2014

Anti-Justice

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ANTI-JUSTICE

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This Article contends that, despite their unique, ethical duty to "seek justice," prosecutors regularly fail to fulfill this ethical norm when removed from the traditional, adversarial courtroom setting. Examples abound. For instance, in 2013, Edward Snowden leaked classified information revealing a government-operated surveillance program known as PRISM. That program allows the federal government to collect metadata from phone companies and email accounts and to monitor phone conversations. Until recently, prosecutors relied on some of this covertly acquired intelligence to build criminal cases against American citizens without informing the accused. In failing to notify defendants, prosecutors violated the explicit statutory directives in the Foreign Intelligence Surveillance Act (FISA). In ignoring the statute, they also breached their obligation to "seek justice." No one complained about the prosecutors' misdeeds because only prosecutors knew that the investigative evidence had been concealed from defendants. In every FISA case, prosecutors alone enjoy access to the relevant surveillance information and singularly decide whether to withhold or disclose it. Such ethical breaches are prevalent in plea bargaining and "Brady" evidence situations as well. This Article contends that because of the non-adversarial and secluded, or as I coin it "anti-justice," environment for moral decision-making in the FISA and other contexts, these ethical violations are predictable, if not inevitable. The review of case files for FISA evidence, like other, analogous, settings in which prosecutors make decisions in seclusion, does not create the milieu where the ethic of doing justice can flourish or, arguably, survive. Doing justice in our system, this Article concludes, requires adversarial judicial proceedings or some equivalent outside influence as a check on prosecutors' power and discretion. Criminal justice scholars and defense lawyers have previously criticized plea bargaining and prosecutors' handling of Brady evidence. This is the first Article to examine prosecutors' recent defiance of FISA as proof

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that in each of these settings, justice demands capable adversarial, judicial, or public influences.

I. INTRODUCTION

Prosecutors bear a unique professional responsibility to seek justice.[1] Yet, our current criminal justice system too often places them in environments in which this seeking-justice norm is bound to wither for lack of adversarial judicial proceedings—the native soil for the duty of justice. For instance, despite explicit statutory directives in the Foreign Intelligence Surveillance Act (FISA),[2] prosecutors have historically failed to notify criminal defendants when the government relied on covertly acquired electronic surveillance[3] in building a criminal case against the accused.[4] In May 2013, describing such notice as "unwarranted and unprecedented," federal prosecutors in Florida denied any duty to disclose such information in a prosecution charging two brothers with conspiring to use weapons of mass destruction and providing

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1. *See* STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION § 3-1.2(b) (1993) ("The prosecutor is an administrator of justice, an advocate, and an officer of the court . . . .") and § 3-1.2(c) (1993) ("The duty of the prosecutor is to seek justice, not merely to convict."); *see also* Berger v. United States, 295 U.S. 78, 88 (1935) (noting that the prosecutor's interest should not be only in winning but that "justice shall be done").

2. *See* 50 U.S.C. §§ 1801–1812 (2010) (governing the electronic surveillance for foreign intelligence information); *see also* 50 U.S.C. § 1806(c) (2010) (declaring that "[w]henever the Government intends to enter into evidence or otherwise use . . . against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person . . . the Government shall . . . notify the aggrieved person and the court or other authority in which the information is to be disclosed or used . . . ."). In 2008, Congress enacted the FISA amendments Act, which "left much of FISA intact, but it 'established a new and independent source of intelligence collection authority, beyond that granted in traditional FISA.'" Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1144 (2013) (citing D. KRIS & J. WILSON, NATIONAL SECURITY INVESTIGATIONS & PROSECUTIONS § 9:11, at 349–50 (2d ed. 2012)); *see also* 50 U.S.C. § 1881a (2012).

3. *See generally* 50 U.S.C. § 1801(f) (2010) (defining "electronic surveillance" to include "the acquisition by an electronic, mechanical or other surveillance device of the contents of any wire or radio and other communication . . . in which a person has a reasonable expectation of privacy . . .").

4. *See* 50 U.S.C. § 1806(c) (2010) (requiring notice to the target of electronic surveillance when the government decides to use evidence obtained by the surveillance "in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States . . . ."); *see also* 50 U.S.C. § 1801(k) (2010) (defining "aggrieved person" for purposes of deciding who can object to the use of the surveillance evidence); 50 U.S.C. § 1806(d) (2010) (providing a similar process for the use by state governments of evidence derived from electronic surveillance).

material support to terrorists.[5] In Chicago, the story is similar. Prosecutors contended they had no obligation to reveal whether the investigation of an American teenager charged with attempting to detonate a bomb outside a Chicago bar was prompted by a government surveillance program.[6]

Prosecutors have also repeatedly breached the duty to seek justice by denying to the accused evidence favorable on the issue of innocence, commonly called "Brady" evidence.[7] The case of former Senator Ted Stevens serves as a high-profile example.[8] In April 2009, newly confirmed U.S. Attorney General Eric Holder announced that he would move to dismiss the jury conviction of the Senator because of prosecutors' failures to provide the defense with *Brady* material before or during trial.[9] The prosecutors who tried the

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5. Devlin Barrett, *U.S. Spy Program Lifts Veil in Court*, WALL ST. J., Jul. 31, 2013, at A1. The defendants in the Florida case are brothers, Raees Alam Qazi and Sheheryar Alam Qazi. Two months after prosecutors refused to consider producing information as required by FISA, the Department of Justice changed positions. "The Justice Department acknowledged for the first time in a terrorism prosecution that it needs to tell defendants when sweeping government surveillance is used to build a criminal case against them." *Id.*

6. Jason Meisner, *Lawyer in Bar Bomb Plot Wants Info on Federal Surveillance Program*, CHI. TRIB., Jan. 3, 2014, *available at* http://articles.chicagotribune.com/2014-01-03/news/chi-adel-daoud-nsa-surveillance-request-20140103_1_adel-downtown-chicago-bar-search-warrants (reporting the defense lawyer's request that the presiding judge order prosecutors to "reveal whether the investigation was sparked by a massive government surveillance program."); *see also* Paula McMahon, *Bank Robbery Suspect Wants NSA Phone Records for His Defense*, SUN SENTINEL, June 12, 2013, *available at* http://articles.sun-sentinel.com/2013-06-12/news/fl-phone-records-fisa-broward-20130612_1_nsa-phone-records-bank-robbery-suspect-cellphone-records (documenting judge giving prosecutors additional time to respond to a request by the defense for phone records gathered by the National Security Agency after prosecutor said that "security procedures" would need to be followed before the prosecution could respond). *But see* United States v. Damrah, 412 F.3d 618, 622 (6th Cir. 2005) (giving notice of an intent to use FISA information, including "audio tapes of phone conversations and two faxes," pursuant to 50 U.S.C. § 1801–1812 (2010)).

7. As explained more below, the Supreme Court in *Brady v. Maryland*, 373 U.S. 83, 86–88 (1963), held that a prosecutor must give the accused access to evidence favorable and material to the accused's guilt or punishment. Thus, before trial, a prosecutor is legally obligated to search the government's files for "*Brady*" materials.

8. *See* Nina Totenberg, *Justice Department Seeks to Void Stevens' Conviction*, NAT'L PUB. RADIO (Apr. 1, 2009), *available at* http://www.npr.org/templates/story.php?storyid=102589818.

9. *Id.*

case concealed from the defense "notes from a 2008 interview," raising significant questions about Senator Stevens' guilt.[10]

Cultural norms and rules of professional responsibility establish behavioral parameters for all practicing lawyers. For most, this guidance manifests in a singular focus on their client's goals and interests. But prosecutors are different; their professional obligations are more complex. Unlike civil litigators and criminal defense attorneys, who owe a duty of "complete loyalty to the client and his cause,"[11] prosecutors are tasked with a responsibility of general virtue and evenhandedness, commonly known as a duty to "do justice."[12] Prosecutors must zealously advocate for their governmental client, while simultaneously looking beyond the government's objectives to "do the right thing," writ large.[13] Although this duty of "justice" is inherently imprecise,[14] in several contexts prosecutors effectively fulfill both directives. For example, in charging,[15] trial,[16] and sentencing,[17] the admonition to seek

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10. *See* Neil A. Lewis, *Justice Dept. Moves to Void Stevens Case*, N.Y. TIMES, Apr. 1, 2009, at A1.

11. *See, e.g.*, State v. Harrington, 534 S.W.2d 44, 50 (Mo. 1976) (discussing the difference between a "public" and "private" prosecutor and referencing the Missouri Code of Professional Responsibility, which outlines the different obligations for each); Ford v. State, 628 S.W.2d 340, 343 (Ark. App. 1982) (acknowledging that "[t]he relationship between the prosecutor, his deputies, and the State, their sole client, is fundamentally different from that which exists between law firms and the ordinary attorney-client relationship."). Charles Fried argued that the difference between the government lawyer and the private attorney is the "complicated and elusive" nature of the client. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1076 (1976). According to Fried, the government lawyer's client "might be thought to be the government of the United States, or the people of the United States, mediated by an intricate political and institutional framework." *Id.*

12. *See supra* note 1 and accompanying text.

13. *See supra* notes 1 and 11 and accompanying text.

14. *See, e.g.*, Bruce A. Green, *Why Should Prosecutors Seek Justice?*, 26 FORDHAM URB. L.J. 607, 608 (1998) (describing the federal prosecutor's duty of justice as "protean as well as vague."); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 48 (1991) (indicating that the "'do justice' standard . . . establishes no identifiable norm" and that "vagueness leaves prosecutors with only their individual sense of morality to determine just conduct").

15. "Prosecutors do not charge in a vacuum; they do so against the backdrop of trial. Because defendants always have the option of forcing a trial, prosecutors have a strong incentive not to press charges in cases that cannot be won." Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1933 (1992). In the federal system, prosecutors' unbridled discretion in what and whether to charge is also guided by Attorney General directives. *See, e.g.*, U.S. Att'y Gen. John

justice works satisfactorily[18] because the prosecutor's role is defined adequately and her power constrained sufficiently by outside scrutiny, such as grand jurors, petit jurors, probation officers, judges and public opinion.[19] The prosecutor in these situations is not free

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Ashcroft, *Memo Regarding Policy On Charging Of Criminal Defendants*, DEP'T OF JUST. (Sept. 22, 2003), *available at* http://www.justice.gov/opa/pr/2003/September/03_ag_516.htm [hereinafter "Ashcroft Memo"] (declaring that "federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case [. . .]."); U.S. Att'y Gen. Eric Holder, *Memo to All Fed. Prosecutors: Dep't Policy on Charging and Sentencing*, DEP'T OF JUST. (May 19, 2010), *available at* http://sentencing.typepad.com/files/holder-charging-memo.pdf [hereinafter "Holder Memo"] (qualifying the Ashcroft directive and explaining that the determination of what charge to levy "must always be made in the context of 'an individualized assessment of the extent to which particular charges fit the specific circumstances of the case . . . .'").

16. When a case advances beyond the plea bargaining stage, a judge evaluates the evidence and controls how witnesses are examined, resolves arguments of foul play by the prosecutor, and is available to assist when the defendant alleges that the prosecutor has withheld *Brady* materials. *See, e.g.*, Lewis, *supra* note 10 (reporting that the Department of Justice planned to drop all charges against former Senator Ted Stevens following the Department's discovery that prosecutors concealed from the defense "notes from a 2008 interview," raising significant questions about Senator Stevens' guilt); United States v. Rigas, 779 F. Supp. 2d 408, 413 (M.D. Pa. 2011) (granting pretrial the defendant's motion for the production of interview notes pursuant to *Brady* despite prosecution's refusal and objection to provide them); Howard v. State, 403 S.W.3d 38, 42–48 (Ark. 2012) (finding that prosecution violated Brady v. Maryland, 373 U.S. 83, 90 (1963), in failing to produce notes from an expert who testified about DNA evidence linking defendant to the crime because notes indicated potential errors in the DNA testing).

17. At sentencing, not only does the judge preside and evaluate the defendant and the case independently of the prosecutor, in many systems (including the federal system), a separate probation office investigates the defendant's criminal history and personal circumstances, reviews all of the known facts of the case, and prepares an elaborate report for the judge, who then selects an appropriate sentence tailored to the defendant. The probation officer's preparation of a pre-sentence report also provides an independent view of the situation, adding another level of review to the prosecutor's sentencing arguments.

18. This is not to say that the system works flawlessly. For instance, if defense counsel is inadequately prepared for trial or otherwise engages in ineffective assistance of counsel, the trial process may result in an unjust outcome. *See generally* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007) (noting various abuses of prosecutorial discretion and the ways in which legislatures have limited judicial oversight of prosecutors thereby increasing the power of prosecutors).

19. *See* Zacharias, *supra* note 14 (discussing the prosecutor's duty of justice in the trial context). At trial, the jury and judge constrain the prosecutor's discretion. When charging, the grand jury constrains the prosecutor's power. At sentencing, the

merely to advance bureaucratic goals—such as efficiency or maximizing the number of convictions—at the expense of the people's larger interests. Nor is the prosecutor permitted to ignore congressionally determined minimums designed to protect the accused during proceedings, such as sentencing goals and corresponding guidelines. These trial and hearing contexts involve a degree of transparency that encourages prosecutors to share information relevant to a judge's or jury's ability to make an educated and equitable decision on the merits, and these same external forces urge prosecutors to account for multiple interests, including procedural and substantive fairness and public confidence in our system of justice. Such external checks foster a prosecutor's ability to serve the interests of both the government and the people, and thereby "do justice" even when there is uncertainty about the most just course of action.[20]

The same is not true when prosecutors pursue a case in which the government intends to use evidence derived from secret electronic surveillance.[21] FISA permits the President[22] to authorize electronic surveillance of foreign powers without a court order.[23] Although Congress adopted FISA in 1978,[24] prosecutors have only recently faced public pressure to comply with Section 1806(c),[25] the

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probation office will expose a prosecutor who strays from the facts or applicable sentencing guidelines.

20. Professor Bruce Green contends that in the trial context, prosecutors and defense lawyers "play by essentially the same rules." Green, *supra* note 14 at n.114 (noting an exception for prosecutors because they "have authority to seek immunity for witnesses" and an exception for the defense because they control "the testimony of the most important witness—the defendant.").

21. *See* Charlie Savage, *Door May Open for Challenge to Secret Wiretaps*, N.Y. TIMES, Jun. 7, 2013, at A3 (describing an internal DOJ debate about whether to disclose to the accused evidence resulting from FISA).

22. The President acts through the U.S. Attorney General. The FISA Amendments Act of 2008 also permits the Attorney General and the Director of National Intelligence to jointly authorize foreign surveillance. 50 U.S.C. §1881(a) (2010).

23. 50 U.S.C. § 1802(a)(1) (2010) ("The President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for periods of up to one year . . . ."); *see also supra* note 22.

24. *See* 50 U.S.C. § 36 (1978) (authorizing the government to conduct electronic surveillance for foreign intelligence purposes).

25. 50 U.S.C. § 1806(c) (2010) (requiring the government to notify aggrieved persons when it intends to use the information in court); *id.* (requiring notice to the target of electronic surveillance when the government decides to use evidence obtained by the surveillance "in any trial, hearing, or other proceeding in or before

provision requiring prosecutors to notify the target of electronic surveillance when the government has acquired and intends to use the covertly acquired information.[26] This pressure mounted after Edward Snowden disclosed classified information in 2013, revealing that the National Security Agency (NSA) was secretly monitoring and collecting data about calls and Internet activities both within and outside the United States.[27] This data includes information about communications by and between American citizens within the U.S.[28] Given that the government singularly knows whether FISA evidence of this type exists, there is an absence of justice-enhancing transparency influences when prosecutors decide whether to disclose information pursuant to FISA's Section 1806(c).

Because little is known about prosecutors' handling of FISA surveillance information, the more common prosecutorial practices of plea bargaining and prosecutors' evaluation of cases for *Brady*[29] evidence are fertile grounds to expose the substantial disincentives for prosecutors to accomplish justice in the FISA context. As with FISA, plea bargaining takes place with little oversight from judges, juries, and the public.[30] Plea outcomes are gauged not on whether justice was done,[31] but in terms of savings in court hours, reductions

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any court, department, officer, agency, regulatory body, or other authority of the United States . . . .").

26. *Id.*

27. *See* Savage, *supra* note 21.

28. Matt Sledge, *A Secret Court Judge Warned the NSA It Was Close to Breaking the Law — Then Gave It More Power*, THE HUFFINGTON POST (Nov. 20, 2013), *available at* http://www.huffingtonpost.com/2013/11/20/nsa-fisa-court-opinion_n_4311787.html (citing FISA Court Presiding Judge John Bates as noting that the NSA's gathering of metadata constituted "a 'systemic overcollection' of Americans' information[,]" that was "so descriptive that it bordered on exposing the contents of Americans' communications.").

29. *See* Brady v. Maryland, 373 U.S. 83, 86–88 (1963); *see also supra* text accompanying note 7; discussion *infra* Part III.B; Kyles v. Whitley, 514 U.S. 419, 437–39 (1995) (explaining that the prosecutor violates due process when she withholds evidence that would have made a different outcome reasonably probable).

30. "As a process, plea bargaining lacks many of the building blocks of adversarial theory, including the presence of neutral and passive decision makers and rules that govern the evidentiary and arbitration process." Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1139 (1998). "Insofar as criminal trials serve to illuminate wrongdoing by the police, prosecutor, or some other agency of government, accepting plea bargains serves to cover up the misconduct." *Id.* at 1178.

31. As explained more in Part III.A., the Supreme Court's decision in *United States v. Ruiz*, 536 U.S. 622 (2002), illustrates the emphasis on outcome over process. The Court there ruled that a prosecutor is under no legal obligation to provide a

in caseloads, increases in docket control, and by whether the case ended in conviction—regardless of whether the crime of conviction matches the offense charged. In every deal, regardless of what fairness might suggest, the bargaining process presses prosecutors to cajole defendants into relinquishing their right to discovery—including the right to receive exculpatory and material information[32]—to forego the right to file a suppression motion challenging evidence or statements as unconstitutional, to waive their rights to appeal a sentence following the entry of the plea, and to surrender their rights to challenge the plea or sentence collaterally for any reason, including for their lawyer's ineffective assistance in negotiating the plea deal.[33] Indeed, the primary and sometimes overwhelming influence on prosecutors during plea bargaining rests with supervisory attorneys, who may exert substantial pressure on junior prosecutors to obtain a conviction and reduce the number of pending motions and cases in the office.[34]

Prosecutors also face significant ethical conflicts in the *Brady* context. In *Brady v. Maryland*, the Supreme Court held that a prosecutor violates the due process rights of an accused when she denies the accused access to evidence favorable and material to

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defendant with materially exculpatory evidence before the accused enters a guilty plea. United States v. Ruiz, 536 U.S. 622, 629 (2002).

32. Before the Supreme Court decided *Ruiz*, which held that the U.S. Constitution does not require pre-guilty-plea disclosures of *Brady* material, there was significant scholarly debate about a defendant's ability to waive the right to receive *Brady* evidence. *See, e.g.*, Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2013 (2000); Erica G. Franklin, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery" Waivers*, 51 STAN. L. REV. 567, 567 (1999).

33. The prosecutor's extensive discretion and power in plea bargaining is the result of a number of Supreme Court rulings. *See e.g.*, *Ruiz*, 536 U.S. at 629 ("The "Constitution does not require the government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant."); Wade v. United States, 504 U.S. 181, 186 (1992) (holding that federal prosecutors have extensive discretion to file or withhold a motion to reduce a defendant's sentence for the defendant's "substantial assistance" to the government in prosecuting other crimes or other criminals); Zacharias, *supra* note 30, at 1178–79 (noting that prosecutors are permitted to "act for the very purpose of avoiding the exposition of the government action" which could include police racism, an illegal search, or to minimize civil damages in a subsequent civil suit).

34. *See* Benjamin Weiser, *Doubting Case, City Prosecutor Aided Defense*, N.Y. TIMES, June 23, 2008, at A1; *see also* Melanie D. Wilson, *Finding a Happy and Ethical Medium Between a Prosecutor Who Believes the Defendant Didn't Do It and the Boss Who Says that He Did*, 103 NW. U. L. REV. COLLOQUY 65, 65–71 (2008).

either his guilt or his punishment, notwithstanding the prosecution's motives in failing to produce the information.[35] At a minimum, the decision in *Brady* requires the prosecutor to search her files—and those of agents and agencies working on the prosecution's behalf—for evidence favorable to the accused.[36] Such evidence might, for instance, involve information bearing on the credibility of a witness.[37] Although this directive sounds simple enough, bright lines have proven elusive in practice. In countless cases, sometimes uncovered years after the fact, prosecutors have breached their duty to produce *Brady* materials.[38] Many scholars and criminal justice lawyers assert that *Brady* is *the most* abused and corrosive problem created by prosecutors.[39]

Like the plea bargaining process, prosecutors review investigative files for *Brady* evidence under a cloak of secrecy. Without consulting the defense or the courts, prosecutors alone decide whether a witness statement or other evidence is material and helpful to the defense's case. Prosecutors conduct this review knowing that 97% of all federal prosecutions and 94% of all state prosecutions are resolved by plea bargaining and not through a trial that may expose a *Brady* failure.[40] Likewise, they conduct the *Brady* review with at least some pressure from supervisors to win a conviction.[41] These pressures and the cloak of secrecy lead to the widespread failure of prosecutors to satisfy their duty of even-handedness.

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35. Brady v. Maryland, 373 U.S. 83, 86–88 (1963).

36. *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995).

37. *See* Giglio v. United States, 405 U.S. 150, 154 (1972).

38. *See* Radley Balko, *The Untouchables: America's Misbehaving Prosecutors, And the System That Protects Them*, HUFF POST POLITICS, Aug. 1, 2013, www.huffingtonpost.com/2013/08/01/prosecutorial-misconeduct-new-orleans-louisiana_n_3529891.html (asserting that "one of the most pervasive misdeeds" by prosecutors is "the Brady violation"—"the most common form of misconduct cited by courts in overturning convictions."); *id.* (quoting Sam Dalton, a Louisiana lawyer who "started a public defender system for indigent defendants" and "will begin his 60th year practicing law," who claims: "Brady made things a little better, at least at first . . . The younger prosecutors tried to take it seriously, and would try to comply, but there was still a community standard to evade disclosure. So they'd actually hide it from their bosses when they'd turn over favorable evidence to us."); *see also supra* note 16.

39. *Id.*

40. *See* Erica Goode, *Stronger Hand for Judges in the "Bazaar" of Plea Deals*, N.Y. TIMES, Mar. 22, 2012, at A12; *see also U.S. Atty's Annual Statistical Report: Fiscal Year 2010*, DEP'T OF JUST. 10, *available at* http://www.justice.gov/usao/reading_room/reports/asr2010/10statrpt.pdf.

41. *See infra* Part III.B.

Because there are strong parallels—such as the exercise of extensive, unfettered power with minimal external oversight—between the way prosecutors handle plea bargaining and *Brady* obligations on the one hand and the way in which prosecutors build cases with FISA evidence on the other, prosecutors' failures in the plea bargaining and *Brady* contexts offer significant lessons for the FISA cases that are coming to fore. This Article examines these lessons.

Focusing on the prosecutor's ethical obligation "to seek justice,"[42] this Article argues that the failure of prosecutors to comply strictly and timely with FISA's disclosure provision is inevitable; yet, the prosecutor's ethical duty to "seek justice" requires compliance. In other words, a prosecutor's duty of justice is an unobtainable aspiration when prosecutors make decisions involving compelling and competing interests without the benefit of capable adversarial, judicial or public influences.[43] Relying on several recent prosecutions built with FISA evidence, as well as two familiar prosecution contexts—plea bargaining[44] and the evaluation of exculpatory

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42. *See supra* note 1 and accompanying text.

43. As developed further in Part III.C., this argument is supported by the Department of Justice's actions leading up to the Florida and Chicago prosecutions mentioned in the introduction. In October, 2012, Solicitor General Donald Verrilli, Jr., argued a civil case before the U.S. Supreme Court in which he contended that the complaining parties lacked standing to assert claims about the wiretapping of conversations, but he said that certain criminal defendants would have standing to challenge such wiretapping. *See* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1154 (2013) (indicating that "if the Government intends to use or disclose information obtained or derived from [the FISA amendments] in judicial or administrative proceedings, it must provide advance notice of its intent, and the affected person may challenge the lawfulness of the acquisition."); *see also* Oral Argument Transcript of Solicitor General Verrilli, Clapper v. Amnesty Int'l, 133 S. Ct. 1138 (Oct. 29, 2012), *available at* http://www.oyez.org/cases/2010-2019/2012/2012_11_1025 (stating "Your Honor, under the statute, there are two clear examples of situations in which individuals would have standing. The first is if an aggrieved person, someone who is a party to a communication, gets notice that the government intends to introduce information in a proceeding against them."); Savage, *supra* note 21, at A3 (noting Mr. Verrilli's concession that prosecutors are obligated to notify defendants when they use evidence derived from covert surveillance). After Mr. Verrilli's public acknowledgement of the disclosure obligation, prosecutors continued to withhold surveillance information in criminal cases. *Id.* (explaining that "national security lawyers" narrowly interpreted the words "derived from" so as to avoid disclosure obligations and that national security lawyers argued that "the rules on wiretapping warrants in foreign intelligence cases are different from the rules in ordinary criminal investigations . . . .").

44. For purposes of this Article, the plea bargaining process includes plea negotiations, the exchange of discovery, and the filing of motions and corresponding

"*Brady*"[45] material—this Article reveals the overwhelming disincentives preventing prosecutors from "doing justice" when they make decisions behind closed doors. The FISA context like other, analogous, settings in which prosecutors make decisions in seclusion, does not create the milieu where the ethic of doing justice can flourish.[46] Doing justice in our system requires adversarial judicial proceedings or some equivalent outside influence as a check on prosecutors' power and discretion.

This Article proceeds in four parts. Part II outlines more fully a prosecutor's unique ethical duties, providing the backdrop to understand the tension prosecutors experience when evaluating FISA cases and similar issues without external justice-promoting influences. It emphasizes the prosecutor's duty to employ fair means, not just reach favorable results. Part III explores the ethical risks inherent in plea bargaining and the ethical hazards prosecutors face during the review of criminal cases for exculpatory "*Brady*" evidence. It discusses the pertinent FISA provision and provides several recent examples of criminal cases in which prosecutors resisted compliance with FISA's mandatory disclosure provision, Section 1806(c). Part III also establishes that countless prosecutors have breached their ethical and professional obligations in all of these contexts, each of which involve decision making behind-the-scenes, necessarily encouraging prosecutors to focus on goals other than evenhandedness and integrity of the system. Part IV evaluates the patterns developing from these prosecutorial failures and offers lessons, warnings, and guidance for prosecutors and judges going forward, especially for matters involving covertly acquired FISA evidence. From these analyses, the Article concludes that, if we are

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evidentiary hearings on those motions that occur after charging and before the entry of a guilty plea.

45. "*Brady* evidence" and "*Brady* material" are common references to the prosecutor's duty to disclose material evidence favorable to an accused in a criminal case. The duty of disclosure was established by the Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963).

46. *See* David Lynch, *The Impropriety of Plea Agreements: A Tale of Two Counties*, 19 LAW AND SOC. INQUIRY 115, 116 (1994) ("Plea bargaining . . . is a closed-door affair that is not readily amenable to observation by outsiders."); *see also* Zacharias, *supra* note 30, at 1139 (citation omitted) ("As a process, plea bargaining lacks many of the building blocks of adversarial theory, including the presence of neutral and passive decision makers and rules that govern the evidentiary and arbitration process."); *id.* at 1178 (citation omitted) ("One general criticism of plea bargaining is that it eliminates the public aspect of criminal prosecutions. Insofar as criminal trials serve to illuminate wrongdoing by the police, prosecutor, or some other agency of government, accepting plea bargains serves to cover up the misconduct.").

to foster the "doing justice" duty in prosecutors, the criminal justice system must not place prosecutors in settings that lack adversarial or judicial checks upon their vast power and discretion.

II. PROSECUTORIAL ETHICS—A DISTINCTIVE DUTY OF JUSTICE

Prosecutors owe a duty to take the moral high ground and act fairly and "justly" in all of their responsibilities. But the requirement to "seek justice" is a vague and protean concept[47] that strains even the most moral of prosecutors, permitting them to slip in and out of compliance with their ethical responsibilities—assuming the prosecutor can determine what course of action is required of an ethical prosecutor.

A. *The Duty*

For well over one hundred years, courts in this country have recognized a prosecutor's heightened obligation of fair conduct beyond that owed by other lawyers.[48] In 1872, the Michigan Supreme Court described the prosecutor's role in the criminal justice process this way:

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47. *See* Green, *supra* note 14, at 608.

48. *See* Hurd v. People, 25 Mich. 405, 415–16 (Mich. 1872) ("[T]he prosecution can never, in a criminal case, properly claim a conviction upon evidence which, expressly or by implication, shows but a part of the *res gestae*, or whole transaction . . . ."); *see also* Wellar v. People, 30 Mich. 16, 23 (Mich. 1874) ("a public prosecutor is . . . a sworn minister of justice, as much bound to protect the innocent as to pursue the guilty . . . ."). *Wellar* involved a murder trial in which the prosecution failed to present one of two witnesses to a homicide. The court reversed the conviction and granted a new trial, ruling that the prosecutor "ha[d] no right to suppress testimony" by failing to present all witnesses, whether favorable or unfavorable, to the alleged crime. *Id.*; *see also* People ex rel. Clancy v. Superior Court, 705 P.2d 347, 350–51 (Cal. 1985) ([The prosecutor] "must refrain from abusing . . . power by failing to act evenhandedly"; "[o]ur system relies for its validity on the confidence of society, without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive;" [The] "prosecutor's "duty of neutrality is born of two fundamental aspects of his employment. First, he is a representative of the sovereign; he must act with impartiality required of those who govern. Second, he has the vast power of the government available to him; he must refrain from abusing that power by failing to act evenhandedly."); Meister v. People, 31 Mich. 99, 104 (Mich. 1875) ("[The prosecutor's] position is one involving a duty of impartiality not altogether unlike that of the judge himself. We have had occasion heretofore to refer to this duty in these officers of justice. Their position is a trying one, but the duty nevertheless exists . . . ."); Commonwealth v. Bolden, 323 A.2d 797, 798 (Pa. Super. Ct. 1974) ("[T]he prosecutor 'enjoys an office of unusual responsibility.'").

> The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object like that of the court, should be simply justice: and he has no right to sacrifice this to any pride of professional success. And however strong may be his belief of the prisoner's guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained, is unjust and dangerous to the whole community.[49]

The California Supreme Court spoke similarly in 1889:

> Equally with the court the district attorney, as the representative of law and justice, should be fair and impartial. He should remember that it is not his sole duty to convict, and that to use his official position to obtain a verdict by illegitimate and unfair means is to bring his office and the courts into distrust. We make due allowance for the zeal which is the natural result of such a legal battle . . . and for the desire of every lawyer to win his case, but these should be overcome by the conscientious desire of a sworn officer of the court to do his duty, and not go beyond it.[50]

The California Supreme Court also noted the substantial risks to society when prosecutors breach this ethical duty of fairness. "Our system relies for its validity on the confidence of society, without a belief by the people that the system is just and impartial, the concept of the rule of law cannot survive."[51]

By the twentieth century, the U.S. Supreme Court also expressly acknowledged the prosecutor's unique responsibility, declaring:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.[52]

The Criminal Justice Standards of the American Bar Association reiterate this duty of prosecutorial fairness, explaining: "The prosecutor is an administrator of justice, an advocate, and an officer

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49. *Hurd*, 25 Mich. at 415–16.
50. People v. Lee Chuck, 20 P. 719, 723 (Cal. 1889).
51. People ex rel. Clancy, 705 P.2d at 350.
52. Berger v. United States, 295 U.S. 78, 88 (1935).

of the court . . . The duty of the prosecutor is to seek justice, not merely to convict."[53]

In other words, for well over one hundred years and continuing to modern day, state and federal courts have viewed the prosecutor's duty to function in an even-handed manner as an imperative for the proper operation of our system of justice.[54] "Not only is a government lawyer's neutrality essential to a fair outcome for the litigants in the case in which he is involved, it is essential to the proper function of the judicial process as a whole."[55]

Despite agreement that prosecutors must act with a sense of evenhandedness and general virtue, in practice, prosecutors often face doubts about how these benevolent principles work in specific factual contexts.

B. *The Risks*

On the one hand, requiring prosecutors to act justly seems obvious. Any legitimate criminal system cannot survive if prosecutors are sinister, self-interested, or profit-motivated. On the other hand, the concept of "seeking justice" is nebulous.[56] Two well-intentioned prosecutors may disagree—slightly or significantly—about what course of action in a given case is warranted to serve retributive, deterrent, rehabilitative, efficiency, privacy, security, and other goals. "Doing justice" inherently requires a prosecutor to exercise discretion. In turn, discretion grants prosecutors flexibility in investigating and charging crimes, preparing for trial, choosing and examining witnesses, bargaining to resolve charges, and recommending a sentence upon conviction.[57] This leeway may cause one prosecutor to charge a defendant with three crimes while another charges only two; it may lead a prosecutor to seek a mandatory minimum sentence while a second opts for an indictment that grants more sentencing discretion to the judge. One prosecutor may call four witnesses, including a questionable, "snitch" witness, to prove her case to a jury, while a different prosecutor subpoenas only two and rejects the snitch's offer to testify, believing that

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53. Standard 3-1.2(b) and (c), *supra* note 1.

54. *See* Zacharias, *supra* note 14, at 68 (referring to a prosecutor as a "minister of justice").

55. People ex rel. Clancy, 705 P.2d 347, 351 (1985).

56. *See* Green, *supra* note 14, at 608 (describing the federal prosecutor's duty of justice as "protean as well as vague").

57. *Id.* at 608–10 (asserting that the duty of justice "assumed different meanings in different contexts, meanings that one could only infer" and indicating a "need to give content to the federal prosecutor's professional obligations.").

snitches create risks of lies and thereby undermine justice.[58] Some prosecutors maintain an "open file" policy for pretrial discovery.[59] Others produce only the minimum evidence mandated by the Constitution and the rules of discovery.[60] Are all of these prosecutors seeking justice? If not, which ones are? Is it possible for each of them to "do justice" while pursuing such different strategies?

It is rarely obvious which course of action justice requires because the meaning of "justice," like the meaning of "fairness," is often open to debate. In attempting to give meaning to the words, scholars and courts often compare prosecutors to judges, "characterizing public prosecution as a quasi-judicial role and envisioning this role as the wellspring of a prosecutor's professional obligations."[61] Professor Bruce Green describes the role as "somewhere between judges, on the one hand, and lawyers advocating on behalf of private clients, on the other."[62] Green contends that justice "might imply an obligation of fairness in a procedural sense. Or, it might imply a substantive obligation of fairness—for example, an affirmative duty to ensure that innocent people are not convicted."[63] Green adds, "Rarely, if ever, does it provide much insight into hard questions about the scope of proper prosecutorial conduct."[64] Professor Michael R. Cassidy has noted that "[t]he legal profession has left much of a prosecutor's day-to-day decision-making unregulated, in favor of [a] catch-all 'seek justice' admonition."[65] And, like Green, Cassidy views many tasks of a prosecutor as "quasi-judicial functions that require them to step out of a purely adversarial role."[66] Like Green and Cassidy, the late

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58. *See generally* ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE 76–78 (2009).

59. *See* Ellen Yaroshefsky, *Ethics and Plea Bargaining: What's Discovery Got to Do With It?*, 23 CRIM. JUST., no. 3, 29, 32–33 (Fall 2008).

60. *See id.* at 30–31.

61. Green, *supra* note 14, at 613.

62. *Id.* at 615.

63. *Id.* at 622 (internal citations omitted).

64. *Id.* at 623.

65. R. Michael Cassidy, *Character and Context: What Virtue Theory Can Teach Us About a Prosecutor's Ethical Duty to "Seek Justice,"* 82 NOTRE DAME L. REV. 635, 637 (2006) (citing Green, *supra* note 14, at 616).

66. *Id.* at 651 (referencing Charles W. Wolfram, Modern Legal Ethics § 13.10.1 at 759 (1986) and Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 227 (1988)). The late Professor Richard Uviller, a professor of criminal law at Columbia University, who died in 2005, also characterized plea bargaining as similar to criminal investigation and the charging process, which he described as quasi-judicial. H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68

prosecutorial ethics scholar Fred Zacharias used the plea bargaining context to note the lack of clear direction for prosecutors.[67] Zacharias argued that when plea bargaining, it is "unclear what duties, if any, prosecutors have to defendants . . . or to the legal system, other than to believe that a defendant is guilty before accepting a plea."[68]

This uncertainty, which follows naturally from discretion, leads prosecutors to slip in and out of compliance with their ethical obligations. When the lines become fuzzy regarding the right course of action, it is easy for prosecutors to fall back on their adversarial instincts—for instance, winning a conviction regardless of costs. Prosecutors are especially prone to such slippage when they act without the justice-enhancing influences from the public, judges, petit and grand jurors—in other words, when they act in an anti-justice environment, such as seclusion.

In fact, secrecy tends to undermine justice norms, even when the prosecutor's duty is well defined. Before turning to Part IV, which explains the damaging effects of secrecy on the prosecutor's ethical duties to produce covert surveillance information in compliance with FISA's statutory directive, Part III (below) illustrates the risk of ethical slippage in the plea bargaining context in which the parameters of justice are elusive and in the *Brady* context in which the rules are certain, but prosecutors decide single-handedly and secretly which evidence they must produce to comply with the rules. In both situations, prosecutors struggle to comply with the duty to seek justice. These traditional settings offer lessons for the more modern FISA context, as discussed in Part IV.

III. PROSECUTORIAL ETHICS—PLEA BARGAINING, *BRADY* REVIEWS, AND CASES INVOLVING COVERTLY ACQUIRED FISA EVIDENCE

Plea bargaining, in which prosecutors wield significant discretion and far-reaching power and sometimes assert extensive pressure on defendants to forego important rights[69]—such as a right to

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FORDHAM L. REV. 1695, 1700–01 (2000); H. Richard Uviller, COLUMBIA LAW SCHOOL, www.law.columbia.edu/media_inquiries/news_events/2005_older/2005/april_1/uviller_obit (last visited August 30, 2014).

67. Zacharias, *supra* note 30, at 1124.

68. *Id.*

69. *See* Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 179–80 (1997) (noting that it is difficult to quantify and compare the benefits that the government versus the defendant receive from a plea); *see also* Zacharias, *supra* note 30, at 1132–33 (contending that a plea bargain has "coercive elements" missing in the civil context).

discovery,[70] the right to exculpatory evidence, and the right to appeal errors, including errors by incompetent defense counsel[71]—reveals that the ideal of even-handed justice is unlikely when powerful prosecutors operate behind closed doors.[72] Likewise, the many cases in which prosecutors have mismanaged the evaluation and production of *Brady* evidence[73] expose the probability for abuses when prosecutors lack oversight for their decisions, even when the rules are clear for how ethical prosecutors should act in that context.[74] Recent terrorism cases in which prosecutors have refused to disclose FISA evidence, defying a clear statutory directive as well as pointed guidance from the Solicitor General, accentuate the need for more transparency in the criminal justice process if prosecutors are expected to serve as both advocate and impartial referee of fair dealing.[75]

A. Negotiating Plea Deals Creates Ethical Slippage

In the federal system, supervisory prosecutors regularly impose blanket directives on their underlings, favoring efficiency goals to the exclusion of others.[76] The bureaucratic efficiency interests include: gaining a statistic of conviction, resolving the pending case quickly, and reducing the likelihood that the defendant will pursue

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70. *See* discussion of *Brady* and *Ruiz infra* Parts III.A.2, III.B.

71. *See* discussion *infra* Part III.A.4 (discussing waivers of rights to appeal, including right to assert claims of ineffective assistance of counsel).

72. Professor Ellen Yaroshefsky has said of plea negotiation: "The words 'ethics' and 'plea bargaining' are rarely used in the same sentence . . . . In many jurisdictions . . . [t]he prosecution makes an offer; the defense lawyer after minimal or no investigation discusses the plea with the client who decides to take the offer to ensure a lesser sentence . . . ." Yaroshefsky, *supra* note 59, at 28. It's no surprise that ethics is not the priority of plea bargaining. Even the Supreme Court has sent an anti-justice message about the prosecutor's duty in this context, announcing: "'Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system.'" Bordenkircher v. Hayes, 434 U.S. 357, 361–62 (1978) (citing Blacklege v. Allison, 431 U.S. 63, 71 (1977)).

73. *See* Brady v. Maryland, 373 U.S. 83 (1963); discussion *infra* Part III.B.

74. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 (1983).

75. Ellen Nakashima, *Man Convicted in Terrorism Case Seeks Evidence From Warrantless NSA Surveilannce* WASH. POST, Jan. 13, 2014, http://www.washingtonpost.com/world/national-security/man-convicted-in-terror-case-challenges-warrantless-spying/2014/01/13/af7da5de-7cba-11e3-95c6-0a7aa80874bc_story.html.

76. *See generally* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL, TITLE 9, CRIMINAL RESOURCE MANUAL § 626 (1997), *available at* www.justice.gov/usao/eousa/foia_readingroom/usam/title9/crm00626.htm.

an appeal or litigate any other claim against the government following sentencing.[77] These influences exclusively favor efficacy and resource preservation and are not counterbalanced with other "doing justice" norms. Although efficiency may support justice in some cases, in others, saving government resources tends to subvert major components of the prosecutor's responsibilities of justice, such as ensuring that the unique circumstances of the offense and characteristics of the defendant are considered in resolving a case, exposing unconstitutional behavior by government actors—whether police or prosecutors, evaluating evidence for proof of the suspect's guilt, and guaranteeing that all defendants receive procedural fairness.[78] If, for example, an accused receives ineffective assistance of counsel in evaluating her case and recommending a plea, we cannot be certain that the accused is deserving of prosecution or punishment. These deficiencies, in turn, weaken societal confidence in the criminal justice system and reduce respect for the rule of law.

Plea bargaining induces prosecutors to serve efficiency[79] at the expense of other, equally important, long-term goals that are required for justice.[80] Prosecutors are repeatedly told—formally and informally, by supervisory prosecutors, by legal precedent, and

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77. *See, e.g.*, Holder Memo, *supra* note 15; *see also* David E. Carney, *Waiver of the Right to Appeal Sentencing in Plea Agreements with the Federal Government*, 40 WM. & MARY L. REV. 1019, 1023 (1999) (citing United States v. Johnson, 992 F. Supp. 437, 438 (D.D.C. 1997) (quoting plea agreement)); Zacharias, *supra* note 30, at 1178–79 (noting that prosecutors are permitted to "act for the very purpose of avoiding the exposition of the government action" which could include police racism, an illegal search, or to minimize civil damages in a subsequent civil suit).

78. *See* Green, *supra* note 14 at 642 (acknowledging that "a prosecutor is a representative of, as well as a lawyer for, a government entity that has several different, sometimes seemingly inconsistent, objectives in the criminal context"); Zacharias, *supra* note 30, at 1124 (asserting that plea bargaining "does not fit the adversarial model" of justice); *id.* at 1150 ("applying different theories of plea bargaining produces different conceptions of justice"); *id.* at 1182 ("[b]ecause the prosecutor represents varying interests and constituencies, it is no easy matter for her to identify just behavior") (internal footnote omitted).

79. Plea bargains "save[] prosecutorial and judicial resources." Zacharias, *supra* note 30, at 1138 (internal citation omitted); *see also* Santobello v. New York, 404 U.S. 257, 260 (1971) (focusing on expediency in the form of plea bargains as an important aspect of the criminal justice system, describing plea bargaining as "an essential component of the administration of justice."). Scholars have also argued that abolishing plea bargaining "would raise the average cost of prosecution because it would increase the percentage of cases that go to trial (and even slimmed-down, cheaper trials will be more expensive than bargained pleas)." Scott & Stuntz, *supra* note 15, at 1932.

80. *See* Yaroshefsky, *supra* note 59, at 32–33.

sometimes even by presiding judges—to resolve cases, to obtain the dismissal of pending motions, and to convince defendants to waive their constitutional and statutory rights as part of the bargain.[81] This institutional obsession with efficacy regularly conflicts with the prosecutor's other responsibilities, such as: treating similarly-situated defendants alike, ensuring that the accused is held fully accountable for his crimes, providing the public with assurances that the criminal justice process is fair—including examining law enforcement and prosecutor conduct for constitutional minimums, giving victims adequate channels for input, and evaluating evidence in each case for weaknesses or other signs that the accused is innocent of the crimes charged.[82] Because the prosecutor owes allegiances to multiple "clients,"[83] her varied ethical responsibilities are often in direct tension with one another.[84] Especially given that plea bargaining occurs behind closed doors, plea outcomes are often less than ideal, leading prosecutors to fall short on their duty "to seek justice." Considering the various internal pressures on

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81. *See* Alan Vinegrad, *Justice Department's New Charging, Plea Bargaining and Sentencing Policy*, 243 N.Y.L.J., no. 110 (June 10, 2010) (explaining the ever-changing DOJ sentencing, plea bargaining, and charging guidelines, handed down to federal prosecutors with each new U.S. Attorney General, and examining Attorney General Holder's less restrictive guidelines in light of former Attorney General Ashcroft's directives); *see also* Memorandum from Deputy Att'y Gen. David W. Ogden on Guidance for Prosecutors Regarding Criminal Discovery to Department Prosecutors, DEPT. OF JUST. (Jan. 4, 2010), *available at* www.justice.gov/dag/discovery-guidance.html (providing guidance on gathering, reviewing, and producing discovery, including *Brady* information); Ashcroft Memo, *supra* note 15 (setting departmental policy on charging and sentencing, including requiring prosecutors to "charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case"); Holder Memo, *supra* note 15 (setting departmental policy on charging and sentencing, including emphasizing the "reasoned exercise of prosecutorial discretion" in prosecuting cases).

82. Robert Scott and William Stuntz, argued:

> There is something puzzling about the polarity of contemporary reactions to [plea bargaining]. Most legal scholars oppose plea bargaining, finding it both inefficient and unjust. Nevertheless, most participants in the plea bargaining process, including (perhaps especially) the courts, seem remarkably untroubled by it. Not only is the practice widespread, but participants generally approve of it.

Scott & Stuntz, *supra* note 15, at 1909–10; *see also* 18 U.S.C. § 3553 (2010) (identifying factors to be considered in imposing a sentence).

83. *See* sources cited *supra* note 11 and accompanying text (recognizing duty to the government as well as to the people).

84. *See* Zacharias, *supra* note 69, at 172.

prosecutors, including heavy case loads—which benefit from early plea deals—and demands from supervisors to cut deals—to reduce judicial backlogs, improve office statistics on the number of cases prosecuted successfully, and avoid future litigation, including hearings on motions to suppress—plea bargaining can fairly be characterized as an anti-justice process.[85]

Professors Robert Scott[86] and William Stuntz[87] have said that by entering into a plea agreement, the attorneys in a criminal case shift the risks of winning or losing.[88] "Before contracting [for a plea], the defendant bears the risk of conviction with the maximum sentence while the prosecutor bears the reciprocal risk of a costly trial[89] followed by acquittal. An enforceable plea bargain reassigns these risks."[90] Once a plea deal is reached, Scott and Stuntz explain that "the defendant bears the risk that a trial would have resulted in acquittal or a lighter sentence, while the prosecutor bears the risk that she could have obtained the maximum (or at least a greater) sentence if the case had gone to trial."[91]

Risk shifting also accounts for several of the influences during plea bargaining that undercut justice norms. In addition to the risk of an acquittal, prosecutors understand the chances that the government will obtain a conviction at trial but later be left to handle extended appeals and post-conviction attacks on the

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85. In his article *Justice in Plea Bargaining*, Fred Zacharias outlined several goals of justice, including: approximating trial results; seeking equitable results between similarly-situated defendants; seeking equitable ends; and saving government resources, among others. Zacharias, *supra* note 30, at 1144. Even though Zacharias outlined many possible goals, he concluded that the various justifications for pleas could be divided into two broad categories: 1) those that "assume that the plea-bargaining process will bring about an appropriate, perhaps even an optimal, result[,]" and 2) justifications which "rest[] on notions of efficiency or resource preservation." *Id.* at 1136–38.

86. Scott is a law professor at Columbia. Robert E. Scott, COLUMBIA LAW SCHOOL, www.law.columbia.edu/fac/Robert_Scott (last visited August 31, 2014).

87. Stuntz was a law professor at Harvard. He died in 2011 after an extended battle with cancer. *See* Douglas Martin, *W.J. Stuntz 52, Stimulated Legal Minds*, N.Y.TIMES, Mar. 21, 2011, at A23.

88. *See* Scott & Stuntz, *supra* note 15, at 1924.

89. In *Plea Bargaining as Contract*, Scott and Stuntz talk in terms of the opportunity costs of trials. "Each defendant can call on the prosecutor to try the case, forcing her to use time and effort that would otherwise be spent processing other cases. For the prosecutor, the opportunity cost of a failure to purchase this call from any individual defendant substantially exceeds the transaction costs of negotiating an individualized contract." *Id.*

90. *Id.* at 1914.

91. *Id.*

judgment—both time-consuming and resource-intensive possibilities.[92] And trials, which are necessarily public,[93] may expose prosecutorial or police misconduct and violations of statutory and constitutional duties—activities that undermine judicial confidence in prosecutors and law enforcement and erode public confidence in the whole justice system.[94] These possible consequences of trial—in addition to the chance of acquittal—explain why prosecutors routinely demand extensive concessions from a defendant as part of plea bargaining, including that she forego receipt of exculpatory and other discovery material and waive any right of appeal.[95] Indeed, federal prosecutors regularly threaten to withhold acceptance of responsibility credits (which reduce sentence length)[96] and sometimes cajole defendants into dismissing or withdrawing motions to suppress evidence or confessions obtained illegally as a condition of a plea offer.[97]

If prosecutors were merely expected to exercise their professional judgment and to assess the likelihood that a given set of evidence would result in a conviction beyond a reasonable doubt, "doing justice" in the plea context would require only experience, effort, and good faith. Because of the many anti-justice influences discussed above, and detailed more below, a prosecutor's role in evaluating the costs of trial versus the benefits of a plea deal is much more complex. In failing to reach a plea agreement with a defendant, a prosecutor risks an acquittal or a guilty verdict on a charge less serious than desired, exposing unconstitutional conduct by police, revealing unethical or illegal conduct by the prosecution, creating the likelihood of drawn out appeals and habeas attacks after trial, and being burdened by the usual time commitment and costs associated

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92. *See* Zacharias, *supra* note 30, at 1144–45.

93. U.S. CONST. amend VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").

94. As the growing number of established *Brady* violations alone demonstrates, this is a real cost of proceeding to trial. *See infra* Part III.B.

95. *See* Zacharias, *supra* note 30, at 1124–26.

96. *See* United States Sentencing Commission, GUIDELINES MANUAL § 3E1.1 (2013) (allowing a decrease in a defendant's offense level for accepting "responsibility for his offense.").

97. *See An Offer You Can't Refuse: How US Federal Prosecutors Force Drug Defendants to Plead Guilty*, HUMAN RIGHTS WATCH 1 (Dec. 2013) ("in the US plea bargaining system, many federal prosecutors strong-arm defendants by offering them shorter prison terms if they plead guilty . . . ."), *available at* http://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0_0.pdf; *see also Offenders Receiving Acceptance of Responsibility Reductions in Each Primary Offense Category*, U.S. SENTENCING COMM'N (2012), *available at* http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/Table19.pdf.

with preparing for and presenting evidence.[98] In other words, prosecutors typically have significant incentives to reach a plea agreement, and defendants do too.[99] Because of the numerous and varied risks and costs associated with trial, prosecutors experience strong pressures to negotiate harsh terms as part of a plea bargain, and defendants feel intense pressure to accept the deal notwithstanding the harsh terms.[100] This negotiation often thwarts rather than supports "seeking justice."

The following section describes some of the harsh, anti-justice terms and consequences of modern plea bargaining.

1. The Prosecutor May Withhold a Sentence Reduction Even After the Defendant Substantially Assists the Government

In 1992, the Supreme Court held in *Wade v. United States* that federal prosecutors may, at their discretion, withhold a motion to reduce a defendant's sentence, even after the defendant provides the government with substantial help in prosecuting other crimes and criminals.[101] "[A] claim that a defendant merely provided substantial assistance will not entitle a defendant to a remedy or even to discovery or an evidentiary hearing" on the exercise of the prosecutor's discretion.[102] Thus, "a showing of assistance [by the defendant] is a necessary condition for relief, [but] it is not a sufficient one."[103] Only if the prosecutor acts irrationally or with unconstitutional motives may the trial judge limit the prosecutor's discretion in this context.[104]

Following the Supreme Court's ruling in *Wade*, prosecutors regularly add a paragraph to the plea contract, allowing the prosecution nearly unfettered discretion in deciding whether or not to ask the court to reduce the defendant's post-plea sentence following the defendant's cooperation in the prosecution of other

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98. *See* Corinna Barrett Lain, *Accuracy Where It Matters:* Brady v. Maryland *in the Plea Bargaining Context*, 80 WASH. U. L. Q. 1, 24–25 (2002) (explaining that prosecutors face many risks with going to trial and weigh them against the benefits of plea bargaining).

99. For instance, the federal sentencing guidelines permit the sentencing judge to reduce the sentence of a defendant who accepts responsibility for her misconduct or for providing substantial assistance to the government in the investigation and prosecution of other crimes. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2013).

100. *See An Offer You Can't Refuse*, *supra* note 97, at 1; Vinegrad, *supra* note 81.

101. Wade v. United States, 504 U.S. 181, 186 (1992).

102. *Id.*

103. *Id.* at 187.

104. *Id.* at 185–86.

cases.[105] Not uncommonly, the prosecution refuses to file a motion to reduce the defendant's sentence despite the defendant's, sometimes significant, help.[106] This unpredictability associated with prosecutors giving and rescinding benefits for a defendant's cooperation undermines defense lawyers' (and sometimes judges') confidence in prosecutors generally.[107] Defense counsel cannot reliably advise a client to share significant information (often at great physical risk to the accused) with the expectation of earning a lower sentence.[108] The odds are that the accused will cooperate and will provide relevant and helpful information, but that assistance will not ultimately lead to a reduced sentence for him.[109]

In addition to the loss of trust that results from the fickle application of sentencing reductions for substantial assistance, the inconsistent use of these enticements results in both an underutilization and overutilization of cooperating witnesses.[110] The underutilization follows when defendants become reluctant to offer assistance, understanding that even if they testify against a substantial criminal, the prosecutor may refuse to ask the judge to shorten their sentence.[111] The overutilization results because the incentive system encourages cooperating defendants to exaggerate the help they can give—even to the point of providing false testimony—to convince the prosecutor to support a sentence reduction.[112] Because relatively few defendants receive the benefit of a government motion to reduce their sentence, they will naturally feel pressure to impress the prosecutor with sufficient information and evidence to assure a benefit.[113] They may well be reluctant to admit that the information they possess is limited.

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105. *See* Melanie D. Wilson, *Prosecutors "Doing Justice" Through Osmosis—Reminders to Encourage a Culture of Cooperation*, 45 AM. CRIM. L. REV. 67, 90–93 (2008) (discussing the many instances in which defendants cooperate with the government but are given no credit for the assistance at sentencing).

106. *Id.* at 75–77; *see also* Alan Ellis, *Federal Sentencing: Practice Tips: Part 1*, 20 CRIM. JUST. 55, 55 (2006).

107. *See* Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 73 (1995); Daniel Donovan & John Rhodes, *The Prisoner's Dilemma becomes the Lawyer's Dilemma: To be a zealous advocate or a Judas goat?*, MONT. LAW., Dec. 2009/Jan. 2010 at 29.

108. *See* sources cited *supra* note 107.

109. *See* sources cited *supra* note 107.

110. *See* Wilson, *supra* note 105, at 70.

111. *Id.* at 87–89.

112. *See* NATAPOFF, *supra* note 58, at 69–81.

113. *See* Linda Drazga Maxfield & John H. Kramer, *Substantial Assistance: An Empirical Yardstick Gauging Equity in Current Federal Policy and Practice*, U.S. SENT'G COMM'N 1, 10 (Jan. 1998).

In both cases, prosecutors fail to seek justice. Justice is undermined, not supported, when a prosecutor denies a benefit specifically provided for in the United States Sentencing Guidelines. He also thwarts justice when he relies on false evidence from an unreliable cooperating defendant who exaggerates her knowledge to please the prosecutor.

2. The Prosecutor May Withhold Exculpatory Evidence From a Defendant to Encourage Her to Make a Deal

Ten years after *Wade*, in *United States v. Ruiz*,[114] the Supreme Court held that the "Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant."[115] Thus, after the decision in *Ruiz*, prosecutors' "*Brady*" obligations were limited to cases going to trial. Before *Ruiz*, many federal circuit courts had required prosecutors to disclose exculpatory evidence to the defense before any plea deal was finalized.[116] Giving the defense such impeachment information before a plea deal was reached helped ensure that the defendant had enough information to accurately weigh the risks of trial, evaluate the realistic chances of acquittal, and knowledgeably decide whether to forego significant constitutional rights[117] as part of a plea deal.[118]

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114. 536 U.S. 622, 633 (2002).

115. *Id.*; *see also id.* at 629 (emphasizing that "the Constitution does not require the prosecutor to share all useful information with the defendant.").

116. Yaroshefsky, *supra* note 59, at 31 ("Until 2002, there was a trend in federal and state courts that prosecutors had a duty to disclose *Brady* material prior to a guilty plea."); *see also* Tate v. Wood, 963 F.2d 20, 25 (2d Cir. 1992) (finding that an evidentiary hearing is required when petitioner's *Brady* claim "if borne out, would entitle petitioner to relief."). *But see* Sanchez v. United States, 50 F.3d 1448, 1454 (9th Cir. 1995) (stating that prosecutors must only disclose exculpatory evidence to defendants in the case of a guilty plea, if "there is a reasonable probability that but for the failure to disclose the *Brady* material, the defendant would have refused to plead and would have gone to trial."); Campbell v. Marshall, 769 F.2d 314, 324 (6th Cir. 1985) (failing to find violation of due process in the suppression of *Brady* material prior plea of guilty, noting "a plea decision is not made with any perfect knowledge of the results were a trial to be held."); United States v. Kidding, 560 F.2d 1303, 1313 (7th Cir. 1977) (refusing to interpret *Brady* as requiring the prosecution to produce inculpatory as well as exculpatory evidence so that defendant could evaluate the benefits of pleading guilty to receive a more lenient sentence).

117. These rights include: the right to subpoena witnesses and evidence, U.S. CONST. amend. VI, to have a jury adjudicate guilt, U.S. CONST. amend. VI, to insist on proof beyond a reasonable doubt, County Court v. Allen, 442 U.S. 140, 156 (1979), the right to confront her accusers, U.S. CONST. amend VI, and many others. *See also*

The *Ruiz* decision added to the anti-justice nature of plea bargaining. As an initial matter, the ruling probably increased the number of defendants who plead guilty. When the defense is ignorant of material evidence undermining the credibility of the government's witnesses, evidence which may be developed to create reasonable doubt at trial, the risk of conviction appears greater than it really is, leading rational defendants to favor a plea bargain over a trial. In turn, these pre-discovery, pre-*Brady* deals lead to other anti-justice consequences. There is growing evidence that with some regularity, prosecutors fail to comply with their *Brady* obligations in cases that are tried.[119] Prosecutors' inattention to their *Brady* obligations may result, in part, from the implied message in *Ruiz* that material information favorable to the defense is not an imperative part of the accused's due process, fair trial rights. After all, if such evidence was crucial for a fair evaluation of the case, the Court would require its production before accepting the defendant's plea of guilty.

In addition, after *Ruiz*, a prosecutor may "act for the very purpose of avoiding the exposition of the governmental action"; this could be police racism, an illegal search, an un-*Mirandized* confession, or to minimize the likely civil damages award in a subsequent civil rights action.[120] Prosecutors who learn that the accused—or some other target of the investigation—suffered physical abuse or was the victim of unconstitutional behavior may well cover up the bad behaviors by offering sentencing concessions while insisting that the defendant forego (or withdraw) any motion to raise such issues before the trial court. Likewise, because of *Ruiz*, prosecutors may continue to rely on investigations conducted by "Giglio impaired"[121] law enforcement officers, meaning officers who

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Ruiz, 536 U.S. at 628–29 (noting that "[w]hen a defendant pleads guilty he or she, of course, forgoes not only a fair trial, but also other accompanying constitutional guarantees.").

118. Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995) (quoting Miller v. Angliker, 848 F.2d 1312, 1320 (2d. Cir. 1998)) ("A waiver cannot be deemed 'intelligent and voluntary' if 'entered without knowledge of material information withheld by the prosecution.'") (quoting Miller v. Angliker, 848 F.2d 1312, 1320 (2d Cir. 1988).

119. *See infra* Part III.B.

120. Zacharias, *supra* note 30, at 1178.

121. This is a slang way to refer to law enforcement agents who, because of past misdeeds, are subject to impeachment by the defense. It derives from *Giglio v. United States*, 405 U.S. 150, 155 (1972), in which the Court held that a prosecutor violates her *Brady* obligations by failing to reveal at trial that a witness was promised leniency in exchange for his testimony. I learned this reference as a prosecutor in the Northern District of Georgia when I was an assistant U.S.

are subject to extensive impeachment because of previous misbehaviors. Because most cases resolve by plea, and given that prosecutors can wait to disclose impeachment evidence until the trial (or shortly before), significantly less pressure exists for law enforcement agencies to drive out officers who are prone to unconstitutional or unlawful behaviors.[122] The ability of prosecutors to shield unlawful police conduct may seem defensible in a given case, but the wide-spread practice runs the risk of jeopardizing societal rights and expectations as a whole.[123]

3. Because of the Prevalence of Guilty Pleas, the Prosecutor May Delay Careful Evaluation of a Case, Until the Eve of Trial, Resulting in the Possibility That Innocent Defendants Will Plead Guilty

Because more than 97% of all criminal cases now end with the defendant's plea of guilty, a prosecutor with a heavy case load is encouraged to conserve her time and resources by preparing only those cases she expects to end in trial.[124] Especially in state prosecutors' offices with extensive caseloads,[125] this means that the vast majority of cases receive only cursory attention until a trial becomes likely. In turn, weaknesses in the evidence and credibility issues with witnesses may never be explored. This is particularly problematic for "seeking justice," given that innocent people have and do plead guilty.[126]

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attorney.

122. *See* John Conroy, *Town Without Pity*, 25 THE CHI. READER 14,18–20 (Jan. 11, 1996), *available at* http://www.chicagoreader.com/chicago/town-without-pity/Content?oid=8 89464 (discussing the case of Gregoary Banks, a suspect brutalized by Cook County, Illinois police officers, who served six years behind bars before his conviction was overturned); Balko, *supra* note 38 (citing the case of Eddie Triplett, who served twelve years in prison after two New Orleans police officers wrongly attributed cocaine found on another man to Triplett, testifying against him at trial and, yet, remained on the force after their wrongdoing was uncovered).

123. *See* discussion *supra* Part II; Hurd v. People, 25 Mich. 405, 415–16 (Mich. 1872) (recognizing that unfair means are unjust to the "whole community.").

124. *See supra* note 40.

125. *See* Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 262–63 (2011) (noting that some "individual prosecutors handle more than one thousand felony cases per year.").

126. *See, e.g.*, *supra* note 122.

4. The Prosecutor May Pressure Defendants to Relinquish Their Right to Appeal, Including the Right to Challenge Defense Counsel's Conduct For Ineffective Assistance

Judges have occasionally rejected a plea agreement conditioned on a defendant's waiver of her rights of appeal.[127] Courts that reject plea waivers tend to do so because at the time of the plea, the accused cannot know whether her sentence will rest on illegal or unconstitutional grounds.[128] One judge reasoned:

> [T]he defendant cannot know at the time he signs the plea agreement and enters the plea whether the sentencing court will find a basis for enhancing the defendant's offense level under the Sentencing Guidelines or whether the court will depart upward from the applicable guideline range . . . . Thus, it is only after the judge has sentenced the defendant that the latter knows which rights he waived, and whether those rights included the right to appeal a sentence in which the court may have erroneously applied the Guidelines or otherwise order an illegal or even unconstitutional sentence.[129]

A trial judge in the District of Colorado rejected a plea with an appeal waiver, arguing that the provision did not serve justice.[130] Judge John Kane concluded: "The interests of justice as I perceive them are best served by permitting the calm and deliberate review by the Court of Appeals . . . ."[131]

Most courts, however, permit the prosecution to demand appellate waivers from defendants during the plea negotiation process.[132] Given that a plea deal is usually accompanied with

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127. For example, in *United States v. Johnson*, 992 F. Supp. 437, 438–39 (D.D.C. 1997), a federal district court judge rejected a plea conditioned on the defendant's waiver of appeal rights. The court viewed the waiver as inconsistent with the requirements of Rule 11, F. R. CRIM. P., requiring pleas to be voluntary and knowing relinquishments of rights. *See also* United States v. Rayno, 989 F. Supp. 43, 44 (D.D.C. 1997).

128. *Johnson*, 992 F. Supp. at 438–39.

129. *Id.* at 439.

130. United States v. Vanderwerff, Crim. No. 12-CR-00069, 2012 WL 2514933, at * 6 (D. Colo. June 28, 2012).

131. *Id.*

132. United States v. Bedzhanyan, No. 11-5199, 2012 WL 2109249, at *1 (4th Cir. 2012) (criminal defendant may in a valid plea agreement waive the right to appeal); United States v. Sakellarion, 649 F.3d 634, 638 (7th Cir. 2011); United States v. Arevalo, 628 F.3d 93, 98 (2d Cir. 2010) (plea waivers are "presumptively

concessions from the government and naturally entails the defendant foregoing important trial rights to earn those concessions, there is arguably nothing inherently underhanded or immoral about a plea waiver. But cases, of course, differ, and not all plea waivers are alike. Some waive direct appeal rights while others surrender considerably more.

Some prosecutors routinely insist that the accused sacrifice the right to challenge his sentence in a subsequent habeas petition.[133] Courts are split on whether such waivers are effective.[134] Other prosecutors demand that a defendant waive the right to challenge the plea or sentence even if hindsight demonstrates that his lawyer was ineffective in recommending or negotiating the plea deal. Both types of waivers raise ethical issues. The Proposed Revision to the ABA Standards for Criminal Justice directed at plea bargains says a prosecutor "should not routinely require plea waivers of post-conviction claims of ineffective assistance of counsel, prosecutorial misconduct, or destruction of evidence unknown to the defendant at the time of the guilty plea."[135] Efficiency is always served by such waivers. But, in cases where defense counsel's ineffectiveness prevented the defense from understanding the terms of the plea, from accurately evaluating his chances for acquittal at trial, or encouraged an involuntary plea of guilty, the goals of procedural fairness are not served. Thus, to the extent prosecutors seek blanket waivers of such rights in every case, they are contributing to the anti-justice nature of plea bargaining. Because of broad plea waivers, in some unknown number of cases, a defendant who is not guilty will plead guilty, and another defendant with viable and legitimate constitutional arguments will lose the right to pursue remedies for those rights.

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enforceable."). Even courts that regularly allow waivers recognize that some waivers are unenforceable. Plea waivers may be invalid if they rest on impermissible grounds like race; the plea itself is involuntary; the agreement itself is unlawful or includes unlawful provisions; or the sentence resulting from the plea exceeds the statutory maximum. *See, e.g.*, United States v. Viera, 674 F.3d 1214, 1219 (10th Cir. 2012); *see also* Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2031 (2010).

133. *See* Anup Malani, *Habeas Settlements*, 92 VA. L. REV. 1, 5 (2006).

134. *See* United States v. Cockerham, 237 F.3d 1179, 1183 (10th Cir. 2001) (discussing split in authority and concluding that waiver of collateral attack rights is valid).

135. *See* Rory K. Little, *The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111, 1150 (2011) (summarizing 2010 proposed revisions to Prosecution Function Standards).

Given the risks to justice norms of plea waivers, the prosecutor's use of his extensive power to leverage such concessions is equally problematic. One tool commonly used by the prosecution is to deny a defendant a sentencing reduction for accepting responsibility for her criminal acts and pleading guilty, if the defendant insists on keeping her right to appeal. This sentencing benefit is colloquially called "the third point" because it is described that way in the federal sentencing guidelines.[136] In *United States v. Divens*, the Fourth Circuit held that a prosecutor acts illegally when denying the defendant such a reduction simply because the defendant refuses to waive her appeal rights.[137] In *Divens*, the defendant pled "straight up,"[138] meaning without a plea contract.[139] The government argued that the defendant's refusal to sign a formal plea document, which included language waiving her right to appeal, justified the government's refusal to move the court for a reduction in guideline range[140] for sentencing purposes.[141] The trial court rejected this argument. But the Seventh Circuit has held that the government is permitted to withhold the additional sentencing discount point authorized by the federal sentencing guidelines whenever a defendant refuses to waive his appellate rights.[142] In *United States v.*

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136. *See* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2013).

137. United States v. Divens, 650 F.3d 343, 347 (4th Cir. 2011) (holding that the State could not refuse to move for a reduction in sentence based solely on the defendant's refusal to sign a plea agreement containing a waiver of his right to appeal); *see also* U.S. v. Raynor, 989 F. Supp. 43 (D.D.C. 1997).

138. This is a common term used by prosecutors and criminal defense lawyers to refer to the act of pleading guilty to the indictment or other charging document without a plea agreement.

139. *See Divens*, 650 F.3d at 344.

140. The applicable provision of the sentencing guidelines provides:

> (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels. (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2013).

141. *See Divens*, 650 F.3d at 345.

142. United States v. Deberry, 576 F.3d 708, 711 (7th Cir. 2009).

Deberry,[143] the court assumed that the defendant "satisfied all the requirements [of the guidelines]," including "assist[ing] authorities in the investigation or prosecution of his own misconduct" and timely notifying the government of his intent to enter a plea, so as to save the government from preparing for trial.[144] But "the government refused to file a motion. The ground of its refusal was the defendant's refusal to agree to waive his right to appeal his conviction or sentence."[145] The court held that the government's refusal was reasonable, explaining that the provision in the guidelines "confers an entitlement *on the government*."[146]

Those courts that find it unlawful for a prosecutor to exact an appeal waiver in exchange for an additional acceptance of responsibility sentencing benefit, are equally likely to prohibit prosecutors from exercising their broad discretion to demand that a defendant withdraw a motion to suppress or lose the acceptance of responsibility benefit.

5. The Prosecutor May Wield Her Extensive Power and Discretion in Ways That Result in Widely Different Outcomes For Similarly-Situated Defendants

The plea bargaining system leads to wildly different sentences for similar crimes and defendants because prosecutors exercise discretion that rewards some defendants and neglects others who are similarly situated.[147] In the federal system, and state systems with sentencing guidelines designed to reduce racially biased and other unwanted sentencing disparities, plea bargaining thwarts this justice-enhancing goal of equality. The federal sentencing guidelines, for example, were implemented nationwide in 1989 with a goal to

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143. *Id.*

144. *Id.* at 710; *see also* United States v. Mulero-Algarin, 535 F.3d 34, 38–39 (1st Cir. 2008); United States v. Kelly, 337 F.3d 897, 902 (7th Cir. 2003).

145. *Deberry*, 576 F.3d at 710.

146. *Id.* at 710 (emphasis in original). *See* Wade v. United States, 504 U.S. 181, 185 (1992), in which the Court held in the context of the government's refusal to file a motion to reduce the defendant's sentence for providing substantial assistance to the government in the prosecution of other crimes, that the government has the power but not a duty to file a motion. The Court in *Wade* did, however, acknowledge that the district court can review the government's refusal to file for an unconstitutional motive. *Id.* In dicta, the Court also stated that a defendant could obtain relief if the prosecutor's refusal is "not rationally related to any legitimate Government end." *Id.* at 186.

147. *See* Zacharias, *supra* note 30, at 1149–71 (discussing the myriad of mental hoops a prosecutor has to jump through in assessing the appropriate plea bargain for each defendant).

"provide certainty and fairness in meeting the purposes of sentencing by avoiding unwarranted disparity among offenders with similar characteristics convicted of similar criminal conduct . . . ."[148] This evenhanded treatment of defendants, regardless of race, gender, age, geographic location, socio-economic background and financial status is lost when prosecutors are permitted to manipulate sentencing outcomes through plea bargaining.

We should be especially concerned about the plea bargaining context given the lack of judicial and public oversight during the process, particularly because experience shows that some prosecutors engage in misconduct even when the judge and jury are watching.[149] There are too few "checks" on the prosecutor's discretion and power and little accountability. Neither a judge nor a jury oversees the process, and defense counsel enjoys a limited ability to respond to prosecutorial overreaching. Even if the defendant learns that a prosecutor or the police have engaged in misconduct, she may use the misconduct as a bargaining tool to obtain a better plea deal without ever reporting the misconduct.[150] Moreover, there are too many competing demands on a prosecutor in the plea bargaining context. Even if a prosecutor's motives are pure, different results are sure to follow because there is no clear mandate of what justice requires when plea bargaining.[151]

B. Evaluating Brady *Evidence Creates Ethical Slippage*

In *Brady v. Maryland*, the U.S. Supreme Court declared unambiguously 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 punishment, irrespective of the good faith or bad faith of the prosecution."[152] This legal duty is also "incorporated into an explicit ethical duty upon government attorneys."[153] Thus, the law is plain and well established that a

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148. *See An Overview of the United States Sentencing Comm'n*, U.S. SENTENCING COMM'N 1, *available at* http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf.

149. *See, e.g.*, Berger v. United States, 295 U.S. 78, 80 (1935).

150. *See* Balko, *supra* note 38 (noting that "[t]here's no question the overall incidence of prosecutor misconduct is drastically masked by the high rate of plea bargains. . . . In some cases, even plea bargains can come about because of prosecutorial misconduct.") (internal citation omitted).

151. Zacharias, *supra* note 30, at 1124.

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

153. Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 531 n.2 (2007) (citing MODEL RULES OF PROF'L

prosecutor owes the accused a duty to produce evidence favorable to her.[154] Yet, in too many cases to count, prosecutors have breached their legal and ethical obligations by withholding "*Brady*" information.[155] Professor Bennett Gershman[156] contends that "[p]rosecutors have violated [*Brady*'s] principles so often that it stands more as a landmark to prosecutorial indifference and abuse than a hallmark of justice."[157]

Arguably, "violations of *Brady* are the most recurring and pervasive of all constitutional procedural violations, with disastrous consequences . . . ."[158] It is not surprising that prosecutors violate the requirements of *Brady* with some regularity.[159] The duty to disclose exculpatory information to opposing counsel requires prosecutors to "straddle the fence between their two principal responsibilities: To serve simultaneously as zealous advocates and neutral 'ministers of justice.'"[160] And "the odds of not getting caught are stacked so heavily in the prosecutor's favor."[161] As many legal scholars have suggested, the private nature of the review of a case significantly increases the probability that a prosecutor will violate her *Brady* obligations.[162] Were prosecutors more immediately accountable to

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CONDUCT and ABA STANDARDS).

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

155. *See, e.g.*, *supra* note 16; *infra* notes 169–77; *see also* Demjanjuk v. Petrovsky, 10 F.3d 338, 339 (6th Cir. 1993) (attorneys within DOJ failed to disclose to the court and to the accused "exculpatory information in their possession during litigation culminating in extradition proceedings.").

156. Bennett L. Gershman is a Professor of Law at Pace School of Law.

157. Gershman, *supra* note 153, at 531.

158. *Id.* at 533.

159. Daniel S. Medwed, Brady's *Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1539 (2010) ("*Brady* violations take place with regularity.").

160. *Id.* at 1535; *see also* Demjanjuk, 10 F.3d at 349–50 (noting a prosecutor's "obligation to work for justice rather than for a result that favors its attorneys' preconceived ideas of what the outcome of legal proceedings should be.").

161. Gershman, *supra* note 153, at 565.

162. *See id.* at 533 (criticizing the prosecutor's ability to "sift, evaluate, and test . . . information in private, [when] coupled with a defendant's limited ability to uncover evidence advantageous to his case."); Medwed, *supra* note 159, at 1540 ("the vast majority of suspect disclosure choices occur in the inner sanctuaries of prosecutorial offices and never see the light of day.") (citing 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)); *id.* at 1541 ("When a prosecutor chooses not to disclose evidence, that decision is seldom revealed to outsiders unless he later has a change of heart or it somehow finds its way into defense hands.") (citing Gershman, *supra* note 153, at 537); *id.* at 1548 (noting that *Brady* determinations "are not made in courtrooms or

the public—or at least the judiciary—when undertaking such a review, the cost-benefit calculus would shift in favor of disclosure. As it is, however, there is little incentive, especially in close cases, to divulge information to the defense.[163] Gershman argues that "it is commonly believed that most *Brady* evidence never gets disclosed; rather, it remains buried in drawers, boxes, and file cabinets in the offices of the prosecutor, the police, and other law enforcement and government agencies connected to the case."[164] This distrust of the process may be warranted, given that 97% of cases end in a plea of guilty, and that cases involving guilty pleas are poor prospects for successful *Brady* claims because the Supreme Court has absolved prosecutors from a duty to produce at least most exculpatory evidence in cases that end with a plea.[165] And at a minimum, the defendant must show that prosecutors failed to produce exculpatory evidence "material" to the defense.[166] Once a plea is entered or a jury finds a defendant guilty beyond a reasonable doubt, a claim arguing materiality[167] becomes nothing more than a hypothetical about how the non-disclosed evidence might have impacted the outcome of the case.[168]

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during formal negotiations with defense counsel, but behind closed doors far from the prying eyes of defendants, judges, and state ethics boards."); 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) (arguing for open-file discovery to offset the "competitive process of the adversary criminal trial" and its "inherent challenges to the critical but vague duty 'to do justice.'").

163. Remember, *Brady* does not require that all helpful information be disclosed, only "material" and helpful information.

164. Gershman, *supra* note 153, at 536.

165. *See supra* Part III.A.2, discussing *Ruiz*. Despite the holding in *Ruiz*, a prosecutor probably violates *Brady* by failing to produce evidence that renders a plea involuntary. *See* Gershman, *supra* note 153, at 536 n.29.

166. *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995); Brady v. Maryland, 373 U.S. 83,86-88 (1963).

167. Materiality in this context means "a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." Smith v. Cain, 132 S. Ct. 628, 630 (2012) (citing Cone v. Bell, 556 U.S. 449, 469–70 (2009)). This was the primary issue in *Cain*, where prosecutors failed to disclose interviews with a key eye witness that contradicted his trial testimony. *Smith*, 132 S. Ct. at 628.

168. Medwed, *supra* note 159, at 1540 (noting that the U.S. Supreme Court "has cited the importance of the materiality prong [of *Brady*] . . . observing that the mere withholding of exculpatory evidence does not rise to the level of a violation unless it prejudices the defendant"); *id.* at 1543 (contending that the materiality standard "gives prosecutors a wide berth to reach the outcome they want" and "is entirely

Despite the many hurdles making it difficult for defendants to establish a violation of the prosecutor's legal and ethical *Brady* obligations, courts have found prosecutorial violations in numerous cases.[169] For instance, in January 2012, the U.S. Supreme Court "reversed the conviction of a New Orleans man, saying prosecutors there withheld important evidence that his lawyers could have used in his defense."[170] The information included notes from an interview of the prosecution's star eyewitness who identified the defendant at trial as a killer of five people.[171] During the trial, the witness pointed at the defendant and said: "I'll never forget him."[172] But in a previous interview conducted only hours after the killings, the same witness admitted "he could not describe the [multiple] intruders except to say they were black men."[173] Five days after that interview, the same witness said "he had not seen the intruders' faces and could not identify them."[174] Prosecutors did not introduce DNA, fingerprint, weapon or other physical evidence to buttress the eyewitness testimony.[175] Perhaps most troubling about the case is that in oral argument before the Supreme Court, an assistant district attorney defended the prosecutor's conduct, maintaining that the prior interviews were not subject to disclosure under the *Brady* decision.[176] Justice Sotomayor showed her dissatisfaction with the position, announcing, "It is disconcerting to me that when I asked you the question directly, should this material have been turned over, you gave an absolute no."[177]

In fact, the Orleans Parish District Attorney's Office is somewhat notorious for *Brady* violations.[178] In 2010, in an unrelated case, the office conceded before the U.S. Supreme Court that it had violated *Brady* during a prosecution for attempted armed robbery.[179] As part of the investigation, a crime technician took a fabric swatch from the

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prospective and thus theoretical").

169. Adam Liptak, *High Court Reverses Conviction in Killings*, N.Y. TIMES, Jan. 10, 2012, at A14; *see also* Smith v. Cain, 132 S. Ct. 627, 628–29 (2012).

170. Liptak, *supra* note 169.

171. Liptak, *supra* note 169.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. Adam Liptak, *Justices Rebuke a New Orleans Prosecutor*, N.Y. TIMES, Nov. 8, 2011, at A18.

177. *Id.*

178. *See id.*; Connick v. Thompson, 131 S. CT. 1350, 1355 (2011).

179. *See Connick*, 131 S. Ct. at 1355 (2011).

victim's clothing, which was stained with the robber's blood.[180] The testing revealed that the robber's blood type was B.[181] The prosecutor did not know the defendant's blood type, did not have it tested, and did not disclose the test results to the defendant's lawyer.[182] The defendant's blood type was O, "proving that the blood on the swatch was not his."[183] In the meantime, the accused was convicted, and the conviction led him to decline to testify in a subsequent murder prosecution for which he was also convicted.[184]

No way exists to measure the number of run-of-the-mill cases in which prosecutors have violated *Brady*,[185] especially considering that such flagrant breaches even occur in high profile cases, such as the prosecution of former Alaska Senator Ted Stevens.[186] "An extraordinary special investigation by a federal judge . . . concluded that two Justice Department prosecutors intentionally hid evidence in the case against Sen. Ted Stevens, one of the biggest political corruption cases in recent history."[187] Prosecutors claimed that the Senator accepted "pricey renovations to his Alaska chalet" and failed to disclose the renovations "on his congressional disclosure forms."[188] Ironically, prosecutors engaged in their own unlawful disclosure failures. They failed to produce "a handwritten note" from the Senator asking for a bill for the renovations[189] and evidence that the

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180. *Id.* at 1356.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *See, e.g.*, Phillips v. Ornoski, 673 F.3d 1168, 1182 (9th Cir. 2012) (holding that the prosecutor failed to disclose agreement to dismiss charges against key witnesses); Gonzalez v. Wong, 667 F.3d 965, 976 (9th Cir. 2011) (holding that evidence of psychological reports in possession of prosecutor should have been disclosed); *see also* Joaquin Sapien & Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody*, PROPUBLICA (Apr. 3, 2013, 5:30 AM), *available at* http:// www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-usual ly-nobody (original analysis by ProPublica showed Brady violations "were the most common form of serious misconduct by city prosecutors, who failed to meet these standards in more than half of the 30 cases reversed by state or federal courts based on misconduct.").

186. *See* Carrie Johnson, *Report: Prosecutors Hid Evidence in Ted Stevens Case*, NATIONAL PUBLIC RADIO (Mar. 15, 2012, 5:56 p.m.), *available at* http://ww.npr.org/2012/03/15/148687717/report-prosecutors-hid-evidence-in-ted-stevens-case.

187. *Id.*; *see also* Mosteller, *supra* note 162, at 257 (discussing "the disciplinary charges brought by the North Carolina State Bar against Nifong for failure to disclose potentially exculpatory evidence . . .").

188. Johnson, *supra* note 186.

189. *Id.*

government's star witness was allegedly involved in a sexual relationship with a fifteen-year-old girl, whom he asked to lie under oath about the relationship.[190]

Indeed, the injustices that result from prosecutors' breaches of their *Brady* obligations are legendary. Such abuses are particularly troubling because they happen relatively often; they have the potential for results that undermine goals of the justice system—such as deterrence and retribution,[191] and prosecutorial misconduct undermines public confidence in the criminal process, especially given that prosecutors who violate *Brady* are rarely disciplined.[192] A murder case from New York illustrates this injustice.[193] In 1994, a young man was shot and near death when police found him.[194] The gunshot victim identified the shooter as two-time felon Tony Bennett.[195] Bennett "was eventually captured, convicted of murder, and sentenced to 25 years to life in prison."[196] Bennett's sentence was later overturned because the prosecutor on his case violated *Brady* by "withholding critical evidence from Bennett's attorney."[197] As a result, Bennett was released after thirteen years in prison.[198] After his release, Bennett talked openly, admitting to killing his victim and bragging about his early release.[199] In the meantime, the prosecutor continued in his job, reportedly "manipulat[ing] evidence in another case" and "l[ying] to a trial judge about the whereabouts of a key defense witness."[200]

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190. *Id.*

191. *See* Mosteller, *supra* note 162, at 263 (discussing the "extraordinary exculpatory evidence" withheld by prosecutors in the murder trial of Alan Gell who was sentenced to death).

192. *See id.* at 261 (examining three cases, including the Duke Lacrosse case as well as two murder cases, in which prosecutors in North Carolina withheld exculpatory information, also noting that between 1998 and 2008 "ten death penalty cases in North Carolina [were] reversed after trial because of prosecution failures to provide *Brady* information."); Sapien & Hernandez *supra* note 185 (finding that "[b]etween 2008 and 2009, just 1 percent of the roughly 91,000 complaints . . . resulted in public sanctions").

193. Sapien & Hernandez, *supra* note 185.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* (ProPublica reports citing other, similar *Brady* violations in New York, including the case of Jabbar Collins, who served a fifteen year prison sentence for murder after a senior Brooklyn prosecutor withheld "critical evidence during trial" and a case in which a Manhattan prosecutor withheld evidence resulting in men

Because of the many cases in which prosecutors have violated their *Brady* obligations, legal scholars have proposed a range of changes to the system to encourage stricter compliance, including internal, formal review committees,[201] open file discovery,[202] and additional judicial participation in *Brady* decisions.[203]

C. Withholding FISA Evidence Violates the Duty of Justice

In December 2012, Senator Dianne Feinstein, Chairwoman of the Senate Intelligence Committee, spoke before Congress about continuing threats of domestic terrorism.[204] In her speech, she referenced a prosecution in Fort Lauderdale, Florida and one in Chicago, Illinois.[205] The mention of these cases led criminal defense lawyers in them to ask the prosecution to disclose information derived from FISA that played a part in the prosecutions.[206] Prosecutors refused to produce the information.[207] They contended that they were obligated to disclose use of the FISA wiretap program "only if [the government] introduced a recorded phone call or intercepted e-mail gathered directly from the program[.]"[208] In refusing to produce the information, DOJ lawyers and "a policy advisory committee of senior United States attorneys focused on operational worries."[209] According to these groups, "Disclosure risked alerting foreign targets that their communications were being monitored, so intelligence agencies might become reluctant to share information with law enforcement officials that could become a problem in a later trial."[210]

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serving 36 years in prison). *Id.*

201. Medwed, *supra* note 159, at 1553.

202. Gershman, *supra* note 153, at 542.

203. Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 427–28 (1984).

204. *See* 158 CONG. REC. S8393 (daily ed. Dec. 27, 2012); *see also* Savage, *supra* note 21.

205. *See* Savage, *supra* note 21.

206. *Id.*; Eric Schmitt, David E. Sanger & Charlie Savage, *Administration Says Mining of Data Is Crucial to Fight Terror*, N.Y. TIMES, June 7, 2013, at A1 ("In both [the Florida and Chicago] cases, defense lawyers have cited Ms. Feinstein's statement and demanded to know whether any evidence against their clients was swept up under the 2008 surveillance law that undergirds Prism.").

207. Savage, *supra* note 21.

208. *Id.*

209. *Id.*

210. *Id.*

The Solicitor General of the United States, Donald B. Verrilli, Jr., ultimately disagreed, noting that "withholding disclosure from defendants could not be justified legally[.]"[211] Even a quick review of the disclosure provision in FISA supports the Solicitor General. The pertinent provision says:

> Whenever the Government intends to enter into evidence or otherwise use or disclose in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, against an aggrieved person, any information obtained or derived from an electronic surveillance of that aggrieved person pursuant to the authority of this subchapter, the Government shall, prior to the trial, hearing, or other proceeding or at a reasonable time prior to an effort to so disclose or so use that information or submit it in evidence, notify the aggrieved person and the court or other authority in which the information is to be disclosed or used that the Government intends to so disclose or so use such information.[212]

Rather than accept the plain meaning of the statute or the Solicitor General's legal position, prosecutors in both the Florida and Chicago cases continued to deny any duty to disclose evidence derived from the FISA surveillance in these criminal prosecutions.[213] In Florida, prosecutors contradicted the Solicitor General's position, declaring in a court filing that such notification to a defendant

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211. *Id.* (indicating that during an internal DOJ debate, the Solicitor General contended that "there was no legal basis for a previous practice of not disclosing links to such surveillance"); *see also* Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1154 (2013) (in which the Solicitor General argued that the complainants lacked standing to complain about the government's wiretapping surveillance program, but that criminal defendants who are aggrieved by the program would have standing to challenge the surveillance); Sari Horwitz, *Justice is Reviewing Criminal Cases That Used Surveillance Evidence Gathered Under FISA*, WASH. POST, Nov. 15, 2013, http://www.washingtonpost.com/world/national-security/justice-reviewing-criminal-cases-that-used-evidence-gathered-under-fisa-act/2013/11/15/0aea6420-4e0d-11e3-9890-a1e0997fb0c0_story.html.

212. 50 U.S.C. § 1806(c) (2010). There is a comparable provision for use of such information by "any State or political subdivision thereof." *See* 50 U.S.C. § 1806(d) (2010).

213. Barrett, *supra* note 5 (indicating that federal prosecutors in a terror prosecution in Chicago and in the Florida terrorism case claimed they "had no obligation to notify a defendant if the secret surveillance program had helped catch him").

"would be 'unwarranted and unprecedented.'"[214] Then, in both the Florida and Chicago cases, prosecutors announced that "they did not intend to use any evidence derived from surveillance of the defendants under the 2008 law."[215] Prosecutors, likewise, failed to turn over the information to the court for in camera, ex parte review, even though such review is expressly provided for by the FISA statute for cases in which disclosure risks harming national security.[216] But "eventually, Verrilli['s position on disclosure] won out."[217] In July 2013, the U.S. Department of Justice first formally acknowledged "in a terrorism prosecution that it needs to tell defendants when sweeping government surveillance is used to build a criminal case against them."[218] In October 2013, federal prosecutors notified defendant Jamshid Muhtorov, charged in

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214. *Id.*

215. Savage, *supra* note 21. *See also* Barrett, *supra* note 5 (stating that the federal government agreed that "generally it should provide . . . a notice to defendants" but then excused any production in the specific case, noting that "prosecutors don't plan to introduce any evidence based on the surveillance program"); Michael Tarm, *Lawyer for Terror Suspects Say Government Doesn't Want Challenge to Surveillance*, ASSOCIATED PRESS, June 21, 2013, http://www.foxnews.com/politics/2013/06/21/lawyers-for-chicago-terror-suspect-say-government-doesnt-want-challenge-to/ (government refuses to confirm or deny whether they used far-reaching surveillance evidence in their investigation of Daoud).

216. The applicable provision says:

> Whenever a court or other authority is notified pursuant to subsection (c) or (d) of this section, or whenever a motion is made pursuant to subsection (e) of this section, or whenever any motion or request is made by an aggrieved person . . . relating to electronic surveillance or to discover, obtain, or suppress evidence or information obtained or derived from electronic surveillance under this chapter, the United States district court . . . shall . . . if the Attorney General files an affidavit under oath that disclosure or an adversary hearing would harm the national security of the United States, review in camera and ex parte the application, order, and such other materials relating to the surveillance as may be necessary to determine whether the surveillance of the aggrieved person was lawfully authorized and conducted.

50 U.S.C. § 1806(f) (2010).

217. Horwitz, *supra* note 211; *see also* Barrett, *supra* note 5 (acknowledging "for the first time [in July, 2013] in a terrorism prosecution that [the government] needs to tell defendants when sweeping government surveillance is used to build a criminal case against them" marking a "change in legal direction . . . bring[ing] government prosecutors in line with statements Solicitor General Donald Verrilli made to the Supreme Court [in 2012].").

218. Barrett, *supra* note 5.

Colorado with providing material aid to a terrorist organization, that they intended to use FISA surveillance information in his case.[219] Prosecutors are still refusing to make disclosures in Chicago, although the defense claims "there [is] circumstantial evidence that his client, Adel Daoud, 19, came to the government's attention by activities that were swept up in surveillance targeted at overseas Web sites."[220] Further, while U.S. Attorney General Eric Holder has indicated that the DOJ "is conducting a comprehensive review of all criminal cases in which the government has [previously] used evidence gathered through its warrantless surveillance program[,]" it remains uncertain, at best, whether prosecutors will undertake the review with any real intention of complying with the law.[221]

According to Holder, DOJ lawyers "will be examining cases that are in a variety of stages, and . . . where appropriate, providing defendants with information that they should have so they can make their own determinations about how they want to react to it."[222] Some examinations may "involve cases in which defendants have already been convicted and are in prison."[223] That is the case, for instance, in Portland, Oregon, where attorneys for a twenty-two year old man, Mohamed Osman Mohamud, who was convicted in 2013 of attempted terrorism, are seeking a new trial because Mohamud "was not informed that the government used the warrantless program in bringing its case the first time."[224] He was told in November 2013 that "the FBI used evidence obtained through the NSA's use of intercepts" under FISA.[225] His lawyers contend that his case "'raises a wide range of serious issues regarding suppression of unlawfully or unconstitutionally obtained evidence, dismissal or other sanctions based on the government's intentional violation of governing rules, and, at least, a new trial based on new evidence of governmental overreaching.'"[226]

More significantly, it is highly unlikely that the Solicitor General, the Department of Justice, or the prosecutor in any criminal matter would have acknowledged use of the FISA surveillance program, let alone disclosed evidence derived from the program, had former NSA contractor Edward Snowden not exposed the federal government's "widespread collection of Internet and

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219. Horwitz, *supra* note 211.
220. Schmitt, Sanger & Savage, *supra* note 206.
221. Horwitz, *supra* note 211.
222. *Id.*
223. *Id.*
224. Nakashima, *supra* note 75.
225. *Id.*
226. *Id.* (citing Mohamud's lawyer, Stephen R. Sady).

phone records" of Americans.[227] While DOJ has publically announced its support for full compliance with FISA's disclosure provisions, strong indicators remain that prosecutors will continue to resist such disclosures. For example, in the Chicago case against teenage defendant Adel Daoud, defense lawyers have asked the trial court to step in and "force prosecutors to reveal whether the investigation was sparked by a massive government surveillance program"[228] because as of January 2014, prosecutors continued to deny any obligation to provide the information voluntarily.[229] The assistant U.S. attorney handling the prosecution told the judge that "prosecutors ha[d] complied with all discovery rules" and that there "is no reason to deviate from decades of precedent."[230]

IV. PROSECUTORIAL ETHICS—LESSONS, WARNINGS, AND GUIDANCE FOR HANDLING FISA EVIDENCE IN A CRIMINAL CASE

Although an unethical prosecutor with malevolent intentions can misbehave in any setting and contribute to a wrongful conviction or cover up unlawful conduct by police or other prosecutors, some contexts are more likely than others to tempt prosecutors to breach their ethical duty of justice. The process of plea bargaining and the review of case files for exculpatory evidence are two contexts in which seemingly well-intentioned prosecutors have repeatedly slipped below the ethical floor.[231] Recent events in which prosecutors have consistently refused to comply with their statutory obligations of disclosure under FISA demonstrate a third, similar context. The common theme among the three is the lack of accountability for prosecutors to juries, judges, or the public. Prosecutors regularly fail to meet the ethical norm when removed from the traditional, adversarial courtroom setting, unless there is an equivalent, outside influence, such as a grand jury, made up of ordinary citizens. This Part of the Article reviews the inherent obstacles for justice in the plea and *Brady* contexts with an eye toward developing lessons for FISA cases.

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227. Barrett, *supra* note 5.

228. Meisner, *supra* note 6.

229. *Id.*

230. *Id.*

231. *See, e.g.*, Connick v. Thompson, 131 S. Ct. 1350, 1355 (2011); Liptak, *supra* note 169; Sapien & Hernandez, *supra* note 185.

A. *The Plea Bargaining and* Brady *Contexts Demand Judicial or Other External Oversight of Prosecutorial Decision Making*

Plea bargaining and the review of files for *Brady* materials contrast starkly with situations in which prosecutors present testimony and evidence before a citizen grand jury, try a case before a petit jury, or present arguments in the presence of competent opposing counsel. Prosecutors have, of course, committed prosecutorial misconduct in the grand jury[232] and trial and hearing settings also,[233] but in those contexts, there is a robust deterrent—immediate public and judicial scrutiny—that limits the likelihood and reach of such prosecutorial misconduct. Grand jurors are free to inquire of the prosecutor about questionable testimony[234] and ask that other evidence be presented.[235] The grand jury also maintains the power to return a "no bill" if the group remains unconvinced by the propriety of the prosecution or one or more counts in an indictment.[236] Likewise, at trial, defense counsel stands ready to raise doubts about any perceived gaps or irregularities in the evidence, the prosecutor's questioning of witnesses, or any arguably improper arguments to the jury.[237] Should the prosecutor commit an infraction of the legal or ethical rules, the trial judge will instruct the jury to disregard the offensive evidence or statement.[238]

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232. *See, e.g.*, Beck v. Washington, 369 U.S. 541, 555 (1962) (court found prosecutor's treatment of a witness during interrogation in a grand jury proceeding, namely threats of prosecution for perjury, to be inappropriate but not an "irregularity of constitutional proportions . . ."); United States v. Serubo, 604 F.2d 807, 814, 818 (3rd Cir. 1979) (prosecutor's graphic and misleading references to defendant's violent conduct and association with organized crime violated ABA Standard 3.5(b), Relations with Grand Jury).

233. *See* United States v. Santos-Rivera, 726 F.3d 17, 27 (1st Cir. 2013) (misconduct in closing argument); Lisa H. Wallach, *Prosecutorial Misconduct in the Grand Jury: Dismissal of Indictments Pursuant to the Federal Supervisory Power*, 56 FORDHAM L. REV. 129, 129–35 (1987) (discussing prosecutorial misconduct in the grand jury).

234. Susan W. Brenny, Lori E. Shaw, & Gregory G. Lockhart, FEDERAL GRAND JURY: A GUIDE to LAW and PRACTICE § 6:3 (Thomson/West ed., 2d ed. 2006).

235. Administratvie Office of the United State Courts, Handbook for Federal Grand Jurors, *available at* htpp://www.mdd.uscourts.gov/jury/docs/federalgrand.pdf.

236. *See* F. R. CRIM. P. R. 6(f) (requiring at least twelve grand jurors to concur before an indictment may be returned); *see also* Charles A. Wright & Andrew D. Leipold, Federal Practice and Procedure: Criminal § 111, at 446, 448 (Thomson/West ed., 4th ed. 2008).

237. *See* United States v. Kojayan, 8 F.3d 1315, 1318 (9th Cir. 1993).

238. *See* Keller v. Bagley, 81 Fed App'x 527, 531 (6th Cir. 2003) (Moore, J., dissenting) (criticizing the defense counsel's failure to object and the court's failure to

Furthermore, if the error is egregious, on direct review, the appellate court will order a new trial or overturn the defendant's conviction.[239]

By comparison to the grand jury, public hearings, and trial settings, prosecutorial overreaching is easily concealed during plea bargaining, and misconduct is equally difficult to detect when prosecutors withhold exculpatory evidence as part of the review of the government's investigation files as required by the decision in *Brady v. Maryland*.[240] Any prosecutorial transgression is typically uncovered years after a defendant's conviction becomes final[241]—if ever—through a post-conviction proceeding, such as habeas corpus.[242] At that late date, after guilt has already been determined, courts possess little motivation to agree that there was prosecutorial wrongdoing. After all, such conduct may not have infected the outcome of the case. Perhaps the defendant is, in fact, guilty of the crimes charged. At the same time, identifying and publicizing prosecutorial misconduct casts a cloud over the integrity of that case, and to some extent, the judicial system itself,[243] especially if the misconduct went undetected for an extended period.

Similarly, overreaching during the plea negotiation process is hidden by the fact that most guilty plea agreements require the defendant to waive all arguments of prosecutorial overreaching (or any other flaw) during the plea bargaining process, including rights to appeal.[244] Thus, the process in which prosecutors currently conduct plea negotiations and perform the review of files for *Brady* materials tends to maximize efficiency and cost savings rather than prosecutorial integrity and accurate outcomes.[245] The system promotes early plea deals in which prosecutors offer relatively minor concessions in exchange for a defendant's relinquishment of multiple rights and for other significant time and resource benefits to the

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instruct the jury to disregard the prosecutor's incorrect statements of the law).

239. United States v. Mendoza, 522 F.3d 482, 495–96 (5th Cir. 2008).

240. *See, e.g.*, Johnson, *supra* note 186; Sapien & Hernandez, *supra* note 185.

241. *See* Sapien & Hernandez, *supra* note 185 (citing the case of Tony Bennet, who served thirteen years in prison before his conviction was overturned because of a *Brady* violation).

242. *See* discussion *supra* Part III.B.

243. Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 63 (2005) (pointing to five death sentences that were overturned after North Carolina's open-files process for death row prisoners' habeas corpus actions uncovered prosecutorial misconduct).

244. *See* discussion *supra* Part III.A.; *see also* Zacharias, *supra* note 30, at 1178–79.

245. Yaroshevsky, *supra* note 59, at 59.

prosecutor.[246] For example, plea deals absolve the government from producing discovery, including exculpatory evidence, some of which may cast doubt on the strength of the government's case; other *Brady* evidence may expose embarrassing or illegal conduct by government investigators.[247] A plea deal also ensures that defendants will not pursue time-consuming and costly appeals after conviction.[248] Likewise, the system allows a single prosecutor to decide, without input from the defense or some other neutral party, which, if any, evidence in the possession of the government is material and favorable to the defense.[249] No appellate or other interlocutory review of the prosecutor's decisions occur about whether the government's files contain evidence that must be disclosed to the defense to ensure compliance with the prosecutor's constitutional, due process obligations.

The custom of allowing prosecutors to make critical decisions behind closed doors, coupled with the current prosecutorial environment favoring efficacy over other equally or more important aims of justice, undermines the milieu in which prosecutors can be expected to accomplish optimum results in these contexts. Before justice can be maximized, the incentive structure for prosecutors must be altered. There are a number of potential changes that could be adopted to shift that structure. Of course, any change to the current system should reflect the targeted outcome. For instance, if the primary goal is to guard against pressuring innocent defendants to plead guilty, or the goal is to permit defendants to retain the right to object to a disproportionate sentence following a plea of guilty, judges could exercise more control over the plea bargaining process. Judges could refuse to accept any plea deal that requires too many concessions by the accused. Such control would necessarily involve closer scrutiny of any plea provision in which a defendant waives his rights to appeal, especially a waiver of a right to seek habeas review for an unexpected sentence or to raise claims of ineffective assistance of counsel during the bargaining process. A goal of reducing the number of wrongful convictions would also warrant a new rule requiring prosecutors to produce exculpatory evidence to the defense before any plea of guilty is entered, notwithstanding the Supreme Court's decision in *Ruiz*.[250] Additionally, judges or legislatures could

246. Zacharias, *supra* note 30, at 1124–26.

247. Lain, *supra* note 98, at 24–25; *id.* at 34–35.

248. *See* discussion *supra* Part III.A.4.

249. Kyles v. Whitley, 514 U.S. 419, 437 (1995) (noting that a prosecutor alone can know what is undisclosed and must be assigned the responsibility of determining the effect of evidence and making disclosure when necessary).

250. *See* discussion *supra* Part III.A.2.

impose a requirement that prosecutors adopt an "open file" discovery policy.[251] Such a change would encourage the production of *Brady* material and promote a sense of transparency of process, which would, correspondingly, reduce any suspicion on the part of the accused or the public that the prosecution withheld relevant and helpful information from the defense. In pursuit of these goals, judges could also intensify the colloquy that precedes the entry of a guilty plea.[252] Normally the colloquy requires the defendant to answer a number of questions to ensure that the plea is voluntary and knowing.[253] But this discussion between the judge and litigants could expand to include a number of questions directed to the prosecutor. If, for example, "doing justice" includes the desire to expose and reduce incidents of wrongdoing by law enforcement, prosecutors could be asked in court and on the record—either during an arraignment, a pretrial hearing, or during the plea colloquy—to articulate whether the government is aware of any constitutional or statutory violations that occurred during the investigation. If "doing justice" entails full compliance with discovery and the production of *Brady* evidence, the judge could ask the prosecutor to identify the specific pieces of evidence produced and the efforts made to locate other responsive evidence. Whatever the specific goal, oversight from outside influences—competent opposing counsel, judges, members of the press and public, or a combination—will play a critical role.

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251. *See* Mosteller, *supra* note 162, at 262.

252. There is precedent for allowing trial judges extensive power over pleas. *See* Santobello v. New York, 404 U.S. 257, 262 (1971) (explaining that there is no right to plead guilty); United States v. Martin, 287 F.3d 609, 623–24 (7th Cir. 2002) (acknowledging trial judges' broad power over pleas); United States v. Carrigan, 778 F.2d 1454, 1458 (10th Cir. 1985) (court rejected proposed plea deal where the defendant corporation would plead guilty upon the condition that the charges against the defendant individual would be dropped. The court allowed the parties an additional week to work out a plea agreement, after warning the parties that the court was wary of any plea agreement that did not "involve some accountability of some guilty individual.").

253. *See* FED. R. CRIM. P. 11(b) (requiring the trial judge to "address the defendant personally in open court" before accepting a plea and engaging in a colloquy to ensure the plea is voluntary and that the defendant understands the rights he is relinquishing).

B. The Concept of Role Morality Explains Why Prosecutors Are Destined to Frustrate Justice without Some External Oversight of Their Decision Making

In terms of accomplishing just results, the private nature of prosecutorial decision making is only part of the anti-justice calculus. The many competing pressures on prosecutors, including sometimes intense pressure from immediate supervisors to win, while cutting costs and corners, threatens an already precarious environment for expecting even-handed treatment of defendants and cases. The literature on role morality is instructive here.[254] The concept of role morality underscores the need for adversarial judicial proceedings or some equivalent check on prosecutors' power and responsibility. "Role morality often involves people acting in ways that they would view as clearly unethical if they were acting on their own behalf, but because they are acting on behalf of their employer or a client, they view their actions as permissible."[255] The basic theory underlying role morality is that "we wear two 'moral hats'—one for work and one for everywhere else."[256]

Role morality has particular applicability to professionals, like prosecutors, "because of their special status"; "[they] may find themselves morally at odds with their best moral judgments."[257] The concept of role morality explains the tension Sam Dalton, a living criminal defense icon,[258] reportedly observed in young prosecutors shortly after the Supreme Court announced the decision in *Brady v. Maryland*. Dalton says that following *Brady*, "younger prosecutors tried to take it seriously, and would try to comply, but there was still a community standard to evade disclosure. So they'd actually hide it from their bosses when they'd turn over favorable evidence to us."[259] Although role morality is merely a theory to explain behavior, for prosecutors, divergent moral and professional pressures can feel very real. For example, a prosecutor's office may have a policy

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254. Robert A. Prentice, *Role Morality,* ETHICS UNWRAPPED (Nov. 12, 2012), http://ethicsunwrapped.utexas.edu/video/role-morality/; *see also* Kevin Gibson, *Contrasting Role Morality and Professional Morality: Implications for Practice*, 20 J. OF APPLIED PHIL., no. 1, 17 (2003) ("The notion of role morality suggests individuals may adopt a different morality depending on the roles they undertake.").

255. Prentice, *supra* note 254.

256. Gibson, *supra* note 254, at 17.

257. *Id.* (giving as an example an attorney who "feel[s] compelled to vigorously cross-examine a fragile witness for the opposing side").

258. Mr. Dalton is a lawyer in New Orleans, Louisiana, where he has practiced for sixty years. *See* Balko, *supra* note 38.

259. *See id.*

demanding that prosecutors obtain a written plea agreement, including a waiver of appellate rights (both direct appeals and habeas corpus review), before the prosecutor agrees to a sentence concession, such as a shorter sentence for the accused's willingness to accept responsibility for his role in the crime. Another office may enact a policy requiring prosecutors to exact a dismissal of all motions to suppress before agreeing to a plea. Still others may implement strict policies favoring the disclosure of minimal discovery—including potentially exculpatory evidence. Indeed, the policies of the Department of Justice regarding charging and sentencing have varied with each new attorney general.[260] And elections commonly result in a different district attorney or new attorney general, and those new officers often adopt policies different from their predecessors.[261]

Because of the divergent pressures on prosecutors, they confront "multi-layered, conflicting and crosscutting demands of differing moralities — the individual's own values, those imposed by the employer, and the constraints of professional codes."[262] These multi-layered demands are even more complicated by the fact that they change over time. As discussed above, one attorney general may demand that every prosecutor charge the most readily provable offense and concede nothing upon the defendant's agreement to plead guilty.[263] Another attorney general may emphasize individualized determinations based on the unique circumstances of a case.[264] Whatever the demands of the supervisory prosecutors in the office, the prosecutor handling the case experiences all of these pressures without counter-balancing oversight and influence from judge, jury, the public, or a competent adversary. Thus, the strongest voice in the calculus will be that of the prosecutor's employer. Typically the prosecutor's employer will mean her immediate supervisor but may include the district attorney, the U.S. Attorney or, in the federal system, the U.S. Attorney General. Sometimes these supervisory voices are intimately involved in individual cases. Often they are not; rather, they speak to individual prosecutors by issuing broad policy guidance.

From the perspective of the prosecutor's employer, it is reasonable to encourage efficiency in the way of maximizing convictions and minimizing the costs of extended trials, multiple hearings, and avoiding extended litigation—such as appeals and

260. *See supra* note 15 and accompanying text.
261. *Id.*
262. Gibson, *supra* note 254, at 24.
263. Ashcroft Memo, *supra* note 15.
264. Holder Memo, *supra* note 15.

claims of ineffective assistance of defense counsel—following conviction. At a macro level, maximizing these efficiencies may maximize just outcomes. Certainly increasing the number of convictions in a prosecutor's office, while decreasing the man-hours and money spent to achieve that higher conviction rate, is defensible as a morally acceptable, if not preferable, outcome. But requiring a prosecutor to maximize efficiency in every case oversimplifies the prosecutor's ethical duty. It also ignores the need for individualized justice determinations. The purest example of the flaw in maximizing efficiency is the case of an innocent defendant who pleads guilty and waives extensive rights (to file motions to suppress and appeal, for instance) in exchange for the prosecutor agreeing to leniency in charging or sentencing. While the prosecutor will have obtained a conviction and saved man-hours and money in doing so, the outcome will be indisputably unjust. This example demonstrates that a prosecutor assigned to a case should always be encouraged to thoroughly evaluate the strength of the evidence, consider whether there is competing, exculpatory evidence, weigh the credibility of the witnesses, decide whether the investigation was conducted in compliance with the Constitution and statutory requirements, reflect upon the defendant's willingness to accept responsibility for her crimes, decide whether the defendant has an ability to assist the government in other criminal cases, review the defendant's criminal history, consider the impact of the crime on victims, and evaluate a myriad of other factors. Prosecutors are effectively prevented from "doing justice" when they are required to maximize bureaucratic goals at the expense of more important interests of the justice system. But they may face intense pressure as employees to follow the directives of their supervisory attorneys and comply with the office culture, which emphasizes efficiency.

This backdrop explains why some scholars have criticized plea bargaining as unfair, and others have argued for significant modifications to the manner in which prosecutors conduct case reviews for exculpatory *Brady* information. Prosecutors regularly confront "conflicting and crosscutting demands"[265] to wield their extensive power in ways that benefit their employers, comply with their own moral standards, recognize the liberty interests of the accused, and respond to the needs of victims and other members of the public. Prosecutors experience these pressures as they make important decisions about how hard to bargain and how much evidence to share with the accused during discovery. These pressures, combined with the fact that prosecutors make such

265. Gibson, *supra* note 254, at 24.

decisions in substantial seclusion, create an environment in which the ideal of justice is improbable. Indeed, it is impossible for a single prosecutor to serve all of the professional demands placed on her at any given time. These demands include: following departmental rules, conforming to the distinctive office culture, winning convictions, and reducing the number of pending cases and motions, while simultaneously reaching results that are equitable and that align with practices of other prosecutors within the same office and with results reached in other offices across the state, region, and country. While prosecutors know that they are obligated to "do justice," they receive "protean"[266] messages about what that responsibility requires in a given case.

C. *There Are Lessons from Plea Bargaining and* Brady *for Prosecutors Making Decisions about FISA Evidence*

There are valuable lessons from the plea bargaining and *Brady* contexts for prosecutors assigned to criminal cases built upon evidence derived from covertly acquired electronic surveillance. These lessons extend to cases affecting national security, including cases alleging terrorism. The questionable policies adopted by prosecutors for plea bargaining and the many mistakes, if not outright wrongdoing, committed by prosecutors when producing exculpatory information material to the defense, offer guidance for prosecutors who hope to avoid ethical pitfalls in cases implicating FISA, which requires that prosecutors give notice to targets "of . . . electronic surveillance."[267] As the cases discussed in Part III demonstrate, prosecutors are uniquely positioned to determine whether a case contains evidence obtained under the authority of FISA. Neither defense counsel nor the judge presiding over a case will have reason to know of such evidence, unless the prosecutor discloses its existence. As recent events have already confirmed, there will be at least mild, if not intense, pressure on prosecutors from supervisors or others, such as national security lawyers within DOJ, to withhold relevant and responsive information. Indeed, in the past year, prosecutors have refused to produce evidence that FISA requires to be disclosed, even after the Solicitor General publically declared that no legally supportable basis exists on which to withhold the information.[268]

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266. *See* Green, *supra* note 14, at 608 (describing the duty of justice as "protean as well as vague").

267. *See* 50 U.S.C. § 1806(c) (2010).

268. *See* Savage, *supra* note 21, at A3.

The time for prosecutors to set and follow a consistent policy of disclosure that complies strictly with the Congressional mandate spelled out in FISA is now. Only recently has the public discovered that the government has been acquiring information about their phone calls and emails, raising doubts about its intrusion on citizen privacy and the government's credibility in failing to divulge the existence, let alone details, of the surveillance program.[269] On the heels of Edward Snowden's exposure of these wide-reaching investigative efforts, criminal defense lawyers and the American people learned that some of this covertly acquired information is being used to build criminal cases. Many of the cases involve allegations of terrorism. In July 2013, prosecutors, for the first time, acknowledged that such evidence was part of the investigation leading to the prosecution of two brothers for alleged terrorism.[270] Apparently, there are a number of other undisclosed, closed cases that were also developed with FISA evidence.[271] In at least some of those cases, prosecutors seemingly failed altogether to comply with their legal obligations as set out in FISA. Presumably, national security lawyers within DOJ (as they did in response to the Solicitor General's directive to give notice) unilaterally decided that the interests of justice absolved them from compliance. A short time ago, the U.S. Attorney General ordered a review of those closed cases.[272]

A prosecutor whose ethical duty requires her to "seek justice" cannot legitimately claim to meet that goal unless she complies with the legal minimums in the FISA (or any other) statute. Even assuming that cases involving FISA investigations will unearth evidence that implicates issues of national security and that prosecutors worry that disclosure of evidence will jeopardize lives or other important national interests, prosecutors can fully meet their legal and ethical obligations by producing the evidence ex parte, in camera, as Section 1806(f) of the FISA statute expressly permits.[273]

Because FISA matters have only recently attracted public attention in criminal cases, prosecutors can help regain the public's confidence by immediately adopting and following a policy favoring disclosure and, when disclosure is impractical, transparency. A policy that shifts the decision making from the backroom of the prosecutor's office to the courtroom will also avoid incentives for prosecutors to adopt strategies that overreach or those that smack of gamesmanship in which prosecutors adopt a win-at-all-costs

269. *See* Barrett, *supra* note 5, at A1.
270. *Id.*
271. *See id.* at A1–A2; *see also* discussion *supra* Part III.C.
272. *See* discussion *supra* Part III.C.
273. 50 U.S.C. § 1806 (f) (2010).

mentality, strategies that have surfaced in the plea bargaining and *Brady* contexts. Submitting close cases to a neutral decision maker, who will review the surveillance evidence and decide whether and what information should be disclosed, will also create an incentive structure that favors fair play and enhances the likelihood that justice will be accomplished. As plea bargaining and *Brady* violations have established, prosecutors experience a greater ability to do justice when exposed to external, justice-enhancing influences beyond supervisory prosecutors.

V. CONCLUSION

In 2013, Edward Snowden, a former contractor for the U.S. National Security Agency, leaked classified information revealing a government-operated surveillance program known as PRISM.[274] As part of PRISM, the federal government collects extensive amounts of data from phone companies and email accounts.[275] It also monitors phone conversations.[276] In the wake of these revelations, the U.S. Solicitor General in February 2013 told the Supreme Court that criminal defendants in individual cases could challenge wiretapping and other covert surveillance operations, such as PRISM.[277] He explained that FISA requires prosecutors to inform defendants affected by evidence derived from FISA surveillance.[278] Despite FISA's unambiguous requirement of disclosure and the Solicitor General's assurances, prosecutors continued to withhold surveillance evidence in criminal cases.[279] In doing so, these prosecutors disregarded both federal law and their ethical duty to "seek justice." But the violations of law and ethics were predictable and, arguably, inevitable. As the many questionable policies pursued by prosecutors in the plea bargaining context and the long trail of *Brady* abuses by prosecutors has already established, it is unrealistic to expect prosecutors to serve the many ideals of justice, while making decisions in seclusion. Prosecutors are incapable of accomplishing even-handed results when supervisory prosecutors are their only meaningful influences. At a minimum, justice demands judicial proceedings or public oversight.

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274. Judy Woodruff, *Looking Back at the Snowden Leaks That Sparked U.S. Surveillance Revelations*, PBS NEWSHOUR (Dec. 26, 2013), *available at* www.pbs.org/newshour/bb/government_programs-july-dec13-surveillance1_12-26/.

275. *Id.*

276. *Id.*

277. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1154 (2013).

278. *Id.*

279. *See* Barrett, *supra* note 5.