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BRADY VIOLATIONS: AN IN-DEPTH LOOK AT "HIGHER STANDARD" SANCTIONS FOR A HIGH-STANDARD PROFESSION

*David E. Singleton**

"Great power involves great responsibility."

—Franklin D. Roosevelt

INTRODUCTION

Discovery is the pre-trial process through which each party seeks to obtain evidence from the opposing party or parties to assess witnesses, documents, and exhibits the other side plans to use during trial. Essentially, it aids in preventing surprises at trial. In a criminal trial, the discovery process is more stringent than in a civil case.[1] A prosecutor has an affirmative duty to disclose material information that is potentially exculpatory.[2] Otherwise, he or she runs the risk of violating the rule established by the United States Supreme Court in *Brady v. Maryland*.[3] The *Brady* decision came down after several other cases began alluding to the idea that prosecutors could no longer withhold evidence as part of a trial strategy. It established the now well-known principle that prosecutors are required to disclose all exculpatory evidence to the defense. Thus, *Brady* is a rule based on fundamental fairness stemming from the Due Process Clause of the Fifth and Fourteenth

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[1] *See, e.g.*, Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1968).

[2] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[3] *Id.*

Amendments, and also helps avert potential violation of the protections that "constitute the fundamental right to a fair trial under the Sixth Amendment."[4]

Specifically, a prosecutor violates *Brady* when he or she fails to disclose exculpatory or impeaching information material to a defendant's case.[5] While evidentiary disclosures have been a staple of criminal law since the beginning of the American legal system, American courts adopted a higher standard for prosecutors only about sixty years ago.[6] The United States Supreme Court has couched the protections of *Brady* within the Due Process Clause of the Fourteenth Amendment.[7] Because discovery is part of the defendant's fundamental right, a violation can occur "when the rigid application of such evidentiary rules precludes the defense from presenting probative exculpatory evidence."[8]

There are two categories of violations: intentional and inadvertent. This article, however, examines only unintentional violations resulting from lack of education, lack of experience, or neglect. More specifically, this article proposes a system of sanctions for prosecutors in light of the higher standard discussed in *Brady v. Maryland* and later statutory mandates.[9]

The United States Supreme Court never expressed a set range of sanctions for prosecutors who fail to comply with required *Brady* disclosure.[10] From a practical standpoint, once a trial is completed, the only useful remedy a court has is to order a new trial with the previously withheld evidence available for consideration.[11] With pre-trial violations, however, the court may order the prosecutor to reveal

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[4] Elizabeth Napier-Dewar, *A Fair Trial Remedy for* Brady *Violations*, 115 YALE L.J. 1450, 1450 (2006).

[5] *Id.*

[6] *Brady*, 373 U.S. at 87.

[7] Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 CRIM. L. & CRIMINOLOGY 415, 466 (2010) [hereinafter Jones].

[8] *Id.*

[9] *See infra* note 200 and accompanying text.

[10] Jones, *supra* note 7, at 443; Thomas F. Liotti, *The Uneven Playing Field, Part III, or What's on the Discovery Channel*, 77 ST. JOHN'S L. REV. 69, 74 (2003) (discussing the courts' lack of meaningful remedial action, specifically, the courts' unwillingness to dismiss charges or provide for any monetary or disciplinary sanctions against prosecutors. The article further argues that these types of remedial actions should be permitted under the current laws because current remedies simply do not do enough to prevent later wrongdoing and violations); *see also* Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 685 (2006) [hereinafter Gershman 2006] (discussing the failed *Brady* doctrine and how the courts continuously fail to enforce violations when they are discovered).

[11] Jones, *supra* note 7, at 443; Thomas F. Liotti, *The Uneven Playing Field, Part III, or What's on the Discovery Channel*, 77 ST. JOHN'S L. REV. 69, 74 (2003); Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 685 (2006) [hereinafter Gershman 2006].

the evidence, grant a continuance to give the defense a fair shot at using the exculpatory evidence, or even craft "strongly worded jury instruction[s]."[12]

Simply ordering the prosecutor to disclose the *Brady* evidence constitutes more of a directive than a sanction because, in this scenario, the prosecutor does not have to take any action beyond that already constitutionally mandated. Under this scheme, the consequences of a prosecutor's noncompliance with *Brady* mirror those of compliance—disclosure of favorable evidence to the defense. Therefore, simply compelling disclosure as a *Brady* sanction does not present a potent deterrent to prosecutors. To encourage compliance with *Brady* disclosure requirements and promote efficient use of time and resources in the criminal justice system, courts must do more than grant new trials and continuances to address *Brady* misconduct.

While some argue that a "Fair Trial Remedy" would prevent prosecutors from abusing their authority and ensure a fair trial for the defendant, the problem has become far too prevalent.[13] Typically, if a defendant can identify a *Brady* violation early on in the trial process, the court could instruct the jury on *Brady* law and further permit the defendant to argue that the violation raises reasonable doubt.[14] This, however, is not enough. While there is certainly no issue with giving the defendant a meaningful opportunity to address the violation, the ultimate focus is best placed on preventative and educational measures to deter prosecutors from committing these violations—mistakes.

Brady violations can be intentional—arguably malicious.[15] More often though, the violations are accidental: the prosecutor overlooks some minutiae of the case.[16] Either way, prosecutors must be put on notice and held accountable for their actions. Thus, something akin to criminal sanction would constitute an appropriate deterrent because, in effect, such a sanction would raise the stakes for prosecutors throughout the justice system. While the standard remedy for a *Brady* violation is a new trial or a continuance, courts should "not follow the general rule if the remedy will likely result in further prejudice to the defense."[17]

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[12] Jones, *supra* note 7, at 421.

[13] Elizabeth Napier-Dewar, *A Fair Trial Remedy for* Brady *Violations*, 115 YALE L.J. 1450 (2006).

[14] *Id.*

[15] U.S. v. Bohl, 25 F.3d 904, 910, 913–14 (10th Cir. 1994).

[16] William S. Sessions and Robert M. Cary, *Putting Justice Above Victory*, WASH. TIMES (Oct. 13, 2013), http://www.washingtontimes.com/news/2013/oct/13/sessions-and-cary-putting-justice-above-victory/; Atina Roberts, *Hunt Trial Clarified*, MOBERLY MONITOR-INDEX (Oct. 16, 2014), http://www.moberlymonitor.com/article/20141016/News/141019263.

[17] *See* United States v. Wilson, 720 F. Supp. 2d 51, 63 n.4 (D.C. Cir. 2010) (noting mistrial is generally the remedy for a *Brady* violation). *See also* U.S. v. Chapman, 524 F.3d 1073, 1087 (9th Cir. 2008) (refusing to grant mistrial). "[The desired] remedy would advantage the government, probably allowing it to salvage what the district court viewed as a poorly conducted prosecution." *Id.*

This article advocates stiffer penalties for *Brady* violations than are currently in effect. Although every state has adopted professional rules of conduct and rules of criminal procedure, violations are excessive.[18] However, disciplinary charges and meaningful sanctions are rarely applied.[19] While the courts' and advocates' goal is to prohibit *Brady* violations, thus far they have failed to meet that goal—largely due to a lack of enforcement.[20] At present, existing incentives are insufficient to induce abstention from *Brady*-type misconduct.[21]

I. BACKGROUND

A. History of Brady *Violations*

In *Brady v. Maryland*, the United States Supreme Court first held "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[22] At its core, a *Brady* violation is a violation of the Due Process Clause of the Fourteenth Amendment.[23] As a result, the Supreme Court now imposes broad disclosure requirements on prosecutors.[24]

Both the facts and the law resulted in curious decisions in *Brady v. Maryland*.[25] Brady openly admitted to his participation in the murder and the prosecution presented overwhelming evidence of his guilt.[26] At trial, he further admitted his complicity in the planning and commission of the crime, but denied having personally committed the killing and claimed his co-defendant committed the killing, thereby fulfilling the legal requirement of the felony murder rule.[27] Defense counsel also admitted his client's guilt at trial, and told the jury they could find him guilty, but they should forego the death penalty due to his lack of culpability.[28] Ultimately, a Maryland jury convicted Brady of first-degree murder.[29]

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[18] Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger,* 65 N.C. L. REV. 693, 716 (1987).

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[23] *Id.* at 86.

[24] BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT 213 (7th ed. 2006).

[25] Gershman 2006, *supra* note 10, at 692 (detailing the intricacies of the facts of the *Brady* case and explaining the oddities in the case that led to the Maryland Court of Appeals ultimate decision to remand on the sole issue of punishment).

[26] *Id.*

[27] *Brady*, 373 U.S. at 84; *see also* Rosen, *supra* note 18, at 699.

[28] *Brady*, 373 U.S. at 84.

[29] *Id.*

Before trial, counsel asked to see all of Brady's co-defendants' statements to police.[30] The prosecutors provided most of the documents and records, but withheld one critical piece:[31] a statement revealing that one of Brady's co-defendants admitted to committing the murder.[32] However, the prosecutor's failure to disclose the isolated statement made by Brady's accomplice was arguably inadvertent and likely had only marginal relevance to his punishment.[33] After the trial, defense counsel raised the issue, demanding a new trial, and the trial court denied the motion.[34]

After being convicted and sentenced, a lower appeals court affirmed the trial court's decision.[35] Yet again, Brady was unsuccessful. He submitted a motion to the trial court to set aside the judgment.[36] However, the trial judge denied the relief based on his belief that the evidence would have been inadmissible anyway.[37] The Maryland Court of Appeals disagreed and held that the prosecutor's suppression of the accomplice statement violated Brady's right to due process, and the court remanded the case solely on the issue of punishment, leaving the issue of guilt out.[38] The court further stated, "withholding of material evidence, even 'without guile,' was a denial of due process and that there were valid theories on which the confession might have been admissible in Brady's defense."[39]

The United States Supreme Court granted certiorari to hear Brady's claims that the suppression of his accomplice's confession and ultimate denial of constitutional rights destroyed the entire trial process.[40] The Court affirmed the Maryland Court of Appeals decision and held that suppression of evidence favorable to the accused was itself sufficient to amount to a denial of due process, requiring a new trial.[41] However, the Court stood by the appellate court's decision to remand only on the issue of punishment, rather than guilt or innocence.[42]

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[30] *Id.*

[31] *Id.* (finding that the prosecution had withheld Brady's co-defendant's extrajudicial statements admitting to committing the homicide. This piece of evidence did not become available to the defense until after Brady was tried, convicted, and sentenced).

[32] *Id.*

[33] Gershman 2006, *supra* note 10, at 692.

[34] *Brady*, 373 U.S. at 84.

[35] Boblit v. State, 154 A.2d 434, 435 (Md. 1959).

[36] U.S. v. Agurs, 427 U.S. 97, 105 (1976).

[37] *Id.*

[38] Gershman 2006, *supra* note 10, at 692.

[39] *Agurs*, 427 U.S. at 105.

[40] *Id.*

[41] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[42] *Agurs*, 427 U.S. at 104.

Moreover, the Court made special note that defense counsel specifically requested the evidence and it met the materiality standard.[43]

In *U.S. v. Agurs*, the United States Supreme Court revisited the *Brady* standard, stating, "there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor."[44] The duty only applies if the subject matter of such a request is "material."[45] In addition, "if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge."[46]

B. Three Types of Brady *Violations*

In *Agurs*, the United States Supreme Court further defined the scope of *Brady* violations.[47] The Court discussed three types of violations that fell within the scope of *Brady*: (1) perjured testimony; (2) specific requests; and (3) general requests.[48] First, the Court described undisclosed exculpatory evidence demonstrating the prosecution's case included perjured testimony, and the prosecution knew or should have known of the perjury.[49] This type of violation, the Court stated, is fundamentally unfair and violates due process.[50] Thus, a conviction based on knowingly perjured testimony must be set aside if there is any reasonable likelihood the testimony could have affected the judgment of the jury.[51] Indeed, this type of violation "involve[s] a corruption of the truth-seeking function of the trial process."[52]

Second are cases in which the prosecutor receives a specific request from the defense for exculpatory evidence, but fails to turn it over.[53] Specific requests from the defense are generally pre-trial requests for certain pieces of evidence—as

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[43] *Id.*

[44] *Id.* at 106.

[45] *Id.*

[46] *Id.*

[47] *Agurs*, 427 U.S. at 103; Rosen, *supra* note 18, at 707 (discussing the Court's mandate to lower courts in dealing with these issues as they arise. Additionally, because these three categories arose out of the *Agurs* opinion, the author further explains the interplay between the different types of requests and the issue of materiality).

[48] *Agurs*, 427 U.S. at 103.

[49] *Id.* (discussing the type of prosecutorial misconduct from Mooney v. Holohan, 294 U.S. 103 (1935)).

[50] *Id.*

[51] Rosen, *supra* note 18, at 707.

[52] *Agurs*, 427 U.S. at 104.

[53] Rosen, *supra* note 18, at 707.

illustrated in *Brady* itself.[54] These requests give the prosecutor notice of exactly which evidence the defense attorney seeks.[55] However, the evidence the defense seeks must also be material, meaning it must affect the outcome of the trial.[56] Once the prosecutor receives the request, he or she determines the materiality of the requested evidence.[57] If it appears the requested evidence is not material, the prosecutor may bring the issue to the judge.[58] In these cases the court should address all requests, even though not every request will be material to the issue of guilt.[59] These type of violations based on specific requests are "seldom, if ever, excusable."[60]

Finally, a defense attorney may issue what the courts have called a general request.[61] This occurs when the defense attorney asks for "all *Brady* material" or for "anything exculpatory."[62] Defense attorneys' general requests, however, fail to give adequate notice to the prosecution of the specific evidence requested.[63] In many cases exculpatory information in the possession of the prosecutor may be unknown to defense counsel, and a general request is the only tool left to him or her.[64] Thus, a prosecutor's affirmative duty to turn over all material evidence upon a general request comes from the exculpatory nature of the evidence.[65] When violations of these requests occur, courts should grant defendants new trials if the suppressed evidence "creates a reasonable doubt that did not otherwise exist."[66]

The common thread in all three situations is the Court's implied requirement of the defense's knowledge, or at least assumption, of exculpatory evidence withheld by the prosecution.[67] The Court's requirement of the defendant's actual knowledge should theoretically create an "appropriate adversarial balance that places reasonable obligations on a defendant and enforces a prosecutor's duty to seek justice."[68] This standard is similar to a knew or should-have-known

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[54] *Agurs*, 427 U.S. at 104.

[55] *Id.*

[56] *Id.* at 106; Rosen, *supra* note 18, at 707.

[57] *Agurs*, 427 U.S. at 106.

[58] *Id.*

[59] *Id.*

[60] Rosen, *supra* note 18, at 707.

[61] *Agurs*, 427 U.S. at 107.

[62] *Id.* at 106.

[63] *Id.* at 107.

[64] *Id.* at 106.

[65] *Id.*

[66] Rosen, *supra* note 18, at 707.

[67] Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 557 (2007) [hereinafter Gershman 2007].

[68] *Id.*

requirement on the defense, calling for "reasonable diligence."[69] Despite a duty on both parties, imposition of a knowledge requirement on the defense creates an imbalance in favor of the prosecutor.[70] This imbalance allows the prosecutor to engage in "gamesmanship" and argue the defense did not exercise reasonable diligence in an attempt to discover all evidence.[71] Nevertheless, the *Agurs* Court stated "if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made."[72]

The Court clarified this affirmative duty in *Kyles v. Whitley*: "[T]he prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation and is of course most prominently associated with this Court's decision in *Brady v. Maryland* . . . ."[73] This is the essence of due process of law for the defendant.

The Model Rules of Professional Conduct further bolster this affirmative duty.[74] "It became clear that a defendant's failure to request favorable evidence did not leave the Government free of all obligation."[75] In the end, "regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government…"[76]

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[69] *Id.* However, Gershman also mentioned the potential for the defense to also abuse this so-called balanced approach. For example, a defendant with actual knowledge of suppressed evidence could possibly wait to expose the violation and consequently "sandbag" the prosecutor. This possibility permits the defense to "take a free ride" throughout the trial and if the outcome is negative for the defense, it can take a second shot at a trial.

[70] *Id.*

[71] *Id.* Gershman noted that this "gamesmanship" has various consequences. First, when the prosecutor shifts the focus away from his or her own duty to find suppressed evidence to the defendant's duty to find it, the prosecutor brings disrepute to himself and disrespect to the profession. Second, this requirement forces the courts to scrutinize a defendant's diligence and care in searching out hidden evidence.

[72] U.S. v. Agurs, 427 U.S. 97, 107 (1976).

[73] Kyles v. Whitley, 514 U.S. 419, 432 (1985).

[74] MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (1983). The rule states:

> [The prosecutor in a criminal case shall:] 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, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal…" The prosecutor in a criminal case shall 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, and, in connection with sentencing, disclose to the tribunal all unprivileged mitigating information known to the prosecutor.

[75] *Kyles*, 514 U.S. at 433.

[76] *Id.*

C. *The* Bagley *Materiality Requirement*

As discussed above, part of the *Brady* standard involves a determination of whether the evidence is material.[77] However, the *Brady* Court left the issue somewhat undefined. In *U.S. v. Bagley*, the United States Supreme Court articulated the standard of materiality in *Brady* violation cases.[78] Specifically, the Court focused on cases where the prosecutor's nondisclosure violates a defendant's due process and fair trial rights.[79] Evidence is material only in instances where there exists a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[80] As a starting point, the defendant bears the burden of proving that the result at trial would have been different had the suppressed evidence been included.[81]

The Court further clarified this standard in *Kyles v. Whitley*, stating, "the question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Furthermore, the Court laid out a three-factor test to determine the materiality of a piece of evidence: (1) the importance of the witness; (2) the significance of the evidence; and (3) the strength of prosecution's case.[82]

To avoid the inevitable distraction of trying to figure out *why* the prosecutor may not have revealed evidence, the Court significantly departed from those cases where the prosecutor intentionally withheld evidence.[83] Instead, it measured the *effect* of prosecutorial misconduct (whether intentional or inadvertent) on the outcome of the trial and determined whether the failure to disclose exculpatory evidence made the proceeding fundamentally unfair.[84]

However, what the courts failed to address in crafting the materiality requirement is what metrics a prosecutor must use to decide what is actually material to a particular case and its facts. Generally, a prosecutor's estimation of materiality does not rest on whether the evidence will be "favorable, helpful, or advantageous to the defense; rather, the only question is whether the [evidence] will be viewed by a court after the trial has been completed as being sufficiently important that it is 'reasonably probable' that with the evidence the defendant

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[77] *See supra* notes 57–60 and accompanying text.

[78] U.S. v. Bagley, 473 U.S. 667, 670 (1985).

[79] *Id.*

[80] *Id.* at 680.

[81] *Id.* at 699.

[82] *Id.*

[83] Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L. REV. 713, 761 (1999).

[84] *Id.*

would not have been found guilty."[85] It is not a prosecutor's prerogative in making a materiality determination to evaluate the credibility of a piece of evidence because "to allow otherwise would be to appoint the fox as henhouse guard."[86] A prosecutor may not unilaterally conclude that evidence is cumulative or redundant.[87] Thus, an unintentional *Brady* violation can easily stem from an erroneous assessment of the materiality requirement.

II. STATUTORY LAW

A. Federal Rules of Criminal Procedure

Similar to the case law of *Brady* and its progeny, the Federal Rules of Criminal Procedure (hereinafter F.R.Cr.P.) require disclosure of requested evidence.[88] Specifically, the F.R.Cr.P. require the prosecution to disclose, upon the defense's request, the defendant's oral statements, defendant's written or recorded statements, defendant's prior record, documents and objects, reports of examinations and tests, and written summaries of any expert witnesses.[89] Nevertheless, the F.R.Cr.P. prohibit requests for disclosure of certain things.[90]

Conversely, the F.R.Cr.P. require certain disclosures from the defendant.[91] Generally, this process becomes a *quid pro quo* exchange. If the defendant requests disclosure of documents, then the defendant must allow the Government to inspect the same types of items within defendant's control that he intends to use in his case-in-chief.[92] Similarly, if the defendant intends to use reports and examinations within the defendant's possession, the same disclosure is required

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[85] Gershman 2007, *supra* note 67, at 549.

[86] DiSimone v. Phillips, 461 F.3d 181, 195 (2d Cir. 2006); *see also* Kyles v. Whitley, 514 U.S. 419, 440 (1985) ("[T[he criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations"); United States v. Alvarez, 86 F.3d 901, 905 (9th Cir. 1996) ("It is not the role of the prosecutor to decide that facially exculpatory evidence need not be turned over because the prosecutor thinks the information is false.").

[87] *See* Monroe v. Angelone, 323 F.3d 286, 301 (4th Cir. 2003) ("[T]he prosecution has a duty to disclose material even if it may seem redundant.").

[88] FED. R. CRIM. P. 16.

[89] FED. R. CRIM. P. 16(a)(1)(A)–(G).

[90] FED. R. CRIM. P. 16(a)(2). The rule states as follows:

> Information Not Subject to Disclosure. Except as permitted by Rule 16(a)(1)(A)-(D), (F), and (G), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

Id.

[91] FED. R. CRIM. P. 16(b)(1).

[92] FED. R. CRIM. P. 16(b)(1)(A)(i–ii).

of the Government.[93] However, this equal disclosure is limited. The F.R.Cr.P. also shield certain information from disclosure.[94] In fact, the rules prohibit disclosure of reports, memoranda, or other documents made by the defendant or attorney during the case's investigation.[95]

Additionally, the F.R.Cr.P. impose upon each party a duty to continue to disclose discovered evidence or material to the other party throughout the proceedings.[96] The rule also requires prompt disclosure to prevent any undue delays and possible gamesmanship.[97] This continuing duty, however, is only required for evidence subject to discovery or inspection and the other party previously requested or if the court ordered its production.[98]

The F.R.Cr.P. also provide a mechanism to regulate discovery.[99] In the event a party fails to comply with the requirements of the F.R.Cr.P., a court may respond in a number of ways, including granting specific performance, granting a continuance, prohibiting that party from introducing undisclosed evidence, or entering any other order that is just under the circumstances.[100]

However, the F.R.Cr.P. lack a cogent manner of dealing with prosecutors once a violation has occurred. Moreover, the statutory provisions and requirements lack a mechanism to remedy the issue. It is true that this is not necessarily the function of the F.R.Cr.P.; however, with the rise of *Brady* violations, some form of penalty process needs to be memorialized and then followed.

III. NOTABLE EXAMPLES OF *BRADY* VIOLATIONS

The following two cases highlight the danger *Brady* violations present to the legal system. Though many *Brady* violations occur every year, this article focuses on only two particularly illustrative examples of prosecutors acting outside the bounds of the profession.[101]

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[93] FED. R. CRIM. P. 16(b)(1)(B)(i–ii).

[94] FED. R. CRIM. P. 16(b)(2).

[95] *Id.*

[96] FED. R. CRIM. P. 16(c).

[97] *Id.*

[98] *Id.*

[99] FED. R. CRIM. P. 16(d).

[100] FED. R. CRIM. P. 16(d)(2)(A)–(D).

[101] *See, e.g.*, *The Ted Stevens Scandal*, WALL ST. J., Apr. 2, 2009, at A18; *In re* Brophy, 442 N.Y.S.2d 818 (N.Y. App. Div. 3d Dept. 1981); Patrick Malone, *Tim Masters: State Should Pay for Unjust Convictions*, COLORADOAN (Mar. 7, 2013), http://www.coloradoan.com/article/20130307/NEWS01/303070048; *see also* Joaquin Sapien and Sergio Hernandez, *Who Polices Prosecutors Who Abuse Their Authority? Usually Nobody*, PROPUBLICA JOURNALISM IN THE PUB. INTEREST (April 3, 2013), http://www.propublica.org/article/who-polices-prosecutors-who-abuse-their-authority-

A. State v. Michael Morton

The State of Texas recently prosecuted former Williamson County District Attorney Ken Anderson (later a Superior Court Judge) for violating state law and acting in contempt of court.[102] When trying Michael Morton's case as a prosecutor, Anderson possessed evidence that might have cleared the defendant, Michael Morton, including statements from the only eyewitness to the crime indicating that Morton was not the culprit.[103] Anderson lied to a trial judge in order to win a conviction in the murder case of *State v. Morton*.[104] Just prior to trial, the trial judge asked Anderson whether he was aware of any further exculpatory evidence, and Anderson replied in the negative.[105] In fact, Anderson was aware of a police interview transcript that showed that the defendant's three-year-old son had witnessed the murder, and that the defendant was not home when the murder occurred.[106] Additionally, Anderson knew of reports by neighbors that a man had parked a green van near the defendant's home and had several times walked into the wooded area behind the defendant's house, which would have corroborated the defendant's theory the murder was the result of a burglary.[107] The Texas court exonerated Morton twenty-seven years later.[108] Anderson faced charges of criminal contempt, tampering with or fabricating physical evidence, and tampering with government records.[109] After the court convicted Anderson, he faced a fine of $500 and six months in jail on the charge of criminal contempt.[110]

Ultimately, the trial court held Anderson in contempt of court.[111] Anderson pled no contest to the charges as part of a plea bargain.[112] The court sentenced

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usually-nobody. The authors of the study examined cases from 2001 to 2011 in state and federal courts, identifying those cases that included serious enough misconduct to overturn a defendant's conviction. In total, the journalists identified thirty cases meeting those criteria. Additionally, in more than fifty cases the appeals courts held there was harmless error.

[102] Mark Godsey, *For the First Time Ever, a Prosecutor will Go to Jail for Wrongfully Convicting an Innocent Man,* HUFFINGTON POST (Nov. 8, 2013), http://www.huffingtonpost.com/mark-godsey/for-the-first-time-ever-a_b_4221000.html.

[103] *Id.*; *In re* Honorable Ken Anderson, No. 12-0420-K26 (D.Williamson Tex. Apr. 19, 2013).

[104] Godsey, *supra* note 102.

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*; *see* TEX. GOV'T CODE ANN. § 21.002(a) (2003); TEX. PENAL CODE ANN. §§ 37.09–37.10 (2013).

[110] TEX. GOV'T CODE ANN. § 21.002(b) (2003).

[111] Chuck Lindell, *Ken Anderson to Serve 10 Days in Jail*, STATESMAN (Nov. 8, 2013) http://www.statesman.com/news/news/ken-anderson-to-serve-10-days-in-jail/nbmsH/.

[112] *Id.*

Anderson to ten days in county jail.[113] Additionally, the court fined him $500 and ordered him to perform 500 hours of community service.[114] As part of an elaborate agreement with the State, he agreed to give up his license to practice law in exchange for the State dropping charges of evidence tampering.[115]

B. Michael Nifong

The next case of prosecutorial misconduct this article will explore involves the 2006 prosecution of three Duke University lacrosse players for rape.[116] In that case, Michael Nifong prosecuted the players, but withheld exculpatory DNA evidence that might have cleared the players' names of all criminal charges.[117] The North Carolina State Bar Disciplinary Panel (hereinafter Panel) charged Nifong with several counts of prosecutorial misconduct, including withholding a complete report setting forth the results of all tests or examinations.[118] In addition, Nifong lied to the trial judge, and later the state bar investigators, about the evidence withheld.[119]

In total, Nifong violated more than a dozen ethics rules during the prosecution of the now-exonerated lacrosse players.[120] The chairman of the Panel speculated that Nifong's conduct was politically motivated.[121] Nifong's continued disregard of the law was due to his "hope" that the facts were as he imagined they were.[122] The Panel considered several aggravating factors, including: "a. dishonest or selfish motive; b. a pattern of misconduct; c. multiple offenses; d. refusal to acknowledge wrongful nature of conduct in connection with his handling of the DNA evidence; e. vulnerability of the victims. . . ; and f. substantial experience in the practice of law."[123] The Panel's discussion of the aggravating factors seemed to focus heavily on Nifong's experience and relation to the profession and practice of law, specifically, how his conduct resulted in "significant actual harm to the legal

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[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Duke Lacrosse Prosecutor Disbarred*, CNN (June 17, 2007), http://www.cnn.com/2007/LAW/06/16/duke.lacrosse/.

[117] *Id.*

[118] N.C. State Bar v. Nifong, Amended Findings of Fact, Conclusions of Law and Order of Discipline, 06 DHC 35 (2007), *available at* http://www.ncbar.com/discipline/printorder.asp?id=505.

[119] *Duke Lacrosse*, *supra* note 116.

[120] *Id.*

[121] N.C. State Bar, 06 DHC 35.

[122] *Id.*

[123] *Id.*

profession" and giving prosecutors in particular the reputation that they "cannot be trusted and can be expected to lie to the court and to opposing counsel."[124] Ultimately, the Panel disbarred Nifong for his conduct.[125]

The chairman of the Panel stated "[this matter] has been a fiasco for a number of people, starting with the defendants, and moving out from there to the justice system in general."[126] The chairman mentioned the immense power a prosecutor has in any case: "[T]he prosecutor, merely by asserting a charge against defendants, already has a leg up."[127] Moreover, "the justice system only works if the people who participate in it are people of good faith and respect those rights."[128]

IV. JURISDICTIONAL EXPERIMENTS

A. Department of Justice

The Department of Justice (DOJ) established the Office of Professional Responsibility (OPR) by order of the Attorney General dated December 9, 1975.[129] The OPR ensures that DOJ employees perform their duties in accordance with the high professional standards expected of the nation's principal law enforcement agency.[130] To ensure this high level of performance, OPR reviews DOJ attorneys' exercise of their authority to investigate, litigate, or provide legal assistance.[131] Moreover, it acts as the disciplinary body when the investigations discover misconduct.[132]

The DOJ may be the best example of an organization that has done a good job of addressing the real problem in *Brady* violations—making a more honest prosecutor.[133] In *U.S. v. Jones*, the United States Supreme Court held that the usual sanctions against prosecutors were "not necessary or appropriate" in all cases.[134] Among the reasons given, the Court noted that in the aftermath of a

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[124] *Id.*

[125] *Duke Lacrosse*, *supra* note 116.

[126] N.C. State Bar, 06 DHC 35.

[127] *Id.*

[128] *Id.*

[129] Office of Professional Responsibility, 28 C.F.R. § 0.39 (2006). "The objective of OPR is to ensure that the DOJ attorneys continue to perform their duties in accordance with the high professional standards expected of the Nation's principal law enforcement agency." U.S. DEP'T OF JUSTICE, OFFICE OF PROFESSIONAL RESPONSIBILITY, *OPR Objectives*, http://www.justice.gov/opr/ (last visited Feb. 5, 2015).

[130] Functions, 28 C.F.R. § 0.39(a) (2006).

[131] *Id.*

[132] *Id.*

[133] United States v. Jones, 620 F. Supp. 2d 163 (D. Mass. 2009).

[134] *See id.*

violation, the prosecutor in that case was "contrite and furthered her education on the subject of discovery obligations, and that the United States Attorneys' Office also implemented significant new initiatives."[135]

Furthermore, the DOJ dutifully enforces the McDade-Murtha Amendment.[136] This law requires federal prosecutors to follow relevant state laws and ethical standards in effect where they conduct legal activities.[137]

The DOJ created a special manual specifically for prosecutors dealing with criminal discovery.[138] Additionally, federal regulations state and require that "[e]ach employee [of the federal government] has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain."[139] While not specifically directed at prosecutors, the regulation applies to *all* federal employees, and it requires that "[e]mployees shall put forth honest effort in the performance of their duties."[140]

B. States' Approach to Brady *Violations*

The most common remedy for a *Brady* violation is a new trial where the defense can introduce previously withheld evidence.[141] However, some states have sought to empower their disciplinary bodies and judiciaries. Generally, the courts rely on three types of sanctions or remedies in an attempt to right the wrongs of prosecutors who violate *Brady*: (1) contempt statutes; (2) criminal convictions; and (3) statutory changes. First, there are contempt statutes.[142] For example, in Florida, the contempt statute reads, "in the exercise of their criminal jurisdiction [the court] may punish for contempt as in the exercise of their civil jurisdiction."[143] Moreover, New Jersey courts have the power to punish for contempt specifically in cases including the "misbehavior of any officer of the court in his official transactions."[144] In Rhode Island, the courts have broad discretion to "punish for *any* contempt of its authority by fine or imprisonment or both."[145]

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[135] *Id.*

[136] Ethical Standards for Attorneys for the Government, 28 U.S.C. § 530(B) (1998).

[137] *Id.*

[138] Memorandum from David W. Ogden, Deputy Attorney General, Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010), *available at* http://www.justice.gov/dag/memorandum-department-prosecutors.

[139] Basic Obligation of Public Service, 5 C.F.R. § 2635.101 (2014).

[140] *Id.* § 2635.101(b)(5).

[141] Jones, *supra* note 7, at 443.

[142] *See, e.g.*, FLA. STAT. § 900.04 (2014); N.J. STAT. ANN. § 2A:10-1 (West 2014); R.I. GEN LAWS § 8-8-5 (2014).

[143] FLA. STAT. ANN § 900.04 (2014).

[144] N.J. STAT. ANN. § 2A:10-1 (West 2014).

[145] R.I. GEN LAWS § 8-8-5 (2014) (emphasis added).

Second, courts can rely on criminal convictions to punish prosecutors who violate the requirements of *Brady.* In a federal case, the New York Court of Appeals criminally convicted and fined—but did not disbar—a prosecutor for his misconduct.[146] In that case, the court upheld a lower court's conviction of the "misdemeanor of willfully depriving an individual of rights secured to him by the United States Constitution in violation of sections 242 and 2 of title 18 of the United States Code."[147] The court fined the lawyer $500.[148] Despite the criminal conviction, the court of appeals rejected the automatic suspension required under state law for convictions of serious crimes.[149] The court said that due to the attorney's previously unblemished record and the stigma of a criminal conviction, a censure would be adequate.[150]

Third, courts, legislators, and executive branch can work together to fashion statutes and rules that control and guide the behavior of prosecutors. For example, Texas recently adopted a new discovery rule for prosecutors. In 2013, Governor Rick Perry signed into law the Michael Morton Act (SB 1611) (hereinafter Act), ushering a new era in discovery in Texas.[151] Prior to the implementation of the Act, the Texas Code of Criminal Procedure required, essentially, the same disclosure as all other jurisdictions—discovery of exculpatory evidence.[152] However, the Texas court's devastating discovery of prosecutorial misconduct in the Michael Morton case (discussed above) exemplified how hard it was for Texas prosecutors to follow the discovery requirements.[153]

The Act requires a broader and more open discovery process.[154] Specifically, prosecutors now must turn over any evidentiary material related to any matter involved in the action.[155] Some critics say "open-file discovery [is not] a cure-all" and could "have negative consequences," leading to other types of gamesmanship.[156] While the critics of the Act have a valid point, the issue of *Brady* violations is far

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[146] *In re* Brophy, 442 N.Y.S.2d 818, 819 (1981).

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] Randall Sims, *The Dawn of New Discovery Rules,* THE PROSECUTOR (July–August 2013), http://www.tdcaa.com/journal/dawn-new-discovery-rules (last visited May 15, 2013).

[152] *Id.*

[153] *Id.*; *see also infra* notes 103–16 and accompanying text.

[154] *Id.*

[155] *Id.*

[156] Brian P. Fox, *An Argument Against Open-File Discovery in Criminal Cases*, 89 NOTRE DAME L. REV. 425, 443 (2013).

too prevalent not to have some preventative measures.[157] Indeed, the idea of an *open-file* policy might be too much—but has the potential to be effective.

Despite contempt charges, criminal convictions, and statutes requiring greater discovery, some prosecutors still fail to respect the discovery process. While each of these sanctions serves a clear and important function, the real issue is the need for well-trained prosecutors. They must learn and understand what the discovery process requires of them. Punishment is only a corollary to the ultimate issue of prevention.

V. Scholarly Approach

A. The Duty of the Prosecutor to Disclose Exculpatory Evidence

The author of a 1960 law review note lamented the awkward requirements of disclosure in an adversarial world of litigation.[158] Despite the fact that the note was written pre-*Brady*, the author captured the essence of the Supreme Court's words in that case. Consistent with the ideas in this article, the author also argues for stiffer sanctions for prosecutors that engage in misconduct.

"When the prosecuting attorney violates his duty to disclose evidence favorable to the defendant, the conviction secured thereby will be set aside."[159] However, the author went on to say that this remedy only gives relief to the defendant without compelling the prosecutor to cease this conduct.[160] Moreover, because of the high-pressure situations most prosecutors face and the desire to get the bad guy, breaches of the duty to disclose will not be discovered.[161] Thus, the author argued that some "counterbalancing penalty for breach of duty to the accused may be desirable."[162]

While civil suits for damages often represented the norm for a wronged defendant, these suits were often ineffective, regardless of whether the criminal defendant sued under the common law principle of malicious prosecution or

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[157] Rosen, *supra* note 18, at 716; Napier-Dewar, *supra* note 13, at 1458; *see also The National Registry of Exonerations Update,* National Registry of Exonerations (April 3, 2013), http://www.law.umich.edu/special/exoneration/Documents/NRE2012UPDATE4_1_13_FINAL.pdf. The study looked at exonerations resulting from prosecutorial misconduct. Specifically, the study found that these exonerations stemmed from perjury or false accusations fifty-two percent of the time and professional misconduct forty-three percent of the time.

[158] Case Note, *The Duty of the Prosecutor to Disclose Exculpatory Evidence*, 60 Colum. L. Rev. 858, 870 (1960).

[159] *Id.* at 868.

[160] *Id.*

[161] *Id.*

[162] *Id.*

under the Civil Rights Act of 1964.[163] The weak statistics are a direct result of the immunity prosecutors enjoy as part of their positions—as long as they act within the scope of their official duties, they are immune from a legal suit.[164] Essentially, courts reject penalizing prosecutors for doing their jobs and thereby creating a perpetual fear of civil litigation for the prosecutor. Moreover, this reasoning is applicable even when defense attorneys allege the action was willful and malicious.

The Note heavily suggested that prosecutorial misconduct was slipping through the cracks.[165] To that end, one possible sanction, in addition to civil suits, could be "statutory provisions for the removal of a prosecutor from office extant in most states."[166] Although uncommon, instances exist where prosecutors were removed from office. Most often, by the time courts, defendants, or even later prosecutors discover the *Brady* violations, the violating prosecutor is long gone and the statutory provisions are largely ineffective.[167]

A recent investigative report by the Chicago Tribune examined 381 cases for potential *Brady* violations.[168] In the report, none of the homicide cases the courts reversed led to sanctions against the errant prosecutors.[169] "With impunity, prosecutors across the country have violated their oaths and the law, committing the worst kinds of deception in the most serious of cases."[170]

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[163] *Id.*

[164] *See* Imbler v. Pachtman, 424 U.S. 409 (1976). In *Imbler*, the Court extended to prosecutors similar immunity from suits brought against them under 42 U.S.C. § 1983 of the United States Code, alleging suppression of exculpatory evidence or the presentation of false evidence. In the end, the Court eliminated all potential civil liability as a deterrent.

[165] *The Duty of the Prosecutor*, *supra* note 159.

[166] *Id.* at 869.

[167] *Id.* The average prosecutor only serves for a short period. In many cases, his breach of duty is not brought before the court until many years later. *See, e.g.*, Napue v. People, 360 U.S. 264 (1959) (twenty years); United States v. Ragen, 86 F. Supp. 382 (N.D. Ill. 1949) (twenty-five years); People v. Fisher, 151 N.E.2d 617 (N.Y. 1958) (twenty-five years); *In re* Morhous, 56 N.E.2d 79 (N.Y. 1944) (thirteen years). Again, the reader should keep in mind this is a pre-*Brady* world, and certainly a time before DNA testing was even a possibility.

[168] Eugene Cerruti, *Through the Looking Glass at the Brady Doctrine: Some New Reflections on White Queens, Hobgoblins and Due Process*, 94 KY. L.J. 220 n.25 (2005–06).

[169] *Id.*

[170] *Id.* (citing to Ken Armstrong & Maurice Possley, *Trial and Error: How Prosecutors Sacrifice Justice to Win*, CHI. TRIB., Jan. 10, 1999, at C1); *see also* Rosen, *supra* note 18, at 693; Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001); Note, *The Duty of the Prosecutor to Disclose Exculpatory Evidence*, 60 COLUM. L. REV. 858 (1960).

VI. A NEW APPROACH TO AN OLD PROBLEM

Each year, a multitude of cases involve allegations of *Brady* violations.[171] Many cases go unreported.[172] Indeed, this article does not intend to catalog all of the reported cases that contain *Brady* violations. Rather, it aims to suggest a new method and mechanism for disciplinary determinations in cases of unintentional violations. Not every prosecutor is guilty of an ethical violation. Nonetheless, disciplinary bodies must determine the guilt that attaches, if any. *Brady* violations constitute a recurring problem that disciplinary bodies fail to adequately address.[173]

To grasp the importance of the disciplinary rules that prohibit misconduct, an understanding of other methods used to punish such misconduct aids this article's analysis. Some *Brady* violations result in reversal, or another similar trial remedy.[174] Nevertheless, reversal has not served to deter prosecutors from further violations, and sanctions such as criminal prosecution or removal from office are rarely, if ever, used and have little deterrent value.[175] Courts are generally reluctant to use heavy criminal sanctions, even in the most egregious instances of prosecutorial abuse, possibly preferring a *quasi-criminal* remedy.[176] For example,

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[171] For discussion of other reported cases involving *Brady* violations, see Comment, *Prosecutorial Misconduct: A National Survey*, 21 DEPAUL L. REV. 422 (1971); Annotation, *Withholding or Suppression of Evidence by Prosecution in Criminal Case as Vitiating Conviction*, 34 A.L.R.3d 16 (1970); Annotation, *Right of Accused in State Courts to Inspection or Disclosure of Evidence in Possession of Prosecution*, 7 A.L.R.3d 8, 32–36 (1966); *see also* Annotation, *Right of Accused to Inspection or Disclosure of Evidence in Possession of Prosecutors*, 52 A.L.R. 207 (1928) (pre-*Brady* cases involving defendant's rights to discovery).

[172] Recent Cases, 123 HARV. L. REV. 1019 (2010) (citing Thompson v. Connick, 578 F.3d 293, 313 n.1 (5th Cir. 2009) (Prado, J., writing to affirm)).

[173] Rosen, *supra* note 18, at 703.

[174] Some of the most notable cases resulting in reversal were U.S. v. Bagley, 473 U.S. 667, 674 (1985); Banks v. Dretke, 540 U.S. 668, 675–76 (2004); and Kyles v. Whitley, 514 U.S. 419, 454 (1985). In the latter two cases, the United States Supreme Court held that the *Brady* violations were so flagrant and inexcusable that reversal was required even under the Court's more prosecutor-friendly standard. *See* Lyn M. Morton, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline*, 7 GEO. J. LEGAL ETHICS 1083, 1086 (1994). Ms. Morton discusses and compares the possibility of remedial trial tactics as a means to right the prosecutorial wrong. Essentially, she argues courts can, as an alternative to direct discipline, suppress other evidence or dismiss the charges entirely. However, she goes on to state that often the government can overcome the remedial tactics with a showing that the misconduct will result in simple harmless error.

[175] Rosen, *supra* note 18, at 697.

[176] 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, 84 (2005). Ms. Dunahoe discusses the potential reluctance of judges and juries to seek criminal sanctions for "technical" violations; rather, using a court's contempt power would be more beneficial and economical. While she specifically discusses intentional violations, her distinction of "technical" constitutional violations is indicative of a general and acceptable form of scaling the severity of a *Brady* violation.

in the *Brophy* case, the New York Supreme Court reversed the lower court's suspension of Brophy's license, basing its decision on the fact that Brophy had an "otherwise unblemished record" and had already faced the "stigma of a criminal conviction."[177] The *Brophy* decision continues a tradition of lack of accountability and educational rehabilitation.

Courts have also said that granting a new trial for the defendant is a form of punishment.[178] In *Kyles*, the Second Circuit Court of Appeals held that "even a negligent suppression of evidence could require a new trial depending on how much the suppression harmed the defendant."[179] The court made a direct correlation between the gravity of the harm caused and the severity of the remedy fitting the transgression.[180] Throughout the discussion, the court meted out a range, or scale, of punishments for *Brady* violations based on notions of fair play.[181] Even still, because of materiality standards, "a prosecutor knows that a decision to withhold or falsify evidence, even if discovered, will not necessarily result in a reversal of the conviction."[182] While this type of remedy is certainly important for the defendant, this example serves another purpose. The courts generally consider varying degrees of *Brady* violations to exist. As such, the courts should also consider similarly varying degrees of punishments as appropriate, including criminal sanctions.

In 2006, Elizabeth Napier argued that another remedy is appropriate in cases where the defendant's rights are at stake because of undiscovered evidence.[183] Her argument centered on the idea that because defendants would rarely find out about hidden evidence, violations go undiscovered without remedy.[184] Moreover, once an appellate court considers a case and finds that a prosecutor suppressed evidence, the cookie-cutter response is to say the error was harmless.[185] Thus, because of appellate review mechanisms, the courts rarely vindicate a defendant's rights.[186] Indeed, the prosecutor rarely suffers a serious penalty for his or her misconduct.[187] Often, however, when courts take remedial measures,

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[177] Brophy v. Comm. on Prof'l Standards, 83 A.D.2d 975 (N.Y. App. Div. 1981); Rosen, *supra* note 18, at 726.

[178] *Kyles,* 297 F.2d at 507.

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] Rosen, *supra* note 18, at 707.

[183] Napier-Dewar, *supra* note 13, at 1458.

[184] *Id.* at 1452.

[185] *Id.*

[186] *Id.*

[187] *Id.*

the government easily overcomes such measures by showing that the prosecutor's conduct was harmless error.[188]

As such, a remedy for the defendant is not sufficient to deter prosecutors who violate *Brady.* Unlike a criminal prosecution, which imposes society's moral condemnation on a person, punishing a prosecutor by granting the defendant relief, such as excluding evidence or dismissing charges, does not necessarily vindicate the interests of the community.[189] While intentional violations are egregious, the unintentional violations should also trigger a remedy to discourage such misconduct in the future. A remedy granted solely to deter future prosecutorial misconduct can lead to incongruous results, such as the dismissal of charges when it is likely that the defendant is guilty of the crime or reversal of a conviction when the proceeding was otherwise fair.[190] Nevertheless, finding improper intent without meting out punishment gives the impression that the courts are powerless in the face of prosecutorial misuse of authority.[191]

Napier certainly makes a persuasive suggestion that criminal sanctions do little to help a defendant immediately.[192] While her contention that *any* higher penalty will fail as an effective deterrent is misplaced, the argument is not without merit. Nevertheless, her conclusion that some other sanction—somewhere between bar censure and criminal sanctions—is not a beneficial or effective deterrent is mere speculation and conjecture.

Additionally, because the legal profession imposes a higher standard on prosecutors, they have a duty to prosecute effectively and with integrity.[193] However, prosecutors sometimes ignore evidence they find immaterial. As stated above, the parties' knowledge of the evidence is the touchstone of *Brady*.[194] To be sure, courts continue to warn prosecutors who may lack knowledge of exculpatory evidence that they have a continuing constitutional and ethical duty to learn about its existence.[195]

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[188] Lyn M. Morton, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline*, 7 Geo. J. Legal Ethics 1083, 1086 (1994).

[189] Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 Wash. U. L. Q. 713 (1999).

[190] *Id.*

[191] *Id.*

[192] Napier-Dewar, *supra* note 13, at 1458.

[193] Lisa M. Kurcias, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69 Fordham L. Rev. 1205, 1206–07 (2000).

[194] Gershman 2007, *supra* note 67, at *557*.

[195] *Id.*

A claim of ignorance offers a prosecutor a convenient opportunity to cover up a mistake. Ignorance, however, is no excuse.[196] A criminal defendant who claims to be unaware of a law does not receive leniency.[197] Indeed, prosecutors—people well versed in the law—do not deserve any leeway for their shortcomings, even if they bury their heads in the proverbial sand. Additionally, a prosecutor claiming ignorance of *Brady* evidence as an excuse for non-compliance does not deserve a less-demanding standard.[198] This article addresses the failure of the standard remedy in *Brady* violations.

Moreover, the quintessential, and standard, remedy for a *Brady* violation—reversal of a conviction—is lackluster at best. Because of the Court's materiality requirement in *Bagley*, a prosecutor likely knows that a decision to commit a *Brady* violation will not *necessarily* result in a reversal of a conviction.[199] Also, a prosecutor who commits *Brady* violations likely does not start doing so intentionally. It is difficult to believe that a new prosecutor, recently graduated from law school, walks into court for his or her first trial and says, "I'm going to withhold all of this exculpatory material." Rather, the more likely scenario is that he overlooked or did not understand a piece of evidence the way a seasoned prosecutor would. Essentially, the idea is to catch, address, and fix unintentional *Brady* violations before they turn into purposeful violations that require a stiffer penalty.

A more appropriate sanction should address the gap left by state bar associations, prosecutor's offices, and courts. Because most state bar association sanctions amount to a private censure, it is clear that in order to create a legal community that does not accept or turn a blind eye to violations, whether accidental or willful, a more severe penalty is necessary. This is not to say that criminal sanctions are appropriate in all cases. What would the courts charge the prosecutors with? Where would it fit in the criminal code? The courts and bar associations must find a middle ground for sanctions that address the real need—prosecutor education—in light of the higher standard imposed on all prosecutors.[200]

On the continuum, there exist two ends: (1) bar sanctions, to whatever degree; and (2) criminal penalties (something akin to obstruction of justice and contempt). Obviously, neither extreme cleanly fits most situations, especially when the violation is unintentional. Therefore, this article argues for a middle ground.

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[196] Cheek v. U.S., 498 U.S. 192, 199 (1991) (establishing the general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system).

[197] *Id.*

[198] *But see* David Luban, *Contrived Ignorance*, 87 GEO. L. J. 957, 976 (1999) ("[I]n legal ethics, unlike criminal law, there is no willful blindness doctrine.").

[199] Rosen, *supra* note 18, at 693.

[200] Berger v. U.S., 295 U.S. 78, 88 (1935).

The ideal sanction would operate in a manner similar to driving citations or infractions—a graded scale of infractions, with cumulative penalties. Like a driver's license, a prosecutor's license would be subject to a point system. For each violation—depending on the severity—the reviewing body could record the points assigned for the violation in the attorney's personal file. Each subsequent violation would result in accrual of additional points. For each accumulation of points, the sanction, punishment, etc., would be commensurate with the amount of points.

For example, a first offense of an unintentional *Brady* violation would amount to two points. Consequently, two points would amount to a warning. Similar to the current situation that occurs in a private censure—by most state bar associations—the reviewing body or bar association would talk to the prosecutor and record the violation in his or her permanent file, all in a private manner. Additionally, because of the importance of educating the prosecutor, remedial continued legal education (CLE) would be required.

For this first violation, a four-hour CLE would be appropriate.[201] The CLE would focus on the need for and the importance of the higher standard imposed upon prosecutors. The hope would be that prosecutors would appreciate and understand the nature of the standard, the basic requirements of *Brady*, and the relevant state rules of criminal procedure. The CLE could use the federal Office of Professional Responsibility as a model and provide a guidebook of proper execution of evidentiary discoveries.[202]

Each violation would escalate from there with corresponding penalties. The overall idea would be to educate the prosecutor each time a violation occurs. Contrary to the differentiation of violations in the driving code, each type of *Brady* violation is not dissimilar in the effect on the defendant—unfair prejudice—and thus, should not be treated differently in the remedial education of the prosecutor. In the end, the only relevant distinction is whether the violation is intentional or unintentional—a distinction best discussed in another article.

The state bar association would track the number of points in an attorney's file. Once an offender accrued a certain number of points, decided by each state, the offender's license would be restricted. For example, two violations within a one-year period would require placement of the offender on a probation period of one month. This may sound unworkable, but it puts the office on notice, as

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[201] The CLEs would operate similar to the "Alive at 25" driving education program many states employ. *See* NATIONAL SAFETY COUNCIL: ALIVE AT 25 PROGRAM, https://aliveat25.us/ (last visited Jan. 22, 2015). The National Safety Council created a four-and-a-half-hour driver's awareness course for young drivers between the ages of fifteen and twenty-four, with a curriculum including lessons on defensive driving, decision-making, and taking responsibility. *Id.*

[202] David Ogden Memoranda, *supra* note 139 and accompanying text.

well. It requires accountability of the offender and everyone else in the office. The offender could still perform research, writing, and everyday duties, but similar to a third-year law student, he or she would need immediate supervision for everything done in court.

For subsequent violations—those occurring after a one-year violation-free period—the offender would be automatically subject to review by a reviewing agency (most likely state bar associations) for possible temporary suspensions. Obviously, this gives great discretion and oversight to the reviewing body. The reviewing body would already have the accumulation of points and completion (or not) of CLEs to direct their decision. If, based on the reviewing agency's decision, the offender's license is suspended, further CLE requirements would be imposed. However, in this instance, the offender would be required to demonstrate competency to the reviewing agency after the suspension period ends. Essentially, the agency's hands are tied unless and until the offender fulfills all requirements to reinstate his or her license. Reinstatement should require intensive CLE, remedial training, and a real-life scenario test. The real-life scenario test would determine whether the offender has adequately learned the knowledge necessary to enter the practice and have his or her license and privileges reinstated. Drivers who violate the rules of the road are required to fulfill similar requirements, including studying for the test, taking the written test, and then actually driving with an instructor after license suspension or revocation. If the driving system permits rehabilitation and adequate testing for every person who attains the age of sixteen, the same is possible for the limited number of licensed prosecutors.

The review board could give a prosecutor a scenario that he or she would then have to navigate to a successful outcome.[203] The prosecutor would receive a case file with a litany of discovery issues. Upon review, he would have to parse out what is discoverable under *Brady*, its progeny, statutes, and relevant state rules. The test would include discovery requests from a defense attorney as well. In the end, the goal is to sufficiently rehabilitate the offender with adequate education such that he makes the right decisions. The test would place attorneys in ethically compromising situations, and set high expectations for their exercise of discretion. Ideally, the prosecutor would make the best choice to serve justice, fairly try the defendant, and achieve the higher standard of professional responsibility required of all prosecutors.

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[203] This scenario is similar to the Multistate Performance Test the National Conference of Bar Examiners administers to law school graduates each year. *See* Nat'l Conference of Bar Examiners, *The Multistate Performance Test*, http://www.ncbex.org/about-ncbe-exams/mpt/ (last visited Feb. 5, 2015). It is wholly practical for the profession to rehabilitate prosecutors the same way it admits them to practice law.

Conclusion

Ultimately, holding prosecutors to a higher standard should not punish society for the misdeeds of a prosecutor.[204] Rather, the Court's focus was always to facilitate a fair trial for the accused.[205] Indeed, "Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[206] The parties' knowledge of exculpatory evidence is the touchstone of the *Brady* decision.[207] One jurist even stated that despite a higher standard and imposition of a duty, "the game will go on, but justice will suffer."[208] The suggestions above and the scheme of remedial sanctions foster a growth and implementation of knowledge such that prosecutors are empowered to make the right decisions. They will have a better understanding of the inherent fairness required of both the profession and the trial process, and they will move away from the gamesmanship so many fear.

In the end, the focus should not be on punishment, but rather on education, reintegration, and achieving a high standard for all prosecutors. Additionally, because there would be less focus on punitive sanctions, prosecutors would be inclined to self-report a violation: a motivation that, until now, has been nonexistent. The idea of self-reporting would also get away from the idea that stiffer penalties would create a chilling effect on the profession. If prosecutors knew that when they accidentally mess up they would be educated and guided rather than *punished*, it seems logical that they would be more amenable to revealing a violation.

The practice of law, writ large, has a reputation as deceptive—full of shady characters and hired guns. While this article cannot possibly affect the entirety of the profession, the suggestions within can and should reach at least the prosecutors—reach prosecutors who swore to protect the people, serve the people, and uphold the law.[209] Prosecutors are held to a higher standard of practice, one that should not be shirked for the possibility of a better or quicker conviction.[210]

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[204] U.S. v. Agurs, 427 U.S. 97, 110 n.17 (1976).

[205] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[206] *Id.*

[207] Gershman 2007, *supra* note 67, at 557.

[208] United States v. Starusko, 729 F.2d 256, 265 (3d Cir. 1984).

[209] *Criminal Justice Section Standards: Prosecution Function*, A.B.A. (Nov. 28, 2014), http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html.

[210] *See generally* Berger v. U.S., 295 U.S. 78, 88 (1935) (describing in detail the role of United States Attorneys and their duty to the public and the profession).

To be sure, the ideas and suggestions in this article are lofty. Furthermore, it is naïve for anyone to think that changes in disciplinary structure and enforcement, alone, are enough to deter prosecutorial misconduct. However, the ideas and suggestions are workable and customizable for each state. The baseline standard set out in *Brady* and its progeny cannot be forgotten or lessened. Prosecutors are the servants of the people, the protectors, and wield a great sword. But they also need to be their own shield—that is what the standard, and society, expects of them.