (1986) (holding that a defendant's right to a fair trial was violated because evidence important to the defense was excluded and the state did not advance "any rational justification" for the exclusion).

36. *Ake*, 470 U.S. at 78.

37. The analysis arguably applies equally in the non-capital context given some of the opinion's language and the Court's statement of the issue at the outset. *Id.* at 70.

38. *Id.* at 79.

39. *Id.*

40. *Id.* at 87.

41. The Court should recognize when deciding what is fundamentally fair in the disclosure context that the government usually has much greater resources than the accused to investigate and obtain evidence. *See, e.g.*, Wardius v. Oregon, 412 U.S. 470, 475 n.9 (1973) (noting "the State's inherent information-gathering advantages"); United States v. Tavera, 719 F.3d 705, 712 (6th Cir. 2013) (noting the inherent advantage of the prosecutor's staff); United States v. Snell, 899 F. Supp. 17, 20 (D. Mass. 1995) (noting the government's greater access to resources); Gerard Fowke, Note, *Material to Whom?: Implementing* Brady*'s Duty to Disclose at Trial and During Plea Bargaining*, 50 AM. CRIM. L. REV. 575, 606 (2013) (asserting that "the government would crush the accused" if there were no checks on the adversarial system).

II. ELIMINATING IRRELEVANT CONSIDERATIONS IN DEFINING RIGHTS

A. Particular Government Actor Should Be of No Consequence

The Court's earliest due process cases concerning evidence involved particularly egregious conduct at trial by prosecutors. In 1935, the Court held in *Mooney v. Holohan*[42] that a due process violation exists if a state prosecutor knowingly presents perjured testimony at trial.[43] Following *Mooney*, the Court proceeded to find due process violations in situations where the prosecutor had failed to correct known false testimony,[44] knowingly used false impression testimony,[45] and deliberately suppressed evidence favorable to the defense.[46]

In *Brady*, the Court again focused on the actions of the prosecutor. It held that suppression by the prosecution of material evidence favorable to an accused (if requested) was a violation of the Due Process Clause.[47] The Court explained that "[t]his ruling is an extension of *Mooney v. Holohan* . . . where the Court ruled on what nondisclosure by a prosecutor violates due process."[48] While *Brady* focused on material in the prosecutor's possession, in 1995, the Court held for the first time in *Kyles v. Whitley*[49] that even undisclosed evidence that the prosecutor was unaware of, if it was favorable to the defendant, could be the basis for finding a due process violation.[50] The Court based this extension of *Brady* on the theory that some responsibility for the failure to disclose should be imputed to the prosecutor. The Court stated that there was no "serious doubt that 'procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it.'"[51]

It took until 2006, in *Youngblood v. West Virginia*,[52] for the Court to explicitly hold that prosecutors are not the only government actors that

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42. 294 U.S. 103 (1935).
43. *Id.* at 112.
44. Napue v. Illinois, 360 U.S. 264, 269 (1959). *See also, e.g.*, Miller v. Pate, 386 U.S. 1, 4–7 (1967) (holding that a due process violation existed when prosecutor failed to correct false testimony by state scientist).
45. Alcorta v. Texas, 355 U.S. 28, 30–31 (1957).
46. Pyle v. Kansas, 317 U.S. 213, 215–16 (1942).
47. Brady v. Maryland, 373 U.S. 83, 87 (1963).
48. *Id.* at 86.
49. 514 U.S. 419 (1995).
50. *Id.* at 438. The undisclosed favorable evidence was known only to the police.
51. *Id.* (alteration in original) (quoting Giglio v. United States, 405 U.S. 150, 154 (1972)).
52. 547 U.S. 867 (2006) (per curiam).

must adhere to the disclosure obligations outlined in *Brady*. In *Youngblood*, the Court held that a *Brady* violation had occurred when a state trooper failed to disclose *Brady* material, even though the failure to disclose was not attributable to the prosecution.[53] As the Court explained, "[a] *Brady* violation occurs when the government fails to disclose evidence materially favorable to the accused."[54]

This recognition that the due process obligation belongs to the government is true to the language of the constitutional commands of the Fifth and Fourteenth Amendments.[55] It properly removes from the constitutional equation the need to pinpoint the exact government actor responsible for the failure to provide the requisite access to the evidence. It also removes the fiction that prosecutors are always partially responsible for any instances of non-disclosure. In reality, prosecutors may diligently gather information from other government actors involved in a case; nevertheless, these officials, whether police or scientists, may not provide the information to them.[56]

Many courts still myopically focus on the prosecutor, defining disclosure obligations not in terms of accurate fact-finding and fairness to the defendant, but as a matter of fairness to the prosecutor.[57] *Brady* rights under this approach are limited to those government actors who are considered part of the prosecution's team.[58] "At bottom, imputation involves

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53. *Id.* at 869–70.

54. *Id.* at 869.

55. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law."); U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").

56. *See, e.g.*, Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOK. L. REV. 1091, 1103 (2014) ("*Brady* is also susceptible to being undermined by investigators. Law enforcement may deliver an investigatory file that, unknown to the prosecutor, excludes exculpatory and material evidence."); Ellen Yaroshefsky, *Why Do* Brady *Violations Happen?: Cognitive Bias and Beyond*, THE CHAMPION, May 2013, at 13 (explaining that one reason for *Brady* violations is that "[p]olice agencies may not comply with the most diligent prosecutor in producing information").

57. *See, e.g.*, United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998) ("[T]he imposition of an unlimited duty on a prosecutor to inquire . . . would 'condemn the prosecution of criminal cases to a state of paralysis.'" (quoting United States v. Gambino, 835 F.Supp. 74, 95 (D.N.Y. 1993), *aff'd*, 59 F.3d 353 (2d Cir. 1995))).

58. *See, e.g.*, United States v. Rivera-Rodriguez, 617 F.3d 581, 595 (1st Cir. 2010) (holding that the duty did not extend to government agents not working with the prosecution); Lovitt v. True, 403 F.3d 171, 185 (4th Cir. 2005) (holding that the duty did not extend to a prison inmate acting as a "professional" informant); United States v. Morris, 80 F.3d 1151, 1169 (7th Cir. 1996); United States v. Meregildo, 920 F. Supp. 2d 434, 440–45 (D.N.Y. 2013) (citing several cases, and holding that the *Brady* obliga-

a question of agency law: should a prosecutor be held responsible for someone else's actions?"[59] Once the fiction of imputation to the prosecutor is abandoned, the due process obligation correctly shifts to possible violations beyond the prosecutor's team. At a minimum, where an officer or another official is involved in a separate investigation, and is aware of the pending case, constitutional disclosure obligations should apply. The right to fundamental fairness implicit in the Due Process clause is better determined by a bright-line disclosure rule that applies to all government actors.

B. Mens Rea in Denying Procedural Fairness Should Not Matter

When the Court engages in rights analysis, it generally follows an objective reasonableness test to determine whether the government conduct violates constitutional norms.[60] For example, in the Fourth Amendment context, the Court has declared that "reasonableness" under that constitutional provision will be evaluated solely by looking at the objective reasonableness of the conduct rather than the subjective intentions of the officer.[61] Likewise, with other criminal procedure rights, courts examine the objective reasonableness of the conduct to determine whether rights have been violated.[62] The Confrontation Clause, for example, is a

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tion extends only to those fairly characterized as being part of the prosecutor's team on the case in question). This narrow approach has been subject to criticism. *See, e.g.*, Anne Bowen Poulin, *Convictions Based on Lies: Defining Due Process Protection*, 116 PENN ST. L. REV. 331, 362 (2011) (advocating a broader approach to imputing the actions of government actors to the prosecution than that taken by most courts).

59. *Meregildo*, 920 F. Supp. 2d at 443.

60. *See, e.g.*, Michigan v. Bryant, 131 S. Ct. 1143, 1156 n.7 (2011) (noting generally the Court's "rejection of subjective inquiries" in evaluating criminal law rights); Bennett L. Gershman, *Mental Culpability and Prosecutorial Misconduct*, 26 AM. J. CRIM. L. 121, 164 (1998) ("The prosecutor's mental culpability, or subjective intent to prejudice a defendant unfairly, ordinarily is considered irrelevant" in evaluating claims of prosecutorial error at trial."). While this is generally true, the Court has not always considered the intent of the government actors irrelevant. *See, e.g.*, United States v. Lovasco, 431 U.S. 783, 795–96 (1977) (holding that where there is prejudicial prosecutorial delay in bringing a prosecution there is no due process violation unless the delay was for the purpose of gaining a tactical advantage).

61. Whren v. United States, 517 U.S. 806, 809–13 (1996) (holding that an officer's pretextual motive for a traffic violation stop is constitutionally irrelevant). Recently, the Court noted that "our Fourth Amendment cases 'have repeatedly rejected' a subjective approach." Fernandez v. California, 134 S. Ct. 1126, 1134 (2014) (quoting Brigham City v. Stuart, 547 U.S. 398, 404 (2006)).

62. For example, in *Santobello v. New York*, 404 U.S. 257 (1971), the Court held that the prosecution's breach of a plea agreement accepted by the court is a violation of due process regardless of prosecutorial mens rea. "That the breach of agreement was inadvertent does not lessen its impact." *Id.* at 262. In *Mabry v. Johnson*, the Court

procedural guarantee to help ensure reliable determinations at trial.[63] When evidence is offered at trial in circumstances that violate this procedural right, the mens rea of the prosecutor is irrelevant. It does not matter whether the prosecutor acted innocently, inadvertently, or in furtherance of a valid state interest.[64]

Mens rea is also irrelevant to due process fundamental fairness. For instance, a violation of due process occurs when the government elicits evidence at trial that a defendant chose to remain silent after he received *Miranda* warnings.[65] This is a constitutional violation because the evidence "[i]n such circumstances [is] . . . fundamentally unfair."[66] The mens rea of the prosecutor who elicited the evidence of post-*Miranda* warnings silence is irrelevant to the constitutional analysis.

In the same vein, *Brady* explicitly treats the duty to disclose as an issue of fairness, characterizing the duty to disclose as one "irrespective of the good faith or bad faith of the prosecution."[67] In *United States v. Agurs*,[68] the Court again emphasized that "moral culpability" should play no role in the *Brady* constitutional analysis.[69] "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."[70]

Unfortunately, the Court has adopted inconsistent mens rea requirements on the right to access evidence that is not deemed to be *Brady* material. Some evidence in the government's possession requires further testing or scrutiny to determine whether it is favorable to the defense. Even when that evidence is potentially exculpatory, the Court has held that there is no due process violation for a failure to preserve it, unless

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again emphasized that it is the actions of the prosecutor that matter, holding "because it did not impair the voluntariness or intelligence of his guilty plea, respondent's inability to enforce the prosecutor's offer is without constitutional significance. Neither is the question whether the prosecutor was negligent or otherwise culpable in first making and then withdrawing his offer relevant. The Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty. Here respondent was not deprived of his liberty in any fundamentally unfair way." 467 U.S. 504, 510–511 (1984) (footnotes omitted).

63. *See* Crawford v. Washington, 541 U.S. 36, 61–62 (2004).

64. *See, e.g.*, Davis v. Alaska, 415 U.S. 308, 317–19 (1974) (holding the right of confrontation was violated even though cross-examination of critical juvenile witness for possible bias was prohibited by state to further generally valid interest in protecting the juvenile from embarrassment).

65. Doyle v. Ohio, 426 U.S. 610, 619 (1976).

66. *Id.* at 618.

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

68. 427 U.S. 97 (1976).

69. *Id.* at 110.

70. *Id.*

bad faith by the government can be shown.[71] This extremely difficult, almost impossible burden to show bad faith is at odds with the Court's stated concern for providing a meaningful opportunity to present a defense.[72]

In *Arizona v. Youngblood*,[73] the defendant was charged with the sexual assault of a ten-year-old boy who had been attacked by a stranger. The police collected the clothes of the victim, which had semen from the assailant on them.[74] If the police had promptly tested or refrigerated the clothing for later testing, the evidence potentially could have exonerated Youngblood. However, the police did neither, and blood group testing was not possible, even though the entire case hinged solely on the uncorroborated testimony of a youthful victim who identified Youngblood as his stranger attacker.[75]

Without considering the value to society and the accused of preserving this evidence, the Court held that no due process violation occurred unless the defendant could establish that the loss of the evidence was the result of bad faith by the government.[76] The Court held that the police acted constitutionally because their actions could "at worst be described as negligent."[77]

In contrast, Justice Blackmun, on behalf of three dissenters in *Youngblood*, would have held that "[r]egardless of intent or lack thereof, police action that results in a defendant's receiving an unfair trial constitutes a deprivation of due process."[78] Unlike the majority, the dissent

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71. *See, e.g.*, Illinois v Fisher, 540 U.S. 544, 547–48 (2004) (per curiam).

72. *See generally, e.g.*, William M. Landes and Richard A. Posner, *Harmless Error*, 30 J. LEGAL STUD. 161, 179 (2001) ("[T]o determine whether the prosecutor had committed the error deliberately would require a difficult and usually inconclusive inquiry into the prosecutor's state of mind."); Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 912 (1998) ("Proof of subjective intent is problematic in any setting, especially when applied not to some distant public official, but to prosecutors with whom adjudicating courts will usually have very close and ongoing relationships." (footnote omitted)).

73. 488 U.S. 51 (1988).

74. *Id.* at 52–53.

75. *Id.* at 53–55.

76. *Id.* at 58. Several years later, in 2000, rectal swabs from the victim were tested using newer, more sophisticated DNA technology, and Youngblood was exonerated. The DNA profile developed led to the arrest and conviction of another man for the sexual assault. *See* Norman C. Bay, *Old Blood, Bad Blood, and* Youngblood*: Due Process, Lost Evidence, and the Limits of Bad Faith*, 86 WASH. U. L. REV. 241, 276–78 (2008).

77. *Youngblood*, 488 U.S. at 58.

78. *Id.* at 62 (Blackmun, J., dissenting).

properly excludes mens rea from the due process analysis. "*Youngblood*'s focus on the subjective motivation of the police represents a break with [the Court's] usual understanding that the presence or absence of constitutional error in suppression of evidence cases depends on the character of the evidence, not the character of the person who withholds it."[79]

The Court's bad faith requirement in *Youngblood* and other cases where the government has lost or destroyed evidence is without supporting rationale.[80] There is no countervailing government interest in condoning negligent conduct in the preservation of evidence. The Court's mens rea approach only serves to encourage careless police work, and discourages the development of adequate procedures and regulations for the preservation of evidence. This is no small concern given that many police officers and prosecutors have no incentive to further investigate or to take precautions to preserve evidence that may potentially exculpate the accused, especially when they feel confident that they have enough evidence to secure a conviction.

Mens rea should play no role in defining fundamental fairness due process rights. The Court has gone down this wrong path in part because it has considered remedies before deciding what rights to recognize.

C. Divorcing Rights from Remedies

Determining the appropriate remedies for violations of rights is of critical significance. Weak remedies, as a practical matter, mean that the rights are limited.[81] Without any remedy, a right is an abstract idea.[82] Some commentators have suggested that it is a useless exercise to talk

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79. Illinois v. Fisher, 540 U.S. 544, 549 n.* (2004) (per curiam) (Stevens, J., concurring). Several state courts since *Youngblood* have held pursuant to state constitutional law that the failure to preserve evidence may be found to violate due process without a showing of bad faith. *Id.* (citing state cases); *see also* State v. Tiedemann, 162 P.3d 1106, 1117 (Utah 2007) (holding that the rule in *Youngblood* is both too broad and too narrow to adequately safeguard fundamental fairness required by the state constitution).

80. *See, e.g.*, Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1436 (1987) ("Prosecutorial intent has little to do with procedural adequacy. If certain actions are prohibited, it is because those actions interfere to an unacceptable degree with the fair formulation or disposition of the charges against the defendant.").

81. *See, e.g.*, David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1202–1203 (2005); Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 55 (2005); John C. Jeffries, Jr., *The Right–Remedy Gap in Constitutional Law*, 109 YALE L.J. 87 (1999); Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 735–36 (1992).

82. *See, e.g.*, Friedman, *supra* note 81.

about "rights" without discussing the inextricably intertwined concept of remedy.[83] There are, however, advantages of first defining rights. When a court defines a right, it provides lower courts and criminal justice system actors with guidance on important constitutional law issues.[84] More specifically, it provides police, prosecutors, and other government actors with notice of what procedures they must follow to comply with the requirements of fundamental fairness in criminal prosecutions. Defining the right has intrinsic value because, regardless of the availability of sanctions, it will cause many police officers and prosecutors to modify their actions to comply with constitutional norms.[85]

It is essential to first recognize what fundamental fairness requires in defining rights. This frees the determination from possible distortions and practical emasculation because of specific remedies a court would view as drastic and be reluctant to give.[86] A prime example is defining the right to evidence preservation solely in the context of a dismissal of criminal charges without trial.[87] Instead, courts should first recognize that the right exists, and only then consider an entire range of potential remedies.

III. RECONSTRUCTING ACCESS TO EVIDENCE RIGHTS

Due process fundamental fairness rights should be recognized whenever the equities of balancing the individual and society's interest in accurate fact-finding determinations outweigh valid governmental inter-

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83. *See, e.g.*, Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 900 (1999).

84. *See, e.g.*, Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 7–8, 72 (2002); Michael T. Fisher, Note, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line*, 88 COLUM. L. REV. 1298, 1315–17, 1324 (1988).

85. *See, e.g.*, Tracey L. Meares, *The Good Cop: Knowing the Difference Between Lawful or Effective Policing and Rightful Policing – and Why it Matters*, 54 WM. & MARY L. REV. 1865 (2013); Carol S. Steiker, *Counter-Revolution In Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2544–46 (1996).

86. *See, e.g.*, Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1565 (2009) ("Current remedies for prosecutorial misconduct are strikingly ineffective, largely because courts view them as too costly to grant.").

87. *See infra* notes 260–266 and accompanying text. *See generally, e.g.*, Marc M. Arkin, *Speedy Criminal Appeal: A Right Without A Remedy*, 74 MINN. L. REV. 437, 482 (1990) ("Shrinking from this extreme remedy (case dismissal), courts refused to find speedy trial violations except in the most outlandish cases; the remedy effectively gutted the right.").

ests.[88] Further, the rights should apply to the actions of all government actors without regard to their mens rea when the governmental obligations are not met.[89]

A. The Brady Obligation: A Right To Disclosure of Evidence Favorable To The Defense

The United States Supreme Court's early due process cases identifying limits on prosecutorial power set forth conduct prohibited by the Due Process Clause. If the governmental conduct violated the Due Process Clause, the Court then decided whether relief was warranted. For example, in *Napue v. Illinois*,[90] the Court first held that a violation of due process occurs when a prosecutor knowingly fails to correct false testimony that goes to the credibility of a witness.[91] The Court then considered the remedy and reversed the conviction because the false testimony "may have had an effect on the outcome of the trial."[92]

Similarly, in *Rosenberg v. United States*,[93] the Court first considered the right and then separately addressed the remedy. In *Rosenberg*, the government failed to disclose a letter written by the victim to the Assistant United States Attorney relaying that her memory of the events had dimmed.[94] The Supreme Court held that it was error under the Jencks Act not to disclose the letter,[95] and cautioned that "[a]n appellate court should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled."[96] However, the Court then rejected the defendant's plea for a new trial because it concluded that the error did not reduce the impeachment information available to defense counsel.[97] The Court held that "[t]here is such a thing as harmless error and this clearly was such."[98] Thus, the Court first determined that the right had been violated, and then separately determined that the defendant was not entitled to a remedy for the violation of his statutory right.

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88. *See supra* Part I.
89. *See supra* Part II A. and B.
90. 360 U.S. 264 (1959).
91. *Id.* at 269.
92. *Id.* at 272.
93. 360 U.S. 367 (1959).
94. *Id.* at 370.
95. *Id.* The Jencks Act, 18 U.S.C. § 3500 (2006), generally requires that after a witness testifies for the government in a federal criminal prosecution, any statements of the witness in the government's possession must be given to the defense.
96. *Rosenburg*, 360 U.S. at 371.
97. *Id.*
98. *Id.*

In *Brady*, the Supreme Court held that favorable evidence must be disclosed by the prosecution.[99] There was no indication that the Court intended to diverge from its traditional approach of analyzing the rights violation before separately determining the remedy. Given the Court's emphasis on treating the defendant fairly at trial,[100] a reasonable interpretation of *Brady* is that all favorable evidence must be disclosed. While the Court held that the due process disclosure duty is violated "where the evidence is material either to guilt or punishment,"[101] it never defined the term "material," which arguably meant relevant in the evidentiary sense.[102]

The next important due process disclosure case after *Brady* was *Giglio v. United States*.[103] *Giglio* appeared to take the same rights/duty approach as *Napue* and *Rosenberg*. The Court recognized that the statutory duty considered in *Rosenberg* was also a constitutional duty, and held that "nondisclosure of evidence affecting credibility falls within this general [*Brady*] rule."[104] Separately, the Court then addressed the question of a possible remedy.[105] The Court noted that "[a] finding of materiality of the evidence is required under *Brady*," and held (under *Napue*) that "[a] new trial is required 'if the false testimony could in any reasonable likelihood have affected the judgment of the jury.'"[106]

After *Giglio*, the Court diluted the constitutional duty to provide favorable evidence to the defense by blending the analysis of the duty with its analysis of the remedy. This reflected the Court's concern over granting defendants new trials after conviction in cases where there had been a failure to disclose. *United States v. Agurs*[107] marked the starting point for this limitation on the constitutional duty to disclose favorable evidence. In *Agurs*, the Court noted that the Constitution does not re-

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

100. *Id.* ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.").

101. *Id.*

102. *Id. See, e.g.*, Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 McGeorge L. Rev. 643, 646 (2002) ("[O]ne perfectly plausible reading of 'material' within the context of the opinion is that it means 'relevant,' such that the prosecution would be obligated to turn over all *relevant* favorable evidence."); Fowke, *supra* note 41, at 58. ("The *Brady* opinion uses 'material' as defined by the law of evidence.").

103. 405 U.S. 150 (1972).

104. *Id.* at 154.

105. *Id.* ("We do not . . . automatically require a new trial.").

106. *Id.* (quoting *Napue*, 360 U.S. 264, 271 (1959).

107. 427 U.S. 97 (1976).

quire the prosecution to share all of its investigatory work with the defense.[108] It then used this unexceptional fact to reach the astounding conclusion that

> since we have rejected the suggestion that the prosecutor has a constitutional duty routinely to deliver his entire file to defense counsel, we cannot consistently treat every non-disclosure as though it were error. It necessarily follows that the judge should not order a new trial every time he is unable to characterize a nondisclosure as harmless under the customary harmless error standard.[109]

Despite the *Agurs* Court's conclusion, a due process obligation to disclose favorable evidence is obviously not the equivalent of a forced open file policy. The prosecutor's file also has inculpatory evidence, and often evidence that is neither favorable to the prosecution nor the defense. There is no duty to disclose this type of evidence under *Brady* because it is not favorable to the defense.

To further justify its refusal to impose a constitutional duty on prosecutors to disclose favorable evidence, the *Agurs* Court explained:

> The problem arises in two principal contexts. First, in advance of trial, and perhaps during the course of a trial as well, the prosecutor must decide what, if anything, he should voluntarily submit to defense counsel. Second, after trial a judge may be required to decide whether a nondisclosure deprived the defendant of his right to due process. Logically the same standard must apply at both times. For unless the omission deprived the defendant of a fair trial there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose.[110]

Carried to its illogical extreme, this passage would mean that there are no specific constitutional procedural duties to ensure that defendants are treated fairly at trial. There are only retrospective evaluations as to whether the trial overall was fair enough after it has resulted in a conviction. Under that premise, there are no constitutional rights until the state action has significantly prejudiciced the accused.

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108. *Id.* at 109.
109. *Id.* at 111–112.
110. *Id.* at 107–108.

In *United States v. Bagley*,[111] the Court again refused to find constitutional error where the state did not disclose evidence favorable to the defendant. The Court further narrowed the constitutional obligation to disclose by holding that the duty for the prosecution to disclose evidence in advance of trial hinges on a prediction of the impact the favorable evidence will have on the trial. Accordingly, there is no obligation to disclose all favorable evidence, and the prosecution only has a duty to disclose materially favorable evidence. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[112]

Justice Marshall dissented in *Bagley* and urged the Court to establish a straightforward due process obligation for the state to disclose all favorable evidence.[113] He advocated for a harmless error test to determine whether a new trial should be granted when constitutional error is found.[114] Despite much scholarly agreement with Justice Marshall,[115] the materiality test set forth in *Bagley* is now the firmly established standard for defining the state's due process obligation.[116]

While the Court has "several times underscored the 'special role played by the American prosecutor in the search for truth in criminal

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111. 473 U.S. 667 (1985).

112. *Id.* at 682. *Bagley* adopted the standard for prejudice necessary to establish an ineffective assistance claim. *Id. See* Strickland v. Washington, 466 U.S. 668, 695 (1984). This unitary standard replaced different tests dependent on the situation, including whether the defendant made a specific request. *See Agurs*, 427 U.S. at 110–13.

113. *Bagley*, 473 U.S. at 695–96 (Marshall, J., dissenting).

114. *Id.* Suggested remedies for *Brady* violations are discussed *infra* at notes 278–82 and accompanying text.

115. *See, e.g.*, Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1540–45 (2010); Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets* Brady, 109 PENN ST. L. REV. 1133, 1151–52 (2005); Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1393 (1991). *See also* Fowke, *supra* note 41, at 598–99 (documenting recent unsuccessful federal legislative and rule-making efforts to eliminate the *Brady* materiality requirement).

116. *E.g.*, Smith v. Cain, 132 S. Ct. 627, 630 (2012); Cone v. Bell, 556 U.S. 449, 469–70 (2009) ("Accordingly, we have held that when the State withholds from a criminal defendant evidence that is material to his guilt or punishment, it violates his right to due process of law in violation of the Fourteenth Amendment."); Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("[S]howing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more."). *See, e.g.*, Colin Starger, *Expanding Stare Decisis: The Role of Precedent in the Unfolding Dialectic of* Brady v. Maryland, 46 LOY. L.A. L. REV. 77, 85 (2012) ("Since 1985, *Bagley*'s materiality standard has become entrenched . . . .").

trials,'"[117] those words ring hollow because, under the materiality test set forth in *Bagley*, "there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."[118]

The Court's narrowing of disclosure obligations is troubling given that a lack of access to investigatory materials creates a dependence on the part of criminal defendants on the good will and diligence of state actors.[119] Under this constitutional paradigm, police and prosecutors face no constitutional pressure to disclose even obviously exculpatory evidence if they believe that it will not alter the outcome of the trial. In our adversarial system, police and prosecutors concentrate their efforts on obtaining a guilty verdict. This desire to win may drive even ethical government actors to unconsciously err on the side of nondisclosure.[120] It makes little sense to have a constitutional doctrine that excuses govern-

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117. Banks v. Dretke, 540 U.S. 668, 696 (2004) (quoting Strickler v. Greene, 527 U.S. 263, 281 (1999).

118. *Strickler*, 527 U.S. at 281 (1999). *See* United States v. Bartko, 728 F.3d 327, 342 (4th Cir. 2013) (expressing frustration with prosecutors repeatedly not disclosing favorable evidence to the defense while "[r]emedies elude defendants because discovery violations ultimately prove immaterial to the verdict.").

119. Usually, "the prosecutor's decision on disclosure is final." Pennsylvania v. Ritchie, 480 U.S. 39, 59 (1987) (plurality opinion). Because of this fundamental problem, some commentators have urged that there be a right to an in-camera hearing where a court would review the prosecutor's files. *See, e.g.*, Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 397–98 (1984). Generally, courts have required an in-camera review of any undisclosed material only when "the accused has made a plausible showing that the evidence would be both material and favorable." United States v. Trevino, 89 F.3d 187, 190 (4th Cir. 1996). *Cf. Ritchie*, 480 U.S. at 58–60. (ordering post-verdict in-camera judicial review of youth services file to determine whether any *Brady* material existed at the time of trial).

120. *See Bagley*, 473 U.S. at 698 (Marshall, J., dissenting) (recognizing pressure on prosecutor as advocate and tension it creates with *Brady* duty); McMullan v. Booker, 761 F.3d 662, 674 (6th Cir. 2014) ("*Brady* creates little incentive for a prosecutor to disclose exculpatory evidence if the prosecutor believes that the evidence is not 'material' within the meaning of *Bagley*."); Alafair S. Burke, *Comment:* Brady*'s Brainteaser: The Accidental Prosecutor and Cognitive Bias*, 57 CASE W. RES. L. REV. 575, 576 (2007) (stating that *Brady* asks the prosecutor, an advocate, to utilize the same standard as an appellate court would to decide whether to reverse a conviction); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 351 (2006) ("Not only do cognitive biases make it unlikely that prosecutors (and judges) can envision a different outcome or appreciate the value of the withheld evidence, prosecutors situated as adversaries are not well-positioned to handle that task.") Medwed, *supra* note 115, at 1542. ("the prosecutor [is] acutely vulnerable to cognitive bias.").

ment actors' intentional withholding of favorable exculpatory or impeachment evidence, so long as it is not material.

At worst, a constitutional requirement of disclosure of all favorable evidence may lead occasionally to the erroneous disclosure of some evidence that is not favorable in the constitutional sense.[121] The risk of overdisclosure causes no appreciable harm to the prosecution or the justice system. Thus, it cannot justify the Court's current rule requiring only disclosure of material favorable evidence. To assure fundamental fairness, the Court should disentangle the due process right to access to evidence from the new trial remedy, and require the disclosure of all favorable evidence.[122] Moreover, defining the right only in terms of a new trial has unwisely limited the development of other appropriate remedies.

B. A Right To Disclosure of Potentially Exculpatory Evidence

This section focuses on evidence that cannot be characterized as favorable evidence under *Brady*, but that is potentially exculpatory. The genesis of recognition of a right to disclosure of potentially exculpatory evidence stems from a case decided over fifty years ago, *Roviaro v. United States*.[123] In *Roviaro*, the government refused to disclose the identity of an informant, even though the informant allegedly participated in the drug transaction that resulted in the arrest.[124] The Court recognized

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121. The Supreme Court has noted that the prosecutor's duty to determine what favorable evidence is material, and thus requires disclosure, comes only with the cost "that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence." Kyles v. Whitley, 514 U.S. 419, 439 (1995). *See also* Cone v. Bell, 556 U.S. 449, 470 n.15 (2009) ("As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure.").

122. Nearly half of the states require disclosure of evidence that is exculpatory or tends to negate guilt or reduce punishment, without requiring that the evidence be material. *See* ALASKA R. CRIM. P. 16(b)(3); 16A ARIZ. R. CRIM. P. 15.1(b)(8); ARK. R. CRIM. P. 17.1(d); CAL. PENAL CODE § 1054.1(e) (West 2013); COLO. R. CRIM. P. 16(a)(2); 4 CONN. PRAC., CRIM. P. § 40-11(a)(1); FLA. R. CRIM. P. R. 3.220(b)(4); HAW. R. PENAL. P. 16(b)(1)(vii); IDAHO CRIM. R. 16(a) (West 2013); ILL. S. CT. R. 412(c); MD. RULES 4-263(d)(5); MASS. R. CRIM. P. 14(a)(1)(A)(iii); MICH. CT. R. 6.201(B)(1); MISS. URCCC 9.04 (A)(6); MO. SUP. CT. R. 25.03(A)(9); MONT. CODE ANN. § 46-15-322 (West 2013); N.J. R. 3:13-3(b)(1); TEX. CODE CRIM. PROC. ANN. art. 39.14(h) (West 2013); UTAH R. CRIM. P. 16(a)(4); VT. R. CRIM. P. 16(b)–(c); WASH. SUPER. CT. CR. R. 4.7 (a)(3); WIS. STAT. ANN. § 971.23(1)(h) (West 2013); State v. Castor, 599 N.W.2d 201, 211 (Neb. 1999). North Carolina mandates disclosure of the entire file of the prosecutor and all investigative agencies. N.C. GEN. STAT. ANN. § 15A-903 (West 2013).

123. 353 U.S. 53 (1957).

124. *Id.* at 55–58. Roviaro was convicted on two counts. *Id.* at 56. On appeal to the U. S. Supreme Court, the government conceded that disclosure was appropriate with

the validity of a confidential privilege for effective police work in gaining information,[125] but held that it must be balanced "against the individual's right to prepare his defense."[126] The Court ordered disclosure of the informant's name because the "possible testimony was highly relevant and might have been helpful to the defense."[127] More importantly, the Court provided the following rule to govern future cases:

> A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.[128]

Roviaro speaks in classic due process terms, and even though it was decided on a non-constitutional basis, the Court has several times since noted that *Roviaro* sets forth due process disclosure requirements.[129] *Roviaro* is constitutionally significant because it recognizes a right to disclosure of evidence that merely has the potential to help the defense, and holds that disclosure of any favorable defense evidence is sufficiently important to overcome countervailing government interests.[130]

In a *Roviaro* situation, the defense is aware of a particular witness, but does not know his/her identity. A more serious problem for the defense is being completly unaware of witnesses known to police or prosecutors who could potentially provide exculpatory information.

At a minimum, disclosure should be constitutionally required for any witnesses who observed any part of a criminal episode. Eyewitnesses may, in an initial police interview, say that they can not identify the perpetrator, or could not see what was happening between the parties. Some

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respect to one count of the indictment, but attempted to sustain the conviction on the other count on the basis of a privilege claim. *Id.* at 58–59.

125. *Id.* at 59–60.

126. *Id.* at 62.

127. *Id.* at 63–64.

128. *Id.* at 60–61 (footnote omitted).

129. *See, e.g.*, United States v. Valenzuela-Bernal, 458 U.S. 858, 870–71 (1982); United States v. Raddatz, 447 U.S. 667, 679 (1980).

130. For disclosure to be mandated under *Roviaro* the defense has an obligation to show that testimony is potentially relevant and helpful to the defense. *See Valenzuela-Bernal*, 458 U.S. 858, 870–71 (1982) (explaining *Roviaro*). *See, e.g.*, DiBlasio v. Keane, 932 F.2d 1038 (2d Cir. 1991) (holding disclosure required if relevant to an entrapment defense); United States v. Tucker, 552 F.2d 202, 209 (7th Cir. 1977) (holding disclosure required where informant was present at time of offense and relevant to defense).

of these witnesses are being truthful, and some are being less than forthcoming because they do not want to get involved. However, when the police conduct additional interviews of these eyewitnesses, they may have highly relevant, or even critical evidence to offer.

In *Smith v. Cain*,[131] the defendant was convicted of killing five people solely on the basis of the inculpatory identification testimony of a single eyewitness, Larry Boatner.[132] Not disclosed to the defense at trial was that Boatner, in an interview shortly after the crime, appeared to be useless as a witness. Boatner told police he could describe the males involved only as being black, and that he could not identify anyone because he could not see their faces.[133] These statements became the basis for a successful post-conviction *Brady* claim based on the non-disclosure of material impeachment evidence.[134] This phenomena of initially unhelpful witnesses offering highly relevant testimony for the prosecution after additional interviews plays out in courtrooms across the country with some frequency.[135]

In *Smith*, police needed to re-interview Boatner because without him they had no case. Police and prosecutors get to pick and choose which eyewitnesses to follow-up with among those who initially say they saw nothing useful. There may be no re-interview of some eyewitnesses because of limited resources or because the case looks solid enough for a conviction without their testimony.

Brady provides no right to disclosure of any of these eyewitnesses after the initial interview because they have not provided any favorable evidence for the defense. *Brady* should be extended to enable a defense determination of whether an eyewitness has favorable testimony to offer at trial. Fundamental fairness mandates the disclosure of all eyewitnesses.[136]

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131. 132 S. Ct. 627 (2012).

132. *Id.* at 629.

133. *Id.* at 629–30.

134. *Id.* at 630–31.

135. *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 442–43 (1995) (explaining that an important eyewitness for prosecution at murder trial initially told police he did not see the murder or the assailant); Commonwealth v. Hunt, 999 N.E.2d 1104, 1109 (Mass. App. Ct. 2013) (explaining that the sole eyewitness before grand jury who identified defendant as murderer had previously told police she could not identify the perpetrator).

136. Several states already require disclosure of eyewitnesses. *See, e.g.*, ALASKA R. CRIM. P. 16(b)(1)(A)(i) (requiring disclosure of "persons known . . . to have knowledge of relevant facts"); COLO. R. CRIM. P. 16(a)(1)(I) (requiring disclosure of "[p]olice, arrest and crime or offense reports, including statements of all witnesses"); FLA. R. CRIM. P. 3.220(b)(1)(A) (requiring disclosure of an extensive list of persons

Recognition of a due process right to the disclosure of all physical evidence that is potentially exculpatory is also essential, especially because there is no state interest protected by non-disclosure. Forensic test results from physical evidence are a powerful tool for the prosecution. Before one considers whether rights of preservation and testing should be recognized for the defense, there must first be a concomitant due process right to know that the evidence exists. Say, for example, a rapist leaves a cigarette butt at the scene of the attack. If the police and prosecution choose not to submit it for forensic analysis, they also need not disclose its existence under *Brady* because it is not defined as favorable defense evidence.

Connick v. Thompson[137] is a Supreme Court case that dramatically highlights a defendant's need for notice of such evidence. In 1985, Thompson was charged with murder.[138] Victims from an attempted armed robbery unrelated to the murder identified Thompson as their assailant, and he was charged in that case as well.[139]

A swatch of cloth from one of the robbery victims was stained with the robber's blood. It was sent to the crime lab for analysis, and the crime lab issued a report before trial that the analyzed blood was type B. The prosecutor decided at trial not to use the swatch or the blood analysis as evidence, and did not disclose this evidence to the defense.[140]

Thompson was convicted of the attempted armed robbery. He did not testify at his murder trial because the robbery conviction could have been used to impeach his credibility.[141] He was convicted of murder and sentenced to death. Thompson exhausted all of his appeals, and the state scheduled his execution on May 20, 1999.[142]

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who may have relevant information, including eyewitnesses); MINN. R. CRIM. P. 9.01(1)(b) (requiring disclosure of "[t]he names and addresses of anyone else with information relating to the case"); N.H. SUPER. CT. R.98(A)(2)(i) (requiring disclosure of statements of all witnesses); N.J.R. 3:13-3(b)(1)(F) (requiring disclosure of anyone with "relevant evidence or information"); N.C. GEN. STAT. ANN. § 15A-903 (West 2013) (requiring disclosure of the complete files of the prosecutor and all investigating agencies); N.D. R. CRIM. P. 16(f)(3) (granting defendant the right to request statements of other persons not included in the general disclosure rule); VT. R. CRIM. P. 16(a)(1) (requiring disclosure, as soon as possible after defendant's request, of all witnesses then known to the prosecutor).

137. 131 S. Ct. 1350 (2011).
138. *Id.* at 1356.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*

In late April 1999, an investigator for Thompson discovered the previously unavailable and undisclosed crime lab report identifying the robber's blood as type B. Thompson had type O blood, and was thus proven innocent of the robbery.[143] The District Attorney's office agreed to stay the execution and dismiss the robbery case, but fought to sustain the murder conviction. An appellate court granted Thompson a new murder trial where he was acquitted.[144]

Thompson initiated a civil rights suit under 42 U.S.C. § 1983.[145] In 2011, the United States Supreme Court addressed whether the District Attorney was liable in his official capacity for failure to train his prosecutors on *Brady* requirements.[146] The District Attorney's office conceded that there had been a *Brady* violation.[147] However, the Court held that civil liability under § 1983 was unwarranted.[148]

What is noteworthy here is that the District Attorney's concession was not dictated by *Brady*. The prosecutors had not failed to disclose favorable evidence. Justice Scalia pointed this out in his concurring opinion: "Connick could not possibly have been on notice decades ago that he was required to instruct his prosecutors to respect a right to untested evidence that we had not (*and still have not*) recognized."[149] The clothing with the assailant's blood had the potential to be highly inculpatory or exculpatory evidence, but it was not favorable evidence that required disclosure under *Brady* because Thompson's blood was untested at the time of trial. Thus, it was unknown whether Thompson's blood type matched the type of blood found on the pants. The pants would have been somewhat inculpatory if Thompson's blood was type B, and exculpatory if his blood type was anything else.

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143. *Id.*

144. *Id.* at 1356–57.

145. *Id.* at 1357. 42 U.S.C. § 1983 generally provides for civil actions against state actors or local governments for constitutional rights violations.

146. *Id.*

147. *Id.*

148. *Id.* at 1358 (holding that "Thompson did not prove that he [the District Attorney] was on actual or constructive notice, and thereby deliberately indifferent to, a need for more or different *Brady* training.").

149. *Id.* at 1369 (Scalia, J., concurring). *See, e.g.*, United States v. Brooks, 727 F.3d 1291, 1300 n.7 (10th Cir. 2013) (stating evidence that could possibly be subjected to DNA testing and exonerate the defendant cannot support a *Brady* claim because it is not at that point favorable to the defense). Justice Thomas's majority opinion in *Thompson* proceeded on the basis of the concession, without deciding whether there was a *Brady* violation. Justice Ginsburg's dissent, with little discussion or citation to authority, disagreed with Justice Scalia's conclusion that there was no breach of *Brady* obligations. *Thompson*, 131 S. Ct. at 1373 n.6 (Ginsberg, J., dissenting).

What happened to Thompson is outrageous.[150] *Thompson* illustrates why a defendant should have a due process right to be notified of the existence of potentially exculpatory evidence. Without a right to notice of the existence of this non-favorable, potentially exculpatory evidence, the defense has no opportunity to decide whether to conduct forensic testing to determine whether the evidence is favorable. The prosecution has no legitimate interest in the non-disclosure of evidence that may be vital to a meaningful defense at trial. Of course, recognizing a due process right to notice to the defense would be meaningless in most cases without a right to preserve the evidence and submit it for testing. This is discussed in the next section.

C. A Right to Preservation and Testing Of Potentially Exculpatory Evidence

In *District Attorney's Office v. Osborne*,[151] a 5-4 decision, the Court refused to recognize a post-conviction due process right to DNA testing.[152] The Court observed that "[a] criminal defendant proved guilty after a fair trial does not have the same liberty interests as a free man. At trial the defendant is presumed innocent . . . ."[153] The Court decided that "the right to due process is not parallel to a trial right," and that "*Brady* is the wrong framework" for the post-conviction DNA testing analysis.[154]

While the holding in *Osborne* was limited to the post-conviction context, the opinion has potentially broader implications for issues related to DNA testing. The Court declined to find a due process testing right, in part, because it would "force [the Court] to act as policymakers,"[155] and to answer many additional questions:

> We would soon have to decide if there is a constitutional obligation to preserve forensic evidence that might later be tested. If so, for how long? Would it be different for different types of evidence? Would the State also have some obligation to gather such evidence in the first place? How much, and when? No doubt there would be a miscellany of other minor directives.

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150. The jury in Thompson's civil rights action agreed, awarding him fourteen million dollars. *Thompson*, 131 S. Ct. at 1355. This award was eventually overturned by the Supreme Court. *Id.* at 1358, 1366.

151. 557 U.S. 52 (2009).

152. *Id.* at 73–75.

153. *Id.* at 68.

154. *Id.* at 69.

155. *Id.* at 73.

> In this case, the evidence has already been gathered and preserved, but if we extend substantive due process to this area, these questions would be before us in short order, and it is hard to imagine what tools federal courts would use to answer them. At the end of the day, there is no reason to suppose that their answers to these questions would be any better than those of state courts and legislatures, and good reason to suspect the opposite.[156]

This is an unconvincing argument for judicial abdication. It would be particularly inappropriate to likewise abdicate authority in the pretrial context where the defendant is presumed innocent and where the Court has a duty to provide procedural protections that ensure a fair trial. That recognition of one due process right may necessarily lead to the recognition of a closely related due process right is no justification for failing to protect a defendant's right to fundamental fairness.

At a minimum, any due process right to preservation should extend to evidence where testing could potentially exculpate the accused.[157] The *Osborne* Court, relying principally on *Medina v. California*, adopted an overly narrow view of the constitutional demands of due process fundamental fairness that excessively deferred to the choices of state legislatures.[158] In doing so, the Court considered, as it had in *Medina*, whether the right to DNA testing is one rooted in the traditions and conscience of our nation.[159] The Court bolstered its refusal to recognize a due process right to DNA testing by stating that DNA access and testing lacks a long history of right recognition or tradition.[160]

However, DNA testing has now been around for over twenty-five years and is firmly established in our society as a powerful tool to both exculpate and inculpate a defendant. Recognition of a due process right to pre-trial DNA testing is long overdue given the societal interest, and the interest of the accused, in access to evidence vital to the truth-determining process that far outweigh any interest of the state in non-preservation.

Prosecutors have long relied on scientific evidence of all sorts to bolster their cases, particularly in cases involving the issue of identification. Evidence that a defendant and an assailant have "similar" hair, fingerprints, sneaker prints, blood type, et cetera, has been offered at trial to

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156. *Id.* at 74 (internal citations omitted).

157. *See, e.g.*, Starger, *supra* note 116, at 157 ("Only empty allegiance to form prevents recognition of the right to untested evidence under *Brady*.").

158. 557 U.S. at 69–73. *See supra* notes 21–34 and accompanying text for discussion of *Medina*.

159. 557 U.S. at 69–73.

160. *Id.*

establish that a defendant is included in the class of people who could have committed the crime.[161] DNA is the most powerful and reliable type of this scientific evidence that can be used to inculpate or exculpate the accused. All of this evidence is potentially powerful exculpatory evidence for the accused because it might show the defendant is excluded from the class of people who could have committed the crime, which is exactly what occurred in *Thompson* after the evidence was disclosed.[162]

The prosecution has no legitimate interest in failing to preserve such evidence. While there may be some expense involved in adequately storing this evidence,[163] the Court could set realistic limits on how long evidence must be preserved without overruling its recent holding in *Osborne* denying post-conviction due process rights. Instead of an indefinite state obligation to preserve that might extend for decades, the Court could hold that states must preserve the evidence through direct appeal, or through first post-conviction proceeding, which often is the defendant's first opportunity to challenge counsel's ineffectiveness with respect to these issues.[164]

The Supreme Court's lead case on the Due Process Clause and evidence preservation is *Arizona v. Youngblood*,[165] a sexual assault case where the identification of the defendant was at issue.[166] Unfortunately, in *Youngblood*, the Court held that no due process violation had occurred because the defendant failed to establish that the government had acted in bad faith when it failed to preserve potentially exculpatory evidence, the sexual assault victim's clothing that was stained with the attacker's semen.[167]

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161. *See, e.g.*, Murphy, *supra* note 10, at 723 ("[T]raditional forensic evidence, such as handwriting, firearms, bullet, bite, toolmark and fingerprint identification, has long played a role in the criminal justice system.").

162. *See supra* notes 137–150 and accompanying text for a discussion of *Thompson*.

163. *See* Bay, *supra* note 76, at 297–99 (noting increased burdens on state if the duty to preserve evidence is expanded beyond *Youngblood*).

164. *See generally* Martinez v. Ryan, 132 S. Ct. 1309, 1317–18 (2012) (discussing reasons some states do not consider ineffective assistance of counsel until collateral review).

165. 488 U.S. 51 (1988).

166. *Id.* at 52–53.

167. *Id.* at 58–59. Justice Blackmun, in dissent, on behalf of three Justices, viewed the question of intent as irrelevant to the constitutional analysis. *Id.* at 62 (Blackmun, J., dissenting); "The Constitution requires that criminal defendants be provided with a fair trial, not merely a 'good faith try' at a fair trial." *Id.* at 61 (Blackmun, J., dissenting). Concurring with the result, Justice Stevens also noted that "there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is so critical to the defense as to make a criminal trial fundamentally unfair." *Id.* (Stevens, J., concurring).

The bad faith requirement makes it impossible for a defendant to prevail when untested evidence is not preserved because the exculpatory value of the evidence must be "apparent before the evidence was destroyed."[168] In *Youngblood*, the Court determined that the "respondent ha[d] not shown that the police knew the semen samples would have exculpated him when they failed to perform certain tests or to refrigerate the boy's clothing; [thus,] this evidence was simply an avenue of investigation."[169] Untested evidence by definition is always "simply an avenue of investigation" and never exculpatory because it has not been tested. *Youngblood* eviscerates the constitutional obligation to preserve potentially exculpatory evidence for possible defense testing.[170] *Youngblood* should be overruled.

Whether or not *Youngblood* remains as the constitutional standard for evidence preservation, where potentially exculpatory evidence is preserved, the Court should hold that there is a right to forensic testing. In the civil context, the Court has already held that the failure to permit the testing of evidence may violate the Due Process Clause. In *Little v. Streater*,[171] the Court held that an indigent defendant in a paternity suit had a due process right to a state-financed paternity test to establish whether or not he was the father of a child.[172] The Court emphasized in *Little* that "due process requires at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."[173] The Court noted that even though the proceeding was characterized by the state as civil, if the defen-

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168. *Id.* at 67 (quoting California v. Trombetta, 467 U.S. 479, 489 (1984)) (Blackmun, J., dissenting).

169. *Id.* at 56 n. *.

170. Erin Murphy, *The Mismatch Between Twenty-First-Century Forensic Evidence and our Antiquated Criminal Justice System*, 87 S. CAL. L. REV. 633, 640 (2014) ("This narrow standard, as applied by courts, has excused almost every decision not to collect or preserve evidence."). "[T]here are 1,675 published cases that have cited *Youngblood* to date but only seven reported cases where bad faith has been found." Teresa N. Chen, *The* Youngblood *Success Stories: Overcoming the Bad Faith Destruction of Evidence Standard*, 109 W. VA. L. REV. 421, 422 (2007). In those seven cases, courts found due process violations, but "the successful cases are not so different from cases with similar facts or reasoning that were unsuccessful in establishing bad faith." *Id.* at 426. In none of them did the court treat the *Youngblood* burden literally and require a showing that the unpreserved evidence would in fact have exculpated the defendant, and the police were aware of the exculpatory value of the evidence. *See id.* at 426–51.

171. 452 U.S. 1 (1981).

172. *Id.* at 15–17.

173. *Id.* at 5–6 (quoting Boddie v. Connecticut, 401 U.S. 371, 377 (1971)).

dant was found to be the father, and he subsequently failed to pay court ordered child support, he could be imprisoned.[174]

The Connecticut statutory scheme made it very difficult for the defendant to establish that he was not the father without the requested testing.[175] The Court observed that blood group testing had been firmly established as reliable scientific evidence with the "ability . . . to exonerate innocent putative fathers"[176] since at least 1976. Therefore, the Court held that "[b]ecause of its recognized capacity to definitively exclude a high percentage of falsely accused putative fathers, the availability of scientific blood test evidence clearly would be a valuable procedural safeguard in such cases."[177] In finding a due process violation, the Supreme Court stated that "[o]bviously, both the child and the defendant in a paternity action have a compelling interest in the accuracy of such a determination."[178]

In a criminal case, where the stakes for the accused are generally greater than for a civil litigant, the testing of any evidence that might exclude the defendant, or otherwise tend to exculpate, should be recognized as a due process right.[179] Additionally, if DNA and fingerprinting test results exclude the defendant as a suspect, the constitutional right to testing should extend to provide the defendant with access to state and national DNA and fingerprint data banks that are currently accessible to

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174. *Id.* at 10.
175. *Id.* at 12.
176. *Id.* at 7.
177. *Id.* at 14.
178. *Id.* at 13 (footnote omitted).
179. Several states recognize a defense right to scientific testing of physical evidence. *See, e.g.*, N.C. GEN. STAT. ANN § 15A-903(West 2011); MINN. R. 9.01 (2010); MICH. COMP. LAWS. ANN. § 6.201 (West 2011). The due process right to testing should extend beyond untested evidence to evidence that the state has tested and concluded has no evidentiary value because this conclusion could be wrong. *See, e.g.*, Jeff Coen & Carlos Sadovi, *Crime Lab Botched DNA Tests, State Says: Suspects Could Have Been Wrongly Freed*, CHICAGO TRIBUNE, Aug 19, 2005, at 1 (reporting that Illinois state quality control testing showed that laboratory that state used in Virginia had missed sperm in rape kits nearly 22 percent of the time); Commonwealth v. Montgomery, 626 A.2d 109, 111 (Pa. 1993) (criminalistics lab report indicated no seminal stains found on blanket, but upon second examination later a seminal stain was found); Cantwell v. Allegheny County, 483 A.2d 1350, 1352 (Pa. 1984) (only on retesting was sperm found on victim's clothing). Because of the capacity for scientific error in all forensic testing, the defense should also have a right to preservation and testing of all inculpatory physical evidence that the state intends to introduce at trial. *See infra* Section III (D).

police and prosecutors.[180] Under this circumstance, there is no legitimate state interest in prohibiting a defendant's access to these state and national banks.[181] If the DNA or fingerprints of an assailant match another individual's profile in the data bank, this is further exculpatory evidence for the defendant. Moreover, it is evidence that comports with society's interest in prosecuting the individual who actually committed the crime.

D. A Right to Preservation and Testing of Inculpatory Evidence That the Prosecution Will Introduce at Trial

In *California v. Trombetta*,[182] the Court addressed whether a state had a due process duty to preserve breath specimens taken from a DUI defendant where the state planned to use the results at trial to demonstrate the defendant's guilt.[183] The state court had concluded that the Dure Process Clause had been violated because there was no effort by the state to preserve the samples for retesting by the defense.[184] As a remedy for this violation, the state court ordered the exclusion at trial of the state's breath analysis results.[185]

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180. *See, e.g.*, Maryland v. King, 133 S. Ct. 1958, 1968 (2013) (describing Combined DNA Index System (CODIS) that connects DNA labs in all states by collecting DNA profiles "from arrestees, convicted offenders, and forensic evidence found at crime scenes," and that has "extreme accuracy in matching individual samples"); Erin Murphy, *License, Registration, Cheek Swab: DNA Testing and the Divided Court*, 127 HARV. L. REV. 161, 181 (2013) (stating that there are "over 10 million offenders" in DNA databases); The Federal Bureau of Investigation, *Integrated Automated Fingerprint Identification System*, http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/iafis, (stating that Integrated Automated Fingerprint Identification System (IAFIS) "is the largest criminal fingerprint database in the world, housing the fingerprints and criminal histories for more than 70 million subjects.").

181. *See, e.g.*, Murphy *supra* note 10, at 790–791; Robert Aronson & Jacqueline McMurtrie, *The Use and Misuse of High Tech Evidence by Prosecutors: Ethical and Evidentiary Issues*, 76 FORDHAM L. REV. 1453, 1485 (2007) (urging prosecutors not to resist post-conviction DNA testing and the use of DNA databases to identify "true perpetrator"); Ethan Brunner, *Lawyers, Saying DNA Cleared Inmate, Pursue Access to Data*, http://www.nytimes.com/2013/01/04/us (discussing problem of defense getting access to DNA databanks, and noting that only nine states have laws granting access); Commonwealth v. Conway, 14 A.3d 101, 109–13 (Pa. Super. Ct. 2011) (DNA testing ordered with results to be run through data banks for possible match); State v. De Marco, 904 A.2d 797, 807 (N.J. Super. Ct. App. Div. 2006) (DNA re-testing of samples from early 1990's case would now permit comparison with offenders in DNA data bank).

182. 467 U.S. 479 (1984).

183. *Id.* at 481–84.

184. *Id.* at 482–84.

185. *Id.* at 483–84.

Based on its concern with the remedy for such a constitutional violation, the Court held that the state had no due process duty to preserve this inculpatory evidence.[186] Specifically, the Court rejected a remedy that would exclude from trial "the State's most probative evidence," or a remedy that would dismiss the case because evidence of speculative use to the defense had been lost or destroyed.[187] The Court failed to first examine whether a defendant has a due process right to preservation of evidence in some inculpatory circumstances, and then to separately address the question of an appropriate remedy if such a right exists. The Court could have decided, for example, that the failure to preserve this scientific evidence was a violation of due process rights, but that an "extreme sanction" such as suppression of the evidence or dismissal of the case was not the appropriate remedy.[188]

In *Trombetta*, the Supreme Court essentially held that there is no due process right to the preservation of inculpatory physical evidence.[189] The Court held that the defendant must show a bad faith failure to preserve the evidence to warrant a finding of a due process violation.[190] More importantly, it held that the due process duty for the state to preserve evidence extends only to evidence that has "exculpatory value that was apparent before the evidence was destroyed."[191] Under the Court's test, the defendant's due process rights were not violated because the "breath samples were much more likely to provide inculpatory [rather] than exculpatory evidence."[192]

The Court's opinion myopically focused on exculpatory evidence. It seriously undervalued the need for evidence preservation to enable the defense to challenge inculpatory evidence. In order to protect the right to confront and cross-examine, all of the physical evidence and data that allegedly support the inculpatory scientific findings must be preserved.[193]

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186. *Id.* at 488.

187. *Id.* at 487.

188. *See, e.g.*, Leon v. United States, 468 U.S. 897, 926 (1984) (referring to the suppression of physical evidence as an "extreme sanction"). The Court in *Trombetta* could have held that a lesser remedy, such as an adverse inference instruction would have been an appropriate constitutional remedy for what it concluded was a due process violation. *See* discussion *infra* notes 254–259 and accompanying text.

189. *Trombetta*, 467 U.S. at 491.

190. *See id.* at 488.

191. *Id.* at 489.

192. *Id.* The Court also held that the evidence must "be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.*

193. *See, e.g.*, Walter F. Rowe, Commentary, in Edward Connors et al, *Convicted by Juries, Exonerated by Science*, XVII–XVIII (1996) (underlying notes and data may

Without the right to preservation and access to inculpatory evidence, a defendant cannot challenge the accuracy and reliability of inculpatory forensic results, which goes to the essence of the right to confront and cross-examine.[194]

Long before *Trombetta*, the Court held in *Davis v. Alaska*[195] that a defendant has a constitutional right "to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness."[196] In *Davis*, in order to show possible bias, defense counsel sought to elicit evidence at trial that the important state juvenile witness was on probation for a crime similar to the one for which Davis was charged.[197] The state had a statute providing that juvenile adjudicatory records were not admissible as evidence. Based on the statute, the trial judge prohibited cross-examination of the juvenile witness, and defense counsel could not elicit this key fact.[198] The Court held that even though the state had a legitimate interest in keeping juvenile records private, that interest had to yield to the defendant's paramount Confrontation Clause interest in demonstrating the possible bias of a witness.[199]

In *Davis*, counsel had access to the underlying information and the juvenile record, but was prohibited from using it to cross-examine the juvenile witness at trial. The impermissible effect on cross-examination is the same whenever the defense is denied access to the underlying information in the first place. Moreover, unlike *Davis*, there is not even a legitimate countervailing state interest to consider in recognizing a due

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indicate weaknesses in the analysis process or discrepancies). Where the state's scientific testing of the evidence will not make it feasible to preserve enough for the defense to meaningfully examine it or to re-test, there should be a requirement that defense counsel and a defense expert be afforded the opportunity to be present for the state's testing. Some states guarantee this right. *See, e.g.*, MINN. R. 9.01 (2010); CONN. GEN. STAT. ANN. § 40-9 (West 2014).

194. *See, e.g.*, Giglio v. United States, 405 U.S. 150, 154 (1972) (*Brady* obligation extends to favorable evidence "affecting credibility"); Smith v. Cain, 132 S. Ct. 627, 630–31 (2012) (failure to disclose material impeachment evidence violates due process); *Cf.*, Dugas v. Coplan, 428 F.3d 317 (1st Cir. 2005) (counsel's performance deficient for failing to consult with scientific expert and failing to attempt to obtain independent testing of physical evidence); Sims v. Livesay, 970 F.2d 1575, 1580 (6th Cir. 1992) (counsel's decision that further investigation of physical evidence and examination by defense expert was unnecessary was unreasonable).

195. 415 U.S. 308 (1974).

196. *Id.* at 318.

197. *Id.* at 309–11.

198. *Id.* at 311.

199. *Id.* at 319–21.

process duty for the state to preserve all underlying data and physical evidence that form the basis for inculpatory scientific findings.

A lot has changed in the field of forensic science since the Court decided *Trombetta* in 1984. These changes overwhelmingly support the need to recognize a due process right to preservation and access to inculpatory evidence. There is much more awareness in the scientific and academic communities of the potential for scientific error and unconscious bias in forensic scientific testing. It is now accepted knowledge that many scientific inculpating results, routinely accepted by the courts for years, are not the product of rigorous scientific principles, and that some forensic analysts are not sufficiently skilled to administer or interpret the results.[200] Further, there is recognition that some scientists may intentionally falsify results.[201]

More importantly, the Court itself has recognized the dangers presented when the state introduces inculpatory scientific analysis results, and the need for cross-examination of the analysts. In *Melendez-Diaz v. Massachusetts*,[202] the defendant was charged with a cocaine trafficking offense based on plastic bags containing a substance that the defendant had allegedly left in a police cruiser.[203] Over defense objection, the trial court permitted the state to introduce at trial a certificate of analysis affidavit from a state chemist, which stated that he had analyzed the substance in the bags, and concluded that it was cocaine.[204]

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200. *See* Murphy *supra* note 10; Paul Gianelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439 (1997) (citing errors by police scientific labs because of inadvertence, or conscious or unconscious bias).

201. There have been several well-publicized scandals involving scientists who falsified results and who regularly testified for the state in criminal prosecutions. *See, e.g.*, Mark Hansen, *Crimes in the Lab*, A.B.A. J., 45–51 (Sept. 2013) http://www.abajournal.com/magazine/article/crime_labs_under_the_microscope_after_a_string_of_shoddy_suspect_and_fraudu/ (recounting intentional and unintentional laboratory errors in several states); United States v. Olsen, 704 F.3d 1172, 1179–80 (9th Cir. 2013) (discussing a Washington state scientist who testified for the prosecution had serious questions raised by independent expert evaluations concerning "his diligence and care in the laboratory, his understanding of the scientific principles about which he testified in court, and his credibility on the witness stand."); *See also* Ex Parte Coty, 418 S.W.3d 597 (Tex.Crim.App. 2014) (discussing issues concerning Houston Police lab technician who fraudulently misrepresented testing data); Bob Salsberg, *Chemist Jailed in Lab Scandal*, HUFFINGTON POST, Nov. 22, 2013, http://www.huffingtonpost.com/2013/11/22/annie-dookhan-guilty_n_4322917.html (reporting conviction and sentence of Massachusetts chemist who faked drug test results).

202. 557 U.S. 305 (2009).

203. *Id.* at 308.

204. *Id.* at 309.

Applying its decision in *Crawford v. Washington*,[205] the Court held that the statement was testimonial, and that admission by the state of the forensic report without calling the state scientist violated the Confrontation Clause because there was no showing of unavailability and a prior opportunity to cross-examine the chemist.[206]

The state argued that *Crawford* should not apply, and that the Confrontation Clause should not require live testimony, because the analyst was not a fact witness to what happened, "and the testimony at issue here . . . is the result of neutral scientific testing."[207] Justice Scalia, writing for the Court, rejected this argument and the notion that scientists are always neutral: "Forensic evidence is not uniquely immune from the risk of manipulation."[208] The Court noted that requests from law enforcement may make a forensic analyst "feel pressure—or have an incentive—to alter the evidence in a manner favorable to the prosecution."[209] Further, the opinion emphasized that the right of confrontation is necessary to expose the possibly biased analyst, and also "the incompetent one as well [because] [s]erious deficiencies have been found in the forensic evidence used in criminal trials."[210]

In other cases, the Court has also cautioned that scientific testing results should not be treated as infallible. In *Bullcoming v. New Mexico*,[211] an aggravated drunk driving case, the state admitted a forensic analyst report that stated the defendant's blood alcohol content. The Court held that there was a Confrontation Clause violation because there had been no showing of unavailability and a prior opportunity to cross-examine the analyst.[212] The Court recognized that "human error can occur at each step" in operating the machines that produce the incriminating statistical results of the analysis.[213] Likewise, in *District Attorney's Office for Third*

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205. 541 U.S. 36 (2004).

206. *Id.* at 68. In *Crawford*, the defendant was charged with a stabbing and claimed self-defense. At trial, the state introduced a tape-recorded statement made to police by the defendant's wife who had witnessed the stabbing. She did not testify. *Id.* at 38–40. The Court held that the introduction of the statement of the non-testifying wife violated the Confrontation Clause because the statement was testimonial in nature, and there was no showing of unavailability and a prior opportunity to cross-examine her. *Id.* at 61.

207. *Melendez-Diaz*, 557 U.S. at 317.

208. *Id.* at 318.

209. *Id.*

210. *Id.* at 319.

211. 131 S. Ct. 2705 (2011).

212. *Id.* at 2709–10.

213. *Id.* at 2711.

Judicial District v. Osborne,[214] Justice Alito's concurring opinion emphasized that even though DNA testing often produces very reliable results, it is subject to the risk of intentional tampering, and inadvertent contamination or subjective misinterpretation.[215] Most recently, in 2014, the Court stated, "we have recognized the threat to fair criminal trials posed by the potential for incompetent or fraudulent prosecution forensics experts . . . ."[216]

The right to cross-examination is only realized when the defendant has knowledge of every fact that could possibly show bias or human error. "Confrontation means more than being allowed to confront the witness physically."[217] To give the accused a "full and fair opportunity at trial," armed with facts and possible "reasons" for rejecting or questioning the worth of the testimony of the state's inculpatory forensic witness, the Court needs to recognize a due process right for the defense to have access to the state's evidence.[218] Another reason to require disclosure is that this evidence and information may enable the defense to present its

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214. 557 U.S. 52 (2009).

215. *Id.* at 80–82.

216. Hinton v. Alabama, 134 S. Ct. 1081 (2014). In *Hinton*, the defendant was found guilty of two separate robberies and murders, and received a death sentence. *Id*. at 1084. The defendant was convicted on the basis of expert forensic testimony that the bullets recovered from the crimes were fired from a gun found in the home he shared with his mother. *Id.* at 1084. At a post-conviction hearing, three reputable experts offered uncontradicted testimony that they had examined the physical evidence and "could not conclude that any of the six bullets had been fired from the Hinton revolver." *Id.* at 1084. The Court held that trial counsel's performance was deficient because he presented a defense expert he knew was inadequate based on a misunderstanding that state law did not permit him any more money to hire an adequate expert. *Id.* at 1086–1087. The inadequate expert was subject to significant impeachment at trial, but testified to the same conclusion as the reputable defense experts at the post-conviction proceeding. *Id.* at 1088. The Court remanded for a determination of whether there was sufficient prejudice to award a new trial. *Id*. at 1090.

217. Davis v. Alaska, 415 U.S. 308, 315 (1974).

218. There is an argument that the right to disclosure should be recognized under the Confrontation Clause as well. In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) (plurality opinion), a case involving non-disclosure of confidential state child protective service files, *id.* at 42–43, the Court concluded that the Confrontation Clause was irrelevant to the analysis because "the right to confrontation is a trial right." *Id.* at 52. However, three Justices disagreed because "[t]hat interpretation ignores the fact that the right of cross-examination also may be significantly infringed by events occurring outside the trial itself, such as the wholesale denial of access to material that would serve as the basis for a significant line of inquiry at trial." *Id.* at 66 (Brennan, J., dissenting). *See also id.* at 61–62 (Blackmun, J., concurring) ("In my view, there might well be a confrontation violation if, as here, a defendant is denied pretrial access to information that would make possible effective cross-examination of a crucial prosecution witness.").

own expert to rebut the state's expert testimony, which is often more effective than cross examination.[219] To this end, and to advance the goal of providing an opportunity for meaningful cross-examination, a right to retesting by the defense should also be recognized whenever feasible. Further scientific scrutiny may reveal that evidence state scientists determine is inculpatory is not quite as inculpatory as alleged, or it may even turn out to be exculpatory.[220]

E. Timely Pre-Trial Disclosure

The Court has recognized that the rights involving access to government evidence are necessary to safeguard a defendant's meaningful opportunity to present a complete defense at trial.[221] A meaningful opportunity, rather than simply *an* opportunity, has to take into account the timing of the required disclosure. Receiving new evidence on the eve of trial or during trial does not provide counsel with an adequate opportunity to evaluate, investigate, and strategize. Counsel has to interview witnesses, check backgrounds, and do further investigation as leads develop. Disclosure of physical evidence often requires scientific self-educa-

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219. *See Kansas v. Cheever*, 134 S. Ct. 596, 600–01 (2013) (holding that where the defense presents testimony from an expert who examined the defendant and asserts that the defendant did not have the necessary mental state for conviction, the prosecutor, on rebuttal, can respond with expert testimony from a court ordered mental examination). *Id.* at 600–601. The Court observed that this was "the only effective means of challenging that evidence: testimony from an expert who has examined him." *Id.* at 601. "Excluding this testimony would have undermined . . . the core truth-seeking function of the trial." *Id.* at 598.

220. The New Hampshire Supreme Court rejected *Trombetta* on state constitutional grounds, and emphasized the possibility of error in state testing:

> [W]e think the issue ultimately boils down to this: we do not believe in the infallibility of human agencies, any more than we believe in infallible technology. Until we are prepared to accept both, we take the view that when the State conditionally requires that a person submit a breath, blood, or urine test conducted by the State, fundamental fairness requires that an additional sample be available to the person tested for his or her own independent analysis. In the light of present day scientific advances, due process, it seems to us, requires a second sample.

Opinion of the Justices, 557 A.2d 1355, 1358 (N.H. 1989). *See also* NMSA 1978, § 66-8-109(B) ("The person tested shall be advised by the law enforcement officer of the person's right to be given an opportunity to arrange for a physician, licensed professional or practical nurse or laboratory technician or technologist who is employed by a hospital or physician of his own choosing to perform a chemical test in addition to any test performed at the direction of a law enforcement officer."); NMSA 1978, § 66-8-109(E) (cost of that test shall be paid by the law enforcement agency); State v. Jones,1998-NMCA-076, ¶ 25, 125 N.M. 556 (holding that defendant was denied a reasonable opportunity to contact a doctor to arrange for an independent alcohol test).

221. *See* Brady v. Maryland, 373 U.S. 83 (1963).

tion or consultation with experts, and sometimes defense examination and testing. All of this takes time, and very late disclosure presents substantial problems for the defense.

All of this is fairly obvious, but surprisingly the Court has never held that any access to evidence due process rights include a timeliness requirement.[222] Given this lack of guidance, many courts have held that there is no right to pre-trial disclosure and that there is no due process violation unless disclosure is extremely late and precludes defense counsel from effectively using the materials at trial. When courts have recognized a prosecutor's duty to timely disclose materials, the remedy for untimely disclosure has typically been a continuance of trial because a continuance gives a defendant the necessary time to investigate the evidence and integrate it into the trial defense.[223] A continuance granted to a defendant who is otherwise ready for trial to enable effective use of the last minute disclosure of *Brady* material is not an appropriate remedy. With crowded dockets, a defendant may have to wait several months for the next trial date.[224] For the incarcerated defendant this means a lengthy additional loss of freedom, leaving the defendant with the unenviable choice between going to trial less than fully prepared or substantially delaying trial with a continuance.[225]

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222. In dictum, the Court has stated that the *Brady* right requires disclosure "to the defendant before trial." District Attorney's Office for Third Judical District v. Osborne, 557 U.S. 52, 68 (2009).

223. *See, e.g.*, United States v. Keys, 721 F.3d 512, 520–21 (8th Cir. 2013) (trial disclosure of *Brady* material not a violation of due process because defendant was able to utilize it); United States v. Moreno, 727 F.3d 255, 262 (3d Cir. 2013) (disclosure made a day before trial not a violation where defendant did not show prejudice and did not request a continuance even though he was offered one); United States v. Brooks, 727 F.3d 1291, 1300 n.7 (10th Cir. 2013) (even assuming that material disclosed at trial was required under *Brady*, defendant "could have—but did not—seek a continuance"); United States v. Sterling, 724 F.3d 482, 510–13 (4th Cir. 2013) (reversing lower court's decision to strike government witness where disclosure was four days before trial, and one day after final date under court order, because a continuance would have remedied the situation). It is very unusual for a defendant to prevail on a claim that late disclosure of *Brady* materials violated due process because the defense could not effectively use the evidence at trial. *See, e.g.*, United States v. Garner, 507 F.3d 399, 405–406 (6th Cir. 2007); Leka v. Portuondo, 257 F.3d 89 (2d Cir. 2001). *See also* Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. L. REV. 531, 561–62 (2007) (only a "handful of cases" where defense has prevailed on a delayed disclosure due process claim).

224. *See, e.g.*, Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Defense of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY, 415, 443–44 (2010).

225. This author, a former criminal defense lawyer at the Defender Association of Philadelphia, had many clients who faced this difficult dilemma. *Cf.*, Barker v. Wingo, 407 U.S. 514, 532–33 (1972) (discussing prejudicial aspects of pre-trial incarceration).

Prosecutors and other state actors have no incentive to timely comply with *Brady* obligations because the courts do not meaningfully require prompt pre-trial disclosure. Worse still, nothing prevents government actors from intentionally delaying disclosure in order to gain a tactical advantage.[226]

Consistent with the objectives of access to evidence due process rights and the problems created by later disclosure, the Court should explicitly hold that these are pre-trial rights, and that they are violated when disclosure is too late. The Court has two choices for defining when is "too late." It could simply provide that "reasonable notice before trial" is required, and leave it to the lower courts to make this determination.[227] However, this approach provides little guidance to prosecutors and the courts. Alternatively, the Court could give concrete protection to its constitutional rule by setting a time limit by which government actors must disclose materials to defense counsel. Under this approach, justifiable late disclosure could be excused by a provision that permits the prosecutor to show good cause.

Many jurisdictions have already adopted this approach.[228] A time limit provides a bright-line constitutional rule that can provide guidance

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"[E]ven if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety, suspicion, and often hostility." *Id.* at 533.

226. *See, e.g.*, Jones, *supra* note 224, at 443 (asserting that prosecutors intentionally withhold disclosure until the last minute before trial); Bennett L. Gershman, *supra* note 223, at 560–62. The Court has held that *Brady* impeachment evidence need not be disclosed where there is a guilty plea. United States v. Ruiz, 536 U.S. 622, 625 (2002). That creates an incentive to delay disclosure while trying to get the defendant to plead guilty. This is no small concern given "the reality that criminal justice today is for the most part a system of pleas, not a system of trials." Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012). "Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Id.* at 1381.

227. This is the approach with discovery rules in some states. *See, e.g.*, ILL. SUP. CT. R. 412(d) (requiring disclosure as soon as practicable after the defendant's request); TEX. CODE CRIM. PROC. ANN. ART. 39.14 (West 2013) (requiring disclosure as soon as practicable after a defense motion for discovery); WIS. STAT. ANN. § 971.23 (West 2013) (requiring disclosure at a reasonable time before trial). *See also, e.g.*, FED. R. EVID. 404 (b)(2)(A) (on request, if prosecutor intends to present other crimes evidence at trial it "must provide reasonable notice").

228. CAL. PENAL CODE § 1054.5, 1054.7 (West 2013) (requiring disclosure to be made "at least 30 days prior to trial," but if a party makes an informal request for material opposing counsel has fifteen days to provide the material or information); COLO. R. CRIM. P. 16(b) (specifying witness lists and statements, tangible evidence, and police reports are to be turned over not less than twenty-one days after the defendant's first appearance, and requiring the prosecutor to complete all other discovery obligations not less than thirty-five days prior to trial); HAW. R. PENAL. P. 16(a), (e)

to prosecutors and courts. Moreover, the Court has already applied this approach, and adopted specified time limits in connection with certain other constitutional criminal procedure rights.[229] Thus, creating a specified time limit by which government actors must disclose materials to defense counsel would be an appropriate exercise of the Court's discretion in defining rights.

IV. REMEDIES

A. Guiding Factors

With every legal right there is the need to provide a meaningful remedy to individuals harmed by violations of their rights,[230] and a need to provide meaningful deterrence in order to prevent future rights violations. The Court has declared, on more than one occasion, that deterrence is the only aim of the suppression remedy for Fourth Amendment violations.[231] Blameworthy conduct justifies remedies aimed at deter-

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(stating discovery may commence upon the filing of an indictment, information, or complaint, but requiring the prosecutor to disclose all materials "within ten (10) calendar days following arraignment and plea of the defendant"); MD. RULES 2-263(h) (requiring the prosecutor to make all disclosures within thirty days after the defendant's first appearance or the appearance of counsel, whichever is earlier); N.J.R. 3:13-3 (b)(1) (requiring the prosecutor to deliver, or make available, discoverable material "within seven days of the return or unsealing of the indictment," with transcripts of the defendant's statements or confessions, and all expert witness information due thirty days prior to trial); Rule 5-501 NMRA (2007) (state shall make disclosures within ten (10) days after arraignment or the date of filing of a waiver of arraignment, unless a shorter period of time is ordered by the court); State v. Allison, 2000-NMSC-027, ¶ 8, 129 N.M. 566 (Rule 5-501 NMRA creates disclosure obligations beyond those required by the Due Process Clause). *See also, e.g.*, United States v. Snell, 899 F. Supp. 17, 21–22 (D. Mass. 1995) (applying local discovery rule to require disclosure of *Brady* material within fourteen days after arraignment).

229. *See, e.g.*, Maryland v. Shatzer, 559 U.S. 98, 110–11 (2010) (establishing a fourteen day break from custody limitation before police may question a suspect in custody who previously validly asserted his Fifth Amendment right to have counsel present during custodial interrogation); County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (specifying forty-eight hours as the constitutional time period for police to bring a person arrested without a warrant before a judicial officer to establish probable cause for further detention).

230. *See supra* notes 81–83; United States v. Morrison, 449 U.S. 361, 364 (1981) ("[T]he general rule [is] that remedies should be tailored to the injury suffered from the constitutional violation.").

231. The suppression remedy "applies only where it 'results in appreciable deterrence.'" Herring v. United States, 555 U.S. 135, 141 (2009) (quoting United States v. Leon, 468 U.S. 897, 909 (1984)). *See also* Perry v. New Hampshire, 132 S. Ct. 716, 721 (2012) (suppression remedy does not apply to unreliable identifications based on sug-

rence. In deciding which violations require deterrence, it is important to recognize that "[s]ome wrongs are more blameworthy than others."[232]

For legislatures, one yardstick to calibrate the severity of criminal offenses is the mens rea of the offender.[233] For example, the most serious assault and homicide charges are typically those where the individual acted intentionally with premeditation.[234] Even if no harm results, the law aims to punish individuals who attempt to intentionally cause harm.[235] In the civil setting, deterrence is a principal goal in deciding due process limits on punitive damages, and the "degree of reprehensibility" is the most important indication of whether punitive damages are reasonable.[236] "Trickery and deceit are more reprehensible than negligence,"[237] and a pattern of recurring violations is worse than isolated negligence.[238] A pat-

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gestive circumstances in absence of state action because the remedy's "aim (is) to deter police from rigging identification procedures.").

232. BMW of North America v. Gore, 517 U.S. 559, 575 (1996) (discussing how to measure reasonableness of punitive damage awards). *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1050–51(1984) (generally rejecting application of exclusionary rule for Fourth Amendment violation to civil deportation hearings, but noting that the particular case did not involve any "egregious violations").

233. *See generally, e.g.*, John M. Burkoff and Russell L. Weaver, *Criminal Law: What Matters and Why*, 36 (2nd ed. 2011) ("Even as between various culpable individuals, the mens rea requirement helps to distinguish between defendants, serving to impose more severe punishment on those defendants who possessed mental states deemed by the legislature to be more culpable than other mental states."). *See also*, Staples v. United States, 511 U.S. 600, 616–17 (1994) ("In a system that generally requires a 'vicious will' to establish a crime . . . imposing severe punishments for offenses that require no mens rea would seem incongruous.").

234. *See generally, e.g.*, Joshua Dressler, *Understanding Criminal Law*, 503 (6th ed. 2012) (noting that "[n]early all states" grading murders provide that first degree murder is an intentional, deliberate and premeditated killing).

235. A criminal attempt "consists of trying to cause harmful results." Stephen A. Saltzburg, et. al., *Criminal Law Cases and Materials*, 659 (3rd ed. 2008). An attempt occurs when an individual has an intent to do a crime and takes a substantial step towards its completion. *Id.* at 668–69.

236. BMW of North America v. Gore, 517 U.S. 559, 575 (1996).

237. *Id.* at 576.

238. *See, e.g.*, Herring v. United States, 555 U.S. 135, 144–48 (2009) (the single isolated instance of a negligent violation of the Fourth Amendment, that was neither systemic nor a reckless disregard of rights, did not warrant the suppression remedy). Several times the Court has noted that a showing of a pattern of repeated violations may warrant a greater remedy for a criminal defendant. Brecht v. Abrahamson, 507 U.S. 619, 638 n. 9 (1993) (noting that habeas relief possibly would be appropriate if a constitutional error harmless under usual standard is shown to be particularly egregious "or one that is combined with a pattern of prosecutorial misconduct"); United States v. Hastings, 461 U.S. 499, 527 (1983) (Brennan, J., concurring) (if "a pattern and practice of intentionally violating defendants' constitutional rights" is shown, re-

tern of recurring violations demonstrates the actor's extreme indifference to the constitutional rights of the accused and may be evidence of intentional violations.[239] The Court should consider both the need for deterrence and the actor's degree of culpability in fashioning remedies.

While the Court has focused on the deterrence rationale when considering police violations at the investigatory stage, it has failed to hold that remedies are necessary to deter particularly blameworthy due process violations when they occur pre-trial or at trial.[240] Although the Court properly held that the "good faith or bad faith of the prosecution" is irrelevant in assessing whether *Brady* rights are violated,[241] it has failed to recognize bad faith as an important consideration in assessing the appropriate remedy for a *Brady* violation. Deterrence should be an important aspect of any remedy addressing bad faith disclosure or preservation violations.

In choosing among different possible remedies, the need to deter future violations must be balanced with the needs of society.[242] Dismissal

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versing a conviction might be justified even though error was harmless); United States v. Morrison, 449 U.S. 361, 365 n.2 (1981) (holding that there was no remedy warranted for Sixth Amendment violation where there was no prejudice while noting "that the record before us does not reveal a pattern of recurring violations by investigative officers that might warrant the imposition of a more extreme remedy to deter further lawlessness").

239. In criminal law, the repeated past commission of the same crime constitutes evidence that a similar non-intentional act shows a reckless indifference to the rights of others. *See, e.g.*, United States v. Tan, 254 F.3d 1204, 1207–13 (10th Cir. 2001) (where the defendant was charged with second degree murder for a fatal crash while he was driving drunk, his previous drunk driving convictions were admissible to show his conduct was reckless and wanton, the necessary mens rea to convict). What the Court said in discussing the need for punitive damages for civil defendants is equally applicable when considering deterrence of police departments and prosecutors' offices that repeatedly violate the constitutional procedural rights of defendants. "Certainly, evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law." BMW of North America v. Gore, 517 U.S. 559, 576–77 (1996).

240. *See, e.g.*, Smith v. Phillips, 455 U.S. 209, 220 (1982) (holding that "Court of Appeals erred when it concluded that prosecutorial misconduct alone requires a new trial" without showing it prejudicially denied defendant a fair trial). "Even in cases of egregious prosecutorial misconduct, such as the knowing use of perjured testimony, we have required a new trial only when the tainted evidence was material to the case." *Id.* at 220 n.10.

241. *Brady*, 373 U.S. at 87 (1963).

242. *See, e.g.*, Herring v. United States, 555 U.S. 135, 144 n.4 (2009) (deterrence has to be weighed against societal costs of applying Fourth Amendment exclusionary rule).

of a case is the most drastic remedy available. It deprives the community of the opportunity to determine where the truth lies, and to have a conviction where the facts warrant.[243] The dismissal remedy is often counterproductive because courts are reluctant to free possibly guilty defendants, and therefore, may consciously or unconsciously avoid finding rights violations when dismissal is the only available remedy.[244] Thus, dismissal should be a remedy available only in limited, well-defined circumstances.

While not as severe as dismissal, the Supreme Court still considers the exclusionary remedy to be an "extreme sanction"[245] because its practical effect is sometimes the same as a dismissal when the prosecution is deprived of critical evidence and can no longer prove its case. In the Fourth Amendment context, the grant of a motion to suppress contraband often results in dismissal of the case because possession of the contraband is an element of the offense. However, in cases that do not involve possession of contraband, suppression much less frequently leads to dismissal of the case. For example, in the driving under the influence context, suppression of a breathalyzer result does not usually result in dismissal of the case because conviction is still possible based on the testimony of the arresting officer.[246] Exclusion of breathalyzer results is sometimes an appropriate remedy for violations of a defendant's access to

243. *See, e.g.*, United States v. Morrison, 449 U.S. 361, 367 (1981) (holding that appeals court erred in dismissing case for Sixth Amendment violation); Barker v. Wingo, 407 U.S. 514, 522 (1972) (holding dismissal of the indictment is required for a speedy trial violation while acknowledging that it is the most "severe remedy . . . because it means that a defendant who may be guilty of a serious crime will be free, without having been tried."); United States v. Blue, 384 U.S. 251, 255 (1966) (rejecting dismissal remedy for Fifth Amendment violation as a "drastic . . . step" that would "increase to an intolerable degree interference with the public interest in having the guilty brought to book").

244. *See, e.g.*, Oregon v. Kennedy, 456 U.S. 667, 676 (1982) (noting that trial judge "might well be more loath to grant a defendant's motion for mistrial" based on prosecutorial misconduct if Court adopted a broader rule barring a second trial on Double Jeopardy grounds); United States v. Tateo, 377 U.S. 463, 466 (1964) ("From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effect of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution.").

245. Leon v. United States, 468 U.S. 897, 926 (1984).

246. *See, e.g.*, State v. Cleverly, 792 A.2d 457, 465 (N.J. Super. Ct. App. Div. 2002); People v. Whelan, 567 N.Y.S.2d 817, 824–25 (N.Y. App. Div. 1991); State v. Knowels, 671 N.W.2d 816, 818–19 (N.D. 2003); State v. Jent, 155 S.E.2d 171, 172 (N.C. 1967).

evidence rights because, although it makes prosecution more difficult, it cannot be equated with outright dismissal.[247]

The remedy of a re-trial order, unlike dismissal or exclusion of evidence, does not deprive the state of any of its evidence. A new trial is a remedy that puts both parties back to square one. If a witness from the first trial is unavailable, as long as the defendant had a full and fair opportunity to cross-examine him during the first trial, the former testimony will be admissible.[248] However, there are sometimes costs, such as when a victim of a heinous crime is forced again to testify about the attack and to be subject to cross-examination.[249] There is also the danger of dimmed memories, which may hurt the prosecution more because it has the burden of proof.[250]

Less extreme remedies, such as adverse inference instructions to the jury, benefit the defense, but have significantly fewer societal costs. The jury is instructed that an adverse inference may be drawn against a party for failing to preserve or produce evidence that was within its control.[251] While not as potent as other remedies, the adverse inference instruction can be important to the defense, particularly in a close case.[252]

Determining which remedy is appropriate in any situation requires balancing the need to make the defendant whole, the need for deterrence, and societal needs. The Court's role in striking this balance is a difficult one. The Court cannot leave the question of remedies entirely to

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247. This is exactly what the lower court did in *California v. Trombetta*, 467 U.S. 479, 483–84 (1984). *See supra* notes 182–194 and accompanying text for discussion of *Trombetta*.

248. *See, e.g.*, FED. R. EVID. 804 (b)(1) (former testimony hearsay exception); Commonwealth v. Laird, 988 A.2d 618, 630 (Pa. 2010) (testimony from first trial of now unavailable witness was admissible against the defendant at the re-trial).

249. *See, e.g.*, United States v. Hastings, 461 U.S. 499, 506–507 (1985) (reversing grant of a new trial that appeared to be based on an exercise of supervisory power, and stating that the court of appeals failed to "consider the trauma the victims of these particularly heinous crimes would experience in a new trial.").

250. *See, e.g.*, Barker v. Wingo, 407 U.S. 514, 521 (1972) (stating that delay in trial may cause prosecution witnesses to "become unavailable or their memories may fade.").

251. In both civil and criminal cases, many jurisdictions have held, on grounds other than a federal due process violation, that the negligent failure to preserve evidence warrants an adverse inference instruction. *See infra* note 266.

252. Jurors are presumed to follow instructions by the court. *E.g.*, Greer v. Miller, 483 U.S. 756, 766 n.8 (1987); Glenn v. Wynder, 743 F.3d 402, 407 (3rd Cir. 2014). The incorrect refusal to give a requested adverse inference instruction by itself may sometimes be considered so prejudicial as to require a new trial. *See, e.g.*, United States v. Sivilla, 714 F.3d 1168, 1173–74 (9th Cir. 2013); Duquesne Light Co. v. Woodland Hills School District, 700 A.2d 1038, 1051 (Pa. Commw. Ct. 1997).

the states when it comes to constitutional rights violations because it has the obligation to protect these rights.[253] However, that does not mean that the Court must specify the exact remedy for every violation.[254] The Court's approach in the due process access to evidence context has been overly rigid. The Court should grant more discretion to the states to fashion appropriate remedies. The Court should avoid, however, giving complete deference to the states, because that could create the danger that rights violations receive only illusory protection. The Court may choose to set the floor and ceiling for permissible remedies by outlining the minimally permissible remedies, while simultaneously barring remedies that it views to be too extreme, such as dismissal.[255] This is a more desirable and

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253. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 655–58 (1961) (holding that states must apply suppression remedy at criminal trial to exclude evidence obtained in violation of Fourth Amendment rights); Napue v. Illinois, 360 U.S. 264, 271–72 (1959) (rejecting state claim that the Court was bound by state determination that the constitutional violation could not have affected the judgment of the jury). In *Chapman v. California*, 386 U.S. 18 (1967), the Court explained that "it is our responsibility to protect by fashioning the necessary rule" for violations of federal constitutional rights. *Id.* at 21. "Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." *Id.* In *Chapman*, the state court affirmed the conviction applying its own state harmless error rule to find the Fifth Amendment trial violation to be harmless. *Id.* at 20. The Court fashioned its own harmless constitutional error rule, applied it and reversed the conviction *Id.* at 22–26.

254. In *Dowd v. United States*, 340 U.S. 206, 209 (1951), the Court, in a habeas action, concluded that the state, in denying the defendant a right to appeal, had violated equal protection rights. The Court ordered the state to provide appellate review within a reasonable time, "failing which he shall be discharged." *Id.* at 210. The Court stated that, "[f]ortunately, we are not confronted with the dilemma envisaged by the State of having to choose between ordering an absolute discharge of the prisoner and denying him all relief. The District Court has power in a habeas corpus proceeding to 'dispose of the matter as law and justice require.'" *Id.* at 209–10 (quoting 28 U.S.C. § 2243, 28 U.S.C.A. § 2243). Of course, even in the absence of a controlling habeas statute, the Court is not hamstrung in its choice of remedies, and can fashion remedies to achieve an appropriate just result.

255. Affording discretion to the states in the fashioning of remedies is obviously not always desirable. It all depends on the particular situation, the amount of discretion, and whether there is sufficient guidance from the Court as to the choice of remedy. For example, in *Santobello v. New York*, 404 U.S. 257 (1971), the Court provided a choice of remedies to the state courts that could be applied arbitrarily because the Court gave no guidance as to how the choice between significantly different remedies should be exercised. The Court held that a breach of a plea agreement at sentencing by the prosecution violated a defendant's due process rights. *Id.* at 261–63. The Court, with no guidance, left to the state courts the decision whether the remedy for this violation of constitutional rights should be specific performance of the plea agreement

nuanced approach that gives appropriate deference to federalism interests.[256]

B. Access To Evidence Remedies

My suggested remedies for access to evidence rights violations differ in many respects from those of the Supreme Court. They are more flexible and take into account the need for deterrence for the most egregious violations, regardless of whether the prosecutor, police, or a rogue scientist commits the intentional or recklessly indifferent violation of rights.

1. *Rights Violations Discovered Pre-Trial*

Where the prosecution violates a constitutional duty to timely provide pre-trial disclosure, a new trial is not an available remedy because the case has not yet been tried. When the prosecution belatedly discloses evidence pre-trial or during trial, the defendant is made whole if he receives the information in time to effectively use it at trial. While in some circumstances this type of violation should warrant no remedy, in no circumstance is the drastic remedy of dismissal appropriate.[257] However, a late disclosure, coupled with the denial of a continuance that is necessary for the defense to effectively use the disclosed information at trial should result in a re-trial if a conviction occurs.[258] A remedy is also appropriate where the late disclosure harms the incarcerated defendant by necessitat-

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or the opportunity to withdraw the plea. *Id.* at 262–63. In no event should the state have the option to provide no remedy after a prejudicial violation of constitutional rights has been established. In *Lafler v. Cooper*, 132 S.Ct. 1376 (2012), the parties conceded that counsel provided ineffective assistance because he provided deficient and prejudicial advice to the defendant on whether to accept a plea deal. *Id.* at 1386. As a result of the advice, the defendant rejected the plea deal, went to trial, was convicted, and received a sentence three and a half times longer than the sentence that he had been offered by the prosecutor in the plea deal. *Id.* at 1391. The Court left the state courts discretion to choose among remedies, which included the option to "leave the convictions and sentence from trial undisturbed." *Id.* In the dissent, Justice Scalia justifiably criticized the majority's conclusion "that the remedy [for a prejudicial constitutional violation] could ever include no remedy at all." *Id.* at 1397 (Scalia, J., dissenting).

256. This more nuanced approach is also preferable for federal prosecutions where the Due Process Clause is equally applicable.

257. *See* discussion in *supra* note 243 and accompanying text.

258. *See, e.g.*, United States v. Garner, 507 F.3d 399 (6th Cir. 2007) (concluding that due process rights were violated when the prosecution disclosed *Brady* material at trial and the court denied the defendant's continuance request that was necessary to effectively use the disclosed information). *See generally* Ungar v. Sarafite, 376 U.S. 575, 589 (1964) (prejudicial refusal to grant continuance request will violate due process of law in some circumstances).

ing a continuance and a substantial delay in trial. The remedy in such circumstance may be an adverse inference jury instruction, which informs the jury that it may consider the state's rights violation in reaching a verdict.[259]

When the state, regardless of which actors are at fault, repeatedly ignores its prompt pre-trial due process obligations or intentionally violates them in a single case, the need for deterrence may require a stronger response. Under this circumstance, the exclusionary remedy may be appropriate. For example, a court could respond to an egregious failure to timely provide *Brady* impeachment material with an order prohibiting the state's witness from testifying. While this remedy is costly to the prosecution, it may be necessary to deter bad faith disclosure rights violations in the future.

A much more serious violation occurs when there is loss or destruction of physical evidence than in situations where evidence is not timely disclosed. The defendant may have been denied evidence that would have exonerated him or provided critical impeachment value. However, the harm, if any, is unknowable. Given the unknowable and possibly inculpatory nature of this evidence, the Supreme Court understandably has rejected dismissal of the case as too drastic a general remedy.[260]

In *Arizona v. Youngblood*,[261] there was no evidence of bad faith when the state failed to preserve evidence that had the potential to exonerate the defendant and could have been tested for DNA.[262] The trial judge gave the defense an adverse inference jury instruction based on the failure to preserve.[263] The Arizona appellate court reversed the conviction, holding that the required remedy was dismissal.[264] The Supreme Court rejected the lower courts' remedies and held that no rights violation occurred.[265] The Court should have held that a due process violation

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259. *See, e.g.*, People v. Jackson, 637 N.Y.S.2d 158, 164 (N.Y. Sup. Ct. 1995) (late disclosure before trial of *Brady* material warranted adverse inference instruction and other relief); CAL. PENAL CODE § 1054.5 (West 2013) (adverse inference jury instruction an optional remedy for late disclosure). Commentators have advocated an adverse inference jury instruction as a possible remedy. *See, e.g.*, Cynthia Jones, supra note 224, at 421, 446–59; Elizabeth N. Dewar, Note, *A Fair Trial Remedy for* Brady *Violations*, 115 YALE L.J. 1450, 1457 (2006).

260. *See, e.g.*, Illinois v. Fisher, 540 U.S. 544 (2004) (per curiam) (reversing state appellate court decision dismissing case on due process grounds for failure to preserve important physical evidence, and holding that there was no due process violation).

261. 488 U.S. 51 (1988).

262. *Id.* at 58.

263. *Id.* at 54, 59–60 (Stevens, J., concurring).

264. State v. Youngblood, 734 P.2d 592, 596–97 (Ct. App. Ariz.1986).

265. *Youngblood*, 488 U.S. at 56–59.

occurred, but that the appellate court's remedy was excessive and that some lesser remedy was appropriate, such as the trial court's adverse inference instruction.[266]

There are remedies less drastic than dismissal that adequately address circumstances where the state, unlike in *Youngblood*,[267] intends to use testimony concerning unpreserved evidence. For instance, several state courts have suppressed evidence and testimony as a means of remedying other violations of a defendant's statutory and constitutional rights.[268] There is no supporting rationale for the Court's consideration of loss-of-evidence rights exclusively through the lens of dismissal.

2. *Post-Trial Remedies For Preservation and Testing Violations*

A defendant should be able to obtain post-trial testing of evidence if it is discovered post-trial that the state failed to comply with its due process obligation to disclose physical evidence, or the court improperly denied a pre-trial motion for the testing of such evidence. The prosecution should then have the burden to establish that the test results do not warrant a new trial.[269]

When the due process violation is a failure to preserve evidence, the question of a post-conviction remedy is more difficult. Given the unknowable nature of what testing would have revealed, a new trial will often be an excessive remedy. However, where the evidence's potential to exonerate was very strong, as in some cases with a lost semen sample from a rapist, a new trial should be awarded in the absence of a showing

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266. A major reason Justice Stevens concurred in *Youngblood* is that the trial court had given an adverse inference instruction. 488 U.S. at 59–61 (Stevens, J., concurring). Some state courts have held that this is an appropriate remedy for a state due process violation for failure to preserve physical evidence. *See, e.g.*, State v. Morales, 657 A.2d 585, 595 n.24 (Conn. 1995); Tinsley v. Jackson, 771 S.W.2d 331 (Ky. 1989); State v. Moffit, No. W2001-00781-CCA-R3-CD, 2002 WL818247, at *4–5 (Tenn. Crim. App. Apr. 19, 2002). An adverse inference instruction is widely accepted as the remedy for the breach of a non-constitutional duty to preserve important evidence, regardless of bad faith. *See, e.g.*, United States v. Sivilla, 714 F.3d 1168, 1171–74 (9th Cir. 2013); State v. Dabas, 71 A.3d 814, 829–30 (N.J. 2013); Schroeder v. Commonwealth, 710 A.2d 23, 27–28 (Pa. 1998) (using adverse inference instruction as a remedy in a civil case).

267. "[T]he State did not attempt to make any use of the [unpreserved] material in its own case in chief." *Youngblood*, 488 U.S. at 56.

268. *See, e.g.*, State v. Lukins, 846 N.W.2d 902, 911 (Iowa 2014); State v. Schauf, 216 P.3d 740, 746 (Mont. 2009); Commonwealth v. Olszewski, 519 N.E.2d 587, 589–92 (Mass. 1988).

269. Chapman v. California, 386 U.S. 18, 24 (1967) (stating that to avoid a new trial the state has the burden to establish that a federal constitutional error was harmless beyond a reasonable doubt).

by the state that there is overwhelming evidence of guilt.[270] Where there is overwhelming evidence of guilt, the state should have the option to provide a defendant with the lesser remedy of a reduced sentence as opposed to no remedy at all.[271] This remedy preserves the conviction, while providing limited relief to the defendant who unfairly lost an opportunity for exoneration. In the unusual case where a defendant can demonstrate a bad faith failure to preserve evidence for testing, the remedy should be a new trial, and states should be free to provide additional relief to the defendant on re-trial.[272]

3. *Brady Violations*

The Supreme Court recognizes that a bad faith failure to disclose materially favorable evidence to the defense at trial constitutes "egregious misconduct" that is far worse than ordinary trial error.[273] The failure to disclose distorts the accuracy of the trial process and prejudicially prevents the defense from using the evidence at trial. Moreover, the violation is hidden from public view.

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270. Given the critical nature of such evidence, the state should also be free to award additional relief at the re-trial, such as an adverse inference instruction or suppression of any state testimony concerning the lost or destroyed sample. For example, a failure to preserve a semen sample is particularly egregious in a case where the state's case depends on the uncorroborated identification of the defendant by the rape victim who was attacked by a stranger.

271. There are now many documented cases where, despite convictions based on overwhelming evidence of guilt at trial, later DNA testing established that the defendant was innocent. *See, e.g.*, Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 108, 109 tbl.8 (2008) (documenting that in 50 percent of cases in which DNA evidence exonerated a convicted person, reviewing courts had commented on the exoneree's guilt and in 10 percent of the cases the courts found there was overwhelming evidence of guilt); Steven A. Drizin & Richard A. Leo, *False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 956 (2004) (noting that fifty-seven individuals who have confessed to crimes have been shown to be innocent through scientific testing, and that 81 percent of those cases involved DNA testing). Where critical evidence has been lost, but there is overwhelming evidence of the defendant's guilt, a reduction in the defendant's sentence provides the defendant with some relief. *Cf.*, Sonja B. Starr, *supra* note 86, at 1518–19 (2009); United States v. Dicus, 579 F.Supp.2d 1142, 1161 (N.D. Iowa 2008) (sentence reduction given as remedy for government's serious breach of plea agreement).

272. *See infra* note 282.

273. In *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), the Supreme Court excoriated the Court of Appeal's reliance on *Brady* in holding that a prosecutor's closing remarks violated due process. "The result reached by the Court of Appeals in this case leaves virtually meaningless the distinction between ordinary trial error of a prosecutor and that sort of egregious misconduct held in . . . *Brady* . . . ." *Id.* at 647.

In *Imbler v. Pachtman*,[274] the Supreme Court held that prosecutors receive absolute immunity in civil suits even when their misconduct includes the knowing use of perjured testimony.[275] Justice White, concurring for three Justices, contended that prosecutors should not receive absolute immunity for such bad faith violations.[276] He emphasized that there is a greater need for deterrence of these violations that are hidden from public view because "[t]he judicial process will by definition be ignorant of the violation when it occurs; and it is reasonable to suspect that most such violations never surface."[277]

The Court has equated a prosecutor's knowing use of perjured testimony with a prosecutor's deliberate withholding of exculpatory evidence.[278] As Justice White aptly recognized, deterrence is necessary for these reprehensible violations that are hidden from public view. After over fifty years with *Brady*, the Court should radically readjust the remedial framework. For starters, the Supreme Court should abandon the "material evidence" test. A defendant should not have to establish that there is a reasonable probability that the outcome would have been different if the evidence had been disclosed in order to prove a rights violation.[279] As with other constitutional violations, the ordinary harmless error standard should apply, and the burden should be on the government to show that no relief is warranted because the error in failing to disclose favorable evidence was harmless beyond a reasonable doubt.[280]

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274. 424 U.S. 409 (1976).

275. *Id.* at 415–16, 430–31 n.34.

276. *Id.* at 433 (White, J., concurring).

277. *Id.* at 443–44 (White, J., concurring).

278. *Id.* at 431 n.34 ("As a matter of principle, we perceive no less an infringement of a defendant's rights by the knowing use of perjured testimony than by the deliberate withholding of exculpatory information. The conduct in either case is reprehensible, warranting criminal prosecution as well as disbarment.").

279. *See, e.g.*, Findley, *supra* note 120, at 352–53; Medwed, *supra* note 115, at 1555–59 (criticizing the *Brady* materiality requirement, and advocating a requirement of open file discovery); Hoeffel, *supra* note 115, at 1144 (advocating that the constitutional error be defined as the withholding of favorable evidence and the burden be placed on prosecution to establish that the error was harmless); Sundby, *supra* note 102, at 645–46 (arguing that the current materiality standard has greatly diminished any defense right to receive favorable evidence).

280. Chapman v. California, 386 U.S. 18, 24 (1967) ("[W]e hold, as we do now, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyod a reasonable doubt."); Speiser v. Randall, 357 U.S. 513, 525–26 (1958). If the burden is not shifted to the prosecution then it at least should be made less onerous. A defendant should only have to show a reasonable possibility, rather than a reasonable probability of a different result. Some state courts, as a matter of state law, have adopted this reasonable possibility prejudice

The Supreme Court should also explicitly recognize that lower courts are free to provide additional remedies at a re-trial after a *Brady* violation. For example, if it is discovered several years after trial that the state failed to disclose the existence of a now deceased eyewitness who gave an exculpatory statement naming another person as the assailant, the eyewitness statement could be ruled admissible at a re-trial even though it would otherwise consititute inadmissible hearsay.[281] The court could also fashion additional appropriate remedies at re-trial.[282] If it ap-

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standard, either generally or where the defendant has made a specific request for the undisclosed evidence. *See, e.g.*, State v. Marshall, 586 A.2d 85, 199–207 (N.J. 1991); People v. Vilardi, 555 N.E.2d 915, 916–21 (N.Y. 1990); Commonwealth v Gallarelli, 502 N.E.2d 516, 519 n.5 (Mass. 1987). The Supreme Court utilizes a less onerous prejudice standard than Brady in cases involving the knowing use of perjured testimony, where a defendant need only show "any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103 (1976). *See, e.g.*, United States v. Clay, 720 F.3d 1021, 1025–26 (8th Cir. 2013) (discussing and comparing the two standards).

281. When the state fails to disclose an exculpatory witness to the defense it in effect is causing the witness to be unavailable. Thus, like any party that wrongfully caused a declarant to be unavailable, the state should be barred from complaining about the introduction of hearsay testimony. *See, e.g.*, FED. R. EVID. 804 (b)(6) ("statement offered against a party that wrongfully caused the declarant's unavailability"). *See also*, Giles v. California, 554 U.S. 353, 359–65 (2008) (defendant forfeits confrontation rights when he engages in conduct that is designed to and does make the declarant unavailable as a witness). *Cf., e.g.*, Edward J. Imwinkelried, *Clarifying the Curative Admissibility Doctrine: Using the Principles of Forfeiture and Deterrence to Shape the Relief for an Opponent's Evidentiary Misconduct*, 76 FORDHAM L. REV. 1295 (2007); United States v. Moussaui, 382 F.3d 453, 476–82 (4th Cir. 2004) (court balanced government interest in not providing enemy combatants as witnesses and defendant's right to present a defense by ruling that defendant could introduce statements of the witnesses); People v. Jackson, 637 N.Y.S.2d 158, 161–64 (N.Y. Sup. Ct. 1995) (late disclosure before trial of *Brady* exculpatory statement of witness who now had dimmed memory warranted admission of his statement). The problem of the unavailability of a witness for a re-trial after a *Brady* violation arises in other contexts as well. For example, in *Williams v. State*, 7 A.3d 1038 (Md. 2010), the court held that the state committed a *Brady* violation by failing to reveal that a key eyewitness had told the police she was legally blind. *Id.* at 1052–55. The court rejected a motion to dismiss based on the subsequent death of the witness, but on non-constitutional grounds barred the admission of her prior testimony at re-trial. *Id.* at 1052–54.

282. For example, in *Moussaui*, 382 F.3d 453 (4th Cir. 2004), the Court of Appeals ordered that admission of the hearsay statements had to be accompanied by an instruction "that the statements were obtained under circumstances that support a conclusion that the statements are reliable." *Id.* at 478 (footnote omitted). For any *Brady* violation, a court should also have the authority on re-trial to decide that an adverse inference instruction is appropriate. It may also be appropriate in some circumstances to permit counsel on re-trial to use the *Brady* violation as evidence that the government was aware that its case was not strong. *See* Shelton v. United States, 26 A.3d

pears that no remedy can provide adequate redress for the defendant at a re-trial, the burden should be on the prosecution to offer additional meaningful remedies to avoid dismissal.

For bad faith violations, remedies need to be enhanced.[283] The Supreme Court has never discussed any remedy other than a new trial for a *Brady* violation.[284] The Court's failure to mention dismissal as a remedy has been widely interpreted as a prohibition.[285] In *Government of Virgin Islands v. Fahie*,[286] the Third Circuit noted that "[o]ur research discloses no case where a federal appellate court upheld dismissal with prejudice as a remedy for a *Brady* violation."[287] Nevertheless, the Third Circuit con-

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216, 233–34 (D.C. Cir 2011) (en banc) (per curiam) (noting that this was a difficult issue of "first impression" that it was not deciding); Cynthia E. Jones, *supra* note 224, at 421, 452–65 (advocating admission of evidence of the *Brady* violation where it was intentional).

283. To what extent *Brady* violations are the result of inadvertence rather than bad faith misconduct is unknowable given that the violations do not occur in public view and are often never discovered. However, it is undeniable that such violations do occur. *See, e.g.*, Bennet L. Gershman, *supra* note 223, at 531 ("Prosecutors have violated its principles so often that it stands more as a landmark to prosecutorial indifference and abuse than a hallmark of justice."); Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1079 (2009) ("[A] review of the twenty-six *Brady* reversals in capital cases indicates only one case in which the prosecutor was unaware of the favorable evidence."); Bill Moushey, *Win At All Costs, Hiding The Facts*, *Pitt. Post-Gazette*, Nov. 24, 1998, at A1 (asserting that a review of the previous ten years of prosecutorial misconduct cases showed "hundreds of examples of discovery violations in which prosecutors intentionally concealed evidence that might have helped prove a defendant innocent or a witness against him suspect.").

284. In *Brady* the Court affirmed the state court ruling "that restricted [the defendant's] new trial to the question of punishment." 373 U.S. at 88. In *Giglio v. United States*, the Court discussed when a new trial would be required for a due process violation for failure to disclose favorable evidence, and ordered a new trial. 405 U.S. at 153–55. Silence has followed concerning other possible remedies, even in the face of obvious violations by the state that appear to be in bad faith. *See, e.g.*, Smith v. Cain, 132 S.Ct. 627 (2012).

285. *See, e.g.*, United States v. Davis, 578 F.2d 277, 280 (10th Cir. 1978); United States v. Evans, 888 F.2d 891, 897 n.5 (D.C. Cir. 1989); United States v. Garcia, 780 F.Supp. 166, 176 (S.D.N.Y. 1991).

286. 419 F.3d 249 (3d Cir. 2005).

287. *Id.* at 254 n.6. After *Fahie*, the Ninth Circuit affirmed a dismissal where a flagrant violation of *Brady* created a need for a mistrial. United States v. Chapman, 524 F.3d 1073, 1085–88 (9th Cir. 2008). On very rare occasions, defendants have been successful in barring a second trial as a result of an egregious *Brady* violation. *See, e.g.*, United States v. Lyons, 352 F.Supp.2d 1231, 1250–52 (M.D. Fla. 2004); Commonwealth v. Smith, 615 A.2d 321, 324–25 (Pa. 1992) (re-trial barred on state constitutional double jeopardy grounds).

cluded that "dismissal for a *Brady* violation may be appropriate in cases of deliberate misconduct because those cases call for penalties which are not only corrective but are also highly deterrent."[288]

The Court needs to explicitly endorse dismissal as a remedy for bad faith prejudicial *Brady* violations. A new trial is inadequate because it does not deter this reprehensible conduct, which often never surfaces because it occurs behind closed doors. This is one of those rare instances that calls for the extreme sanction of dismissal.

CONCLUSION

Since *Brady* was decided over fifty years ago, much has changed. The advent of DNA testing, with its power to exonerate, has shown that even seemingly clear-cut cases of guilt sometimes involve an innocent accused person. There is also more awareness of the potential for error, negligent and otherwise, by state scientists.

These changes mandate recognition of expanded due process rights for access to some of the government's evidence, including an enhanced obligation to preserve and disclose physical evidence to the defense, and the availability of that evidence for defense testing. The Court should make clear that due process rights apply to all state actors, and culpability is irrelevant in defining these access-to-evidence rights because these rights exist to ensure fairness to the defense and accurate determinations at trial.

Unlike other areas of the law, the Court's remedies for access-to-evidence violations have been one-dimensional. Moreover, the Court has completely failed to recognize that the need for deterrence is especially necessary to remedy the most culpable rights violations because they often occur outside of trial and beyond public scrutiny.

The Supreme Court has stated that the goal of its Due Process Clause access-to-evidence decisions is to ensure that each defendant has a meaningful opportunity to present a complete defense. However, the Court's jurisprudence falls far short of making this a reality for criminal defendants.

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288. *Fahie*, 419 F.3d at 254–55 (footnote omitted).