"Brady" Obligations, Criminal Sanctions, and Solutions in a New Era of Scrutiny

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I. INTRODUCTION

Six days after terrorist attacks shook New York City and Washington, D.C., the FBI raided an apartment complex in a suburb of Detroit and apprehended three North African men. Among the men’s possessions were hand-drawn sketches potentially detailing targets for terrorist attacks abroad. Four men were charged with providing material support for terrorism and document fraud and were brought to trial two years later. Richard Convertino, an assistant United States attorney with a strong track record in the DOJ, was tapped to prosecute the case and won convictions against three of the four defendants. Attorney General John Ashcroft personally and publicly lauded the importance of the case and proclaimed the convictions victories in the war on terror.

Allegations soon arose, however, that Convertino and a “regional security officer” concealed photographs of one of the alleged targets from the defense at trial. The defense claimed that these photographs would have shown that the sketches were benign and not “terrorist casing sketches” as the prosecution had asserted at trial. Convertino vigorously denied any wrongdoing, but an investigation revealed that he may have received an email containing the

1. This case is the recent prosecution of former Assistant U.S. Attorney Richard Convertino stemming from his role as lead prosecutor in United States v. Koubriti. Danny Hakim, Trial Set to Begin for Four Men Accused of Being in Terror Cell, N.Y. TIMES, Mar. 17, 2003, at A14. Convertino emphatically proclaimed his innocence, with those defending him calling the prosecution an act of political revenge for Convertino’s criticism of the current administration and Department of Justice. See generally http://www.convertino.org (last visited Oct. 5, 2008) (chronicling Convertino’s “fight against malicious prosecution and abuse of governmental power”).

2. A fourth suspect and defendant, an Algerian, had previously been arrested.


4. Danny Hakim & Caitlin Nish, 2 Arabs Convicted and 2 Cleared Of Terrorist Plot Against the U.S., N.Y. TIMES, June 4, 2003, at A1. Two of the four were convicted on “terror” related charges, while a third was convicted of a charge related to document fraud. Id. The fourth defendant was acquitted on all charges. Id.

5. Id.


7. Id.
photographs at issue. Amid a maelstrom of controversy and allegations of political reprisal, Convertino was charged and indicted for conspiracy, obstruction of justice, and making false declarations.\footnote{8} This may have been the first time a U.S. attorney faced prosecution for failing to adhere to his prosecutorial duty to disclose exculpatory evidence. That distinction was of little solace to Convertino as he awaited his fate at trial, facing the very real possibility of years behind bars.\footnote{9}

At almost the same time in Durham, North Carolina, an exotic dancer accused three athletes at Duke University of raping her at an off-campus party where she had been hired to perform.\footnote{10} The county's district attorney, Mike Nifong-facing reelection\footnote{11} and a volatile electorate—immediately took the reigns of the case, speaking to the media freely and exalting the strength of the impending prosecution.\footnote{12} As the prosecution moved forward, it became apparent that the evidence in the case was less than convincing. Nifong subsequently withheld the results of a DNA test, witness statements, and other evidence that cast significant doubt on the guilt of the three accused.\footnote{13} Against an onslaught of criticism, Nifong remained recalcitrant, refusing to abandon the prosecution, and instead asked the state attorney general's office to take control of the case.\footnote{14} The North Carolina Attorney General soon dismissed all charges against the students, proclaimed their innocence, and cited numerous prosecutorial improprieties.\footnote{15}

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Admittedly, prosecutorial behavior in these two cases was extreme, but each example gives rise to significant questions about our system of criminal justice. When a prosecutor misbehaves, what outcome is just? Should a factually guilty defendant escape punishment because of a prosecutor's error? Who really suffers in these situations? How should prosecutors pay for their misdeeds? Convertino endured a full-blown jury trial and could have spent years behind bars if convicted, while Nifong lost his license to practice law and spent just one night in jail. Which outcome is fair?

The two cases also illustrate that prosecutors can wield an incredible amount of control over the civil liberties of their fellow citizens by withholding evidence. When abuses of this nature occur, repercussions are few and inconsistent. This Note examines the federal and state remedies currently employed to combat prosecutorial failure to disclose evidence. An examination of these remedies reveals a frustrating system; disclosure violations continue to occur at high rates at both the federal and state levels, while individual prosecutors rarely face repercussions for these violations. This Note makes two primary recommendations for decreasing the incidence of disclosure violations. First, "open-file" policies during the pretrial period are essential to combat failures to disclose. Second, post-trial criminal prosecutions should be used more frequently against offending prosecutors. Admittedly, the second proposal is dramatic, but if the epidemic of disclosure violations is as rampant and longstanding as it seems, a dramatic cure may be exactly what is needed.

II. BACKGROUND

In 1963, the Supreme Court handed down its seminal decision in *Brady v. Maryland*. In a 7-2 decision, the Court held that the Due Process Clauses of the Fifth and Fourteenth Amendments require the prosecution in a criminal trial to disclose all evidence that is favorable to the accused and "material to guilt or to punishment." Forty-five years after *Brady*, prosecutors' so-called "*Brady* obligations" remain unclear, despite the Court's subsequent elaboration. The convoluted

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16. Nifong also endured a number of other repercussions.

17. See Angela Davis, *Arbitrary Justice* 130–32 (2007) (noting that "*Brady* violations are among the most common forms of prosecutorial misconduct" and discussing a study by the Chicago Tribune which revealed that among cases studied between 1963 and 1999, 381 defendants were convicted, and sixty-seven of them sentenced to death, because prosecutors either concealed exculpatory information or presented false evidence).

history of judicial and legislative measures that follows in this Section demonstrates that today's prosecutorial system still fails to meet the constitutional due process requirement enunciated in *Brady*.

**A. Due Process and the Disclosure of Evidence**

1. *Brady v. Maryland*

   John L. Brady was convicted of first-degree murder for his role in a killing during a robbery and was sentenced to death.\(^{19}\) Brady appealed his conviction and argued that the prosecution had kept the confession of his accomplice from him.\(^{20}\) The Court held that the failure to disclose this statement violated Brady's Fifth and Fourteenth Amendment due process rights and announced that "the suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."\(^{21}\) *Brady* adheres to the belief that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."\(^{22}\) The decision echoes the idea that, in this country, a prosecutor's ultimate duty is "not to convict, but to see that justice is done."\(^{23}\)

   *Brady* was an extension of the Court's prior due process jurisprudence. In *Mooney v. Holohan*, a 1935 opinion, the Court invalidated a verdict obtained through the knowing submission of perjured testimony to a jury.\(^{24}\) In doing so, the Court held that "[s]uch a contrivance by a state to procure the conviction and imprisonment of a defendant is an [sic] inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."\(^{25}\) The Court's 1942 decision in *Pyle v. Kansas* held that deliberate suppression of favorable evidence and utilization of perjured testimony violates due process in a "deprivation of rights guaranteed by the Federal Constitution."\(^{26}\)

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19. *Id.* at 84–86.
20. *Id.*
21. *Id.* at 87.
22. *Id.*
23. ABA CANONS OF PROF'L ETHICS Canon 5 (1908).
25. *Id.* at 112.
In the forty-four years since *Brady*, some critics have argued that those accused of crimes in the United States are not receiving the due process that *Brady* supposedly assures. Some suggest that *Brady* failed from its inception "as a discovery doctrine" because it "is insufficiently enforced when violations are discovered, and virtually unenforceable when violations are hidden."\(^\text{27}\) Regardless of the reason for *Brady*'s failure, nondisclosure of favorable evidence continues to occur far too often.

2. Developments After *Brady*

\textit{a. What Is "Material?"}

The Supreme Court has continued to refine the scope of prosecutors' disclosure duties since *Brady*. In doing so, the largest problem for the Court has been defining a standard of "materiality." The Court's materiality requirement is necessary; otherwise, a failure to turn over any tangential or irrelevant piece of evidence could render the trial court's verdict invalid.\(^\text{28}\) Such a requirement would place an enormous burden on the prosecutor while only minimally benefiting the defendant, and the *Brady* Court determined that due process does not demand so much.\(^\text{29}\) A "true" *Brady* violation demands that "[t]he evidence at issue [ ] be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."\(^\text{30}\) As the doctrine developed, however, the threshold requirement of actual prejudice proved to be problematic.

In *United States v. Agurs*,\(^\text{31}\) the Court named three different contexts in which *Brady* obligations apply: (1) cases like *Mooney*, in which perjured testimony is employed and prosecutors know or should know of such perjury; (2) cases like *Brady*, in which the defense makes a specific pretrial request for evidence; and (3) cases in which the defense either makes a broad request for exculpatory evidence or no request at all.\(^\text{32}\) The *Agurs* Court found that evidence in the first

\(\text{29.} \) *Id.*
\(\text{31.} \) *427 U.S. 97* (1976).
\(\text{32.} \) *Id.* at 103–06.
scenario was material because "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and [the evidence is material] if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." In the second scenario, the Court suggested that evidence capable of "affecting the outcome" of the trial is material and must be disclosed. In the third scenario, the Court noted that omitting evidence that "creates a reasonable doubt that did not otherwise exist" is a constitutional error.

Agurs noted that "[t]he test of materiality in a case like Brady in which specific information has been requested by the defense is not necessarily the same as in a case in which no such request has been made." Later, however, the Court in United States v. Bagley abrogated this distinction and held that the test for materiality is the same whether the defense makes no request, a general request, or a specific request. The test in all circumstances is whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." The Bagley Court, in part relying on Strickland v. Washington, defined "reasonable probability" as "a probability sufficient to undermine confidence in the outcome."

The Court further clarified the standard of materiality in Kyles v. Whitley and held that "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." In addition, the Court set forth four principles that further define Bagley's "reasonable probability" standard: (1) materiality does not

33. Id. at 103.
34. Id. at 106 (discussing Brady and noting that the "confession could not have affected the outcome on the issue of guilt but could have affected Brady's punishment. It was material on the latter issue but not the former. And since it was not material on the issue of guilt, the entire trial was not lacking in due process."). Justice Stevens did not specifically articulate a standard for materiality, but "affected the outcome" seems to be the standard that the Court intended. See United States v. Bagley, 473 U.S. 667, 681 (finding the "standard of materiality applicable in the absence of a specific Brady request is therefore stricter than the harmless-error standard but more lenient to the defense than the newly-discovered-evidence standard").
35. Agurs, 427 U.S. at 112.
36. Id.
37. 473 U.S. at 682.
38. Id.
39. Id. However, it should be emphasized that in the Strickland context (dealing with ineffective assistance of counsel claims) courts seem to focus on confidence in the overall adversarial process and its truth-seeking function rather than the ultimate verdict rendered.
mandate that the defendant show beyond a preponderance of the evidence that disclosure would have resulted in acquittal; (2) a defendant need not show that the evidence was insufficient to convict "after discounting the inculpatory evidence in light of the undisclosed evidence;" (3) once an appellate court has applied Bagley and found a constitutional error, harmless-error review need not follow; and (4) materiality should be judged with an emphasis on the "cumulative effect of suppression" and not through piecemeal analysis.\textsuperscript{41}

Problematically, the same standard of materiality has been employed before trial by prosecutors and post trial by judges because, "unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose."\textsuperscript{42} While a materiality analysis seems practicable \textit{post hoc}, it remains difficult for prosecutors to use the standard uniformly to guide their pretrial decisions.\textsuperscript{43} Prosecutors are forced to make independent predictions about whether there is a reasonable probability that the outcomes of their cases would be different if they withheld evidence.\textsuperscript{44} Such a determination obviously is easier to make after events have played out at trial. Thus, in practice there is a notable disparity between the post-trial decision of a judge and the pretrial evaluation of a prosecutor. Since the standard is "inevitably imprecise," and because it is difficult to analyze the importance of a single piece of evidence in isolation, ideally a prosecutor would tend to err on the side of disclosure.\textsuperscript{45}

Despite the other requirements of \textit{Brady}, the subjective intent of the prosecutor does not matter because the obligation to disclose

\textsuperscript{41} Id. at 434–38.
\textsuperscript{43} See Christopher Deal, Note, \textit{Brady Materiality Before Trial: The Scope of the Duty To Disclose and the Right To a Trial By Jury}, 82 N.Y.U. L. REV. 1780, 1780 (2007) (arguing that "it is both impractical and unconstitutional to ask prosecutors to use materiality as the measure of their disclosure obligations before trial," and advocating a new balancing test weighing the "\textit{Brady} disclosure rules and the defendant's right to a trial by jury to determine when favorable evidence must be disclosed"); see also Mary Prosser, \textit{Reforming Criminal Discovery: Why Old Objections Must Yield To New Realities}, 2006 WIS. L. REV. 541, 563–69 (2006) (arguing that "[r]ather than encouraging prosecutors to err on the side of disclosure, as the Court suggested would happen, the materiality standard that has evolved since \textit{Brady} provides the opposite incentive," and thus "the Supreme Court has defined a standard for disclosure that has not lived up to \textit{Brady}'s ideal that '[s]ociety wins not only when the guilty are convicted but when criminal trials are fair" ).
\textsuperscript{44} Kyles, 514 U.S. at 437.
\textsuperscript{45} See id. at 439 (stating that "a prosecutor anxious about [not disclosing material evidence] will disclose a favorable piece of evidence").
applies regardless of the prosecutor's good (or bad) faith. The harm to a defendant in instances of nondisclosure is not alleviated merely because a prosecutor made a good-faith error in judgment or was simply negligent in meeting the Brady requirements. Moreover, "reliance on prosecutorial intent would create an unduly narrow rule that could make judicial ascertainment of the government's motives paramount to an assessment of the fairness of the trial," thereby undercutting the original impetus underlying Brady. Although the subjective intent of the prosecutor is not relevant to determining whether a violation has occurred, it is extremely instructive in determining how to deal with prosecutors who fail to disclose exculpatory evidence.

3. Practical Application of Brady Obligations

Although Brady and its progeny provide prosecutors with amorphous guidance, the Court has offered some practical guidance over the years. The Court noted that "[t]here is no general constitutional right to discovery in a criminal case, and Brady did not create one." Nonetheless, a prosecutor is obligated to be aware of favorable evidence known to other prosecutors and investigative agencies acting on the prosecution's behalf, including police agencies. Furthermore, the Court determined that evidence that would impeach the credibility of a witness must be turned over to the defense.

Still, there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case," and the Constitution does not require the prosecution to supply the defendant with the names of


47. Peter J. Henning, Prosecutorial Misconduct and Constitutional Remedies, 77 WASH. U. L.Q. 713, 761 (noting that "Brady cited Mooney and its progeny to reach a result that fundamentally changed the due process analysis of prosecutorial misconduct, eschewing an assessment of prosecutorial intent for a broader review of the overall fairness of the proceeding").

48. See supra notes 46–47 (discussing relevance of subjective intent when punishing prosecutors).


51. See Giglio, 405 U.S. at 153–54 ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [the Brady rule]." (citation omitted)).

unfavorable prosecution witnesses before trial.\textsuperscript{53} Also, if information is largely cumulative of previously disclosed information or if the accused had knowledge of the information or the ability to acquire such information with reasonable diligence, the evidence is not material for \textit{Brady} purposes.\textsuperscript{54}

All of these rules are built on the idea that "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."\textsuperscript{55} In fact, the Court consistently has maintained that the mandates of the Fifth and Fourteenth Amendment Due Process Clauses do not require prosecutors to reveal to the defendant every piece of evidence or even every piece of favorable evidence in their possession, without more.\textsuperscript{56} With each decision the Supreme Court has pushed itself further along, but not off of, this tightrope between a prosecutor's ability to act effectively as the state's advocate and the prosecutor's overarching duty to see that justice is done.

\textbf{B. Statutory and Other Guidance}

\textit{Brady} and its progeny lay out a persistently perplexing constitutional framework of the prosecutorial duty to disclose. As a result, the way that this framework has been put into practice on both the federal and state levels has been anything but uniform. Rules of criminal procedure and legislation attempt to clarify and elaborate on the prosecutorial duty to disclose favorable evidence, but unfortunately they do so with limited success.

\textbf{1. Federal Rule of Criminal Procedure 16}

While there is no constitutional guarantee of discovery in criminal cases, Federal Rule of Criminal Procedure 16 ("Rule 16") attempts to ensure that a qualified flow of information exists between the prosecution and the defense in federal cases.\textsuperscript{57} In 1974, the

\textsuperscript{53} See \textit{Weatherford}, 429 U.S. at 559 ("It does not follow from the prohibition against concealing evidence favorable to the accused that the prosecution must reveal before trial the names of all witnesses who will testify unfavorably.").

\textsuperscript{54} Kuo & Taylor, \textit{supra} note 46, at 702 (citing Byrd v. Collins, 209 F.3d 486, 518–19 (6th Cir. 2000); Johns v. Bowersox, 203 F.3d 538, 545 (8th Cir. 2000); United States v. Avellino, 136 F.3d 249, 257 (2d Cir. 1998); Westley v. Johnson, 83 F.3d 714, 726 (5th Cir. 1996)).


\textsuperscript{56} See \textit{supra} notes 49–55 and accompanying text (citing cases supporting this proposition).

\textsuperscript{57} See \textit{FED. R. CRIM. P.} 16 advisory committee's note to 1974 amendment (explaining that the Rule "is revised to give greater discovery to both the prosecution and the defense").
Advisory Committee on the Federal Rules of Criminal Procedure explained that it opted “not to codify the Brady Rule” in order to give broader discovery to both parties in a federal case.\(^{58}\) Accordingly, Rule 16 requires prosecutors to disclose certain evidence to the defense. This includes the substance of any oral statement made by the defendant to the government that the government intends to use at trial. Further, a defendant’s written or recorded statements within the government’s possession that the prosecutor knows (or should know) exist must be turned over.\(^{59}\) The government is also under a continuing obligation to disclose information as it becomes available prior to or during trial.\(^{60}\) In the event of noncompliance by a party, Rule 16 permits courts to order that party to allow discovery or inspection, to grant a continuance, to prevent the party from introducing the undisclosed evidence, or to enter orders that are “just under the circumstances.”\(^{61}\)

Rule 16 essentially imposes a reciprocal obligation for the defense to turn over the same material it wishes to acquire from the government pursuant to Rule 16(a)(1)(E)-(G).\(^{62}\) The defense, however, is under no obligation to turn over documents made by the defendant, the defendant’s attorney, or the defendant’s agent during the investigation or defense of the case.\(^{63}\) The defense is not required to disclose statements made to the defendant, the defendant’s attorney, or the defendant’s agent by the defendant, a government or defense witness, or a prospective government or defense witness.\(^{64}\)

Rule 16 has been a point of contention between the U.S. Department of Justice (“DOJ”) and groups such as the American College of Trial Lawyers (“ACTL”). The ACTL favors an amendment to the rules that codifies Brady, clarifies “both the nature and scope of favorable information,” and implements a due diligence requirement

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58. Id.

59. FED. R. CRIM. P. 16(a)(1)(A)-(B). Further, the government must: (1) provide a copy of the defendant’s prior criminal record; (2) turn over documents and objects in the government’s possession that are “material to preparing the defense,” are intended for use by the government as evidence in chief at the trial, or were “obtained from or belong[] to the defendant;” and (3) allow the defense to inspect examinations and tests that are material to the preparation of the defense. Lastly, the government must turn over any written summaries of expert testimony that it intends to use at trial. Id. 16(a)(1)(D)-(G).

60. Id. 16(c)(1)-(2).

61. Id. 16(d)(2)(A)-(D).

62. Id. 16(b)(1)(A)-(C).

63. Id. 16(b)(2)(A)-(B).

64. Id.
for prosecutors in locating information. In response, the DOJ contends that Brady obligations already are sufficiently “defined by existing law that is the product of more than four decades of experience with the Brady rule,” and therefore no codification of the Brady rule [is] warranted.” In 2004, the Advisory Committee forwarded a new draft of Rule 16 to the Standing Committee for publication that would have added the following subsection:

(H) Eculpatory or Impeaching Information. Upon a defendant’s request, the government must make available all information that is known to the attorney for the government or agents of law enforcement involved in the investigation of the case that is either exculpatory or impeaching. The court may not order disclosure of impeachment information earlier than 14 days before trial.

Ultimately, however, the Standing Committee rejected the proposal, preserving the language of Rule 16 as is. The Advisory Committee’s notes to the proposed amendment stated that the amendment was “intended to supplement the prosecutor’s obligations to disclose material exculpatory or impeaching information under Brady v. Maryland . . . . The rule contains no requirement that the information be ‘material’ to guilt.” Also, the proposed amendment would require prosecutors to disclose to the defense all exculpatory or impeaching information known to any law enforcement agency that participated in the case “without further speculation as to whether this information will ultimately be material to guilt.” The amendment would have acted as a catch-all of sorts, codifying most of the key elements of the Court’s Brady jurisprudence while eliminating the need for a showing of materiality as to guilt or innocence.

Such an amendment likely will continue to spark debate in the Rules Committee in the future, but for now, the Rule 16 disclosure requirements remain the same. Although the amendment would have

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66. Id. (citing Memorandum from U.S. Dep’t of Justice (Criminal Div.) to Hon. Susan C. Bucklew, Chair, Judicial Conference Subcomm. on Rules 11 and 16, at 2 (Apr. 26, 2004)).

67. Id. at 7, 23–24.


69. HOOPER & THORPE, supra note 65, at 23–24.

70. Id.
provided uniformity that is long overdue, it certainly was not a cure-all for Brady violations. The drive to amend Rule 16 demonstrates that Brady violations remain very relevant and, regrettably, are unaddressed by the current procedural scheme.

2. The Jencks Act

The Jencks Act ("the Act") regulates discovery of statements made by witnesses appearing for the government in federal criminal trials. Under the Act, the defense may by motion compel the production of any statement by a witness testifying for the state that "relates to the subject matter" of the witness's testimony. The Act has been criticized, however, because it only allows such a motion after the witness has testified at trial. The purported rationale for this delay is to protect witnesses from threats to their safety and to prevent the defense witnesses from changing their testimony to

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71. See infra Section II.B.iii (describing the lack of uniformity among federal district courts).

   (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

   (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

But see United States v. Avellino, 129 F. Supp. 2d 214, 218 (E.D.N.Y. 2001) (stating that "the government's Brady obligation trumps the statutory time table set forth in 18 U.S.C. § 3500," meaning the government cannot wait until after a witness has testified on direct examination to disclose "material evidence favorable to the defendant").


[S]trict compliance with the Jencks Act necessitates frequent delays and adjournments. Counsel often need time to digest and investigate the information received. As a practical matter, any thorough investigation at that juncture of the proceedings may be impossible, and counsel must do the best that they can in the brief time usually allotted. The court and the jury are inconvenienced by even brief delays . . . .

Id.
“accommodate information received from the government.” 75 As will be discussed in Part IV, some critics do not believe that concern for the safety of witnesses is enough to justify the current strictures.

The Jencks Act and Brady conflict when the defense seeks potentially exculpatory statements made by witnesses before they testify at trial. Federal courts are split on how to resolve this tension. 76 Some courts conclude that providing such statements after a witness testifies at trial is insufficient, and therefore a prosecutor’s obligation to disclose “trumps” the Jencks Act. 77 Others see no conflict, maintaining that, as long as the material is provided at trial, no Brady problem exists. 78

3. District Court Rules

Brady obligations are not uniformly incorporated into the local rules of district courts. 79 Thirty-seven of the ninety-four districts have a local rule, order, or procedure that specifically governs Brady obligations. 80 The remaining fifty-seven districts have not employed any rules to help prosecutors execute their Brady obligations, and instead follow Rule 16 or a local rule analog. 81 Among the thirty-seven districts that do have a Brady regulation, twenty-eight require automatic disclosure, nine require disclosure only upon the request of the defense, two employ a rebuttable presumption that the defendant automatically requests disclosure, and one mandates a pretrial conference to determine what must be disclosed under Brady. 82 Also, in most (thirty-one of the thirty-seven) of these districts, the disclosure obligation persists beyond the initial discovery and continues throughout the trial, similar to Rule 16(c). 83 No local rule, order, or procedure employed at the district court level provides a remedy or

75. Id. at 1089.
76. See WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE pt. IV, ch. 20, § 3 (3d ed. 2007) (noting that “Federal courts have divided treating such potential conflicts between Brady and the limits placed on federal pretrial discovery”).
77. Id.
78. Id.
79. See HOOPER & THORPE, supra note 65, at 7–8 (summarizing differences in incorporation of Brady obligations by district courts).
80. Id.
81. Id.
82. Id. at 8.
83. Id.
sanction for nondisclosure, however. Instead, most jurisdictions rely on the court’s general sanctioning power as authorized by Rule 16.

4. State Rules

All fifty states have adopted some sort of disclosure rule, often enacting a rule of procedure similar to Rule 16. Some states exceed the scope of Rule 16 and the Brady constitutional obligations, however, by explicitly setting deadlines by which prosecutors must have disclosed evidence. Most states also employ a continuing duty of disclosure after the initial discovery period. Every state has some type of sanction for prosecutors who fail to comply with disclosure requirements; several states enable their trial courts to dismiss the charges completely while other states have found dismissal to be too severe. Overall, as it is on the federal level, protection from prosecutorial failure to disclose is inconsistent at the state level, exposing defendants in different jurisdictions to potentially great discrepancies in legal process.

III. Analysis

Against this backdrop of constitutional, statutory, and procedural obligations of disclosure, a number of remedies have been suggested to prevent breaches of these obligations. Professional disciplinary actions, judicial remedies, internal supervision, and civil liability all have been offered as means of combating Brady violations. However, an analysis of each proffered remedy reveals that all have been generally ineffective in combating disclosure violations.

84. Id. The authors note, however, that some districts reference negative consequences for the prosecution in the event of a Brady violation. For instance:

The Eastern District of Michigan’s rule notes “the government proceeds at its peril if there is a failure to disclose information pursuant to Rule 16(a)(1) and exculpatory evidence.” And the Western District of Kentucky’s rule states that the “[f]ailure to disclose Brady [material] at a time when it can be used effectively may result in a recess or continuance so that defendant may properly utilize such evidence.”

Id. at 19.

85. Id. at 20.

86. Id. at 61.

87. Id.

88. Id.

89. Id. For a more in-depth discussion, see id. at 59–60.
A. Ethical Guidance and Professional Discipline

1. ABA Guidelines

The underlying ethos of *Brady* is hardly a new one. It was articulated as early as 1908 when the American Bar Association ("ABA") adopted the Canons of Professional Ethics, which state that "the primary duty of a lawyer engaged in public prosecution is not to convict, but to see that justice is done." Every state has adopted some formulation of ethical standards for attorneys in general (and prosecutors specifically), largely based on principles first promulgated by the ABA. In 1980, the ABA adopted the Model Code of Professional Responsibility’s Disciplinary Rule ("Model Code"), which provides in pertinent part that a prosecutor must disclose the existence of evidence known to the prosecutor or other government lawyer that "tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." A literal reading of this section implies that a prosecutor is under the obligation to disclose the fact that exculpatory evidence exists but not necessarily to turn it over to the defense. The ABA Model Rule of Professional Conduct ("Model Rule") 3.8(d) provides that a prosecutor in a criminal case must disclose all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigate the offense. Similarly, in perhaps the most comprehensive set of ethical guidelines for prosecutorial conduct, the ABA's Criminal Justice Standards ("Standards") require that a prosecutor not intentionally fail to disclose the existence of all evidence or information that tends to negate the guilt of the accused, mitigate the offense charged, or reduce the punishment of the accused. Further, the Standards require that a prosecutor make a reasonably diligent effort to comply with

90. ABA CANONS OF PROF'L ETHICS Canon 5 (1908).
92. ABA MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103(B) (1980).
93. See Richard A. Rosen, Disciplinary Sanctions Against Prosecutors For Brady Violations: A Paper Tiger, 65 N.C. L. REV. 693, 711 (1987) (pointing out that because “[d]isciplinary Rule 7-103(B) requires the disclosure only of ‘the existence of evidence[,]’ [t]his theoretically allows the prosecutor merely to inform the defense that the evidence exists without actually turning it over”).
94. ABA MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2004).
96. ABA STANDARDS FOR CRIMINAL JUSTICE Stand. 3-3.11 (2d ed. 1980).
discovery requests and not avoid seeking evidence because it might damage the prosecution’s case.97

Thus, the Model Rules and the Standards both incorporate a duty to disclose evidence and information that tends to negate guilt or mitigate an offense.98 Even though the prosecutorial duty to disclose is specifically listed in ethical guidelines like the Model Rules, little is offered in the way of defining whether a piece of evidence “tends to negate the guilt” of a defendant, again leaving the prosecutor to his own devices when attempting to proceed ethically.99

Under these guidelines, the prosecution’s ethical duty seems to be broader than its constitutional duty. The U.S. Constitution requires a prosecutor merely to disclose evidence that is materially favorable to the defense. Ethical rules such as Model Rule 3.8(d), however, oblige a prosecutor to disclose all evidence that “tends to negate the guilt of the accused or mitigates the offense,” which is more accommodating than outcome-determinative strictures of materiality.100 Model Rule 3.8(d) is not limited to admissible evidence; it includes all evidence or information that is favorable to the accused, whether or not it is admissible.101 Furthermore, a prosecutor is not constitutionally obligated to disclose cumulative evidence, evidence of which a defendant is already aware, or evidence the defendant can acquire through reasonable diligence; ethical requirements do not mandate such a restriction.102 Thus, “[a]n ethical violation can, and often will, be present even when due process is not violated.”103 In theory at least, ethical guidelines create a broader obligation of criminal discovery.

97. Id.
98. Id.
99. See Abby L. Dennis, Note, Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power, 57 DUKE L.J. 131, 137 (2007) (noting that ethical guidelines such as these have been criticized as offering only a “handful of special ethical obligations for prosecutors,” but not acting as “a guideline at all, and as a result, the prosecutor is thrown back on his own subjective value and notions about fundamental fairness”).
100. Bennett L. Gershman, Reflections on Brady v. Maryland, 47 S. TEX. L. REV. 685, 691 n.28 (2006); see also Rosen, supra note 93, at 714 (noting “[t]he ethical duties imposed by all three of the modern codes, however, are significantly broader than the due process standard in one important respect— the absence of a materiality requirement”).
101. Gershman, supra note 100, at 691 n.28.
102. Id.
103. Rosen, supra note 93, at 714 (citing United States v. Anderson, 574 F.2d 1347 (5th Cir. 1978); United States ex rel. Marzeno v. Gengler, 574 F.2d 750 (3d Cir. 1978); Ruiz v. Cady, 548 F. Supp. 764 (E.D. Wis. 1982); Nelson v. State, 208 N.W.2d 410 (Wis. 1973)).
2. Professional Discipline

With such a powerful arsenal of ethical guidelines, professional discipline by bar associations should present a formidable method of curbing prosecutorial failures to disclose. According to the U.S. Supreme Court, “a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.”104 As numerous commentators have decried, however, “despite the universal adoption by the states of Disciplinary Rules prohibiting prosecutorial suppression of exculpatory evidence . . . and despite numerous reported cases showing violations of these rules, disciplinary charges have been brought infrequently and meaningful sanctions rarely applied.”105 Presented with the implicit difficulties of charging a prosecutor with an ethical violation, professional disciplinary bodies seem “unable or unwilling to grapple with ethical violations by prosecutors.”106

Intuitively, it seems that *Brady* violations should be addressed in disciplinary proceedings, as “an appellate court will in many cases already have reviewed the facts and made a finding of the prosecutor’s misconduct,” and thus a lot of the factual legwork will already have been done for bar associations.107 Empirically, however, bar disciplinary authorities are underutilized.108 Several obstacles

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105. Rosen, supra note 93, at 697; see also Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001) (noting that “[n]umerous commentators have reacted by noting the dearth of cases in which disciplinary authorities have sanctioned prosecutors”).
107. Weeks, supra note 91, at 880.
108. See Rosen, supra note 93, at 720 (finding, at the time of his publication, only nine instances of discipline for Brady-like violations by prosecutors); see also Weeks, supra note 91, at 881–82 (finding an additional seven instances of disciplinary action against prosecutors for *Brady* infractions since Rosen’s publication, of which only four received actual punishment); NEIL GORDON, CTR. FOR PUB. INTEGRITY, MISCONDUCT AND PUNISHMENT: STATE DISCIPLINARY AUTHORITIES INVESTIGATE PROSECUTORS ACCUSED OF MISCONDUCT (2003), available at http://projects.publicintegrity.org/pm/default.aspx?act=sidebarsb&aid=39:

Out of 44 attorney disciplinary cases: In 7, the court dismissed the complaint or did not impose a punishment. In 20, the court imposed a public or private reprimand or censure. In 12, the prosecutor’s license to practice law was suspended. In 2, the prosecutor was disbarred. In 1, a period of probation was imposed in lieu of a harsher punishment. In 24, the prosecutor was assessed the costs of the disciplinary proceedings. In 3, the court remanded the case for further proceedings.

This does not mean that disciplinary actions *never* occur, nor does it imply that professional disciplinary tools are always toothless when actually employed. See Zacharias, supra note 105, at 745 (finding “at least that, in appropriate cases, courts and disciplinary organizations sometimes have been willing to address prosecutorial misconduct” and that instances of suppression of
typically decrease the likelihood that a disciplinary body will levy sanctions against a misbehaving prosecutor.

One preliminary obstacle is "actually getting the prosecutor before the disciplinary body for a review of his or her actions." 109 Disciplinary complaints typically are initiated by individuals, and because prosecutors, unlike private attorneys, do not have individual clients, lodging a complaint falls to the defense attorney or the defendant, who often are more focused on the underlying case than on reporting the prosecutor. 110 In addition, defense attorneys frequently must work again with the same prosecutors, and consequently are reluctant to file a complaint against a prosecutor. 111 Moreover, even when complaints are filed, disciplinary bodies fail to impose strong punishments on prosecutors. 112

Further compounding the problem, federal prosecutors often refuse to comply with state disciplinary guidelines. 113 In 1989, the infamous "Thornburgh Memo" announced that federal prosecutors would follow internal DOJ guidelines rather than the ethical rules of the state in which they pursue a case. 114 While the Citizens Protection Act of 1998 officially overturned this practice, federal prosecutors remain unwilling to follow state ethical guidelines, and the Act merely returned prosecutors to their previous state of reluctance, which is unproductive in deterring or punishing wrongdoing. 115

There also are hidden factors that make embarrassing professional sanctions even less likely, such as entrenched personal and political allegiances to prosecutors. Furthermore, because bar associations operate "under the rubric of the courts," some commentators note a separation-of-powers concern with the judiciary branch potentially trammeling upon the workings of the executive branch. 116 "[P]rosecutors have directly [and successfully] raised the

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109. Rosen, supra note 93, at 733.
110. Id. at 733–34.
111. Id. at 735.
112. Id. at 733.
113. DAVIS, supra note 17, at 129.
114. Id.
115. Id.
116. Zacharias, supra note 105, at 761 (noting that "[t]o the extent discipline requires an investigation of the workings of a prosecutor's office, disciplinary agencies may consider it invasive of the authority of a coordinate branch of government").
claim that the application of particular professional rules to them violates the principle of separation of powers.”

While the preceding concerns cast significant doubt on the efficacy of professional disciplinary sanctions in curbing Brady violations, this is not to say that such sanctions should be abandoned altogether. Disciplinary rules still may be effective “not so much because prosecutors are regularly disciplined, but because there often are no legal means other than professional discipline by which to enforce prosecutors’ compliance with ethical obligations.” More pressure must be brought to bear on bar associations to cease tolerating misconduct. The efficacy of disciplinary rules will increase in the future if and only if awareness of these kinds of violations is heightened.

B. Judicial Solutions

Judicial solutions provide another method of combating prosecutorial misconduct that, like disciplinary sanctions, is theoretically strong. As discussed above, Rule 16 and its state analogs permit courts (1) to order a party to permit the discovery or inspection; to specify its time, place, and manner; and to prescribe other just terms and conditions; (2) to grant a continuance; (3) to prohibit that party from introducing the undisclosed evidence; or (4) to enter any other order that is just under the circumstances. For example, if a trial court feels as though prosecutorial misconduct has prejudiced the defense, it may order the suppression of certain evidence. However, “[t]rial courts which [sic] suppress evidence acquired through unethical conduct often face reversal at the appellate level due to the harmless error analysis.” Suppression is not particularly helpful in the Brady context, as prosecutors are unlikely to seek to introduce evidence favorable to the defendant anyway. Suppression often faces a similar criticism to remedies for Brady violations because it fails to personally affect or punish an individual prosecutor.

117. Id.; see also Dennis, supra note 99, at 143–44 (noting that some prosecutors have even won outright on their challenges to disciplinary sanctions by employing this argument).

118. Bruce A. Green, Prosecutorial Ethics as Usual, 2003 U. ILL. L. REV. 1573, 1584–85 (2003); see also Dennis, supra note 99, at 142 (acknowledging that, while the practical impact of disciplinary sanctions is minimal because they are so infrequently used, many commentators believe these rules to be the only effective method of discipline).


120. Lyn M. Morton, Seeking The Elusive Remedy For Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?, 7 GEO. J. LEGAL ETHICS 1083, 1102 (1994).

121. Id. at 1103.
Other potential judicial remedies are: instructing the jury simply to assume certain facts that the undisclosed information could have proven, holding the nondisclosing party in contempt, declaring a mistrial, or even dismissing the case.\textsuperscript{122} Holding the offending party in contempt is a promising remedy, but "reluctance to use contempt as a mechanism to combat prosecutorial misconduct is somewhat curious," because courts could effectively tailor their contempt power to sanction a prosecutor's specific conduct.\textsuperscript{123} This tailoring ability is helpful given the variance in contexts and levels of culpability in which violations occur. For instance, in the federal system, section 401 of the United States Code provides that a court may punish offenders by fine or imprisonment (or both) at its discretion.\textsuperscript{124} Most federal courts require a finding of wrongful intent in addition to the statutory conditions to support a conviction for contempt, though some jurisdictions apply a more lenient standard.\textsuperscript{125} Further, the Federal Rules of Criminal Procedure enable a federal court to punish "summarily a prosecutor whose conduct constitutes contempt when the judge certifies that the contumacious conduct was committed in the judge's presence."\textsuperscript{126} In theory, this allows courts to avoid "the full panoply of procedural protections" that have to be given in other contempt actions.\textsuperscript{127}

The strongest judicial remedy available for a \textit{Brady} violation may be appellate reversal of a defendant's conviction or sentence. While reversal fails to punish an offending prosecutor directly, it provides the strongest possible relief to a wronged defendant. It also

\begin{itemize}
  \item 122. 4 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 20.6(a) (3d ed. 2008); see also Elizabeth Napier Dewar, \textit{A Fair Trial Remedy for Brady Violations}, 115 YALE L.J. 1450, 1450 (2006) (advocating "instructing the jury on the duty to disclose and allowing the defendant to argue that the failure to disclose raises a reasonable doubt about the defendant's guilt" as a remedy for \textit{Brady} violations).
  \item 125. \textit{E.g.}, \textit{In re} Farquhar, 492 F.2d 561, 564, (D.C. Cir. 1973) ("By definition, contempt is a 'wilful disregard or disobedience of a public authority.' The requisite intent may be inferred if a lawyer's conduct discloses a reckless disregard for his professional duty." (quoting Sykes v. United States, 444 F.2d 928, 930 (1971))); United States v. Seale, 461 F.2d 345, 367 (7th Cir. 1972) ("[W]hile numerous courts, including this Court, have apparently required a specific finding of wrongful intent, . . . the Government has vigorously argued that the lesser requirement enunciated in \textit{Offutt v. United States} be applied." (citations omitted)).
  \item 126. Meares, supra note 123, at 895; see also FED. R. CRIM. P. 42(b) ("[T]he court (other than a magistrate judge) may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contumacious conduct and so certifies.").
  \item 127. Meares, supra note 123, at 895.
\end{itemize}
reflects poorly on the prosecutor and forces her to re-prosecute or drop the charges altogether.

In a study of capital cases from 1973 to 1985, one of the most common reasons for reversal was prosecutorial suppression of evidence. In a study of capital cases from 1973 to 1985, one of the most common reasons for reversal was prosecutorial suppression of evidence. Criminal defendants typically must demonstrate a violation of constitutional due process on appeal, which in turn requires a showing that, in light of all of the evidence in the case, the presence or absence of the withheld evidence would affect the outcome of the case. Prosecutorial misconduct alone is not enough; a likelihood of affecting the outcome must be demonstrated. Harmless-error review does not apply because the defendant must meet the threshold of materiality, and "materiality is not simply harmless error by another name." Rather a prosecutor's actions, a priori, necessarily are judged on how guilty a defendant appears, even after the undisclosed evidence is included. Thus "the guiltier a defendant seems before trial, the less disclosure he is legally owed," a fact that should trouble many.

Courts also are forced to consider which individuals really suffer when judicial remedies are employed. If a defendant is factually guilty but his conviction is overturned because of a prosecutor's gaffe, society at large, not merely the individual prosecutor, suffers.


129. Dunahoe, supra note 128, at 90.


132. Id.

133. See Dennis, supra note 99, at 141:

[A]lthough courts may lament improper actions by prosecutors that fall short of constitutional violations, their failure to punish prosecutorial misconduct recalls, as one judge said, "the bitter tear shed by the Walrus as he ate the oysters..." [If courts accounted for the full range of prosecutorial misconduct by suppressing evidence, dismissing charges, or overturning convictions accordingly, society would suffer the consequences of a guilty
Logically, judges will not pursue a policy that allows many guilty individuals to go unpunished as it would eviscerate the societal benefit of the criminal justice system, a system judges protect. If punishing prosecutorial misconduct might allow guilty men to go unpunished, courts will remain reluctant in their use of these remedies. In the tug of war between judicial propriety and the vindication of society’s wishes, the prosecutor essentially can escape the system unscathed.

C. Civil Liability

In addition to the difficulties arising from the Supreme Court’s materiality standard, the unavailability of civil liability as a remedy after the Supreme Court’s 1976 decision in Imbler v. Pachtman is one of the largest obstacles to effective disclosure of exculpatory evidence. Many commentators have extolled the potential benefits of using civil liability to fight prosecutorial abuse. The most commonly employed means of finding a governmental employee personally liable, 42 U.S.C. section 1983 (“section 1983”) provides that any person who, under color of law, subjects a citizen of the United States to the deprivation of any constitutional rights shall be civilly liable to the party injured. Accordingly, section 1983 could be a person going free while the prosecutor effectively would receive no “more than a personal slap on the wrist.”

134. See id. (“Neither judges nor the public are willing to accept such a high price to address what both regard as collateral harm at best.”). Of course, even if a violation is found and reversal is granted, a defendant might be re-prosecuted and convicted anyway.


136. See DAVIS, supra note 17, at 130 (“[A]lthough [prosecutors] may not always intentionally set out to engage in misconduct, it leads one to question whether the Supreme Court has provided prosecutors with a comfort zone that fosters and perhaps even encourages a culture of wrongdoing.”). But see Meares, supra note 123, at 892–93:

It is not clear that civil damages would curb effectively the persistence of prosecutorial misconduct, even if such damage actions were available. The poor are disproportionately represented among criminal defendants, and generally speaking, there is no right to appointed counsel in civil cases. Unless these civil damage suits reap lucrative damage awards, it is unlikely that many attorneys would accept them on a contingency fee basis.


Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party
powerful tool in combating transgressions by civil servants in positions of authority.

In Imbler, the Court wrestled with the inherent tension in deciding where to draw the line in immunizing prosecutors. On one hand, absolute immunity may leave “the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty.” On the other hand, offering prosecutors only qualified immunity may subject prosecutors to time-consuming and costly defenses of frivolous claims, encouraging prosecutors to be overly tentative in pursuing their cases during and after trial. Additionally, trying certain allegations under section 1983 “would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury.” The Court in Imbler concluded that the “trust of the prosecutor’s office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages,” and it granted prosecutors absolute immunity for their acts in initiating and pursuing the government’s case.

According to the Imbler Court, civil liability as a remedy is unnecessary because the two most effective means of combating prosecutorial conduct remain available: disciplinary sanctions and criminal prosecution. The availability of these checks “undermine[s] the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.” As previously discussed, disciplinary sanctions are underused and ineffective. Criminal liability, however, seems more promising, as the “Court has never suggested that the policy considerations which [sic] compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law.” Thus, this Note argues that criminal sanctions, in

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138. 424 U.S. at 427.
139. Id.
140. Id. at 425.
141. Id. at 424–25.
142. Id. at 429.
143. Id.
addition to a more extensive use of “open-file” policies, offer the best prospects for curtailing Brady violations.

D. Internal Supervision

The best method of reducing prosecutorial misconduct like Brady violations may be prevention, and one mechanism of prevention is internal supervision. Internal controls in the form of training, guidelines, and manuals can be effective because “[p]rosecutors tend to adhere to these regulations, not only because they provide needed guidance in resolving ethical dilemmas, but because violations may serve as a basis for internal discipline or poor performance evaluations.” Such consequences may have a greater and more immediate bearing on prosecutors than other remedies.

For instance, in response to the above-mentioned push to amend Rule 16, the DOJ simultaneously reworked the parts of the U.S. Attorneys’ Manual dealing with the government’s disclosure obligations in order to support its contention that amending the Rules is unnecessary. The December 2006 version of the manual offers a “department policy” that goes beyond the mandates of constitutionality, acknowledging that “a fair trial will often include examination of relevant exculpatory or impeachment information that . . . may not, on its own, result in an acquittal.” The policy requires “disclosure by prosecutors of information beyond that which is “material” to guilt as articulated in Kyles v. Whitley and Strickler v. Greene.” Whether the revised manual will reduce Brady violations or provide prosecutors much guidance is unclear, and it would be difficult to measure empirically. The Rules Committee, however, regarded the revisions as a step in the right direction.

144. Zacharias, supra note 105, at 762.
145. Id. at 762–63.
146. See HOOPER & THORPE, supra note 65, at 6: DOJ has continually opposed any proposed amendment to Rule 16, believing it to be unnecessary and expressing inter alia concern about pretrial disclosure of the identity of prosecution witnesses. Notwithstanding that position, DOJ has worked with the committee in drafting language for a proposed amendment while simultaneously undertaking efforts to revise the U.S. Attorneys’ Manual (Manual) regarding the government’s disclosure obligations that might serve as an alternative to an amendment to Rule 16.
148. Id. (emphasis added).
149. See HOOPER & THORPE, supra note 65, at 7 (“Committee minutes revealed that some committee members believed the revised language to the Manual was a substantial
IV. SOLUTION

The Supreme Court's complex standard of materiality coupled with other obstacles hampers the effective use of traditional remedies for disclosure violations on both the state and federal levels. This Note suggests two additional methods of curtailing *Brady* violations. First, state and federal prosecutors should move to a so-called "open-file" policy of discovery in criminal proceedings. Second, criminal sanctions like those available in U.S. Code chapter 18 section 242 should be employed in cases of particularly egregious behavior.

A. Open-File Policies

Justice Marshall, in his *Bagley* dissent, advocated a more inclusive standard of disclosure than the materiality standard because "disclosure of all evidence that might reasonably be considered favorable to the defendant would have the precautionary effect of assuring that no information of potential consequence is mistakenly overlooked." As Justice Marshall noted, "[t]he prosecutor surely greets the moment at which he must turn over *Brady* material with little enthusiasm." An open-file discovery policy would best accommodate this inclusive rationale.

1. Policies and Practice

Perhaps the simplest way to combat the withholding of exculpatory evidence before trial is to further liberalize discovery rights. A number of state and federal prosecutors already employ so-called "open-file" policies, allowing defendants and their attorneys to examine all evidence to be used against them before trial. The benefits of such policies are apparent: the opportunity for a prosecutor to keep a key piece of evidence from the opposition disappears if an open-file policy is maintained properly. However, the potential for prosecutors to act in bad faith is one of many potential criticisms of open-file policies.

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150. 473 U.S. at 698 (Marshall, J., dissenting) (emphasis added).
151. *Id.*
152. For an in-depth look at discovery and open-file discovery in the Duke Lacrosse Case, for instance, see Mosteller, *supra* note 15, at 257 (discussing the need for full prosecutorial disclosure of all evidence).
Such a solution has the potential to create a normative shift before prosecutors even consider hiding evidence. If an individual office establishes a longstanding and consistent practice of disclosing all evidence to a defendant, the incidences of both bad-faith and inadvertent disclosure violations likely would decrease. Moreover, establishing this practice as a norm for an office ideally would foster a sense of office-wide responsibility for meeting disclosure obligations, thereby reducing the individual incentives to violate these obligations.

Additionally, this recommendation is premised on the fact that most prosecutors do not intentionally act in bad faith but rather are pressured into misconduct by superiors, the electorate, or the victims and their families. A systematic and well-established policy of simply putting all the cards on the table might actually be refreshing for prosecutors, freeing them from the challenge of guessing the impact that a piece of evidence might have at trial.

One benefit of open-file discovery is that the relative strength or weakness of a case will be readily apparent, which in turn will lead to more efficient plea bargaining. While some prosecutors may claim that liberalizing discovery will impede their ability to “bluff” their way into a more advantageous plea for the state,\textsuperscript{153} plea deals based on such deception are precisely the type of outcomes that due process seeks to prevent. Moreover, it is unclear whether pursuing higher sentences than would be attainable at trial through surreptitious plea deals is desirable.\textsuperscript{154} Greater disclosure also would alleviate some of the internal institutional pressure which frequently forces prosecutors to overcharge a defendant.\textsuperscript{155} Closer calls will still go to trial and depend on the parties' advocacy and a judge's or jury's fact finding. On the other hand, defense attorneys and prosecutors will save resources under an open-file policy, as defense attorneys can more persuasively

\textsuperscript{153.} See Eleanor J. Ostrow, Comment, The Case for Preplea Disclosure, 90 YALE L.J. 1581, 1584 (1981):
Confronted with a defendant who is uninformed about the evidence available or likely to be available for trial, a prosecutor may bluff or mislead the defendant about the strength of the government’s case. The prosecutor may thereby obtain a plea from, or a stiffer sentence for, the defendant than would otherwise be possible.

\textsuperscript{154.} See id. (same).

\textsuperscript{155.} See id. at 1586 ("Although prosecutors have little excuse for filing inadequately supported charges, they are under strong institutional pressures not to move for dismissal once charges have been filed.").
show their clients the strength of the prosecutor’s case instead of wasting resources on truly futile trials.  

These policies can be judicially enforced and do not rely completely on prosecutors because the government can be forced to adhere to an open-file policy once it is employed. Thus, a prosecutor who violates an open-file policy may be subject to sanctions by the trial court. The discretion of a court to employ these sanctions sounds in equity, as hiding pieces of evidence from a defendant under an open-file policy clearly prejudices a defendant who relies to her detriment on the policy.

Prosecutors may worry that open-file policies will result in over-exposure. Revealing too much during discovery could threaten the safety of witnesses, compromise the integrity of an investigatory process, or enable would-be perjurers to concoct alibis that match the prosecution’s evidence. Open-file discovery also could seriously undermine the adversarial role of the prosecutor. This problem can be solved by creating exceptions to the policy with a minimal threshold for showing cause before a court. That is, if a prosecutor decides to redact information that might expose a witness to danger, the court


Defendants don’t always want to believe a lawyer who tells them the state has a rock-solid case, they said. So if a lawyer can show the defendant a copy of the full police report, witness statements, and the sky-high lab results of his blood alcohol test, he or she is more likely to be convinced that a trial is a bad gamble. And that, they say, saves time and money for everyone. “I’ve had clients tell me they don’t believe what they’ve got in the file,” [a defense attorney] said. “The more information I have, the easier it is for me. I’m not on a suicide mission here.”

157. United States v. Atisha, 804 F.2d 920, 924 (6th Cir. 1986) (“If the government agrees to maintain an ‘open file’ policy, thereby disclosing its evidence and theories to the defendant, however, the government is obligated to adhere to that agreement.”).

158. Id.

159. See id.: An open file agreement is essentially an informal discovery agreement; as with other discovery orders, it is generally within the district court’s discretion to award sanctions when there has been a violation. Therefore, even if the government violated its open file policy, it would still be within the district court’s discretion to determine what the appropriate sanction — such as excluding the evidence or awarding a continuance or mistrial — should be.

can demand a showing of cause but give a great deal of latitude in doing so. Additionally, a file can display all of the prosecution’s evidence without divulging the prosecutor’s work product.

Currently, discovery policies are broadening in a number of ways, ranging from pretrial mandatory disclosure of lists of witnesses and their prior statements to open-file policies.\textsuperscript{161} For instance, two U.S. attorneys in the Southern District of Texas praise the open-file policy in their office for permitting “the defense to review materials even beyond that required by Federal Rule of Criminal Procedure 16” which “frequently impels defendants to opt for a guilty plea rather than trial.”\textsuperscript{162} While a number of state jurisdictions and even some U.S. attorneys’ offices currently use open-file policies or are debating their implementation, this use still is not widespread enough to maximize the benefits that open-file policies present or to guard against the potential for differing outcomes based solely on the fact that a defendant was arrested in one jurisdiction and not another.\textsuperscript{163}

In a comprehensive analysis of discovery in the Duke Lacrosse case, Professor Robert Mosteller lauds the “critical importance of full open-file discovery as an aid to justice.”\textsuperscript{164} As Professor Mosteller notes, political pressure after the infamous Gell death penalty prosecution in North Carolina resulted in an expansion of criminal discovery in the state.\textsuperscript{165} Liberalized discovery, coupled with intense media scrutiny, brought the calamity of the Duke Lacrosse


\textsuperscript{163} For example, Texas has a fairly widespread use of open-file policies. Warren Diepraam, \textit{Prosecutorial Misconduct: It Is Not the Prosecutor’s Way}, 47 \textit{S. TEX. L. REV.} 773, 780 (2006); see also Brandon L. Garrett, \textit{Innocence, Harmless Error, and Federal Wrongful Conviction Law}, 2005 \textit{WIS. L. REV.} 35, 75 n.194 (2005) (“For example, in response to a high profile exoneration where exculpatory witnesses’ statements were suppressed, North Carolina Attorney General Roy Cooper has called for statewide adoption of open file policies.”); Sarokin & Zuckermann, \textit{supra} note 74, at 1107 (noting that many federal prosecutors “choose to open their files to opposing counsel” and that some are “[c]ognizant that the practice promotes greater efficiency and is in many cases likely to convince the defendant to enter a guilty plea rather than undergo the rigors of trial when the case against him is strong”); Andrea Weigl, \textit{Lawyers Debate Openness}, \textit{NEWS & OBSERVER} (Raleigh, N.C.), Mar. 15, 2004, at B1 (reporting that North Carolina Attorney General Roy Cooper has proposed that prosecutors open their files).

\textsuperscript{164} Mosteller, \textit{supra} note 15, at 307.

\textsuperscript{165} See id. at 260 (“Gell’s acquittal . . . produced the passage of a . . . full open-file discovery law broadly applicable in the trial of all felony cases.”); see also Anne Blythe & Joseph Neff, \textit{Nifong, Bar Will Both Be Judged}, \textit{NEWS & OBSERVER} (Raleigh, N.C.), Dec. 12, 2007, at A1 (referring to “withering criticism [of the State Bar] for its tepid prosecution” of the Gell prosecutors as contributing to the “pressure . . . to get it right this time,” and stating that case had prompted the rule change).
prosecution to light, and "after full disclosure... District Attorney Nifong was, in short order, off the prosecution." Indeed, the "largest and most important message of [the Duke Lacrosse case and other similar cases] is that full disclosure solves, or at least helps solve, Brady issues," a message that neither prosecutors nor legislators should take lightly.167

2. Legislative Action

Implementing open-file policies on a statewide basis through legislation would send a strong message and provide much-needed consistency among jurisdictions. In its second edition, the ABA Standards for Criminal Justice ("the Standards") recommended what essentially amounts to an open-file discovery policy, mandating disclosure of "all the material and information within the prosecutor's possession or control." Only one state, North Carolina, adopted a provision loosely based on the second edition's proposal. In its third edition, the Standards moved to a categorical classification of disclosure, but sought to keep in line with the spirit of the "open-file discovery adopted in the second edition of the Standards." While the ABA and other similar organizations have recognized the benefits of open-file discovery, legislative movement towards such liberalized discovery has not followed, and opposition to such legislation remains strong.

In New York, for example, a state assemblyman has repeatedly introduced a bill that would liberalize criminal discovery and has encountered much opposition. A number of district attorneys in the state have criticized the bill, citing witness safety as the principal reason for their objections. Even though the bill reportedly addresses this concern, allowing prosecutors to request protective orders regulating discovery for "good cause," the bill continues to "languish" in committee, and may never pass. As this situation illustrates, even in the face of what appears to be a well-reasoned

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166. Id. at 307.
167. Id. at 308.
168. ABA STANDARDS FOR CRIMINAL JUSTICE 11-2.1 (2d ed. 1980); LAFAVE ET AL., supra note 76, § 20.1(c).
169. LAFAVE ET AL., supra note 76, § 20.1(c) (citing N.C. GEN. STAT. ANN. § 15A-903(a)(1)).
170. ABA STANDARDS FOR CRIMINAL JUSTICE 11-2.1; LAFAVE ET AL., supra note 76, § 20.1(c).
172. Id.
173. Id.
proposal that accommodates prosecutors' concerns about over-liberalizing discovery, many prosecutors seemingly will always object to a relinquishment of their control over evidence. Legislating open-file policies across the board, instead of relying on local jurisdictions to do so individually, cuts down on the potential for discrepancies in fundamental rights from district to district. Legislation is also symbolic: it uses the full force of an elected legislature to emphasize how important an entire state considers the discovery rights of criminal defendants to be.

3. Potential Pitfalls

Open-file policies are by no means a cure-all for Brady violations. The largest potential obstacle to an effective open-file policy is that its success depends upon prosecutorial compliance. A prosecutor's office can purport to maintain a transparent file system while hiding exculpatory evidence that may never come to light.174 Moreover, if prosecutors' mixed or plainly malevolent motives underlie Brady violations, a system seemingly predicated on the good-faith compliance of prosecutors may not aid the situation.

Two cases in particular demonstrate problems with open-file policies. First, as one scholar notes, "Strickler v. Greene provides a cautionary lesson on the dangers of reliance on a prosecutor's open-file policy."175 The prosecutor in Strickler employed an open-file policy but failed to include impeachment information from a police report that the defense could have used at trial.176 The defense relied on the open-file policy and failed to discover this evidence.177 Similarly, in Banks v. Dretke, a defense attorney relied on a prosecutor's open-file guarantees and failed to discover that a key witness was an informant and had questionable motives underlying his testimony.178

174. J. Thomas Sullivan, Ethical and Effective Representation in Arkansas Capital Trials, 60 ARK. L. REV. 1, 36–37 (2007): Reliance on an "open file" policy poses two potential problems for trial counsel. First, while it may prove convenient for defense counsel and permit pretrial investigation to proceed without conflict, it presupposes the good faith of the prosecutor's office... Second, regardless of the prosecutor's good faith in making disclosure through the "open file," the defendant's access to exculpatory material may be frustrated by the failure of members of the prosecution team—including investigators—to disclose evidence favorable to the accused to the prosecutor for inclusion in the "open file."


176. Strickler, 527 U.S. at 273–76.

177. Id. at 276.

**Strickler**, however, the defendant in *Dretke* successfully avoided procedurally defaulting on his appellate claim, but the potential danger of reliance on open-file policies remains just as clear.  

As these cases demonstrate, vigilance is necessary in criminal discovery even if an open-file policy is used in a given district. Nonetheless, the potential drawbacks of an open-file policy do not outweigh its benefits. Open files encourage a transparent process and alleviate the burden of making close calls for prosecutors. However, rogue prosecutors still may intentionally leave beneficial evidence out of the open discovery files. A more severe remedy is needed, therefore, for prosecutors who act in bad faith.

**B. Criminal Sanctions**

Criminal sanctions are often overlooked when it comes to fighting prosecutorial misconduct, and perhaps for good reason. The notion of prosecuting prosecutors for crimes stemming from their acts in their official capacity should certainly give one pause but should not remove the remedy from the arsenal altogether. An examination of current scholarly material reveals a widespread belief that prosecutorial misconduct continues to occur at an alarmingly high rate and that remedies currently employed to combat such misconduct have failed. Thus, it may not be a truism to declare that such an extreme situation calls for an extreme remedy.

1. 18 U.S.C. Section 242

Regarded as the criminal analogue to 42 U.S.C. section 1983, 18 U.S.C. section 242 ("section 242") provides a means by which agents of the government can be held criminally responsible for their misdeeds under color of their official position. Section 242 provides that any person who, under color of law, subjects a citizen of the United States to the deprivation of any constitutional rights shall be subject to fine, imprisonment of not more than one year, or both.  

Despite the *Imbler* Court's endorsement of section 242, scholars have largely ignored or dismissed the possibility of using the statute to combat *Brady* violations. This neglect is partially attributable to

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179. *Id.* at 704-05.
182. See Dunaho, *supra* note 128, at 83 (noting that this "sanction has received the least attention by both courts and scholars"); see also Weeks, *supra* note 91, at 878-79 (noting the
the historical rarity of using section 242 against prosecutors\textsuperscript{183} and the obstacles presented by suggesting prosecution under section 242.

\textit{a. The Elements}

To prove an offense under section 242: (1) the prosecutor's acts must have deprived someone of a right secured or protected by the Constitution or laws of the United States; (2) the prosecutor's illegal acts must have been committed under color of law; (3) the person deprived of his rights must have been an inhabitant of a state, territory, or district; and (4) the prosecutor must have acted willfully.\textsuperscript{184}

The most troublesome element is the fourth, which necessitates a \textit{willful} civil rights violation.\textsuperscript{185} This burden is difficult to meet because "the state must prove not only that the prosecutor violated the defendant's rights, but that the prosecutor did so knowing that his or her actions would deprive the defendant of these rights."\textsuperscript{186} Prosecuting a \textit{Brady} violation could be particularly difficult because the government would have to prove beyond a reasonable doubt not only that a prosecutor suppressed \textit{Brady} material—evidence that meets the \textit{Brady} standard of materiality—but that the prosecutor willfully suppressed the evidence to deprive the defendant of his constitutional rights.

According to the Supreme Court, once a due process right has been recognized and defined by court decisions, that right is encompassed by section 242.\textsuperscript{187} Thus, "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law within the meaning of section 242."\textsuperscript{188} It is important to note

\begin{itemize}
\item \textsuperscript{183} See Weeks, supra note 91, at 878–79 (noting that "not one of the many specific judicial findings of a deliberate refusal by a prosecutor to disclose \textit{Brady} material that have been summarized in this article has even resulted in a prosecution, far less a conviction, of the prosecutor").
\item \textsuperscript{185} See Apodaca v. United States, 188 F.2d 932, 938 (10th Cir. 1951) ("[I]ntent and willfulness are essential elements of the offense delineated in section 242." (citing Screws v. United States, 325 U.S. 91 (1945))).
\item \textsuperscript{186} Dunaho, supra note 128, at 84.
\item \textsuperscript{187} United States v. Stokes, 506 F.2d 771, 774–75 (5th Cir. 1975) (citing Screws, 325 U.S. at 104).
\item \textsuperscript{188} United States v. McDermott, 918 F.2d 319, 325 (2nd Cir. 1990) (quoting Williams v. United States, 341 U.S. 97, 99 (1951) (internal quotations omitted)).
\end{itemize}
that proving the prosecutor possessed the specific intent to violate a constitutional right is not essential to conviction; it is enough to prove that the prosecutor’s “aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution.”

Under section 242, an act is willful if it is carried out “voluntarily and intentionally and with specific intent to do something [the] law forbids; that is, with intent to violate a specific protected right.” Section 242 is fundamentally “designed to prevent violations of all fourteenth amendment rights,” but it must actually be implemented against misbehaving prosecutors to secure any preventative benefit.

b. Initiating Prosecution

Because section 242 is a criminal statute, a prosecutor must initiate a prosecution, meaning that prosecutors must initiate these actions against their own. Thus, if “[p]rosecutors simply will not prosecute other prosecutors,” any notion of employing section 242 more frequently may be futile. Such a contention should not be fatal, however, as any solution offered places faith in certain actors to uphold and enforce the law. Further, with every disclosure violation that becomes publicly scrutinized (such as the Duke case), pressure on prosecutors to guard the integrity of their offices increases, and the appeal of a remedy like section 242 becomes more apparent.

189. United States v. McClean, 528 F.2d 1250, 1255 (2d Cir. 1976):
Proof of a specific intent on the part of the police officers to deprive persons of federal rights, rather than to engage in conduct having the effect of such deprivation, was unnecessary. The fact that they “may not have been thinking in constitutional terms is not material where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution.”

(quot ing Screws, 325 U.S. at 104); United States v. O'Dell, 462 F.2d 224, 232 n.10 (6th Cir. 1972).

190. United States v. Reese, 2 F.3d 870, 885 (9th Cir. 1993).
[Plaintiff's] intention . . . to institute personally a criminal proceeding against the State and the individual defendants . . . cannot be done. Any such complaint should have been sent to the United States Attorney, and in a proper case the Court might refer the papers to him, but that would be futile in this case.

In Dixon, a prisoner attempted to initiate a criminal proceeding against a number of state officials, including the State's Attorney for Baltimore. Id. While more anecdotal than instructive, the case at least informs us that criminal liability under section 242 is not an altogether new idea.

193. Weeks, supra note 91, at 879.
As the *Imbler* Court noted, one of the chief rationales underlying prosecutors' immunity from civil liability is that anyone can initiate a civil proceeding; thus, a large amount of frivolous and burdensome litigation theoretically would weigh prosecutors' offices down. Criminal prosecutions do not present the same problem because the government alone can initiate a proceeding under section 242, which is just one of its benefits as a remedy.

c. Section 242 and Materiality

In order to use section 242, the government must prove beyond a reasonable doubt not only that a prosecutor suppressed *Brady* material—evidence that meets the *Brady* line of cases’ standard of materiality—but also that such a suppression was made willingly. However, “that [a prosecutor] may not have been thinking in constitutional terms is not material.”194 It is enough to show that a prosecutor acted “in reckless disregard of constitutional prohibitions or guarantees.”195 Still, this burden is a substantial impediment to increasing the use of section 242. Luckily, this burden is not insurmountable.

Because a paramount concern in the criminal prosecution of a prosecutor is the possibility of punishing a prosecutor for a mere "technical" blunder, a high standard requiring willfulness is actually desirable to weed out accidental violations. This standard would ensure that prosecutions under section 242 would be reserved only for the most egregious breaches of prosecutorial duty, including willful suppressions of *Brady* material. Additionally, requiring a showing of the offending prosecutor's recklessness toward the deprivation of a defendant's constitutional rights is hardly fatal. Prosecutors are well aware of *Brady* and the constitutional liberties it protects. Accordingly, a prosecutor cannot claim, *post hoc*, that he was unaware that the defendant would be deprived of his due process rights by knowingly suppressing favorable evidence warranting *Brady* protection. In other words, proving an intentional suppression of evidence necessarily means that a prosecutor intentionally deprived a defendant of his constitutional rights.

One of the few cases on record in which a prosecutor was prosecuted for a *Brady* violation occurred twenty-five years ago in New York. In that case, Patrick J. Brophy was convicted in the District Court for the Western District of New York of "willfully

depriving an individual of rights secured to him by the United States Constitution in violation of [section 242].” Brophy contended that "his conviction resulted from an inadvertent violation of a prosecutor's duty under the mandates of Brady v. Maryland not to withhold evidence favorable to an accused." Thus, even if a strong showing of willfulness seems difficult, Brophy suggests that section 242 still may be employed.

d. Criminal Sanctions and Professional Discipline

A conviction under section 242 may, in some instances, lead to professional disciplinary sanctions including censure, suspension, or removal from office. If professional discipline is a theoretically effective means of combating prosecutorial misconduct but is hampered by the lethargy or unwillingness of disciplinary boards, section 242 can, in theory, act as a preliminary step. Once the fact-finding process is complete, associations or courts need only evaluate what professional punishment is warranted.

2. Federal Oversight of State Prosecutors

An additional benefit of section 242 is that it provides an avenue to bring charges against a state official in federal court. If particularly egregious examples of Brady violations surface, the DOJ can step in and pursue criminal actions against misbehaving, local district attorneys. As the vast majority of criminal cases in this country are handled at the state level, the locus of most prosecutorial abuse is likewise at the state level. If political entrenchment, cronyism, and a lack of political capital paralyze most localities from policing their own prosecutors, then oversight by the federal government may be warranted.

There are many well-reasoned challenges to this idea. First and foremost, given the exigencies of the current political climate, prosecuting state prosecutors is likely to take a backseat for the foreseeable future on the DOJ's agenda. Moreover, persuading federal authorities that there is a sufficient federal interest in bringing charges against local prosecutors with an already thinly stretched

197. Id. (internal citation omitted).
198. Id.
budget is unlikely. Even if actions against misbehaving prosecutors are not the focal point of the next administration's policy for the DOJ, the beauty of a criminal action is in its *in terrorem* effect, offering a great deal of potential deterrence "cheaply."

Few, if any, "defense attorneys have the time, resources, or expertise to conduct massive investigations of prosecution officials" on the state level, so many are left to wonder: who else can? Again, even while acknowledging budgetary constraints, it would seem that federal authorities are much more capable of shouldering this burden than individual defense attorneys because of the infrastructure and resources they already have in place to conduct such an investigation.

C. Tighter In-House Regulation and Media Transparency

Tighter in-house regulation coupled with closer media scrutiny is the final (and least formal) tool advocated by this Note. Because the best method for reducing prosecutorial misconduct is prevention, methods of in-house regulation (such as those provided by the *U.S. Attorneys' Manual*) are effective and provide a stable foundation of conduct on which prosecutors can base their trial strategies. Further, there is perhaps no greater leverage available than the threat of a poor performance review or a pass-over for advancement because of misconduct.

Further, if internal controls are insufficient to rein in disclosure violations, the news media is always just around the corner. In the Duke case, for instance, it was the media that initially emboldened Mike Nifong and all but convicted the student defendants before they set foot in the courtroom. Once Nifong's misconduct came to light, persistent media coverage spurred a quick response

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200. *Transactional Records Access Clearinghouse* (TRAC), *Under Color of Law* (2004), http://trac.syr.edu/tracreports/civright/107/ (noting that section 242 claims (against any official, not just prosecutors) frequently top declination rates for federal offenses). For example, during the first quarter of 2004, of 230 criminal proceeding against individuals in which 242 was the principal charge, 227 of these resulted in the DOJ declining to file formal charges, although the three which did proceed each resulted in conviction. *Id.* In sixty-nine percent of these, prosecutors said they rejected these charges for one of four reasons: "lack of evidence of criminal intent, minimal federal interest, no federal offense evident, or weak or insufficient admissible evidence." *Id.* (emphasis added).

201. By "*in terrorem*" I mean to deter or frighten into compliance beforehand.


203. *Id.*

from the North Carolina Attorney General’s Office. The media also provided an accessible avenue of vindication and redress for the accused. Would the attorney general have moved so quickly if Nifong’s transgressions had not been plastered on the Raleigh News and Observer’s front page each morning?

Prosecutors’ offices should use the power of the media to their advantage. Publicity, even of the negative sort, can be used to foster a sense of trust in prosecutors and to dissuade any misbehaving actors within their own offices. Prosecutors are faced with a cruel dilemma after an office discovers a disclosure violation: announce the violation or keep quiet and hope the violation never becomes public, which may carry a fate Nifong knows too well. While neither is ideal for most offices, the former at least allows the office the first crack at how the error is revealed to the public and offers the office a means to nurture a sense of trust in the public by voluntarily owning up to its mistakes.

V. CONCLUSION

The Supreme Court’s promise of fair process in Brady remains largely unfulfilled. While the vast majority of prosecutors at both the state and federal levels perform their jobs in an ethical manner under a great deal of pressure, the occasional prosecutor acting in bad faith can affect a great deal of harm. For a variety of reasons, traditional solutions such as professional disciplinary actions, judicial remedies, and procedural rules simply are ineffective at curtailing disclosure violations.

The inexpensive and relatively noninvasive practice of open-file discovery policies can go a long way toward preventing these violations. Indeed, imagine if Michael Nifong were so accustomed to handing over DNA results as a matter of course that he knew he would have to abandon the case the moment he received the test results. What if Richard Convertino had been required to simply hand over everything in his possession, preventing him from even mistakenly withholding the photographs?

In addition, a harsh remedy like criminal prosecution under section 242 is needed for those ill-willed prosecutors who intentionally and maliciously withhold evidence, refusing to comply with any other preventative measure. If imagining that Nifong would have voluntarily handed over the DNA results even under a more liberal open-file scheme is difficult, subjecting him to a criminal action seems the most fitting recourse.

205. See, e.g., supra notes 13–15 and accompanying text.
No one "wins" when a prosecutor is prosecuted. Rather, success will be realized when those accused of crimes in this country are assured that all evidence, whether incriminating or exonerating, is heard by a jury of their peers without ever contemplating the need to criminally prosecute those sworn to uphold our laws.

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