Washington and Lee Law Review

Volume 67 | Issue 4 Article 7

Fall 9-1-2010

# Brady's Bunch of FLaws

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# *Brady*'s Bunch of Flaws

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*Abstract*

*The 1970s television program* The Brady Bunch *provided a lighthearted and optimistic portrayal of American family life. A divorced man with three brown-haired boys married a divorced woman with three blonde daughters. They melded together into a happy, well-adjusted crew committed to mad-cap adventures accompanied by syrupy background music. Yet the promise of* The Brady Bunch *was illusory. Divorce has wreaked havoc on this country. The problems that derive from divorce and remarriage are multifaceted; they seldom lend themselves to tidy resolution in thirty minutes, let alone a lifetime. The show provided a distraction—and a disservice. It sent an inaccurate message about the world to legions of children suffering the painful consequences of divorce in their own families.*

*In some respects,* The Brady Bunch *television show resembles the federal constitutional doctrine requiring that prosecutors disclose exculpatory evidence to defendants in criminal cases under* Brady v. Maryland. *The Supreme Court's* Brady *decision in 1963 offered hope that prosecutors can straddle the fence between their two principal responsibilities: To serve simultaneously as zealous advocates and neutral "ministers of justice." By turning over all evidence that exculpates the accused, prosecutors advance the cause of justice; by retaining all other items of evidence, they safeguard and promote their advocacy role.* Brady *represented a marriage of two somewhat disparate images of the prosecutorial function. But in the ensuing half-century the ideals of* Brady *have not gained much traction in practice. Even worse, the doctrine as presently constituted may provide a disservice to the very concept of justice.*

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*This Article examines this state of affairs and puts forth some potential solutions.*

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## *I. Introduction*

The 1970s television program *The Brady Bunch* provided a lighthearted and optimistic portrayal of American family life. A divorced man with three brown-haired boys married a divorced woman with three blonde daughters. They melded together into a happy, well-adjusted crew committed to mad-cap adventures accompanied by syrupy background music. Although the family had its moments of tension, those incidents were resolved favorably in the window of a standard half-hour comedy. I loved watching *The Brady Bunch* during my childhood. I had a crush on the actress Florence Henderson, the charming mother of the brood. As someone with only one sibling, a brother, I envied the Brady boys. I had always wanted a sister, better yet, three. And while I am not the product of divorce, many of my friends are. *The Brady Bunch* supplied a pleasant, almost utopian vision of life in divorce-ridden 1970s America, an image of family interactions far removed from the blurrier, bleaker experiences of my pals.

It strikes me that the promise of *The Brady Bunch* was illusory. Divorce has wreaked havoc on this country. The problems that derive from

divorce and remarriage are multifaceted; they seldom lend themselves to tidy resolution in thirty minutes, let alone a lifetime. The show provided a distraction—and a disservice. It sent an inaccurate message about the world to legions of children suffering the painful consequences of divorce in their own families.

In some respects, *The Brady Bunch* television show resembles the federal constitutional doctrine that requires prosecutors to disclose exculpatory evidence to defendants in criminal cases under *Brady v. Maryland*.[1] The United States Supreme Court's *Brady* decision in 1963 offered hope that prosecutors can straddle the fence between their two principal responsibilities: To serve simultaneously as zealous advocates and neutral "ministers of justice."[2] By turning over all evidence that exculpates the accused, prosecutors advance the cause of justice; by retaining all other items of evidence, they safeguard and promote their advocacy role.[3] *Brady* represented a marriage of two somewhat disparate images of the prosecutorial function.[4] But in the ensuing half-century the ideals of *Brady* have not gained much traction in practice.[5] Even worse, the doctrine as presently constituted may provide a disservice to the very concept of justice.

Given the international theme of this symposium, it is worth noting that the United States fares poorly in comparison to many other countries' approaches to discovery.[6] When the Supreme Court handed down *Brady*, it

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1. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

2. *See* Jane Campbell Moriarty, *Misconvictions, Science, and the Minister of Justice*, 86 NEB. L. REV. 1, 21–22 n.117 (2008) (noting that American prosecutors' obligation to seek justice is traceable as far back as George Sharwood's 1854 "An Essay on Professional Ethics").

3. *See Brady*, 373 U.S. at 87 (specifying that proper disclosure of information is necessary because the role of the prosecutor is not only to convict criminals but to exonerate the innocent).

4. *See id.* ("Society wins not only when the guilty are convicted but when criminal trials are fair.").

5. *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, 211 (2006) (describing the *Brady* rule as a typically well-intentioned rule of criminal procedure that "has never actually required the prosecutor to do what is so manifestly the right thing to do").

6. *See id.* at 246 (contrasting the limited scope of *Brady* with the "transparent" discovery process in civil law countries where both parties have access to the same files and the "broad set of '*Brady* rules' in foreign adversarial jurisdictions which have transformed

elevated the United States above all other nations as the first to mandate the disclosure of exculpatory evidence by prosecutors.[7] Despite this head start, much of the western world has outpaced the United States in the depth and breadth of the discovery rights granted to criminal defendants.[8] This Article examines this state of affairs and puts forth some potential solutions.

## *II. The Duty to Disclose Exculpatory Evidence: Theory and Practice*

The United States Supreme Court has never recognized a general constitutional right to discovery in criminal cases.[9] As a matter of federal constitutional law, prosecutors are not even compelled to furnish the defendant with the names of prosecution witnesses prior to trial, much less disclose all of the police investigative information.[10] State and federal discovery rules normally fill the void by providing defendants with the statutory right to receive at least some of the evidence against them in advance of trial. Even so, discovery rules tend to offer minimal solace to defendants.[11] The scope of discovery in criminal cases is generally (and bizarrely, given the stakes) narrower than that of civil cases.[12]

There is one category of evidence to which criminal defendants are constitutionally entitled prior to trial: Evidence that exculpates them from

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the template for the duty of such disclosures").

7. *See id.* ("[T]he need for a rule specifically targeting the disclosure of exculpatory information had not been recognized in any of the foreign common law or adversarial jurisdictions.").

8. *See id.* at 246–74 (detailing the expansion of disclosure requirements for exculpatory information in England, Canada, and within international courts and tribunals).

9. *See* Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 561 ("There is no general constitutional right to discovery in criminal cases." (citing United States v. Ruiz, 536 U.S. 622, 629 (2002))); Weatherford v. Bursey, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case and *Brady* did not create one . . . ."); Wardius v. Oregon, 412 U.S. 470, 474 (1973) ("[T]he Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . .").

10. *See* FED. R. CRIM. P. 16 (listing the information the government is required to disclose upon request prior to trial, which does not include the names of the prosecution's witnesses).

11. *See* Prosser, *supra* note 9, at 573–89 (discussing the inadequacy of preliminary hearings and formal discovery mechanisms in providing defendants and defense counsel with access to information).

12. *Id.* at 561, 573–94 (analyzing the scope of discovery in both civil and criminal cases and determining that the scope of discovery is narrower in criminal cases due to the limited mechanisms available to the defense and the often ambiguous disclosure obligations placed on prosecutors).

criminal charges.[13] The Supreme Court held in *Brady v. Maryland* that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or punishment."[14] A prosecutor's failure to abide by her disclosure obligations under *Brady* is not subject to a good faith exception.[15] *Brady* violations exist "irrespective of the good faith or bad faith of the prosecution."[16] The *Brady* obligation is also ongoing. If a *Brady* violation is found during the course of trial, a mistrial may result.[17] If it occurs after a guilty verdict, the typical remedy is a new trial.[18]

The Court later fleshed out the precise nature of this obligation in several key ways beneficial to criminal defendants.[19] First, it expanded the scope of the *Brady* duty in *Giglio v. United States* to cover any materials that could be used to show bias on the part of government witnesses, such as information about promises, rewards, or inducements made in exchange for their testimony or anything else that could impeach the credibility of those witnesses on the stand.[20] Second, the Court modified the *Brady* rule

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13. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that, irrespective of the good or bad faith of the prosecutor, due process requires disclosure of evidence material to guilt or punishment).

14. *Id.*

15. *Id.*

16. *Id.*

17. *See* R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 72–73 (2005) (noting that "if the withheld evidence is discovered during the proceedings and a continuance cannot cure any prejudice to the accused" courts will typically declare a mistrial).

18. *See id.* (differentiating between the consequences of a prosecutor violating the constitutional disclosure obligation, which typically results in the court ordering a new trial, and violations of prosecutors' ethical duty); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 431 (2001) [hereinafter Davis, *The American Prosecutor*] (discussing a study that revealed 381 homicide convictions were overturned due to *Brady* violations between 1963 and 1999 (citing Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1991, at A1)).

19. *See* Giglio v. United States, 405 U.S. 150, 154–55 (1972) (expanding the scope of the *Brady* obligation to include evidence of witness credibility when "'reliability of a given witness may well be determinative of guilt or innocence'" (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959))); United States v. Bagley, 473 U.S. 667, 676 (1985) ("Impeachment evidence, however, as well as exculpatory evidence, falls within the *Brady* rule." (citing *Giglio*, 405 U.S. at 154)); United States v. Agurs, 427 U.S. 97, 110–11 (1976) (clarifying that the disclosure requirement is not contingent on a specific request by the defendant); United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989) (expanding the scope of the *Brady* obligation beyond the prosecutor and his immediate subordinates).

20. *See* CASSIDY, *supra* note 17, at 69 ("[T]he Court in *Giglio v. United States* enlarged its construction of constitutionally 'exculpatory' evidence to encompass evidence

by mandating that its disclosure requirements apply even without a specific defense request.[21] Third, prosecutors must "timely" deliver *Brady* material to allow the defendant to make effective use of the material at trial.[22] Fourth, all exculpatory evidence possessed by law enforcement is classified as *Brady* material regardless of whether the specific prosecutor in charge of the case has actual knowledge of its existence.[23] Simple constructive knowledge suffices; evidence known only to the police is imputed to the prosecutor under *Brady*.[24] This suggests prosecutors have an affirmative duty to learn about the evidence in the hands of their law enforcement colleagues.[25]

States have followed the Supreme Court's constitutional lead.[26] State constitutional decisions, statutes, and rules fortify the *Brady* doctrine—and even impose duties above and beyond it.[27] State ethical rules, in particular, usually demand more from prosecutors in disclosing evidence than required by federal constitutional law.[28] The American Bar Association's Model

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which would demonstrate a witness's bias towards the government." (citing *Giglio*, 405 U.S. at 155)); *see also* R. Michael Cassidy, *"Soft Words of Hope:" Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. U. L. REV. 1129, 1131 (2004) (discussing the expansion of the mandatory disclosure requirement to include evidence of "a 'promise, reward or inducement' to a government witness in a criminal case").

21. *See* United States v. Agurs, 427 U.S. 97, 110–11 (1976) (describing the type of evidence that must be disclosed by a prosecutor without a specific request).

22. *See* CASSIDY, *supra* note 17, at 71–72 (comparing the constitutional timeliness requirement with the undefined ethical timeliness standard).

23. *See id.* at 74 ("Due process requires exculpatory evidence to be revealed whenever it is 'possessed by the prosecutor or anyone over whom the prosecutor has authority.'" (quoting United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989))).

24. *See id.* (comparing prosecutors' duty not to turn a blind eye to potentially exculpatory evidence with ABA Model Rule 3.8(d)'s requirement to disclose only evidence actually known).

25. *See* Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 287 n.59 (2007) [hereinafter Davis, *Legal Profession's Failure*] (noting that the individual prosecutor has an affirmative duty to learn about favorable evidence known to others acting on the government's behalf, including police) (citing Kyles v. Whitley, 514 U.S. 419, 437–38 (1995)); *see also* BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT 231–34 (Thomson-West, 2d ed., 2007) (outlining the prosecutors' obligation to obtain and disclose exculpatory information).

26. *See* CASSIDY, *supra* note 17, at 70 ("Following the lead of *Brady*, Rules of Professional Conduct enacted in most states also impose an affirmative obligation on prosecutors to disclose exculpatory evidence to the accused prior to trial.").

27. Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn from Their Lawyers' Mistakes?*, 31 CARDOZO L. REV. 2161, 2165 (2010).

28. *See* CASSIDY, *supra* note 17, at 70–71 ("[T]he use of the term 'tends' in Rule 3.8(d) and its predecessor, ABA Model Code provision DR 7–103(b), was likely intended to

Rule of Professional Conduct 3.8(d) is typical of these rules, requiring prosecutors to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."[29] Most states have adopted rules consistent with Model Rule 3.8(d) by either mirroring or emulating the "tends to negate guilt" construction of exculpatory evidence.[30] The use of the verb "tends" in Rule 3.8(d) likely reflects a desire to create a disclosure obligation even broader than that of *Brady*.[31]

The optimism felt by criminal defendants in the aftermath of *Brady* has been tempered by the application of this doctrine in practice.[32] Most prosecutors undoubtedly strive to fulfill their *Brady* obligations.[33] A great many even bend over backwards to comply.[34] They do so for reasons both ethical (to embody the minister-of-justice ideal) and practical (to avoid eventual *Brady* controversies and to grease the wheels of the plea bargaining process by nurturing a good reputation with the defense bar).[35] In spite of these efforts, *Brady* violations take place with regularity.[36]

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suggest a broader disclosure obligation than the 'materially exculpatory evidence' standard of *Brady* and its progeny.").

29. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2008).

30. *See* CASSIDY, *supra* note 17, at 70–71 (comparing the use of "tends" in Rule 3.8(d) with the phrase *tends to negate guilt* from *Brady*).

31. *See id.* at 70–71 ("[T]he use of the term 'tends' in Rule 3.8(d) and its predecessor, ABA Model Code provision DR 7-103(b), was likely intended to suggest a broader disclosure obligation than the 'materially exculpatory evidence' standard of *Brady* and its progeny."); Kyles v. Whitley, 514 U.S. 419, 437 (1995) (recognizing that prosecutors' constitutional requirement illustrated by *Brady* and *Bagley* is less than the obligation under professional ethics standards).

32. *See* Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 647 (2002) (citing the Supreme Court's increasingly narrow reading of "materiality" as the reason *Brady*'s initial promise never came to pass).

33. *See* Steven M. Dettelbach, *Commentary:* Brady *from the Prosecutor's Perspective*, 57 CASE W. RES. L. REV. 615, 615–16 (2007) (recalling a senior prosecutor who instructed the author to remember that "[t]here is no case and no criminal that is worth your integrity and your career").

34. *See id.* at 616 (positing that a fear of personal consequences leads prosecutors in many jurisdictions to go above and beyond the minimum disclosure requirements).

35. *See, e.g.*, Dettelbach, *supra* note 33, at 615–16 (recounting how young prosecutors were encouraged by their supervisors to disclose exculpatory information); John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 457–60 (2001) (detailing the numerous advantages the people garner from early disclosure of all available evidence).

36. *See* Ellen Yaroshefsky, *Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously*, 8 D.C. L. REV. 275, 278, 285 (2004) (detailing the results of wrongful

Studies have pinpointed the suppression of exculpatory evidence as a factor in many documented wrongful convictions later overturned by post-conviction DNA testing.[37] In some of those cases, prosecutors simply deemed the evidence not to be important.[38] In others, prosecutors eager to secure convictions willfully bypassed the disclosure rules.[39] Analyses of wrongful convictions lacking DNA evidence further suggest that *Brady* violations frequently contribute to the conviction of the innocent.[40] Worst of all, proven *Brady* errors hint at a larger problem because the vast majority of suspect disclosure choices occur in the inner sanctuaries of prosecutorial offices and never see the light of day.[41]

Given that the *Brady* obligation is broad, ongoing, and not limited by a good faith exception, a certain number of violations are inevitable.[42] But the prospect of error is enhanced by the vagueness of the duty's doctrinal formulation. How does a prosecutor figure out prior to trial whether evidence is *favorable* to the accused and *material* to guilt or punishment? Determining whether evidence is favorable to the accused does not pose especially vexing problems in many cases. A much thornier issue, though, concerns whether evidence is material to guilt or punishment.

The Supreme Court has cited the importance of the materiality prong throughout much of its post-*Brady* jurisprudence, observing that the mere withholding of exculpatory evidence does not rise to the level of a violation unless it prejudices the defendant.[43] The Court clarified in *United States v.*

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conviction studies in the United States).

37. *See id.* at 278 (noting that where prosecutorial misconduct was a factor in forty-five percent of cases in one study, "[t]he vast majority of those instances were cases of destruction or suppression of exculpatory evidence").

38. *Id.*

39. *Id.* ("'[A] team of police and prosecutors were so convinced of their righteousness that they were willing to do anything to get their man.'" (quoting BARRY SCHECK, PETER NEUFIELD & JIM DWYER, ACTUAL INNOCENCE 226–27 (2001))).

40. *See, e.g.*, Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 23–24, 57 (1987) (citing data showing that 10% of 350 wrongful convictions studied involved suppression of evidence by prosecutors).

41. *See, e.g.*, Sara Gurwitch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Information to the Defense*, 50 SANTA CLARA L. REV. 303, 306–07 (2010) (stating that proving *Brady* violations is difficult because the evidence is withheld from both the defense and the court).

42. *See* Davis, *The American Prosecutor*, *supra* note 18, at 431 ("Because the obligation is expansive, continuing, and not limited by the good faith efforts of the prosecutor, great potential for wrongdoing exists.").

43. *See* United States v. Agurs, 427 U.S. 97, 104 (1976) ("A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.").

*Bagley* in 1985 that evidence is "material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[44] The materiality test hinges on whether the defendant can prove that the absence of the evidence undermines confidence in the verdict.[45] In analyzing materiality, courts often look at three factors: (1) the importance of the withheld evidence; (2) the strength of the rest of the prosecution case; and (3) other sources of evidence available to and used by the defense.[46] The strength of the prosecution's case is the central variable in the materiality calculus. The stronger the government's case, the less likely it is that a particular item of evidence will be construed as material.[47]

It is largely up to prosecutors alone to make decisions about the materiality of a particular piece of evidence.[48] Defense lawyers, for all their incentives to find exculpatory information, usually lack the "time, resources, or expertise" to conduct the type of massive pretrial investigation needed to ferret out this evidence.[49] When a prosecutor chooses not to disclose evidence, that decision is seldom revealed to outsiders unless he

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44. United States v. Bagley, 473 U.S. 667, 682 (1985); *see also* Strickler v. Greene, 527 U.S. 263, 281–82 (1999) (clarifying that a breach of the broad obligation to disclose exculpatory evidence is only a *Brady* violation if "there is a reasonable probability that the suppressed evidence would have produced a different verdict").

45. *See* Kyles v. Whitley, 514 U.S. 419, 434 (1995) (showing there is a "reasonable probability" the result would have differed is sufficient to satisfy materiality) (citing *Bagley*, 473 U.S. at 678).

46. *See* CASSIDY, *supra* note 17, at 74 (listing "(1) the importance of the evidence withheld; (2) the strength of the government's case aside from the exculpatory material; and (3) other sources of defense available and utilized by the defendant" as three issues typically examined in order to determine materiality); GERSHMAN, *supra* note 25, at 221, 224–25. Materiality is assessed based on the nondisclosed evidence in its entirety. *Id.* at 221 n.7. Certain pieces of evidence are deemed so fundamental that their withholding constitutes reversible error seemingly regardless of the strength of the government case. For example, the Supreme Court has indicated that a police report showing that fingerprints on the murder weapon exculpate the accused must be disclosed as a matter of "elemental fairness." *Agurs*, 427 U.S. at 110. Likewise, if one of two chief prosecution eyewitnesses were to inform the police that the defendant was not the culprit, the prosecution's subsequent failure to turn over that statement would mandate reversal. *Id.* at 112 n.21.

47. *See* GERSHMAN, *supra* note 25, at 222 ("When the government's proof is strong, undisclosed evidence has less capacity to affect the verdict."); *see also infra* note 50 and accompanying text (discussing various ways undisclosed evidence may be discovered).

48. *See* Davis, *The American Prosecutor*, *supra* note 18, at 432 (noting that prosecutors make most disclosure decisions behind closed doors and defense attorneys are ill-equipped to discover potentially material evidence in the prosecutor's possession).

49. *Id.*

later has a change of heart or it somehow finds its way into defense hands.[50] How do prosecutors go about making these decisions guided mainly by a nebulous legal standard of materiality and an even more nebulous obligation to do justice? Specifically, how is a prosecutor supposed to apply the *Brady* materiality standard prospectively before any evidence has been adduced or the defense strategy divulged at trial?

The tension between the prosecutor's dual role of zealous advocate and minister of justice peaks in the context of *Brady* decisions, leaving the prosecutor acutely vulnerable to cognitive bias.[51] Alafair Burke points out that the materiality test forces prosecutors to "engage in a bizarre kind of anticipatory hindsight review" dependent on an artificial comparison of the evidence and the as-of-yet unborn trial record.[52] Cognitive biases can prompt a prosecutor who has already charged the defendant with a crime and is now conducting a pretrial materiality assessment to "engage in biased recall, retrieving from memory only those facts that tend to confirm the hypothesis of guilt."[53] The prosecutor may process information selectively, undervaluing the potentially exculpatory evidence and overrating the strength of the rest of the prosecution case.[54] The inculpatory evidence

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50. *See* Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 537 (2007) [hereinafter Gershman, *Litigating*] (listing various ways undisclosed evidence may be discovered, including Freedom of Information Act requests, independent investigation by defendants or their relatives, discovery during post-trial motion hearings, and by chance).

51. *See* Alafair Burke, *Improving Prosecutorial Decision-Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1593–1601 (2006) [hereinafter Burke, *Lessons*] (arguing that prosecutors are susceptible to cognitive bias that leads to imperfect decision-making as a result of confirmation bias, selective information processing, belief perseverance, and the avoidance of cognitive dissonance).

52. *Id.* at 1610; *see also* Alafair Burke, *Commentary:* Brady's *Brainteaser: The Accidental Prosecutor and Cognitive Bias*, 57 CASE W. RES. L. REV. 575, 576 (2007) ("*Brady* requires a prosecutor, *ex ante*, to apply the same standard an appellate court would use *ex post* to decide whether to reverse a conviction.").

53. Burke, *Lessons*, *supra* note 51, at 1611; *see also* Alafair Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 495 (2009) [hereinafter Burke, *Revisiting*] (describing confirmation bias, "the well-documented tendency to favor evidence that confirms one's working hypothesis," and why it likely affects a prosecutor's initial review of a case file, causing potentially exculpatory information to be disregarded). In the words of Justice Thurgood Marshall, "[g]iven this unharmonious role, it is not surprising that these advocates oftentimes overlook or downplay potentially favorable evidence, often in cases in which there is no doubt that the failure to disclose was a result of absolute good faith." United States v. Bagley, 473 U.S. 667, 697 (1985) (Marshall, J., dissenting).

54. *See* Burke, *Lessons*, *supra* note 51, at 1611–12 (postulating that cognitive biases will cause the prosecutor to "overestimate the strength of the government's case against the defendant and underestimate the potential exculpatory value of the evidence whose

takes on tremendous significance, the exculpatory evidence insignificance. One's natural resistance to cognitive dissonance might also affect a prosecutor's evaluation of the potential *Brady* evidence.[55] Having already concluded that the defendant is likely guilty, a prosecutor might discount the subsequent discovery of exculpatory information so as to shirk the uncomfortable psychic reality that he may have charged an innocent person with a crime.

Cognitive biases aside, the *Brady* materiality standard gives prosecutors a wide berth to reach the outcome they want.[56] If a prosecutor withholds information to improve his chance of earning a conviction at trial, he can rationalize that choice by weighing the evidence in a fashion that suggests it is immaterial.[57] And since this evaluation is entirely prospective and thus theoretical, it is not subject to rigorous second-guessing from others, especially defense attorneys who may never even know such a decision was made.[58]

When *Brady* issues do come to light, the materiality test is a heavy burden for a defendant to overcome on appeal. Appellate courts are frugal in doling out *Brady* reversals.[59] One study by Bill Moushey of the *Pittsburgh Post-Gazette* waded through 1,500 cases and determined that prosecutors routinely withheld favorable evidence.[60] Despite this high rate

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disclosure is at issue"); Burke, *Revisiting*, *supra* note 53, at 495 ("Because of confirmation bias, [the prosecutor] is likely to search the investigative file for evidence that confirms the defendant's guilt to the detriment of any exculpatory evidence that might disprove the working hypothesis.").

55. *See* Burke, *Revisiting*, *supra* note 53, at 495–96 ("To avoid the cognitive dissonance of having to admit that she may have charged an innocent person, the prosecutor is likely to discount the exculpatory value of the new evidence and overestimate the strength of her original case against the defendant.").

56. *See* Burke, *Lessons*, *supra* note 51, at 1589–90 (summarizing the traditional rationale for prosecutorial misconduct in the absence of cognitive bias).

57. *See* Sundby, *supra* note 32, at 651–52 (arguing that if the materiality standard is taken literally the only situation in which a prosecutor should disclose *Brady* material is one where there exists significant doubt that the prosecution should even proceed).

58. *See* Yaroshefsky, *supra* note 36, at 291 ("Except for the very limited cases, such as knowing use of false testimony, prosecutors know that there is little, if any, remedy for misconduct because the appellate standard of review is harmless error." (citation omitted)).

59. *See* Davis, *The American Prosecutor*, *supra* note 18, at 431–32 (noting that in one study of defendants exonerated by DNA tests none of the prosecutors who were found to have engaged in misconduct were convicted of a crime or barred from practicing law).

60. *See* Bill Moushey, *Win at All Costs: Out of Control*, PITTSBURGH POST-GAZETTE, Nov. 22 1998, at A-1 ("Promises of lenient sentences and huge government checks encourage criminals to lie on the witness stand. Prosecutors routinely withhold evidence that might help prove a defendant innocent. Some federal agents work so closely with their

of nondisclosure, appellate courts found reversible error in only a handful of cases where the mistakes were so glaring, the conduct so heinous, that judges had no other recourse.[61] Another study found a reversal rate of less than twelve percent of all cases involving *Brady* allegations decided in 2004.[62] Even then, a reversal of a conviction on *Brady* grounds does not spring open the prisoner's cell. It just entitles the defendant to a new trial with the previously suppressed evidence now available.[63]

Scholars have repeatedly condemned *Brady*'s materiality standard, often on the premise that it all too easily empowers overzealous prosecutors to engage in gamesmanship to dodge their obligations to disclose.[64] It should not come as a surprise, then, that many calls for reform emphasize "sticks" designed to beat back prosecutorial misconduct and nudge prosecutors to disclose iffy *Brady* material.[65] But focusing on bad actors obscures the issue of good prosecutors who inexplicably under-disclose. Accordingly, I will now put forth a number of possible remedies to address both intentional misconduct and inadvertent lapses of judgment regarding prosecutors' disclosure obligations.

## *III. Giving* Brady *Teeth: Punishing Intentional Misconduct*

Disciplinary boards have shown a striking reticence to punish prosecutors for even the most grievous of errors.[66] The withholding of

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undercover informants that they become lawbreakers themselves.").

61. *See* Davis, *The American Prosecutor*, *supra* note 18, at 432 ("He found that prosecutors withheld evidence in hundreds of cases during the past decade, but that courts overturned verdicts in only the most extreme cases.").

62. Burke, *Revisiting*, *supra* note 53, at 490 n.54.

63. Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2129 (2010) [hereinafter Burke, *Talking*].

64. *See, e.g.*, Gershman, *Litigating*, *supra* note 50, at 538–42, 548–64 (outlining the numerous methods prosecutors can use to altogether avoid or minimize the effects of disclosing exculpatory evidence); Sundby, *supra* note 32, at 645 ("[I]t is the Court's materiality decisions that essentially have robbed *Brady* of any pre-trial . . . powers and transformed the doctrine from a pre-trial discovery right into a post-trial remedy for government misconduct.").

65. *See* Burke, *Revisiting*, *supra* note 53, at 488–93 (noting scholars have proposed reforms that encourage prosecutors to place greater value on doing justice, advocate increased enforcement of ethical rules, demand double jeopardy protection attach to convictions reversed due to *Brady* violations, and even call for civil and criminal liability for *Brady* violators).

66. *See* Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 173 (2004) (referencing a 1999 study

exculpatory evidence is the most common—and most dangerous—form of prosecutorial misconduct. The ethical rules governing the suppression of exculpatory evidence are also the clearest and easiest to enforce within the pantheon of oft-vague admonitions like the warning to "do justice."[67] In some jurisdictions, the canons of ethics give supervisory lawyers the task of monitoring subordinates in prosecutors' offices to ensure compliance with the disclosure rules.[68] Those supervisors may be subject to discipline for ordering, ratifying, or even failing to correct known discovery violations.[69]

Yet, disciplinary bodies hardly ever sanction prosecutors who disregard *Brady*'s precepts.[70] Two decades ago, Richard Rosen studied the

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of Illinois state court convictions that were reversed on appeal for prosecutorial misconduct that revealed only two prosecutors out of 326 such cases were subject to sanctions, and none were dismissed from the State's Attorney's Office); Yaroshefsky, *supra* note 36, at 278–80 (claiming that while there has not been a detailed study of the types and severity of errors committed by prosecutors it is clear that few have been disciplined, even in cases where prosecutors suppressed evidence in order to obtain death penalty convictions in capital cases); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 722 (2001) ("Numerous commentators have reacted by noting the dearth of cases in which disciplinary authorities have sanctioned prosecutors."). An exhaustive study by Professor Fred Zacharias unearthed a "far from staggering" number of reported cases nationwide (roughly 100) in which prosecutors had received discipline, and most of those were quite dated. *Id.* at 744. Zacharias observes that "the body of cases is not entirely negligible," especially given its confinement to matters of public record. *Id.* at 743–45.

67. *See, e.g.*, Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 723 (2006) [hereinafter Gershman, *Reflections*] (explaining the reticence to discipline prosecutors for *Brady* violations despite the contention that "the ethical rule governing a prosecutor's suppression of evidence is the most explicit and easiest to enforce"). This is not to say that ethical rules in the discovery area are perfect. In particular, the rules could be far more explicit in requiring individual prosecutors to undertake a diligent search for *Brady* material in law enforcement's possession. *See* Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427, 453–54 (2009) (attempting to bolster its ethical rules in this area, North Carolina now requires that prosecutors make a "reasonably diligent inquiry" to locate potentially exculpatory evidence).

68. *See, e.g.*, STANDING COMM. ON ETHICS AND PROF'L RESPONSIBILITY, AM. BAR ASS'N, FORMAL OPINION 09-454, *Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense* 8 (2009) [hereinafter ABA OP. 09-454] ("Any supervising lawyer in the prosecutor's office and those lawyers with managerial responsibility are obligated to ensure that subordinate lawyers comply with all their legal and ethical obligations" (citing MODEL RULES OF PROF'L CONDUCT R. 5.1(a) and (b))).

69. *See id.* at 8 ("Thus, supervisors who directly oversee trial prosecutors . . . are subject to discipline for ordering, ratifying or knowingly failing to correct discovery violations." (citing MODEL RULES OF PROF'L CONDUCT R. 5.1(b))).

70. *See* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 731 (1987) ("In light of the numerous reported cases that contain evidence of intentional *Brady*-type misconduct, the instances of discipline are too rare . . . .").

entire volume of written disciplinary decisions and dug up only nine cases in which a prosecutor had even been referred to the ethics board for suppressing exculpatory evidence.[71] Just one of those nine disciplinary proceedings ended with a sanction, and merely a suspension at that.[72] Rosen's research methodology included a survey sent to disciplinary representatives in every state.[73] Thirty-five of the forty-one states that responded to this query indicated that no formal complaints had ever been filed alleging *Brady*-type misconduct.[74]

Joseph Weeks followed up on Rosen's research ten years later and discovered a similar pattern. Weeks found seven cases where prosecutors had been referred to disciplinary bodies for purported *Brady* violations. Four of these referrals resulted in sanctions, the most severe of which was a six-month suspension.[75] These findings about the paucity of discipline imposed on prosecutors for *Brady* violations, even the rarity of allegations themselves, are startling. Nothing suggests things have changed much in recent years.[76] On the contrary, data produced by groups across the country suggest that disciplinary agencies stand idly by as the tide of *Brady* violations, if not rising, continues unabated.[77]

One glaring example of disciplinary inaction took place in California in 2010. A state appellate court determined in 2007 that an assistant prosecutor in Tulare County, Phil Cline, had improperly withheld audiotapes of interviews with state witnesses that pointed to the defendant's innocence in a capital murder case from the 1980s.[78] The appellate judges had listened to the tapes themselves. They came away from that experience

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71. *See id.* at 730–31 (discussing the results of the survey).

72. *Id.* at 731.

73. *See id.* at 696–97 (describing the background research that supplemented an exhaustive review of available print records with surveys sent to the lawyer disciplinary bodies of each of the fifty states and the District of Columbia).

74. *Id.* at 730–31.

75. *See generally* Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833 (1927).

76. *See* GERSHMAN, *supra* note 25, at 568 n.5 (detailing a U.S. Department of Justice report from 1997 that showed that in hundreds of investigated cases of prosecutorial misconduct none resulted in punishment from supervisors or sanctions from courts or bar associations).

77. *See, e.g.*, Yaroshefsky, *supra* note 36, at 278, 285 (detailing the results of wrongful conviction studies in the United States).

78. Kathleen Ridolfi & Maurice Possley, *Executive Summary: A Study of Prosecutorial Misconduct and Wrongful Conviction in California* 3–5 (Aug. 2010) (on file with the Washington and Lee Law Review).

shocked by Cline's callous disregard for justice. The defendant in the case, Mark Sodersten, had recently died after twenty-two years in prison, a fact that ordinarily terminates or "abates" any lingering litigation in a criminal case. Angered by the severity of Cline's misconduct, the court bypassed the abatement principle and overturned the conviction.[79] But the opinion had no practical effect. Sodersten was dead, Cline went on practicing law. Cline had even moved up the office ladder to chief prosecutor in 1992, and voters had re-elected him ever since. With the appellate decision in hand, Sodersten's lawyer filed a complaint against Cline with the California State Bar. Three years later, a bar official wrote a letter to the attorney explaining that it was closing the investigation because it could not find sufficient proof of wrongdoing.[80] Cline remains the district attorney in Tulare County today.[81]

State disciplinary authorities are well-positioned in theory to sanction prosecutors, considering that much of their work revolves around investigating claims of lawyer misbehavior.[82] The challenge lies in finding ways to motivate ethics officials to take on prosecutors. An array of factors explains why state disciplinary bodies rarely punish prosecutors for misdeeds.[83] Ethics investigations are normally instigated by the submission of a formal complaint against a particular lawyer.[84] The fact that prosecutors represent "the People," and not a client per se, signifies that no individual has a strong incentive for filing an ethics complaint against them, except for criminal defendants whose cries of injustice are understandably received with a dose of skepticism.[85] Instances of prosecutorial misconduct

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79. *Id.*

80. *Id.*

81. Tulare County District Attorney, *Welcome to the Office of the Tulare County District Attorney*, http://www.da-tulareco.org/ (last visited Nov. 15, 2010) (on file with the Washington and Lee Law Review).

82. *See* Imbler v. Pachtman, 424 U.S. 409, 429 (1976) (suggesting some avenues already exist to sanction prosecutorial behavior by imposing criminal penalties).

83. *See* Zacharias, *supra* note 66, at 749–55 (identifying the unique character of the prosecutor within the legal system as contributing in numerous ways to the dearth of proceedings initiated against prosecutors by opposing counsel, courts, and professional associations).

84. *See id.* at 749–50, 758 (noting that prosecutors lack traditional clients who are the most likely party to bring an ethics complaint before a disciplinary body).

85. *See* Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 445 (1992) [hereinafter Gershman, *New Prosecutors*] (listing the structure of ethics and grievance committees, the prestige attached to the prosecutor's office, and the lack of a private attorney-client relationship as reasons few ethics complaints are brought against prosecutors). Criminal defendants may have the motivation to file formal complaints, but

are also hard to detect.[86] Discretionary decisions by prosecutors, like disclosure choices, usually occur in the interstices of the criminal process.[87] They are not made in courtrooms or during formal negotiations with defense counsel, but behind closed doors far from the prying eyes of defendants, judges, and state ethics boards.[88] On those occasions where the door blocking exposure to those decisions opens to outsiders, ethical codes treat prosecutors deferentially, formulating generous boundaries for what comprises a legitimate exercise of discretion.[89] Moreover, the reluctance to discipline prosecutors might be attributed in part to political considerations.[90] Ethics boards may fear blowback from prosecutors, many of whom wield political clout.[91]

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many lack the resources to pursue their claims with the tenacity needed to provide substantiation. *See* Zacharias, *supra* note 66, at 749–50 ("Criminal defendants rarely have incentives or resources to pursue complaints to the bar."). Criminal defense lawyers may resist the temptation to file complaints against prosecutors because of the risk of alienating common adversaries whom they will likely encounter in the future and upon whom they depend for favorable plea bargains and scheduling accommodations. *Id.*; *see also* Yaroshefsky, *supra* note 36, at 295–96 (discussing a range of other explanations for the reluctance of disciplinary agencies to sanction prosecutors, including resource constraints and a lack of expertise in criminal justice ethics).

86. *See* Zacharias, *supra* note 66, at 758 (reasoning that because most complaints against lawyers are brought by clients, the lack of traditional clients prevents prosecutors from having their misconduct discovered).

87. *See* Gershman, *New Prosecutors*, *supra* note 85, at 435–36 (blaming the lack of clearly articulated standards regulating prosecutorial conduct for creating "virtually unlimited prosecutorial discretion").

88. *See id.* at 407–08 (citing the lack of judicial review of the charging decision as an example of unfettered prosecutorial discretion).

89. *See id.* at 445 (suggesting discipline committees are more familiar with and willing to proceed against private attorneys); Zacharias, *supra* note 66, at 725 (comparing the disparate treatment private attorneys and prosecutors receive from disciplinary bodies). It is also quite possible that disciplinary agencies may be leery of pinpointing cases of misconduct and interfering with what they perceive to be a role most appropriately played by the judiciary. *See* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 977–78 (2009) ("Separation-of-powers concerns can also make state authorities hesitate to intrude upon prosecutors' province."); Yaroshefsky, *supra* note 36, at 293 ("[D]eference to the executive branch may reflect the view that the separation-of-powers doctrine limits the authority of state disciplinary committees, which, as arms of the judiciary, cannot control executive branch decision-making."); Zacharias, *supra* note 66, at 754 ("[D]isciplinary authorities may be leery of interfering with, or having an undue effect upon, the judicial process.").

90. *See* Yaroshefsky, *supra* note 36, at 292 ("[P]erhaps the most significant reason for the hands off approach to discipline of prosecutors[] is their political power and deference to the executive branch.").

91. *See* Gershman, *New Prosecutors*, *supra* note 85, at 445 ("[A]s a governmental figure of enormous power and prestige, the prosecutor is a person who professional bar

In order for disciplinary agencies to confront the issue of ill-advised disclosure decisions, the underlying bases for those decisions must first become public with greater regularity. Given the absence of likely individual complainants against prosecutors, ethics boards should take a more proactive stance toward investigating possible instances of prosecutorial misbehavior that may surface through media reports and local court opinions.[92] Also, requiring more extensive prosecutorial record-keeping about discovery decisions would give ethics boards a greater factual foundation upon which to evaluate and ultimately rest allegations of misconduct.[93] But providing ethics boards with increased access to information about potential *Brady* violations will only help *if* ethics boards are keen on disciplining prosecutors at a higher rate.[94] How might one convince these entities to drop their longstanding reluctance to punish prosecutors?

Professor Angela Davis has proposed an intriguing reform: The creation of discrete "Prosecution Review Boards" geared solely toward evaluating disciplinary claims involving prosecutors.[95] Her ideal review board "would not only review specific complaints brought to its attention by the public, but it would conduct random reviews of routine prosecution decisions."[96] The board would investigate "bad practices" (in addition to outright misconduct) and the random nature of its operation would assist in

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organizations would not wish to alienate."); Zacharias, *supra* note 66, at 761 (claiming that disciplinary authorities may view investigating and sanctioning prosecutors as an invasion of the executive branch). As Stephanos Bibas notes, it may also be that "bar authorities have bigger fish to fry, such as blatant financial pilfering by civil lawyers." Bibas, *supra* note 89, at 977.

92. *See* Zacharias, *supra* note 66, at 774 (arguing that proactive approaches to discipline ought to be required of disciplinary agencies because of the "absence of likely complainants").

93. *See* Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 FORDHAM L. REV. 1379, 1385–1420 (2000) (observing the evolution of England's Criminal Procedure and Investigation Act, 1996, and a subsequent Police Code of Practice).

94. *Cf.* Geoffrey S. Corn & Adam M. Gershowitz, *Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct*, 14 BERKLEY J. CRIM. L. 395, 407 (2009) ("And even when prosecutors commit a clear violation—for instance withholding exculpatory evidence—ethics boards rarely impose discipline.").

95. *See* Davis, *The American Prosecutor*, *supra* note 18, at 463–64 ("Congress and state legislatures should pass legislation establishing Prosecution Review Boards."); *see also* Yaroshefsky, *supra* note 36, at 297–99 ("It is time to establish and fund independent commissions . . . .").

96. Davis, *The American Prosecutor*, *supra* note 18, at 463–64.

deterring "arbitrary prosecution decisions."[97] Whether housed within a state disciplinary body or constructed as a separate entity altogether, Davis's suggestion deserves consideration. A review board specializing in prosecutorial behavior would soon assemble the expertise necessary to penetrate the unique web of discretionary decisions by prosecutors. Finding capable participants for prosecution review boards might prove arduous, but strong candidates should emerge from the ranks of former prosecutors and judges, distinguished retirees with the background (and the back*bone*) to challenge prosecutors and little to lose by alienating the law enforcement establishment.

A renewed focus by ethics organizations on punishing prosecutors, like Phil Cline, for concealing exculpatory evidence would help deter the most blatant types of misconduct. More abstractly, it would send a message that these actions will not be tolerated by the bar. External regulation has a profoundly positive effect on attorney behavior generally.[98] There is no reason to doubt that more vigorous (and rigorous) supervision of prosecutors by regulatory bodies could achieve similarly constructive results.[99]

Scholars have suggested various other sticks to goad prosecutors to turn over evidence. The proposals include relaxing the strict principle of absolute prosecutorial immunity from civil liability and criminalizing *Brady* violations themselves.[100] Simply convincing appellate courts to identify the names of prosecutors who commit *Brady* violations in judicial opinions might help.[101] Several intriguing suggestions involve punishing not the prosecutor individually, but the prosecution's case as a whole by either forbidding the government from retrying a defendant whose case is reversed due to a *Brady* error or otherwise putting the government in a

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97. *Id.*

98. *See* Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U.L. REV. 1, 27 n.111 (2009) ("[C]redible threats of malpractice liability have influenced lawyers' conduct.").

99. *See, e.g., id.* ("The broad answer is that the potential for external regulation in general has proven to be a positive influence upon lawyers.").

100. *See* Burke, *Revisiting*, *supra* note 53, at 491 nn.58–59 (arguing for increased liability for *Brady* violations). The U.S. Supreme Court is examining the topic of prosecutorial immunity and *Brady* violations this term in *Connick v. Thompson*. *See* Connick v. Thompson, SCOTUS BLOG, http://www.scotusblog.com/case-files/cases/connick-v-thompson (last visited Nov. 15, 2010) (on file with the Washington and Lee Law Review).

101. Adam Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1069 (2009).

worse position on retrial.[102] Because sticks alone may be inadequate, some commentators have endorsed carrots to incentivize prosecutors to comply with *Brady*, such as the use of financial incentives to reward prosecutors for abiding by their ethical duties.[103]

Although intentional *Brady* violations by bad actors are the exception rather than the rule, the annals of criminal law are sufficiently rife with anecdotes of this misbehavior to cause concern.[104] Deterring prosecutors from the deliberate suppression of *Brady* evidence, though, is not the gravest danger in this area of criminal law. The most pressing problem relates to how well-meaning prosecutors tend to interpret their constitutional disclosure obligations in a way that all too often leads to withholding.

### *IV. Office Policies and Practices*

Some prosecutors' offices have responded to news of *Brady* violations by beefing up their training and policies on disclosure. It is hard even for the most fair-minded prosecutor to apply a doctrine dominated by the muddled concept of materiality. One study of the Los Angeles District Attorney's Office revealed that assistant prosecutors were often confused about the scope of the *Brady* doctrine. This confusion was exacerbated by supervisors who expressed wildly different opinions about how to determine whether a piece of evidence was exculpatory.[105] That office now

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102. *See* Burke, *Revisiting*, *supra* note 53, at 491 ("Still others have argued that as a disincentive to the risk-taking that *Brady* currently encourages in prosecutors, the Fifth Amendment's prohibition against double jeopardy should prohibit the government from retrying a defendant if his conviction is reversed because of a *Brady* violation."); Gurwitch, *supra* note 41, at 322 (explaining how the current remedy under *Brady* calling for a new trial fails to disadvantage the prosecution, while resulting in numerous disadvantages toward the defendant); Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets* Brady, 109 PENN. ST. L. REV. 1133, 1152 (2005) ("[T]he court could order that, on retrial, the defendant should get open discovery, or a deposition of the witness who was the subject of the withheld information. The hope is that by putting the prosecutor in a worse position on retrial, maybe he will reconsider the decision.").

103. *See generally* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851 (1995).

104. *See* Burke, *Talking*, *supra* note 63, at 2119 ("[S]tories of bad prosecutorial decision-making in the cases against Genarlow Wilson, the Jena Six, and three Duke lacrosse players are merely high-profile examples of prosecutorial misconduct . . . .").

105. *See* Erwin Chemerinsky, *The Role of Prosecutors in Dealing with Police Abuse: The Lessons of Los Angeles*, 8 VA J. SOC. POL'Y & L. 305, 317 n.69 (2001) (citing an

has a *Brady* Compliance Division to coordinate and publicize information about the doctrine.[106] Other prosecutorial agencies have followed suit by implementing in-house disclosure training programs and drafting office manuals that cover the topic.[107]

Internal training and guidelines to steer *Brady* decisions are admirable reforms, especially if offices set up procedures to ensure that line prosecutors actually follow these directives. Offices could issue disclosure checklists for prosecutors to complete for each case, followed by the random auditing of case files to test whether line prosecutors are using them correctly.[108] Decision-making research shows that people learn best from their mistakes if they receive explicit feedback about when they succeeded and when they failed.[109] Standardizing a feedback process to analyze what went wrong in poor *Brady* decisions would reinforce the use of disclosure checklists, guidelines, and audits.[110] Critical to this type of program is

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independent assessment of the Los Angeles police department conducted by Erwin Chemerinsky); *see also* Prosser, *supra* note 9, at 569 ("If there is no working definition of exculpatory evidence in their jurisdiction, or no training in their offices as to what to disclose and how to make those decisions, they may well not appreciate what exculpatory evidence is or recognize it when they learn of it.").

106. *See* Gershman, *Reflections*, *supra* note 67, at 687 n.10 (mentioning a special directive from the Los Angeles County District Attorney's Office).

107. It appears as if many, perhaps most, prosecutors' offices now have ample training programs on *Brady*. *See* Gail Donaghue, *Section 1983 Cases Arising from Criminal Convictions*, 18 TOURO L. REV. 725, 731 (2002) (providing a sample discussion between the participants involved). The Department of Justice announced discovery reforms for U.S. Attorney's Offices in 2010. This announcement occurred after several much-publicized discovery gaffes, among them the dismissal of federal criminal charges against Senator Ted Stevens due to the failure to turn over *Brady* material. These incidents cast aspersions on federal prosecutors. Among other initiatives, DOJ appointed a national criminal discovery ombudsman to oversee internal education and vowed that discovery coordinators must provide annual training in each office. Green, *supra* note 27, at 2161–63.

108. *See generally New Perspectives on* Brady *and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961 (2010).

109. Gordon Schiff, *Voices from the Field: An Inter-Professional Approach to Managing Critical Information*, 31 CARDOZO L. REV. 2037, 2065 (2010).

110. Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2216 (2010). Drawing upon practices in the medical field, Barry Scheck has proposed the formation of Professional Integrity Programs within prosecutors' offices to oversee disclosure. Scheck envisions:

> checklists and disclosure conferences, the non-punitive tracking of errors and "near misses," the development of clear office-wide legal definitions of *Brady* material, the administration of audits and root cause analysis . . . and the creation of simulation exercises for training staff that builds on the lessons learned from "near misses" and audits.

convincing line prosecutors that higher-ups will not frown on late disclosure of *Brady* material. Absent a better-late-than-never message from the top brass, a prosecutor who does not turn over evidence at the outset has an incentive to keep it buried.[111]

While these proposals resonate with me, I am less bullish on internal regulation of disclosure duties than are many other observers.[112] My pessimism does not come from distrust of prosecutors, or even doubts about getting them to effectuate these changes,[113] but rather from ambivalence about the *Brady* doctrine as currently formulated. Providing more extensive education and fine-tuning office policy about what constitutes *Brady* material will fall short because the doctrine defies easy explanation. Its case-specific materiality analysis just does not lend itself to meaningful guidelines.

### *V. Layers of Review*

Conscientious prosecutors faced with nettlesome *Brady* issues would benefit from presenting those issues to others through a formal review structure. Internal fresh-look committees might assist in counteracting the force of cognitive biases that can cause individual prosecutors to trivialize potentially exculpatory evidence in their cases.[114] Even if similar reviews already take place informally in many prosecutors' offices, those reviews occur in haphazard fashion.[115] Institutionalizing the process would make the practice routine as well as insert greater transparency and accountability into *Brady* decision-making.

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*Id.*; *see also* Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2105–12 (2010) (discussing the compliance model's use in the prosecutor's office); Green, *supra* note 27, at 2171–72 (discussing why prosecutors might "be skeptical about the prospects for learning from disclosure mistakes").

111. Scheck, *supra* note 110, at 2237–38.

112. *See generally id.*

113. For some interesting and creative ideas about how to prompt prosecutors' offices to adopt entity-level compliance programs, see Barkow, *supra* note 110, at 2112–18. As Bruce Green points out, one challenge with disclosure review processes is how to avoid motivating prosecutors to conceal their errors. Green, *supra* note 27, at 2183–84.

114. *See* Burke, *Lessons*, *supra* note 51, at 1626–31 (suggesting reforms for repairing *Brady*).

115. *See, e.g.*, Patrick J. Fitzgerald, *Thoughts on the Ethical Culture of a Prosecutor's Office*, 84 WASH. L. REV. 11, 25 (2009) ("We also have ethics advisors, and when we have tough cases and tough problems we run them by the advisors.").

Some scholars have even called for judicial involvement in screening prosecutors' *Brady* decisions during the discovery phase.[116] One proposal would require that at the time of pre-trial discovery the prosecutor submit his full case file to the trial court or a magistrate for inspection.[117] The independent adjudicator would have the authority to determine whether the file has *Brady* evidence.[118] After the adjudicator reaches a decision, she would notify the prosecutor about the information recommended for disclosure.[119] At this point, the prosecutor could object.[120] There is already precedent for judicial involvement in the disclosure process. Massachusetts state judges must hold pretrial conferences to confirm that all discovery obligations have been met.[121] Asking courts to examine the evidence in prosecutors' files is a logical outgrowth of the pretrial conference format.

Whatever the merits of adding secondary review structures to oversee individual prosecutors' *Brady* decisions prior to trial (and there are many), the reviewing bodies would still have to make the subjective determination about whether favorable evidence is material to guilt or punishment *before* the trial has occurred or the defense has even revealed its strategy. The absence of information makes the process of weighing whether the evidence would have a reasonable probability of affecting the trial outcome purely speculative. In the end, the prospective assessment of materiality mandated by *Brady* and its progeny is fundamentally flawed given its vulnerability to cognitive bias even for those players—judges, prosecutorial supervisors, and others—one step removed from the heat of litigation. It may be time to rethink the very propriety of the materiality standard itself.

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116. *See* Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problem of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 427–28 (1984) (proposing a right to an in camera hearing at the time of pre-trial discovery); *see also* Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1636–38 (2005) ("Pre-hearing judicial review of the prosecutorial file forces disclosure to a player who can check executive-branch judgment without raising concerns . . . .").

117. *See* Capra, *supra* note 116, at 427 ("This proposal for a per se right to an in camera inspection proceeds as follows: At the time of pre-trial discovery, the prosecutor must submit his entire file on the case to the trial court or to a magistrate.").

118. *See id.* at 428 ("[T]he independent adjudicator shall determine whether, and to what extent, the file contains information favorable to the defendant's preparation or presentation of his defense.").

119. *See id.* ("Once a preliminary determination of favorability is made, the adjudicator would notify the prosecutor of the information proposed for disclosure.").

120. *See id.* ("At this point the prosecutor could object to disclosure in whole or in part . . . .").

121. MASS. R. CRIM. P. 11(a)(1) (2010).

### *VI. Materiality Under the Microscope*

In trying to recast the doctrine to fulfill its early promise, let's start with a look at whether *Brady* can be saved by modifying the materiality test. The key question is how to calibrate the test to strike the proper balance between a prosecutor's advocacy interests and the defendant's right to a fair trial.

One solution might consist of amending the materiality standard to make it easier for defendants to satisfy on appeal.[122] Changing the test from a reasonable probability of a different result to a reasonable *possibility* would make it harder for prosecutors to justify withholding borderline *Brady* information and less onerous for defendants to carry the burden of subsequently proving a violation. New York has taken this approach in certain *Brady* situations.[123] Where a defendant in New York state court makes a specific request for a piece of favorable evidence, nondisclosure of that item will satisfy materiality so long as its presence would have created only a reasonable possibility of a different result.[124]

Another potential reform is to flip the burden of proving materiality on appeal from the defendant to the prosecution.[125] Defendants usually must prove that the withholding of favorable evidence affected the outcome at trial. Courts instead could force prosecutors to show that the withholding did *not* impact the verdict. New Hampshire has followed this course. In 1995, the New Hampshire Supreme Court held that the *Brady* test places "too severe a burden" on criminal defendants, and chose as a matter of state constitutional law to put the appellate burden on prosecutors to show "that the undisclosed evidence would not have affected the verdict."[126]

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122. *See* Christopher Deal, Brady *Materiality Before Trial: The Scope of the Duty to Disclose and the Right to a Trial by Jury,* 82 N.Y.U. L. REV. 1780, 1790 n.57 (2007) ("Justice Stevens believed that this more lenient definition of materiality should apply.").

123. *See generally* People v. Fuentes, 907 N.E.2d 286 (N.Y. 2009).

124. *See id.* at 289 (explaining that when a document is requested by the defense, failure to provide that document will result in the materiality standard being met if the court can conclude that it was reasonably possible that the document could have changed the result of the proceedings). For alleged *Brady* errors where there was no specific request, the test remains reasonable probability. *Id.*

125. Several scholars have criticized the Supreme Court for neglecting to require that prosecutors on appeal must prove that the nondisclosure of favorable evidence was not material. After all, prosecutors typically bear the burden of proving that a constitutional error, once established, was not harmless. Gershman, *Reflections*, *supra* note 67, at 713; Hoeffel, *supra* note 102, at 1144.

126. State v. Laurie, 653 A.2d 549, 552 (N.H. 1995).

While altering the requirements of the materiality test itself and/or shifting the burden of proof on appeal have advantages, the major drawback lingers. Prosecutors would still undertake the "bizarre kind of anticipatory hindsight review" described by Burke that allows selective information processing, confirmation bias, and the aversion to cognitive dissonance to flourish.[127] Telling prosecutors to consider, prior to trial, whether evidence that favors the defendant would have a reasonable possibility of affecting the outcome is but a mild improvement over the reasonable probability requirement. Many prosecutors might unconsciously perceive the evidence so as to underrate the exculpatory information, overrate the inculpatory evidence, and conclude that no reasonable possibility of a different result exists. Other prosecutors might consciously subvert the modified standard by interpreting it in a manner that supports withholding, as some observers suggest is the case with the current test.[128] Similarly, giving the burden of proof on appeal to prosecutors would have minimal impact on the decision to characterize evidence as material at the front end of the process.

In recognition of the difficulties that any formulation of the materiality standard poses for all actors in the criminal justice system—prosecutors in evaluating it prospectively, defendants (or even prosecutors) in overcoming it retrospectively, courts in judging it from a distance—several scholars want to discard that prong of *Brady* altogether.[129] Prosecutors could simply be required to disclose all favorable evidence in order to comply with due process.[130] A prominent advocate of this view was Justice Thurgood Marshall. His dissent in *Bagley*, the case that produced the present version of the materiality standard, lobbied for a prosecutorial duty to turn over "all information . . . that might reasonably be considered favorable to the defendant's case."[131] In fact, well before *Bagley* and ensuing cases developed the Court's materiality jurisprudence, the initial *Brady* decision intimated that all relevant evidence favorable to the accused should be

127. *Supra* notes 52–55 and accompanying text.

128. *See* Gershman, *Reflections*, *supra* note 67, at 713 (discussing "a new standard of materiality that in practice rendered suppression of favorable evidence by prosecutors a routine and rationale act").

129. *See* Hoeffel, *supra* note 102, at 1151 (describing how some scholars, attempting to envision effective solutions to the problems with *Brady*, noted that the courts could "create better legal standards for the due process violation than those set as the floor in *Bagley*").

130. *See, e.g.*, *id.* at 1151–52 ("The better standard would require that a due process error occurs at trial if favorable information is withheld."); Sundby, *supra* note 32, at 661–63 ("[T]he 'reasonably favorable' query would thus have presented a standard that would have been far easier for the prosecutor to apply prior to trial.").

131. United States v. Bagley, 473 U.S. 667, 695–96 (1985) (Marshall, J., dissenting).

turned over.[132] With a duty to disclose all favorable evidence in place, prosecutors would no longer need to speculate about how the evidence might theoretically affect the outcome of a case. This vision of the constitutional disclosure obligation would also more closely align it with state ethical rules that demand disclosure of all evidence that "tends to negate guilt."[133] Some jurisdictions appear inclined to go in this direction.[134]

Nonetheless, shedding the materiality prong is not a complete solution. Prosecutors would still have to determine whether the evidence is favorable, a subjective evaluation that occurs prior to trial without full access to information about the defense strategy.[135] Although this assessment may not pose especially complicated questions in many cases, it may occasionally produce some very tough calls. Abandoning the materiality aspect of *Brady* therefore fails to cure the doctrine's ills completely.[136]

### *VII. Open File Discovery*

The best way to guarantee that defendants obtain the exculpatory evidence owed to them under *Brady* is to require "open file discovery" where prosecutors must turn over all evidence known to the government, exculpatory *and* inculpatory alike.[137] Some commentators have pushed for a federal constitutional doctrine of open file discovery to realize *Brady*'s

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132. *See* Sundby, *supra* note 32, at 646–47 ("The Court's holding, therefore, while not expressly embracing a relevance standard, was consistent with the idea that the exculpatory evidence simply had to be relevant (and admissible) to be material.").

133. *See, e.g.*, ABA OP. 09-454, *supra* note 68, at 2 ("Rule 3.8(d) does not implicitly include the materiality limitation recognized in the constitutional case law. The rule requires prosecutors to disclose favorable evidence so that the defense can decide on its utility.").

134. *See, e.g.*, ILL. SUP. CT. R. 412(c) (adopting a court rule mandating that prosecutors disclose evidence that "tends to negate the guilt of the accused").

135. *See* Burke, *Revisiting*, *supra* note 53, at 513–14 ("[It] still leaves them to determine whether the evidence is favorable to the defense in the first instance. Because the prosecutor is unaware of the facts known to the defense, or the defense's theory of the case, she may fail to appreciate the favorability of evidence.").

136. *See id.* (presenting an example of how determining whether evidence is favorable to the defense before trial can pose challenges for prosecutors). *Cf.* Sundby, *supra* note 32, at 662 (suggesting that prosecutors would not struggle much if required only to disclose evidence "reasonably favorable" to the accused).

137. *See* Burke, *Revisiting*, *supra* note 53, at 514 (proposing a system of "'open file' discovery in which prosecutors disclose all evidence known to the government, whether it seems to inculpate or exculpate").

idealistic vision.[138] Others have advocated a broadening of state and federal discovery laws.[139] These suggestions reflect the idea that a prophylactic rule of open file discovery is preferable to a case-specific standard like *Brady*.[140]

Open file discovery certainly removes much of the subjectivity from the equation.[141] Prosecutors would not have to engage in an artificial, prospective assessment about how particular items of evidence fit within the jigsaw puzzle of a possible trial; defendants would not have to clear the virtually insurmountable hurdle of showing that the evidence would have made a difference in the outcome; and appellate judges could shed the chore of divining the importance of withheld evidence.[142]

Open file discovery more generally would level the playing field by giving defendants a bird's eye view into the exact nature of the

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138. *See, e.g., id.* at 514 nn.195–96 ("Several scholars have previously called for open file discovery."); Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 262 (2008) ("[T]he message of these cases is the paramount importance of a broad and sure disclosure requirement in criminal cases . . . ."); Yaroshefsky, *supra* note 36, at 295 ("Changes in discovery obligations from less of a 'cat and mouse game' to relatively open discovery would afford the true believer less opportunity to stretch ethical boundaries . . . .").

139. *See* Gershman, *Reflections*, *supra* note 67, at 725–28 ("Amending the Federal Rules of Criminal Procedure to impose strict and explicit disclosure requirements on prosecutors might be one way to restore the promise of *Brady v. Maryland*."); Burke, *Revisiting*, *supra* note 53, at 500 (noting that changing the rules of criminal procedure or recognizing increased discovery rights under state constitutional law could certainly expand discovery obligations but that either solution would "lack the sweeping impact of a change to federal constitutional doctrine"); *see, e.g.*, Paul C. Giannelli, Brady *and Jailhouse Snitches*, 57 CASE W. RES. L. REV. 593, 604 (2007) (observing that the author encountered few *Brady* issues during his stint as a lawyer in the military where the practice was to give the prosecution and the defense "the same case file . . . , usually at the same time").

140. *See* Burke, *Revisiting*, *supra* note 53, at 500–01 (advocating for a prophylactic rule applicable to the *Brady* materiality standard).

141. *See* Peter J. Henning, *The Pitfalls of Dealing with Witnesses in Public Corruption Prosecutions*, 23 GEO. J. LEGAL ETHICS 351, 366 n.61 (2010) ("The beauty of full open-file discovery is obvious as a remedy for the difficulty of subjective choice in a competitive adversarial environment. It does not require a prosecutor to make difficult discretionary decisions.").

142. *Cf.* Gilbert Stroud Merritt, Jr., *Prosecutorial Error in Death Penalty Cases*, 76 TENN. L. REV. 677, 684 (2009) ("Line prosecutors need to commit to disclosing favorable evidence, without letting their subjective certainty about a defendant's guilt cloud their judgment. Attorney generals [sic] have to be willing to confess error and grant new trials . . . . Judges must enforce *Brady* doctrine without letting fear . . . characterize [*Brady* violations] . . . as immaterial.").

government's case.[143] The most obvious benefit of open file discovery—reducing the rate of wrongful convictions—would help restore faith in our criminal justice system.[144] A handful of states have implemented far-reaching discovery regimes in recent years.[145] Mandating open file discovery as a matter of federal due process, preferably in tandem with related state discovery laws and ethics rules, could rekindle *Brady*'s flickering fifty-year-old flames.

Yet open file discovery is controversial. Opponents of the proposal frequently contend that it goes too far.[146] Rather than leveling the playing field, they suggest that compelling open file discovery would unduly shift the balance of power in the criminal justice system in favor of the defendant.[147] Another criticism is that open file discovery could invite abuse by defendants who might intimidate witnesses or fabricate their defense strategy in reaction to the evidence against them.[148] Judge Learned Hand summarized these concerns about broad discovery rules nearly a century ago:

> 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

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143. *Cf.* Giannelli, *supra* note 139, at 604 (emphasizing how the military approach of both sides receiving the same case file and evidence at the same time illustrates that "[a] better approach is expanded discovery rules").

144. *See* Gurwitch, *supra* note 41, at 304 ("Numerous commentators have questioned whether the remedy, under current *Brady* jurisprudence, is sufficient to assure that wrongful convictions are being avoided, individual defendants are receiving a fair trial, and that the integrity of the criminal justice system is being protected.").

145. *See* Brown, *supra* note 116, at 1622–24 (observing the extent to which many states have supplemented or extended the *Brady* requirements in recent years); Janice Morse, *Ohio's New Criminal Court Rules Kick In*, CINCINNATI ENQUIRER, July 1, 2010 ("On July 1, Ohio becomes an 'open-discovery' state.").

146. *See, e.g.*, Michael Lumer, People v. Jackson: Rosario *Reductionism and Collateral Attacks*, 60 BROOK. L. REV. 1229, 1287–88 n.290 (1994) ("It also may have been that [Judge Bellacosa] advocated doing away with the per se standard completely, replacing it perhaps with a [sic] open-file discovery process . . . . Such an *extreme position* may have dissuaded other members of the bench from signing on to his opinions . . . ." (emphasis added)).

147. *See* Dettelbach, *supra* note 33, at 616–17 (noting that the materiality requirement is partly a "self-defense mechanism" to protect prosecutors and rightful convictions from creative defense attorneys and "armchair quarterbacking" by judges).

148. *See* RICHARD G. SINGER, CRIMINAL PROCEDURE II: FROM BAIL TO JAIL 100 (Aspen Publishers 2nd ed. 2008) ("Some defendants will destroy or alter evidence, intimidate or kill witnesses, create fantasies of defense, etc.").

> 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.[149]

Although these concerns have merit in theory, lessons learned from jurisdictions that currently have broad discovery rules suggest these fears are not borne out in practice.[150] And in some other jurisdictions, prosecutors strive to disclose more evidence than required by law, suggesting that open file practices might be in their best interest.[151] The voluntary enactment of open file discovery practices signals that a particular prosecutor's office seeks transparency and burnishes its image as an institution committed to fairness.[152] With greater faith in the goodwill of their adversaries, defendants might embrace the notion of fair play and be reluctant to instigate protracted discovery litigation for the sake of fishing for some unknown delicacy in the deep blue sea of the prosecution's files.[153] Prosecutors can even benefit directly from open file discovery.[154] Defendants who are fully aware of the strength of the case against them might express greater willingness to accept plea bargains than those who lack such insight.[155] If revealing sensitive information in the file could endanger a witness or jeopardize a longstanding investigation, prosecutors can always seek protective orders to prevent disclosure of that material.[156]

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149. U.S. v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

150. *See* Brown, *supra* note 116, at 1622–24 (articulating that although safety and investigatory concerns are real, "those interests are not strong in most cases").

151. *See* Burke, *Revisiting*, *supra* note 53, at 515 ("Furthermore, many prosecutors already voluntarily disclose more than *Brady* requires them to.").

152. *See id.* ("One advantage of open file discovery is that it reflects the commitment of a prosecutor's office to transparency, which in turn promotes the appearance of prosecutorial accountability and institutional fairness.").

153. *See id.* ("Those cases that do proceed to trial may be litigated more efficiently because the defense attorney will have had an opportunity to identify the central issues in the case prior to trial.").

154. *See id.* ("Open file discovery is also thought to bring more pragmatic advantages [for prosecutors].").

155. *See id.* at 516 (discussing how strong evidence may create an incentive for the defendant to plead guilty whereas weak evidence may encourage the defense to argue persuasively for dismissal); Gershman, *Litigating*, *supra* note 50, at 543 ("An open file arrangement may encourage defendants to plead guilty in the belief that having been fully informed about the prosecution's case, they may assume that they will receive a favorable bargain from a prosecutor who acts with integrity.").

156. *See* Burke, *Revisiting*, *supra* note 53, at 516 ("[A] rule mandating broad discovery should contain an exception for cases in which disclosure would endanger witnesses, interfere with an ongoing investigation, or otherwise jeopardize a governmental interest.").

Note the experience with open file practices in Milwaukee. District Attorney John Chisholm developed an extensive case screening and diversion program to find alternatives to incarceration for low-risk offenders.[157] Chisholm believed that early access to information by the defense was vital to the success of this program. This caused him to champion open file discovery. Not all of his assistants welcomed this idea. Chisholm nevertheless plowed ahead, and in 2010 observed that open file discovery in his office had facilitated guilty pleas and enriched relationships with the defense bar.[158]

For open file discovery to succeed on a large scale, however, there must be mechanisms to enforce compliance.[159] Even without requiring prosecutors to conduct the pretrial *Brady* materiality test that is so susceptible to gamesmanship, prosecutors still control the open file discovery process.[160] They alone would have access to the precise contents of their files.[161] Defendants can be lulled into a false sense of security in jurisdictions with an open file discovery policy in place.[162] Several flagrant *Brady* violations have occurred in cases where prosecutors alleged that they maintained open file discovery, yet nonetheless withheld exculpatory evidence.[163]

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157. *See* Schiff, *supra* note 109, at 2074–77 (discussing John Chisholm's ideas about "[h]ow individuals are processed through the criminal justice system"); Ellen Yaroshefsky, *Foreword: New Perspectives on* Brady *and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943, 1951 (2010) ("Hon. John Chisholm provided an overview of his office's effective and innovative strategies not only in disclosure, but also in various community-based initiatives.").

158. Schiff, *supra* note 109, at 2074–77.

159. *See* Peter A. Joy, Brady *and Jailhouse Informants: Responding to Injustice*, 57 CASE W. RES. L. REV. 619, 641 (2007) ("Without guidelines on the exercise of discretion in discovery, there is the potential for some prosecutors to use factors such as the race or social standing of the defendant or the defendant's lawyer in determining who receives open file discovery.").

160. *See id.* ("[W]hether a defendant receives the benefit 'of an open file policy may depend on the particular prosecutor . . . .'").

161. *Cf. id.* at 641 n.99 ("Provided the material in the prosecutor's file *is complete* and contains information compiled by *all* of the law enforcement personnel related to the case, there cannot be any *Brady* material not disclosed . . . ." (emphasis added)).

162. *See* Tamara L. Graham, *Death by Ambush: A Plea for Discovery of Evidence in Aggravation*, 17 CAP. DEF. J. 321, 345 (2005) ("Defense attorneys should not be lulled into a false sense of the prosecution's case, even when granted discovery."); *see also* Gershman, *Litigating*, *supra* note 50, at 544 ("Through the pretense of transparency, prosecutors have the ability to not only withhold *Brady* evidence—as they may do in any case—but also by suggesting that full disclosure has been made, forestall any further inquiry and, in fact, change the nature of the defense.").

163. *See* Gershman, *Litigating*, *supra* note 50, at 544 ("[S]everal of the most egregious

To be sure, open file discovery provides ample opportunities to game the system.[164] Prosecutors can stretch the definition of sensitive information beyond its logical boundary and refuse to disclose an array of evidence under that purported justification.[165] Open file discovery might also induce police and supervisory prosecutors to shield information from the trial prosecutor or otherwise decline to reduce their knowledge to writing in order to circumvent mandatory disclosure.[166] Skeptical defense lawyers have even derided some policies as "open empty file" policies.[167] At the other end of the spectrum, prosecutors might *over*-disclose by providing defense lawyers with a mountain of inscrutable material to sift through.[168] In one of the Enron financial fraud cases, the prosecutors' open file discovery practice led them to turn over eighty *million* pages of documents without identifying or highlighting anything in particular.[169]

The behavior of Carmen Marino, the former chief prosecutor in Cleveland, offers a cautionary tale about the limits of open file discovery practices in individual prosecutors' offices.[170] Marino "opened" his files by asking his assistants to invite defense attorneys down to the office for a conversation.[171] During these meetings, prosecutors would read documents

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*Brady* violations have been reported in cases where prosecutors represented that they allegedly maintained an open file policy and had claimed to disclose everything in the file relating to the case, including *Brady* evidence."). Some offices lack a sweeping open file discovery policy, but vest discretion in individual prosecutors to utilize this practice if they wish. This means that the availability of open file discovery is often haphazard and subject to the whims of individual prosecutors. *See* Joy, *supra* note 159, at 641.

164. *See* Gershman, *Litigating*, *supra* note 50, at 544 ("The opportunities for gamesmanship under an open file policy are considerable.").

165. *See* Gurwitch, *supra* note 41, at 316 ("It seems apparent that a prosecutor who makes a conscious decision to withhold exculpatory material from the defense is equally likely to remove such information from the file before 'complying' with open file discovery.").

166. *See id.* ("But if this statement was not reduced to writing, open file discovery would play no role in assuring that the statement was provided to the defense.").

167. Green, *supra* note 27, at 2178.

168. *See* Gershman, *Litigating*, *supra* note 50, at 548 ("[A] variation of the open file gambit . . . [is] to overwhelm the defense with massive amounts of documents, including items that may be potential *Brady* evidence, and that are virtually impossible to read and digest in the limited time available for pretrial preparation.").

169. *Id.*

170. *See id.* at 547–48 ("As anybody who has followed Marino's prosecutorial career is aware, he has been the subject of widespread criticism by courts and commentators for his overzealous and unethical conduct.").

171. *Id.*

aloud instead of allowing their adversaries to look at the files.[172] Subsequent litigation showed that these meetings were often a sham.[173] Cleveland prosecutors under Marino's watch withheld critical exculpatory material, including evidence that would have exonerated innocent defendants in capital cases.[174]

### *VIII. Ensuring the Openness of Open File Discovery*

If open file discovery were adopted nationwide, how could one verify that prosecutorial files are truly "open" to the defense? Vigilant oversight of discovery practices by courts and ethics boards would surely help. But greater supervision by these actors should be combined with reforms designed to bolster the likelihood that the police will turn over evidence to prosecutors in the first place. Frankly, without much evidence in their possession, prosecutors honorably adhering to open file discovery do little to benefit defendants. As noted above, information known only to the police is attributed to the prosecution for *Brady* purposes.[175] This means that prosecutors should root out exculpatory evidence from other law enforcement officials.[176] As noble as this component of the doctrine may be, it ignores the practicalities of the relationship between the police and the prosecution. Prosecutors are effectively at the mercy of the police.[177] Police agencies operate independently from prosecutorial offices and answer to different constituencies.[178] Getting the police to turn over exculpatory evidence to the prosecutor is not a matter of authority, but one of negotiation and persuasion.[179] Prosecutors neither have information about the contents of investigative files without police blessing nor wield the explicit power to enable access to that material in the absence of such

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172. *Id.*

173. *Id.*

174. *Id.*

175. *See supra* note 24 and accompanying text (referring to how prosecutors are liable for what police withhold).

176. *See supra* note 25 and accompanying text (suggesting that prosecutors have an affirmative duty to discover evidence in the hands of other law enforcement colleagues).

177. *See* Fisher, *supra* note 93, at 1384 (noting that if police "cooperation is not forthcoming, the prosecutor's ability to comply with *Brady* is fatally compromised").

178. *See id.* at 1382–83 (discussing how police are not under the authoritative thumb of prosecutors).

179. *See id.* at 1383 (suggesting that obtaining this information requires the prosecutor to motivate the police with the proverbial carrot more commonly than the stick).

blessing. One entity that does have the power to pry open files, the judiciary, seems unenthusiastic about monitoring police practices in the discovery arena.

How might the police be convinced to turn over exculpatory evidence consistently to the prosecution? Stanley Fisher recommends legislative reform.[180] His statutory fixes would require the police to list and record all relevant evidence, disclose those lists to the prosecution, and provide the prosecution with entrée to all investigative materials.[181] Fisher would couple these reforms with measures to increase the probability of compliance: drafting police forms to list pieces of evidence, offering training, and designating particular police personnel as responsible for aspects of the recordation and regulation process.[182] This is a sensible remedy, provided the United States has the political will to supervise police activity in this way.[183]

As an alternative remedy, Fisher suggests changes to the ethical rules.[184] Fisher's proposed changes include the articulation of prosecutorial duties to become familiar with police record-keeping procedures, to promote uniform recordation by law enforcement, and to educate the police about the importance of revealing specific categories of potentially exculpatory evidence.[185] Legislative changes or amendments to the ethical rules surrounding prosecutors' obligations to learn about material in the possession of the police would probably lead to the dissemination of more evidence to the accused.[186]

Still, these reforms may not stymie one of the worst threats to the success of open file discovery, which is not the reluctance of the police to turn over exculpatory evidence to the prosecution, but their propensity *never to record* such information at all.[187] Even when the police record

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180. *See id.* at 1385–1420 (using past English practices to create a plan for better police involvement in the American judicial system).

181. *Id.*

182. *Id.*

183. *See id.* at 1385 (lamenting the fact that America most probably lacks the political will to bring about the appropriate changes).

184. *See id.* at 1424 (suggesting modification to the Model Rules and Prosecution Function Standards).

185. *See id.* at 1423–24 (suggesting that the ABA modify Model Rule 3.8 and Prosecution Function Standards 3-2.7 and 3-3.11 to reflect necessary changes for how prosecutors relate to law enforcement investigators and guide them).

186. *See id.* at 1425 ("The proposed amendments address the prosecutor's duty to bridge the gap between what she knows and what she must know . . . .").

187. *See* Gurwitch, *supra* note 41, at 315–16 (declaring that statements not reduced to

exculpatory information, that material might not be made available to the prosecution.[188] Before its practices were exposed in the late 1980s, the Chicago Police Department employed a double-file system. Detectives kept two sets of books: official files and shadow "street files." Absent from the former, which were turned over to the prosecution, were any number of exculpatory items dutifully recorded and retained in the latter.[189]

Allowing the defense to depose prosecution witnesses in criminal cases might alleviate the fear that information that is not recorded will evade disclosure. Depositions are often used in civil cases by parties seeking to interrogate opposing witnesses before the trial.[190] They help in learning about the other side's case and in pinning witnesses down to their accounts.[191] In the criminal context, subjecting investigating officers to depositions could prompt them to disclose information they failed to put into writing yet might mention at trial.[192] Deposing other prosecution witnesses could generate information unknown even to law enforcement that aids the defense.[193] Several states currently permit so-called "discovery depositions" in criminal cases.[194] Some observers dislike these devices because of the perception that they are costly and run the risk of abusing witnesses.[195] These concerns appear unfounded. Even assuming that discovery depositions add incidental burdens to the criminal justice system, their upside still greatly outweighs their downside. Increasing the use of

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writing would not be subject to open file discovery and consequently would play no role in assisting the defense).

188. As Stan Fisher points out, "[p]olice reports may mislead by misstating facts, omitting facts, or a combination of both." Stanley Z. Fisher, *"Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports*, 28 NEW ENG. L. REV. 1, 6 (1993). Fisher further explores how resource conservation, self-protection, and partisanship conspire to motivate police to take a "minimalist approach" to drafting reports. *Id.* at 8–9.

189. *Id.* at 36–38.

190. *See* Prosser, *supra* note 9, at 581 (discussing how civil cases allow a variety of mechanisms, including deposition of witnesses, in order to discover relevant facts essential to the case).

191. *See id.* at 607 ("Depositions allow questioning of prosecution and defense witnesses . . . .").

192. *Id.*

193. *See id.* at 612 ("[D]epositions provide an opportunity to discover evidence that is not known to the police or to the prosecution, but that may be highly relevant to the case against the defendant.").

194. *See id.* at 608–12 (discussing discovery rules in several states).

195. *See id.* at 613 ("Objections to criminal depositions are primarily those of cost and abuse of witnesses.").

depositions across the nation would enhance the truth-seeking function of the discovery process by nicely supplementing open file practices.[196]

Finally, training prosecutors and creating an ethical culture within prosecutorial agencies should go part and parcel with a movement toward open file discovery. Although providing education for prosecutors about *Brady* bears limited fruit in light of the inherent malleability and subjectivity of the doctrine, training about open file discovery is much easier: Simply instruct prosecutors to turn everything over unless an item might endanger a witness or impair a current investigation.[197] Open file discovery rules do not rest entirely on the ethical judgment of a prosecutor—and for good reason.[198] Prosecutors have not proven themselves up to the task of reliably making the correct choice.[199]

## *IX. Conclusion*

The initial promise of the *Brady* doctrine has not been realized. Various alterations, even alternatives to *Brady* must be considered to reach its extraordinary potential to promote justice. Whether *Brady* remains unchanged, experiences modifications, or is replaced with open file discovery, decisions regarding the disclosure of evidence to the defense will still depend to some extent on the ethical compasses of individual prosecutors. Patrick Fitzgerald, now the United States Attorney in Chicago, believes that "culture shapes behavior" in prosecutorial agencies.[200] Fitzgerald tries to hire people who already have good values and then train them to be ethical lawyers.[201] He looks for lawyers who upon finding potentially exculpatory evidence while sitting alone in the office on a Saturday before a Monday trial will turn it over without batting an eye.[202]

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196. *See id.* at 612 ("Allowing depositions in criminal cases would address some of the deficits of open file policies and of even the most liberal discovery rules.").

197. *See, e.g.*, Mosteller, *supra* note 138, at 259–60 ("These cases in general . . . show the importance of concrete standards of conduct, such as an obligation to full disclosure."); *see also supra* note 156 and accompanying text (noting that danger to witnesses should call for exceptions to disclosure policies).

198. *See* Mosteller, *supra* note 138, at 260 (observing that open file discovery does not "rely on the ethical judgment of a prosecutor involved in a fiercely competitive adversary trial process to determine what is exculpatory").

199. *See id.* at 259–60 (observing that prosecutors have not shown themselves capable of following the current standards set forth).

200. Fitzgerald, *supra* note 115, at 14.

201. *See id.* at 14–16 ("An ethical culture starts with hiring.").

202. *See id.* (stating the qualities wanted in one of his attorneys); *see also* Bibas, *supra*

The Dallas County District Attorney's office shares this view. That office even sends case law on disclosure obligations to job applicants and tells them to come to their interviews ready to discuss the ethics of disclosure.[203] Crafting disincentives to deter the withholding of evidence and incentives to promote obedience to disclosure rules work on the outer edge of prosecutorial behavior. Forming an ethical institutional environment where disclosure is the accepted cultural norm works at the core.

note 89, at 963 ("Simply commanding ethical, consistent behavior is far less effective than creating an environment that hires for, inculcates, expects, and rewards ethics and consistency.").

203. Schiff, *supra* note 109, at 2072–73.