

## NEW YORK DISCOVERY REFORM PROPOSALS: A CRITICAL ASSESSMENT

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### INTRODUCTION

In recent years, defense attorneys in New York have argued that it is time for a change in New York's criminal discovery regime.<sup>1</sup> According to these critics, New York lags behind other states in so-called discovery reform.<sup>2</sup> Those same critics charge that the discovery statute is "outdated" and "unfair."<sup>3</sup> To them, the question of reform is a "critical" issue that New York must confront.<sup>4</sup>

Proponents of change allege that many benefits would flow from an overhaul of the system.<sup>5</sup> No less of an authority than former Chief Judge Lippman of the Court of Appeals has suggested that discovery changes are needed to guard against wrongful convictions.<sup>6</sup> Discovery reform is thought necessary to combat *Brady* violations<sup>7</sup> and is said to benefit defense attorneys, who are supposedly better able to investigate and prepare for trial.<sup>8</sup> Although several well-researched documents have been produced by proponents of reform, there is a decided lack of scholarship on the other side of the issue.

This paper examines proponents' claims with a critical eye, and concludes that their proposed reforms would not achieve their ends.

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<sup>1</sup> See THE LEGAL AID SOC'Y, CRIMINAL DISCOVERY REFORM IN NEW YORK: A PROPOSAL TO REPEAL C.P.L. ARTICLE 240 AND TO ENACT A NEW C.P.L. ARTICLE 245, at 1 (2009), <https://www.legal-aid.org/media/73762/proposal%20for%20discovery%20reform%20in%20new%20york.pdf>.

<sup>2</sup> See *id.*

<sup>3</sup> See *id.* at 11.

<sup>4</sup> N.Y. STATE JOINT TASK FORCE, REPORT OF THE NEW YORK STATE JUSTICE TASK FORCE OF ITS RECOMMENDATIONS REGARDING CRIMINAL DISCOVERY REFORM 2 (2014) [hereinafter JTF MAJORITY], <http://www.nyjusticetaskforce.com/pdfs/Criminal-Discovery.pdf>.

<sup>5</sup> See THE LEGAL AID SOC'Y, *supra* note 1, at 1.

<sup>6</sup> See JONATHAN LIPPMAN, THE STATE OF THE JUDICIARY 2014, at 18 (2014), <http://www.ny.courts.gov/ctapps/soj2014.pdf>.

<sup>7</sup> See JTF MAJORITY, *supra* note 4, at 2–3; THE LEGAL AID SOC'Y, *supra* note 1, at 53–55; N.Y. STATE BAR ASS'N, NYSBA REPORT OF THE TASK FORCE ON CRIMINAL DISCOVERY 23 (2015), <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=54572>.

<sup>8</sup> JTF MAJORITY, *supra* note 4, at 3.

More important, those same reforms would have deleterious effects on the operation of the criminal justice system and would, ultimately, make the public less safe. The legislature should carefully consider the arguments for and against discovery reform before jumping in feet first.

## I. A BRIEF HISTORY OF DISCOVERY IN NEW YORK

### A. *The Development of Criminal Discovery in New York*

At common law, there was no right to discovery in a criminal cause.<sup>9</sup> Requests for discretionary discovery were held in equally low regard.<sup>10</sup> Learned Hand famously expressed the opinion of the bench that:

Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. . . . Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.<sup>11</sup>

In 1927 the New York Court of Appeals—speaking through the great Cardozo—reaffirmed the rule that a defendant was not entitled to evidence against her simply because “the evidence will be helpful in preparing her defense.”<sup>12</sup> In the absence of a statute concerning discovery in a criminal case, New York courts were powerless to order it.<sup>13</sup> So clearly established was the rule that the Court of Appeals unanimously upheld a writ of prohibition against a discovery order.<sup>14</sup> For many years thereafter, “the steadfast rule in New York was that

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<sup>9</sup> JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1850 (2d ed. 1915).

<sup>10</sup> *Rex v. Holland* [1792] 100 Eng. Rep. 1248, 1248, 1249. In *Rex v. Holland*, the King's Bench denied a request for discovery of a document upon which the defendant's prosecution was based. *Id.* at 1250. To do so, said Lord Chief Justice Kenyon and Justice Grose, “would subvert the whole system of criminal law” and “would be dangerous in the extreme.” *Id.* at 1249, 1250.

<sup>11</sup> *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

<sup>12</sup> *People ex rel. Lemon v. Supreme Ct. of State*, 156 N.E. 84, 87 (N.Y. 1927).

<sup>13</sup> *Id.* at 85.

<sup>14</sup> *See id.* at 87.

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the accused had no right either to inspection or disclosure except in rare instance[s] where . . . it was necessary to prevent injustice.”<sup>15</sup>

Over time, recognition grew that a system that denied a defendant any discovery at all was inequitable. Great legal thinkers like Judge Roger Traynor led the charge for criminal discovery during the 1960s.<sup>16</sup> But it was the eloquence of Justice William Brennan that made it a reality. During a lecture at the Washington University School of Law in 1962, he took aim squarely at criminal discovery.<sup>17</sup> Brennan famously compared trials under the no-discovery regime of the day with “sporting contests.”<sup>18</sup> He argued strenuously that criminal procedure in general, and discovery in particular, should facilitate a search for truth: “a serious inquiry aiming to distinguish between guilt and innocence.”<sup>19</sup>

Traditionally, those opposed to any criminal discovery advanced three arguments against it.<sup>20</sup> The leading case was *State v Tune*,<sup>21</sup> authored by New Jersey Chief Justice Arthur Vanderbilt, whom even Brennan hailed as “one of the great judges of our time.”<sup>22</sup> In that case, the defendant was denied the right to inspect the statements of others before trial, and the decision was upheld by the Supreme Court of New Jersey.<sup>23</sup>

Three reasons supported the Court’s decision. First, Chief Justice Vanderbilt wrote that:

[L]ong experience has taught the courts that often [criminal] discovery will lead not to honest fact-finding, but on the contrary to perjury and the suppression of evidence. Thus the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense.<sup>24</sup>

Second, the court worried that a defendant who is given the names of the prosecution’s witnesses prior to trial “may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves so that they are unavailable to testify.”<sup>25</sup> And “many

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<sup>15</sup> Robert Keith Beck, *Discovery in New York: The Effect of the New Criminal Procedure Law*, 23 SYRACUSE L. REV. 89, 91 (1972).

<sup>16</sup> See Roger J. Traynor, *Ground Lost and Found in Criminal Discovery in England*, 39 N.Y.U. L. REV. 749, 749 (1964).

<sup>17</sup> William J. Brennan Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279, 279 (1963).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (quoting Glanville Williams, *Advance Notice of the Defence*, 1959 CRIM. L. REV. 548, 554 (1959)).

<sup>20</sup> See *Britt v. North Carolina*, 404 U.S. 226, 238 (1971) (Douglas, J., dissenting); David W. Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CAL. L. REV. 56, 57, 58 (1961).

<sup>21</sup> *State v. Tune*, 98 A.2d 881 (N.J. 1953).

<sup>22</sup> Brennan, *supra* note 17, at 289.

<sup>23</sup> *Tune*, 98 A.2d at 883–84, 893–94.

<sup>24</sup> *Id.* at 884.

<sup>25</sup> *Id.*

witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information during the investigation of the crime.”<sup>26</sup>

Third, the court noted that the defendant had a constitutional protection from self-incrimination.<sup>27</sup> As a result, the defendant would be able to “introduce any sort of unforeseeable evidence he desires” without giving the prosecutor any notice of his defense<sup>28</sup>—one of the objections that had so animated Learned Hand thirty years prior.<sup>29</sup> Whereas civil discovery facilitated the search for truth by assuring that the parties played with an open hand, in the criminal context the right against self-incrimination gave the defendant an unfair advantage, especially given the prosecutor’s much higher burden in a criminal case.<sup>30</sup>

Justice Brennan brushed these concerns aside. On the question of perjury, he noted that the “alleged experience [was] simply non-existent,” since the traditional rule had “firmly shut the door” against criminal discovery.<sup>31</sup> He referred to the argument as an “old hobgoblin” and said that a similar prediction of widespread perjury had not held true when discovery was created in civil actions.<sup>32</sup> In any event, he said, the argument was a slander against the defense bar, as the idea that a defense attorney would allow perjured testimony “hardly comports with the foundation of trust and ethics which underlies our professional honor system.”<sup>33</sup>

The objection that the right against self-incrimination made meaningful reciprocal discovery impossible was similarly denigrated. As he did elsewhere, Brennan took a functional approach: against the prosecutor’s “[l]aboratories, skilled investigators, [and] experts in all areas”, the defendant’s right against self-incrimination was not a daunting one.<sup>34</sup>

Brennan had trouble only with the question of witness intimidation.

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 885.

<sup>28</sup> *Id.*

<sup>29</sup> See *supra* notes 10, 11 and accompanying text.

<sup>30</sup> See *Tune*, 98 A.2d at 884–85; Thomas F. Liotti, *Avoiding Prosecutions*, 67 N.Y. St. B.J. 49, 54 n.28 (Feb. 1995).

<sup>31</sup> Brennan, *supra* note 17, at 290. See also *United States v. Projansky*, 44 F.R.D. 550, 556 (S.D.N.Y. 1968) (referring to a greater incident of perjury as untested folklore).

<sup>32</sup> Brennan, *supra* note 17, at 291.

<sup>33</sup> *Id.* at 291–92.

<sup>34</sup> *Id.* at 291. Additionally, the *Tune* court addressed a common refrain from reformists that Britain had introduced criminal discovery without problems. See Eugene Cerruti, *Through the Looking-Glass at the Brady Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process*, 94 KY. L.J. 211, 247 (2005/2006). They were not convinced that the British experience was necessarily applicable to the American system. *Tune*, 98 A.2d at 889. Without much evidence on either side, Brennan simply disagreed that those jurisdictions and their people were so different from ours that criminal discovery could not work in the United States. See Brennan, *supra* note 17, at 293.

He admitted: “Of course, there have been instances where this has happened,” calling witness intimidation a “legitimate concern.”<sup>35</sup> And he conceded that criminal discovery should not “be at large and without the intervention of judicial discretion.”<sup>36</sup> The solution, Brennan argued, was to commit discovery to the discretion of judges.<sup>37</sup> When circumstances justified it, he said, the judge could make the evidence available subject to a protective order.<sup>38</sup>

Although they glossed over the dangers of witness intimidation, proponents of criminal discovery were clear on what they viewed as the benefits of a liberal discovery regime. It would promote “the search for the truth by ensuring that all relevant facts would be brought out at trial and that . . . surprise tactics would be eliminated.”<sup>39</sup> They argued that pretrial discovery would quickly and efficiently allow a defendant and his attorney the ability to weigh the evidence against him, thus streamlining the plea bargaining process.<sup>40</sup> Indeed, some argued that disclosure would benefit the prosecutor by inducing more defendants to plea.<sup>41</sup> Finally, they argued that defense attorneys would be better able to investigate and prepare for trial,<sup>42</sup> which they felt necessary to counteract the state’s greater investigatory resources. After all, Brennan wryly noted: “Not every accused has the good fortune to have an ingenious Perry Mason as his counsel.”<sup>43</sup>

A few months after Brennan’s lecture, the Supreme Court handed down its watershed decision in *Brady v. Maryland*.<sup>44</sup> The era of criminal discovery had begun. For a time, it appeared that discovery might become a constitutionalized area of criminal procedure, and appellate courts across the country began to develop common law discovery rules.<sup>45</sup> In New York, discovery was provided “in furtherance of justice” and in the discretion of the judges.<sup>46</sup> Even then, the defendant bore the burden of showing with particularity that the information sought was material, admissible, competent, and was important to the defense.<sup>47</sup> By the end of the decade, judicial innovation had created a jumble of “inconsistent and conflicting” rules

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<sup>35</sup> Brennan, *supra* note 17, at 292.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 295.

<sup>38</sup> *Id.* at 294, 294 n.48.

<sup>39</sup> Thomas N. Kendris, *Criminal Discovery in New York: The Effect of the New Article 240*, 8 *FORDHAM URB. L.J.* 731, 733 (1979); Brennan, *supra* note 17, at 286–87.

<sup>40</sup> Kendris, *supra* note 39, at 734.

<sup>41</sup> Brennan, *supra* note 17, at 287.

<sup>42</sup> Kendris, *supra* note 39, at 734.

<sup>43</sup> Brennan, *supra* note 17, at 287.

<sup>44</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>45</sup> Beck, *supra* note 15, at 89.

<sup>46</sup> Kendris, *supra* note 39, at 734–35.

<sup>47</sup> Beck, *supra* note 15, at 92.

that gave judges little guidance.<sup>48</sup>

In 1971, the legislature stepped in. Perhaps acting partly out of fear that the courts would constitutionalize discovery and partly in an effort to fix the mess that common law discovery had created,<sup>49</sup> the legislature adopted Article 240 of the Criminal Procedure Law.<sup>50</sup> That statute “provided specific criteria for judges to follow in granting discovery and expanded an accused’s right to pretrial discovery well beyond the most liberal pre-CPL case law.”<sup>51</sup> Based upon Rule 16 of the Federal Rules of Criminal Procedure,<sup>52</sup> the 1971 Article 240 granted defendants discovery upon motion by the defendant made with due diligence.<sup>53</sup> Some material was discoverable as of right; some was discoverable at the discretion of the judge, upon a showing of materiality.<sup>54</sup>

As liberal as it was, the statute still exempted from discovery any “reports, memoranda or other internal documents or work papers made by district attorneys, police officers or other law enforcement agents . . . in connection with the investigation [and] prosecution . . . of a criminal action.”<sup>55</sup> On its face, Article 240 exempted police reports from pre-trial disclosure (although, in practice, courts often circumvented the exemption).<sup>56</sup> So-called *Brady* material was not included in the list of discoverable material, an oversight that created interpretative tensions in the courts.<sup>57</sup> Moreover, statements by witnesses and prospective witnesses were not discoverable pretrial, although of course statements of those who actually testified were made available to the defense at the conclusion of their direct testimony.<sup>58</sup>

The 1971 Article 240 went a long way in making criminal discovery a reality, but it failed in its goal of ensuring liberal and consistent discovery across the state. With so much discretion, the scope of discovery varied from case to case and trial judge to trial judge, with one trial court even reporting that there had “frequently been an utter lack of consistency in the practice relating to pretrial disclosure.”<sup>59</sup> Throughout the 1970s, however, the legislature could not agree on how to fix Article 240—on the one hand, liberals wanted to expand its scope

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<sup>48</sup> Kendris, *supra* note 39, at 735. Other states that toyed with judicially-imposed discovery faced the same difficulty. In California, the standard was that discovery was provided when needed for a “fair trial” a term that necessarily invoked a vast degree of discretion on the part of trial judges. Louisell, *supra* note 20, at 84–85.

<sup>49</sup> See Kendris, *supra* note 39, at 735.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> Beck, *supra* note 15, at 93.

<sup>53</sup> *Id.* at 94; Kendris, *supra* note 39, at 736–37.

<sup>54</sup> Kendris, *supra* note 39, at 737, 738.

<sup>55</sup> *Id.* at 737.

<sup>56</sup> *Id.* at 744–45.

<sup>57</sup> *Id.* at 756–57, 758.

<sup>58</sup> *People v. Rosario*, 173 N.E.2d 881, 883 (N.Y. 1961).

<sup>59</sup> Kendris, *supra* note 39, at 763.

considerably, on the other, many did not want to see further expansion.<sup>60</sup>

By 1979, a compromise was reached. The legislature repealed the original statute, with a new Article 240 taking effect on January 1, 1980.<sup>61</sup> This new Article 240 considerably streamlined and expanded the scope of discovery in New York State. First, the new Article 240 dispensed with the necessity to file a motion with the court for discovery, instead replacing it with a demand system.<sup>62</sup> Second, the new Article provided for pre-trial discovery of oral statements by the defendant and any co-defendant, as well as grand jury testimony by the defendant and any co-defendant, a provision which allowed the defendant to “intelligently” prepare for or challenge a joint trial.<sup>63</sup> Finally, defendants gained access to all prosecution photographs and drawings relating to the crime, property obtained from them or co-defendants, and electronic recordings the prosecutor intended to introduce at trial—items discoverable only in the discretion of the court upon a showing of good cause in the original Article 240.<sup>64</sup>

The 1980 version of Article 240 also put to bed any lingering questions regarding when *Brady* material must be handed over. While the original statute made no reference to *Brady*, the new Article 240 provided for discovery of “[a]nything required to be disclosed, prior to trial . . . pursuant to the constitution of this state or of the United States.”<sup>65</sup> This effectively codified the holding of *Brady v. Maryland*, as well as left room for the growth of constitutional discovery.<sup>66</sup> That provision was important to implement the holding of *Brady* because it specified when such information must be turned over.

At the same time it expanded the definition of discoverable material on the one hand, the new Article 240 narrowed considerably the category of property exempt from disclosure; the new statute, by its terms, exempted only “attorneys’ work product” from possible discovery.<sup>67</sup> Attorneys’ work product consisted of “the opinions, theories or conclusions of the prosecutor, defense counsel or members of their

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<sup>60</sup> *Id.* at 763–64.

<sup>61</sup> *Id.* at 764.

<sup>62</sup> *Id.* at 765. If a prosecutor fails to turn over discovery the defendant believes should have been turned over, the defendant may also make a motion to compel discovery. *Id.*

<sup>63</sup> *Id.* at 765–66.

<sup>64</sup> *Id.* at 736–37, 766.

<sup>65</sup> *Id.* at 766; see N.Y. CRIM. PROC. LAW § 240.20(1)(h) (McKinney 2016).

<sup>66</sup> *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Kendris*, *supra* note 39, at 766. For example, subsequent case law established that the prosecution has a duty to disclose information needed to correct misleading testimony by a prosecution witness—for instance, testimony before the grand jury. See *United States v. Bagley*, 473 U.S. 667, 683, 684 (1985); *People v. Novoa*, 517 N.E.2d 219, 223 (N.Y. 1987) (first citing *People v. Piazza*, 397 N.E.2d 700, 700 (1979); and then citing *People v. Savvides*, 136 N.E.2d 853, 887 (N.Y. 1956)).

<sup>67</sup> *Kendris*, *supra* note 39, at 767–68.

legal staffs.”<sup>68</sup>

In addition to pre-trial discovery, the 1980 Article 240 also codified and expanded the *Rosario* rule regarding discovery at trial, requiring that *Rosario* material be handed over to the defense at trial no later than the point at which the jury is sworn in.<sup>69</sup>

The 1980 version of Article 240 also contained a residual clause—one which allowed a court to order the production of any other property the prosecutor intended to introduce at trial upon a showing that the property was “material” to preparing his defense and that the request was otherwise “reasonable.”<sup>70</sup> In sum, the revamped version of Article 240 gave defendants access, by right, to a broad range of evidence pre-trial and, upon a showing of materiality, access to everything else the prosecutor planned to introduce at trial. Moreover, the statute imposed a duty to make a “diligent, good faith effort” to acquire demanded property.<sup>71</sup>

Despite its much-expanded scope, the 1980 version of Article 240 did embody some compromises. First, defendants were required to make a discovery demand.<sup>72</sup> Second, the statute contained reasonable time limitations; a defendant was required make a demand within thirty days of arraignment, and a prosecutor must respond within fifteen days or, if compliance cannot be made within fifteen days, “as soon thereafter as practicable.”<sup>73</sup> Third, the names and addresses of witnesses did not need to be turned over to the defense, and their statements did not need to be turned over until the start of trial, an important concession to prosecutors’ concerns about witness intimidation.<sup>74</sup> Most important, statements of those who would not be testifying at trial did not need to be turned over at all, unless they constituted *Brady* material.<sup>75</sup>

The codification of expanded discovery rights in statute was important, since by 1980 the drum beat to constitutionalize discovery had ceased with the dawn of a more conservative Supreme Court under the leadership of Chief Justice Warren Burger.<sup>76</sup> The Supreme Court ruled in 1977 that there was no generalized constitutional right to

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<sup>68</sup> N.Y. CRIM. PROC. LAW § 240.10(2).

<sup>69</sup> Kendris, *supra* note 39, at 769. In 1982, the legislature expanded the codification to require *Rosario* material to be given over to the defense at a hearing upon request at the close of the witness’ direct testimony. N.Y. CRIM. PROC. LAW ch. 558, § 7 (McKinney 1982) (current version at N.Y. CRIM. PROC. LAW § 240.44(1)).

<sup>70</sup> N.Y. CRIM. PROC. LAW § 240.40(1)(c).

<sup>71</sup> *Id.* § 240.20(2).

<sup>72</sup> *Id.* § 240.80(1).

<sup>73</sup> *Id.* § 240.80(1), (3).

<sup>74</sup> Kendris, *supra* note 39, at 769, 770.

<sup>75</sup> *Id.* at 769.

<sup>76</sup> See Herald Price Fahringer, *Has Anyone Here Seen Brady?: Discovery in Criminal Cases*, 9 CRIM. L. BULL. 325, 326 (1973) (“[T]he reform of criminal procedure embarked upon by the Supreme Court under the able leadership of Chief Justice Earl Warren has apparently come to an end, and so too has the expansion of the *Brady* doctrine.”).

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discovery,<sup>77</sup> while the Court of Appeals followed suit in 1988.<sup>78</sup> And the Supreme Court has not been receptive to attempts to expand the scope of *Brady* obligations since.<sup>79</sup>

In New York, the 1980 edition of Article 240 has persisted in substantially the same form ever since.<sup>80</sup>

### *B. The Continued Push for Open File Discovery in New York*

Despite getting so much of what they wanted in the current Article 240, proponents of criminal discovery expressed disappointment with the regime even before it took effect.<sup>81</sup> The first sustained criticism of the system took place in 1991, in a report written for the Assembly Codes Committee.<sup>82</sup> That report argued that New York should require prosecutors to turn over the names, addresses, and statements of intended witnesses well before trial.<sup>83</sup> The report downplayed the possibility of witness intimidation, calling the connection between pretrial discovery and intimidation “extremely weak.”<sup>84</sup>

Throughout the 1990s, commentators and defense attorneys criticized the discovery regime as insufficiently liberal, and the Office of Court Administration suggested bills to the legislature calling for changes.<sup>85</sup> These proposals would have expanded the scope of

<sup>77</sup> *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977); *see also* *United States v. Agurs*, 427 U.S. 97, 109 (1976) (“Whether or not procedural rules authorizing . . . broad discovery might be desirable, the Constitution surely does not demand that much.”).

<sup>78</sup> *See In re Miller v. Schwartz*, 72 N.Y.2d 869, 870 (N.Y. 1988) (citing *Weatherford*, 429 U.S. at 559).

<sup>79</sup> *See* Stephanos Bibas, *Brady v. Maryland: From Adversarial Gamesmanship Toward the Search for Innocence?*, in *CRIMINAL PROCEDURE STORIES* 129, 129–30 (Carol Steiker ed., 2006) (listing reasons why *Brady* has not come into light more often).

<sup>80</sup> *See* N.Y. CRIM. PROC. LAW § 240.20(1)(k); WILLIAM C. DONNINO, *PRACTICE COMMENTARIES* 49 (2014). There have been only minor changes. For instance, in 1989 the legislature added a provision clarifying that breathalyzer records are available to a defendant charged with a violation of the Vehicle and Traffic Law, a provision perhaps inspired by the legislature’s new found interest in DWI. *See* CRIM. PROC. LAW § 240.20(1)(k). Paragraph (c) of section 240.20 was generally considered to have covered those records. *See* DONNINO, *supra*, at 49.

<sup>81</sup> *See* Kendris, *supra* note 39, at 770, 771.

Most obviously the new law could have made the names, addresses, and *Rosario* statements of the prosecution’s potential witnesses, along with all police reports, available to the defense upon demand. In addition, the prosecutor’s entire file could have been made available to the defendant’s counsel at some pretrial stage so that he could search it himself for any potential *Brady* material.

*Id.*

<sup>82</sup> *See* BRAD MIDDLEKAUFF, *A REPORT TO THE NEW YORK STATE ASSEMBLY CODES COMMITTEE, CRIMINAL DISCOVERY IN NEW YORK STATE: CURRENT PRACTICE AND PROPOSALS FOR CHANGE* 112 (1991).

<sup>83</sup> *Id.* at 94, 95.

<sup>84</sup> *Id.* at 112.

<sup>85</sup> *See* N.Y. STATE UNIFIED COURT SYS., 20TH ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS 57–58 (1997) <https://www.nycourts.gov/reports/annual/pdfs/ar20-legrul.pdf>. Beginning with the 1995–1996 legislative session, the OCA bill was introduced by Assemblyman Joseph Lentol, then and now chairman of the Assembly Committee on Codes, “at the request of the Chief Administrative Judge upon the recommendation of his Advisory Committee on Criminal Law

discovery, shortened the time frame for it, and eliminated the need for a discovery demand.<sup>86</sup> On the other hand, those proposals typically would not have required the prosecution to hand over the names and addresses of witnesses that the prosecutor *did not* intend to call at trial.<sup>87</sup>

Outside of these occasional calls, the push for expanded discovery only gained steam in 2006, in the wake of the infamous Duke Lacrosse case.<sup>88</sup> That case generated a flurry of scholarly work arguing that the tragic miscarriage of justice there could have been prevented by open file discovery.<sup>89</sup> In 2006, the New York County Lawyers' Association released a report based on an informal survey they had conducted about discovery practices of District Attorneys' offices in New York City for misdemeanor cases.<sup>90</sup> At the conclusion of their report, they recommended that "[o]pen file discovery or discovery by stipulation policies be instituted citywide."<sup>91</sup>

Building on that work, in 2009 the Legal Aid Society, an organization that represents indigent criminal defendants in New York, released a lengthy report and attached proposal calling to replace the current discovery regime with a new one, built from the ground up.<sup>92</sup> Their efforts resulted in the proposed legislation being introduced in the legislature in 2011, when it died on the floor of the Assembly.<sup>93</sup> It has

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and Procedure." See Assemb. B. 7655, 1995-1996 Reg. Sess. (N.Y. 1995); *Biography*, N.Y. ST. ASSEMBLY, <http://assembly.state.ny.us/mem/Joseph-R-Lentol/bio/> (last visited Apr. 20, 2016). A similar bill had previously been proposed by the Chief Administrator since 1990. See N.Y. STATE UNIFIED COURT SYS., TWELFTH ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS 87 (1990) [hereinafter TWELFTH ANNUAL REPORT], <https://www.ncjrs.gov/pdffiles1/Digitization/132992NCJRS>. Those proposals, based upon the recommendations of the Advisory Committee on Criminal Law and Procedure, have continued throughout the years. See, e.g., N.Y. STATE UNIFIED COURT SYS., REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL LAW AND PROCEDURE TO THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS OF THE STATE OF NEW YORK 3 (2008), [https://www.nycourts.gov/ip/judiciary/legislative/pdfs/CriminalLawProcedure\\_08.pdf](https://www.nycourts.gov/ip/judiciary/legislative/pdfs/CriminalLawProcedure_08.pdf) (recommending reforms of discovery in criminal matters).

<sup>86</sup> See N.Y. Assemb. B. 7655.

<sup>87</sup> See *id.* The early OCA proposals would have required disclosure of the names and addresses of all witnesses, whether or not the prosecutor intended to call that witness at trial. See N.Y. STATE UNIFIED COURT SYS., FOURTEENTH ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS 77 (1992), <https://www.ncjrs.gov/pdffiles1/Digitization/146418NCJRS.pdf>; TWELFTH ANNUAL REPORT, *supra* note 85, at 88. But those proposals were dropped by the time of the 1995 program bill; in fact, that proposed legislation would have specifically allowed the prosecutor to redact name, address, and identifying information of witnesses contained in police reports. See N.Y. Assemb. B. 7655.

<sup>88</sup> Brian P. Fox, *An Argument Against Open-File Discovery in Criminal Cases*, 89 NOTRE DAME L. REV. 425, 425-26 (2013).

<sup>89</sup> *Id.* at 426 & n.5.

<sup>90</sup> N.Y. CTY. LAWYERS' ASS'N, DISCOVERY IN NEW YORK CRIMINAL COURTS: SURVEY REPORT & RECOMMENDATIONS 1 (2006), [http://www.nycla.org/siteFiles/Publications/Publications228\\_1.pdf](http://www.nycla.org/siteFiles/Publications/Publications228_1.pdf).

<sup>91</sup> *Id.* at 23.

<sup>92</sup> See THE LEGAL AID SOC'Y, *supra* note 1, at 2-3; *Criminal Practice*, THE LEGAL AID SOC'Y, <http://www.legal-aid.org/en/criminal/criminalpractice.aspx> (last visited Apr. 20, 2016).

<sup>93</sup> See Assemb. B. 6907-A, 2011-2012 Reg. Sess. (N.Y. 2011). After being amended, the bill died on the floor at the end of the 2011-2012 legislative session. *Assembly Bill A6907A*, N.Y. ST. SENATE, <https://www.nysenate.gov/legislation/bills/2011/a6907/amendment/a#amendment-details>

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been reintroduced during each session since, with the same record of success.<sup>94</sup> The Legal Aid Society renewed its efforts in 2013, releasing an updated version of its proposal.<sup>95</sup> Once again, the proposal was quickly introduced to the legislature, and went nowhere.<sup>96</sup>

But even as Legal Aid's efforts in the legislature flagged, the defense bar gained a powerful ally in the judiciary—Chief Judge of the State of New York Jonathan Lippman.<sup>97</sup> As Chief Administrative Judge from 1996-2007, Judge Lippman was responsible for the annual Office of Court Administration reports calling for discovery reform.<sup>98</sup> But as Chief Judge of the State, his calls carried more weight and garnered more attention.<sup>99</sup>

In February of 2014, Chief Judge Lippman announced during his annual State of the Judiciary speech that the state Justice Task Force—a committee appointed solely by him—was “now recommending groundbreaking statutory reforms” in the area of criminal discovery.<sup>100</sup> Among other things, he said that the Task Force would recommend that the names of all witnesses must be turned over to the defense.<sup>101</sup> The Task Force, he said, was made up of “prosecutors, defense lawyers, law enforcement officials, judges and others,” a broadly representative group.<sup>102</sup> Lippman identified the discovery reform proposals he promised from the Task Force as necessary to fight against wrongful

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(last visited Apr. 20, 2016) (showing the bill never made it past the floor after 2012).

<sup>94</sup> See Assemb. B. 3667, 2013-2014 Reg. Sess. (N.Y. 2013); *Assembly Bill A3667*, N.Y. ST. SENATE, <https://www.nysenate.gov/legislation/bills/2013/a3667/amendment/original> (last visited Apr. 20, 2016) (showing the bill has never made it to the floor); Assemb. B. 2924, 2015-2016 Reg. Sess. (N.Y. 2015); *Assembly Bill A2924*, N.Y. ST. SENATE, <https://www.nysenate.gov/legislation/bills/2015/a2924/amendment/original> (last visited Apr. 20, 2016) (showing the bill has never made it to the floor).

<sup>95</sup> See THE LEGAL AID SOC'Y, MEMORANDUM IN SUPPORT OF LEGISLATION 1 (2013), [http://www.legal-aid.org/media/175488/2013\\_discovery\\_reform\\_proposal.pdf](http://www.legal-aid.org/media/175488/2013_discovery_reform_proposal.pdf).

<sup>96</sup> See Assemb. B. 5996, 2015-2016 Reg. Sess. (N.Y. 2015); Assemb. B. 6078, 2013-2014 Reg. Sess. (N.Y. 2013); *Assembly Bill A5996*, N.Y. ST. SENATE, <https://www.nysenate.gov/legislation/bills/2015/a5996/amendment/original> (last visited Apr. 20, 2016); *Assembly Bill A6078*, N.Y. ST. SENATE, <https://www.nysenate.gov/legislation/bills/2013/a6078/amendment/original> (last visited Apr. 20, 2016) (showing the bill has never made it to the floor).

<sup>97</sup> *Chief Judge Jonathan Lippman*, CT. OF APPEALS ST. OF N.Y., <https://www.nycourts.gov/ctapps/jlippman.htm> (last visited Apr. 20, 2016).

<sup>98</sup> *Id.*; *The Legal Aid Society Calls for a Modern Discovery Statute to Replace New York State's Outmoded and Unfair Criminal Discovery Rules*, THE LEGAL AID SOC'Y, <https://www.legal-aid.org/en/criminal/criminalpractice/discoveryreformproposal.aspx> (last visited Apr. 20, 2016) [hereinafter *Calls for a Modern Discovery Statute*].

<sup>99</sup> See JUDITH S. KAYE & JONATHAN LIPPMAN, THE NEW YORK STATE COURTS: AN INTRODUCTORY GUIDE 7, <http://nycourts.gov/reports/ctstrct99.pdf> (describing the Court of Appeals as New York's highest court and how all Court of Appeals decisions are final); *Calls for a Modern Discovery Statute*, *supra* note 98 (noting that the Legal Aid Society played a role in Chief Judge Lippman's Justice Task Force).

<sup>100</sup> JONATHAN LIPPMAN, THE STATE OF THE JUDICIARY: VISION AND ACTION IN OUR MODERN COURTS 18 (2014), <http://www.nycourts.gov/ctapps/soj2014.pdf>; *Calls for a Modern Discovery Statute*, *supra* note 98.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

convictions.<sup>103</sup> These reforms, Lippman later told a gathering of the New York State Bar Association, would “make our criminal discovery process fairer and [] protect the integrity of our justice system.”<sup>104</sup>

In July of that same year the Task Force did act, by releasing a twenty-five page report with recommendations.<sup>105</sup> They recommended that the names and addresses of civilian witnesses be made discoverable regardless of whether the prosecutor intended to call the witness at trial, and they recommended that the names be disclosed to the defense at least thirty days before trial.<sup>106</sup> They also recommended abolishing the demand discovery system and expanding the scope of discovery regarding access to tangible objects, search warrant applications, and expert witnesses.<sup>107</sup> In its report, the Task Force argued that “robust pretrial disclosure of evidence is a critically important protection against wrongful convictions,” and went on to criticize prosecutors for “inconsistent application” of *Brady v. Maryland*.<sup>108</sup>

Prosecutors shot back in a dissent to the report, which was submitted to the Chief Judge and signed by then-President of the District Attorneys Association, Frank A. Sedita.<sup>109</sup> Although it was submitted as a dissent, it was not included on the Task Force’s website as an attachment to the majority’s report, nor was any dissent noted in the majority’s report itself.<sup>110</sup>

In his dissent, Sedita decried the process by which the majority’s report was produced.<sup>111</sup> He wrote that although the majority’s Task Force report claimed to be the result of a broad consensus, “the vast majority” of district attorneys viewed its proposals as “unwarranted” and “disastrous.”<sup>112</sup> During Task Force sessions “[t]he legitimate concerns of law enforcement, prosecutors, and victims’ advocates were . . . often disregarded or disparaged” by the majority.<sup>113</sup> The dissent also

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<sup>103</sup> *Id.* at 18.

<sup>104</sup> Hon. Jonathan Lippman, Address at N.Y. Bar Ass’n Summit: The Past, Present, and Future of Indigent Defense in New York: Where has 10 years of Reform Gotten Us and Where Are We Going? 6 (June 6, 2014), <https://www.ils.ny.gov/files/Past%20Present%20Future%20of%20Indigent%20Defense%20060614.pdf>.

<sup>105</sup> JTF MAJORITY, *supra* note 4, at 2.

<sup>106</sup> *Id.* at 6.

<sup>107</sup> *Id.* at 7–8.

<sup>108</sup> *Id.* at 2.

<sup>109</sup> Letter-Dissent from Frank A. Sedita III, President of the Dist. Attorney’s Ass’n of N.Y., to Hon. Jonathan Lippman, Chief Judge of N.Y. 1 (Sept. 4, 2014) [hereinafter JTF dissent]. District Attorney Sedita has since been elected to the State Supreme Court and was sworn into office on December 30, 2015. Evan Anstey, *Former Erie County District Attorney Sown in as State Supreme Court Justice*, WIVB 4 (Dec. 30, 2015), <http://wivb.com/2015/12/30/erie-county-da-to-be-sworn-in-state-supreme-court-justice/>.

<sup>110</sup> JTF MAJORITY, *supra* note 4; *Task Force Recommendations*, ST. OF N.Y. JUST. TASK FORCE, <http://www.nyjusticetaskforce.com/recommendations.html> (last visited Apr. 20, 2016).

<sup>111</sup> JTF dissent, *supra* note 109, at 4–5.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 5.

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noted that the Justice Task Force's mission was to consider how to curb wrongful convictions; in the opinion of the dissenters, the proposals relating to criminal discovery would not serve that end.<sup>114</sup>

The Justice Task Force's report was soon followed by a report from the New York State Bar Association's Task Force on Criminal Justice, which was adopted by the NYSBA House of Delegates in January of 2015.<sup>115</sup> In it, the NYSBA group made several suggestions for "[l]arge-scale changes" to the discovery statute, which it claimed would make the criminal justice system fairer and more efficient.<sup>116</sup> Among other recommendations, they called for the names and addresses of witnesses to be disclosed to the defendant, even when the prosecutor does not plan to call those witnesses.<sup>117</sup> The report brushed off concerns about witness intimidation, concluding that "discovery rules in comparable states did not result in a general problem of witness intimidation."<sup>118</sup>

They also called for a two "phase" disclosure of information by the prosecution without a discovery demand.<sup>119</sup> The first phase would include police reports, witness statements, names and addresses of witnesses, a list of tangible objects obtained from the defendant, information about search warrants, and "favorable . . . information" to the defendant to be turned over within fifteen days of arraignment.<sup>120</sup> The second phase would include the bulk of all other discoverable materials.<sup>121</sup> The NYSBA group also recommended a "catch-all" provision that would give judges the "authority and flexibility" to order even more discovery when the evidence sought is "reasonably likely to be material."<sup>122</sup>

Once again, prosecutors shot back. Warning that the NYSBA majority would effect a "radical restructuring" of discovery that would have "enormous consequences" for the criminal justice system, the three dissenters urged rejection of the majority's proposals.<sup>123</sup> Each of the dissenters was a career prosecutor.<sup>124</sup> They raised the specter of witness intimidation, arguing that the problem is powerful and

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<sup>114</sup> *Id.* at 1.

<sup>115</sup> N.Y. STATE BAR ASS'N, *supra* note 7.

<sup>116</sup> *Id.* at 7.

<sup>117</sup> *Id.* at 11.

<sup>118</sup> *Id.* at 13.

<sup>119</sup> *Id.* at 31.

<sup>120</sup> *Id.* at 32, 34–35.

<sup>121</sup> *Id.* at 31.

<sup>122</sup> *Id.* at 38.

<sup>123</sup> *Id.* at 76.

<sup>124</sup> *Id.*; see John Eligon, *No Crime, Just Punishment*, N.Y. TIMES (Dec. 10, 2010), <http://cityroom.blogs.nytimes.com/2010/12/10/no-crime-just-punishment/>; *Essex County District Attorney Kristy Sprague*, ESSEX COUNTY, N.Y., <https://www.co.essex.ny.us/wp/district-attorney/> (last visited Apr. 22, 2016); *Adjunct Faculty: Itamar J. Yeager*, PACE L., <http://www.law.pace.edu/faculty/itamar-j-yeager> (last visited Apr. 22, 2016).

growing.<sup>125</sup> While they believed that early disclosures of the identity of witnesses would endanger the witnesses, the dissenters did agree that some changes to the discovery statute would make sense.<sup>126</sup>

Even before the NYSBA report was approved by the House of Delegates, a bill was introduced in the legislature to effectuate its proposals.<sup>127</sup> As the 2015 legislative session began, advocates and some political figures began sounding the drumbeat for reform legislation.<sup>128</sup> In February, Chief Judge Lippman once again called for reform of criminal discovery in his 2015 State of the Judiciary speech.<sup>129</sup> But the unexpected leadership changes in both houses led to a stalemate on several criminal justice issues considered by the legislature during 2015.<sup>130</sup> As the legislature works through the 2016 session, there is little doubt that criminal discovery reform will once again be on the agenda.

## II. A CRITICAL ASSESSMENT OF THE REFORMER'S ARGUMENTS

### A. *Why Now? A Manufactured Crisis*

Since 2009, three major reports have called for discovery reform in New York State: the 2009 Report by the Legal Aid Society, the 2014 Report by the New York State Justice Task Force, and the 2015 Report by the New York State Bar Association.<sup>131</sup> The first report was written by the Legal Aid Society, the primary public defender organization in New York City.<sup>132</sup> The next two were authored by organizations

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<sup>125</sup> N.Y. STATE BAR ASS'N, *supra* note 7, at 86.

<sup>126</sup> *Id.* at 102–03, 105.

<sup>127</sup> See S.B. 11, 2015-2016 Reg. Sess. (N.Y. 2015). Senator Hassell-Thompson's bill was introduced on January 7, 2015, while the House of Delegates did not give final approval to the NYSBA Task Force's report until January 30, 2015. *Id.*; N.Y. STATE BAR ASS'N, *supra* note 7.

<sup>128</sup> Will Bredderman, *Bronx Pols Seek New Rules for Disclosing Evidence in Criminal Cases*, OBSERVER (Sept. 29, 2014), <http://observer.com/2014/09/bronx-pols-seek-new-rules-for-disclosing-evidence-in-criminal-cases/>; Nick Reisman, *Lentol's Wish List for Criminal Justice Reform*, ST. OF POLS. (Jan. 14, 2015), <http://www.nystateofpolitics.com/2015/01/lentols-wish-list-for-criminal-justice-reform/>; see *New York State Legislative Session Calendar*, N.Y. ASSEMBLY, <http://assembly.state.ny.us/leg/docs/2015sessioncalendar.pdf> (last visited Apr. 22, 2016).

<sup>129</sup> JONATHAN LIPPMAN, *THE STATE OF THE JUDICIARY 2015*, at 17 (2015), <https://www.ny.courts.gov/whatsnew/pdf/2015-SOJ.pdf>.

<sup>130</sup> Jon Campbell, *Cuomo: AG to Be Special Prosecutor for Police Incidents*, TIMES UNION (June 23, 2015), <http://blog.timesunion.com/capitol/archives/237632/cuomo-ag-to-be-special-prosecutor-for-police-incidents/>; Jimmy Vielkind, *Albany Adjourns after Passing "The Big Whatever,"* CAP. N.Y. (June 26, 2015), <http://www.capitalnewyork.com/article/Albany/2015/06/8561040/Albany-adjourns-after-passing-big-whatever>.

<sup>131</sup> See JTF MAJORITY, *supra* note 4, at 1; THE LEGAL AID SOC'Y, *supra* note 1; N.Y. STATE BAR ASS'N, *supra* note 7.

<sup>132</sup> See THE LEGAL AID SOC'Y, *supra* note 1; *Criminal Practice*, THE LEGAL AID SOC'Y, <https://www.legal-aid.org/en/criminal/criminalpractice.aspx> (last visited Apr. 22, 2016); *The History of the Legal Aid Society*, THE LEGAL AID SOC'Y, <http://www.legal-aid.org/en/las/aboutus/ourhistory.aspx> (last visited Apr. 22, 2016).

overwhelmingly comprised of defense attorneys.<sup>133</sup> In both of the latter reports, the majority's conclusions were strenuously contested in dissents written by the prosecutors on panels charged with studying the issue.<sup>134</sup> The three reports represent the three leading proposals for reform of the current discovery regime.

Each of the three reports begins by attempting to justify the need for discovery reform at the present time, and each does so in strikingly similar language. The Legal Aid Society's 2009 report began by sounding the alarm bell, making an "urgent" call for reform.<sup>135</sup> The Justice Task Force majority, writing in 2014, called the issue a "critical" one.<sup>136</sup> The NYSBA Task Force majority agreed that reforms were "urgently needed and long overdue,"<sup>137</sup> before going on to label the situation a "crisis."<sup>138</sup> But the reasons given by the three reports regarding why reform is so urgently needed now are vague and unpersuasive.

The Legal Aid Society report noted that "[c]ommittees of experts and practitioners have repeatedly urged the Legislature to fundamentally revise [and] modernize" New York's discovery regime.<sup>139</sup> The Justice Task Force majority echoed that point, writing that "lawyers, judges, and scholars have called" for reform.<sup>140</sup> The NYSBA majority makes the same claim, writing that calls for reform have persisted "for decades . . . so far to no avail."<sup>141</sup>

It is very clear that calls to expand criminal discovery reform beyond the scope of the current Article 240 have persisted since its passage, as discussed in detail above. But of course, simply because reformers have repeated their complaints ad nauseam does not make those complaints any more true or the problem they describe any more urgent. That is especially true given that each successive call for reform largely restates the arguments of the last, that they offer very

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<sup>133</sup> *New York State Justice Task Force*, N.Y. ST. JUST. TASK FORCE, <http://www.nyjusticetaskforce.com/members.pdf> (last visited Apr. 3, 2016); *Significant Changes in Criminal Discovery Adopted by NY State Bar House of Delegates*, THE LEGAL AID SOC'Y (Feb. 9, 2015), <http://www.legal-aid.org/en/mediaandpublicinformation/inthenews/significantchangesincriminaldiscoveryadoptedbynystatebarhouseofdelegates.aspx> [hereinafter *Significant Changes in Criminal Discovery*]. Interestingly, the primary author of the 2009 Legal Aid Report sat on the NYSBA Task Force that produced the 2015 NYSBA Report. *Significant Changes in Criminal Discovery*, *supra* note 133. And the attorney in charge of the Legal Aid Society's Criminal Defense Practice sat on the NYS Justice Task Force, the group which produced the 2014 Justice Task Force report. *New York State Justice Task Force*, *supra* note 133.

<sup>134</sup> See JTF MAJORITY, *supra* note 4, at 11; JTF dissent, *supra* note 109, at 1; N.Y. STATE BAR ASS'N, *supra* note 7, at 76.

<sup>135</sup> THE LEGAL AID SOC'Y, *supra* note 1, at 3.

<sup>136</sup> JTF MAJORITY, *supra* note 4, at 2.

<sup>137</sup> N.Y. STATE BAR ASS'N, *supra* note 7, at 2.

<sup>138</sup> *Id.* at 7.

<sup>139</sup> THE LEGAL AID SOC'Y, *supra* note 1, at 4.

<sup>140</sup> JTF MAJORITY, *supra* note 4, at 2.

<sup>141</sup> N.Y. STATE BAR ASS'N, *supra* note 7, at 2.

similar reform suggestions, and that the organizations making the calls are dominated by the defense bar.<sup>142</sup> Indeed, the lack of action by the legislature or push from the broader legal community may well speak to their judgment that there is not an urgent need for change.

The Legal Aid Society's report makes another argument to justify the claim that discovery reform is an issue in need of urgent attention. They note that many other states have enacted some form of open discovery<sup>143</sup> and urge that New York is behind the times.<sup>144</sup> The NYSBA majority echoes that "[d]ozens of other States have employed [open discovery regimes] for many years."<sup>145</sup> Both cite a leading treatise on criminal procedure that lists New York as one of the fourteenth most restrictive states for criminal discovery—the Legal Aid Society report notes that fact on its very first page.<sup>146</sup>

This is a peculiar argument to justify the claim that there is a crisis in criminal discovery. To be sure, the experiences of other states are relevant to the design and implementation of discovery in New York. But the fact that some other states (or even a majority of states) have adopted some form of open discovery is not an argument in favor of it. Nor is the fear of being left behind, or a general consternation that the discovery statute is insufficiently progressive.

New York can learn from the discovery regimes of other states, and perhaps those states can learn from New York. But in doing so, New York must thoroughly evaluate their experiences, consider the similarities and differences in the totality of their criminal procedures, and draw independent conclusions about what will work in New York. That some other states have adopted practices different from New York's regime does not constitute a crisis or make the situation urgent.

The NYSBA majority offers a third possible reason why change is now so critical. According to that report, the criminal justice system has shifted from a trial-based system to a plea-based system "in recent decades."<sup>147</sup> The report cites statistics showing that "[n]inety-seven

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<sup>142</sup> See *supra* notes 133, 135–41 and accompanying text. All three major reports by the reformers identify judges as among those calling for reform. N.Y. STATE BAR ASS'N, *supra* note 7, at 51; see JTF MAJORITY, *supra* note 4, at 2; THE LEGAL AID SOC'Y, *supra* note 1, at 6 n.11. But there does not appear to be an outpouring of support for reform from the bench. In fact, only two judges appear in the reports as outspoken supporters: former Chief Judge Lippman and James Yates, a former Supreme Court Judge in New York County. See JTF MAJORITY, *supra* note 4, at 2; THE LEGAL AID SOC'Y, *supra* note 1, at 6 n.11; *Assembly Speaker Sheldon Silver Names Honorable James A. Yates Counsel to the Speaker*, N.Y. ASSEMBLY (Jan. 6, 2011), [http://assembly.state.ny.us/Press/20110106/\[Assembly Speaker Sheldon Silver\]](http://assembly.state.ny.us/Press/20110106/[Assembly%20Speaker%20Sheldon%20Silver]). Prior to becoming a Judge, Yates was an attorney for the Legal Aid Society. *Assembly Speaker Sheldon Silver*, *supra* note 142. He later quit that post in order to become Counsel to former Speaker of the Assembly Sheldon Silver. *Id.*

<sup>143</sup> THE LEGAL AID SOC'Y, *supra* note 1, at 7.

<sup>144</sup> See *id.* at 10.

<sup>145</sup> N.Y. STATE BAR ASS'N, *supra* note 7, at 2.

<sup>146</sup> *Id.* at 3; see THE LEGAL AID SOC'Y, *supra* note 1, at 1.

<sup>147</sup> N.Y. STATE BAR ASS'N, *supra* note 7, at 6.

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percent of federal convictions and ninety-four percent of state convictions” are pursuant to plea agreements.<sup>148</sup> Noting that the discovery statute has remained largely unchanged since 1979, they argue that this new situation calls for new discovery rules.<sup>149</sup>

But this argument evinces an ignorance of historical fact.<sup>150</sup> It is true that the American criminal justice system is largely reliant on pleas, but that development is hardly a recent one.<sup>151</sup> It was in 1928 that Raymond Moley’s groundbreaking study, *The Vanishing Jury*, first reported the guilty plea rates for felony convictions in cities across the country.<sup>152</sup> He found that even then the criminal justice system was dependent upon guilty pleas: in Detroit, 78% of felony convictions were by plea, in Chicago the number was 85%, and in Minneapolis it was 90%.<sup>153</sup> He also found that by 1926, 90% of felony convictions in Manhattan and Brooklyn were resolved by guilty pleas;<sup>154</sup> 85% of those pleas were to lesser crimes than originally charged.<sup>155</sup> A contemporary study by the New York State Crime Commission found that defendants pleading guilty received light sentences: suspended sentences were more than twice as likely for defendants who pled guilty.<sup>156</sup>

As early as 1936, New York Governor Herbert Lehman lamented the “abuse” of plea bargaining in a special message to the Legislature.<sup>157</sup> Governor Lehman illustrated his point with two populous counties. In one county during the last six months of 1934 there had been 1,378 felony convictions and 1,211 pleas—an 87.8% plea rate.<sup>158</sup> In the second county, in the first six months of 1935 the plea rate was 91.1%.<sup>159</sup> “It is generally admitted,” Governor Lehman

<sup>148</sup> *Id.* at 6–7, 6 n.14.

<sup>149</sup> *Id.* at 6–7.

<sup>150</sup> *Bryan v. United States*, 492 F.2d 775, 780 (5th Cir. 1974) (“Plea bargains have accompanied the whole history of this nation’s criminal jurisprudence.”); JAMES E. BOND, PLEA BARGAINING AND GUILTY PLEAS § 1.07[1] (1978) (“Plea bargaining . . . apparently originated in seventeenth century England as a means of mitigating unduly harsh punishment.”).

<sup>151</sup> Mary E. Vogel, *The Special Origins of Plea Bargaining: Conflict and the Law in the Process of State Formation, 1830–1860*, 33 LAW & SOC’Y REV. 161, 162–63 (1999) (“The significance of plea bargaining lies in the fact that, by the late 19th century, most cases in the criminal courts were being resolved through this process. Although the popular image is one of jury trials with a presumption of innocence, a very different process has anchored the American courts.”).

<sup>152</sup> Raymond Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97, 105 (1928).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*; see Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 18 (1979).

<sup>155</sup> Alschuler, *supra* note 154, at 28; see Moley, *supra* note 152, at 110–11.

<sup>156</sup> Albert W. Alschuler, *Plea Bargaining and its History*, in THE LAW & SOCIETY READER 138, 152 (Richard L. Abel ed., 1995); see THE CRIME COMM’N OF N.Y. STATE, REPORT TO THE COMMISSION OF THE SUB-COMMISSION ON STATISTICS 61 (1928).

<sup>157</sup> PUBLIC PAPERS OF HERBERT H. LEHMAN 113 (1940) [hereinafter LEHMAN]. Lehman was not the only critic of plea bargaining at the time. One commentator reported that “[t]he usual case is now decided, not by the court, but by the commonwealth’s attorney [who is] often young, often rather inexperienced.” HUGH N. FULLER, CRIMINAL JUSTICE IN VIRGINIA 155–56 (1931).

<sup>158</sup> LEHMAN, *supra* note 157, at 113.

<sup>159</sup> *Id.* In many such cases, crimes charged as assaults were pled to misdemeanors. Governor

reported, “that this practice is not confined to our larger jurisdictions but is carried on . . . throughout the state.”<sup>160</sup>

Things were no different in 1979, when the current discovery statute was enacted. That year, the overall statewide felony plea rate was 88.3%.<sup>161</sup> That number has remained relatively stable over time.<sup>162</sup> In 1991, the statewide felony plea rate was 84%.<sup>163</sup> In 2001, the number was 87%.<sup>164</sup> In 2012 and 2013, the statewide plea rate was 87.3% and 86.9%, respectively.<sup>165</sup>

The data shows that plea bargains have been the major source of convictions in New York for generations and that their prevalence has remained stable.<sup>166</sup> Plea bargaining was as common when Article 240 was revised in 1979 as it is today, a fact of life that the legislature was surely aware of when it designed the current discovery regime.<sup>167</sup> Its continued importance to the justice system does not now constitute a crisis requiring immediate action.

In sum, the claims of proponents that the criminal justice system is in crisis do not hold weight. By repeating that claim over and over again, proponents of reform have created a false sense of urgency regarding criminal discovery. That sense of urgency places undue pressure on the legislature to act, possibly before changes have been fully considered and vetted, and before all interested parties are able to make their case.

The legislative process works best when it is slow and deliberate.<sup>168</sup> Many needful changes to New York law are years in the making and go through multiple amendments before passage. On the other hand, the

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Lehman noted with contempt that in one of the counties 80.6% of burglaries were pled down to misdemeanors, and 73% of assault and grand larcenies cases were allowed to plea down as well. *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> See STATE OF N.Y., SECOND ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS 33, 35 (1980) [hereinafter SECOND ANNUAL REPORT]. In the Fourth Department, the plea rate was an astonishing 97.1%. *Id.*

<sup>162</sup> See STATE OF N.Y., FOURTEENTH ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS 20 (1992) [hereinafter FOURTEENTH ANNUAL REPORT]; SECOND ANNUAL REPORT, *supra* note 161, at 33, 35.

<sup>163</sup> FOURTEENTH ANNUAL REPORT, *supra* note 162, at 20.

<sup>164</sup> STATE OF N.Y., TWENTY-FOURTH ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS 14 (2001) [hereinafter TWENTY-FOURTH ANNUAL REPORT].

<sup>165</sup> See STATE OF N.Y., THIRTY-FIFTH ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS 23 (2012) [hereinafter THIRTY-FIFTH ANNUAL REPORT]; STATE OF N.Y., THIRTY-SIXTH ANNUAL REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS 24 (2013) [hereinafter THIRTY-SIXTH ANNUAL REPORT].

<sup>166</sup> See FOURTEENTH ANNUAL REPORT, *supra* note 162, at 20; SECOND ANNUAL REPORT, *supra* note 161, at 33, 35; THIRTY-FIFTH ANNUAL REPORT, *supra* note 165, at 23; THIRTY-SIXTH ANNUAL REPORT, *supra* note 165, at 24; TWENTY-FOURTH ANNUAL REPORT, *supra* note 164, at 14.

<sup>167</sup> See N.Y. STATE BAR ASS'N, *supra* note 7, at 2; SECOND ANNUAL REPORT, *supra* note 161, at 33, 35; THIRTY-SIXTH ANNUAL REPORT, *supra* note 165, at 24.

<sup>168</sup> See Rogan T. Kersh, *Interest-Group Lobbying in New York State*, in GOVERNING NEW YORK STATE 93, 105, 106–07 (Robert F. Pecorella & Jeffrey M. Stonecash eds., 5th ed. 2006).

legislature does not do its best work when it is rushed.<sup>169</sup> Practitioners, commentators, and the legislature should be careful to accept at face value the hyperbolic warnings of proponents of discovery reform, lest they rush in to changes without carefully considering all relevant arguments.

*B. Retreading Old Ground: The Core Arguments for Reform*

Each of the three leading reports relied on the same basic arguments to support the crusade for expanded discovery.

First, they argued that expanding discovery would result in an efficient and streamlined plea bargain process. As the Legal Aid Society put it, expanded discovery would result in “speedy and fair” resolution of cases by providing the accused with “sufficient information to make an informed plea.”<sup>170</sup> Similarly, the Justice Task Force majority argued that expanding discovery will “encourage early resolutions” of cases.<sup>171</sup> The authors of the NYSBA report echo that expanded discovery will “allow prompt and properly informed decisions on guilty pleas.”<sup>172</sup> On their account, greater access to information during the plea-bargaining stage “encourages guilty people to plead guilty earlier in the proceedings by showing them the evidence against them.”<sup>173</sup> The NYSBA Task Force majority opined that earlier

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<sup>169</sup> See, e.g., Thomas Kaplan, *Sweeping Limits on Guns Become Law in New York*, N.Y. TIMES (July 1, 2013), [http://www.nytimes.com/2013/01/16/nyregion/tougher-gun-law-in-new-york.html?\\_r=0](http://www.nytimes.com/2013/01/16/nyregion/tougher-gun-law-in-new-york.html?_r=0) (discussing one such example, the controversial SAFE Act, a law that passed in the middle of the night on the first day on the legislative session in 2013). The SAFE Act legislation was drafted in a matter of hours, and is notoriously poorly written. See Rick Karlin, *A SAFE Move Out of the State: Swiftiness of Gun Control Act Rattles Company*, TIMES UNION (July 1, 2013), <http://www.timesunion.com/local/article/A-SAFE-move-out-of-the-state-4641781.php>. As initially drafted, the legislation appeared to criminalize both prop guns used by the film industry and weapons carried by police officers in the course of their duties, and it contained a seven-round magazine limit—even though no companies produced seven round magazines. See Margaret Hartmann, *Cuomo Acknowledges Seven-Round Magazines Don't Exist, Loosens Gun Law*, N.Y. MAGAZINE (Mar. 21, 2013), <http://nymag.com/daily/intelligencer/2013/03/cuomo-discovers-7-round-magazines-dont-exist.html>; Tony Maglio, *Whoops: New York's Gun Law Omits Hollywood Exception*, WRAP (Apr. 3, 2013), <http://www.thewrap.com/why-new-yorks-new-gun-control-laws-are-causing-headaches-hollywood-83676/>; Will Rahn, *Cuomo's New Gun Law Does Not Exempt New York Cops, Could Prevent Police from Responding to School Shootings*, DAILY CALLER (Jan. 17, 2013), <http://dailycaller.com/2013/01/17/cuomos-new-gun-law-does-not-exempt-new-york-cops-could-prevent-police-from-responding-to-school-shootings/>. Another example is the Making a Terroristic Threat Statute, Penal Law § 490.20. Making a Terrorist Threat, N.Y. PENAL LAW § 490.20 (McKinney 2016). Passed only six days after the attacks of September 11, 2001, courts have struggled to square its extremely broad language with the legislature's apparent intent. See, e.g., *People v. Morales*, 982 N.E.2d 580, 582, 585, 586 (N.Y. 2012) (demonstrating the difficulty courts have had in determining what the statute meant).

<sup>170</sup> THE LEGAL AID SOC'Y, *supra* note 1, at 8.

<sup>171</sup> JTF MAJORITY, *supra* note 4, at 3.

<sup>172</sup> N.Y. STATE BAR ASS'N, *supra* note 7, at 1. Elsewhere, the NYSBA majority argues that the current discovery regime “blocks defendants, some of them innocent or over-charged, from . . . making informed decisions about plea offers.” *Id.* at 3–4.

<sup>173</sup> *Id.* at 4.

discovery would force the prosecutor to review his evidence early in a case, resulting in “more appropriate and better-informed plea offers.”<sup>174</sup> The result, the Legal Aid Society argues, is that “justice will be better served.”<sup>175</sup>

Second, and interrelated, proponents argued (with no apparent irony) that expanded discovery will benefit prosecutors in several ways. As a corollary to the first argument, the Justice Task Force majority argued that reform will benefit “the entire criminal justice system,” since faster pleas will “conserve prosecutorial resources.”<sup>176</sup> According to the Legal Aid Society, this will free up prosecutors to carry a larger case load.<sup>177</sup> There would be other benefits to prosecutors, on their account. Expanding discovery would “simplify[] prosecutors’ jobs” by eliminating the need for prosecutors to determine what should and should not be turned over in discovery.<sup>178</sup>

Third, the proponents of reform argued that expanded and earlier discovery would aid the truth-finding process of the criminal justice system by eliminating “surprise” and “gamesmanship.”<sup>179</sup> Earlier discovery allows the defendant to prepare for the “unfair surprise” of—for example—being questioned about his prior criminal convictions.<sup>180</sup> Surprise evidence, they argue, can “readily produce unreliable verdicts and wrongful convictions.”<sup>181</sup> Eliminating what they decry as “trial by ambush” must inevitably aid the search for truth at trial.<sup>182</sup>

Finally, proponents argued that expanding the scope of discovery will allow defense attorneys to better prepare for trial.<sup>183</sup> According to the NYSBA majority, under current New York law discoverable material is turned over “too late for the defense to use it.”<sup>184</sup> The Legal Aid Society similarly urged that its reform proposals were necessary in order to allow the defense counsel to “intelligently investigate the case [and] prepare for trial.”<sup>185</sup> According to the Justice Task Force majority, “earlier and more robust discovery” will enable defense counsel to better prepare and thereby serve as “effective bulwarks against wrongful convictions.”<sup>186</sup> And the NYSBA majority claims that the names and addresses of potential witnesses are an “often essential” piece of

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<sup>174</sup> *Id.*

<sup>175</sup> THE LEGAL AID SOC’Y, *supra* note 1, at 11.

<sup>176</sup> JTF MAJORITY, *supra* note 4, at 3.

<sup>177</sup> THE LEGAL AID SOC’Y, *supra* note 1, at 8.

<sup>178</sup> *Id.* at 10.

<sup>179</sup> *Id.* at 11, 40.

<sup>180</sup> N.Y. STATE BAR ASS’N, *supra* note 7, at 41.

<sup>181</sup> *Id.* at 5.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 2.

<sup>184</sup> *Id.* at 4.

<sup>185</sup> THE LEGAL AID SOC’Y, *supra* note 1, at 4.

<sup>186</sup> JTF MAJORITY, *supra* note 4, at 3.

evidence.<sup>187</sup> Proponents make these claims against what they described as a backdrop of “drastically limited resources” of court-appointed counsel, which they argue are wasted by the spectacle of concurrent investigations.<sup>188</sup> Prosecutors’ offices, meanwhile, are able to “quickly dispatch investigators” to interview potential defense witnesses.<sup>189</sup>

These four basic arguments for expanded discovery reform are precisely the same arguments identified in the 1960s by reformers like Justices Traynor and Brennan. And while each argument has a certain surface appeal, we should be careful about accepting them uncritically.

The first argument, that early discovery will result in faster plea bargains by confronting defendants with the evidence against them, is one that, at first blush, makes some sense. The idea is that when the defendant sees the strength of the evidence he will realize the jig is up and take a plea bargain. Repeated throughout the system, that should lead to faster pleas and lower caseloads. This is thought to be a principle benefit of early, open file discovery.

But experience does not necessarily bear that claim out. The Bronx District Attorney’s Office, for example, adheres to a liberal and expedited open discovery policy.<sup>190</sup> Nevertheless, the New York Times reported that in January 2013, over 950 pending felony cases on the Bronx court docket were over two years old, out of a total of 4,755 cases—just over twenty percent of all cases.<sup>191</sup> In New York County, on the other hand, the District Attorney strictly adheres to current Article 240 discovery rules,<sup>192</sup> and yet in the same time period New York County courts had very few cases over two years old on the docket.<sup>193</sup> That is not to say that open file discovery led to that delay; it is merely to suggest that open discovery may not be the panacea that proponents claim it is. Anecdotal evidence from New York City’s experience suggests that the speed with which a case is resolved is largely independent of when discovery is handed over.<sup>194</sup>

Putting speed of conviction to one side, in many circumstances we can readily imagine that quick open file discovery will lead to less just

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<sup>187</sup> N.Y. STATE BAR ASS’N, *supra* note 7, at 10.

<sup>188</sup> *Id.* at 12.

<sup>189</sup> *Id.* at 11.

<sup>190</sup> Connie Solimeo, *An Analysis of the Impact of Discovery Rules on Dispositions in Criminal Cases*, JUST. ACTION CTR. STUDENT CAPSTONE J., 2007, at 14.

<sup>191</sup> See James C. McKinley, Jr., *Bronx Courts Make Gains in Reducing Case Backlog*, N.Y. TIMES (Dec. 11, 2013), <http://www.nytimes.com/2013/12/12/nyregion/bronx-courts-make-gains-in-reducing-case-backlog.html>. By November 2013 that percentage had dropped precipitously after a massive effort by OCA. See *id.* Even then, 10% of the docket was made up of cases over two years old. *Id.*

<sup>192</sup> Solimeo, *supra* note 190, at 14.

<sup>193</sup> See William Glaberson, *Faltering Courts, Mired in Delays*, N.Y. TIMES (Apr. 13, 2013), <http://www.nytimes.com/2013/04/14/nyregion/justice-denied-bronx-court-system-mired-in-delays.html?pagewanted=all>.

<sup>194</sup> See *supra* notes 190–93 and accompanying text.

results. Imagine, for instance, a rape case where the defendant is in fact guilty of the rape. After reviewing the prosecutor's file the defendant may realize that the prosecutor is having trouble getting the victim or a key witness to testify. The defendant may conclude that proceeding to trial is less risky than he anticipated. He could then leverage the information he learned to force a lesser plea bargain.<sup>195</sup> Or, steeled by the information, he might resolve to go to trial<sup>196</sup>—and win because the prosecutor is unable to prove his guilt. In either case, we would be hard-pressed to find a member of the general public who finds either outcome just.

But proponents of discovery reform—largely members of the defense bar—do believe that this constitutes a better outcome. This is what they mean when they write that defendants who know more about the prosecutor's case are better able to “decide whether to plea bargain or proceed to trial,”<sup>197</sup> and that an “informed plea” makes possible “speedy and *fair*” resolutions.<sup>198</sup>

The fundamental problem is that they view the plea bargaining process through the lens of game theory and from the perspective of the defendant.<sup>199</sup> Following the dominant theoretical model of plea-bargaining, the proponents of reform appear to assume that once defendants are charged with a crime they will act rationally in plea negotiations.<sup>200</sup> This theory assumes that plea bargain negotiations take place in the “shadow” of a possible trial.<sup>201</sup> Both defense and prosecutor try to forecast the probability of a trial conviction and the anticipated sentence after it, then discount the expected value by the resources necessary to take the case to trial.<sup>202</sup> Other factors that impact the final bargain include the risk aversion of the actors, agency

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<sup>195</sup> Or—most troublingly—he might realize that even very subtle intimidation of the witness will suffice to assure his acquittal.

<sup>196</sup> See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 31 (1966) (“[A]t every stage of this informal process of pre-trial dispositions . . . decisions are in part informed by expectations of what the jury will do.”); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *HARV. L. REV.* 2463, 2464 (2004) (“The conventional wisdom is that litigants bargain toward settlement in the shadow of expected trial outcomes. In this model, rational parties forecast the expected trial outcome and strike bargains that leave both sides better off by splitting the saved costs of trial.”).

<sup>197</sup> *THE LEGAL AID SOC'Y*, *supra* note 1, at 6 (internal quotation omitted).

<sup>198</sup> *Id.* at 8 (emphasis added) (internal quotation omitted).

<sup>199</sup> See H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 *CATH. U. L. REV.* 63, 67–68 (2011). “Game theory, an analytical tool often used in the field of economics to analyze the motivations of individual actors in various situations, may help elucidate the delicate intricacies of plea . . . bargaining.” *Id.*

<sup>200</sup> See Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 *WASH. & LEE L. REV.* 73, 77 (2009).

<sup>201</sup> Bibas, *supra* note 196, at 2466 (“By and large, though, scholars view the shadow of trial as the overwhelming determinant of plea bargaining.”).

<sup>202</sup> See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1937 (1992) (“That estimate [of the likelihood of conviction] will determine the price that each will insist on as a condition of reaching a bargain.”).

costs, discount rates,<sup>203</sup> and the judge's independent weighing of all the factors.<sup>204</sup> By far, the most important factor for the prosecutor in making an offer is the strength of his case.<sup>205</sup> Since the prosecutor's main benefit from a plea bargain is that he preserves scarce resources, he will typically offer the deepest discount to the defendant early in the process, before he must perform the substantial work of gathering and turning over discovery.<sup>206</sup> As the case proceeds closer to trial, the prosecutor preserves fewer resources and therefore offers a lesser discount to the defendant.<sup>207</sup>

This model makes a great deal of sense as applied to defendants who are, in fact, guilty. Guilty defendants know that they are guilty, and are therefore wisely inclined to hedge their bets by playing the game of "Let's Make a Deal" that plea bargaining represents. Acting rationally, guilty defendants weigh the chance of conviction after trial and the likely sentence, and they will take a plea offer if the offered sentence is adequately discounted below the expected value of the sentence if they proceeded to trial.<sup>208</sup> Since a defendant does not actually plead with a slide rule in hand,<sup>209</sup> the discount must be substantial enough that it is obvious.<sup>210</sup>

Whether the defense and the prosecution are able to come to an agreeable plea bargain is largely dependent upon whether or not they view the probability of conviction similarly. If a defendant thinks the probability of conviction is low, say 20%, and the prosecutor thinks it is 80%, the defense and the prosecution are unlikely to make a deal.<sup>211</sup> When the parties are relying on similar information, we should expect that their weighing of the probabilities (and thus of what a fair offer is)

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<sup>203</sup> See Covey, *supra* note 200, at 78. As to risk aversion, a discussion of the difference in decision making between a defendant adhering to a minimax principle and a maximax principle is found in the work of Stuart Nagel and Marian Neef. See Stuart S. Nagel & Marian Neef, *Plea Bargaining, Decision Theory, and Equilibrium Models: Part I*, 51 IND. L.J. 987, 1006–07 (1976).

<sup>204</sup> MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 147, 199 (1978).

<sup>205</sup> Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 58 (1968) ("The overwhelming majority of prosecutors view the strength or weakness of the state's case as the most important factor in the task of bargaining."); Welsh S. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 451 (1971) ("New York prosecutors often reduce their sentence recommendations by at least fifty percent if they believe that there is a fifty percent chance of a hung jury, and by a great deal more if they believe that there is a fifty percent chance of acquittal.").

<sup>206</sup> See White, *supra* note 205, at 440, 449, 465.

<sup>207</sup> See *id.*

<sup>208</sup> Bibas, *supra* note 196, at 2487 n.97; Caldwell, *supra* note 199, at 70; Oren Gazal-Ayal & Avishalom Tor, *The Innocence Effect*, 62 DUKE L.J. 339, 342 (2012).

<sup>209</sup> See Nagel & Neef, *supra* note 203, at 1009.

<sup>210</sup> See, e.g., Jeffrey T. Ulmer & Mindy S. Bradley, *Variations in Trial Penalties among Serious Offenders*, 44 CRIMINOLOGY 631, 652 (2006) (finding that Pennsylvania defendants who went to trial received sentences 57% longer than those who plead guilty). Indeed, the discount typically is quite significant. *Id.*

<sup>211</sup> See Bibas, *supra* note 196, at 2499 ("If one side overestimates the chances of winning at trial, it is likely to . . . reject reasonable offers.").

will be similar.<sup>212</sup> But at the early stages of the case, before discovery, both parties' weighing of the probabilities will be influenced by significant informational disparities, which may present as both informational advantages and disadvantages.<sup>213</sup> The prosecutor obviously knows the extent of his evidence against the defendant, something the defendant does not know at that point, at least in the absence of informal discovery. The defendant knows whether or not he is in fact guilty; he knows what the universe of potential evidence against him is and is able to forecast what future evidentiary developments might be.<sup>214</sup> The defendant also knows any potential defenses he might employ.<sup>215</sup>

At this early stage, the prosecutor probably has an informational advantage over the defendant, in that he can more accurately gauge what the probability of conviction at trial will be. A guilty defendant, although he has better knowledge of the specifics of his crime, may overestimate what evidence the prosecutor has and therefore overestimate the chance of his conviction.<sup>216</sup> In that situation a defendant may be induced to plead guilty when he otherwise would not, or to take a higher plea than if he knew everything in the prosecutor's file.<sup>217</sup> Moreover, at this stage a defendant may be induced to take a somewhat higher offer "based on bluffing, puffery, fear, and doubt."<sup>218</sup>

There is reason to believe that as the case progresses closer to trial the informational advantage of the prosecutor disappears. As with any market system, as the actors move closer to perfect information, outcomes will become more in line with what theory predicts.<sup>219</sup> Economists term those outcomes as "efficient," "optimal," or in

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<sup>212</sup> See Nagel & Neef, *supra* note 203, at 1012.

<sup>213</sup> See Bibas, *supra* note 196, at 2494–95. Despite this, unless the parties are far off in their estimates, they will likely still reach a deal. Gazal-Ayal & Tor, *supra* note 208, at 366.

<sup>214</sup> See Covey, *supra* note 200, at 77. Generally speaking, guilty defendants know that any additional evidence is likely to inculpate them, while innocent defendants know that it is likely to exculpate them. See *id.* at 77, 107–08; Bibas, *supra* note 196, at 2494.

<sup>215</sup> See Bibas, *supra* note 196, at 2531, 2532.

<sup>216</sup> *Id.* at 2495.

<sup>217</sup> Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1125–26 (1998).

<sup>218</sup> See Bibas, *supra* note 196, at 2495.

<sup>219</sup> See Covey, *supra* note 200, at 91; Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 308, 309 (1983) (arguing that plea-bargaining is desirable as a mechanism for setting the market price of crime); Zacharias, *supra* note 217, at 1131–32.

[T]he plea bargaining process is like an old-fashioned marketplace where . . . the potential buyer and potential seller haggle over the price. . . . The buyer knows the maximum price which he is willing to pay, but the buyer tries to convince the seller that his limit is much lower than it is. Likewise, the seller knows the minimum price which he is willing to accept, but the seller tries to make the buyer think that his limit is much higher than it is. If the buyer-defendant's upper limit and the seller-prosecutor's lower limit can be determined, a more realistic assessment may be made about whether and at what point an equilibrium price will be reached.

Nagel & Neef, *supra* note 203, at 1000–01.

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“equilibrium,” in the sense that parties with perfect information should strike the bargain that the market will bear.<sup>220</sup> By the time full discovery is made, both parties have a much better picture of the probability of conviction at trial and should in theory choose a more “optimal” result.<sup>221</sup>

But it should be clear in the plea bargaining context that such a result is not necessarily the most desirable or just result. After all, economic efficiency can hardly be equated with substantive justice. Ideally, a system of justice should ensure that “guilt shall not escape or innocence suffer,”<sup>222</sup> and sentences should reflect just desert, culpability, and the need for punishment and deterrence.<sup>223</sup> The very act of plea bargaining is a concession to the reality that prosecutorial and judicial resources are scarce and must be utilized to maximize their impact.<sup>224</sup> Guilty defendants are given a discount from what the prosecutor believes the most just result should be based on that concession.

Reform proponents argue that pre-trial discovery should be changed to pre-plea discovery, reducing the information gap between the parties—which they suggest results in more just pleas. Functionally, the result of such a change would be to help guilty defendants evaluate “the strength of the prosecution’s case, and therefore how likely it is that [they] can ‘beat’ the charges despite [their] guilt.”<sup>225</sup> To the extent that earlier discovery would encourage more factually guilty defendants to go to trial and win based on their better understanding of the prosecutor’s case, it certainly does not serve the interests of justice. Similarly, earlier discovery will give some guilty defendants leverage to force deeper discounts from prosecutors; one’s opinion regarding whether or not that serves the interest of justice will depend on one’s particular ideological bent.

Proponents also argue that pre-trial discovery also helps *innocent* defendants, “who must make rational decisions about plea offers” based

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<sup>220</sup> Nagel & Neef, *supra* note 203, at 1000 (discussing “optimum” plea strategy and “equilibrium point”); see Bibas, *supra* note 196, at 2506 n.177 (discussing pleas sold on an “efficient market”).

<sup>221</sup> But this does not necessarily benefit the defendant. Even if the case winds up being somewhat weaker than the defendant initially imagined, the discount given by the prosecutor will be less, since the prosecutor has expended resources in giving discovery. Depending on the details, the result may be a wash for the defendant.

<sup>222</sup> See *Berger v. United States*, 295 U.S. 78, 88 (1935); see also Caldwell, *supra* note 199, at 67 (stating the goal of the criminal justice system is to convict only those who are guilty).

<sup>223</sup> Bibas, *supra* note 196, at 2470, 2528; see also F. Andrew Hessick III & Reshma Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 *BYU J. PUB. L.* 189, 194 (2002) (stating a prosecutor must examine the adequacy of a punishment).

<sup>224</sup> Zacharias, *supra* note 217, at 1138, 1138 n.49–52.

<sup>225</sup> N.Y. STATE BAR ASS’N, *supra* note 7, at 101–02.

on the prosecutor's case.<sup>226</sup> In making this argument, the proponents follow the traditional shadow of a trial model of plea bargaining, which predicts that factually innocent defendants will act similarly to factually guilty defendants.<sup>227</sup> For an actually innocent person accused of a crime, the risk of going to trial will often outweigh the cost of accepting a lenient bargain.<sup>228</sup> Since the defendant's personal knowledge of his innocence is irrelevant at trial,<sup>229</sup> game theory suggests that the best, most rational strategy for an innocent defendant who *appears* to be guilty<sup>230</sup> will be to minimize his exposure.<sup>231</sup> That has caused some scholars to assume that innocent defendants actually act in that way.

Common sense has caused many to question that assumption.<sup>232</sup> And a substantial and growing body of empirical research suggests that this is uncommon.<sup>233</sup> Psychologically, innocent defendants may be systematically overly optimistic about the probability of acquittal, based on the mistaken belief that the jury will believe them because they are telling the truth.<sup>234</sup> Research suggests that people tend to overestimate the ability of others to discern their inner thoughts and feelings, as well

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<sup>226</sup> *Id.* at 127.

<sup>227</sup> Covey, *supra* note 200, at 74; see Gazal-Ayal & Tor, *supra* note 208, at 342–43.

<sup>228</sup> Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1137 (2008). See also Russell D. Covey, *Longitudinal Guilt: Repeat Offenders, Plea Bargaining, and the Variable Standard of Proof*, 63 FLA. L. REV. 431, 450 (2011) (“When the deal is good enough, it is rational to refuse to roll the dice, regardless of whether one believes the evidence establishes guilt beyond a reasonable doubt, and regardless of whether one is factually innocent.”).

<sup>229</sup> Covey, *supra* note 200, at 75 (“Under standard assumptions, private information about guilt and innocence is irrelevant to plea bargaining outcomes.”).

<sup>230</sup> Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1970 (1992). As Judge Easterbrook properly observes, “[i]nnocent persons are accused not because prosecutors are wicked but because these innocents *appear* to be guilty.” *Id.*

<sup>231</sup> See Covey, *supra* note 200, at 75; Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 YALE L.J. 2011, 2012 (1992) (“[It is likely that] innocent defendants as a class are significantly more risk averse than guilty defendants as a class, [so] a prosecutor’s failure to internalize a defendant’s private information will cost the prosecutor nothing because the defendant, even if innocent, will take the deal anyway.”).

<sup>232</sup> *Newton v. Rumery*, 480 U.S. 386, 409 (1987) (Stevens, J., dissenting) (“Although there may be some cases in which an innocent person pleads guilty to a minor offense to avoid the risk of conviction on a more serious charge, it is reasonable to presume that such cases are rare and represent the exception rather than the rule.” (citing FED. R. CRIM. P. 11(f))).

<sup>233</sup> See Gazal-Ayal & Tor, *supra* note 208, at 352. As one detailed study concluded:

The categorized data revealed that only 37 of the 466 exonerated defendants, or 7.9 percent, were convicted following a guilty plea. The remaining 92.1 percent were convicted by an erroneous jury decision at trial. This 7.9 percent rate stands in sharp contrast to the common rate of guilty pleas in comparable felony cases during the same period, which was approximately 90 percent.

*Id.* Only 5.6% of those exonerated of sexual assault pled guilty. *Id.* at 353. Interestingly, most of the exonerations of those who pled guilty occurred in the face of a false confession to the police or out of fear of the death penalty. *Id.* In New York, where the courts robustly review the voluntariness of confessions, and where the death penalty is not active, those effects are surely lessened. See *People v. Thomas*, 8 N.E.3d 308, 313–14 (N.Y. 2014); *People v. LaValle*, 817 N.E.2d 341, 367 (N.Y. 2004).

<sup>234</sup> Gazal-Ayal & Tor, *supra* note 208, at 370, 371.

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as their ability to determine whether they are lying or telling the truth—a phenomenon known as the “illusion of transparency.”<sup>235</sup> Another non-rational reason cited for an innocent defendant’s refusal to plead guilty is the common belief in a “just world,” in which the innocent will eventually be acquitted.<sup>236</sup>

If all this is correct, the effect of pre-plea discovery will be to make guilty defendants better off (by eliminating bluffing and better allowing them to calculate their risks at trial) while making innocent defendants worse off (or at least more likely to erroneously plead guilty).<sup>237</sup> Informing guilty defendants of the weakness of the prosecutor’s case early on could result in more lenient deals based not on their factual guilt, but on procedural weaknesses in the prosecutor’s case that otherwise would not be known to them. At the same time, innocents will not see the same benefits as the guilty, since innocents disproportionately choose to go to trial.<sup>238</sup> Innocents who go to trial and are convicted will be perversely worse-off, since the disparity between their sentence and the sentence of a guilty man who pled guilty will grow.<sup>239</sup> To the extent that pre-plea discovery might induce some innocents to plead who otherwise would not,<sup>240</sup> those innocent defendants will be treated less favorably under New York law if they try to prove their innocence after the plea.<sup>241</sup> Those results do not serve the interest of justice, since they do not enhance the process of sorting the guilty from the innocent. Ultimately, expanded pre-trial discovery may actually make the plea-bargaining system in New York less efficient, less fair, and less just.

Proponents next argue that earlier discovery will benefit prosecutors. They reason that faster pleas will “conserve prosecutorial resources,”<sup>242</sup> “simplify[] prosecutors’ jobs,”<sup>243</sup> and free up prosecutors to carry a larger case load.<sup>244</sup> It is a wonder that prosecutors are not clamoring for change! Perhaps that is because prosecutors perceive that it would not have the productive effects proponents predict. Early,

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<sup>235</sup> *Id.* at 369, 370. Interestingly, the same phenomenon means that guilty individuals are likely to overestimate the ability of the jury to ferret out their guilt; this may cause a guilty defendant to overestimate the probability of conviction, putting increased pressure on him to accept a favorable plea offer. *See id.* at 370, 371.

<sup>236</sup> *See id.* at 370–71.

<sup>237</sup> *See* Covey, *supra* note 200, at 91. Expanded criminal discovery would “increase both the number of guilty defendants who hold out for trial and the number of innocent defendants who enter guilty pleas.” *Id.*

<sup>238</sup> Gazal-Ayal & Tor, *supra* note 208, at 347–48.

<sup>239</sup> *Id.* at 383–84.

<sup>240</sup> Covey, *supra* note 200, at 90.

<sup>241</sup> *See* N.Y. CRIM. PROC. LAW § 440.30(1-a)(a)(1), (2) (McKinney 2016) (treating defendants seeking DNA testing to prove their innocence differently based on whether that defendant pled guilty or was convicted after trial).

<sup>242</sup> JTF MAJORITY, *supra* note 4, at 3.

<sup>243</sup> THE LEGAL AID SOC’Y, *supra* note 1, at 10.

<sup>244</sup> *Id.* at 8.

expanded discovery, may “simplify” the prosecutor’s job at some level of abstraction, but it will not conserve prosecutorial resources—it will have the opposite effect. Under the current regime, many defendants plead guilty before any discovery has been turned over or after a small amount of informal discovery.<sup>245</sup> Mandatory discovery will require work in each of those cases. Prosecutors will have to hand over more discovery than they do right now, while scrambling to comply with the unrealistically fast fifteen-day discovery deadline.

Early discovery will also cause, on average, higher sentences overall. Prosecutors discount their plea bargain offers based on the amount of work they have saved.<sup>246</sup> If they are forced to hand over discovery in virtually every case, they will have saved far less work, undermining the key justification for plea bargaining. We can therefore expect that if every case requires more work, then every plea bargain will be concomitantly higher, making defendants on average worse off.<sup>247</sup>

And, as we have already seen, higher plea bargain offers and having a better idea of the evidence against them will increase the number of guilty defendants who hold out for a trial.<sup>248</sup> Trials are time-consuming, difficult, expensive, and uncertain affairs.<sup>249</sup> Even a handful more trials will mean a huge increase in the workload of prosecutors, meaning they will be able to handle fewer cases, and likely not as well.<sup>250</sup> Surely this is not in the interests of justice.

The third major argument of the proponents is that earlier and expanded discovery is needed to eliminate “surprise” and “gamesmanship” from the trial process. They argue that the current system is akin to “trial by ambush,”<sup>251</sup> as if New York were stuck in some sort of time warp.<sup>252</sup> If that were an accurate description of the criminal justice system in New York, it would scarcely be worth the name. Happily, it is not so. Although proponents routinely make those hyperbolic pronouncements, their own reports fall far short of making that case. Indeed, as prosecutors have pointed out, New York’s criminal justice system is exceptionally progressive, affording defendants numerous protections that other states do not.<sup>253</sup> And New

<sup>245</sup> See Covey, *supra* note 200, at 88–89.

<sup>246</sup> See Bowers, *supra* note 228, at 1122–23.

<sup>247</sup> See *id.* Notably, both the guilty and the innocent defendants will be given a higher plea offer than they otherwise would have been given—for those who worry that innocent defendants often plead guilty, this will simply make innocent defendants worse off. See *id.*

<sup>248</sup> See *supra* note 225 and accompanying text.

<sup>249</sup> Fox, *supra* note 88, at 439.

<sup>250</sup> *Id.* at 439–40.

<sup>251</sup> N.Y. STATE BAR ASS’N, *supra* note 7, at 5.

<sup>252</sup> *Id.* This was much the situation at common law. To compare New York’s robust discovery system under CPL 240.20 to the common law no-discovery rule is silly.

<sup>253</sup> See *id.* at 79. As the NYSBA dissenters note:

In contrast to New York, 43 states and the federal system allow longer than 144

York's regime is certainly not out of step with the nation. Only about a third of states have open discovery; most states and the federal government still require discovery demands.<sup>254</sup>

The fourth basic argument of proponents of reform is that expanded and earlier discovery will allow defense attorneys to “intelligently investigate the case [and] prepare for trial,”<sup>255</sup> in light of their “drastically limited resources.”<sup>256</sup> It seems unlikely that discovery as early as proponents call for would actually help the defense prepare better. If defense attorneys are really operating under drastically limited resources, it stands to reason that they will not start preparing for trial in earnest until relatively close to trial, when it becomes clear that the defendant will not take a plea. That suggests that there are diminishing marginal returns to the utility of earlier discovery.<sup>257</sup> The same is true for expanded discovery. Generally, more discoverable material would be expected to help the defense prepare for trial. But it would also drastically increase the amount of irrelevant information a defense attorney would have to sift through, since the prosecutor will have to turn over not only information he intends to use at trial but also information he does not, a large portion of which is likely to have no evidentiary value. Overburdened defense attorneys, with their “drastically limited resources” will have a tougher job than ever under open discovery, since they will have more to investigate and (functionally) not more time to do it. Although it would not much help defense attorneys, it would inconvenience prosecutors, who would have to rush to produce large amounts of discovery and then watch as the defense sat on the information. And, to the extent that expanded

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hours for probable cause determinations regarding felony defendants in custody; 32 states and the federal system allow hearsay or partial hearsay at probable cause hearings or grand jury proceedings; 49 states and the federal system do not provide automatic transactional immunity to witnesses in the grand jury; in 42 states and the federal system the right to counsel attaches only at arraignment, co-extensive with the Sixth Amendment; 33 states and the federal system do not allow challenges to the evidentiary sufficiency of an indictment; 31 states and the federal system require the prosecution's consent for a non-jury trial; 37 states and the federal system have time limits for post-conviction relief motions; 27 states allow for a state prosecution following a federal prosecution where jeopardy attaches, as does the federal system following a state prosecution; 46 states and the federal system adhere to the *Strickland* rule for ineffective assistance of counsel; 43 states and the federal system adhere to the *Bagley* materiality standard in deciding *Brady* cases; 32 states and the federal system have no accomplice corroboration requirement; and New York is the only jurisdiction in the country, state or federal, that does not permit evidence of photographic identifications at trial, in effect requiring that convictions be supported by corporeal identifications.

*Id.* at 77 n.133.

<sup>254</sup> See THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW 8 (2007).

<sup>255</sup> THE LEGAL AID SOC'Y, *supra* note 1, at 4.

<sup>256</sup> See N.Y. STATE BAR ASS'N, *supra* note 7, at 10–11, 11–12.

<sup>257</sup> For instance, discovery thirty days before trial is likely to be much more useful than discovery three days before trial. But discovery one hundred days before trial will not be more useful than thirty days before, since the defense is unlikely to investigate so early.

discovery would result in more trials, it would also serve as a major inconvenience to defense attorneys, who would have to dedicate more resources to trials and even fewer resources to other clients.

As we have seen, proponents of discovery reform use four basic arguments in support of their proposals. Each of these four basic arguments has some force. Indeed, it was these arguments that ultimately won the day in the debate over whether to afford defendants discovery at all. Whether those arguments now justify expanding discovery further depends on whether expansion will have the beneficial effects that proponents argue it will, and if it will serve the ends of justice. Above I have endeavored to show that, in fact, the reforms proponents advocate for will not make the system more efficient, more fair, or more predictable. Nor will they serve to punish the guilty and let the innocent go free. In short, the proposed reforms will not serve the interests of justice.

### C. *Open File Discovery as a Cure for Brady Violations*

To the traditional four arguments, the modern proponents of discovery reform in New York add a fifth: that open-file discovery as they envision it will stop *Brady* violations. The theory is that if all information is discoverable, prosecutors will not be able to hide behind the materiality component of *Brady* in choosing to withhold information.<sup>258</sup> On their account, *Brady* violations are rampant. The Justice Task Force majority, for instance, refers to “inconsistent application by prosecutors of the requirement for disclosure of exculpatory evidence pursuant to *Brady v. Maryland*.”<sup>259</sup> The NYSBA majority quotes Chief Judge Kozinski of the Ninth Circuit Court of Appeals (in the dissent) for the proposition that “*Brady* violations have reached epidemic proportions in recent years.”<sup>260</sup>

While it is a sad fact that some prosecutors have sometimes concealed *Brady* material, it seems likely that critics tend to “exaggerate the prevalence and seriousness of prosecutorial misconduct.”<sup>261</sup> Proponents of reform are able to provide precious little evidence of rampant misconduct, citing a handful of reversals and

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<sup>258</sup> JTF MAJORITY, *supra* note 4, at 2–3; THE LEGAL AID SOC’Y, *supra* note 1, at 55 & n.77; N.Y. STATE BAR ASS’N, *supra* note 7, at 23.

<sup>259</sup> JTF MAJORITY, *supra* note 4, at 2.

<sup>260</sup> N.Y. STATE BAR ASS’N, *supra* note 7, at 51 & n.103.

<sup>261</sup> See Angela J. Davis, *Lawyering at the Edge: Unpopular Clients, Difficult Cases, Zealous Advocates: The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 277 (2007) (“Although there is no dispute that prosecutorial misconduct exists, there is considerable disagreement about whether it is a widespread problem.”); Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 70 (1995).

anecdotal opinions.<sup>262</sup> They also point to the fact that there are few disciplinary actions for prosecutorial misconduct as evidence of its pervasiveness—a strange bit of logic indeed.<sup>263</sup> Of course, the nature of a successful *Brady* violation is that it probably will never come to light.<sup>264</sup> Thus, the defense bar is left with a vague sense that *Brady* violations are common but have no way to prove it.<sup>265</sup> Proponents of discovery reform may share that sense, but in truth the reforms they propose are merely chasing shadows.

Even if *Brady* violations are as pervasive a problem as discovery reform proponents would have the public believe, the changes they propose are unlikely to solve the problem. To begin with, in cases disposed of by plea bargains (i.e., the vast majority of cases), failure to disclose exculpatory information is not a *Brady* violation, since *Brady* only requires disclosure for trial purposes.<sup>266</sup> In that sense, the proposal to move discovery reform up will not curb *Brady* violations, since there are none to curb, it will simply expand the prosecutor's duty well beyond *Brady*.

Open file discovery will also not curb *Brady* violations for those cases that go to trial. As commentators have noted, even if the prosecutor's entire file is by law available to the defense, "a prosecutor seeking to hide evidence could still take affirmative steps to conceal pieces of favorable information."<sup>267</sup> A bad actor who would conceal *Brady* from the defense under the current discovery regime would not hesitate to pluck it from an open discovery file.<sup>268</sup> Prosecutors

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<sup>262</sup> See JTF MAJORITY, *supra* note 4, at 2. In its report, the Justice Task Force majority referenced "[d]ocumented instances of inconsistent application by prosecutors" of *Brady*, without a single citation. See *id.* The NYSBA task force majority cites to a previous NYSBA report on wrongful convictions, which contains a smattering of cases where a *Brady* violation was found by the New York Courts. See N.Y. STATE BAR ASS'N, *supra* note 7, at 22 n.38 (citing N.Y. STATE BAR ASS'N, FINAL REPORT OF THE NEW YORK STATE BAR ASSOCIATION'S TASK FORCE ON WRONGFUL CONVICTIONS 24–26 (2009), <http://www.nysba.org/wcreport/>).

<sup>263</sup> See N.Y. STATE BAR ASS'N, *supra* note 7, at 65.

<sup>264</sup> Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 489 (2009) ("[P]rosecutors . . . are their own watchers. If they intentionally suppress evidence that might jeopardize a conviction, they can do so in the comfort of knowing there is little chance the evidence will ever come to light.")

<sup>265</sup> See, e.g., *United States v. Oxman*, 740 F.2d 1298, 1310 (3d Cir. 1984) ("[W]e are left with the nagging concern that material favorable to the defense may never emerge from secret government files." (citing *United States v. Starusko*, 729 F.2d 256, 265 (3d Cir. 1984)), *vacated by* *United States v. Plfaumer*, 473 U.S. 922 (1985). One commenter writes that the question presents "potentially unwinnable empirical debates about the prevalence and consequences of nondisclosure, which pit prosecutors against discovery reform advocates in often hostile terms." Jennifer E. Laurin, *Brady in an Age of Innocence*, 38 N.Y.U. REV. L. & SOC. CHANGE 505, 520 (2014).

<sup>266</sup> *United States v. Ruiz*, 536 U.S. 622, 633 (2002) ("We do not believe the Constitution here requires provision of this information to the defendant prior to plea bargaining. . . . [T]he need for this information is more closely related to the fairness of a trial than to the voluntariness of the plea.")

<sup>267</sup> Fox, *supra* note 88, at 443.

<sup>268</sup> *Id.* at 445 ("If the prosecution has the desire to conceal evidence from the defense, no level

unscrupulous enough to “engage in such misconduct presumably don’t want to be caught, and will take steps to conceal their actions.”<sup>269</sup> In such a circumstance, it is unlikely that the defense will ever discover the violation of *Brady* and open discovery rules. Indeed, open discovery would be especially insidious in that case, since the defense would assume that all material had been provided.<sup>270</sup>

Open discovery is also said to benefit defense attorneys in regard to *Brady*, “by better enabling them to investigate their cases and prepare for trial.”<sup>271</sup> But that claim is doubtful. In an open discovery system, already over-burdened defense counsel would be inundated with mostly unhelpful information and be forced to sort through it in search of *Brady* material.<sup>272</sup> Prosecutors could even pad the discovery file with useless disclosure in order to flummox the defense. Indeed, this so-called “*Brady* Dump” could quickly become the favorite tool of prosecutors seeking strategic advantage.<sup>273</sup> Resource-strapped defense attorneys will be faced with situations where they will never realistically be able to pick through all the documents for possible *Brady* material—and *Brady* itself would not require the prosecutor to identify that material.<sup>274</sup> Counter-intuitively, the proponents’ plan to take the prosecution out of the business of determining materiality would provide cover to prosecutors utilizing the *Brady* Dump, placing a new and powerful element of gamesmanship into the mix.<sup>275</sup>

Even in cases where the prosecution is not participating in gamesmanship, open file discovery could still paralyze a defense by providing counsel with far more information than they can realistically handle.<sup>276</sup> The wealth of additional pre-trial discovery will surely lead to more ineffective assistance claims when defense counsel, perhaps understandably, fails to notice an important bit of evidence buried in

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of openness will be sufficient to prevent this from happening.”)

<sup>269</sup> John G. Browning, *Prosecutorial Misconduct in the Digital Age*, 77 ALB. L. REV. 881, 881 (2014).

<sup>270</sup> See Fox, *supra* note 88, at 443.

<sup>271</sup> JTF MAJORITY, *supra* note 4, at 3.

<sup>272</sup> See Fox, *supra* note 88, at 438.

<sup>273</sup> *Id.* at 447.

<sup>274</sup> See *United States v. Mmahat*, 106 F.3d 89, 94 (5th Cir. 1997) (“[T]he government conceded that it had been aware of [two pages of *Brady* material] but argued that it had met its *Brady* obligation by disclosing them in the 500,000-page cache. . . . We agree.”); *United States v. Causey*, 356 F. Supp. 2d 681, 693, 694 (S.D. Tex. 2005). There was no *Brady* violation where it would take “15 years to review every page” for “100 attorneys working 12 hours a day” taking “30 seconds reviewing each of the[] 80 million pages” turned over in discovery. *Id.*

<sup>275</sup> Fox, *supra* note 88, at 443.

<sup>276</sup> *Id.* at 437–38. Take, for instance, a hypothetical case in which a murder takes place at a crowded club. Three witnesses tell police they saw the murder; the prosecution plans to call only those three witnesses. Fifty witnesses did not see anything; they were too far away, or were otherwise occupied. If discovery reform proponents succeed, the names and addresses of those fifty witnesses will be turned over to the defense so that it can “investigate meaningfully.” N.Y. STATE BAR ASS’N, *supra* note 7, at 11. Should the defense re-interview each of these witnesses? Does the defense have the resources? If so, is it the best use of those resources?

the boxes sent over from the district attorney's office.<sup>277</sup> Factually innocent defendants are the losers in such a regime, since they are the defendants who stand to benefit the most from the receipt of exculpatory material, and stand to lose the most if they cannot effectively utilize it.

Once again, the proposals advocated by the reformers would fail to have the outcomes that reformers claim they would. They would do nothing to eliminate concealment of evidence but would provide a new tool for gamesmanship to prosecutors. They would harm, rather than serve, the cause of justice.

### III. WITNESS INTIMIDATION: AN OBJECTION WITHOUT AN ANSWER

#### A. *Witness Intimidation through the Eyes of the Reformers*

In Justice Brennan's landmark 1963 lecture, he brushed aside concerns that criminal discovery would lead to witness intimidation, tampering, and perjury.<sup>278</sup> He rejected experiential arguments that criminal discovery would lead to those results, saying that there was no experience to draw from since criminal discovery was not allowed, and he characterized the concern about perjury as an "old hobgoblin."<sup>279</sup> Twenty-six years later he stood at the same podium to give a "progress report" on criminal discovery.<sup>280</sup> Brennan claimed that history had vindicated his arguments: "Experience should certainly have persuaded doubters that improved criminal discovery does not lead to more perjury," he said, adding "I know of no indication . . . that the changes of the last quarter-century have encouraged perjury in criminal actions."<sup>281</sup> And while he acknowledged that in "some cases" pretrial

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<sup>277</sup> Fox, *supra* note 88, at 440–41. Ironically, this would undermine the proponent's stated goal of taking the materiality component out of *Brady*. See JTF MAJORITY, *supra* note 4, at 2–3; THE LEGAL AID SOC'Y, *supra* note 1, at 55 & n.77; N.Y. STATE BAR ASS'N, *supra* note 7, at 22. To prove a *Brady* violation on appeal, a defendant would have to show the materiality of the evidence. Fox, *supra* note 88, at 440–41. If the defendant gets the evidence and his attorney is ineffective in utilizing it, materiality is a component of an ineffective assistance of counsel claim as well. *Id.*

<sup>278</sup> Brennan, *supra* note 17, at 290–91, 292.

<sup>279</sup> *Id.* at 290–91.

<sup>280</sup> William J. Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L.Q. 1, 1 (1990).

<sup>281</sup> *Id.* at 13. Although not the focus of this article, Justice Brennan's lack of concern about perjury is startling. In testimony to Congress in 1998, famed academic and defense attorney Alan Dershowitz testified to his belief "that no felony is committed more frequently in this country than the genre of perjury and false statements. . . . Perjury at criminal trials is so common that whenever a defendant testifies and is found guilty, he has presumptively committed perjury." See Transcript of Testimony of Alan M. Dershowitz at 1–2, House of Representatives Judiciary Committee, 1998 WL 827454 (1998) [hereinafter Dershowitz]. As Justice Sonia Sotomayor (then a district court judge) pointed out in a 1996 article, the prevalence of perjury can and does undermine the public fair in the criminal justice system. See Sonia Sotomayor & Nicole A. Gordon, *Returning Majesty to the Law and Politics: A Modern Approach*, 30 SUFFOLK U. L. REV. 35, 46–47, 47 n.52 (1996) ("Perjury cases are not often pursued, and perhaps should be given greater

discovery had resulted in witness intimidation, he maintained that it had not resulted in “a mass failure to get convictions because of increased perjury or witness intimidation.”<sup>282</sup> In essence, he argued that experience had shown that witness intimidation was not a problem that should derail even greater discovery.

New York’s modern reformers follow Brennan in their belief that criminal discovery has not resulted in “general problems of witness intimidation or impaired law enforcement.”<sup>283</sup> Citing a 1991 report written for the Assembly Codes Committee, the Legal Aid Society’s report concluded that there was no major problem of witness intimidation in the cities studied in the report, including Los Angeles, Chicago, Detroit, Philadelphia, Miami, San Diego, and Newark, each of which have an open file discovery regime.<sup>284</sup> The report’s authors apparently spoke to prosecutors and defense attorneys in those cities, and concluded: “In none of these cities did any interviewee . . . speak of a significant level of overall witness intimidation.”<sup>285</sup> These interviews, they claim, “debunk[] the notion” that witness intimidation will be the inevitable result of expanded discovery.<sup>286</sup> The NYSBA majority relied on the same report to reach the same conclusion.<sup>287</sup> In addition, the reformers cite to a few law review articles that casually conclude that witness intimidation is not a major problem.<sup>288</sup> What little problem there is, they suggest, is related to gang violence.<sup>289</sup>

Each of the three proposals—the Legal Aid Society’s proposal,<sup>290</sup> the Justice Task Force majority’s proposal,<sup>291</sup> and the NYSBA majority’s proposal<sup>292</sup> provide mechanisms for prosecutors to ask for redaction or protective orders of discovery (including names and addresses of

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consideration by prosecuting attorneys as a means of enhancing the credibility of the trial system generally.”). Since, as Dershowitz notes, “whenever a defendant testifies and is found guilty, he has presumptively committed perjury,” it is likely that expanded discovery will encourage perjury. Dershowitz, *supra* note 281, at 2. First, it will make perjury more effective, since there will be less likelihood that the defendant will be surprised by evidence inconsistent with his story. Second, it will become more likely precisely because it will become more effective.

<sup>282</sup> Brennan, *supra* note 280, at 13–14, 16.

<sup>283</sup> THE LEGAL AID SOC’Y, *supra* note 1, at 3.

<sup>284</sup> *Id.* at 5.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 42.

<sup>287</sup> N.Y. STATE BAR ASS’N, *supra* note 7, at 13.

<sup>288</sup> See *id.* at 3 n.2, 13 n.23; Cary Clennon, *Pre-Trial Discovery of Witness Lists: A Modest Proposal to Improve the Administration of Criminal Justice in the Superior Court of the District of Columbia*, 38 CATH. U. L. REV. 641, 662 (1989) (“The most serious objection to disclosure of witness lists is the prospect of widespread witness tampering. . . . Practitioners from jurisdictions with broad discovery, both local and federal, have downplayed its occurrence.”); Milton C. Lee, Jr., *Criminal Discovery: What Truth Do We Seek?*, 4 U. D.C. L. REV. 7, 23 (1998) (“The concerns regarding witness intimidation, perjury, and one-way discovery have been refuted by the experience of the states.”).

<sup>289</sup> N.Y. STATE BAR ASS’N, *supra* note 7, at 126.

<sup>290</sup> THE LEGAL AID SOC’Y, *supra* note 1, at 29, 117.

<sup>291</sup> JTF MAJORITY, *supra* note 4, at 11.

<sup>292</sup> N.Y. STATE BAR ASS’N, *supra* note 7, at 15–17.

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witnesses) upon good cause shown. Assuming that witness intimidation is an insubstantial problem and that the prosecutor would actually be able to show good cause in appropriate cases, those provisions might be sufficient to protect witnesses. But if the proponents' assumptions are outdated or simply not descriptive of the full extent of the problem, protective orders may not be enough.

*B. Witness Intimidation: A Serious and Growing Problem*

“Witness intimidation,” as one set of scholars has noted, is a “fundamental threat to the rule of law.”<sup>293</sup> It thwarts attempts at detection of crimes, because when it is common it will discourage crimes from being reported to the police.<sup>294</sup> And it complicates the prosecution of crimes, by placing the victims and witnesses in fear of testifying.<sup>295</sup> Without that testimony, prosecutors may be wholly unable to prove their case at trial.<sup>296</sup> As a result, widespread witness intimidation allows the most violent criminals to go free, makes neighborhoods less safe, and undermines public faith in the criminal justice system.<sup>297</sup>

The reformers rely primarily upon a single, twenty-five year old report for their conclusion that witness intimidation is not a major problem.<sup>298</sup> Perhaps that report was accurate at the time,<sup>299</sup> but today a wealth of empirical evidence supports the conclusion that witness

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<sup>293</sup> Brief for Amicus Curiae at 9, District Attorneys Association of the State of New York, *In re Garner* (2015) [hereinafter Brief for Amicus Curiae].

<sup>294</sup> *Id.*

<sup>295</sup> See *id.*; John Browning, #Snitches Get Stitches: *Witness Intimidation in the Age of Facebook and Twitter*, 35 PACE L. REV. 192, 192 (2014).

<sup>296</sup> TERESA M. GARVEY, WITNESS INTIMIDATION: MEETING THE CHALLENGE 3 (2013), <http://www.aequitasresource.org/Witness-Intimidation-Meeting-the-Challenge.pdf>. Indeed, when a witness recants a prior statement at trial, witness intimidation is often the suspected culprit. *Id.*

<sup>297</sup> Browning, *supra* note 295, at 192; KELLY DEDEL, WITNESS INTIMIDATION 6 (2006), [http://www.popcenter.org/problems/pdfs/witness\\_intimidation.pdf](http://www.popcenter.org/problems/pdfs/witness_intimidation.pdf).

<sup>298</sup> MIDDLEKAUFF, *supra* note 82, at 1.

<sup>299</sup> There is reason to doubt that. Witness intimidation is nothing new, as New York history reveals:

At common law, even the names of the witnesses who testified before the grand jury were secret. But when New York adopted the Code of Criminal Procedure in 1881, the rule was changed by statute; § 271 required that the names of witnesses before the Grand Jury “be indorsed upon the indictment.” New York led the way, with a handful of states following suit in the ensuing years. But by the 1930s, the rule had fallen out of favor in New York in the face of organized crime. In 1936, Governor Lehman transmitted a special message to the legislature calling for a number of improvements in criminal justice. Among the proposals was a request to repeal § 271, apparently at the behest of then-special prosecutor Thomas Dewey, who was striving to prosecute the infamous “Murder Inc.” Governor Lehman explained that witnesses were reluctant to testify before the grand jury knowing that their names would be released to the defendant. As such, § 271 “operate[d] as a means for the intimidation of witnesses, particularly in racketeering and other extortion investigations.” The legislature obliged by repealing § 271.

Brief for District Attorneys Association of the State of New York as Amicus Curiae Supporting Respondent at 12–13, *James v. Donovan* (2015) (No. 2015-2774) (internal citations omitted).

intimidation is a commonplace occurrence in New York, as does the daily experience of prosecutors across the state. All that would be bad enough, but it appears that incidents of witness intimidation are increasing.<sup>300</sup>

According to a report issued by the United States Department of Justice, in neighborhoods with endemic gang activity witness intimidation is suspected in over 75% of all violent crimes.<sup>301</sup> Another report revealed that 36% of witnesses in Bronx County criminal courts had been threatened, and another 57% feared retaliation even in the absence of a direct threat.<sup>302</sup> Those who had been threatened were three times more likely to drop charges.<sup>303</sup> And the problem affects jurisdictions large and small. A survey of prosecutors nationwide found that 81% of prosecutors in large jurisdictions and 68% of prosecutors in small jurisdictions reported that witness intimidation was a significant problem in their jurisdictions.<sup>304</sup> Police share that view; one survey found that 66% of departments across the country considered gang intimidation a “common occurrence” in their areas.<sup>305</sup> The statistics regarding witness intimidation likely underestimate the extent of the problem by a wide margin, since when it is successful, witness intimidation is likely to go undetected.

Even when it is detected, the sheer audacity of the perpetrators may contribute to the fear and dread a witness feels. In one particularly brazen case, an Erie County defendant wore a t-shirt reading “Snitches Get Stitches” to his own sentencing.<sup>306</sup> In another case in Erie County, two defendants robbed a victim at gun point, then kidnapped and tortured him because they believed he was a prosecution “snitch.”<sup>307</sup> The defendants made a cell phone video of them penetrating the victim’s tooth with a power drill and posted it on Facebook as a warning to others.<sup>308</sup> In Albany County, a defendant charged with three drug sales attacked a police confidential informant while he was out on bail.<sup>309</sup> He and his co-defendant held the informant down and

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<sup>300</sup> Brief for Amicus Curiae, *supra* note 293, at 10.

<sup>301</sup> PETER FINN & KERRY MURPHY HEALEY, NAT’L INST. OF JUSTICE, PREVENTING GANG AND DRUG-RELATED WITNESS INTIMIDATION 5 (1996), <https://www.ncjrs.gov/pdffiles/163067.pdf>.

<sup>302</sup> Brief for Amicus Curiae, *supra* note 293, at 10. Perhaps it is unsurprising that the Bronx has the highest just trial acquittal rate of any county in New York State with over ten trials. See N.Y. STATE UNIFIED COURT SYS., REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS 24 (2013) (noting the acquittal rate for the Bronx is 46.5% and the state average for all counties is 27.5%).

<sup>303</sup> ROBERT C. DAVIS ET AL., WITNESS INTIMIDATION IN THE BRONX COURTS: HOW COMMON IS IT, AND WHAT ARE ITS CONSEQUENCES? 17 (1990), [http://www.popcenter.org/problems/witness\\_intimidation/PDFs/Davis\\_etal\\_1990.pdf](http://www.popcenter.org/problems/witness_intimidation/PDFs/Davis_etal_1990.pdf).

<sup>304</sup> Brief for Amicus Curiae, *supra* note 293, at 10.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> JTF dissent, *supra* note 109, at 8.

<sup>308</sup> *Id.*

<sup>309</sup> *People v. Roberts*, 913 N.Y.S.2d 829, 830 (N.Y. App. Div. 2011).

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interrogated him for several hours before finally piercing the informant's ear with a hot grill fork.<sup>310</sup> In another Albany County incident, a nineteen-year-old man posted a photograph of a witness to a robbery to social media.<sup>311</sup> He superimposed the words "WANTED" and "REWARD \$1000" across the top of the photograph in "Wild West-style" block font.<sup>312</sup> Below the bounty the post read: "HE'S A (expletive) RAT."<sup>313</sup> Prosecutors in that case got lucky—because of the way social media morphs and spreads, it is often difficult and sometimes impossible to determine who created the intimidating social media post.<sup>314</sup>

Sometimes, witness intimidation can be deadly. In one case, a sixty-one-year-old woman testified at a grand jury after she witness a shooting in Queens.<sup>315</sup> As a result two individuals were indicted for attempted murder.<sup>316</sup> When one of the defendants discovered her identity and learned of her testimony, he killed her.<sup>317</sup> In Schenectady County, a man accused of murder received information about the witnesses against him just prior to trial, then conspired to murder them<sup>318</sup>

But generally attempts at intimidation are not so bold. Countless methods are used to intimidate witnesses, most of them indirect. Often, criminals will post information about a witness in public places or on social media sites such as Facebook in an effort to provoke community-wide intimidation.<sup>319</sup> In one case, a defendant in custody awaiting trial obtained grand jury testimony and witness statements from his defense attorney, then sent them to his girlfriend to post on Facebook.<sup>320</sup> That case prompted the prosecutor to declare that witness intimidation is "the [number one] impediment to me doing my job as a prosecutor."<sup>321</sup> That phenomenon, well-known among prosecutors, has recently gained the attention of the press.<sup>322</sup> These tactics work because in some neighborhoods, "being labeled a snitch carries a price, not just of

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<sup>310</sup> *Id.*

<sup>311</sup> Bryan Fitzgerald, *Witnesses Exposed on the Web*, TIMES UNION (May 4, 2014), <http://www.timesunion.com/local/article/Witnesses-exposed-onthe-Web-5452747.php>.

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> Brief for Amicus Curiae, *supra* note 293, at 10.

<sup>316</sup> *Id.* at 10–11.

<sup>317</sup> *Id.* at 11.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> James Staas, *Man Convicted of Witness Intimidation after Grand Jury Testimony is Posted on Facebook*, BUFFALO NEWS (Oct. 30, 2013), <http://www.buffalonews.com/city-region/erie-county-court/manconvicted-of-witness-intimidation-after-grand-jury-testimony-is-posted-onfacebook-20131030>.

<sup>321</sup> *Id.*

<sup>322</sup> See, e.g., Fitzgerald, *supra* note 307 (discussing a Facebook post offering a bounty for a witness).

potential violence, but of ostracism by neighbors and peers”<sup>323</sup> Even without a direct or indirect threat, the fear of social stigmatism can effectively stanch any cooperation with authorities. That may explain what happened in Rochester, where 100 people witnessed a man get shot in front a club, but none would talk to police.”<sup>324</sup>

In many cases, witness intimidation may be all but impossible to prove. After all, by definition successful witness intimidation is virtually undetectable.<sup>325</sup> Contributing to the difficulty is the profile of who is intimidated: the research shows that witness intimidation is most commonly aimed at some of the weakest and most vulnerable members of society, such as children, the elderly, immigrants, and domestic violence victims.<sup>326</sup> Even when it occurs openly, it is often difficult and sometimes impossible to determine who is responsible for indirect forms of intimidation, like the kind often found on social media. It is therefore not surprising that between 2000 and 2012, police in the state made only 1,353 arrests for witness intimidation.<sup>327</sup>

Witness intimidation of this kind is not limited to New York, of course. The experience of Philadelphia is perhaps the most illustrative case of the disconnect between the reality of witness intimidation and the proponents’ understanding of it. Both the Legal Aid Society report<sup>328</sup> and the NYSBA majority’s report,<sup>329</sup> relying on the 1991 Assembly Codes Committee report, assert that there is no widespread problem of witness intimidation in Philadelphia. Indeed, Pennsylvania is held up as an example of a state in which broad pre-trial discovery has “worked for decades.”<sup>330</sup>

But Philadelphia has apparently become “ground zero” for witness intimidation via social media.<sup>331</sup> The Philadelphia District Attorney’s Office has publicly stated that witness intimidation has reached a “near epidemic” level.<sup>332</sup> The headliner for intimidation is the now-shuttered “Rats215” Instagram account, which was discovered accidentally by police in 2013.<sup>333</sup> Photographs of witnesses in various cases, as well as their statements and testimonies, were posted to the account, which operated as a clearinghouse for information on police informants and

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<sup>323</sup> Brief for Amicus Curiae, *supra* note 293, at 11.

<sup>324</sup> *Id.*

<sup>325</sup> See Brendan O’Flaherty & Rajiv Sethi, *Witness Intimidation 2* (Columbia University Department of Economics Discussion Paper No. 0708-07 Oct. 2007), <http://academiccommons.columbia.edu/catalog/ac%3A99652>.

<sup>326</sup> DEDEL, *supra* note 297, at 7–8.

<sup>327</sup> Brief for Amicus Curiae, *supra* note 293, at 11.

<sup>328</sup> THE LEGAL AID SOC’Y, *supra* note 1, at 3, 4–5.

<sup>329</sup> N.Y. STATE BAR ASS’N, *supra* note 7, at 2, 13.

<sup>330</sup> *Id.* at 13.

<sup>331</sup> Browning, *supra* note 295, at 194.

<sup>332</sup> *Id.*

<sup>333</sup> See *id.* at 195.

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other witnesses.<sup>334</sup> At its peak, the account was updated almost daily and boasted 7,900 followers, many of whom could be seen calling for “hits” on the exposed witnesses.<sup>335</sup> By the time it was shut down, the account had revealed more than thirty witnesses to violent crimes in Philadelphia.<sup>336</sup> Prosecutors in Philadelphia report “widespread problems of witness intimidation, recantation, and failure to appear, as well as spiraling relocation costs.”<sup>337</sup>

In response, Philadelphia has implemented “a host of new procedures” to address the growing problem.<sup>338</sup> Prosecutors there have taken to watermarking papers handed over to defense attorneys, so they can hold those attorneys accountable when the papers end up posted online by their clients.<sup>339</sup> The Pennsylvania judiciary has developed a bench book to instruct judges on dealing with witness intimidation in the courtroom.<sup>340</sup> And in 2012 the Pennsylvania Supreme Court revived the use of grand juries, which had not been used there since 1976, when they were “abolished as unnecessary” relics of a bygone era.<sup>341</sup> The Chief Justice of the court explained that the move was necessary to address witness intimidation, a problem he said had grown worse over time.<sup>342</sup> In an ironic twist, several Philadelphia prosecutors and a Pennsylvania Supreme Court justice actually traveled to New York in order to study its grand jury system.<sup>343</sup> Authorities there are taking the problems seriously, and have filed over 2000 witness intimidation charges between 2011 and early 2014 as part of their effort to address the ubiquitous problem.<sup>344</sup>

Despite being confronted with many of these facts in prosecutors’ dissents to both the Justice Task Force Report and the NYSBA majority report, reformers persist in denying the existence of a witness intimidation problem.

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<sup>334</sup> *See id.*

<sup>335</sup> *Id.* at 195, 210.

<sup>336</sup> *Id.* at 195.

<sup>337</sup> N.Y. STATE BAR ASS’N, *supra* note 7, at 92.

<sup>338</sup> Craig C. McCoy, *To Fight “No Snitch,” Philly Using Indictment Testimony in Secret*, PHILLY.COM (Mar. 18, 2013), [http://articles.philly.com/2013-03-18/news/37789804\\_1\\_grand-jury-jury-indictments-police-and-prosecutors](http://articles.philly.com/2013-03-18/news/37789804_1_grand-jury-jury-indictments-police-and-prosecutors).

<sup>339</sup> N.Y. STATE BAR ASS’N, *supra* note 7, at 85 n.145.

<sup>340</sup> PA. COMM’N ON CRIME AND DELINQUENCY, *FREE TO TELL THE TRUTH—PREVENTING AND COMBATING INTIMIDATION IN COURT: A BENCH BOOK FOR PENNSYLVANIA JUDGES 3* (2011), <https://www.courts.phila.gov/pdf/report/ri/Free-to-Tell-the-Truth-Preventing-and-Combating-Intimidation-in-Court.pdf>.

<sup>341</sup> Brief for Amicus Curiae, *supra* note 293, at 12.

<sup>342</sup> *Id.*

<sup>343</sup> N.Y. STATE BAR ASS’N, *supra* note 7, at 93 n.161.

<sup>344</sup> *Id.* at 92–93.

## CONCLUSION

Modern reformers in New York offer open file discovery as a solution for problems they see throughout the criminal justice system. They promise that open file discovery will be a panacea for *Brady* violations, for wrongful convictions, and for court congestion.

Unfortunately, the proposed reforms will not have the desired effects. Intentional *Brady* violations will certainly not be curbed by open file discovery, and prosecutors will be gifted with a new tool for gamesmanship, one that will be difficult to effectively police. Innocent defendants will not be better off, since more discovery will not necessarily lead to a better defense at trial (and may lead to a worse defense). Court congestion will only increase, since greater discovery will encourage more defendants to go to trial, only increasing the crushing workload for both the defense and the prosecutors.

Moreover, it is clear from the statistics and the anecdotal evidence that the proponents of discovery reform in New York seriously underestimate the extent of the witness intimidation problem. As a result, their discovery reform proposals fail to adequately address the very real possibility that expanded, earlier discovery will have a large and deleterious effect on the criminal justice system in New York.

Their proposal to turn over the names and addresses of witnesses far in advance of trial is particularly troubling, since it would provide defendants with a roadmap for whom to intimidate in order to ensure their acquittal. Proponents will no doubt respond that the prosecutor can withhold even that list upon a showing of good cause. But that ignores the fundamental reality that most forms of witness intimidation are difficult or impossible to detect, and that the prosecutor cannot predict in advance who will engage in it. Prosecutors, therefore, will only rarely be able to make out a good-faith reason to withhold the list. That certainly will not help prosecutors convince reluctant, frightened witnesses to testify.<sup>345</sup>

The clear weight of authority and the experiences of prosecutors throughout the state prove that witness intimidation is a problem worthy of our attention. Given that witness intimidation has emerged as a significant threat to the integrity of the criminal justice system, its central importance to the continuing debate over discovery reform should be acknowledged and addressed, not minimized and ignored, as proponents of reform have so far done. Until reformers can offer credible solutions for overcoming the predictable rise in witness intimidation that would accompany their reforms, practitioners, judges, and scholars should be careful to endorse them.

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<sup>345</sup> *Id.* at 99.

In the name of preventing wrongful convictions, reformers have devoted a great deal of attention to discovery reform. But research suggests that less controversial areas for improvement exists, areas with a far greater impact on the likelihood of an erroneous conviction. The Justice Task Force, for instance, has made recommendations for improving eyewitness identifications, basing those recommendations on guidelines developed by the best practices committee of the District Attorneys Association of the State of New York.<sup>346</sup> The same task force has recommended legislation to require the tape recording of custodial interrogations, so that courts can better guard against false confessions.<sup>347</sup> Over 70% of the wrongful convictions exonerated by DNA evidence featured eyewitness misidentification.<sup>348</sup> And 31% of cases involved a false confession—including 63% of wrongful convictions for homicide.<sup>349</sup> These statistics suggest that if reform advocates are serious about wrongful convictions they should dedicate their time and attention to adopting the simple, common-sense recommendations of the Justice Task Force, rather than attempting to re-write a substantial portion of the criminal procedure law.

This paper has attempted to take the first step toward jump-starting a rigorous public debate on the subject of discovery reform in New York. It has taken a critical look at the claims of the reformers, and has pointed out flaws in their facts and their logic. It has attempted to show that, in some cases, the reforms proposed will not have the effect intended. Finally, this paper has shown that reformers do not acknowledge the severity of the problem of witness intimidation, a problem that will only be exacerbated by one of their key proposals.

Further scholarship is required in order to fully understand the changes proposed and to assess their impact if adopted. The legislative process can only benefit from more research into this area, and especially from research focused on New York State in particular. Only then can we begin to make the changes necessary to foster a more perfect criminal justice system.

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<sup>346</sup> N.Y. STATE JUSTICE TASK FORCE, RECOMMENDATIONS FOR IMPROVING EYEWITNESS IDENTIFICATIONS 1–2, 3–5 (2011), [http://www.nyjusticetaskforce.com/2011\\_02\\_01\\_Report\\_ID\\_Reform.pdf](http://www.nyjusticetaskforce.com/2011_02_01_Report_ID_Reform.pdf).

<sup>347</sup> N.Y. STATE JUSTICE TASK FORCE, RECOMMENDATIONS REGARDING ELECTRONIC RECORDING OF CUSTODIAL INTERROGATIONS 3–4 (2012), <http://www.nyjusticetaskforce.com/ElectronicRecordingOfCustodialInterrogations.pdf>.

<sup>348</sup> *DNA Exonerations Nationwide*, INNOCENCE PROJECT (Mar. 17, 2016), <http://www.innocenceproject.org/free-innocent/improve-the-law/fact-sheets/dna-exonerations-nationwide>.

<sup>349</sup> *Id.*