BRADY MATERIALITY BEFORE TRIAL: THE SCOPE OF THE DUTY TO DISCLOSE AND THE RIGHT TO A TRIAL BY JURY

CHRISTOPHER DEAL*

Brady v. Maryland *requires prosecutors to disclose to criminal defendants all material, favorable evidence in the government's possession. Evidence is material if its disclosure would have created a reasonable probability of a different verdict. Though materiality may correctly guide appellate courts in deciding when to reverse convictions, the author contends that it is both impractical and unconstitutional to ask prosecutors to use materiality as the measure of their disclosure obligations before trial. It is impractical because it requires prosecutors convinced of the defendant's guilt to decide what combination of evidence, if disclosed, would create a reasonable probability of an acquittal at the end of a trial that has yet to begin. It is unconstitutional so long as due process means something other than that which produces the right outcome. This Note suggests that prosecutors should employ a balancing test based on the interaction of* Brady *disclosure rules and the defendant's right to a trial by jury to determine when favorable evidence must be disclosed. This balancing test provides prosecutors with a disclosure standard that is simple, constitutional, and compatible with courts' continued use of the materiality standard after trial.*

INTRODUCTION

On January 18, 1997, police found the frozen body of twelve-year-old Darryl Hall in a Washington, D.C. park.[1] Three days earlier, Darryl and his older brother had been walking home from school when a group of armed men accosted the two boys and chased them through the streets.[2] Although Darryl's brother managed to escape, the men—members of a rival gang—forced Darryl into a car they had parked in a nearby alley.[3] The men took Darryl to a ravine, where

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1 Cindy Loose & Robert E. Pierre, *Body of D.C. Boy Is Found; Youth Charged in Abduction*, WASH. POST, Jan. 19, 1997, at A1; Bill Miller, *D.C. Teen Guilty of Killing Boy; Died Amid Feud Between Two Gang Factions*, WASH. POST, Dec. 2, 1997, at C1.

2 Miller, *supra* note 1.

3 *See* Boyd v. United States, 908 A.2d 39, 55 (D.C. 2006) ("The government's evidence at trial established that Darryl Hall was seized on the *street*, and that he was then dragged behind a building to a car which was parked in the *alley*.") (second emphasis added); Loose & Pierre, *supra* note 1 (describing attack).

they shot him in the back of the head.[4] Darryl's mid-afternoon abduction and cold-blooded execution shook the city.[5]

This Note is not about Darryl or gang violence, but about one of the men accused of murdering Darryl—Dante Boyd. Boyd, then twenty-three years old, was the oldest of the men charged in the killings and the last to be apprehended.[6] Police told the press that Boyd had ordered Darryl's abduction and execution.[7] By the time of Boyd's trial in February 1998, two of his codefendants had pled guilty, while the third had confessed his involvement to the grand jury and was subsequently found guilty at trial.[8] The case against Boyd was significantly weaker.[9] Boyd presented an alibi defense and argued that three men, not four, had abducted and killed Darryl.[10] To support the latter claim, Boyd requested that the government disclose any witness statements indicating that only three men had abducted Darryl.[11] The government acknowledged that it had taken statements

4 Miller, *supra* note 1.

5 *See, e.g.*, Justin Gillis & Bill Miller, *In D.C.'s Simple City, Complex Rules of Life and Death; a Bloodstained Community Reels from Crews' Violence*, WASH. POST, Apr. 20, 1997, at A1 ("A simple fact about Darryl's slaying—12!—has galvanized the public and the police department into action in a way that death after death of older victims could not."); Marcia Slacum Greene, *Long-Troubled D.C. Neighborhood Hopes Peace Will Prosper; Cultivating a Truce Among Rival Youth, Community Witnesses an Extraordinary Return of the Ordinary*, WASH. POST, Apr. 21, 1997, at A1 ("Although there had been many shootings and other slayings in the neighborhood in recent years, none had been as confounding or emotionally wrenching as the Jan. 15 abduction of 12-year-old Darryl.").

6 Marcia Slacum Greene & Bill Miller, *Suspect Played Key Role in Slaying, Court Is Told*, WASH. POST, Mar. 18, 1997, at B3.

7 *See Four Indicted in Murder of SE Boy, 12*, WASH. TIMES, June 25, 1997, at C3 ("Authorities say Mr. Boyd ordered the killing.").

8 *See Boyd*, 908 A.2d at 42 (noting guilty pleas of two codefendants and summarizing third codefendant's statement to grand jury and government's use of statement in closing argument). The Public Defender Service for the District of Columbia, where I worked as an intern during the fall of 2002 and spring of 2003, filed an amicus brief in Boyd's case with the District of Columbia Court of Appeals in 2005, urging the adoption of a more defendant-friendly *Brady* regime. *Id.* at 49. I did not work on the brief, nor have I received any information about the case other than that reported in the Court of Appeals opinion.

9 *See id.* at 44–48 (discussing evidence and government's theory at Boyd's case). Indeed, the government argued at Watson's trial that Watson, one of Boyd's codefendants was driving the car used in the abduction. *Id.* at 43. Three months later, the same prosecutor before the same judge told a different jury that Boyd was the driver. *Id.* at 44–45. No significant new evidence had been discovered. *See id.* at 45 ("There were no significant new developments between the two trials."). Though the appellate court reprimanded the government for this conduct, it found no reversible error. The court held that the contradiction did not go to the heart of the government's case and that Boyd's trial counsel had access to the transcript in Watson's case. *Id.* at 51–54; *see also infra* note 49 (explaining that government does not violate *Brady* by not disclosing evidence defendant should have discovered).

10 *Id.* at 42–43.

11 *Id.* at 48.

from three such witnesses—Witnesses 1, 2, and 3[12]—but claimed that it had no obligation to disclose this evidence.[13]

This dispute about the government's duty to disclose such evidence was a dispute about the scope of *Brady v. Maryland*.[14] *Brady* and its progeny interpret the Due Process Clause of the Fifth and Fourteenth Amendments to require prosecutors to disclose to criminal defendants all material, favorable evidence in the government's possession. Favorable evidence is evidence that tends to negate the defendant's guilt or to impeach the credibility of the government's witnesses.[15] Evidence is material if its disclosure would have created a "reasonable probability" of a different verdict.[16]

In Boyd's case, the trial court held that under the *Brady* rule the statements of witnesses who saw only three men did not have to be turned over.[17] Refusing to review the statements herself, the judge adopted the government's argument: Evidence that some witnesses saw only three men did not necessarily mean that four men were not there.[18] As such, the judge decided that this evidence was not material under *Brady*.[19] Unable to develop this evidence and present it to the jury at trial, Boyd was found guilty of murder, kidnapping, and related charges.

On appeal in 2005, eight years after trial, the government revealed that two additional witnesses—Witnesses 4 and 5—saw only three men attack Darryl. As with the other statements, the government claimed that *Brady* did not require disclosure of this evidence to the defense.[20] Witnesses 1, 2, and 3 each told police that there were three or fewer men in the alley when Darryl was pushed into the car.[21] Witness 1's statement also contradicted the testimony of two other government witnesses—the government's witnesses saw two men struggling to push Darryl into the car, while Witness 1 saw only one man.[22] Witnesses 4 and 5 saw the men attack Darryl in the street, but

[12] Following the convention of the court in its opinion, I refer to the witnesses by number.

[13] *Boyd*, 908 A.2d at 48.

[14] 373 U.S. 83 (1963).

[15] *See* United States v. Sudikoff, 36 F. Supp. 2d 1196, 1199 (C.D. Cal. 1999) ("In the *Brady* context, 'favorable' evidence is evidence which relates to guilt or punishment, and which tends to help the defense by either bolstering the defense's case or impeaching prosecution witnesses." (internal citations omitted)).

[16] *See infra* Part I.

[17] *Boyd*, 908 A.2d at 48.

[18] *Id.* at 54–55.

[19] *Id.*

[20] *Id.* at 56.

[21] *Id.* at 54.

[22] *Id.* at 55–56.

could not see what happened in the alley.[23] The appeals court ordered the five statements disclosed and instructed the lower court to assess the materiality of the suppressed evidence[24] to decide whether *Brady* required that Boyd be given a new trial.[25] The lower court has yet to rule.[26]

Dante Boyd may or may not have abducted and murdered Darryl Hall. Boyd's guilt or innocence, however, should not determine the due process protections he deserves at trial. Yet current *Brady* doctrine relies on the prosecutor's assessment of the defendant's guilt to define the extent of the duty to disclose favorable evidence.[27]

A prosecutor need only disclose material evidence, and evidence is material only if it has a reasonable probability of altering the jury's verdict. Thus, materiality is an issue at two different times in a criminal prosecution. Before trial, prosecutors must determine what evidence is material to decide what they must disclose to the defense. After trial, when deciding whether or not to reverse the conviction, judges must determine what evidence would have been material. The same definition of materiality is supposed to govern decisionmaking at both stages. I argue that *Brady* is best enforced without recourse to the first use of materiality, which requires a pretrial assessment of guilt.

Brady materiality is, in some ways, analogous to harmless-error review. Following trial, appellate courts regularly grant or withhold remedies based on their view of an error's impact on the jury's verdict.[28] The idea behind harmless error is simple: Courts will not reverse a defendant's conviction unless the error might have mattered. Depending on the type of error, courts require differing levels of certitude that the error did not make a difference.[29] With *Brady* materiality, the suppression of favorable evidence does not entitle a

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[23] *Id.* at 56.

[24] For *Brady* purposes, evidence is "suppressed," regardless of whether the prosecutor knew of such evidence, as long as it is in the possession of the government and is not known by the defense. *See infra* note 49.

[25] *Boyd*, 908 A.2d at 63.

[26] Meanwhile, Boyd has been incarcerated for close to ten years in connection with Darryl Hall's murder. *Id.* at 62.

[27] More precisely, it requires them to guess the jury's likely assessment of the defendant's guilt.

[28] *See* Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1173–85 (1995) (surveying and critiquing harmless-error practice).

[29] *See* Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 U. KAN. L. REV. 309, 315–24 (2002) (comparing standards for harmlessness of constitutional and nonconstitutional errors).

defendant to a new trial unless its disclosure portends a reasonable probability of a different result.[30]

But *Brady* materiality is not simply harmless error by another name. Appellate courts do not just *enforce* the defendant's right to the disclosure of favorable evidence by reversing convictions; they claim that those reversals *define* the extent of the defendant's right to this evidence in the first place.[31] On this account, the government's pretrial nondisclosure violates *Brady* only if it would merit reversal on appeal. To the extent that prosecutors can guess what evidence will end up being material, *Brady* creates a set of disclosure rules that shift depending on the prosecutor's assessment of the defendant's guilt.[32] Thus, under *Brady*, the guiltier a defendant seems before trial, the less disclosure he is legally owed.[33]

This outcome-oriented pretrial guessing game is unfair, impractical, and—most importantly—unsatisfying as an interpretation of the constitutional guarantee of due process. Imagine if the Supreme Court claimed that the guiltier a defendant seemed, the less robust his right to cross-examine witnesses or the more permissible the use of coercive interrogation techniques.[34] After conviction, remedies can

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[30] Indeed, the Supreme Court has held that *Brady* materiality incorporates harmless-error analysis. *See* Kyles v. Whitley, 514 U.S. 419, 435 (1995) ("Once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review.").

[31] *See, e.g.*, United States v. Bagley, 473 U.S. 667, 700 (1985) (Marshall, J., dissenting) ("Although [materiality] looks like a post-trial standard of review, it is not. Instead, the Court relies on this review standard to define the contours of the defendant's constitutional right to certain material prior to trial." (citation omitted)).

[32] *See* Eugene Cerruti, *Through the Looking-Glass at the* Brady *Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process*, 94 KY. L.J. 211, 213–14 (2005) (noting that *Brady* is anomalous in this regard and, paraphrasing Lewis Carroll's White Queen, summing up current system as requiring that "the trial must come first, and the disclosure of exculpatory evidence must come only after a conviction, if at all").

[33] That is, the guiltier the prosecutor (or a reviewing judge) *thinks* the defendant will (or did) appear to the jury, the less disclosure defendant is owed.

[34] *See, e.g.*, Arizona v. Fulminante, 499 U.S. 279, 308–12 (1991) (approving use of harmless-error standard for improper admission of defendant's coerced statement to police); Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986) (employing harmless-error analysis of judge's improper limitation of scope of defendant's cross-examination of government witness). That the Court has applied harmless-error analysis in these cases does not give legal license to courts, prosecutors, or police to treat defendants differently depending on how certainly culpable they appear. As currently construed, *Brady* differs from the right to cross-examine witnesses or to be free from coerced confessions in that its protective scope is dependent on the likely impact of suppressed evidence on the eventual verdict. If there were no other way to sensibly evaluate the *Brady* right, the due process problem might be tolerable. However, Part III proposes an alternate approach that avoids this problem.

shift based on assessments of guilt; before conviction, procedural rights should not.[35]

These problems with current understandings of *Brady* have inspired a number of federal district courts to find that *Brady* materiality, like harmless error, should not be considered before trial. These courts have ordered prosecutors to disclose to the defense all favorable evidence without regard to materiality. Their remedy at once clashes with the Supreme Court's *Brady* jurisprudence and fulfills it. The Court has taught that only material evidence must be disclosed, and that the materiality standard should be the same before trial as it is afterwards;[36] yet the Court has also offered that prosecutors have a broad duty to disclose favorable evidence, the violation of which does not always require that the defendant's conviction be reversed.[37]

In the face of this ambiguity, I set forth what I regard as the fixed points of the Supreme Court's *Brady* jurisprudence. For ease of reference, I refer to these fixed points as the Court's *Brady* commitments. I identify four such commitments: (1) The duty to disclose arises out of the special role of the prosecutor to do justice, (2) due process does not require undermining the adversarial system by mandating discovery of all or most of the evidence in the prosecutor's file, (3) due process does not require the reversal of convictions for failure to disclose nonmaterial favorable evidence, and (4) prosecutors may exercise discretion in determining what evidence to disclose. The third commitment is by far the most important to the Court—nearly every *Brady* opinion repeats the refrain that only suppressions of material evidence require a new trial. As a corollary, the Court has held that before trial, due process requires prosecutors to disclose only material

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[35] *See* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 821–22 (2006) (arguing that procedural rights are poorly enforced by "unlawlike formulas such as 'fundamental fairness' and 'shocks the conscience'"); Michael T. Fisher, Note, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line*, 88 COLUM. L. REV. 1298, 1298 (1988) (arguing that "whether prosecutorial misconduct violates due process should not be determined by an outcome-determinative test"). *But cf.* Daryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 808 (2004) (arguing that scarce resources for indigent defense require lawyers to consciously prioritize their work for defendants with plausible claims of "factual innocence"). A number of the Court's due process decisions flirt with this problem. *See infra* note 77.

[36] *See infra* note 64.

[37] *See infra* note 82 and accompanying text; *cf.* Elizabeth Napier Dewar, Note, *A Fair Trial Remedy for* Brady *Violations*, 115 YALE L.J. 1450, 1467–68 (2006) (linking Court's characterization of prosecutor's "broad obligation" to disclose with district courts opinions' discussed in Part II.B).

evidence.[38] In other words, the corollary interprets due process to be denied only when the nondisclosure undermines confidence in the outcome. Yet this corollary cannot be correct so long as due process means something other than that which produces the right outcome. In this Note, I attempt to separate the corollary from the commitment.[39]

By holding that prosecutors must disclose all favorable evidence, the district courts have created a pretrial standard that is consistent with the procedural nature of due process. However, it is also a standard that the Supreme Court has considered and rejected.[40] This rejection is consistent with the Court's commitments to preserving the adversarial system and limiting the number of reversed convictions on *Brady* grounds.[41] As I view these commitments to be central to the Court's *Brady* jurisprudence, I suggest an alternate resolution.

Cast in procedural terms, the commitment that only material suppressions trigger the need for a new trial implicitly treats such suppressions as substantial deviations from a fair process. Though the Court has never explained the content or scope of the underlying process or duty, I propose that the Court's commitments combined with the right to a trial by jury can fill this gap. Petit juries have no inquisitorial powers; they must rely on the evidence the parties present to them. If the government suppresses evidence that it has but the defendant does not, the jury will never learn of the evidence. Thus, the process by which prosecutors seek out favorable evidence in the government's possession, and decide what evidence to disclose to the defense, bears heavily on the defendant's right to have a jury decide his guilt. While pretrial materiality analysis asks whether disclosure

[38] *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached."); United States v. Bagley, 473 U.S. 667, 678 (1985) ("[A] constitutional error occurs, and the conviction must be reversed, only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial."); United States v. Agurs, 427 U.S. 97, 108 (1976) ("But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial.").

[39] In other words, I believe that the Court should dismiss its seeming adoption of the corollary as ill-considered dicta at odds with the plain language of due process.

[40] *See Kyles*, 514 U.S. at 437 ("[*Brady*] requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate.").

[41] *See infra* Part I.B (discussing that preservation of adversarial system and limitation of reversals on *Brady* grounds are two core *Brady* commitments); *infra* notes 159–61 and accompanying text (noting that rejection of requirement that all favorable evidence be disclosed is inconsistent with core *Brady* commitments).

would change the outcome, I propose that courts and prosecutors evaluate the duty to disclose based on the impact of disclosure on the procedural integrity of the jury's deliberations. Where greater disclosure would, on balance, aid the jury's deliberations, prosecutors should disclose the favorable evidence. Throughout this Note, I refer to my approach as "jury-centric" to emphasize this focus on the interaction of *Brady* with the right to a trial by jury.

Unlike the district courts, I believe that the government may validly suppress some favorable evidence. On my account, suppression of favorable evidence is permitted when the benefits of the jury's review of the evidence are outweighed by the costs of disclosure to the integrity of the jury's fact-finding. I suggest two relevant costs: the threat of witness intimidation created by the disclosure of witness names, and the risk that a defendant presented with the outlines of the prosecution's case before trial will gain an unfair advantage.[42]

Because *Brady* requires disclosure of evidence in the government's possession, whether known to the prosecutor or not, prosecutors may sometimes suppress evidence inadvertently. I argue that a reasonableness standard should govern prosecutors' exercise of their duty to search out favorable evidence. Reasonableness, as opposed to a more stringent standard, is appropriate because jury fact-finding at adversarial trials requires that the prosecutor's chief duty be to seek out and present the strongest evidence of the defendant's guilt. However, in order for the evidence presented to the jury to be relatively complete, the prosecutor must allocate a reasonable amount of time to ensuring that she is aware of all the favorable evidence in the government's possession.

I intend only to delineate the prosecutor's obligations at trial, not to challenge the use of the materiality standard on post-conviction review. Rather, I contend that the Constitution allows a reviewing court to reverse the defendant's conviction only when the prosecutor's balancing of her disclosure and search obligations was clearly wrong.

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[42] By "unfair," I refer to the advantage the defendant receives from previewing the *inculpatory* evidence the government plans to produce against him at trial. Under a classic understanding of the adversarial system, required disclosure of inculpatory evidence before trial creates an "unfair" advantage for defendants. *See infra* notes 69, 168, 173. Whether pretrial disclosure of inculpatory evidence is actually unfair may be disputed, but that is beyond the scope of this Note. My argument relies only on the premise that disclosure of *exculpatory* or *impeachment* evidence poses a risk of unfairness *to the extent* that such disclosure requires the revelation of the inculpatory evidence the government will present at trial. As I explain in Part III, the balancing test I propose asks prosecutors to weigh the defendant's interest in receiving exculpatory or impeachment material against the unfair advantage he might gain by the accompanying revelation of inculpatory evidence.

To avoid fact-bound inquiries and to keep faith with the Supreme Court's *Brady* commitments, courts should continue to use the materiality standard as a rough approximation of a case-by-case reasonableness inquiry.

My argument proceeds in three parts. Part I examines how the seminal *Brady* cases conceptualized the constitutional impetus for disclosures of favorable evidence. I isolate the Supreme Court's core commitments and highlight the Court's inability to coherently explain and defend the scope or nature of the pretrial duty to disclose. Part II surveys the district court decisions that have held pretrial *Brady* disclosures of nonmaterial favorable evidence to be constitutionally required. I review the practical objections to the Supreme Court's outcome-oriented approach raised by the district courts and supported by recent scholarship. I also note the incompatibility of the district court decisions with the Supreme Court's commitments. Part III presents the jury-centric *Brady* account. I explain the theory behind the approach and demonstrate its likely application by referencing Dante Boyd's case. The Note concludes with an assessment of possible enforcement mechanisms.

I
BRADY IN THE SUPREME COURT

Across a shifting array of tests, the Supreme Court's *Brady* jurisprudence has claimed fairness as both its justification and its end. In particular, the Court has focused on the prosecutor's duty to "do justice" and has used the correctness of a conviction as its measuring stick for fairness. This focus on outcomes may be appropriate for appellate courts reviewing the constitutionality of convictions, but its application to pretrial disclosure decisions is inconsistent with due process. While the Court has assumed that materiality should govern disclosures before trial, none of its cases require this result. I identify four fixed points in the Court's cases—its *Brady* commitments—against which to evaluate the district courts' remedy in Part II and my own in Part III.

A. The Prosecutor's Duty To Do Justice: Brady v. Maryland

In 1963, *Brady v. Maryland* held that government suppression of material, favorable evidence from the defendant violates due process.[43] Justice Douglas's constitutional analysis relied on a line of due process cases involving prosecutors soliciting or willfully failing to cor-

[43] 373 U.S. 83, 87 (1963).

rect false evidence and on a quote inscribed on a wall in the Department of Justice. The cases, *Mooney v. Holohan*,[44] *Pyle v. Kansas*,[45] and *Napue v. Illinois*,[46] had set a low floor of fairness at trial, finding a due process violation only when the state "knowingly use[d] false evidence . . . to obtain a tainted conviction."[47] The inscribed quote taught that "[t]he United States wins its point whenever justice is done its citizens in the courts."[48] The *Brady* Court held that justice is not achieved when the prosecution suppresses favorable evidence material to guilt or punishment, despite a specific defense request.[49]

Though the Court held that suppression of material favorable evidence was a constitutional violation "irrespective of the good faith or bad faith of the prosecution," its discussion of the cases and the quote emphasized the importance of the prosecutor's duty.[50] The *Brady* Court quoted *Mooney*'s admonition that due process is violated where prosecutors "contrive[ ] a conviction . . . through a deliberate deception of court and jury."[51] Likewise, the Court approvingly cited Judge Sobeloff's statement that the Solicitor General is an "advocate for a client whose business is . . . to establish justice."[52] *Brady* left for future cases the explanation of the constitutional relevance of the prosecutor's duty to "do justice"[53] and, perhaps more importantly, the definition of materiality.[54]

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44 294 U.S. 103, 112 (1935).

45 317 U.S. 213, 216 (1942).

46 360 U.S. 264, 269 (1959).

47 *Id*.

48 *Brady*, 373 U.S. at 87 (internal quotation marks omitted). The Court cited a speech from Judge Simon Sobeloff that attributed the sentiment to former Solicitor General Frederick William Lehmann. *Id.* at 87 n.2. Whatever its origins, the quote echoes an oft-cited passage from *Berger v. United States*, favored for its exposition of prosecutorial duty with similar profundity and no greater clarity. *See* Berger v. United States, 295 U.S. 78, 88 (1935) ("[The government's] interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.").

49 *Brady*, 373 U.S. at 87; *see also* Boss v. Pierce, 263 F.3d 734, 739 (7th Cir. 2001) ("[E]vidence is suppressed only if (1) the prosecution failed to disclose evidence that [the government] was aware of before it was too late for the defendant to make use of the evidence, and (2) the evidence was not otherwise available to the defendant through the exercise of reasonable diligence.").

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

51 *Id.*

52 *Id.* at 87 n.2.

53 In *United States v. Agurs*, the Court explained that the prosecutor's duty created a constitutional difference between "evidence . . . available to the prosecutor and not submitted to the defense" and "[evidence] discovered from a neutral source after trial." United States v. Agurs, 427 U.S. 97, 111 (1976); *see also infra* note 82 and accompanying text (describing similar statement in *Strickler v. Greene*, 527 U.S. 263, 281 (1999)).

54 The Second Circuit has offered that *Brady* likely used "material" in its evidentiary sense, which would include all "evidence that has some probative tendency to preclude a

B. What Due Process Cannot Require: Agurs *and* Bagley

Taken together, the Court's next two *Brady* cases show its commitment to avoiding both full discovery and frequent reversals of convictions for nondisclosures. In *United States v. Agurs*, the Court took up the materiality problem.[55] The Court described three types of nondisclosures and provided a different materiality standard for each. First, where the prosecution solicited or tolerated perjury, the suppression of the perjury-revealing evidence would be material when there was "any reasonable likelihood that the false testimony could have affected the judgment."[56] Second, where the defense made a specific request for favorable evidence as it did in *Brady*, the prosecutor should respond by disclosing the evidence or by submitting to the court the question of whether a substantial basis for claiming materiality existed.[57] Third, where the defense made a general request or no request at all, the prosecutor was required to disclose only evidence that was material—evidence that if disclosed, would have created "a reasonable doubt that did not otherwise exist."[58]

The bulk of Justice Stevens's opinion for the Court discussed the materiality standard applicable in this third category of cases. Justice Stevens focused on what the Constitution could not require: for the prosecutor "routinely to deliver his entire file to defense counsel,"[59] or for convicted defendants to get a new trial whenever the nondisclosure of favorable evidence could not be considered harmless.[60] To discern precisely what the Constitution did require, Justice Stevens returned to the idea broached by the cited inscription in *Brady* of the

finding of guilt or lessen punishment." United States v. Coppa, 267 F.3d 132, 141 (2d Cir. 2001); *see also infra* note 57.

55 427 U.S. at 107–14.

56 *Id.* at 103. Stephen Saltzburg has argued that *Agurs* misread *Mooney*, *Pyle*, and the other false evidence cases as applying only where formal perjury occurs. Stephen A. Saltzburg, *Perjury and False Testimony: Should the Difference Matter So Much?*, 68 FORDHAM L. REV. 1537, 1566–67 (2000).

57 *Agurs*, 427 U.S. at 106. Though Justice Stevens's use of "material" in *Agurs* is unclear, he subsequently wrote in his *United States v. Bagley* dissent that *Brady* had used materiality to mean "could have affected." United States v. Bagley, 473 U.S. 667, 710–11 (1985) (Stevens, J., dissenting) (internal quotation marks omitted). In the face of a specific request, Justice Stevens believed that this more lenient definition of materiality should apply. *Id.* at 711–13.

58 *Agurs*, 427 U.S. at 112.

59 *Id.* at 111.

60 *Id.* at 111–12. The standard for harmless constitutional error requires reversal of a conviction unless the error is harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 24 (1967). Thus, at least according to the *Agurs* Court, treating every nondisclosure of favorable evidence as an error would require frequent reversals and over-broad discovery. *Agurs*, 427 U.S. at 111–12.

prosecutor's duty to see that "justice shall be done."[61] He interpreted this command to find that a constitutional error occurred only when the suppressed evidence might have created a reasonable doubt.[62] As only the accuracy of the outcome mattered, Stevens argued that the prosecutor's good or bad faith should be irrelevant.[63] Likewise, since the relevant constitutional requirement was for prosecutors to "do justice" at all times, Stevens found that the standard for pretrial disclosure had to be the same as the posttrial standard for reversing a defendant's conviction.[64]

In *United States v. Bagley*,[65] a divided Court scrapped *Agurs*'s three-tiered system in favor of the reasonable probability standard.[66] Although perjury-related suppressions were still to be governed by the narrow first tier,[67] all other suppressed favorable evidence would only be material where there was a "reasonable probability" of a different result.[68] Writing for the plurality, Justice Blackmun confirmed *Brady*'s limited scope: "Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur."[69] Blackmun explained that the reasonable probability standard possessed the flexibility to account for the misleading impact of a refusal to respond to a specific defense request.[70] More importantly, he argued that treating every suppression of favorable evidence as error "would impose an

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61 *Agurs*, 427 U.S. at 111 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

62 *Id.* at 112.

63 "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." *Id.* at 110.

64 The Court observed that "[l]ogically" the same standard for materiality must apply before and after trial, "[f]or 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." *Id.* at 108. At the same time, the Court acknowledged that materiality determinations would be "inevitably imprecise" and that the "significance of an item of evidence can seldom be predicted accurately until the entire record is complete." *Id.*

65 473 U.S. 667 (1985).

66 *Id.* at 678–82.

67 *See id.* at 713 n.6 (Stevens, J., dissenting) (noting agreement on continued vitality of this standard in opinions of Justice Blackmun, joined by Justice O'Connor, and Justice Marshall, joined by Justice Brennan).

68 *Id.* at 685 (White, J., concurring in judgment) (agreeing, for himself as well as for Justices Burger and Rehnquist, with Justice Blackmun's opinion).

69 *Id.* at 674 (plurality opinion). My approach acknowledges that pretrial disclosure of inculpatory evidence poses a risk that the defendant may deceive the jury. Such acknowledgment derives from this and similar references to the importance of the adversarial system. I reject as inconsistent with the plain language of due process the idea that our historic reliance on the adversarial system means that due process is violated only when a reviewing court thinks the defendant is likely innocent.

70 *Id.* at 682–83.

impossible burden on the prosecutor and would undermine the interest in the finality of judgments."[71]

Dissenting, Justice Stevens noted that the *Brady* Court had reversed the defendant's death sentence because the suppressed evidence "could have affected [his] punishment."[72] Because *Brady* involved a specific request, Stevens argued that the case had established the appropriate materiality standard for specific-request situations. He offered two reasons, and hinted at a third, for why the materiality standard should require greater disclosure when a specific request was made. First, silence in the face of a specific request is misleading.[73] Second, a specific request gives the government notice of the defense's need for, and interest in, particular pieces of evidence.[74] Third, a request provides proof that the prosecutor actually examined the evidence and decided whether or not to disclose it.[75]

Justice Stevens's *Bagley* dissent highlights the majority's failure to come to terms with the mechanics of *Brady* disclosures before trial. Instead of focusing on the differences between specific and general requests, *Bagley* relied on the workability of the materiality standard in two then-recent non-*Brady* cases.[76] But in those earlier cases, materiality had worked only as a standard for reversing convictions—

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[71] *Id.* at 675 n.7.

[72] *Id.* at 710 (Stevens, J., dissenting) (quoting United States v. Agurs, 427 U.S. 97, 106 (1976)) (internal quotation marks omitted).

[73] *Id.* at 714 ("Such silence actively misleads in the same way as would an affirmative representation that exculpatory evidence does not exist when, in fact, it does (*i.e.*, perjury) . . . .").

[74] *Id.* at 711 (characterizing *Agurs* as holding that without notice provided by specific request, government has "[a] constitutional duty to volunteer only 'obviously exculpatory . . . evidence.'" (quoting *Agurs*, 427 U.S. at 107)).

[75] Though Justice Stevens did not make the point directly, it follows from the first two distinctions. It is also suggested by his differing use of the terms "suppression" and "nondisclosure." For instance, he criticized the *Bagley* Court's approach to specific request cases as creating a

> result-focused standard that seems to include an independent weight in favor of affirming convictions despite evidentiary *suppression*. Evidence favorable to an accused and relevant to the dispositive issue of guilt apparently may still be found not "material," and hence *suppressible* by prosecutors prior to trial, unless there is a reasonable probability that its use would result in an acquittal.

Id. at 714 (emphasis added). By contrast, in *Agurs*, Stevens argued against treating all nondisclosures as automatic error. *See Agurs*, 427 U.S. at 111–12 ("[T]he judge should not order a new trial every time he is unable to characterize a *nondisclosure* as harmless under the customary harmless-error standard." (emphasis added)). This rhetorical choice underscores Justice Stevens's attempt to balance his reticence to impose on prosecutors a burdensome affirmative duty to disclose evidence, the relevance of which they may not even recognize, with his desire to deter them from choosing not to disclose favorable evidence they know to be of interest to the defense.

[76] *Bagley*, 473 U.S. at 681–82 (plurality opinion) (citing Strickland v. Washington, 466 U.S. 668 (1984); United States v. Valenzuela-Bernal, 458 U.S. 858 (1982)).

it had not defined a fair process.[77] In large part, *Agurs* and *Bagley* settled the question of when courts should reverse convictions for the prosecution's failure to disclose favorable evidence, but they left unclear the scope of the prosecutor's duty to disclose.

C. The Prosecutor's Discretion: Kyles *and* Strickler

In *Kyles v. Whitley*[78] and *Strickler v. Greene*,[79] the Court turned to the prosecutor's special status as both an advocate and the representative of the sovereign in an attempt to define the scope of the government's disclosure obligations.[80] Both cases voice the refrain that prosecutors are representatives of a "sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore . . . [is] that justice shall be done."[81]

As elsewhere, the application of the abstract command that prosecutors should "do justice" invites more questions than it answers. Struggling with the problem, Justice Stevens declared for the Court in

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[77] The Court held in *Valenzuela-Bernal* that, for a defendant to succeed on a claim that the government had violated due process by deporting potential witnesses before he could interview them, he must make a showing that the testimony of such witnesses would have been favorable and material. *Valenzuela-Bernal*, 458 U.S. at 873–74. Yet, the Court also required prosecutors to make a good faith determination that deported witnesses could provide *no* evidence favorable to the defense. *Id.* at 872. In *Strickland*, the Court adopted the materiality standard to govern ineffective assistance of counsel claims. *See infra* note 146. Of course, the underlying "process" in *Strickland* is the defendant's right to his choice of counsel and the government's obligation to provide the indigent with counsel. *Strickland*, 466 U.S. at 685. Without specifically using the term "materiality," the Court has also found that a prosecutor's improper trial comments are not constitutional violations unless they "so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)). *Brady* disclosures are not regularly overseen by judges (as are the prosecutor's statements to the jury), undertaken by defense counsel (as with the actions leading to ineffective assistance claims), or premised on the prosecutor's good faith (as with *Valenzuela-Bernal*). With *Brady*, prosecutors have no mandatory procedure to follow or neutral observer to placate. They are not duty-bound to serve the interests of the defendant. Instead, they can withhold nonmaterial evidence for any or no reason; and the guiltier the defendant seems, the more evidence they can withhold. By contrast, a defendant is afforded due process of law even where the prosecutor disparages him to the jury, because he enjoys the benefits of a procedure that allows his counsel to object and the trial judge to correct any misinformation. In this context, the prosecutor's comments will be improper without necessarily having the effect of depriving the defendant of due process.

[78] 514 U.S. 419 (1995).

[79] 527 U.S. 263 (1999).

[80] *See Strickler*, 527 U.S. at 281 (highlighting "special role played by the American prosecutor in the search for truth in criminal trials"); *Kyles*, 514 U.S. at 439 (observing that liberal disclosure of favorable evidence "will serve to justify trust in the prosecutor").

[81] *Strickler*, 527 U.S. at 281 (quoting Berger v. United States, 295 U.S. 78, 88 (1935)); *Kyles*, 514 U.S. at 439.

Strickler that the prosecutor's "special status explains both the basis for the prosecution's broad duty of disclosure and [the] conclusion that not every violation of that duty necessarily establishes that the outcome was unjust."[82] This statement of *Brady*'s underpinnings raises the question of the nature, extent, and mechanics of the prosecution's "broad duty of disclosure."[83] This is exactly the question at the heart of the practical problems discussed in Part II, and the question I hope to answer in Part III.

Sadly, it is also a question that the Court has avoided. Of course, the procedural posture of the cases the Court reviews does not require it to address the full pretrial extent of the broad duty to disclose. Yet, the Justices' colloquy with the state's counsel during the oral argument in *Kyles* presented the Court with the practical and doctrinal confusion wrought by using the materiality standard before trial to guide prosecutorial disclosure. When the state's counsel explained that, under his understanding of *Bagley*, prosecutors must disclose favorable evidence once the collective impact of all the undisclosed evidence would create a reasonable probability of a different result,[84] Justice Scalia called this notion "crazy."[85] He noted that it would mean that one "can never say that any single piece of evidence didn't have to be turned over because it all depends . . . upon whether . . . that piece of evidence plus all the other ones that might help a little bit . . . together would have made a difference."[86] In contrast, Scalia said, he could "understand using [this type of] cumulative test *after* there has been an established violation of *Brady*."[87] It is unclear how Justice Scalia would determine the existence of such a threshold violation in the first place.

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[82] *Strickler*, 527 U.S. at 281; *see also* United States v. Agurs, 427 U.S. 97, 111 (1976) ("[*Berger*'s] description of the prosecutor's duty illuminates the standard of materiality that governs [the prosecutor's] obligation to disclose exculpatory evidence.").

[83] The acknowledgment of a "broad duty" is consistent with the tension in the Court's *Agurs* opinion between its mandate to use the materiality standard before trial and its skepticism of prosecutors' ability to know what evidence will ultimately be material. *See supra* note 64. *Kyles* and *Strickler* attempt to resolve this tension by exhorting prosecutors to err on the side of liberal disclosure. *See infra* note 90 and accompanying text. Part II.B.2 explains why the infrequent reversal of convictions often does not provide sufficient prosecutorial incentive for broad disclosure.

[84] Transcript of Oral Argument at 32–34, Kyles v. Whitley, 514 U.S. 419 (1995) (No. 93-7927).

[85] *Id.* at 37.

[86] *Id.* The transcript does not record the names of the questioner. I determined the identity of the Justice asking the question by listening to a recording of the argument. *See* Audio file: Kyles v. Whitley, Warden – Oral Argument (93-7927) (November 7, 1994), *available at* http://www.oyez.org/cases/1990-1999/1994/1994_93_7927/argument/93-7927_19941107-argument.mp3 (recording of oral argument).

[87] Transcript of Oral Argument, *supra* note 84, at 36 (emphasis added).

Despite this colloquy, the *Kyles* majority taught that the prosecution must "gauge the likely net effect of all [undisclosed] evidence and make disclosure when the point of 'reasonable probability' is reached."[88] However, as Justice Kennedy remarked during oral argument, such a standard "does not give much guidance to the prosecutor as to what its constitutional obligation is."[89] Indeed, the *Kyles* majority likely meant to be vague, so that a "prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence."[90]

In sum, the Court's *Brady* doctrine provides lower courts with scant guidance either on the extent of the duty to disclose nonmaterial favorable evidence or on its enforcement. In the next Part, I track the efforts of several district court judges to enforce the prosecutor's "broad duty" to disclose at and before trial. Part III proposes an alternative doctrinal framework that gives content to the prosecutor's pretrial duty to disclose.

II
BRADY AT TRIAL

This Part presents the largely practical critiques of district court judges attempting to apply the materiality standard to pretrial disclosure disputes. These judges have argued that, in such situations, materiality seems to require weighing the impact of evidence on a trial that has yet to begin. Moreover, they, along with scholars, have identified

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[88] *Kyles*, 514 U.S. at 437. The Court did engage the State's concerns of prosecutorial uncertainty in assessing materiality before trial, but only to reject the argument that this uncertainty counseled *raising* the threshold of materiality. *Id.* at 438–39. While conceding that it would be difficult for the prosecutor to assess materiality before trial, the Court reasoned that the prosecutor's responsibility to do so was unavoidable. *Id.* at 439. Any disclosure regime would require prosecutors to "exercise some judgment" and allowing prosecutors to suppress material evidence would be manifestly unjust. *Id.*; *see also infra* note 171.

[89] Transcript of Oral Argument, *supra* note 84, at 33. It should be noted that the dissent in *Kyles*, authored by Justice Scalia and joined by Justice Kennedy, did not challenge the majority's understanding of *Brady*. Rather, Justice Scalia argued that the case presented no disputed issue of federal law at all and criticized the majority for reviewing the case in the first place. *Kyles*, 514 U.S. at 456–60 (Scalia, J., dissenting).

[90] *Kyles*, 514 U.S. at 439. As one commentator has observed, "[t]he Court appears to want prosecutors to view themselves as under an obligation to turn over 'so-called' *Brady* [material]," yet it "is unwilling to [require] . . . pre-trial disclosure of such evidence because it does not want to provide a post-trial remedy unless it is convinced that serious doubts exist as to the defendant's guilt." Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 657–58 (2002); *see also* United States v. Bagley, 473 U.S. 667, 702 (1985) (Marshall, J., dissenting) ("Apparently anxious to assure that reversals are handed out sparingly, the Court has defined a rigorous test of materiality.").

the professional and cognitive impediments that a prosecutor faces in deciding that disclosing a piece of evidence would create a reasonable probability of an acquittal. Consequently, these district courts have held that *Brady*'s original logic suggests that prosecutors should disclose all favorable evidence without regard to materiality. Before examining the district court decisions and related scholarship, I begin with an explanation of the statutory discovery rules that prompt and shape these decisions.

A. The Statutory Duty To Disclose

The vast majority of *Brady* opinions involve postconviction challenges that arise after the defense discovers favorable evidence that the government failed to disclose in time for effective use at trial. Still, trial courts also regularly face motions by defense counsel to compel the government to comply with its discovery obligations.[91] These obligations are of two sorts: constitutional and statutory.

In federal cases, the statutory obligation derives from two sources: Rule 16 of the Federal Rules of Criminal Procedure and the Jencks Act, 18 U.S.C. § 3500. Rule 16 requires the government to disclose the defendant's oral or recorded statements,[92] the defendant's prior criminal record,[93] certain documents and tangible objects,[94] reports of medical examinations and scientific tests,[95] and a summary of expert testimony.[96]

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[91] *See, e.g.*, United States v. Owens, 933 F. Supp. 76, 89 (D. Mass. 1996) ("[I]n this District much time is wasted framing and responding to boilerplate discovery motions in criminal cases."); United States v. Washington, 669 F. Supp. 1447, 1451 (N.D. Ind. 1987) ("At the outset, the court wishes to express its great displeasure over the criminal bar's growing practice, in every case, of seeking to have the court 'order' the prosecution to comply with its *Brady* obligations, even when no *Brady* violation is alleged to be occurring.").

[92] FED. R. CRIM. P. 16(a)(1)(A)–(B). For more on discovery under Rule 16, see John G. Douglass, *Balancing Hearsay and Criminal Discovery*, 68 FORDHAM L. REV. 2097, 2160–74 (2000); Milton C. Lee, Jr., *Criminal Discovery: What Truth Do We Seek*, 4 D.C. L. REV. 7, 14–19 (1998); Wm. Bradford Middlekauff, *What Practitioners Say About Broad Criminal Discovery Practice*, 9 CRIM. JUST. 14, 15–16, 54–55 (1994); and Robert G. Morvillo et al., *Motion Denied: Systematic Impediments to White Collar Criminal Defendants' Trial Preparation*, 42 AM. CRIM. L. REV. 157, 158–62 (2005).

[93] FED. R. CRIM. P. 16(a)(1)(D).

[94] FED. R. CRIM. P. 16(a)(1)(E).

[95] FED. R. CRIM. P. 16(a)(1)(F).

[96] FED. R. CRIM. P. 16(a)(1)(G). Discovery of documents and objects, reports of examinations and tests, and expert witnesses is reciprocal—if the defense requests these items, it must in turn disclose the corresponding evidence in its possession. FED. R. CRIM. P. 16(b)(1)(A)–(C).

The Jencks Act applies to the pretrial statements of government witnesses in prosecutions brought by the United States.[97] It forbids the discovery of such statements until after the witness testifies on direct examination.[98] After direct examination, the Jencks Act requires the court, at the defendant's request, to order the government to disclose witness statements to the extent that they relate to the "subject matter . . . to which the witness has testified."[99]

Rule 16 and the Jencks Act are important to the inquiry here for three reasons. First, they provide the backdrop against which most pretrial *Brady* litigation occurs in federal court.[100] Second, their provisions attest to the limited scope of rule-based discovery in federal criminal cases.[101] Third, the Jencks Act's prohibition on disclosure of witness statements until after the witness's direct examination means

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97 18 U.S.C. § 3500(a) (2000). For a more detailed discussion of the Jencks Act and a survey of actual discovery practice under it, see generally Ellen S. Podgor, *Criminal Discovery of* Jencks *Witness Statements: Timing Makes a Difference*, 15 GA. ST. U. L. REV. 651 (1999). The Jencks Act is also incorporated into the Federal Rules. FED. R. CRIM. P. 26.2.

98 18 U.S.C. § 3500(a). The Jencks Act excludes from its protection statements made by the defendant.

99 18 U.S.C. § 3500(b). Congress passed the Jencks Act in response to a case of the same name, *Jencks v. United States*, 353 U.S. 657 (1957), in which the Supreme Court used its supervisory power to authorize discovery before cross-examination of all statements made by a government witness. *See* Palermo v. United States, 360 U.S. 343, 345–48 (1959) (describing holding of *Jencks* and congressional response). The Jencks Act made two important changes to the *Jencks* decision: First, it defined discoverable statements narrowly (the term refers only to statements that are written, recorded or substantially verbatim, and contemporaneously transcribed); second, it provided a method by which the government could request the trial court to examine the statement *in camera* and excise any portion unrelated to the witness's trial testimony. *See* 18 U.S.C. § 3500(e) (defining term "statement"); 18 U.S.C. § 3500(c) (providing for *in camera* review).

100 *See, e.g.*, United States v. Causey, 356 F. Supp. 2d 681, 688 (S.D. Tex. 2005) (holding that *Brady* creates "a self-executing constitutional rule," in case where defendants sought pretrial order to require government to disclose *Brady* material).

101 *See* Lee, *supra* note 92, at 7–8 (noting that nearly three-quarters of states have criminal discovery rules more progressive than those used in federal and D.C. courts); Morvillo, *supra* note 92, at 158–68 (explaining particular burden that Rule 16 and Jencks Act place on white-collar criminal defendants). The Advisory Committee on Criminal Rules of the Judicial Conference of the United States has forwarded for publication an amendment to Rule 16 that would require prosecutors to disclose all exculpatory and impeachment evidence upon the defendant's request. *See* LAURAL HOOPER & SHELIA THORPE, FED. JUDICIAL CTR., *Brady v. Maryland* Material in the United States District Courts: Rules, Orders and Policies 7, 23–24 (2007), *available at* http://www.uscourts.gov/rules/BradyFinal2007.pdf ("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 . . . that is either exculpatory or impeaching. The court may not order disclosure of impeachment information earlier than 14 days before trial."). The Department of Justice plans to oppose adoption of the rule. ADVISORY COMM. ON CRIM. RULES, MINUTES: SEPTEMBER 5, 2006 – SPECIAL SESSION 2 (2006), *available at* http://www.uscourts.gov/rules/Minutes/CR09-2006-min.pdf.

that any judicially-created regime for earlier discovery of these statements must be constitutionally mandated.[102]

B. The District Courts and the Constitutional Duty To Disclose

This Section will consider the district court decisions that have found that *Brady* requires the government to disclose all favorable evidence before trial. These courts make three interwoven arguments: (1) Application of the materiality standard before trial is impossible; (2) prosecutors are particularly ill-situated to make the required materiality determination; and (3) appellate decisions construing *Brady* have identified when the suppression of favorable evidence is *prejudicial*, and therefore, reversible error, but they have not defined when suppression is *improper* without being prejudicial. Although these three arguments demonstrate that *Brady* should not require prosecutors to determine materiality before trial, they do not support ordering the government to disclose all favorable evidence before trial.

1. Materiality Before Trial: A Standard Without a Standard?

Here, I focus on three district court opinions. The first, Judge Pregerson's discovery order in *United States v. Sudikoff*,[103] was a response to a dispute in a securities prosecution over the government's obligation to disclose favorable information relating to the credibility of certain accomplice witnesses.[104] After surveying the materiality rules, the *Sudikoff* court concluded that it could not complete the task the case law had assigned to it—the court could not determine whether the evidence the government was trying to withhold would create a reasonable probability of a different outcome at

[102] *See, e.g.*, United States v. Lewis, 35 F.3d 148, 151 (4th Cir. 1994) (observing, in response to standing district order that required disclosure of Jencks Act materials in advance of trial, that "[t]he district court may not require the government to produce Jencks Act material relating to one of its witnesses until *after* the witness has testified"). Indeed, the circuits are split as to whether *Brady* requires disclosure of Jencks material in advance of trial. *See* United States v. Beckford, 962 F. Supp. 780, 791 (E.D. Va. 1997) (noting split and collecting cases); BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 5.17 (2d ed. 2002) (same); Morvillo, *supra* note 92, at 169 & nn.60–61 (same). *Brady* requires that disclosure occur in time for its effective use at trial. *E.g.*, Leka v. Portuondo, 257 F.3d 89, 91, 93–94 (2d Cir. 2001) (reversing conviction where, six days before trial, government disclosed existence of eyewitness who was living one thousand miles away, whose statement to police tended to exculpate defendant and contradict accounts of government witnesses, and defense was unable to secure testimony of such eyewitness in time for trial). However, some courts have held that "*Brady* is not a pretrial remedy" and therefore does not override the Jencks Act. *E.g.*, United States v. Scott, 524 F.2d 465, 467 (5th Cir. 1975).

[103] 36 F. Supp. 2d 1196 (C.D. Cal. 1999).

[104] *Id.* at 1198.

trial.[105] Consequently, the court declared that "[the materiality] standard is only appropriate, and thus applicable, in the context of appellate review."[106]

In the second case, *United States v. Carter*,[107] the defendant moved for an *in camera* review of a cooperating codefendant's psychological report compiled by a court-appointed psychologist for a competency hearing.[108] The government agreed to the inspection, but it disagreed with the court's evaluation that it had to disclose part of the report.[109] Justifying the decision to require disclosure, Judge Adelman included an extended quotation from *Sudikoff* and reiterated that "[a court] cannot know what possible effect certain evidence will have on a trial not yet held."[110] Thus, Adelman concluded, courts "should ordinarily require the pre-trial disclosure of all exculpatory or impeachment evidence" without regard to materiality.[111]

The final case that I consider in this Section is a criminal prosecution that arose out of the Jack Abramoff scandal. David Safavian, charged with obstruction of justice and making false statements, moved the court under *Brady* and Rule 16 to order the government to disclose a number of documents in the possession of the FBI and the Government Services Agency.[112] Observing that the government and the defendant appeared to have very different understandings of the government's discovery obligations, Judge Friedman set out the court's analysis of *Brady*'s pretrial application.[113] He noted that any

105 *Id.* at 1198–99.

106 *Id.* at 1198.

107 313 F. Supp. 2d 921 (E.D. Wis. 2004).

108 *Id.* at 922.

109 *Id.* The disclosure of mental health records is governed by the *Brady* rule. Pennsylvania v. Ritchie, 480 U.S. 39, 56–58 (1987). In theory, mental health records could be regarded as analytically different from other evidence in government control because the prosecutor does not generally have access to the contents of such reports. The dissenters in *Ritchie* argued that this material should be made available to the defendant under the Confrontation Clause. *Id.* at 66–72 (Brennan, J., dissenting). The defendant argued additionally that he had a right to the reports under the Compulsory Process Clause. *See id.* at 51, 55–56 (rejecting compulsory process argument). The report in *Ritchie* had been generated by Pennsylvania's Children and Youth Services Agency, whose records were protected by a state statute requiring a court order for them to be disclosed to anyone. *Id.* at 43–44 & n.2.

110 *Carter*, 313 F. Supp. 2d at 925.

111 *Id.*

112 United States v. Safavian (*Safavian I*), 233 F.R.D. 12, 13–14, 17–20 (D.D.C. 2005).

113 *Id.* at 14. Judge Friedman has expressed similar sentiments in other opinions. *See* United States v. Naegele, 468 F. Supp. 2d 150, 152 (D.D.C. 2007) ("At the outset, the Court notes that too often in criminal cases the prosecution and defense are like two ships passing in the night when it comes to *Brady* . . . ."); United States v. Hsia, 24 F. Supp. 2d 14, 29 (D.D.C. 1998) ("While the government has represented that it 'understands its

pretrial judgment on materiality is "speculative" and dependent on questions that are "unknown or unknowable," including:

> which government witnesses will be available for trial, how they will testify and be evaluated by the jury, which objections to testimony and evidence the trial judge will sustain and which he will overrule, what the nature of the defense will be, what witnesses and evidence will support that defense, what instructions the Court ultimately will give, what questions the jury may pose during deliberations (and how they may be answered), and whether the jury finds guilt on all counts or only on some (and which ones).[114]

Judge Friedman characterized the government's effort to evaluate its disclosure obligations in light of postconviction materiality standards as an attempt to "look at the case pretrial through the end of the telescope an appellate court would use post-trial."[115]

Stephanos Bibas, a former prosecutor, has argued additionally that the prevalence of plea bargaining means that prosecutors "often . . . do not finish investigati[ng] and familiarize themselves with the evidence until trial is imminent," and therefore "have difficulty forecasting before trial what evidence will in retrospect seem to have been material."[116] This latter difficulty prompted Justice Marshall, in *United States v. Bagley*, to characterize pretrial materiality as a standard that "virtually defies definition."[117]

2. Prosecutors and Materiality Before Trial

Although courts have been reticent to make the point directly, many commentators have argued that the prosecutor's adversarial position makes the already content-less pretrial materiality assessment even more suspect.[118] Critics make two sorts of arguments: First,

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Brady obligations and it fully intends to abide by them,' the Court shares defense counsel's skepticism." (internal citations omitted)).

114 *Safavian I*, 233 F.R.D. at 16.

115 *Id.*

116 Stephanos Bibas, Brady v. Maryland*: From Adversarial Gamesmanship Toward the Search for Innocence?*, *in* CRIMINAL PROCEDURE STORIES 129, 143 (Carol S. Steiker ed., 2006). A number of other scholars have registered similar criticisms. *See, e.g.*, Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1610 (2006) ("Because *Brady*'s materiality standard turns on a comparison of the supposedly exculpatory evidence and the rest of the trial record, applying the standard prior to trial requires that prosecutors engage in a bizarre kind of anticipatory hindsight review."); John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 471 (2001) ("It seems curious, to say the least, that a prosecutor has a constitutional obligation *before* trial to disclose a category of information that cannot be defined until *after* trial.").

117 473 U.S. 667, 700 (1985) (Marshall, J., dissenting).

118 *See, e.g.*, Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets* Brady, 109 PENN. ST. L. REV. 1133, 1144–47 (2005) (explaining why "prudent"

individual prosecutors have incentives to favor nondisclosure; second, cognitive biases make it difficult for the neutral prosecutor to determine what evidence will be material.

Three primary factors shape prosecutorial incentives in assessing *Brady* materiality before trial.[119] First, disciplinary rules, which require prosecutors to disclose all favorable evidence,[120] are almost never enforced against prosecutors.[121] Second, since individual prosecutors tend to be transitory, particularly at the state level, they are likely to act to maximize their personal professional gain.[122] As Bibas has argued, "prosecutors receive promotions and better jobs if they have favorable win-loss records and rack up many convictions."[123] An investigative report by the *Chicago Tribune* confirms the prevalence of this problem in Cook County: Over a twenty-year period, forty-two prosecutors went from committing misconduct that merited

prosecutor will err on side of suppression, not disclosure); Dewar, *supra* note 37, at 1454–55 (collecting criticisms).

119 *Cf.* Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 400 (arguing that prosecutorial misconduct arises from "vague ethics rules," "vast discretionary authority [without] . . . transparency," and "inadequate remedies [that] . . . create perverse incentives" encouraging misconduct).

120 *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2007) (requiring prosecutors to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense"). *See generally* Lisa M. Kurcias, Note, *Prosecutor's Duty To Disclose Exculpatory Evidence*, 69 FORDHAM L. REV. 1205 (2000) (surveying scope of duty to disclose rule and evaluating possible changes).

121 The leading study on this problem is Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987). For a more recent collection of the evidence demonstrating that disciplinary bodies do not use their powers to sanction prosecutors for violations of ethical rules relating to disclosure, see Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 722–23 & nn.268–72 (2006). For an investigative report on the lack of sanctions for *Brady* and similar misconduct in homicide cases, see Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at 1.

122 *See* Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 62–67 (2005) (arguing that since low-level prosecutors are transitory and loosely supervised, political pressure created by public recognition of mistakes or misconduct are unlikely to affect their individual cost-benefit analysis in given situation). Federal prosecutors tend to stay in their positions longer than their state counterparts. *Compare id.* at 60 & nn.70–71 (finding evidence that state prosecutors stay in their jobs for only two or three years), *with* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 913 (1995) (noting that most federal prosecutors must commit to at least four years of service and that average time between notice of appeal and final disposition was eleven months as of 1994).

123 Bibas, *supra* note 116, at 141.

reversal of convictions to sitting on the state bench.[124] The third factor builds on the first two—courts rarely reverse convictions on *Brady* grounds,[125] thereby limiting the incentive for the prosecutor's office to make up for the lack of an individual sanction for nondisclosures.[126] Moreover, the incentive structure created by *Brady* materiality seems to invite prosecutors to "play the odds"—to disclose favorable evidence only when they feel they must in order to avoid reversal.[127]

[124] Ken Armstrong & Maurice Possley, *Break Rules, Be Promoted*, CHI. TRIB., Jan. 14, 1999, at 1; *see also* Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 132–37 (2004) (describing how institutional dynamics of prosecutor's offices create professional incentives for pursuit of convictions).

[125] Bibas examined 210 *Brady* claims in 2004, and found that only twenty-five proved successful. Bibas, *supra* note 116, at 144–45. Moreover, his attempt to catalogue reversals on *Brady* grounds puts the number at less than five hundred between 1959 and August 2004. *See id.* at 145 (counting cases in archive maintained by Capital Defender Network). I explore institutional and cognitive bases for this trend in the next section. *See infra* Part II.B.3.

[126] Worse, a recent study of U.S. Attorneys (the federal prosecutors who head up district offices) revealed that the length of prison sentences secured by their offices was positively correlated with their personal career success and advancement. *See* Richard T. Boylan, *What Do Prosecutors Maximize? Evidence from the Careers of U.S. Attorneys*, 7 AM. L. & ECON. REV. 379, 380, 396 (2005) (providing support for "the common assumption in the economics literature that prosecutors seek to maximize prison time minus the cost of prosecutorial time").

[127] *See* United States v. Bagley, 473 U.S. 667, 701 (1985) (Marshall, J., dissenting) ("At worst, the [materiality] standard invites a prosecutor, whose interests are conflicting, to gamble, to play the odds, and to take a chance that evidence will later turn out not to have been potentially dispositive."); Gershman, *supra* note 121, at 715–22 (offering examples of this problem in reported decisions). Fortunately, many prosecutors, particularly federal prosecutors, take their disclosure obligations more seriously. *See* Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 449 (2002) ("[A]s government officials, we hope and expect that prosecutors will serve the government's interests . . . . [W]e know that lawyers who choose careers in law enforcement rather than the more lucrative private sector often make that choice because of a desire to serve the public."); Symposium, *Panel Discussion: Criminal Discovery in Practice*, 15 GA. ST. U. L. REV. 781, 784–88 (1999) (statement of G. Doug Jones, U.S. Attorney for Northern District of Alabama) (describing his efforts to enforce more liberal discovery practice among assistants in his office in deference to "fundamental fairness"). *But see* American College of Trial Lawyers, *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 93, 104 (2004) [hereinafter *Proposed Codification*] ("This Committee, a majority of whose members practice in the federal courts, believes that across the country federal prosecutors routinely defer *Brady* disclosures unless ordered by the trial court."); Hoeffel, *supra* note 118, at 1138–39 (arguing that leading scholars of prosecutorial discretion are often, like Bruce Green, former Assistant U.S. Attorneys whose analysis is skewed by self-serving bias and by assumption that state prosecutors are as vigilant as their federal counterparts).

The second set of problems applies even to prosecutors earnestly seeking to do justice.[128] Institutional pressures and cognitive biases create "tunnel vision," in which "[i]nvestigators focus on a suspect, select and filter the evidence that will 'build a case' for conviction, while ignoring or suppressing evidence that points away from guilt."[129] One key type of tunnel vision is confirmation bias—"the tendency to seek or interpret evidence in ways that support existing beliefs, expectations, or hypotheses."[130] The prosecutor's hypothesis before trial is, of course, that the defendant is guilty. This means that she will more likely discount the importance of favorable evidence in her file.[131] Maintaining this hypothesis of guilt is not just a matter of predilection but also a part of the prosecutor's ethical duty.[132] However, under the materiality approach to pretrial *Brady* disclosure, the duty to reveal favorable evidence is only triggered when it could "undermine confidence in the verdict."[133] Sundby argues that even attempting this inquiry requires an effort of "Zen-like . . . harmonizing."[134]

While commentators have highlighted the problem of cognitive bias at length, the cases analyzed here include very few harsh words for the way prosecutors assess *Brady* materiality before trial. The

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128 *See, e.g.*, Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 329 ("Ironically, even for the most ethical prosecutors, those most committed to the ideal of doing justice, the prosecutorial role inevitably fosters tunnel vision.").

129 Dianne L. Martin, *Lessons About Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847, 848 (2002).

130 Findley & Scott, *supra* note 128, at 309.

131 *See Bagley*, 473 U.S. at 702 (Marshall, J., dissenting) ("The prosecutor, convinced of the guilt of the defendant and of the truthfulness of his witnesses, may all too easily view as irrelevant or unpersuasive evidence that draws his own judgments into question."); Stephen P. Jones, Note, *The Prosecutor's Constitutional Duty To Disclose Exculpatory Evidence*, 25 U. MEM. L. REV. 735, 764–65 (1995) ("As a zealous advocate for society, the prosecutor's good faith judgment might be affected in determining whether the evidence in question is material.").

132 *See* Sundby, *supra* note 90, at 652–53 & n.49 (noting that while ABA standards require only that prosecutor have "probable cause" in order to proceed with prosecution, *Standards for National Prosecution* and *U.S. Attorney's Manual* suggest that prosecutor be significantly more certain of defendant's guilt).

133 Kyles v. Whitley, 514 U.S. 419, 435 (1995).

134 Sundby, *supra* note 90, at 653–54. Depending on the degree of certainty the prosecutor thinks she is required to have in order to bring a case to trial, she might think:

> This piece of evidence is so exculpatory in nature that it actually undermines my belief that a guilty verdict would be worthy of confidence. Under *Brady*, therefore, I need to turn this evidence over to the defense. Then, once I turn the evidence over and satisfy my constitutional obligation, I can resume my zealous efforts to obtain a guilty verdict that I have just concluded will not be worthy of confidence.

Id. at 651.

most direct statement comes from Judge Friedman, who observed in *Safavian I* that the problem with a pretrial materiality assessment is that "it permits prosecutors to withhold admittedly favorable evidence whenever the prosecutors, *in their wisdom*, conclude that it would not make a difference to the outcome of the trial."[135] Continuing, he offered that this approach was unworkable as prosecutors "are neither neutral (nor should they be) nor prescient."[136] In *Safavian II*, an opinion responding to the government's motion for the court to clarify *Safavian I*, Judge Friedman acknowledged that the earlier opinion was "inconsistent" with the government's position that *Brady* only required disclosure of material evidence.[137] "But," he suggested, "there is no need for clarification. There simply is a need for the Justice Department to change the mindset of its trial prosecutors to assure that its approach to *Brady* is broad and open . . . ."[138]

In the District of Massachusetts, a majority of judges seem to share Judge Friedman's concern about the government's reluctance to make full *Brady* disclosures. For instance, Judge Gertner remarked with regard to the government's approach to *Brady* disclosures that "[i]t is not enough to say that the Government should disclose the minimum exculpatory evidence, and withhold arguably exculpatory information at its peril . . . ."[139] Such an approach, she reasoned, "encourages brinkmanship, taking one's chances that at a later date, when the pressures to continue a trial or sustain a conviction are greatest, the issue will be dealt with more leniently by the Court."[140] Indeed, in 1998, that district court adopted local rules requiring the government to disclose material exculpatory evidence within twenty-eight days of arraignment, and most impeachment evidence at least twenty-one days before trial.[141] The Rules' drafting report explains

135 United States v. Safavian (*Safavian I*), 233 F.R.D. 12, 16 (D.D.C. 2005) (emphasis added).

136 *Id.*

137 United States v. Safavian (*Safavian II*), 233 F.R.D. 205, 206–07 (D.D.C. 2006).

138 *Id.*

139 United States v. Snell, 899 F. Supp. 17, 22 n.11 (D. Mass. 1995).

140 *Id.* at 23 n.11.

141 D. MASS. R. 116.1–117.1. For more information on the District of Massachusetts's local rules, see generally D. MASS., REPORT OF THE JUDICIAL MEMBERS OF THE COMMITTEE ESTABLISHED TO REVIEW AND RECOMMEND REVISIONS OF THE LOCAL RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS CONCERNING CRIMINAL CASES (1998) [hereinafter MASSACHUSETTS REPORT] (highlighting key features of Rules and explaining spirit in which they should be implemented) (on file with First Circuit library); Amy Baron-Evans, *New Local Rules for Discovery in Federal Criminal Cases*, BOSTON B. J., Mar./Apr. 1999, at 8, 8–9, 19 (describing rules and providing analysis). *See also* 3B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 901 (3d ed. 2004) (explaining district court authority to make local rules); Hooper & Thorpe, *supra* note 101, at 25–38 (collecting district court rules and

that the Rules respond to dysfunctional discovery practice in the district, which resulted in cases going to trial "without legally required discovery having been provided."[142]

3. Harmless Error Is Still Error

The first two arguments—that applying materiality before trial is almost impossible and that prosecutors' institutional role makes this determination particularly difficult—explain why pretrial materiality assessments are undesirable. The third argument—that the suppression of favorable evidence is error—makes an affirmative case for a standard that does not depend on "materiality."[143] In *Sudikoff*, Judge Pregerson placed great weight on the difference between courts' appellate and trial roles, arguing that while appellate courts can ignore harmless errors, trial courts must not.[144] Judge Pregerson drew on the idea of the equivalence of the materiality standard and harmless-error

orders for *Brady* disclosures). The committee's drafting report explains that "material" is meant to be understood in light of *Kyles* and "what may become its evolving progeny." MASSACHUSETTS REPORT, *supra*, at 17.

142 MASSACHUSETTS REPORT, *supra* note 141, at 8. As the report explains, the rule revisions create a process for automatic discovery corresponding to duties under Rule 16, the Jencks Act, and *Brady*. *Id.* at 7–9. For examples of courts criticizing discovery abuses arising out of prosecutions in the U.S. District Court of Massachusetts, see United States v. Osorio, 929 F.2d 753, 757, 760–62 (1st Cir. 1991), considering sanctions where the government failed to reveal that its chief witness in a drug prosecution was himself "a major drug dealer" until midway through trial, and United States v. Mannarino, 850 F. Supp. 57, 59 (D. Mass. 1994), ordering a new trial where cross-examination revealed that the state police officer destroyed contemporaneous notes of interview with the principal government witness, and noting "a pattern of sustained and obdurate indifference to, and unpoliced subdelegation of, disclosure responsibilities."

143 While acknowledging the difficulties of determining materiality before trial, a number of courts have explicitly rejected the application of a different standard before trial. Most notably, the Second Circuit reversed a district court order requiring immediate disclosure of all favorable evidence in the government's possession upon a defense request. United States v. Coppa, 267 F.3d 132, 146 (2d Cir. 2001). The court noted that "*Bagley* makes the *extent* of the disclosure required by *Brady* dependent on the anticipated *remedy* for violation of the obligation to disclose." *Id.* at 142. Likewise, many courts have held that *Brady*'s materiality standard eliminates the possibility of a pretrial remedy for *Brady* violations. *See, e.g.*, United States v. Causey, 356 F. Supp. 2d 681, 688, 698 (S.D. Tex. 2005) (rejecting defense motion for court order for discovery of *Brady* evidence before trial and citing Fifth Circuit precedents holding that "*Brady* is not a pretrial remedy" (internal quotation marks omitted)); United States v. Washington, 669 F. Supp. 1447, 1451 (N.D. Ind. 1987) ("An order to produce *Brady* materials makes as little sense as an order to preserve the accused's right to be free from unreasonable searches and seizures. . . . [F]rom a court's perspective, *Brady* is remedial in nature.").

144 United States v. Sudikoff, 36 F. Supp. 2d 1196, 1198–99 (C.D. Cal. 1999); *see also* United States v. Carter, 313 F. Supp. 2d 921, 924–25 (E.D. Wis. 2004) (quoting *Sudikoff* at length). In *Kyles v. Whitley*, 514 U.S. 419, 435 (1995), the Supreme Court held that the *Brady* materiality inquiry incorporates a harmless-error review.

review to determine an appropriate pretrial standard.[145] He reasoned that a suppression could be "improper" without being prejudicial—that is, "[t]hough an error may be harmless, it is still error."[146] Likewise, in *Safavian I*, Judge Friedman argued that "[b]ecause the definition of 'materiality' discussed in *Strickler* . . . is a standard articulated in the post-conviction context for appellate review, it is not the appropriate one for prosecutors to apply during the pretrial discovery phase."[147]

This "materiality as harmless-error" analysis links *Brady* to a host of academic commentary on problems with harmless-error review.[148] In particular, use of appellate materiality to guide pretrial disclosures, like harmless error, threatens to separate constitutional rights from remedies.[149] Some separation is inevitable, since harmless-error review means that remedies are withheld for "harmless" violations of an accused's constitutional rights; however, the problem is exacerbated by the reticence of courts to overturn convictions when an error has occurred in the trial of a seemingly guilty defendant.[150] Worse, hindsight bias skews judicial assessments of guilt after conviction:[151]

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145 *Sudikoff*, 36 F. Supp. 2d at 1199.

146 *Id.* To support this claim, Judge Pregerson used the standard of prejudice required for a conviction to be overturned for ineffective assistance of counsel as an analogy. In *Strickland v. Washington*, the Supreme Court adopted the *Brady* materiality standard to determine the prejudice suffered by a defendant due to the deficiency of her counsel. 466 U.S. 668, 694 (1984). To win a new trial on ineffective assistance grounds, a defendant must show that his counsel made an unreasonable error and that the error was material. *Id.* Despite the post-conviction requirement of materiality, inexcusably bad lawyering is "improper" and not to be tolerated by trial courts. *Sudikoff*, 36 F. Supp. 2d at 1199.

147 United States v. Safavian (*Safavian I*), 233 F.R.D. 12, 16 (D.D.C. 2005).

148 *See generally* Cooper, *supra* note 29 (providing history of harmless-error review and criticizing use of "overwhelming evidence" test in *Neder v. United States*, 527 U.S. 1, 17–18 (1999)); Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79 (1988) (criticizing Supreme Court's harmless-error jurisprudence and proposing alternative doctrinal structure).

149 The basic problem is well explained in Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1 (2002). By definition, harmless-error review withholds remedies for some violations of an accused's constitutional rights. Kamin argues that because courts often decide whether the conduct was harmless before they decide whether such conduct was an error, harmless error leads to the stagnating of constitutional law and fails to deter prosecutors from committing harmless errors. *Id.* at 6–8, 85.

150 *See, e.g.*, Edwards, *supra* note 28, at 1171 ("In other words, I believe that, more often than not, we [judges] review the record to determine how we might have decided the case; the judgment as to whether an error is harmless is therefore dependent on our judgment about the factual guilt of the defendant.").

151 *See* Bibas, *supra* note 116, at 143 (applying evidence of hindsight bias to *Brady*); Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 2 & n.7 (explaining problem of hindsight bias and collecting sources); Findley & Scott, *supra* note 128, at 317–21 (explaining hindsight and outcome biases, and noting particular problems they pose for courts assessing *Brady* violations).

Once courts "learn what actually happened, that outcome seems to have been inevitable all along."[152] Thus, while *Brady* relies on appellate court decisions to teach prosecutors what evidence they must disclose, three institutional factors lead appellate courts to underestimate the materiality of suppressed evidence: (1) the legally prescribed respect for the finality of convictions, (2) the natural desire to avoid reversing convictions of the guilty, and (3) the unconscious hindsight bias that makes a defendant's guilt seem inevitable and uncontroverted.

Since appellate court assessments of materiality are colored by their institutional role, district courts have attempted to provide their own standard.[153] Judge Pregerson's opinion in *Sudikoff* presents the most direct defense for treating all suppressions of favorable evidence as errors. *Sudikoff* cited *Brady*'s roots in *Mooney* and *Napue* to demonstrate the constitutional distinction between evidence that is favorable to the defense and evidence that is merely helpful.[154] Before trial, knowing about any and every bit of evidence in the government's possession is helpful in the formation of a defense strategy. However, evidence is only favorable when it tends to exculpate the defendant or to impeach a government witness.[155] This difference has a constitutional dimension, *Sudikoff* argues, "[b]ecause *Brady* seeks to protect the quality and completeness of the evidence upon which the jury bases its verdict."[156]

Treating every nondisclosure of favorable evidence as a constitutional error is certainly appealing—most of the commentators who have not given up on *Brady* altogether suggest the adoption of this

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152 Bibas, *supra* note 116, at 143.

153 *See, e.g.*, United States v. Sudikoff, 36 F. Supp. 2d 1196, 1198 (C.D. Cal. 1999) ("[T]he standard that evidence must meet to fall within the scope of *Brady* and require pretrial discoverability has not been clearly stated. Therefore, before discussing the appropriate standard, the Court will address why the 'materiality' standard, the usual standard associated with *Brady*, should not be applied in this context.").

154 *Id.* at 1200–01; *see supra* Part I.A (discussing line of due process cases involving prosecutorial use of false evidence cited in *Brady*).

155 *Sudikoff*, 36 F. Supp. 2d at 1199.

156 *Id.* at 1201. Neither *Carter* nor *Safavian I* attempt much of a positive account of the basis for the constitutional obligation to disclose all favorable evidence regardless of materiality. Rather, both find the materiality prong to be unworkable and thus opt to excise it from their analysis. *See* United States v. Safavian (*Safavian I*), 233 F.R.D. 12, 16 (D.D.C. 2005) (rejecting materiality standard and stating that "the government must always produce any potentially exculpatory or otherwise favorable evidence . . . as affecting the outcome of the trial"); United States v. Carter, 313 F. Supp. 2d 921, 925 (E.D. Wis. 2004) (arguing for "pretrial disclosure of all exculpatory or impeachment evidence" because "[t]he judge cannot know what possible effect certain evidence will have on a trial not yet held").

approach, or one similar to it.[157] However, this ignores *Kyles*'s teaching that the Constitution does not require the disclosure of all favorable evidence.[158] The Court's unwillingness to mandate disclosure of all favorable evidence appears to come from two sources. The first, as exemplified by *Bagley*, is the concern that broad discovery will upset the adversarial system.[159] The second, as exemplified by *Agurs*, is the belief that finding the Constitution to require disclosure of all favorable evidence would require reversing convictions any time a reviewing court is "unable to characterize a nondisclosure as harmless under the customary harmless-error standard."[160] As argued in Part I, preserving the adversarial system by not requiring broad discovery and avoiding frequent reversals of convictions are two of the fixed

[157] *Compare* Fisher, *supra* note 35, at 1312–17 (calling on courts to define what constitutes prosecutorial misconduct in *Brady* and other areas, and to reverse convictions whenever error is not harmless beyond reasonable doubt), Janice E. Joseph, *The New Russian Roulette:* Brady *Revisited*, 17 CAP. DEF. J. 33, 39–45 (2004) (advocating relaxed materiality standard and greater use of sanctions), *and* Jenny Roberts, *Too Little Too Late: Ineffective Assistance of Counsel, The Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1153–54 (2004) (suggesting mandatory open-file discovery as prophylactic remedy to ensure effective assistance of counsel), *with* Cerruti, *supra* note 32, at 274 ("*Brady* is now best understood as a rule of prosecutorial privilege rather than a rule of disclosure."), Gershman, *supra* note 121, at 727 (arguing for change in Federal Rules of Criminal Procedure to require disclosure of all favorable evidence), Hooper & Thorpe, *supra* note 101, at 23 (recording amendment to Rule 16 proposed by Advisory Committee on Criminal Rules), *Proposed Codification*, *supra* note 127, at 111–22 (proposing and justifying similar change), *and* Sundby, *supra* note 90, at 645 ("[T]he danger exists that a *Brady* mirage is obscuring a clear-eyed evaluation of whether current discovery standards are effectively granting defendants access to exculpatory evidence."). One alternate proposal of note is presented in a Note by Elizabeth Napier Dewar, who identifies many of the problems discussed in Part II and suggests that courts employ what she calls a "fair trial remedy." Dewar, *supra* note 37, at 1453–57 (internal quotation marks omitted). The remedy, available at the discretion of trial courts, would create an inference that the prosecution's tardiness or outright failure to disclose favorable evidence harmed the defense's preparation for trial. *Id.* at 1457–58. The inference could be communicated to the jury by instruction or in defense summation. *Id.* at 1459.

[158] Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("[T]he rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate.").

[159] United States v. Bagley, 473 U.S. 667, 675 (1985); *see also Kyles*, 514 U.S. at 436–37 (citing *Bagley* for proposition that "the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense"). As noted above in *supra* notes 154–56 and accompanying text, *helpful* evidence is a broader category than *favorable* evidence. I believe that broad disclosure of favorable evidence can undermine the adversarial system only to the extent that it involves the disclosure of either inculpatory evidence that the government plans to present at trial or of the names of citizen witnesses. *See supra* note 69.

[160] United States v. Agurs, 427 U.S. 97, 111–12 (1976); *see also Kyles*, 514 U.S. at 439 (contending that "if due process were thought to be violated by every failure to disclose an item of exculpatory or impeachment evidence," harmless error would be "the government's only fallback").

points of the Supreme Court's *Brady* jurisprudence. Moreover, the Jencks Act's prohibition on orders requiring the government to disclose witness statements until after direct examination means that the district court orders cannot be valid as exercises of supervisory power.[161]

The outline of the problem this Note hopes to solve is now complete. Using materiality to decide what favorable evidence prosecutors should disclose before trial is both unconstitutional and impractical. However, the Supreme Court has held firm that the Constitution does not require prosecutors to disclose all favorable evidence and that suppressions of favorable evidence must be material in order to merit reversal. The next Part suggests an alternate test for disclosure of favorable evidence before trial that is compatible with materiality review posttrial.

III
BRADY AND THE JURY

Part I argued that the Court has relied on the accuracy of the jury's verdict as the touchstone for due process fairness. This reliance on accuracy, I contended, may be appropriate after trial but conflicts with due process at and before trial. Part II presented the practical problems with the Court's approach, identified by a handful of district court judges. I concluded Part II by arguing that the district courts' resolution of these problems is inconsistent with the Supreme Court's *Brady* commitments. In this Part, I suggest that a jury-centric approach is in harmony with the Court's commitments while addressing the district courts' grievances. My proposed approach gives content to the prosecutor's pretrial duty to disclose, while making sense of materiality after trial. I first explain the theory behind the jury-centric approach and then return to Dante Boyd's case to illustrate its practical application. I conclude by analyzing its likely enforcement.

A. The Jury-Centric Brady *Approach in Theory*

The Sixth Amendment gives defendants the right to have their guilt determined by a jury.[162] The Supreme Court has recently reasserted that the jury must pass on all questions of fact necessary to determine guilt or punishment.[163] Though the *Brady* rule arises out of

[161] *See supra* note 102.

[162] U.S. CONST. amend. VI.

[163] *See, e.g.*, United States v. Booker, 543 U.S. 220, 226–27 (2005) (holding that mandatory federal sentencing guideline scheme violated Sixth Amendment by allowing

due process concerns, *Brady* also protects the jury right by ensuring that favorable evidence gets to the defendant, who can then decide how to present this evidence to the jury.[164] As the Supreme Court has observed, liberal *Brady* disclosure "will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations."[165] To be sure, the Sixth Amendment jury right does not itself require disclosure of favorable evidence. I argue only that focusing on the way that disclosure regimes affect the jury right better reveals the relevant interests at stake and more firmly anchors the inquiry in process rather than in outcomes.

Petit juries have no power of independent investigation. Rather, the adversarial system assumes that the parties will search for all relevant evidence and that each party will be well-positioned to present the most persuasive evidence to the jury.[166] In civil cases, this process is facilitated by extensive pretrial discovery; in criminal cases, discovery is much more limited.[167] Some have contended that requiring the government to disclose any evidence is unwise and unnecessary—they argue that the defendant already enjoys substantial protections in a criminal trial[168] and that the Fifth Amendment prevents the recip-

judges to increase defendants' sentences above guideline maximums based on their own fact-finding rather than on facts found by jury); *see also* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1182–99 (1991) (noting historic centrality of jury to framework of Bill of Rights and arguing that accused cannot waive right to jury trial because such right belongs not to him but to people); Steven H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421, 429–32 (1980) *(*arguing that harmless error violates defendant's right to trial by jury); *cf.* Rita v. United States, No. 06-574, slip op. at 4 (U.S. June 21, 2007) (Scalia, J., concurring in part and concurring in judgment) (arguing that majority's holding that federal sentences falling within U.S. Sentencing Guidelines are presumptively reasonable is inconsistent with *Booker*'s understanding of Sixth Amendment).

164 *See, e.g.*, Cerruti, *supra* note 32, at 226 ("Exculpatory material in the prosecutor's file . . . is information that is by definition not part of the prosecutor's case. It is information that the prosecutor would not otherwise present at trial and would be of use only to the defendant in building a defense to the prosecution's case.").

165 Kyles v. Whitley, 514 U.S. 419, 440 (1995).

166 *See, e.g.*, United States v. Bagley, 473 U.S. 667, 698 (1985) (Marshall, J., dissenting) ("[F]avorable evidence indisputably enhances the truth-seeking process at trial. And it is the job of the defense, not the prosecution, to decide whether and in what way to use arguably favorable evidence.").

167 *See, e.g.*, H. Lee Sarokin & William E. Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 RUTGERS L. REV. 1089, 1089 (1991) ("It is an astonishing anomaly that in federal courts virtually unrestricted discovery is granted in civil cases, whereas discovery is severely limited in criminal matters.").

168 One of the earliest—and most famous—iterations of this critique was made by Judge Learned Hand in the denial of a defendant's request to inspect grand jury minutes in *United States v. Garsson*:

rocal pretrial exchange of information found in civil cases.[169] Yet, the prosecutor's extraordinary ability to harness the investigative powers of the modern police force and her duty as a representative of the sovereign provide strong justifications for asymmetric disclosure requirements.[170]

I do not intend to resolve the debate over the merits of liberal discovery. Rather, I aim to present a unified *Brady* theory that comports with due process, beginning with the prosecutor's pretrial obligation to disclose evidence. I explain what evidence prosecutors should disclose, what evidence they may suppress, and how they can tell the difference before trial. I then discuss how courts should treat *Brady* disputes under my jury-centric approach.

My approach starts with the difference between inculpatory evidence, which tends to prove the defendant's guilt, and favorable evidence, which tends to negate guilt or render inculpatory evidence less

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> Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see.

291 F. 646, 649 (S.D.N.Y. 1923).

169 U.S. CONST. amend. V. *But see* Cerruti, *supra* note 32, at 219 & n.22 (noting erosion of belief that Fifth Amendment prevents all discovery of evidence possessed by defendant). *Guilty* defendants almost certainly enjoy an ill-gained, fact-discovering advantage over the government—if they committed the crime, they are aware of all sorts of evidence favorable to the government that the Fifth Amendment allows them to suppress. But our criminal procedure requires us to always presume innocence rather than guilt, so we cannot premise the balance of discovery obligations on the assumption that defendants will be guilty. Sarokin & Zuckerman, *supra* note 167, at 1091.

170 *See, e.g.*, Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 584 (citing resource disparities as reason to reject view that discovery should be denied defendants because they do not have broad reciprocal disclosure duty); Rosen, *supra* note 121, at 694 ("A prosecutor at the local, state, or federal level, who has at his or her disposal a large array of investigative capabilities, generally commands resources vastly superior to those available to the defense attorney, who most often represents an indigent client."). The resources available to the prosecutor include not only full-time investigators and professionally staffed laboratories but also significant structural advantages. Police generally arrive at the scene of a crime relatively quickly and begin to gather evidence and locate witnesses even before they suspect a particular individual. The grand jury gives prosecutors the power to compel evidence and formally memorialize witness statements. In many cases, the government's informal investigative efforts are more likely to be met with cooperation from witnesses. With—and often without—a warrant, the government can search the defendant, his house, his car, and his personal effects, or listen to his phone calls (and now, read his e-mail). *See* Barry Nakell, *Criminal Discovery for the Defense and the Prosecution—The Developing Constitutional Considerations*, 50 N.C. L. REV. 437, 439–42 (1972) (noting foregoing investigative advantages of prosecutor).

credible. Because of the adversarial system, suppression of evidence *favorable* to the defendant keeps that evidence from the jury, which undermines the jury's ability as fact finder. By contrast, the government has no general duty to disclose *inculpatory* evidence because the system relies on prosecutors to decide which pieces of inculpatory evidence should be presented to the jury.

Next, the jury-centric approach considers two risks related to the pretrial disclosure of favorable evidence. First, pretrial knowledge of the evidence that the government plans to present at trial may give defendants an unfair advantage that undermines the adversarial system and impedes the jury's fact-finding mission. The Supreme Court attempted to balance the prosecutor's role as adversary with her role as a servant of justice through the creation of the materiality standard.[171] As I believe that materiality as defined by the Court cannot apply before trial, my approach identifies the concrete harm that early disclosure poses to the adversarial system and asks prosecutors to weigh that harm against the costs of keeping favorable evidence from the jury given the particular facts of the case.[172]

Second, the disclosure of witness names may sometimes allow the defendant to thwart the presentation of evidence through witness coercion.[173] Although the government has no general duty to disclose the inculpatory evidence it will present at trial, such evidence, along with witness names, may be tied up with discoverable favorable evidence. Where disclosure of favorable evidence carries either of these two risks, the government can balance the importance of disclosing the favorable evidence with the risk that disclosure will let defendants

171 The Court has emphasized that *Brady* is a "limited departure" from the practice of treating the "adversary system as the primary means by which truth is uncovered." United States v. Bagley, 473 U.S. 667, 675 & n.6 (1985). Such a departure is necessary to avoid allowing the "adversary system of prosecution . . . to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth . . . ." Kyles v. Whitley, 514 U.S. 419, 439 (1995); *see also Bagley*, 473 U.S. at 675 n.6 ("[T]he prosecutor's role transcends that of an adversary . . . .").

172 In addition to the unfair advantage created by pretrial disclosure of the government's trial evidence, the adversarial system might also be harmed by requiring government lawyers to approach the investigation and compilation of evidence with too inquisitorial an eye. My approach recognizes that a prosecutor's primary duty is to develop evidence of the defendant's guilt and holds prosecutors only to a reasonableness standard in their efforts to discover favorable evidence within the government's possession. *See infra* note 174 and accompanying text.

173 *See, e.g.*, *Bagley*, 473 U.S. at 698–99 (Marshall, J., dissenting) (noting government argument against "disclosure of inculpatory evidence that might result in witness intimidation and manufactured rebuttal evidence"); Douglass, *supra* note 92, at 2156–58 (same); Roberts, *supra* note 157, at 1148–51 (summarizing common witness interference arguments).

subvert the jury system by gaining an unfair advantage or by coercing witnesses.

The jury-centric model must also incorporate the prosecutor's duty to seek out evidence in the possession of other government actors. *Brady* requires the prosecutor to disclose all of the evidence in the government's possession, whether she knows of it or not. Thus far, my analysis of the prosecutor's disclosure obligations has assumed a prosecutor who is consciously trying to decide whether to disclose evidence or to withhold it. Sometimes, however, evidence in the government's possession is left undisclosed simply because prosecutors are not aware of it.[174] Here, the prosecutor's duty is to allocate her investigative resources in a way that will put her in a position both to disclose all relevant favorable evidence to the defense and to present the strongest inculpatory evidence to the jury. Most of her time must be devoted toward ascertaining the defendant's probable guilt and then marshalling appropriate evidence. However, she should also be expected to spend a reasonable amount of time and effort searching her files and those of other government agents for evidence favorable to the defense.

In both the disclosure and search contexts, the constitutional obligation to disclose increases with the importance of the favorable evidence. By "importance," I mean something akin to the evidentiary relevance of a piece of information.[175] Relevance provides a useful touchstone because it shifts the inquiry away from the impact on the finding of guilt and toward the impact on a particular fact in question.

The jury-centric approach I have laid out so far only applies to the prosecutor's internal disclosure and search decisions. It does not provide a judicially enforceable standard. Rather, my approach is consistent with courts' continued use of materiality as the standard for reversing convictions for *Brady* violations. In my account, materiality incorporates two components: deference to the prosecutor's balancing decisions and constitutional harmless-error review. Given the Court's commitments to prosecutorial discretion and to limiting the reversal of convictions on *Brady* grounds, reasonableness is an appropriate measure for courts' deference to prosecutors' pretrial disclosure

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174 *See Kyles*, 514 U.S. at 437–38 (noting that prosecutor might fail to "learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police").

175 *See, e.g.*, FED. R. EVID. 401 (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

decisions.[176] Materiality, roughly speaking, corresponds to reasonableness plus harmlessness; as a general matter, only when there is a reasonable probability that the suppression of the evidence would affect the trial can courts be certain that the prosecutor's balancing efforts were unreasonable and that her error was not harmless. While this approach clashes with the case-by-case reasonableness determination most naturally suggested by the jury-centric approach, individualized determinations would be quite difficult to conduct in practice. Appellate review of the particular circumstances impacting a prosecutor's balancing and investigation decisions would be speculative and would require extensive fact-finding, which appellate courts are neither equipped nor inclined to carry out. Thus, materiality remains the most appropriate standard for appellate review of alleged *Brady* violations.

B. The Jury-Centric Brady *Approach in Practice*

In this Section, I apply the jury-centric approach to the Boyd case to show how it might work in practice. In Boyd's case, government lawyers argued before and after trial against the disclosure of several favorable witness statements solely because they were not important enough, in the government's judgment, to affect the verdict. Under the jury-centric approach, the prosecutor would instead weigh the importance of the favorable evidence contained in the witness statements against two costs of disclosure: those posed by disclosure of witness names and those presented by the early disclosure of inculpatory evidence that the government planned to present at trial.

In the case of Dante Boyd, prosecutors had real reason to be concerned about disclosing the names of potential witnesses. However, their concern does not necessarily mean that the evidence should have been kept from Boyd. Prosecutors have a duty to balance the risk of improper influence or intimidation against the importance of the favorable evidence. As part of this balance, prosecutors should be expected to consider disclosure methods that mitigate risks to witnesses. If prosecutors are concerned about improper influence, they may lock a witness into an initial story by soliciting a written or

[176] Deference to the prosecutor's discovery decisions might strike some advocates as perverse. However, the idea that delegated discretion should entail deference to reasonable executive determinations is a familiar one. *See, e.g.*, Turner v. Safley, 482 U.S. 78, 89 (1987) (holding that to ensure continued discretion of prison administrators, prison regulations that burden inmates' constitutional rights are valid if "reasonably related to legitimate penological interests"); Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (explaining that where statute is unclear, courts should defer to executive agency's permissible construction of statute, in part because statute's silence and ambiguity represents delegation of discretion).

recorded statement before disclosure. If prosecutors worry that a witness might face intimidation, they might make the witnesses available to the defense only at a supervised location.[177]

Disclosure of favorable evidence may also reveal evidence that the government plans to use against the defendant at trial. We may fear with Judge Learned Hand that a defendant fully apprised of the evidence to be presented against him gains an unfair advantage over the government.[178] In Boyd's case, it does not appear that revealing any of the witness statements would have involved the release of the inculpatory evidence that the government planned to present at trial.[179] Balancing these two costs of disclosure (revealing witness names and inculpatory evidence) with the relevance of the evidence, it appears that the government should have at least disclosed the statements of Witnesses 1, 2, and 3.

The second set of witnesses in Boyd's case, Witnesses 4 and 5, poses a slightly different inquiry because the prosecutors may or may not have been personally aware of their statements.[180] The jury-centric approach to *Brady* acknowledges that prosecutors may not actually make a disclosure decision about every piece of favorable evidence within the government's possession. Thus, the approach asks the prosecutor to allocate her time and investigative resources reasonably. For Boyd, the defense request for statements of witnesses who saw only three men suggests that a reasonable allocation of time and resources should have turned up the second set of statements.

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177 To be sure, even with these possible protective techniques, disclosing the names of citizens to those who, like Boyd, have been accused of violent crimes imposes costs on the integrity of the jury system. In assessing these costs, it is worth remembering that, absent special circumstances, the government may not keep the identities of its witnesses secret at trial. *See, e.g.*, United States v. Rangel, 534 F.2d 147, 148 (9th Cir. 1976) (approving trial court's refusal to require witness to give true name and home address where government made adequate showing that witness's life had been threatened). In Boyd's case, the identities of those witnesses whose testimony prosecutors hoped would lead to Boyd's lengthy prison stay were disclosed at or before trial, while the government withheld the names of the witnesses who made exculpatory statements to the police. *Compare* Boyd v. United States, 908 A.2d 39, 46–47 (D.C. 2006) (referring to government witnesses by name), *with id.* at 54–56 (recounting government's refusal to identify Witnesses 1–5).

178 *See supra* note 168. I do not want to suggest that prosecutors should not disclose inculpatory evidence to defendants before trial; my claim is only that such disclosures involve certain costs to the jury's fact-finding process.

179 After all, the government had already tried one of Boyd's codefendants using similar evidence in open court. *Boyd*, 908 A.2d at 45–47.

180 On appeal, government lawyers represented that they re-examined the prosecutor's trial file and discovered the existence of Witnesses 4 and 5. *Id.* at 56. While the prosecutor at trial should have been aware of these witness statements (and given their location in the trial file, very likely was aware), it is possible that the prosecutor did not have actual knowledge of the statements.

Under the jury-centric approach, the prosecutors in Boyd's case committed a *Brady* violation—they should have been aware of the statements of Witnesses 4 and 5 and should have disclosed the contents of all five witness statements to the defendant. However, the approach accepts that whether or not Boyd deserves a new trial depends upon the materiality of those statements. In so doing, the jury-centric approach remains compatible with the continued application of materiality review after conviction.

C. Enforcing the Jury-Centric Brady *Approach*

Boyd's case suggests the existence of at least three interlocking mechanisms to enforce prosecutors' *Brady* obligations under a jury-centric approach without the reversal of more convictions: trial court engagement, prosecutorial self-enforcement, and wide-angled review by courts and legislatures.

When parties submit *Brady* problems to trial courts, as they did in Boyd's case, the jury-centric approach provides a pretrial inquiry for determining disclosure obligations that is consistent with the procedural nature of due process. The judge, aided by prosecutorial proffers (ex parte or otherwise), must decide whether the prosecutor's balancing of her disclosure obligations is reasonable. Where the defendant does not know of the existence of a particular piece of favorable evidence, the jury-centric approach does not authorize the trial court to order the government to disclose all favorable evidence as did the courts discussed in Part II. Rather, trial courts following the jury-centric approach should apply the same sort of deference to prosecutorial allocation of search resources as an appellate court would.

The second mechanism is prosecutorial self-enforcement. In Part II, I explained why self-enforcement fails in the current system, regardless of prosecutorial good faith. The jury-centric approach, by contrast, provides an inquiry that neither forces the prosecutor to predict the future nor conditions disclosure on a self-undermining assessment of the likelihood of a jury's acquittal of the defendant. In Boyd's case, the prosecutor's pretrial arguments against disclosure included misjudgments about the evidence eventually presented at trial[181] and a self-serving assertion that Boyd could still be found guilty even if some witnesses saw only three men.[182] With the jury-

[181] *See Boyd*, 908 A.2d at 55 ("Nevertheless, the prosecutor resisted the *Brady* demand on the basis of a theory that proved incompatible with the evidence which the government later introduced.").

[182] As noted above, the government's theory was that witnesses who saw only three men "were not *necessarily* in a position to see all four people." *Id*. at 54 (internal quotation

centric approach, a prosecutor acting in good faith can more readily determine what evidence the Constitution requires her to disclose by balancing the relevance of the evidence against the risks of disclosure. Likewise, the approach allows prosecutors' offices to more effectively oversee and teach disclosure obligations by moving disclosure decisions away from abstract predictions.[183] Although it requires more disclosure than many offices currently provide, the jury-centric approach should not necessarily be expected to encounter significant bureaucratic resistance.[184] It does not take power over disclosure

marks omitted). The very form of this argument is indicative of the sort of mental gymnastics that the pretrial materiality analysis invites prosecutors to engage in. *See supra* Part II.B.2.

183 Indeed, the U.S. Attorney's Manual was recently revised to provide federal prosecutors with more specific guidance on the conduct of their disclosure duties. The Manual now instructs federal prosecutors to make broader disclosure than that required under *Brady*. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY MANUAL § 9-5.001-C (2006), *available at* http://www.usdoj.gov/usao/foia_reading_room/usam/title9/5mcrm.htm ("[T]his policy requires disclosure by prosecutors of information beyond that which is 'material' to guilt . . . ."); *see also* Hooper & Thorpe, *supra* note 101, at 7 (noting that provision was officially disseminated on October 19, 2006). All exculpatory "information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of [materiality,]" must be disclosed "reasonably promptly after it is discovered." U.S. DEP'T OF JUSTICE, *supra*, § 9-5.001-C.1, -D.1. Likewise, impeachment information that "casts a substantial doubt upon the accuracy of any evidence . . . the prosecutor intends to rely on to prove an element of any crime charged" will "*typically* be disclosed at a reasonable time before trial to allow the trial to proceed efficiently." *Id.* § 9-5.001-C.2, -D.2 (emphasis added). The Manual advises that delayed disclosure may be appropriate when necessary to accommodate witness safety or national security concerns. *Id.* § 9-5.001-D.2.

The recently added provisions are not only a welcome development, but also an instructive example of the ability of other governmental bodies to positively influence prosecutorial outlook (and hopefully performance). The revision appears to have been at least partly prompted by the Advisory Committee on Criminal Rules's consideration of amendments to Rule 16 that would require greater *Brady* disclosure. *See* ADVISORY COMM. ON CRIM. RULES, *supra* note 101, at 2 (noting that "the Department [of Justice] had worked to improve the proposed Manual revision since the April meeting" and that it had "explore[d] ways of addressing the [Committee's] concerns," and recording Committee member's question as to "whether the Manual revision was still being offered strictly as an alternative" to Rule 16 amendment); Hooper & Thorpe, *supra* note 101, at 6 ("DOJ has worked with the committee in drafting language for a proposed amendment while simultaneously undertaking efforts to revise the *U.S. Attorneys' Manual* . . . regarding the government's disclosure obligations that might serve as an alternative to an amendment to Rule 16."); *supra* note 101 (discussing Advisory Committee's proposed amendment). Court recognition of the jury-centric *Brady* theory might prompt similar reform efforts at the state and local levels. Moreover, by recognizing that such reforms are not simply wise but also constitutionally required, the jury-centric approach would empower courts to intervene to ensure that broader discovery is practiced as well as preached.

184 *Cf.* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 15–21, 30–36 (1991) (noting difficulties courts face in implementing significant social changes and suggesting necessary conditions for success); Note, *Judicial Intervention and Organization Theory: Changing Bureaucratic Behavior and Policy*, 89

decisions away from prosecutors; moreover, it explicitly incorporates an evaluation of the nonpersonal costs of disclosure that most concern prosecutors. However, to the extent that prosecutors are motivated by securing convictions, they may resist applying any approach that requires greater disclosure.[185]

Finally, where a prosecutor's office refuses to adhere to its disclosure obligations, courts and legislatures must intervene to implement more drastic changes.[186] Under the logic of the current system, no *Brady* violation goes without a remedy: Only material suppressions are unconstitutional and every material suppression requires the defendant be given a new trial. My approach, on the other hand, interprets the Constitution to require prosecutors to undertake a set of disclosure and search obligations but recognizes the practical difficulty of intrusive judicial review of the government's disclosure duties. Thus, my approach assumes that *Brady* violations will not be remedied where the prosecutor is unreasonable in balancing her search or disclosure obligations but a court finds the suppressed evidence to be nonmaterial. In these cases, a constitutional violation has occurred, but no remedy will be forthcoming.

Though my approach does not explicitly provide a remedy in such cases, it authorizes courts to take remedial action where prosecutors routinely fail to meet their disclosure duties. As I have argued above, in an individual case, courts lack the institutional capacity and will to

YALE L.J. 513, 519–25 (1980) (arguing that courts seeking to alter bureaucratic practices should pay close attention to internal and external forces that shape agency activity).

185 *See supra* notes 123–24 and accompanying text; *see also* ROSENBERG, *supra* note 184, at 322–23, 328–29 (explaining failure of exclusionary and *Miranda* rules to change police behavior as due in part to police resistance to changed procedures).

186 Of course, courts may lack the institutional will or competence to supervise such reform efforts. *See, e.g.*, MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 3–19 (1998) (arguing for legitimacy of judicial policymaking but noting its limits in rectifying many serious problems in prison systems); R. SHEP MELNICK, REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT 343–44 (1983) (assessing mixed results of D.C. Circuit and other courts' intervention into Environmental Protection Agency's enforcement of Clean Air Act); ROSENBERG, *supra* note 184, at 306–17 (noting failure of courts to achieve reform goals across variety of criminal law areas); Stuntz, *supra* note 35, at 823–31 (arguing that centrally commanded conduct rules governing police and prosecutor conduct have made criminal procedure less effective and less fair). Likewise, legislators may lack the interest or desire to expend political capital on behalf of the accused. *See, e.g.*, Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 751–54 (2005) (noting psychological biases and institutional incentives for politicians to favor harsh sentences for criminal defendants); Stuntz, *supra* note 35, at 785 & n.15 (collecting claims that "American politics is too punitive, discriminatory, and unconcerned with the interests of the criminal justice system's targets").

assess the particular circumstances of a prosecutor's nondisclosure.[187] However, over time, trial judges are exceedingly well-situated to recognize a pattern of constitutionally impermissible nondisclosure by the prosecutors who practice in their courtrooms every day.[188] When courts recognize consistent constitutional violations, they may order appropriate remedial action themselves.[189]

On its own, though, the jury-centric approach goes no further than this: It helps relevant actors to identify problematic suppression practices and to label them as constitutional violations. It leaves the hard work of compiling disclosure records, fashioning direct remedies, and creating incentives for legislative involvement to trial courts, public defenders, ethics boards, and other interested policy actors.[190]

Thus, the jury-centric approach shares the current system's skepticism of judicial intervention in prosecutors' pretrial disclosure decisions. Unlike the current system, however, the jury-centric approach does not allow skepticism about enforcement mechanisms to prevent it from clearly identifying constitutional standards. For Dante Boyd, the approach would have required disclosure of the five witnesses. More importantly, it would have clearly communicated to prosecutors that their disclosure discretion could not be used for strategic purposes—that their duty to do justice did not allow them to keep witnesses from the defendant, and by extension the jury, in order to increase the likelihood of a conviction. If accompanied by other seemingly purposeful nondisclosures, the suppression of evidence in Boyd's case would have alerted courts that prosecutors were likely

187 *See supra* note 176 and accompanying text (discussing judicial deference to prosecutor's pretrial discovery decisions).

188 *See* Stuntz, *supra* note 35, at 825 ("Representatives of the same police force, district attorney's office, and public defender's office (often the same individual cops, prosecutors, and defense lawyers) appear repeatedly before any judge who tries criminal cases. Trial judges are therefore well positioned to see patterns of good and bad conduct by those institutions.").

189 Although the type of remedial action should depend on local practices and the particular pattern of violations, the jury-centric approach does not authorize courts to require that prosecutors disclose all favorable evidence to the defense, as the district courts discussed in Part II did. Ordering such a remedy would overenforce the *Brady* right as I have defined it here.

190 *See generally* Stuntz, *supra* note 35 (arguing that courts and other actors should employ injunctions, penalty defaults, and other nonindividual remedies based on evidence of consistent bad behavior by police forces and prosecutor's offices). One of the most difficult challenges for any system-wide reform of disclosure practices is integrating plea-bargaining practice. *See* Bibas, *supra* note 116, at 149–51 (noting that ninety-five percent of adjudicated cases lead to guilty pleas and explaining *Brady*'s limited application to plea bargaining).

failing to fulfill their constitutionally imposed disclosure obligations.[191]

CONCLUSION

The Supreme Court's *Brady* jurisprudence has been driven by a fear of hamstringing prosecutorial discretion and undermining the adversarial system. The cost of giving into that fear is a pretrial materiality inquiry that fails both in theory and practice. The jury-centric approach that I have proposed provides a coherent explanation of the constitutional requirement of disclosure practices before trial and appellate review after trial. This approach reinforces *Brady*'s commitment to due process by interpreting it in light of the right to a trial by jury, yet remains true to the Supreme Court's core *Brady* commitments. Consequently, the jury-centric approach is compatible with judicial deference to prosecutors' good-faith disclosure decisions, as well as with forceful interventions to remedy consistently poor disclosure practice.

[191] The appropriate response to this failing would depend on the extent of the problem in the particular district.