Foul Blows: Using the Ethical Standard to Prevent Low-Level *Brady* Violations from Slipping Through the Cracks

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INTRODUCTION

Over the past election cycle, the presidential campaigns of Vice President Kamala Harris and Senator Amy Klobuchar have both faced severe scrutiny over allegations of impropriety during the candidates' time as District Attorneys.[1] Specifically, critics alleged that the two former prosecutors had withheld exculpatory evidence from criminal defendants and defended instances of prosecutorial misconduct.[2] At the same time, prosecutors have been criticized for their failure to either hold their partners in law enforcement accountable for their excesses or resist the conviction-focused, tough-on-crime culture that leads prosecutors to violate their legal and ethical obligations by withholding information that should be shared with the accused.[3] The cases of prosecutorial misconduct that occurred under Vice President Harris and Senator Klobuchar demonstrate that a problem of prosecutorial failure to disclose exists, but they do not demonstrate the scale of the problem; they are simply the rare examples of prosecutions that have gathered enough post-conviction scrutiny to reveal prosecutorial abuse of power. These

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1. S.A. Miller, *Kamala Harris' prosecutor past threatens 2020 White House bid*, A.P. NEWS, (Jan. 30, 2019), https://apnews.com/article/cb35de115586c2e1e3ee704d64351982 [https://perma.cc/WM2F-U5XL]; Michael Kranish, *Crime lab scandal rocked Kamala Harris's term as San Francisco District Attorney*, WASH. POST, (March 5, 2019), https://www.washingtonpost.com/politics/crime-lab-scandal-rocked-kamala-harriss-term-as-san-francisco-district-attorney/2019/03/06/825df094-392b-11e9-a06c-3ec8ed509d15_story.html [https://perma.cc/M3S9-UJ2M]; Christina Carrega, *Minnesota man seeks to toss his murder conviction Sen. Amy Klobuchar stood behind for 17 years,* ABC NEWS, (February 24, 2020) https://abcnews.go.com/US/minnesota-man-seeks-toss-murder-conviction-sen-amy/story?id=69123101 [https://perma.cc/59X5-8V85].

2. *See* Kranish, *supra* note 1; Carrega, *supra* note 1.

3. *See* Kristy Parker, *Prosecute the Police*, THE ATLANTIC, (June 13, 2020), https://www.theatlantic.com/ideas/archive/2020/06/prosecutors-need-to-do-their-part/612997/ [https://perma.cc/NP4P-JXN]; Diana Becton, Satana Deberry, et. al., *'Prosecutors Are Not Exempt From Criticism,'* POLITICO MAG., (August 25, 2020), https://www.politico.com/news/magazine/2020/08/25/black-prosecutors-11-ideas-393577 [https://perma.cc/9YFY-U92Y]; Kate Levine & Joanna Schwartz, *Hold Prosecutors Accountable, Too*, BOSTON REV., (June 22, 2020), http://bostonreview.net/law-justice/kate-levine-joanna-schwartz-hold-prosecutors-accountable-too [https://perma.cc/XQK4-ZU96].

cases are the exception; the vast majority of criminal convictions do not draw scrutiny of prosecutors' actions.[4]

Prosecutors have long been held to distinct standards regarding the disclosure of information to opposing parties beyond ordinary discovery requirements. Most famously, the Supreme Court held in *Brady v. Maryland* that prosecutors are obligated to by a constitutional due process standard to disclose exculpatory evidence to criminal defendants.[5] Despite this constitutional requirement, however, there is ample evidence that prosecutors routinely withhold evidence favorable to defendants and that these prosecutors are rarely disciplined for doing so. There have been multiple studies demonstrating both the widespread failure of prosecutors to disclose exculpatory information[6] and the widespread failure of disciplinary authorities to hold prosecutors accountable for such failures in a meaningful way.[7]

These studies of prosecutorial disclosure violations likely understate the problem because they depend on violations being detected and accurately reported as violations. Defense attorneys are likely to fail to detect violations based on information that is never disclosed to them; defense attorneys will therefore remain unaware that there is a basis for challenging convictions. Even when it does become apparent that prosecutors have withheld information, these potential violations are likely to remain invisible as a result of the *Brady* disclosure framework, which includes a "materiality" requirement that deems prosecutorial withholding of information to not be a violation at all if it is not readily apparent on appeal that disclosure would have altered the outcome of the case.[8] Under this materiality standard, violations that are "immaterial"—that is, they do not appear

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4. *See* Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 298-300 (2007) (describing media exposure in a high-profile criminal case as unusual).

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

6. *See, e.g.,* Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., (Jan. 11, 1999), at Al (summarizing the results of the reporters' nationwide study of prosecutorial misconduct in homicide cases). It is important to note that this investigation only focused on the comparatively rare defendants who were convicted at trial and whose homicide convictions that were eventually dismissed. Because of its limited scope, it likely understates the problem of prosecutorial suppression of evidence. *See also* Davis, *supra* note 4, at 279-80 (describing studies that reveal widespread and routine *Brady* violations); Richard A. Rosen, *Disciplinary Sanctions against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697 (1987); Andrew Smith, *"Brady" Obligations, Criminal Sanctions, and Solutions in a New Era of Scrutiny*, 61 VAND. L. REV. 1935,1938 (2019) ("An examination of these remedies reveals a frustrating system; disclosure violations continue to occur at high rates at both the federal and state levels, while individual prosecutors rarely face repercussions for these violations."); Jessica Brand, *The Epidemic of Brady Violations: Explained*, THE APPEAL (April 25, 2018), https://theappeal.org/the-epidemic-of-brady-violations-explained-94a38ad3c800/.

7. *See* Rosen, *supra* note 6; Smith, *supra* note 6; Daniel S. Medwed, *Brady's Bunch of FLaws*, 67 WASH. & LEE L. REV. 1533, 1545-47 (2010) ("Yet, disciplinary bodies hardly ever sanction prosecutors who disregard *Brady*'s precepts."); Kevin C. McMunigal, *The (Lack of) Enforcement of Prosecutor Disclosure Rules*, 38 HOFSTRA L. REV. 847, 860-64 (2010).

8. Strickler v. Greene, 527 U.S. 263, 281-82 (1998) ("[S]trictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.").

to have altered the outcome of a case—are hidden from review because they are not considered violations at all. Furthermore, it is plausible that appellate courts and disciplinary authorities use the materiality requirement to avoid imposing discipline on prosecutors in all but the most egregious cases. This system allows prosecutors to withhold information with impunity up to some degree of materiality, and there is widespread agreement among practitioners that this invisible record of prosecutorial disclosure violations exists.[9]

The result of these failures is a significant systemic burden on defense attorneys. When cops and prosecutors fail to meet their obligations in a timely manner, defense attorneys must remain vigilant for last minute surprises and will sometimes fail to discover evidence of which they should have been made aware.[10] While the majority of such failures hopefully involve documents of minor importance, the cumulative effect of tolerating *Brady* violations is a massive structural hurdle for defenders and yet another way for the prosecution to exercise excessive control over criminal proceedings. Even if it is true that the majority of violations relate to information of minor importance, sources suggest that prosecutorial withholding of relevant evidence occurs to a sufficient degree to undermine faith in the criminal legal system as whole.[11]

Furthermore, we should care about such violations even when it makes no difference in a particular case, or when it is only a "minor" violation. We should expect prosecutors to live up to their professional obligations even at the cost of successful convictions. Even without data showing that these violations exist, an

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9. Jason Kreag, *Disclosing Prosecutorial Misconduct*, 72 VAND. L. REV 297, 307 ("Despite being settled law for over fifty years, noncompliance with Brady's constitutional protections persists. . . . Knowledge of the actual rate of Brady misconduct remains elusive, however, because it is unknown how often Brady violations go uncovered. The absence of an agreed-upon base rate for how often prosecutors violate Brady often leads proponents and opponents of Brady reform to disagree about whether Brady violations are an epidemic or merely episodic."); Ellen Yaroshefsky, *Why Do Brady Violations Happen?: Cognitive Bias and Beyond*, NACDL, (May 2013), https://www.nacdl.org/Article/May2013-WhyDoBradyViolationsHappenCogn [https://perma.cc/G53F-ZHZX]; Emma Zack, *Why Holding Prosecutors Accountable Is So Difficult*, INNOCENCE PROJECT, (April 23, 2020), https://innocenceproject.org/why-holding-prosecutors-accountable-is-so-difficult/ [https://perma.cc/9437-NSMY]; Elizabeth Napier Dewar, *A Fair Trial Remedy for Brady Violations*, 115 YALE L. J. 1450, 1453 ("The range and frequency of prosecutors' failures to disclose *Brady* evidence has been widely lamented.").

10. *Advocacy Groups Letter to Protect Discovery Reform*, HUMAN RIGHTS WATCH, (March 16, 2020), https://www.hrw.org/news/2020/03/16/advocacy-groups-letter-protect-discovery-reform [https://perma.cc/4GA7-CUC9] (urging New York Governor Cuomo to protect the newly-enacted state discovery reforms that prevent prosecutorial abuse of the criminal justice system); Rosen, *supra* note 6, 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.").

11. Rosen, *supra* note 6 at 694, 698 ("Whenever a prosecutor suppresses exculpatory evidence or presents false evidence, these actions cast doubt on the integrity of our legal system and the accuracy of the determinations of guilt and punishment. . . .[A] disturbingly large number of published opinions indicate that prosecutors knowingly presented false evidence or deliberately suppressed unquestionably exculpatory evidence."); Dewar, *supra* note 9, at 1452 ("Such failures violate defendants' rights to due process of law under the Fifth and Fourteenth Amendments and thwart the various protections that together constitute the fundamental right to a fair trial under the Sixth Amendment.").

analysis of the *Brady* "materiality" framework reveals that these widespread, invisible violations *could* slip through the cracks. Because it is highly possible that such violations occur with much greater frequency than the record shows, it is necessary to consider altering the structure of disciplinary measures for violative attorneys to prevent wrongdoing.

Accepting that a problem of frequent, low-level violations of prosecutorial disclosure obligations exists and that such violations are largely invisible to the legal record, this Note proposes that a proper response to this problem requires a shift in prosecutorial culture, a greater awareness of ethical disclosure obligations broader than the *Brady* standard, and expanded enforcement of professional disciplinary measures for prosecutors who violate their obligations.

Part I of this Note will outline the existing prosecutorial disclosure obligations derived from the line of caselaw following *Brady*. Part II will contrast these legal duties with the potentially broader disclosure duties imparted by the ethical rules governing attorney conduct. Part III will briefly discuss existing avenues for discipline of prosecutors that fail to meet these obligations and why the existing forms of discipline are insufficient to prevent violations from recurring. Part IV will discuss potential solutions to the problem of these routine violations. These will include front-end solutions, such as changing the conviction-focused culture of prosecutors' offices and judges' awareness of their ability to enforce broader ethical duties, and back-end solutions revolving around the expansion of realistic disciplinary options.

I. THE LEGAL DISCLOSURE DUTIES OF THE PROSECUTOR

A. THE REASONS FOR HEIGHTENED PROSECUTORIAL OBLIGATIONS

Prosecutors wield a tremendous amount of power within the criminal justice system. They enjoy broad discretion in choosing who should be charged and with what crime.[12] They are granted absolute legal immunity for their professional actions.[13] They are accountable largely to the rarely exercised in-house disciplinary measures of their respective offices.[14] The consequences of these

12. Angela J. Davis, *The American Prosecutor - Power, Discretion, and Misconduct*, 23 CRIM. J. 24, 26 (Spring 2008), https://digitalcommons.wcl.american.edu/facsch_lawrev/1396 ("The most remarkable feature of these. . .decisions is that they are totally discretionary and virtually unreviewable."). *See also* Medwed, *supra* note 7, at 1548 ("[Prosecutors' discretionary decisions] are not made in courtrooms or during formal negotiations with defense counsel, but behind closed doors far from the prying eyes of defendants, judges, and state ethics boards. On those occasions where the door blocking exposure to those decisions opens to outsiders, ethical codes treat prosecutors deferentially, formulating generous boundaries for what comprises a legitimate exercise of discretion.").

13. Imbler v. Pachtman, 424 U.S. 409, 427 (1976) ("We conclude that the considerations outlined above dictate the same absolute immunity under § 1983 that the prosecutor enjoys at common law."). The Court also explained that the public still has recourse to punish prosecutorial misconduct because prosecutors do not have immunity from criminal law. *Id.* at 429.

14. *See, e.g.,* Davis, *supra* note 4, at 293 ("Even though [the DOJ Office of Professional Responsibility] may ultimately refer its prosecutors to state disciplinary authorities, it only does so if its own investigation and

prosecutorial powers are severe for those accused of crimes, as these are the decisions that will result in people receiving formal criminal charges, facing burdensome trials, obtaining criminal records, and becoming incarcerated, not to mention the vast array of collateral consequences that follow criminal convictions.[15]

Because of the extent of prosecutorial power and the severity of criminal consequences, prosecutors face additional burdens that other attorneys do not share. The Supreme Court has stated that although the prosecutor "may strike hard blows, he is not at liberty to strike foul ones. . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."[16] The prosecutor's highest duty is not towards a singular client, as is that of the criminal defense attorney, but to the People or to the State, including innocent defendants, and to justice writ large.[17]

The prosecutor's duty to disclose potentially exculpatory information to defendants is particularly important aspect of their heightened duties towards society, including potentially innocent defendants.[18] Prosecutors' greatest concern is not meant to be securing convictions, but doing justice, and a free flow of information allows defendants to fully litigate their cases based on all available evidence.[19] Prosecutors must therefore allow defendants and defense attorneys access to relevant information in a timely manner. To require less of prosecutors would be to either doom defendants to "trial by ambush"[20] or allow relevant information that could prevent innocent people from being convicted to sit undiscovered in the files of police and prosecutors.[21]

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the disciplinary process of the particular federal prosecutor's office sustain a finding of misconduct, and then only if the misconduct implicates that state's disciplinary rules."). While prosecutors are theoretically also held accountable by voters, it is unclear how voters could discipline lower-level prosecutors who are likely to remain in their jobs even as their superiors are voted out of office.

15. Lisa M. Kurcias, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69 FORDHAM L. REV. 1205, 1209 (2000).

16. Berger v. U.S., 295 U.S. 78, 88 (1935).

17. *Id.*

18. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2009); *see* Brady v. Maryland, 373 U.S. 83, 87 (1963) ("We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."); Medwed, *supra* note 7, at 1536-37.

19. *See Berger*, 295 U.S. at 88; *Brady*, 373 U.S. at 87-88 ("A prosecution that withholds evidence. . . casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice. . .").

20. Eric Gonzalez, *Commentary: Reform discovery rules, writes district attorney*, TIMES UNION, (March 2, 2019), https://www.timesunion.com/opinion/article/Commentary-Reform-discovery-rules-writes-13656795.php [https://perma.cc/AV99-W5YT] [*hereinafter "Gonzalez Op-Ed*"] (Brooklyn DA criticizes existing New York State discovery requirements that fulfill *Brady* as nevertheless allowing prosecutors to subject defendants to "trial by ambush" and advocates for prosecutors to share information with defendants more expansively).

21. Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

B. THE *BRADY* STANDARD

The Supreme Court in *Brady v. Maryland* began to sketch a federal jurisprudence outlining prosecutors' obligation under the Due Process Clause of the Constitution to provide information to defendants in advance of criminal trials.[22]

In *Brady* itself, the Supreme Court ruled that the prosecution's suppression of a confession from someone other than the defendant violated the defendant's due process rights.[23] The defendant admitted to committing a robbery with a companion in which somebody was killed but argued that the companion had been the one to commit the murder.[24] Defense counsel had asked for and been allowed to see records of the companion's extrajudicial statements, but a critical statement containing the companion's confession to the murder was withheld by prosecution and the defendant remained unaware of the confession until after his conviction for first-degree murder.[25] Extending a prior holding that imprisonment resulting from "perjured testimony, knowingly used by State authorities" violates a person's due process rights,[26] the *Brady* Court held that "suppression by the prosecution of evidence favorable to an accused upon request" is of a similar character to the knowing use of perjured testimony.[27] Such suppression of favorable evidence therefore "violates due process where the evidence is material to either guilt or punishment, irrespective of the good faith or bad faith of the prosecution."[28] Significantly, the statement that suppression of favorable evidence is only a due process violation when the evidence is "material" (without further elaboration on what "material" means) establishes a "materiality" standard.[29] This standard implicitly leaves open the possibility that evidence suppression may not be a constitutional violation at all if the suppressed information is not "material," as defined by subsequent cases.[30]

The *Brady* holding constitutes the central rule of prosecutors' constitutional disclosure requirements. In light of the prosecutor's loyalty to justice and fair process rather than their conviction rate, as outlined in the aspirational *Berger* opinion, the prosecutor may not withhold evidence material to the case that the

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22. *Brady*, 373 U.S. 83, 87 (1963) (locating defendant's right to disclosure of favorable information in the Due Process Clause and stating that the principle underlying *Brady* is "not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused").

23. *Id.*

24. Brady v. Maryland, 373 U.S. 83, 84 (1963).

25. *Id.*

26. Pyle v. Kansas, 317 U.S. 213, 216 (1942).

27. *Brady*, 373 U.S. at 86-87.

28. *Id.*

29. *Id.* at 87. *See also* United States v. Agurs, 427 U.S. 97, 104 (1976) ("A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.").

30. Brady v. Maryland, 373 U.S. 83, 108 (1963) ("[U]nless 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.").

defense has specifically requested,[31] though later cases undermine the importance of a specific request for evidence by the defense.[32] It is significant that this standard was written with the rights of the criminal defendant in mind, rather than the behavior of the prosecuting attorney. Because the focus is on the process rights of the accused, the good or bad faith of the withholding attorney is irrelevant. The rights of the accused are violated whenever material information is suppressed.

As a result of *Brady*, prosecutors are required to turn over any information that is "material" to the case at hand.[33] *Brady* has in turn been followed by a long line of cases determining what it means for information to be relevant, how relevant withheld information must be to constitute a violation, and what it means for the prosecution to "have" that information, among other questions following from the general disclosure obligation.

C. SUBSEQUENT CASELAW

The *Brady* holding provided the foundation for prosecutors' Due Process disclosure obligations, but it also left open questions for later cases regarding what information prosecutors must share and when. The Court later ruled that prosecutors must go through the work of determining what information is in the possession of "the State" and turn over all material evidence; they cannot avoid a *Brady* violation by remaining ignorant about the contents of police files.[34] Other subsequent cases clarified which specific categories of documents or information qualified as "material" and thus must be disclosed under the *Brady* standard, including witness's prior inconsistent statements for impeachment purposes,[35] evidence casting suspicion on another party,[36] and witness's motive to lie (including any deals reached between the witness and prosecutors),[37] among other information.

A central line of cases has focused on defining the materiality requirement that governs which information must be disclosed. While *Brady* contains an

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31. The original holding of *Brady* was apparently limited to information that prosecution must disclose specifically "upon request" by defense counsel. Brady, 373 U.S. 83, 87.

32. After *Brady*, later cases have held that whether the information was requested may be relevant to the Court's analysis of whether that lack of disclosure could have been prejudicial, but that prejudice is the test for a violation regardless of whether defense requested the information. *See* United States v. Bagley, 473 U.S. 667, 682 (1985); Strickler v. Greene, 527 U.S. 263, 289 (1998).

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

34. Kyles v. Whitley, 514 U.S. 419, 438 (1995) ("[N]o one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it.") (quoting Giglio v. US, 405 U.S. 150, 154 (1972)).

35. *Giglio*, 405 U.S. 150, 154 (1972) ("When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule.") (internal quotations omitted).

36. Brady v. Maryland, 373 U.S. 83, 84 (1963) (involving a confession of another party).

37. Banks v. Dretke, 540 U.S. 668, 691 (2004) ("As to the first *Brady* component (evidence favorable to the accused), beyond genuine debate, the suppressed evidence relevant here, [the witness]'s paid informant status, qualifies as evidence advantageous to Banks.").

implication that the materiality of information is related to whether it was specifically requested by the defense,[38] the Supreme Court has shifted away from this approach.[39] Instead of applying different materiality tests in cases where the defense requested specific information from the prosecution, cases where the defense made a general request for exculpatory information, and cases where the defense made no request for exculpatory information, the Court has held that a single test applies in all cases.[40] This test is whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[41]

In *Strickler v. Greene*, the Court again refined the definition of "material" information as that which 1) is either exculpatory or impeaching, (2) has been suppressed by the state, and (3) has actually caused prejudice in a given case.[42] The *Strickler* Court seems to have retained the "reasonable probability" standard articulated in *United States v. Bagley* as the definition of when "actual prejudice" has occurred.[43] As part of the *Strickler's* prejudice prong, the *Bagley* "reasonable probability" formulation remains a governing standard for assessing whether *Brady* violations have occurred.[44] Similar to the *Strickland v. Washington*[45] ineffective assistance of counsel standard from which it was adopted,[46] this approach takes a post-hoc view of the trial in which the prosecution is alleged to have improperly suppressed relevant information and asks whether there is a reasonable chance that that evidence would have led the case to a different outcome had it been shared at trial.[47] This places defendants who allege *Brady* violations in the difficult position of trying to prove counterfactual arguments about what would have hypothetically happened had things been different. Though the language

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38. *See Brady*, 373 U.S. at 86-87 (1963); United States v. Agurs, 427 U.S. 97, 106 (1976) ("The test of materiality in a case like Brady in which specific information has been requested by the defense is not necessarily the same as in a case in which no such request has been made.").

39. *Id.* at 112 (holding that the test for a *Brady* violation is whether "the omitted evidence creates a reasonable doubt that did not otherwise exist"). *See also* United States v. Bagley, 473 U.S. 667, 682 (1985) ("We find the *Strickland* formulation of the *Agurs* test for materiality sufficiently flexible to cover the 'no request,' 'general request,' and 'specific request' cases of prosecutorial failure to disclose evidence favorable to the accused.").

40. *Id.*

41. *Id.* at 682 ("The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.").

42. Strickler v. Greene, 527 U.S. 263, 281-82 (1998) ("There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.").

43. *Id.* at 289 (holding that the defendant "must convince [the Court] that 'there is a reasonable probability' that the result of the trial would have been different if the suppressed documents had been disclosed to the defense").

44. *See* Smith, *supra* note 6, at 1941.

45. Strickland v. Washington, 466 U.S. 668, 694 (1984).

46. United States v. Bagley, 474 U.S. 667, 682 (1985). *See also Strickland*, 466 U.S. at 694.

47. *Bagley*, 474 U.S. at 682; Strickler, 527 U.S. at 289.

from *Bagley* only requires the defense to show a "reasonable probability" of the different outcome,[48] the defense's need to show that any unrevealed information is significant enough to overcome countervailing evidence that was otherwise sufficient to sustain a conviction is a significant burden that can allow prosecutors to withhold information without punishment when there is other evidence supporting the conviction.[49]

II. THE PROSECUTOR'S RULE ETHICAL DISCLOSURE OBLIGATIONS

A. ABA MODEL RULE 3.8(D)

An alternative source for the prosecutor's duty to disclose can be found in the American Bar Association's (ABA) *Model Rules of Professional Conduct*.[50] Because of the prosecutor's higher duty to justice, the immensity of the resources possessed by the state, and the severity of the consequences of prosecution, the ABA has also acknowledged that prosecutors occupy a unique position within professional norms.[51] This unique position is enshrined within ABA Model Rule 3.8, entitled "Special Responsibilities of the Prosecutor."[52] Most relevant to the duty to disclose material information is Rule 3.8(d).

Rule 3.8(d) requires disclosure of information to the defense using much broader language than that used in *Brady* and its progeny. It requires the prosecutor 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."[53] There is no prejudice or materiality analysis here. This requirement is not limited by admissibility, materiality, or defendant's ability to procure the material through other means.[54] The prosecutor faces a simple ethical obligation to disclose "*all"* information that could reflect favorably on the defendant, either by weighing against their guilt of the offense or by reflecting a mitigating factor that lessens their culpability.[55]

This difference in language between the ethical rule and the *Brady* standard has been noted by the Supreme Court. Though the Court has never explicitly interpreted the meaning of this discrepancy, it has remarked that "the obligation

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48. *Bagley*, 474 U.S. at 682.

49. *See id.* at 702 (Marshall, J., dissenting) ("The reviewing court, faced with a verdict of guilty, evidence to support that verdict, and pressures, again understandable, to finalize criminal judgments, is in little better position to review the withheld evidence than the prosecutor.").

50. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2009).

51. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2009).

52. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2009).

53. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2009). This provision also goes on to require further disclosure for sentencing purposes.

54. Smith, *supra* note 6, at 1951 (Model Rule 3.8(d) "includes all evidence or information that is favorable to the accused, whether or not it is admissible. Furthermore, a prosecutor is not constitutionally obligated to disclose cumulative evidence, evidence of which a defendant is already aware, or evidence the defendant can acquire through reasonable diligence; ethical requirements do not mandate such a restriction.").

55. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2009).

to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations" than under their *Brady* due process obligations.[56] The court of last resort for the District of D.C. (the D.C. Court of Appeals), however, has had the opportunity to decide almost exactly this question (in the context of D.C.-specific ethical rules) and has determined that the ethical requirement is broader than the constitutional requirement.[57]

B. *IN RE ANDREW J. KLINE* AND THE D.C. ETHICAL STANDARD

In *In re Andrew J. Kline*, the D.C. Court of Appeals considered the case of a federal prosecutor who failed to disclose to the defendant in a drive-by shooting case that a witness had told the police shortly after the shooting that he didn't know who the shooter was, even after the defense explicitly asked for any "prior inconsistent or non-corroborative" statements from the witnesses.[58] Appealing his 30-day suspension by the D.C. Bar for violating Rule 3.8(e) of the D.C. Rules of Professional Conduct (closely based on ABA Model Rule 3.8(d)),[59] Kline argued that the withheld information did not violate *Brady* because it did not cause actual prejudice to the defendant's case; this argument was bolstered by the defendant's conviction in his second trial, after the information was disclosed.[60] Kline further argued that the D.C. Rule 3.8's disclosure requirements were identical to *Brady* materiality, including the prejudice requirement, and that he had therefore violated neither standard.[61]

Denying Kline's argument that Rule 3.8 is coextensive with *Brady*, the Court of Appeals held that D.C.'s Rule 3.8 is broader than *Brady*, in part because it serves a different purpose.[62] As discussed above, *Brady* is solely concerned with ensuring that a defendant's due process rights are not trampled by prosecutors. It is not about guiding prosecutors' professional standards. If the reviewing court sees no reason why withheld information would alter the outcome of a case, then the defendant has not been prejudiced by the failure to disclose and no rights were denied. The Rules of Professional Conduct, however, are aimed at the very different goal of ensuring that attorneys practice law in a professional and ethical

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56. Cone v. Bell, 556 U.S. 449, 470 fn.15 (2009). *See also* 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.").

57. In re Andrew J. Kline, 113 A.3d 202, 204 (2015).

58. *Id.* at 204-05.

59. D.C. R OF PROF'L CONDUCT R. 3.8(e) (2014). Significantly, the D.C. Rule 3.8(e) differs from the ABA Model Rule 3.8 in that it applies only prosecutors to withhold evidence "intentionally." Rule 3.8(e). In this way, the broader ethical rule may actually be more favorable to prosecutors than *Brady* because the ethical standard does not create an avenue for prosecutors to be disciplined for mistakes that are not willful. *See* Sara Kropf, *Can the Ethics Rules Stop Brady Violations?*, GRANDJURYTARGET.COM (May 1, 2015), https://grandjurytarget.com/2015/05/01/can-the-ethics-rules-stop-brady-violations/ [https://perma.cc/QM9A-27BD].

60. *In re Andrew J. Kline*, 113 A.3d at 205-06.

61. *Id.* at 206.

62. *Id.* at 204, 213 ("We hold that Kline's interpretation of Rule 3.8(e), which incorporates a retrospective materiality analysis, is not the appropriate test for determining whether a prosecutor has violated Rule 3.8(e).").

manner. With that goal in mind, the Court of Appeals saw "no logical reason to base our interpretation about the scope of a prosecutor's ethical duties on an *ad hoc*, after the fact, case by case review of particular criminal convictions."[63] Prosecutors may cross over into unethical behavior by withholding evidence that "tends the negate guilt or mitigate the offense" even if that evidence is not sufficient to cast the entire outcome of the case into doubt.[64]

Despite finding that Kline had violated his ethical disclosure obligations under D.C. Rule 3.8, the court ultimately declined to sanction Kline on the basis that the difference between the *Brady* and the D.C. Rule 3.8 standards had not been made clear up until that point and that Kline's misunderstanding of the rule was not an unreasonable reading of the poorly worded comment to the rule.[65] Nevertheless, the message from the *Kline* court should be clear in the case's aftermath. Prosecutors within the jurisdiction of D.C. must be on notice that suppression of evidence favorable to defendants may amount to an ethical violation worthy of sanction, even when the suppression does not create a strong likelihood that the case's outcome was affected.

C. DEBATE OVER THE ETHICAL STANDARDS

Despite the relevant state ethical rules being overwhelmingly based on the same source (ABA Model Rule 3.8),[66] states have come to different conclusions regarding the comparison of the ethical standard to the *Brady* standard. The ABA Ethics Committee is in agreement with the D.C. court in *Kline*, having held in a 2009 formal ethics opinion that "Rule 3.8(d) is more demanding than the constitutional case law, in that it requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial's outcome."[67] This approach has also been followed by courts in California, Texas, and North Dakota.[68] On the other side, courts in Colorado, Ohio, Oklahoma, Wisconsin, Louisiana, and Tennessee[69] have

63. In re Andrew J. Kline, 113 A.3d 202, 210 (2015).

64. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2009). *See also In re Andrew J. Kline*, 113 A.3d at 209-210.

65. *Id.* at 215 ("[W]e are mindful of the fact that our comment to Rule 3.8(e) has created a great deal of confusion when it comes to a prosecutor's disclosure obligations under Rule 3.8."). *See also* D.C. R OF PROF'L CONDUCT R. 3.8 cmt. 1 (2014) ("The rule, however, is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.").

66. Kurcias, *supra* note 15, at 1208 ("[S]tate supreme courts have supervisory authority over the attorneys in their jurisdiction. In order to govern the professional conduct of attorneys, the state supreme courts adopt ethics rules that are based largely on either the Model Code or the Model Rules").

67. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009).

68. David L. Hudson, Jr., *Split intensifies over prosecutors' ethical disclosure duties*, ABA JOURNAL, (Oct. 2, 2019, 8:30am). https://www.abajournal.com/web/article/split-over-prosecutors-ethical-disclosure-duties-intensifies [https://perma.cc/8J9V-WJ4L].

69. Tenn. Sup. Ct. R. 8, RPC 3.8(d); *In re: Petition to Stay the Effectiveness of Formal Ethics Opinion 2017-F-163*, No. M2018-01932-SC-BAR-BP at 5 (Tenn. 2019).

specifically rejected the expansive "broader than *Brady*" approach.[70] In a decision specifically staying a Tennessee Board of Responsibility Ethics Opinion that agreed with the *Kline* court, the Tennessee Supreme Court declined to hold that a Tennessee ethical rule that is nearly identical to ABA Model Rule 3.8(d)[71] is broader than the *Brady* disclosure requirement. Relying on policy arguments, the Tennessee Supreme Court reasoned that requiring prosecutors and reviewing courts to consider separate and conflicting disclosure standards could bring about confusion and conflict.[72] When drafting a motion for the court to hold prosecution to a potentially broader ethical standard or arguing that the broader *Kline* standard should apply at all,[73] defense practitioners must remain cognizant of any determination or lack thereof by local courts regarding local ethics rules in that jurisdiction.

III. REMEDIES AND DISCIPLINE FOR VIOLATIONS

As the outcome of *Kline* suggests, there has been a serious problem in securing enforcement of prosecutor's disclosure obligations even when violations can be proven.[74]

The legal remedy for a *Brady* violation on appeal is the reversal of the conviction where there is a concern that a failure to disclose favorable information has prejudiced the outcome of a trial.[75] If the violation has effectively denied the defendant their right to due process, the remedy is to give them a new trial where due process will be maintained. Remedies for defendants are scarce because of both the likelihood that withheld information never comes to light post-trial and the barrier imposed by the *Bagley/Strickler* prejudice element of materiality; however, even greater access to post-conviction remedies by defendants would not necessarily be sufficient to prospectively curb prosecutorial abuses. Reversal of convictions, while embarrassing for a career prosecutor, creates little deterrence for prosecutors who face no concrete, individual professional consequences.

Even when violations are discovered, discipline for violative prosecutors remains scarce. Civil liability for prosecutors is largely foreclosed by the Supreme Court's decision in *Imbler v. Pachtman*, which held that prosecutors enjoy absolute civil immunity for their official actions and broad discretion to take such actions.[76] Bar associations and courts rarely choose to exercise their

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70. *See* Hudson, *supra* note 68.

71. Tenn. Sup. Ct. R. 8, RPC 3.8(d); *In re: Petition to Stay the Effectiveness of Formal Ethics Opinion 2017-F-163*, No. M2018-01932-SC-BAR-BP at 5-6 (Tenn. 2019).

72. *Id*. at 12.

73. *See* Part IV, *infra*.

74. Medwed, *supra* note 7, at 1544-48.

75. Dewar, *supra* note 9, at 1453 ("A conviction must be overturned 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'") (*quoting* United States. v. Bagley, 473 US at 682).

76. Imbler v. Pachtman, 424 U.S. 409, 425, 427 (1976).

power to sanction prosecutors for failure to disclose *Brady* material, which effectively leaves responsibility for disciplining prosecutors largely to District Attorneys' Offices' internal processes, which lack transparency.[77] The signal that this paucity of discipline sends to prosecutors is that only the most egregious of violations will be met with any professional repercussions.

Local bar associations remain the primary authority responsible for enforcing ethical rules for attorneys practicing in their jurisdictions.[78] Enforcement of disciplinary rules by bar associations against prosecutors remains the exception to the norm partially because bar associations act on the basis of individual complaints.[79] Prosecutors, who do not have individual clients, are somewhat insulated from the usual process in which complaints are made to the bar. Therefore, there is no one with an interest in the prosecutor's compliance to make such a complaint other than the defense attorney who is opposing them. The defense attorney, however, is likely to be far more concerned with securing a remedy for their client (such as by reversing a conviction) than with forcing the prosecutor to comply with professional standards.[80] The defense attorney may not care about ensuring the prosecutor is disciplined, or may even face significant incentive to *not* complain about the prosecutor's conduct, either because the complaint might jeopardize their client's chance to get a new trial or because the defense attorney and prosecutor are both repeat players in their local criminal court and future defense clients could benefit from a defense attorney's smooth relationship with prosecution.[81] Even when a complaint is filed, investigations regularly fail to yield any meaningful sanction on the prosecutor.[82]

The alternative to bar association investigations for securing disciplinary sanctions against prosecutors is through the internal supervision of prosecutor's offices. Forward-thinking DA's can be a significant factor in setting a higher ethical and professional standard for prosecutors in their office by encouraging

77. Smith, *supra* note 6, at 1952-54; Rosen, *supra* note 6, at 697 ("The result is a disciplinary system that, on its face, appears to be a deterrent to prosecutorial misconduct, but which has had its salutary impact seriously weakened by a failure of enforcement."). *See also* Brooke Williams, Samata Joshi, & Shawn Musgrave, *How the Secretive "Discipline" Process For Federal Prosecutors Buries Misconduct Cases*, THE INTERCEPT, (Oct. 10, 2019), https://theintercept.com/2019/10/10/justice-department-federal-prosecutors-accountability/ [https://perma.cc/4VW9-Q8MF].

78. Rosen, *supra* note 6, at 696-97, 709.

79. Smith, *supra* note 6, at 1953 ("Disciplinary complaints typically are initiated by individuals, and because prosecutors, unlike private attorneys, do not have individual clients, lodging a complaint falls to the defense attorney or the defendant, who often are more focused on the underlying case than on reporting the prosecutor."); Rosen, *supra* note 6, at 733-34.

80. *Id.*

81. *Id.* at 734 (discussing Smith v. Kemp, 715 F.2d 1459 (11th Cir. 1983), in which a prosecutor testified in a deposition that he had promised a witness a recommendation for a lesser sentence in return for testimony, despite having argued that no such promise was made at trial. After a complaint was made, the prosecutor testimony at the defendant's post-conviction hearing forcefully repudiated his deposition statement, which led the judge to find that no promise was made to the witness and denied relief based on the suppression of any information about the deal.).

82. *Id.* at 697; Smith, *supra* note 6, at 1952-54.

subordinates to exercise discretion in a more lenient direction and instituting open-file discovery policies.[83] These forward-facing internal policy changes are a necessary step in the right direction, but they should not be mistaken as sufficient for the scale of the existing problem. Aside from the fact that the electoral success of prosecutors interested in disciplining their own may be severely limited by jurisdiction,[84] these measures, like the *Brady* and the ethical rules themselves, do nothing without the possibility of enforcement in the face of violations. While internal discipline or damaged professional prospects could be a strong incentive for prosecutors to comply with internal guidelines because of their direct and personal effect on the prosecutor as an individual,[85] the effectiveness of such guidelines is dependent on a District Attorney's Office's willingness to actually enforce sanctions against its own employees. The aforementioned problem of the defense attorney's relationship with the prosecutor is multiplied tenfold here. Those tasked with enforcing discipline for *Brady* violations are those who work alongside the violating attorney, are immersed in the same professional culture that allows for frequent violations and may even have played a role in encouraging the prosecutorial tactics that lead to violations of prosecutorial duties.

The end result of this system is that meaningful discipline of *Brady* violations and other disclosure failures is exceedingly rare.[86] With the possibility of civil liability legally foreclosed,[87] bar sanctions procedurally unlikely,[88] and workplace discipline uncertain,[89] those hoping to deter future violations can only hope that a significant enough number of defendants can show prejudice, thread the *Bagley* needle, and have their convictions reversed so that the threat of a poor reversal record might encourage prosecutors to live up to their obligations. This system is both ineffective in actually deterring prosecutorial misconduct and cold comfort to those who have already been convicted.

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83. *21 Principles for the 21st Century Prosecutor*, FAIR AND JUST PROSECUTION, (2018), https://fairandjustprosecution.org/wp-content/uploads/2018/12/FJP_21Principles_Interactive-w-destinations.pdf [https://perma.cc/FSP7-V6TG] [*hereinafter*, "21 Principles for the 21st Century Prosecutor"]. *See also* Part IV(A)(i): Changing the Culture, *infra*.

84. Daniel Nichanian, *The Politics of Prosecutors*, THE APPEAL, https://theappeal.org/political-report/the-politics-of-prosecutors/ (showing the distribution of elected prosecutors and policies that the author deems "progressive.") [https://perma.cc/LQ6K-TQNB].

85. Smith, *supra* note 6, at 1959 (noting that internal controls can be especially effective in guiding self-interested actors because "violations may serve as a basis for internal discipline or poor performance evaluations. Such consequences may have a greater and more immediate bearing on prosecutors than other remedies.").

86. *See* Davis, *supra* note 4, at 290 ("The current process has proven totally ineffective in sanctioning prosecutors who engage in misconduct."); Rosen, *supra* note 6, at 697.

87. *See* Imbler v. Pachtman, 424 U.S. 409, 431 (1976).

88. *See* Davis, *supra* note 4, at 290.

89. *See* Williams, et al., *supra* note 77.

IV. POTENTIAL SOLUTIONS

So long as the *Brady* standard incorporates a materiality element that deems minor violations to be no violations, another form of sanction for minor violations will be necessary to deter prosecutors from withholding information. A comprehensive solution must focus on both the inputs to the prosecutorial process and on our systemic responses to its outputs. In this scenario, the inputs are the prosecutors themselves and their legal duties, and the outputs are the violations, which can be affected by an appropriate disciplinary response.

A. FRONT-END SOLUTIONS: CHANGING PROSECUTORIAL CULTURE AND CHANGING THE DISCLOSURE OBLIGATIONS THEMSELVES

The prosecutorial system has faced growing criticism for several years, particularly as a result of growing public awareness of mass incarceration and the complicity of prosecutors in the overcriminalization epidemic.[90] As part of this movement for reconsideration of prosecutorial responsibility, reformers have suggested that an internal culture shift could be one path towards greater prosecutorial disclosure.[91]

Additionally, the legal duties borne by prosecutors could be increased. While this solution does not directly address withheld evidence that remains undiscovered, an increase in the scope of the disclosure duty would draw more information within its ambit and could lead prosecutors and courts to seriously review more potentially violative material, leading to more violations being discovered. It could also lead to more careful consideration of whether any given instance of withholding amounts to a violation.

1. CHANGING THE CULTURE

Culture is a nebulous concept that is impossible to quantify. However, the epidemic of disclosure violations comes from a culture that prizes convictions at the expense of due process, which the progressive prosecution movement aims to change.[92] Despite criticisms of these reformers as legitimizing a fundamentally cruel system with surface-level tweaks,[93] these reforms are necessary and should not be rejected simply because they do not go far enough towards restructuring the entire system of prosecution.[94] A prosecutor's office that engages in broad voluntary disclosure may still be complicit in mass incarceration, but to the

90. Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3(1) UCLA CRIM. J. L. REV. 1, 1 (2019), https://escholarship.org/uc/item/2rq8t137 [https://perma.cc/8ZX6-C94G].

91. *See* Ben Grunwald, *The Fragile Promise of Open-File Discovery*, 49 CONN. L. REV. 771, 774 (2017); 21 Principles for the 21st Century Prosecutor, *supra* note 83.

92. *See* Davis, *supra* note 90, at 5. *See also* 21 Principles for the 21st Century Prosecutor, *supra* note 83.

93. Alec Karakatsanis, *Usual Cruelty: The Complicity of Lawyers in the Criminal Injustice System*, 83-85 (2019).

94. Davis, *supra* note 90, at 5, 27.

defendant whose attorney is able to find exculpatory information and avoid a prison sentence because of these policies, these reforms are certainly meaningful.

The progressive prosecutor movement is generally concerned with the vast amount of discretionary power maintained by prosecutors and its goals include revisiting extreme past sentences, relying less on the coercive power of overcharging to reach guilty pleas, and encouraging prosecutors to use their discretion to offer leniency rather than harshness.[95] Despite the "progressive" label, many of these goals can be shared across the political spectrum, as there is ample reason for conservatives concerned about government overreach to be alarmed by the unbounded discretion of prosecutors to exercise power over everyday lives.[96]

These admittedly nebulous cultural reforms can have real impact on how prosecutors perform their jobs. Prosecutors trained to hold themselves to a more exacting standard are more likely to hold themselves to that standard, and they are more likely to foresee professional consequences to noncompliance when they are surrounded by a culture that explicitly commands them to do so. The presence of leadership that is willing to train hires to a higher standard of compliance and generous disclosure to the opposition is equally important to leadership that is willing to use the disciplinary tools at its disposal to provide meaningful sanctions for improper failure to disclose.

The most salient single policy change for disclosure obligations under the "progressive prosecution" umbrella is the movement towards open-file policies. An open-file policy can be broadly defined as "discovery in which everything contained in the files of law enforcement and the prosecution, with the exception of work product and privileged material, is provided to defense attorneys."[97] Several District Attorneys have already adopted open-file policies under this definition[98] and several jurisdictions have also instituted statutory open-file discovery policies.[99] While such policies go far beyond the constitutionally mandated minimum disclosure of *Brady*, the existence of jurisdictions that voluntarily comply

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95. Davis, *supra* note 90, at 5. *See generally "Issues At A Glance" Briefs,* Fair and Just Prosecution, https://fairandjustprosecution.org/resources/issues-at-a-glance-briefs/ [https://perma.cc/8XKX-JYHS].

96. Lars Trautman, *The criminal justice reforms pushed by 'progressive prosecutors' are surprisingly conservative*, WASHINGTON EXAMINER (Nov. 26, 2019), https://www.washingtonexaminer.com/opinion/the-criminal-justice-reforms-pushed-by-progressive-prosecutors-are-surprisingly-conservative [https://perma.cc/ZA7D-7SR4]; Marc Levin, *Doing justice isn't left, it's right*, THE HILL (March 3, 2019), https://thehill.com/opinion/criminal-justice/432385-doing-justice-isnt-left-its-right [https://perma.cc/5V5R-DY8A].

97. Mike Klinkosum, *Pursuing Discovery in Criminal Cases: Forcing Open the Prosecution's* Files, THE CHAMPION, (May 2013) nacdl.org/Article/May2013-PursuingDiscoveryinCriminalCas [https://perma.cc/8VLR-YXLV].

98. *See* Gonzalez Op-Ed, *supra* note 20; 21 Principles for 21st Century Prosecutors, *supra* note 83 (section on broadening discovery through open-file policies).

99. Klinkosum, *supra* note 97 ("As of 2004, approximately one-third of the states (including California, Florida, New Jersey, Illinois, Michigan, and Pennsylvania) had implemented relatively broad discovery rules modeled on the American Bar Association standards."). Grunwald notes that there may be significant differences between different open-file statutes or policies; however, these differences have received little scholarly attention. *See* Grunwald, *supra* note 91, at 789, n.86.

with a broader standard of sharing more information at an earlier date than required should demonstrate to lawyers and law enforcement that compliance with that standard is not unduly burdensome on prosecution and has not resulted in an explosion of the crime rate.[100] Concerns about open file policies endangering witnesses by revealing too much personal information to the accused can also be simply and adequately addressed with provisions allowing prosecutors to withhold or redact limited information on showing of good cause before the court.[101]

Such policies would play a necessary role in altering the culture of prosecution and communicating to prosecutors that their professional superiors expect them to comply more fully with their disclosure obligations, but this is only one piece of the puzzle. Internal culture and procedures without any kind of review from outside the prosecutor's office would depend entirely upon prosecutors' voluntary compliance with their own policies (or on state legislatures imposing higher disclosure obligations upon local prosecutors). Effective change requires this cultural willingness to comply with higher standards to be combined with an outside method of enforcing these standards.

2. HEIGHTENED OBLIGATIONS AND INCREASED AWARENESS OF THE HEIGHTENED OBLIGATION

The most obvious solution to the insufficiency of existing disclosure obligations is to heighten the obligations themselves. By drawing more materials within the scope of the disclosure rule, this would hopefully cause prosecutors to review more information more carefully, leading to either fewer violations or the discovery of more violations that would have otherwise gone unnoticed.

a. Change in the Constitutional *Brady* Standard

One possible though unlikely avenue for an altered disclosure standard is for the Supreme Court to revisit the *Brady* line, particularly by altering the "materiality" standard.[102] While the Supreme Court in *Kyles v. Whitley* made some statements in dicta encouraging cautious prosecutors to err on the side of disclosure in unclear cases,[103] the Court's apparent assumption that the existing *Brady* doctrine was sufficient to incentivize disclosure appears to have failed. It is possible to

100. *See* Gonzalez Op-Ed, *supra* note 20; *Brooklyn continued to record historic decline in violent crime over 2019*, THE BROOKLYN DISTRICT ATTORNEY'S OFFICE (Jan. 3, 2020) http://www.brooklynda.org/2020/01/03/brooklyn-continued-to-record-historic-decline-in-violent-crime-in-2019/#:~:text=Brooklyn%20District%20Attorney%20Eric%20Gonzalez,that%20was%20recorded%20in%202018 [https://perma.cc/64JP-YNZR].

101. Smith, *supra* note 6, at 1962-63 ("[I]f a prosecutor decides to redact information that might expose a witness to danger, the court can demand a showing of cause but give a great deal of latitude in doing so.").

102. Lower federal courts may also play a role in further clarifying the existing materiality standard. However, it is unclear that lower courts have the power to make meaningful alterations to the materiality standard without violating binding Supreme Court precedent.

103. *See* Kyles v. Whitley, 514 U.S. 419, 439 (1995) ("This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence."). *See also* United States v. Agurs, 427 U.S. at 108 ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure.").

contemplate a strengthened *Brady* formula which would find a violation whenever prosecution withholds evidence potentially favorable to a defendant. Such a shift in constitutional doctrine, however, is exceedingly unlikely to occur. *Brady* is not nominally concerned with punishing prosecutors for failure to disclose information; the standard is only concerned with ensuring that due process is respected.[104] While there is a fair argument that a more robust disclosure obligation (with more robust enforcement) is necessary to ensure a fair trial and that post-hoc *Bagley* review allows the existing conviction to prejudice the defendant out of simple inertia, it is difficult to imagine the Supreme Court considering such a drastic revision of such a foundational standard. Furthermore, the existing Rule 3.8 standard already requires disclosure of all information that "tends to negate the guilt of the accused or mitigate the offense."[105] Because that standard already exists and can be applied, there is no reason for hopeful reformers to place their hopes on an extremely unlikely constitutional revision by the courts.

b. State-Level Legislative Change

An alternative would be a legislative change to disclosure requirements, which would allow states to take the decision to exceed *Brady*'s bare constitutional requirements out of the judiciary's hands. This statutory decision may include a full open-file discovery policy,[106] but a state legislature may also choose to enact a disclosure requirement in between the *Brady* minimum and a total open file policy, such as a standard similar to the *Kline* ethical requirement. The current cultural movement away from tough on crime rhetoric and towards greater rights for the criminally accused may make this an opportune moment to push for greater trial disclosure rights for defendants, particularly because these reforms would more directly affect the accused than the convicted and the voting public tends to express less sympathy for those who have already been convicted.[107]

New York's recent attempt at statutory criminal discovery reform shows that this approach is littered with political pitfalls. After the state legislature passed a substantial discovery and bail reform bill in 2019,[108] the new discovery

104. *See* Brady v. Maryland, 343 U.S. 83, 87 (1963). *See also* Barry Scheck & Nancy Gertner, *Combatting Brady Violations With An 'Ethical Rule' Order for the Disclosure of Favorable Evidence*, THE CHAMPION (May 2013) https://www.nacdl.org/Article/May2013-CombattingBradyViolationsWithA [https://perma.cc/7G2Z-8EE3] ("*Brady* was not about deterring future violations (rather than preserving the due process right to a fair trial and accuracy in adjudication). . .").

105. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2009).

106. *See, e.g.,* Grunwald, *supra* note 91, at 773.

107. Legislation that would help those not yet convicted appears more politically feasible even though some of those who have been convicted likely would not have been convicted if discovery reform had already occurred.

108. *Discovery Reform in New York: Major Legislative Provisions, Updated after April 2020 Amendments*, https://www.courtinnovation.org/sites/default/files/media/document/2020/Discovery_NYS_Revised_2020.pdf [https://perma.cc/N9LL-6PPN]. This act was partially aimed at New York's "Blindfold Laws" which prevent defendants and their attorneys from obtaining vital information about witnesses and contact information. These

requirements were assailed as unnecessarily demanding of prosecutors and then promptly undermined by subsequent legislation.[109] However, this need not be a dead end; a small number of states have successfully enacted disclosure statutes much broader than *Brady*, up to and including full open-file policies.[110] Should more states impose broader statutory disclosure obligations on prosecutors, it would only remain for the states to enforce discipline upon violations of these statutes.[111]

c. The Higher Ethical Standard of Rule 3.8

Rather than wait for lawmakers, defense attorneys and defendants concerned about possible prosecutorial abuses can choose, right now, to utilize a tool that is already available to them: the broader obligation under 3.8 found by the *Kline* court.[112] By introducing this standard through defense motions, these attorneys can attempt to convince the court to hold prosecutors to the 3.8 standard in a binding, sanctionable manner (rather than leave enforcement of ethical rules to the bar association) while also increasing judicial awareness of the standard.[113]

As the D.C. Court of Appeals noted in its reasoning for declining to sanction Kline, the distinction between the disclosure requirements under the *Brady* standard and the Rule 3.8 standard are far from clear.[114] While *Kline* itself has hopefully put prosecutors in that jurisdiction on notice of their obligations, the higher ethical standard remains little-known in comparison to the lower but more well-known *Brady* standard, which is considered an ubiquitous and fundamental aspect of criminal procedure (even if its borders remain not entirely clear). Therefore, any ability to actually enforce the higher ethical standard must rely on courts being made aware of the difference between the standards and given the power to enforce the ethical standard in addition to the *Brady* standard.

Courts can be given the power to do so based on an affirmative pretrial motion by defense counsel. The National Association of Criminal Defense Lawyers

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laws have been criticized for making thorough pre-trial investigation of witnesses impossible. *See* Gonzalez Op-Ed, *supra* note 20; Tina Luongo & Barry Scheck, *Stop the Fear-Mongering, Allow Disclosure of Evidence*, TIMES UNION (Feb. 16, 2018), https://www.timesunion.com/opinion/article/Stop-the-fear-mongering-allow-disclosure-of-12556641.php [https://perma.cc/A7WA-8GLD].

109. *See* Briana Supardi, *New York State Budget Slated to Taper Back Controversial Bail* Reforms, CBS NEWS ALBANY, (April 2, 2020) https://cbs6albany.com/news/local/new-york-state-budget-slated-to-taper-back-controversial-bail-reforms [https://perma.cc/ZAY2-N5HT] (reporting that controversy over discovery reform provisions passed in 2019 has led the state legislature to undercut the effect of the reform on prosecutors' newly expanded discovery obligations).

110. Grunwald, *supra* note 91, at 773, 788.

111. It should be noted that Grunwald finds that the adoption of expansive or open-file discovery policies has had little effect on improving outcomes for defendants in terms of "charging, plea bargaining, sentencing, trial rates, or time-to-disposition" in the states that he studied. *Id*. at 824-26. However, this study does support the proposition that open-file policies increase the volume of prosecutorial disclosure. *Id*. at 809-10.

112. In re Andrew J. Kline, 113 A.3d 202, 204 (2015).

113. *See* Scheck & Gertner, *supra* note 105.

114. *See In re Andrew J. Kline*, 113 A.3d at 215.

(NACDL) has suggested that defense attorneys submit such a motion citing Rule 3.8(d) and asking the judge to issue an explicit court order requiring prosecution to comply with the higher requirements of the ethical rule and provide *all* material "that tends to negate the guilt of the accused or mitigate the offense," rather than or in addition to *Brady* material.[115] Such motions are rare and are likely to surprise both judges and prosecutors who have never seen such a request before.[116] To increase the chances of the court granting the order, defense movants can demonstrate the reasonableness of their request by explicitly requesting that the order allow prosecution to delay production of materials for good cause (such as the safety of witnesses), pursuant to in camera review by the judge.[117] As part of this showing of reasonableness, defense should not request materials too early unless there is a specific reason why a given piece of information should be produced rapidly.[118] The motion can also ask to limit contempt sanctions to "willful and deliberate failure to comply," excluding negligent or inexperienced prosecutors from sanction and encouraging judges to be willing to enforce meaningful sanctions against violators.[119]

In response to such motions, the NACDL strategy anticipates both judges and prosecutors arguing that the existing *Brady* obligations make extra protection under the ethical rule unnecessary and that a broader ethical rule places an undue burden on prosecutors.[120] Defense counsel should argue in response that prosecution should already consider itself to be bound by the ethical rules of practice in their jurisdiction, regardless of a court order enforcing said rule, and that compliance should therefore not be any more burdensome.[121] Secondary sources cataloging the frequency of such willful prosecutorial abuses abound and can be used to demonstrate to the court the necessity for the extra judicial protection, and it would reflect poorly on prosecution to argue against protection from only willful violations.[122] Furthermore, regular exercise of the ethical order motion should gradually increase judicial awareness of the Rule 3.8 standard, eventually making it seem like a less excessive request to ask of the court and ideally informing the court that it has the power to require such disclosures without specific request by defense. While this approach may be foreclosed to practitioners in jurisdictions that have explicitly disagreed with the *Kline* court,[123] broad use of such motions

115. Scheck & Gertner, *supra* note 104.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *See id.*
121. *Id.*
122. *Id. See, e.g.,* Armstrong & Possley, *supra* note 6; Rosen, *supra* note 6, at 697.
123. *See, e.g.,* In re: Petition to Stay the Effectiveness of Formal Ethics Opinion 2017-F-163, No. M2018-01932-SC-BAR-BP. Practitioners in jurisdictions that reject a broader ethical standard may instead be forced to rely on state FOIA-equivalents for their disclosure needs. Such statutes are commonplace and exist in almost every state. Monique C.M. Leahy, *Proof Supporting Disclosure Under State Freedom of Information Acts*, 132

may spread awareness of the standard and help make arguments of practitioners in favor of the broad ethical standard in other jurisdictions more reasonable.

B. BACK-END SOLUTIONS: GREATER DISCIPLINE FOR PROSECUTORS

There has been extensive commentary on the legal system's failure to provide appropriate discipline for prosecutors who fail to make obligatory disclosures.[124] This, combined with the aforementioned conviction-focused culture of prosecutors' offices, creates a system in which prosecutors face little deterrence from committing such violations.[125] While harsher discipline without greater enforcement does little to deter violations, enhanced enforcement of existing penalties could go a long way in signaling to prosecutors that their existing violation-rife practices must change in order for them to avoid significant professional consequences. For that reason, a movement away from disciplinary sanctions and towards criminal sanctions for *Brady* violations seems unlikely to solve the issue without a change in enforcement. By instead submitting pretrial motions to courts convincing them to hold prosecutors to the 3.8 ethical standard at the threat of already available disciplinary sanction, defense attorneys can rely on increased enforcement of existing standards rather than an increase in punishment.[126]

As an alternative to existing disciplinary sanctions, criminal sanctions for prosecutors seem like an intuitive solution: by increasing the amount of punishment, we theoretically increase the deterrent effect on prosecutors and make it less likely that they will choose to withhold evidence. A statute already exists providing criminal sanction for government actors who deprives any U.S. citizen of their constitutional rights under color of law in 18 U.S.C. § 242[127] and usage of this statute against prosecutors who deprive defendants of their constitutional *Brady* rights by willfully suppressing evidence has already been specifically endorsed by the Court in *Imbler* as an alternative to civil liability.[128] This statute would allow the prosecutor who suppresses evidence "willfully" to deprive the citizen of a constitutional right or with "reckless disregard of constitutional

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Am. Jur. PROOF OF FACTS 3d 1, § 1, § 6 (2013). However, the continuing commentary on the frequency of prosecutorial disclosure violations suggests that these statutes are insufficient to curb these abuses, and the question of whether state FOI noncompliance creates another approach for disciplining prosecutors is outside the scope of this Note. *See* Justin Cox, *Maximizing Information's Freedom: The Nuts, Bolts, and Levers of FOIA*, 13 N.Y. CITY L. REV. 387, 414 ("As with federal FOIA, state FOI laws frequently fail to deliver on what they promise. Like the FOIA, most are chronically under-enforced, and many states' statutes provide relatively mild sanctions for noncompliance that are simply inadequate to deter violations.").

124. *See* Rosen, *supra* note 6, at 696-97; Smith, *supra* note 6, at 1952; Davis, *supra* note 4.

125. *See* Davis, *supra* note 4, at 290; Rosen, *supra* note 6, at 697.

126. *See* Part II(A)(ii): Heightened Obligations and Increased Awareness of Higher Ethical Standard, *supra*.

127. 18 U.S.C. § 242 (1996).

128. Imbler v. Pachtman, 424 U.S. 409, 429 (1976) ("Even judges, cloaked with absolute civil immunity for centuries, could be punished criminally for willful deprivations of constitutional rights on the strength of 18 U.S.C. s 242, the criminal analog of § 1983. The prosecutor would fare no better for his willful acts.") (citations omitted).

prohibitions or guarantees"[129] to be prosecuted in turn and punished by a fine or up to one year of imprisonment.[130] Such criminal sanctions could also work in concert with professional disciplinary sanctions by providing a basis for disciplinary action.[131]

However, the drawbacks of the criminal approach to *Brady* violations should be readily apparent. The prosecution of the violating prosecutor would remain within the discretion of their fellow prosecutors.[132] The bonds of sympathy between professional colleagues already appear sufficient to prevent effective exercise of internal disciplinary measure; it is even less likely that the fellow prosecutors will choose to proceed with far harsher and entirely discretionary criminal sanctions. While there is a possibility of federal prosecution of state and local prosecutors to attempt to place some distance between them,[133] this does not remove the sympathy for other prosecutors that will be forged by a career spent facing similar obligations and professional challenges. A reliance on criminal charges would therefore do little to help increase enforcement of penalties outside of the most egregious cases and may in fact lead to prosecutors being even more reluctant to hold each other responsible. Because of the harshness of criminal penalties and their collateral consequences, criminal penalties would only be used in the most blatantly abusive cases.[134] Even if it is appropriate in those worst cases, this approach would do nothing to deter prosecutors from common, low-level violations.

Furthermore, legal scholars have harshly criticized the tendency of lawyers and legislators to go straight to criminalization in a misjudged attempt to solve all social ills, leading to the sprawl of criminal legislation and the carceral state.[135] This is exactly such a scenario where the lesser, non-criminal sanction would be appropriate if appropriately enforced. Disciplinary measures are already available, if underused; to resort to criminal prosecution would be to forego a scalpel for a chainsaw. Defense attorneys, by making the pretrial ethical order motion, can provide a judicial avenue for courts to hold prosecutors their higher ethical duties. All that this would require is that judges be willing to acknowledge the

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129. Smith, *supra* note 6, at 1969 (quoting United States v. O'Dell, 462 F.2d 224, 232 (6th Cir. 1972)).

130. 18 U.S.C. § 242 (1996).

131. Smith, *supra* note 6, at 1970 ("If professional discipline is a theoretically effective means of combating prosecutorial misconduct but is hampered by the lethargy or unwillingness of disciplinary boards, section 242 can, in theory, act as a preliminary step.").

132. *Id*.at 1968.

133. *Id*. at 1970-71.

134. *Id*. at 1969 (The willingness standard "would ensure that prosecutions under section 242 would be reserved only for the most egregious breaches of prosecutorial duty, including willful suppressions of Brady material").

135. *See* Ellen S. Podgor, Overcriminalization: New Approaches to a Growing Problem, 102 J. CRIM. L. & CRIMINOLOGY 529, 534-36 (2013) https://scholarlycommons.law.northwestern.edu/jclc/vol102/iss3/2 [https://perma.cc/2RMQ-BZR4] (listing examples of scholarship on the problem of overcriminalization); Shon Hopwood, *Clarity in Criminal Law*, 54 AM. CRIM. L. REV. 695, 699 (2017).

failure of prosecutors' offices to discipline their own and issue the ethical order upon defense's motion.

From the other direction, some lawyers may object to the idea that increased discipline for disclosure violations is necessary. They may argue that the "invisible record" of violations is invisible because it does not truly exist and that existing disciplinary measures sufficiently curb violations. Aside from the vast commentary that suggests that the problem exists and is widespread,[136] this position can be rejected because the legal framework itself creates a clear opportunity for rampant low-level prosecutorial disclosure violations to occur without punishment via the movable materiality standard. Even ignoring the hypothesized invisible record, there exist many cases following *Bagley* where minor violations are held to be "harmless error."[137] Because cases inarguably exist demonstrating that prosecutorial failures frequently go unpunished, there is sufficient reason to believe that disciplinary options that apply to this space of "harmless error" can drive prosecutors to meeting a higher standard.

CONCLUSION

It is clear that the existing *Brady* standard is grossly insufficient to guide prosecutors or deter them from improperly withholding information favorable to defendants and that a standard with such deficiencies undermines faith in the entire criminal justice system. In order to deter prosecutors from failing their disclosure duties, it is necessary that these duties actually be enforced with a meaningful threat of sanctions. These sanctions do not need to be unnecessarily harsh; so long as there is a credible threat that they will be applied to violators, professional and ethical sanctions will suffice. Such sanctions must have sufficient consequences for a prosecutor's career prospects to force them to err on the side of disclosure, as the Court in *Agurs* and *Kyles* contemplated,[138] and can be enforced under the existing ethical standard of Model Rule 3.8 as determined by the D.C. Court of Appeals.[139] This approach would require that judges be made aware that the ethical rule creates more expansive obligations than *Brady* and that judges have the power to enforce those obligations, and that prosecutors themselves make efforts to reform a heavily criticized internal culture in favor of defendants' rights.

136. *See* Davis, *supra* note 4, at 279-80; Rosen, *supra* note 6, at 696-97.
137. *See* Dewar, *supra* note 9, at 1452, 1455-56.
138. Kyles v. Whitley, 514 U.S. 419, 439 (1995); United States v. Agurs, 427 U.S. 97, 108 (1976).
139. In re Andrew J. Kline, 113 A.3d 202, 213 (2015).