BEYOND *BRADY*: AN EIGHTH AMENDMENT RIGHT TO DISCOVERY IN CAPITAL CASES

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The fiftieth anniversary of *Brady v. Maryland*[1] has provided yet another opportunity to reflect on the legacy of this landmark case in ensuring a fair trial. Unfortunately, while *Brady's* disclosure regime was once heralded, there is now a growing consensus that it is deeply flawed.[2] As Judge Gilbert Merritt of the Sixth Circuit Court of Appeals, writing about *Brady* violations in the cases that have come before him, has concluded, "the greatest threat to justice and the Rule of Law in death penalty cases is state prosecutorial malfeasance—an old, widespread, and persistent habit."[3]

The effect of *Brady*'s shortcomings is particularly acute in capital cases, where the stakes are the highest. Numerous capital convictions have been overturned due to the belated detection of a prosecutor's failure to disclose vital

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1. 373 U.S. 83 (1963). In *Brady*, the prosecutor failed to disclose the co-defendant's confession taking responsibility for the actual killing of the victim. *Id.* at 84. While the Maryland Court of Appeals granted the defendant relief as to sentencing, it denied the defendant's request for a new trial because the suppressed statement would not result in a different finding as to guilt or innocence. *Id.* at 84–85. While the United States Supreme Court affirmed the Maryland court's disposition of the case, *id.* at 90–91, the Court recognized that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id*. at 87. Over the following two decades, the Court elaborated on *Brady*'s dicta, imposing on prosecutors a duty to disclose material exculpatory and impeachment evidence. *See* United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976).

2. *See*, *e.g.*, Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1535 (2010) ("The United States Supreme Court's *Brady* decision in 1963 offered hope that prosecutors can straddle the fence between their two principal responsibilities: To serve simultaneously as zealous advocates and neutral 'ministers of justice.' * * * But in the ensuing half-century the ideals of Brady have not gained much traction in practice. Even worse, the doctrine as presently constituted may provide a disservice to the very concept of justice."); Bennett L. Gershman, *Reflection on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 686 (2006) ("*Brady* . . . occupies a special place in the constellation of Supreme Court decisions protecting a criminal defendant's right to a fair trial. * * * Reflecting on this landmark decision forty-three years later, one is struck by the dissonance between *Brady*'s grand expectations to civilize U.S. criminal justice and the grim reality of its largely unfulfilled promise.").

3. Judge Gilbert Stroud Merritt, Jr., *Prosecutorial Error in Death Penalty Cases*, 76 TENN. L. REV. 677 (2009).

exculpatory information.[4] John Thompson, for example, spent almost two decades on death row—and came within weeks of execution—before a private investigator uncovered exculpatory blood evidence that prosecutors had repeatedly failed to disclose.[5]

Many impoverished defendants languish for years on death row before getting relief. While it is these capital defendants who most visibly bear the consequences of *Brady* violations, the harm from such prosecutorial misconduct is deeper. Where the failure to disclose evidence results in the improper conviction of an innocent defendant, the accompanying failure to apprehend the actual culprit diminishes public safety, as the perpetrator of the original crime is left free to potentially victimize an unknown number of additional persons.[6] Moreover, given the difficulties in unmasking *Brady* violations, there is no account of how many capital defendants have been executed without getting relief.[7]

Given the finality of the death penalty as well as its gravity, five decades of persistent failure to comply with a basic duty to disclose evidence in capital cases is constitutionally untenable. The Eighth Amendment's Cruel and Unusual Punishments Clause requires heightened reliability in capital cases. This

4. *See*, *e.g.*, Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 278–80 (2007) (discussing study conducted by Center for Public Integrity and national study of prosecutorial misconduct, primarily *Brady* violations, conducted by Chicago Tribune reporters Ken Armstrong and Maurice Possley); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. REV. 53, 59–64 (2005) (discussing reports documenting *Brady* violations and providing examples from cases across the country). *See also* Jeffrey L. Kirchmeier, Stephen R. Greenwald, Harold Reynolds & Jonathan Sussman, *Vigilante Justice: Prosecutor Misconduct in Capital Cases*, 55 WAYNE L. REV. 1327, 1331 (2009) (discussing studies of misconduct in capital cases around the country, including a report in the Cincinnati Enquirer about fourteen local capital cases affected by prosecutorial misconduct).

5. *See* Samuel R. Wiseman, Brady*, Trust, and Error*, 13 LOY. J. PUB. INT. L 447, 449 (2012) (discussing the egregious *Brady* violations by the Orleans Parish District Attorney's Office in John Thompson's case). Thompson's case is all the more stunning because prosecutors repeatedly failed to disclose the exculpatory evidence in appellate proceedings despite the deathbed confession of one of the trial prosecutors. *Id.*

6. *See* Gerard Fowke, *Material To Whom?: Implementing* Brady*'s Duty to Disclose at Trial and During Plea Bargaining*, 50 AM. CRIM. L. REV. 575, 596–97 (2013) ("Wrongful convictions are costly. * * * [T]he crimes of the perpetrator who avoided punishment impose costs on society. Wrongful convictions also lead to more crime by decreasing the criminal law's deterrent effect: refraining from crime is less rational if it nonetheless merits punishment.").

7. *See* Degabrielle & Turner, *infra* note 11, at 286 ("[V]iolations of the [*Brady*] rule are not always apparent. Because *Brady* requires a prosecutor to disclose something that is not known to the defense, its violation is likely to be discovered only by happenstance."); Wiseman, *supra* note 5, at 454 ("*Brady* violations are difficult to discover—the only one with proof of the violation is often the violator. As a result, many are never revealed."); Gershman, *supra* note 2, at 687–88 ("If the prosecutor chooses to conceal exculpatory evidence, the evidence usually will remain hidden until long after the defendant is convicted, and in fact may never be discovered."). A recent book chronicling the story of Carlos DeLuna provides a compelling account of a capital defendant who may have been wrongfully executed due, in part, to a *Brady* violation. *See* JAMES S. LIEBMAN, SHAWN CROWLEY, ANDREW MARKQUART, LAUREN ROSENBERG, LAUREN GALLO WHITE & DANIEL ZHARKOVSKY, THE WRONG CARLOS: ANATOMY OF A WRONGFUL EXECUTION (2014).

constitutional imperative necessitates a more robust discovery regime than the one theoretically envisioned by *Brady* or actually engaged in by many prosecutors.

Part I of this article evaluates the efficacy of the *Brady* disclosure regime in capital cases; it discusses not only empirical data about the lack of compliance with *Brady* in capital cases, but also the underlying doctrinal deficiencies of the *Brady* regime. Part II of the Article, grounded in the Eighth Amendment's requirement of heightened reliability in capital cases, outlines a constitutional remedy in the form of open-file discovery combined with a continued duty of prosecutorial disclosure, subject to meaningful safeguards against potential misuse of information by defendants.

I.
BRADY'S INEFFICACY IN CAPITAL CASES

A seminal study of cases in which the death penalty was imposed between 1973 and 1995 found that more than two-thirds of them were reversed on appeal, with *Brady* violations accounting for sixteen percent of cases reversed in state post-conviction proceedings.[8] Given the difficulty in uncovering and proving *Brady* violations, the actual rate of *Brady* violations in capital cases is likely much higher.[9]

Much has been written about some prosecutors' lack of understanding of their *Brady* obligations[10] and the seemingly systematic refusal of others to comply with the disclosure mandate.[11] Moreover, while there is no doubt that

8. James S. Liebman, Jeffrey Fagan, Valerie West & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1850 (2000). *See also* Richard B. Roper, *The Death Penalty at the Intersection of Reality and Justice*, 41 TEX. TECH L. REV. 15, 27 (2008) (observing that, while the percentage of exonerations in capital murder cases is very small considering the large number of murder convictions, "wrongful convictions can be, and . . . probably are, both systemic and exceedingly rare.") (citation omitted).

9. *See* Robert J. Smith, *Recalibrating Constitutional Innocence Protection*, 87 WASH. L. REV. 139, 143 (2012) ("Though he has emphasized that the full scope of the problem is 'unknown and frustratingly unknowable,' Professor Samuel Gross has labeled the known cases of wrongful conviction as 'the tip of the iceberg.'") (citing Samuel R. Gross, *Souter Passant, Scalia Rampant: Combat in the Marsh*, 105 MICH. L. REV. FIRST IMPRESSIONS 67 (2006), http://www.michiganlawreview.org/assets/fi/105/gross.pdf).

10. *See*, *e.g.*, Bruce A. Green, *Beyond Training Prosecutors about their Disclosure Obligations: Can Prosecutors' Offices Learn from their Lawyers' Mistakes?*, 31 CARDOZO L. REV. 2161, 2163–64 (2010) ("The assumption that without adequate training, federal prosecutors will not adequately understand their minimal legal obligations, seems fair given that federal prosecutors' disclosure obligations have many sources and their scope is uncertain or contested in various respects."). *See also* Gershman, *supra* note 2, at 690 n.24 (discussing results of survey of New York State prosecutors conducted by the John Jay Legal Clinic of Pace Law School); Jon O. Newman, A Panel Discussion before the Judicial Conference of the Second Judicial Circuit (Sept. 8, 1967), reprinted in *Discovery in Criminal Cases*, 44 F.R.D. 481, 500–01 (1968) (discussing state prosecutors' failure to properly identify their *Brady* obligation in what the author "thought was the easiest case—the clearest case for disclosure of exculpatory information!").

11. *See* Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2091–92 (2010) (discussing the various reasons why prosecutors fail to

most prosecutors act ethically and responsibly,[12] there are significant concerns about *Brady*'s efficacy in ensuring a fair trial due to its doctrinal deficiencies,[13] particularly the limitation that only "material" evidence be disclosed.[14]

As troubling as the doctrinal deficiencies in *Brady*'s disclosure regime are in most criminal cases, the Due Process jurisprudence of the *Brady* line of cases is fundamentally ill-suited to addressing an indigent defendant's need for information in a capital case. *Brady*, as the Court has noted, is not a case about discovery;[15] at its core, *Brady* is a case about regulating prosecutorial conduct.[16] And that is a jaundiced lens through which to view the particularized demands of a capital sentencing proceeding.

Death is different.[17] Not only is the death penalty qualitatively different from all other punishments,[18] but the task entrusted to a capital sentencing jury is

disclose exculpatory information); Don J. Degabrielle & Eliot F. Turner, *Ethics, Justice, and Prosecution*, 32 REV. LITIG. 279, 282 (2013) ("Despite its pedigree, and its common-sense appeal, [*Brady*] remains among the most troublesome procedural rights to vindicate . . . [and] a prosecutor's character has much to do with how and whether *Brady*'s command is followed.") (citation omitted); Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 B.Y.U. L. REV. 53, 59–60 (2005) (discussing major studies that have found that significant numbers of innocent people have been convicted, and sentenced to death, due to prosecutorial misconduct and concluding that "[i]n light of these findings, one can no longer indulge in the comforting but false fantasy that our criminal justice system sufficiently protects the innocent from prosecutorial misconduct and ensuing wrongful convictions.").

12. *See*, *e.g.*, Kirchmeier, *supra* note 4, at 1329 ("[M]ost prosecutors take their special legal, ethical, and moral obligations as to seek justice seriously . . . .") (citation omitted); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, (2001) (observing that, while there are a fair number of prosecutors who "introduce false evidence, make false statements to tribunals, withhold evidence, and obstruct access to witnesses," that may constitute only "a small percentage" of all prosecutors).

13. *See* Barbara O'Brien, *A Recipe For Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999, 1009–10 (2009) ("Focusing on prosecutorial misconduct, however, tells us only part of the story about prosecutors' willingness and ability to comply with the duty to administer justice. Prosecutors exercise their discretion in ways that are both well intentioned and within the law but that nevertheless profoundly affect the accuracy and fairness of the system.").

14. *See* Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639, 645–46 (2013) [hereinafter *Federal Criminal Discovery Reform*] ("*Brady* and subsequent decisions limit prosecutors' constitutional obligation in various ways, but the 'materiality' element is the most significant limitation on the disclosure duty.").

15. Weatherford v. Bursey, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one."). Despite this, the perception of *Brady* as a discovery case persists. *See, e.g.*, JOSHUA DRESSLER & GEORGE C. THOMAS, III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 892 (5th ed. 2013) ("*Brady* announced a broad rule of constitutional criminal discovery . . . .").

16. *See* Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643 (2002) (arguing that *Brady*'s "significance lies primarily outside the realm of pre-trial discovery" and that "the doctrine [is] less of a pre-trial discovery right and more of a post-trial remedy for prosecutorial and law enforcement misconduct.").

17. *See* Scott W. Howe, *The Eighth Amendment as a Warrant Against Undeserved Punishment*, 22 WM. & MARY BILL RTS. J. 91, 111 (2013) (discussing the idea that death is different for Eighth Amendment purposes).

18. *See* H. Mitchell Caldwell & Thomas W. Brewer, *Death Without Due Consideration?:*

also distinct.[19] In deciding whether the defendant deserves the death penalty, each member of the capital jury exercises her independent judgment.[20] The decision about whether to render a judgment of life or death is made individually by each juror.[21] What one juror finds mitigating, another might not, and reasonable jurors may disagree about the value to be accorded to mitigating evidence.[22] In addition, the capital jury exercises broad discretion, taking into account a range of mitigating evidence.[23] A juror may consider any aspect of the defendant's background or character in deciding whether to spare her life.[24]

In the context of the unfettered, discretionary enterprise of capital sentencing, it is particularly problematic to ask, as *Brady* does, that a prosecutor speculate *ex ante* about whether a piece of evidence has a reasonable probability of leading to a different sentencing outcome.[25] Apart from the cognitive bias that

Overcoming Barriers to Mitigation Evidence by "Warming" Capital Jurors to the Accused, 51 HOW. L.J. 193, 198 (2008) (describing reasons why death penalty is ultimate punishment as irrevocable and excluding possibility of rehabilitation).

19. *See* Raoul G. Cantero & Robert M. Kline, *Death is Different: The Need for Jury Unanimity in Death Penalty Cases*, 22 ST. THOMAS L. REV. 4, 5–6 (2009) ("The Supreme Court has held that death penalty cases require extensive procedural safeguards. * * * Procedural safeguards must regulate not only the judge's role, but the jury's as well. By design, juries play a major role in death penalty cases. They decide not only whether the defendant is guilty of a capital offense, but also whether the facts surrounding that offense are so atrocious that the defendant deserves to die.").

20. Turner v. Murray, 476 U.S. 28, 33–34 (1986) (reasoning that juries make individualized judgments as to whether defendant deserves death sentence).

21. *See* McKoy v. North Carolina, 494 U.S. 433, 442–43 (1990) ("[E]ach juror [must] be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death."); Mills v. Maryland, 486 U.S. 367 (1988) (holding that North Carolina's unanimity requirement violates the Constitution); Caldwell v. Mississippi, 472 U.S. 320, 340 n.7 (1985) ("[I]n one crucial sphere of a system of capital punishment, the capital sentencer comes very near to being 'solely responsible for the defendant's sentence,' and that is when it makes the often highly subjective, 'unique, individualized judgment regarding the punishment that a particular person deserves.'") (quoting Zant v. Stephens, 462 U.S. 862, 900 (1983) (Rehnquist, J., concurring)).

22. *See* Scott E. Sundby, *The* Lockett *Paradox: Reconciling Guided Discretion and the Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1179–80 (1991) (discussing the potential arbitrariness in capital sentencing caused by the fact that some jurors may find some evidence mitigating (such as the defendant's troubled childhood), while other jurors may not).

23. *See, e.g.*, *Turner*, 476 U.S. at 35 (noting the unique opportunity for racial prejudice to affect sentencing proceedings in death penalty cases because of "the range of discretion entrusted to a jury in a capital sentencing hearing."). *See also* James M. Carr, *At* Witt's *End: The Continuing Quandary of Jury Selection in Capital Cases*, 39 STAN. L. REV. 427, 454 (1987) ("[E]ven after *Furman*, the Supreme Court has recognized and promoted the continuing exercise of broad discretion by capital juries.").

24. *See* Penry v. Johnson, 532 U.S. 782, 788 (2001); Penry v. Lynaugh, 492 U.S. 302 (1989) (acknowledging that sentencer must be able to consider mitigating evidence for sentence to reflect defendant's background).

25. Green, *supra* note 14, at 647 (noting the Court's recognition that prosecutors do not err on the side of disclosure and that "the prosecutor's *ex ante* determination [of materiality] is inherently imprecise . . . ."); Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2132 (2010) ("One structural impediment facing prosecutors is the *Brady* doctrine itself . . . . Requiring disclosure of evidence only if it undermines confidence in the trial's outcome, the standard is

might arise from a prosecutor's natural tendency to believe in her theory of the case,[26] a prosecutor in a capital case—who might see herself as tasked with giving a voice to the silenced victim[27]—would likely have a different standard for the mitigating value of evidence than a juror.[28]

Concerns about *Brady*'s inefficacy in capital sentencing proceedings are not limited to its impact on mitigating evidence. *Brady* restricts disclosure to "helpful" (that is, mitigating) evidence, which leads to insufficient information sharing. The absence of a duty to disclose aggravating evidence that the state will use in the penalty phase of the trial undermines the reliability of sentencing determinations. For example, when Norton Hamilton was sentenced to death in Louisiana, the prosecutor introduced evidence of prior, unrelated criminal conduct despite having stated prior to the sentencing proceedings that such evidence would not be introduced.[29]

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phrased not from the perspective of an attorney making pre-trial decisions, but of an appellate court determining with the benefit of a trial record whether to grant post-conviction relief. Accordingly, it requires prosecutors to imagine a the record of a trial they have not yet started, and then ask whether in hindsight the evidence at issue would undermine confidence in a resulting conviction.").

26. *Burke*, *supra* note 25, at 2133 ("The likelihood that a well-intentioned prosecutor will underestimate the exculpatory value of evidence is only heightened by cognitive biases that interfere with a neutral assessment of case evidence."). *See also id*. at 2134 ("Once police and prosecutors believe that a suspect is guilty, their theory of guilt may taint their assessment of the case evidence, causing them unconsciously to accept inculpatory evidence without question, draw inculpatory inferences from ambiguous evidence, and disregard potentially exculpatory evidence.").

27. *See* Ex parte Monk, 557 So.2d 832, 837 (Ala. 1989) ("The prosecutor cannot screen files for potential mitigating evidence to disclose to the defense counsel because, '[w]hat one person may view as mitigating, another may not.'") (quoting Dobbert v. Strickland, 718 F.2d 1518, 1524 (11th Cir. 1983)). *See also* Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 560 (2005) (noting the "prosecutor's important role in safeguarding the rights of victims" but observing that "there has been little examination of the relationship between prosecutors and victims, and the extent to which that relationship implicates ethical rules regulating a prosecutor's conduct.").

28. *See Burke*, *supra* note 25, at 2133 ("[B]ecause prosecutors must make unilateral decisions about whether to disclose evidence without reciprocal discovery from the defense, they may not be able to recognize when a piece of evidence is potentially exculpatory. Evidence that appears neutral or even inculpatory to the prosecutor might nevertheless be exculpatory in the context of evidence known only to the defense or the defense's theory of the case."); Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 HASTINGS L.J. 1321, 1335 (2011) ("[P]rosecutors and defense lawyers rarely agree as to what constitutes 'materiality,' and appellate courts produce split opinions.").

29. *See* State v. Hamilton, 478 So. 2d 123, 125 (La. 1985) (concluding that the introduction, without notice, of the evidence of the unrelated armed robbery, for which the defendant had been convicted, sufficiently prejudiced the defendant such that the penalty phase must be retried). While the Louisiana Supreme Court overturned Hamilton's death sentence, not all capital defendants are so fortunate. *See, e.g.*, Hughes v. State, 24 S.W.3d 833, 842 (Tex. Crim. App. 2000) (rejecting defendant's argument that state failed to give proper notice about use of unadjudicated, unrelated murder and robbery in capital sentencing proceeding); State v. Kinder, 942 S.W.2d 313, 331 (Mo. 1996) (rejecting defendant's argument that state failed to give notice of intent to use evidence of alleged prior sexual assaults as nonstatutory aggravating evidence). At Coleman Gray's capital sentencing proceeding in Virginia, for example, the prosecutor introduced evidence of unrelated

Indeed, to develop an effective sentencing case on behalf of a capital client, defense counsel (and experts[30]) must have a good understanding of all the aggravating evidence.[31] As counsel presents a holistic picture of the client's life and background,[32] it is incumbent on counsel to present a coherent narrative that accounts for both the mitigating and aggravating aspects of the client's life.[33]

In response to *Brady*'s flaws, scholars have suggested various reforms, including "institutional and systemic methods of preventing prosecutor misconduct[,] punishment of individual prosecutors responsible for egregious misconduct[,] [and] remedies for defendants who are victims of misconduct."[34] These proposed measures would undoubtedly strengthen the *Brady* disclosure regime if they were implemented successfully. However, serious doubt remains about their viability and efficacy, in part because these reforms would be effectuated through voluntary actions by various actors, including prosecutors,

criminal conduct without providing prior notice to Gray. Tamara L. Graham, *Death by Ambush: A Plea for Discovery of Evidence in Aggravation*, 17 CAP. DEF. J. 321, 321–27 (2005). *See also* Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709 (1998) (discussing Gray v. Netherland, 518 U.S. 152 (1996)). Despite Gray's limited ability to respond to this late evidence, his claim was denied and he was executed in Virginia in 1997. Graham, *supra* at 321–22. Virginia has since amended its statute and now requires that the prosecutor provide notice to defendants when planning to use prior unadjudicated criminal conduct to prove the defendant's future dangerousness in a capital sentencing proceeding.

30. Emily Hughes, *Mitigating Death*, 18 CORNELL J.L. & PUB. POL'Y 337, 343 (2009) (discussing the role and duties of capital mitigation specialists).

31. Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 608 (1995) ("It is the defendant as a complete person, not as a composite drawing of mitigating and aggravating evidence, who will suffer the ultimate penalty. The fundamental purpose of the capital sentencing hearing is to force the sentencer to view the defendant as a person . . . .").

32. Scharlette Holdman & Christopher Seeds, *Cultural Competency in Capital Mitigation*, 36 HOFSTRA L. REV. 883, 883–84 (2008) ("A capital defense team strives to explain a client's life through the comprehensive process of compiling a social history, thereby revealing the client's humanity and providing important context for the client's conduct at the time of the crime.").

33. *See* Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. REV. 1143, 1154–55 (1999) (explaining that while a "mitigation theory based on a defendant's positive qualities has a certain appeal . . . [,] a high probability exists [] that the defendant's background or character is not respectable or virtuous. It is far more likely that the defendant's life history will include prior criminal convictions or violent behavior. Thus, while building a mitigation theory around a defendant's nonviolent character may appear desirable, it is likely to be unrealistic and, therefore, ultimately unpersuasive to the jury."); *id.* at 1200–01 ("When properly prepared, the defense may counter the prosecution's characterization by placing the prior violence in context, presenting testimony about the defendant's lack of future dangerousness, and refocusing the jury's attention on the precipitating source of the defendant's violence.").

34. *See, e.g.*, Kirchmeier, *supra* note 4, at 1333, 1364–85 (discussing various proposals for addressing prosecutorial misconduct in capital cases). These reforms would complement statutes and rules adopted in a number of jurisdictions that provide for discovery in criminal cases; Green, *supra* note 14, at 647–48 (describing federal statutes, criminal procedure rules and local district court rules that supplement federal prosecutors' *Brady* obligations). As Professor Green explains, the presence of these supplementary devices of discovery has not obviated the need for *Brady*'s disclosure and, in fact, a class of information remains untouched even after enforcement of the supplementary means of discovery described. *Id*.

legislators or bar associations tasked with enforcing ethical rules.[35] As Judge Merritt concluded about such proposals, "[e]xperience, history, and an understanding of institutional dynamics make me skeptical that these methods will mitigate the problem."[36]

II.
THE EIGHTH AMENDMENT'S MANDATE

The Eighth Amendment's prohibition of Cruel and Unusual Punishments has played a significant role in regulating the death penalty.[37] Not only has the amendment been used to categorically exclude entire classes of crimes and defendants from the death penalty,[38] but it has also demanded heightened reliability in capital cases.[39] This heightened-reliability requirement implicitly has led the Court to give broader meaning to a number of constitutional provisions in capital cases, particularly in the context of the functioning of the jury and the defendant's access to information.[40] The Court has interpreted the Sixth Amendment right to a jury trial more broadly in capital cases when it comes to the trial judge's duty to ask potential jurors about their views on race.[41]

35. *Id. See also* Burke, *supra* note 25.

36. Merritt, Jr., *supra* note 3, at 684, n.95. One example of the resistance to such reforms was the opposition of the Department of Justice (DOJ) to legislation proposed by Senator Murkowski that would have broadened prosecutors' *Brady* obligations in federal cases. *See* Degabrielle & Turner, *supra* note 11, at 296 (discussing the DOJ's opposition to the "Fairness in Disclosure of Evidence Act of 2012"). As the Chicago Tribune series on prosecutorial misconduct revealed, this is not an isolated incident; rather, offending prosecutors frequently benefit professionally despite the misconduct. *See* Ken Armstrong & Maurice Possley, *Trial and Error: How Prosecutors Sacrifice Justice To Win*, CHI. TRIB., Jan. 14, 1999.

37. *See* Michael Coenen, *Constitutional Privileging*, 99 VA. L. REV. 683, 694 (2013) ("Courts apply specialized procedures in capital cases . . . [because] 'death is different'—that is, given the heightened individual and societal interests at stake, special measures are needed to ensure that capital cases are handled in a meticulous and error-free manner.").

38. *See* William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69 (2011) (discussing the Supreme Court's categorical exclusion of certain crimes, including rape and child rape, and the categorical exclusion of juveniles and persons with mental retardation).

39. Schiro v. Farley, 510 U.S. 222, 238 (Blackmun, J., dissenting) ("The 'unique' nature of modern capital sentencing proceedings . . . derives from the fundamental principle that death is 'different' and that heightened reliability is required at all stages of the capital trial."). *See also* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion of Stewart, Powell, and Stevens, JJ.); Carol S. Steiker & Jordan M. Steiker, Miller v. Alabama*: Is Death (Still) Different?*, 11 OHIO ST. J. CRIM. L. 37, 51 (2013) ("In addition to . . . proportionality review, and the twin pillars of guided discretion and individualized sentencing, the 'death-is-different' Eighth Amendment has yielded one further mode of special constitutional regulation—the requirement of 'heightened reliability' in capital cases.").

40. *See* Steiker & Steiker, *supra* note 39 (discussing how the "death is different" principle has provided "the central justification for doctrines affording special substantive and procedural protections for capital defendants.").

41. In *Ristaino v. Ross*, 424 U.S. 589 (1976)—a non-death penalty, inter-racial case—the Court held that the trial judge did not violate the Sixth Amendment by refusing to ask potential jurors about racial prejudice during jury selection. A decade later, in *Turner v. Murray*, 476 U.S. 28 (1986)—a death penalty, inter-racial case—the Court reached the opposite result, holding that the trial judge's failure to ask potential jurors their views on race violated the Sixth Amendment.

Likewise, the Court has read the Due Process Clause more expansively in capital cases. For example, the Court has forbidden sentencing judges from using information contained in presentence reports without disclosing that information to capital defendants.[42] Concerns about a jury's ability to properly exercise its judgment in capital cases has led the Court to uphold both "death qualification" and "life qualification" questioning in *voir dire*, even though such questioning about punishment is not permitted in non-capital cases.[43]

While the Due-Process-based duty of disclosure imposed by *Brady* plays an important role in ensuring a fair trial, the Eighth Amendment requires more in light of *Brady*'s compliance problems and doctrinal deficiencies. Not only is there a heightened need for *Brady* information during the guilt phase of the trial due to the stakes involved in capital cases,[44] but there is a need for additional information in the sentencing phase, both mitigating and aggravating in nature.[45]

Given the inefficacy of a doctrinal regime that mandates only limited disclosure,[46] open-file discovery would be an invaluable means of ensuring the heightened reliability of verdicts in capital cases.[47] Interpreting the Eighth

42. In *Williams v. New York*, 337 U.S. 241 (1949), prior to the advent of the "death-is-different" jurisprudence, the Court rejected a Due Process challenge to a trial judge's use of a presentence report that was not disclosed to the defendant. A quarter century later, in *Gardner v. Florida*, 430 U.S. 349 (1977), the Court upheld a constitutional challenge to the trial court's use of a presentence report that was not disclosed to the defendant. While Justice Stevens' plurality opinion in *Gardner* distinguished this case from *Williams* on the facts and resolved the case on Due Process grounds, *see id.* at 362, Justice White grounded his concurring opinion in the Eighth Amendment's heightened reliability requirement. *See id.* at 363–64.

43. *See* Morgan v. Illinois, 504 U.S. 719 (1992) (upholding "life qualification" questioning of potential jurors); Wainwright v. Witt, 469 U.S. 412 (1985) (upholding "death qualification" questioning of potential jurors).

44. *See* Maya Thomas, *Prosecutorial Misconduct*, 77 GEO. L.J. 931, 1029 (1989) ("[P]rosecutorial misconduct during sentencing hearings for capital crimes may also violate the Eighth Amendment's 'cruel and unusual punishment' clause. This clause requires a heightened degree of reliability that the death penalty is the appropriate punishment before a capital sentence may be imposed.").

45. *See* Paul L. Caron, *The Capital Defendant's Right to Obtain Exculpatory Evidence from the Prosecution to Present in Mitigation Before Sentencing*, 23 AM. CRIM. L. REV. 207, 208 (1985) (arguing that "the Eighth and Fourteenth Amendments impose an affirmative obligation on the prosecutor to disclose to a capital defendant all relevant mitigating evidence that might affect the sentencing decision."); *id.* at 240 ("Reliability is furthered in capital sentencing by requiring 'an individualized determination on the basis of the character of the individual and the circumstances of the crime.' Consequently, the concern for fairness and truth-seeking in capital sentencing is greater than the concern for fairness and truth-seeking in the guilt phase of trials or in the sentencing phase of noncapital trials."). *See also* Stefanie Lindeman, *Because Death is Different: Legal and Moral Arguments for Broadening Defendants' Rights to Discovery in Federal Capital Cases*, 73 ST. JOHN'S L. REV. 541 (1999).

46. *See supra* Section I for a discussion of *Brady*'s limitations.

47. *See* Degabrielle & Turner, *supra* note 11, at 294 ("[O]pen-file discovery is likely one of the more effective solutions for *Brady*'s limitations and one that is consistent in many ways with the prosecutor's duty to seek justice."). There are significant substantive issues that remain to be explored about the proposed open-file discovery regime, such as its exact contours, electronic discovery and the use of interrogatories and depositions. A fuller exploration of these issues is beyond the scope of this symposium article whose goal is to outline in broad strokes a theoretical

Amendment to require open-file discovery not only would avoid the problems of improper prosecutorial conduct[48] or of cognitive bias that might cause even ethical prosecutors to violate *Brady*'s mandate,[49] but it would alleviate the difficulties posed by forcing prosecutors to make *ex ante* judgments about the weight of evidence that might be disclosable under *Brady*.[50]

Indeed, recognizing the importance of providing information to defendants in death penalty proceedings, several jurisdictions have granted discovery in capital cases that goes beyond the disclosures mandated by *Brady*.[51] The Alabama Supreme Court, for example, noted that because "capital cases are sufficiently different by their very nature," trial courts have discretion to order prosecutors to provide ongoing open-file discovery, subject to the court's *in camera* review of materials that prosecutors want to withhold from defendants.[52]

These broad discovery measures have proven to be valuable in ensuring reliability in capital proceedings. For example, several defendants using North Carolina's process have had their death sentences overturned after uncovering *Brady* violations.[53]

The success of existing broad discovery measures highlights the feasibility and wisdom of mandating greater information sharing in death penalty proceedings. There is still a need, however, to recognize a broad constitutional right to open-file discovery in capital cases because there is great variation in the current discovery measures. For example, while some jurisdictions have open-file policies that would result in the disclosure of non-*Brady*, potentially

framework for a robust discovery scheme that will ensure that capital cases are litigated in a manner that is faithful to the Eighth Amendment.

48. *See, e.g.*, Kirchmeier, *supra* note 4, at 1384 ("Fortunately, most prosecutors take their legal, ethical, and moral obligations seriously and they do not strike 'foul blows.' But our legal system must be better prepared to remedy the situation where a rogue or vigilante lawyer pursues a death sentence in a way that circumvents constitutional and ethical rules.").

49. *See* Alafair S. Burke, *Prosecutorial Agnosticism*, 8 OHIO ST. J. CRIM. L. 79, 80 (2010) ("Tunnel vision . . . impairs the prosecutor's ability to identify material, exculpatory evidence to which the defense is entitled under *Brady v. Maryland*, as selective information processing will cause the prosecutor to overestimate the strength of her case without the evidence at issue and to underestimate the evidence's potential exculpatory value.").

50. *See* Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1154 (2004) (observing that a requirement of open-file discovery in criminal cases "would be prophylactic, in the sense that it would be a 'risk-avoidance rule [ ] . . . not directly sanctioned or required by the Constitution, but . . . adopted to ensure that the government follows constitutionally sanctioned or required rules.' As such, it would be consistent with other rules of criminal procedure: 'Constitutional criminal procedure is rife with prophylactic rules.'") (citation omitted).

51. *See* Yaroshefsky, *supra* note 28, at 1331 (noting that Arizona, Colorado, Florida, Ohio, New Jersey, and North Carolina have enacted legislation granting broad discovery and observing that local prosecutors' offices, such as those in Milwaukee and Portland, have adopted similar discovery policies even though there is no state-wide policy).

52. Ex parte Monk, 557 So. 2d at 836–38.

53. Johns, *supra* note 11, at 63 (citing Leonard Post, *Open Files Key in Reversals: A Unique Discovery Statute Helps Death Row Inmates Win New Trial*, NAT'L L. J., Nov. 10, 2003, at 4).

mitigating evidence[54], other states only require disclosure of aggravating evidence leading to no disclosure of non-*Brady* mitigating evidence.[55]

By mirroring duties that some states have already imposed legislatively or judicially, an open-file discovery requirement based on Eighth Amendment considerations would be grounded in the practical experience of criminal justice systems throughout the country.[56] And, as the voluntary practices of many prosecutors' offices in other states demonstrate, the proposed Eighth Amendment open-file discovery requirement would not be onerous to meet. In fact, eliminating the need to have prosecutors speculate *ex ante* about the value of evidence would be more efficient.

An open-file discovery requirement by itself, however, would not be sufficient to avoid violating the Eighth Amendment's prohibition of Cruel and Unusual Punishment. As scholars have observed, while open-file discovery has reduced the incidence of *Brady* violations, it has not eliminated them.[57] For example, in *Strickler v. Greene*, the defendant had broad access to evidence because the prosecutor had an open-file policy for discovery. Despite this policy, the defendant did not discover notes regarding a key witness's statement and letters to the police because these notes were not in the prosecutor's file at that time.[58]

Whether the limitations of open-file discovery have been due to deliberate misleading or inadvertent practices, the heightened reliability required by the Eighth Amendment would necessitate the imposition of a continuing duty of disclosure as a backstop.[59]

Imposition of these broad discovery rules under the Eighth Amendment

54. *See, e.g.*, MO. R. CRIM. P. 25.03(A)(9) (requiring disclosure of evidence "which tends to negate the guilt of the defendant as to the offense charged, mitigate the degree of the offense charged, or reduce the punishment."); TENN. SUP. CT. R. 8, RULES OF PROF'L CONDUCT R. 3.8(d) (requiring prosecutor to "disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor.").

55. *See, e.g.*, O.C.G.A. § 17-16-4(a)(5) (requiring only disclosure of "any evidence in aggravation of punishment that the state intends to introduce in sentencing.").

56. *See* Burke, *Talking about Prosecutors*, *supra* note 25, at 2126 (observing that "a growing number of offices already employ open-file discovery on their own initiative . . . . "). *See also* Green, *Beyond Training Prosecutors about their Disclosure Obligations*, *supra* note 10, at 2164 ("In federal criminal prosecutions, federal statutes and rules of criminal procedure also establish disclosure obligations, and in some districts, local court rules and/or rules of professional conduct also do so, augmenting as well as overlapping with the federal constitutional dictates. The scope of some of these additional obligations is also unclear. Ultimately, judicial approaches to discovery vary among the federal district courts."). It is important to note that, by providing a constitutional basis, grounding the open-file discovery requirement in the Eighth Amendment would enhance the efficacy of these existent open-file discovery regimes.

57. *See* Degabrielle & Turner, *supra* note 11, at 294 (discussing the *Brady* violations in the prosecution of Senator Ted Stevens and arguing that "open-file discovery should not absolve a prosecutor of his duty to examine the evidence for exculpatory evidence himself.").

58. 527 U.S. 263 (1999).

59. *See* Degabrielle & Turner, *supra* note 11, at 294 ("However, as an ethical matter, open-file discovery should not absolve a prosecutor of his duty to examine the evidence for exculpatory evidence himself.").

would be subject to the state's compelling duty to guard against witness intimidation and the destruction of evidence—a concern often voiced in opposition to open-file discovery.[60] While there may be strong reason to doubt the strength of these concerns as a general matter,[61] the very nature of a capital case that justifies this discovery regime—the possibility of imposing the death penalty—also heightens concerns about a defendant's incentive to alter the nature of the case arrayed against her. What, one might argue, would prevent a person already facing the death penalty from engaging in misconduct that puts others at peril? Indeed, "[f]ull, open-file discovery in New Jersey has proved deadly to witnesses, tempting defendants' associates to kill them to keep them from testifying."[62]

Several solutions short of barring discovery have been identified, including memorializing witness statements through affidavits and depositions, obtaining waivers from the defendant to the use of such memorialized evidence at trial, liberalizing hearsay restrictions for such evidence if the witness is later unavailable, and obtaining protective orders.[63] A judicial determination about the inefficacy of such alternate measures would permit non-compliance with the discovery requirement.

Finally, failure to comply with the proposed broad-discovery requirement would not automatically require a new sentencing proceeding, but would rather be subject to harmless-error analysis. This approach would be fundamentally different from the current *Brady* disclosure regime, whose development began

60. *See* Yaroshefsky, *supra* note 28, at 1334 ("[L]egitimate considerations weigh against liberal disclosure in certain types of cases, notably, those raising concerns about witness protection, confidential information, and national security.").

61. *See*, *e.g.*, Dan Simon, *More Problems with Criminal Trials: The Limited Effectiveness of Legal Mechanisms*, 75 LAW & CONTEMP. PROBS. 167, 208–09 (2012) (arguing that concerns of witness bribery or intimidation are "grossly overblown. A number of states, including Arizona, Colorado, New Jersey, and North Carolina, have implemented regimes that afford substantial discovery, with no apparent regrets. Some states, notably Florida and Vermont, even give criminal defendants the right to depose the prosecution's witnesses ahead of the trial. These states do not appear to show any of the calamities predicted by the critics of such policies.").

62. Stephanos Bibas & William W. Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 DUKE L.J. 637,697 (2010) (citing David Kocieniewski, *Scared Silent: In Witness Killing, Prosecutors Point to a Lawyer*, N.Y. TIMES, Dec. 21, 2007, at A1 (detailing the murder of a key witness in a drug case)). As a result, Professors Bibas and Burke-White argue that "[d]iscovery is desirable, but it must be coupled with inquisitorial measures to preserve and admit witness testimony, and to thwart witness tampering." *Id.*

63. *See, e.g.*, Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1148–51 (2004) (in response to claims that broad discovery might result in witness interference, arguing that any such danger can be alleviated through the use of protective orders or by disclosure to defense counsel without disclosing it to the defendant). Professor Roberts also explains that a broad grant of discovery to defendants need not impose reciprocal duties of disclosure on defendants. *Id.* at 1151–52. In fact, requiring defense disclosure of aggravating evidence might implicate the Fifth Amendment and requiring defense disclosure of mitigating evidence might implicate the Eighth Amendment by imposing a cost on the investigation and potential presentation of mitigating evidence.

prior to the Court's harmless-error jurisprudence.[64] The current doctrine requires automatic relief: once a defendant establishes a *Brady* violation, there is no need for an additional analysis of whether relief should be granted. This is because the current doctrine has merged the two questions—violation of a right and necessity of a remedy—by subsuming a prejudice analysis into the showing of the violation. Specifically, the materiality element of the current *Brady* requirement ensures that relief is limited to cases in which the failure to comply results in the exclusion of evidence that has a reasonable probability of leading to a different outcome.[65] In contrast, if harmless-error analysis was applied, it would trigger a discussion about the probative value of the excluded evidence, not in the context of determining whether a right has been violated, but rather only in the context of deciding whether to grant a remedy for a violation.

Re-positioning the harm analysis in this way would be more consistent with how constitutional rights generally have been construed in the context of trial errors in criminal cases.[66] Furthermore, it would properly allocate the burden of showing lack of harm onto the prosecutor—the party responsible for excluding evidence in the first place.[67]

Re-positioning the harm analysis would also have the broader benefit of tagging misconduct as being constitutionally defective, even in cases in which relief is not granted. While the defendant would not benefit from the court's ruling, the ruling could change prosecutorial behavior for the better in future cases. This result would increase the prescriptive value of the law.

III.
CONCLUSION

Taking a defendant's life is one of the most striking exercises of state power, and has rightfully been understood to be constitutionally restricted to those cases involving the worst of the worst. The determination of which capital defendant should be killed and whose life should be spared is a jury's most awesome task—a task it should only perform with all available evidence at its disposal. The current *Brady* regime, geared primarily towards regulating

64. The Supreme Court first recognized the applicability of harmless error analysis to constitutional errors in *Chapman v. California*, 386 U.S. 18 (1967), four years after its decision in *Brady*.

65. United States v. Bagley, 473 U.S. 667, 682 (1985) ("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. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.").

66. *See* Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167 (1997).

67. *See Chapman*, 386 U.S. at 24 ("Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.").

prosecutorial behavior, is fundamentally inadequate for ensuring the adequate flow of information in capital cases. The heightened reliability requirement in capital cases demanded by the Eighth Amendment's prohibition of Cruel and Unusual Punishments requires the recognition of a broader right to information by the defendant. Such a requirement would not only vindicate a capital defendant's right to be heard and present a defense, but would also ensure the jury's ability to function as constitutionally envisioned.