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WHEN SELF-POLICING DOES NOT WORK: A PROPOSAL FOR POLICING PROSECUTORS IN THEIR OBLIGATION TO PROVIDE EXCULPATORY EVIDENCE TO THE DEFENSE

Sara Gurwitch*

It is incumbent upon all those who study the criminal justice system to evaluate the causes of wrongful convictions, and to consider ways to address them.1 While certain causes—including faulty eyewitness identifications and unreliable confessions—have, appropriately, received significant attention and useful reforms have been proposed,2 the role of prosecutorial misconduct in wrongful conviction cases has failed to generate reform efforts within the criminal justice community.

Under Brady v. Maryland, prosecutors have a constitutional obligation to provide the defense with exculpatory material.4 If a prosecutor fails in this obligation,

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1. The fact of wrongful convictions is well documented. See, e.g., Jim Dwyer, Peter Neufeld & Barry Scheck, Actual Innocence (2000).


the defendant is entitled to a new trial, provided that he or she can show that there is a “reasonable probability” that the outcome of the proceeding would have been different, had the exculpatory evidence at issue not been withheld.5

Numerous commentators have questioned whether the remedy, under current Brady jurisprudence, is sufficient to assure that wrongful convictions are being avoided, individual defendants are receiving a fair trial, and that the integrity of the criminal justice system is being protected.6 Part I of this article examines whether the current remedy for a Brady violation—the possibility of a new trial, if the Brady prejudice standard7 is met—serves as a sufficient deterrent to prosecutors, and concludes that it does not; Part II evaluates various alternative remedies proposed by commentators; and Part III suggests a new incentive mechanism.

Under the new incentive mechanism that I am proposing, a defendant would be entitled to dismissal of the indictment against her, without the possibility of re-indictment, rather than a new trial, where the Brady violation is shown to be the product of willful misconduct by the prosecutor. The intent of the actor who commits the misconduct would be paramount in determining whether dismissal of the indictment is appropriate. Under this proposal, Brady’s current prejudice standard would be maintained. The interaction of these two central precepts—evaluation of the intent of the prosecutor and maintaining Brady’s current prejudice standard—would

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7. Kyles, 514 U.S. at 433; Bagley, 473 U.S. at 682.
result in dismissal of the indictment only where it is established that the prosecutor acted intentionally and willfully in suppressing exculpatory evidence, and the evidence is of such a nature that its suppression truly prejudiced the defendant. The imposition of an intent standard, coupled with a severe sanction to the prosecution (dismissal of the indictment and an inability to re-indict the defendant), should lead to a reduction in the likelihood that a prosecutor would suppress evidence. Yet by maintaining Brady’s prejudice standard, only the truly harmed defendant would benefit from the severe sanction to the prosecution proposed. Further, an incentive to disclose previously withheld evidence could be created by exempting cases from the operation of the proposed rule where the prosecution comes forward and discloses the evidence.

I. THE RULE OF BRADY V. MARYLAND

Under Brady v. Maryland, the prosecution has an obligation, under the Due Process Clause of the Fourteenth Amendment, to provide an accused with exculpatory, material evidence. In Brady, the Court held that the

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9. The Brady rule applies to evidence known to those acting on the government’s behalf, such as police officers. Youngblood v. West Virginia, 547 U.S. 867, 869–70 (2006) (citing Kyles, 514 U.S. at 434).

10. The Model Rules of Professional Conduct also impose such an obligation on prosecutors. Rule 3.8, entitled Special Responsibilities of a Prosecutor, provides:

   The prosecutor in a criminal case shall . . . (d) 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 . . . .

Model Rules of Prof’l Conduct R. 3.8 (1983). This rule is broader than Brady, as it does not contain a materiality standard.
suppression by the prosecution,\textsuperscript{11} of evidence that is material to either guilt or punishment and is favorable to the accused\textsuperscript{12} is a violation of that accused individual's due process rights, irrespective of the good faith or bad faith of the prosecution.\textsuperscript{13} Exculpatory evidence encompasses impeachment evidence.\textsuperscript{14}

The prosecution's \textit{Brady} obligation is largely self-enforced: prosecutors determine what is exculpatory and what must be turned over to the defense.\textsuperscript{15} As a result, lack of compliance with the \textit{Brady} rule will often go undetected, and it is fair to assume that most \textit{Brady} violations go undiscovered. Because the essence of a \textit{Brady} violation is that the prosecution has withheld information from both the defense and the court, there is no court that would be aware of such a violation. \textit{Brady} violations often come to light during trial or post-conviction, usually by way of re-investigation or fortuity.\textsuperscript{16} The type of full-scale re-investigation that is typically necessary to discover

\textsuperscript{11} Evidence is not deemed suppressed if the defendant knows of it, or should have known of it. \textit{See}, e.g., Leka v. Portuondo, 257 F.3d 89, 100 (2d Cir. 2001); Johns v. Bowersox, 203 F.3d 538, 545 (8th Cir. 2000) (finding no \textit{Brady} violation where the defense could have obtained the evidence through "reasonable diligence"); Felker v. Thomas, 52 F.3d 907 (11th Cir. 1995). Where the prosecution has hidden evidence, however, the defense is not obligated to search it out. Banks v. Dretke, 540 U.S. 668, 696 (2004).

\textsuperscript{12} Subsequent to \textit{Brady}, the Court abandoned the requirement that the defense specifically request exculpatory material. \textit{See Bagley}, 473 U.S. at 682.

\textsuperscript{13} \textit{Brady} v. Maryland, 373 U.S. 83, 87 (1963).

\textsuperscript{14} In \textit{Giglio v. United States}, 405 U.S. 150 (1972), the Court clarified that the \textit{Brady} doctrine applies to nondisclosure of evidence affecting credibility. The prosecution failed to disclose that a critical prosecution witness had been told that he would not be prosecuted if he testified against the defendant. \textit{Id.} at 150–51.

The Court in \textit{Giglio} also explained that every attorney in a prosecutor's office has the obligation to disclose such information to the defense, whether or not he or she made the promise to the witness. \textit{Id.} at 154. The Court explained that "[a] promise made by one attorney must be attributed, for these purposes, to the Government." \textit{Id.} (citing \textit{Restatement (Second) of Agency} § 272 (1958); American Bar Association, \textit{Project on Standards for Criminal Justice, Discovery and Procedure Before Trial} § 2.1(d) (1970)).

\textsuperscript{15} \textit{See}, e.g., Pennsylvania v. Ritchie, 480 U.S. 39, 59 (1987).

\textsuperscript{16} An example of fortuity is when defense counsel discovers information relevant to the credibility of a witness in one case because the same witness is involved in a second case where the same attorney represents a different defendant. If the credibility evidence were disclosed in the second case, but not the first, the attorney would fortuitously discover a \textit{Brady} violation in the first case.
previously suppressed exculpatory evidence post-conviction is rarely conducted.\textsuperscript{17} This is both logical and appropriate: if the defense could gain access to exculpatory material that is provided it by the prosecution on its own, a due process rule requiring the disclosure of such material would be unnecessary. Unfortunately, as a consequence, the actual number of \textit{Brady} violations remains unknown.

Less frequently, \textit{Brady} violations are discovered by a prosecutor—either the original prosecutor or a different prosecutor\textsuperscript{18}—and brought to the attention of the court and the defense. A prosecutor who discovers, at any point, that her office has failed to provide the defense with \textit{Brady} evidence is required to disclose this failure.

In \textit{Brady}, the Court made clear that its paramount interest was the protection of an accused individual's right to a fair trial.\textsuperscript{19} Notably, the Court explicitly said that it was not including the punishment of prosecutors in its rationale.\textsuperscript{20} Consistent with this lack of interest in punishing prosecutors, the \textit{Brady} rule applies whether the suppression of evidence is the result of good faith or bad faith.\textsuperscript{21}

The types of evidence that are most commonly the subject of \textit{Brady} violations fall into a small number of general categories:\textsuperscript{22} (1) evidence that a prosecution

\textsuperscript{17} The appellate process is not well suited to the discovery of \textit{Brady} violations. Typically, appellate review is limited to legal errors made below. Accordingly, it is rare that appellate counsel will conduct a factual reinvestigation. Furthermore, most criminal defendants are indigent and, therefore, do not have the resources to conduct this type of investigation.

\textsuperscript{18} In the case of an intentional \textit{Brady} violation, one would have to assume that it would be a different prosecutor, or that the prosecutor who committed an intentional \textit{Brady} violation had a change of heart regarding his past misconduct.

\textsuperscript{19} "The principle of \textit{Mooney v. Holohan} is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair . . . ." \textit{Brady v. Maryland}, 373 U.S. 83, 87 (1963).

\textsuperscript{20} \textit{Id}.

\textsuperscript{21} \textit{Id}.

\textsuperscript{22} A number of courts have held that the evidence must be admissible to fall within the \textit{Brady} rule. \textit{See} Madsen v. Dormire, 137 F.3d 602, 604 (8th Cir. 1998); \textit{United States v. Derr}, 990 F.2d 1330, 1335–36 (D.C. Cir. 1993). The Supreme Court has also suggested that only admissible evidence is subject to the \textit{Brady} rule. \textit{See} Wood v. Bartholomew, 516 U.S. 1, 6 (1995). There are, however, cases that find that inadmissible evidence is within the \textit{Brady} rule.
witness received or was to receive a benefit in exchange for her testimony,\textsuperscript{23} (2) evidence that casts doubt on the credibility of a prosecution witness in some other fashion,\textsuperscript{24} (3) evidence that someone other than the defendant committed the crime at issue,\textsuperscript{25} and (4) evidence that otherwise undermines the prosecution's case against the defendant.\textsuperscript{26}

The Supreme Court has crafted a rigorous materiality standard for \textit{Brady} violations. Where the prosecution has suppressed exculpatory evidence, a defendant is entitled to a new trial only if he or she can establish that "there is a reasonable probability that, had [the suppressed evidence] been disclosed to the defense, the result of the proceeding would have been different."\textsuperscript{27} In defining its "reasonable probability of a different result" materiality standard, the Court has explained that it is met when the prosecution's suppression "undermines confidence in the outcome of the trial."\textsuperscript{28}

\textsuperscript{23} See Ellsworth v. Warden, 333 F.3d 1, 5 (1st Cir. 2003); Wright v. Hopper, 169 F.3d 695, 703 (11th Cir. 1999).

\textsuperscript{24} United States v. Arnold, 117 F.3d 1308 (11th Cir. 1997), is in this category. The prosecution in Arnold suppressed tape recordings that demonstrated, \textit{inter alia}, that the main prosecution witness testified falsely at trial when he said that he had no expectation that he would receive a benefit in exchange for his cooperation. \textit{Id.} at 1315–17.

\textsuperscript{25} Crivens v. Roth, 172 F.3d 991 (7th Cir. 1999), is an example of such a case. In Crivens, a murder case, the prosecution withheld the criminal history of the "key" prosecution witness. \textit{Id.} at 998.

\textsuperscript{26} Robinson v. Cain, 510 F. Supp. 2d 399 (E.D. La. 2007), falls into this category. The state in Robinson withheld a police report containing details corroborating the defendant's version of the events at issue, and supplying a motive for a person other than the defendant to have committed the murder of which the defendant was convicted. \textit{Id.} at 409–10.

\textsuperscript{27} People v. Hunter, 892 N.E.2d 365 (N.Y. 2008), is an example of such a case. In Hunter, a sex crimes case, the prosecution withheld that the complainant had, subsequent to the incident with the defendant, accused a different individual of the same crime under similar circumstances. Without the suppressed information, the defense was without a basis to explore whether the defendant had been the victim of a false allegation. \textit{Id.} at 366.


\textit{Id.} at 434 (quoting United States v. Bagley, 473 U.S. 667, 678 (1985)).
II. THE ROLE OF BRADY IN THE PROPER FUNCTIONING OF THE CRIMINAL JUSTICE SYSTEM

Prosecutorial suppression of exculpatory evidence is a well-documented problem in the criminal justice system. The ongoing nature of this problem strongly suggests that the current system for sanctioning Brady violations—only granting the defendant a new trial when suppressed Brady evidence is discovered, and the defendant is able to meet Brady's materiality standard—is not effective. This problem is especially troubling given that the withholding of exculpatory evidence has been widely identified as a significant cause of wrongful convictions, and the conviction

29. It is difficult to discern, based on published decisions, whether certain prosecutors are repeat Brady violators, as these decisions often do not name the prosecutor who committed, or was alleged to have committed, the Brady violation. See Bruce A. Green & Fred C. Zacharias, Regulating Federal Prosecutors' Ethics, 55 VAND. L. REV. 381, 449 (2002). There are a limited number of cases, however, in which the prosecutor at issue is named. See BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT 13–15 n.75 (1998). Similarly, it is difficult to establish whether Brady violations are the product of aberrant behavior or whether certain prosecution offices implicitly or explicitly condone them.

30. See supra note 6. When the New York State Bar Association Task Force on Wrongful Convictions analyzed fifty-three New York State wrongful conviction cases, it concluded that “government practices,” by prosecutors and police were a “possible cause” of wrongful conviction in more than fifty percent of the cases. PRELIMINARY REPORT OF THE N.Y. STATE BAR ASSN'S TASK FORCE ON WRONGFUL CONVICTIONS 19 (2009), http://www.nysba.org/Content/ContentFolders/TaskForceonWrongfulConvictions/TFWrongfulConvictionsreport.pdf. Brady violations were one of the four types of government practices the task force identified as possibility leading to wrongful convictions. Id.

31. Part of the problem seems to be that, as Richard Rosen argues, “a prosecutor knows that a decision to withhold or falsify evidence, even if discovered, will not necessarily result in a reversal of the conviction.” See Rosen, supra note 6, at 707–08.

32. The Innocence Project identifies the seven most common causes of wrongful convictions as being: eyewitness misidentification, unreliable/limited science, false confessions, forensic science misconduct, unreliable informants/snitches, bad lawyering, and government misconduct. See The Innocence Project, The Causes of Wrongful Conviction, http://www.innocenceproject.org/understand/ (last visited Mar. 22, 2009). In a study analyzing the first seventy-four DNA exoneration cases, the Innocence Project found that prosecutorial misconduct was found to have played a role in the wrongful conviction in forty-five percent of the cases. DWYER ET AL., supra note 1, at 365. The Innocence Project identifies suppression of exculpatory evidence by the prosecution as a common form of prosecutorial misconduct. See The Innocence Project, Government Misconduct,
of an innocent person is a wrong of broad societal acceptance. *Brady* violations can also undermine confidence in the integrity of the criminal justice system. The idea of a prosecutor—the people’s representative—violating a fundamental rule mandated by the Constitution does not comport with society’s general expectation of how the criminal justice system should function.33

III. ALTERNATIVE ENFORCEMENT MECHANISMS

Given the general agreement among commentators that the current remedy for *Brady* violations does not sufficiently foster compliance by prosecutors with the *Brady* rule, there is an active discussion in the criminal justice literature regarding alternative enforcement mechanisms.34 These alternatives include the following.35

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http://www.innocenceproject.org/understand/Government-Misconduct.php (last visited Mar. 22, 2009). As an example of suppression of exculpatory evidence resulting in a wrongful conviction of an innocent person, the Innocence Project website contains a description of the prosecution and exoneration of Lesly Jean of North Carolina. See The Innocence Project, Lesly Jean, http://www.innocenceproject.org/Content/183.php (last visited Mar. 22, 2009). Mr. Jean was convicted of rape and sexual assault and sentenced to two life terms of imprisonment. The Innocence Project, Lesly Jean, supra note 32. His conviction was reversed after Mr. Jean had served nine years in prison when it was discovered that the prosecution and police suppressed exculpatory evidence. The Innocence Project, Lesly Jean, supra note 32. Mr. Jean was subsequently exonerated by DNA testing. The Innocence Project, Lesly Jean, supra note 32. See also CTR. FOR PUB. INTEGRITY, HARMFUL ERROR: INVESTIGATING AMERICA’S LOCAL PROSECUTORS (2003).

33. Prosecutors have a special role and set of obligations in the criminal justice system. See, e.g., Berger v. United States, 295 U.S. 78, 88 (1935) (stating that the prosecutor's interest “is not that it shall win a case, but that justice shall be done”); see also Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 314–15 (2001) (the prosecutor's obligation is “not simply to convict the guilty but to protect the innocent.”).

34. See, e.g., Joseph, *supra* note 6, at 44 (“In fact, in many cases, the only sanction a prosecutor receives is in the form of a critical judicial opinion concerning prosecutorial misconduct.”); Rosen, *supra* note 6, at 730–31 (describing the infrequency of disciplinary actions against prosecutors for *Brady*-type misconduct and the leniency of the sanctions actually imposed).

35. The alternative enforcement mechanisms discussed are limited to those addressing complete *Brady* violations, rather than late disclosure of *Brady* material. In her student note, Elizabeth Napier Dewar proposes an alternative remedy for the situation where previously suppressed *Brady* material is discovered by the defense during trial or immediately prior to trial. Elizabeth Napier Dewar, Note, *A Fair Trial Remedy for Brady Violations*, 115 YALE L.J. 1450 (2006). Dewar proposes that, in such a situation, the judge should instruct the jury on the prosecution's obligation to disclose such evidence, and the
1. Financial Penalties to Prosecutors, by Way of Lawsuits or Fines

A number of commentators have suggested that individual prosecutors should be held personally liable for defense should be permitted to argue that the failure to meet this obligation establishes reasonable doubt. Id. at 1452.

36. This is a different notion than compensation for wrongful conviction. Such compensation is authorized in a number of jurisdictions, as well as under the International Covenant on Civil and Political Rights, art. 14(6), Mar. 23, 1976, 999 U.N.T.S. 171. Alabama, California, Connecticut, the District of Columbia, Florida, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Missouri, Montana, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wisconsin have statutes for compensating wrongfully convicted individuals. These statutes differ in terms of the level of compensation, filing deadlines, and exclusions. For example, Alabama requires that the claim be filed within two years of exoneration, and allows compensation of $50,000 per year of wrongful conviction. ALA. CODE § 29-2-159 (1975). If convicted of a new felony, the claimant may no longer receive compensation. Id. § 29-2-161. California requires that the claim be filed within six months of acquittal, pardon, or release, and permits compensation of $100 per day of wrongful incarceration. CAL. PENAL CODE §§ 4900-4906 (West 2009). The claimant must show he did not "contribute to the bringing about of his arrest or conviction." Id. § 4903. In the District of Columbia, there is no limit on the amount of compensation an individual may receive. D.C. CODE § 2-421 (2002). Louisiana allows for compensation of $15,000 per year of wrongful incarceration, up to a maximum of $150,000, if the claimant's conviction has been vacated and she can prove factual innocence. LA. REV. STAT. ANN. § 15:572.8-.9 (2009); LA. CODE CIV. PROC. ANN art. 87 (2009). The claimant is also eligible for reimbursement for job or skill training for one year, medical and counseling services for three years, and tuition at a community college or the state university. LA. REV. STAT. ANN. § 15:572.8. In Massachusetts, a wrongfully convicted person who did not plead guilty (unless the plea was withdrawn, vacated or nullified) must file for compensation within two years of exoneration and may receive up to $500,000, as well as college tuition. MASS. GEN. LAWS ANN. ch. 258D, §§ 1–9 (West 2004). A wrongfully convicted person in New Jersey must file for compensation within two years of release or pardon and may receive the greater of $20,000 per year of wrongful incarceration, or double the amount of his income in the year prior to incarceration. N.J. STAT. ANN. § 52:4C-1–6 (West 1997). The New York statute, which has a two-year limitations period, applies where the wrongfully convicted individual "did not by his own conduct cause or bring about his conviction." N.Y. CT. CL. ACT § 8-b (McKinney 2009). Compensation is available for the amount "the court determines will fairly and reasonably compensate" the claimant. Id. An individual wrongfully convicted in Tennessee must file for compensation within one year of exoneration, and is eligible to receive $1,000,000. TENN. CODE ANN. § 9-8-108 (2004). The Virginia statute entitles a wrongfully convicted individual whose conviction has been vacated and who did not plead guilty (unless he was charged with a capital offense) to ninety percent of the Virginia per capita personal income for up to twenty years plus a tuition award worth $10,000 in the Virginia community college system. VA. CODE ANN. § 8.01-195.10–11 (2007).
Brady violations, with some arguing explicitly in favor of financial incentives or disincentives. Supreme Court precedent, however, presents a serious impediment to such proposals, as it provides for absolute immunity for prosecutors acting in their prosecutorial function. In Imbler v. Pachtman, the Court held that prosecutors are entitled to absolute immunity from suit under 42 U.S.C. § 1983 for the exercise of prosecutorial functions. In interpreting what

37. See, e.g., Weeks, supra note 6, at 914–22. Weeks advocates that “for the most serious Brady violations, prosecutors should be held personally liable for damages sustained by the defendant for wrongful imprisonment.” Id. at 833.

38. Tracey L. Meares asserts that “[financial incentives could motivate prosecutors to behave ethically.” Meares, supra note 6, at 901. Professor Meares proposes a system in which prosecutors are financially rewarded with a bonus when appellate review of a case does not establish misconduct by a prosecutor, or a defendant does not seek appellate review of his conviction. Id. at 902. It is Professor Meares’s contention that when “the defendant does not appeal his conviction . . . it must be assumed that the prosecutor’s behavior was proper.” Id. There are, however, many reasons why, even in a situation when the prosecutor has committed misconduct, the defendant would not seek appellate review of his conviction. Furthermore, one could argue that it is unseemly to reward prosecutors for fulfilling their constitutional obligations.

39. When prosecutors act outside a prosecutorial function, they are entitled only to qualified immunity. Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993) (“A prosecutor’s administrative duties and those investigatory functions that do not relate to an advocate’s preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity.” (citing Burns v. Reed, 500 U.S. 478, 494–96 (1991))). In determining whether a prosecutor is entitled to qualified, rather than absolute, immunity, the Court has directed that a functional test should be used. Id. at 269–70; Forrester v. White, 484 U.S. 219, 229 (1988) (stating that “the nature of the function performed, not the identity of the actor who performed it” is the relevant inquiry). Only conduct “intimately associated with the judicial process,” dealing with the “initiating or conducting of a prosecution” is entitled to absolute immunity. Burns, 500 U.S. at 494.

Recognizing the federal rule of absolute prosecutorial immunity from civil liability, Professor Weeks suggests that prosecutors may be liable under state law. Weeks, supra note 6, at 914–22. Weeks, however, recognizes that most states do not have an analog to a civil rights action under 42 U.S.C. § 1983. Id. at 915. He further considers whether absolute prosecutorial immunity for malicious prosecution could be extended to Brady-based claims under a state’s constitution. Id.


41. Id. at 430. After the defendant in Imbler was convicted, the prosecutor discovered evidence that supported the defendant’s alibi and cast doubt on the credibility of one of the witnesses who identified the defendant as the perpetrator. Id. at 412. Less than one month before Imbler was scheduled to be executed, the prosecutor presented this evidence in a letter to the governor. Id. Imbler’s conviction was ultimately overturned, after a federal court granted his habeas corpus petition, finding that the prosecution used false and misleading testimony to convict him, and the police suppressed exculpatory evidence. Id. at
constitutes a prosecutorial function, the Court has taken a broad view, defining prosecutorial acts as those that are “intimately associated with the judicial phase of the criminal process.” Consequently, even knowing, willful Brady violations fall within the Imbler rule of absolute prosecutorial immunity.

Although the Imbler Court's historical basis for absolute prosecutorial immunity is widely understood to be inaccurate, and its holding has been the subject of significant criticism, the Court has shown no willingness to

414. After being released from prison, Imbler filed suit under 42 U.S.C. § 1983, against the prosecutor and the police. Id. at 415. The prosecutor was held to be absolutely immune from liability. Id. at 430.

42. Prosecutorial acts outside the traditional prosecutorial function, such as administrative and investigative activities, are entitled to only qualified immunity. Van de Kamp v. Goldstein, 129 S. Ct. 855 (2009).

43. Imbler, 424 U.S. at 430.

44. While Congress could amend § 1983 to eliminate this broad immunity, it has shown no inclination to do so.

45. Concurring in Kalina v. Fletcher, 522 U.S. 118, 130 (1997), Justice Scalia rejected the historical support for the Imbler rule. He explained that the notion that prosecutors were protected by absolute immunity from liability under the common law in 1871, when § 1983 was enacted, is inaccurate. Id. at 132. For reasons of stare decisis, however, Justice Scalia took the position that Imbler should not be overruled. Id. at 135. Margaret Johns contends that absolute prosecutorial immunity was not applied by a court until 1896, well after § 1983 was enacted. Margaret Z. Johns, Reconsidering Absolute Prosecutorial Immunity, 2005 BYU L. REV. 53, 55.

46. In fact, Justice White's concurrence in Imbler was a criticism of the broad scope of the rule of absolute immunity. Joined by Justices Brennan and Marshall, Justice White stated:

I disagree with any implication that absolute immunity for prosecutors extends to suits based on claims of unconstitutional suppression of evidence because I believe such a rule would threaten to injure the judicial process and to interfere with Congress' purpose in enacting 42 U.S.C. § 1983, without any support in statutory language or history. Imbler, 424 U.S. at 433. Justice White agreed with the majority that prosecutors should be absolutely immune for claims “that they knew or should have known that the testimony of a witness called by the prosecution was false.” Id. at 440. He broke with the majority, however, regarding absolute immunity from “suits for constitutional violations other than those based on the prosecutor's decision to initiate proceedings or his actions in bringing information or argument to the court.” Id. at 441. He stated that “[m]ost particularly I disagree with any implication that the absolute immunity extends to suits charging unconstitutional suppression of evidence.” Id. (citing Brady v. Maryland, 373 U.S. 83 (1963)). Regarding the impact of such liability, Justice White explained, “one would expect that the judicial process would be protected—and indeed its integrity enhanced—by denial of immunity to prosecutors who engage in unconstitutional conduct.” Id. at 442. He continued:

It would stand this immunity rule on its head, however, to apply it to a
depart from the rule, even for knowing or willful Brady violations. To the contrary, the Court has consistently reaffirmed its commitment to the broad rule that prosecutors should not be subject to civil liability when they suppress exculpatory evidence—even if the suppression is unquestionably willful. The Court's guiding principle has been a concern about hampering the independence of prosecutors and shifting resources from prosecutorial work to defending against civil suits. The repeated reaffirmance of the Imbler rule of absolute prosecutorial immunity is a seemingly insurmountable obstacle to sanctioning prosecutors

suit based on a claim that the prosecutor unconstitutionally withheld information from the court. Immunity from a suit based upon a claim that the prosecutor suppressed or withheld evidence would discourage precisely the disclosure of evidence sought to be encouraged by the rule granting prosecutors immunity from defamation suits. Denial of immunity for unconstitutional withholding of evidence would encourage such disclosure. A prosecutor seeking to protect himself from liability for failure to disclose evidence may be induced to disclose more than is required. But, this will hardly injure the judicial process. Indeed, it will help it.

Id. at 442–43.

Professor Johns sharply criticizes the rule of absolute prosecutorial immunity and the rationales presented by the Imbler Court in support of the rule. With respect to the concern about vexatious litigation, Johns argues that absolute immunity is unnecessary to protect the honest prosecutor, as that prosecutor is protected by qualified immunity. Johns, supra note 45, at 55. It is Johns's contention that absolute immunity only protects "the most incompetent and willful wrongdoers," at the expense of innocent victims. Id. at 55–56. Johns contends that "[p]rosecutorial liability—with the safeguard of qualified immunity to prevent vexatious litigation—is necessary to ensure the integrity of the criminal justice system." Id.

47. The most recent example of the Court's commitment to the Imbler rule of absolute immunity is its decision in Van de Kamp, in which it held that prosecutors are absolutely immune for lapses in supervision, training, and information system management that result in Brady violations. Van de Kamp, 129 S. Ct. at 856.

48. It is notable that lower courts have, on occasion, expressed frustration with this rule in the context of particularly egregious prosecutorial misconduct. See, e.g., Shmueli v. City of New York, 424 F.3d 231, 237 (2d Cir. 2005) ("Although such conduct [knowing use of perjured testimony and deliberate withholding of exculpatory information] would be 'reprehensible,' it does not make the prosecutor amenable to a civil suit for damages."); Cousin v. Small, 325 F.3d 627, 635 (5th Cir. 2003) (considering, but ultimately rejecting, what would be, in essence, an "egregiousness" exception to the Imbler rule).

49. In Imbler, the Court warned against "harassment by unfounded litigation [that] would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." Imbler, 424 U.S. at 423.
for Brady violations with financial penalties.\textsuperscript{50}

An additional problem with a rule of imposing civil liability for prosecutors who have committed Brady violations is that it creates a disincentive to disclose, post-conviction, that exculpatory evidence was wrongly suppressed.\textsuperscript{51} Given the widely held belief that Brady violations undermine the integrity of the criminal justice system and create a risk of wrongful conviction, there should be a strong incentive for prosecutors to admit to their own mistaken suppression of evidence, or to disclose similar violations by fellow prosecutors. If such an admission or disclosure could result in financial liability, the great risk that such information, when discovered, would not be disclosed could increase.

2. Expansion of Open File Discovery to All Jurisdictions

Under open file discovery, which has been adopted in a limited number of jurisdictions,\textsuperscript{52} the full police and prosecution files are made available to the defense. As a general proposition, the defense bar supports open file discovery, as it results in more information being provided to the defense, typically earlier in the proceedings.\textsuperscript{53} In the specific context of Brady reform,\textsuperscript{54} it also provides the benefit

\textsuperscript{50} Looking at the possibility of financial incentives and/or disincentives from an opposite viewpoint, Professor Meares argues that prosecutors should be given positive financial incentives for complying with their constitutional obligations, including those established by Brady. Meares, supra note 6, at 910.

\textsuperscript{51} There are a number of reported cases in which the suppression of exculpatory information came to light because of the post-conviction disclosure of a prosecutor (typically a different prosecutor than the one who initially suppressed the information). In fact, Imbler is such a case.

\textsuperscript{52} Minnesota and North Carolina practice open file discovery. Additional states, Alabama, Colorado, Florida, Maryland, New Hampshire and Oregon, require open file discovery in capital cases.

\textsuperscript{53} More liberal discovery rules are generally believed to result in fewer Brady violations for at least two main reasons. First, the more information that is provided to the defense, the more likely that Brady material will be provided. Second, even if the material provided is not itself Brady material, fuller disclosure makes it more likely that defense counsel will learn facts that lead to the discovery of Brady material.

\textsuperscript{54} Professor Rosen recommends, in essence, open file discovery. See Rosen, supra note 3, at 272. He suggests:

Disclosures equivalent to that in civil cases should be required in criminal cases. The change needed is really rather simple—the presumption should change to favor disclosure rather than secrecy. The entire police file should be provided to the defense, with reverse discovery as allowed under constitutional strictures. To avoid harm to
of allowing the defense, rather than the prosecution, to decide which evidence is material.

Open file discovery will not always function as a substitute for a prosecutor’s compliance with her Brady obligation, because there can be exculpatory materials not contained in the file, and thus not provided to the defense as part of open file discovery. If, for example, in the context of exculpatory evidence that has not been reduced to writing, a witness provided information, via an oral account, that cast doubt on the defendant’s guilt, the witness’s statement would be Brady material. But if this statement was not reduced to a writing, open file discovery would play no role in assuring that the statement was provided to the defense. Open file discovery also provides no assistance where there is a knowing, willful Brady violation. It seems apparent that a prosecutor who makes a conscious decision to withhold exculpatory material from the defense is equally likely to remove such information from the file before “complying” with open file discovery. Adoption of open file discovery in all jurisdictions, therefore, would not eliminate Brady violations, but it would help address the problem.

3. Disciplinary Sanctions

The disciplining of lawyers who commit misconduct, by state and county disciplinary committees, provides an appropriate vehicle for punishing prosecutors who violate Brady. Because these committees limit their inquiry to the conduct of the attorney under review, the materiality of evidence suppressed is irrelevant. While this makes for an inquiry that is narrowly focused, disciplinary committees infrequently sanction prosecutors who violate Brady.

In 1987, Richard Rosen published an exhaustive study of the frequency of disciplinary sanctions in response to known Brady violations. Rosen sent a survey regarding disciplinary sanctions to each state’s disciplinary committee, and received responses from forty-one witnesses or ongoing investigations, and to satisfy any further legitimate governmental interest, appropriate provisions for protective orders should be implemented.

Id.

55. Rosen, supra note 6, at 707–08.
56. Id. at 730–31.
When Self-Policing Does Not Work

The committees reported the following sanctions: thirty-five states disclosed no formal complaints filed for Brady-type misconduct; one state disclosed three formal complaints that were dismissed after a hearing; and the remaining five states issued four minor sanctions. In terms of more serious sanctions in these final five states, Rosen found one suspension and one expulsion; the expulsion, however, was subsequently reversed.

Joseph Weeks, concentrating on the ten-year period following Rosen’s study, updated Rosen’s research and discovered a similar pattern of negligible discipline. Weeks found just seven cases where a prosecutor was referred to a disciplinary body due to a Brady violation. Four of the seven referrals resulted in discipline: a private reprimand, a public reprimand, a suspension of three months, and a suspension of six months. As this research demonstrates, disciplinary committee action in response to Brady violations is uncommon and, when it occurs, mild.

The general lack of disciplinary committee response to Brady violations is not surprising. Disciplinary committees are typically understaffed, which makes it unlikely that they will seek out cases when they often have difficulty dealing with their caseload of referred matters. Most disciplinary actions result from financial matters, and are referred by the person who believes he or she was wronged. In the context of Brady violations, the person wronged is a criminal defendant who typically will seek to be vindicated by the courts.

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57. Id. at 730.
58. Id. at 731.
59. Weeks, supra note 6, at 881.
60. Id.
61. Id. at 882.
62. See In re Attorney C., 47 P.3d 1167 (Colo. 2002) (recognizing that prosecutors rarely face discipline for discovery violations, including Brady violations).
63. This is not to suggest that disciplinary committees do not, on occasion, investigate reported Brady violation cases.
64. Professor Rosen suggests that “the bar counsel’s offices should review the reported decisions and institute disciplinary proceedings whenever an opinion indicates possible prosecutorial suppression or falsifications of evidence, irrespective of due process violations.” Rosen, supra note 6, at 735–36.
Disciplinary sanctions do not work to prevent *Brady* violations. Discipline is too rare and too mild to have any deterrent effect. 66 Without a substantial shift in the punishment imposed by disciplinary committees when a prosecutor withholds exculpatory evidence, 67 it is difficult to imagine that prosecutorial behavior is much affected by the threat of disciplinary sanctions. 68

### 4. Criminal Prosecution

While state penal laws contemplate the prosecution of prosecutors who violate *Brady*, 69 they are so infrequently enforced that the possibility of prosecution barely warrants a mention. One anomalous case is that of the prosecutor who, in 2006, handled the prosecution of members of the Duke University lacrosse team on rape and kidnap charges. 70 The prosecutor committed various types of misconduct, including

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66. *Read v. Virginia State Bar*, 357 S.E.2d 544 (Va. 1987), is an example of the general lack of willingness to discipline prosecutors. In *Read*, the prosecutor withheld the fact that a witness who had previously identified the defendant as the perpetrator recanted the identification. Id. at 545–46. The court found no *Brady* violation as defense counsel learned the information from the witness himself, who, concerned that the exculpatory information would not otherwise be provided to the defense, contacted defense counsel. Id. at 545. While the state bar disciplinary committee had revoked the prosecutor's license to practice law, the Supreme Court of Virginia reversed the order of the disciplinary committee. Id. at 544.

67. There are, however, calls for greater use of disciplinary sanctions of prosecutors who violate *Brady*. For example, the subcommittee on Government Practices of the New York State Bar Association's Task Force on Wrongful Convictions recommended the creation of a statewide procedure for identifying and reviewing *Brady* violations. See *PRELIMINARY REPORT OF THE N.Y. STATE BAR ASS'N'S TASK FORCE ON WRONGFUL CONVICTIONS*, supra note 30, at 9.

68. An additional, related enforcement mechanism is internal discipline by the district attorney's office. Whether such mechanisms exist in prosecution offices does not appear to be addressed in the literature.

69. Such conduct could constitute, *inter alia*, criminal contempt.

withholding exculpatory DNA test results.\textsuperscript{71} Subsequent to being disbarred,\textsuperscript{72} the prosecutor was found guilty of criminal contempt and sentenced to a jail term of twenty-four hours.\textsuperscript{73}

This case was highly unusual, and was surely influenced by the national publicity it attracted, as well as the resources of the defendants who were the victims of the prosecutorial misconduct at issue.\textsuperscript{74} In more typical cases, the prosecution of attorneys who violate \textit{Brady} is nonexistent, thus rendering the deterrent value of the threat of prosecution to nearly nothing.\textsuperscript{75}

5. Abolition of the Public Prosecutor

Another interesting idea suggested, but ultimately rejected, by Janet Hoeffel is abolition of the public prosecutor's office altogether, and the adoption of the British system,\textsuperscript{76} where private attorneys are called upon to represent the government in criminal prosecutions.\textsuperscript{77}


\textsuperscript{74} Another anomalous situation is that of the prosecution of former United States Senator Ted Stevens. At the time of the writing of this article, Senator Stevens's ethics conviction had been dismissed—on the government's own motion—due to prosecutorial misconduct, and the judge who presided over the case had named a special prosecutor to investigate whether the six Justice Department prosecutors at issue should themselves be prosecuted. Neil A. Lewis, Tables Turned on Prosecution in Stevens Case, N.Y. TIMES, Apr. 7, 2009, at A1, available at http://www.nytimes.com/2009/04/08/us/politics/08stevens.html; Michel Martin & Nina Totenberg, Stevens Case a Blow to Justice Department, NAT'L PUB. RADIO, Apr. 6, 2009, http://www.npr.org/templates/story/story.php?storyId=102778052. While it was the government that sought dismissal of the indictment, it is notable that there had been a change in administration between when the misconduct was committed and when it was discovered.

\textsuperscript{75} One additional criminal prosecution of a prosecutor who violated \textit{Brady} was located. See Brophy v. Comm. on Prof'l Standards, 442 N.Y.S.2d 818 (App. Div. 1981). An attorney who violated \textit{Brady} was convicted in federal court of the misdemeanor of deprivation of rights under color of law, in violation of 18 U.S.C. § 242, and sentenced to pay a fine of $500. \textit{Id.} at 819. A subsequent disciplinary proceeding resulted in censure. \textit{Id.}

\textsuperscript{76} The British prosecutorial agency is the Crown Prosecution Service. For more information, see The Crown Prosecution Service, http://www.cps.gov.uk.

\textsuperscript{77} Janet C. Hoeffel, \textit{Prosecutorial Discretion at the Core: The Good
theory behind this proposal is that those who act only part time in a prosecutorial role will be less likely to suppress exculpatory evidence in an attempt to secure a conviction—because as private citizens they will be less concerned about "winning" a conviction and more concerned about justice being done and the rules being followed. Putting aside whether the theory behind this argument is correct, it seems virtually impossible that such a substantial change in the general United States system of prosecution would ever be adopted.

IV. PROPOSAL: ESTABLISH A BAR TO RETRIAL WHERE A WILLFUL BRADY VIOLATION IS DEMONSTRATED

There are two central priorities that should be considered when evaluating remedies for Brady violations: the adequate protection of the accused, and the deterrence of prosecutorial misconduct. The Brady rule was designed to address the first priority by permitting a defendant a new trial when it has been shown that exculpatory evidence was withheld from the defense, and there is a "reasonable probability" that the suppressed evidence could have affected the outcome of the proceeding. While some commentators have argued otherwise, modification of this aspect of the rule is unnecessary.

The current remedial mechanism, however, is much less effective in meeting the second value. The possibility of a retrial if a Brady violation is discovered does not provide a sufficient incentive to prosecutors to abide by their Brady obligations. Particularly with a self-enforced rule like Brady, it is important that the penalty for violating the rule is

78. Id.
79. In some small jurisdictions, however, prosecutions are handled by part-time prosecutors. Also, similar to the British model, special prosecutors are on occasion appointed to handle certain prosecutions and/or investigations. Whether these part-time and special prosecutors are more or less likely to commit Brady violations does not appear to have been studied, but is an interesting question.
82. Rosen argues, in essence, that the materiality standard should be abandoned in cases where the Brady violation is shown to be willful. Rosen, supra note 6.
especially onerous. Dismissal of the indictment in a case where the prosecution intentionally and willfully withholds exculpatory evidence meeting the Brady materiality standard is one such penalty.

The adoption of this proposal would further a number of important interests. First, it would create a substantial disincentive to prosecutors in committing Brady violations. Putting aside cases of unintentional Brady violations, which are not implicated by this proposal, one can presume that most often Brady violations occur either where (1) the prosecutor has an extremely high degree of confidence in the defendant’s guilt, but some reason to doubt that the fact finder will convict the defendant; or (2) where the prosecutor believes that the exculpatory evidence at issue is unreliable, but that it would be useful to the defense in defending against the case. In either of these situations, if the prosecutor willfully suppressed the evidence and this suppression was discovered, dismissing the indictment—allowing the defendant to go free—would be an unbearable outcome for the prosecutor. As a result, the risk of this outcome should be too great to allow the prosecutor to suppress evidence.

83. Both the severity of the harm and the frequency with which it occurs impact the harm’s deterrent effect. See Wilson & Crouch, supra note 8.

84. With an unintentional Brady violation, the willfulness aspect of the proposed rule would not be met and, as a result, the current remedy of a new trial would remain.

85. An example of such a case could be one where there are witnesses, to be called by the prosecution, who connect the defendant to the crime, but also witnesses, to be called by the defense, who support the defendant’s alibi. If the prosecutor believed that the prosecution witnesses were being truthful, and the defense witnesses were being untruthful, the prosecutor would have a strong degree of confidence in the defendant’s guilt, but also good reason to believe that the jury would accept the testimony of the defense witnesses and vote to acquit. If there were a piece of exculpatory evidence unknown to the defense, the concern might be that this evidence would “tip the balance” in favor of the defense.

86. Such an example could be evidence that undermines the credibility of a prosecution witness. Assume a case in which the verdict turns on the testimony of a single witness, and the prosecutor has complete confidence in the testimony of this witness connecting the defendant to the crime. If there is evidence—such as a prior conviction under a different name—that undermines the witness’s credibility, might the prosecutor be concerned about disclosing this exculpatory evidence?

87. Bennett L. Gershman asserts that prosecutors conduct a risk-benefit analysis when engaging in misconduct. Gershman, supra note 8. Gershman further argues that, under current rules, prosecutors have an incentive to risk
While the current remedy of a new trial for the defendant may be an annoyance to the prosecutor, his and the government’s interests are not truly harmed by having to prosecute the defendant a second time. While there are additional costs and effort that come with prosecuting a case at a second trial, the prosecutor is in no worse a position, in regard to securing a conviction, than if he had never committed the *Brady* violation. Furthermore, as the defendant would likely have spent some number of years in prison prior to the discovery and litigation of the *Brady* violation, there is a high likelihood that the defendant would agree to plead guilty in exchange for a sentence less than that imposed after the original trial. In such a circumstance, the prosecutor would achieve a secure conviction and sentence of someone he truly believed to be guilty. Given this reality, one can see how certain prosecutors would take their chances by violating *Brady*.9

Second, as the rule proposed in this article would only be invoked where a willful *Brady* violation is discovered, it would encourage prosecutors to come forward if they discover a *Brady* violation was committed through oversight. In fact, committing misconduct. If they do so in a strong case, the conviction will likely be upheld even with the discovery of the misconduct, due to harmless error analysis. *Id.* at 430–31. In a weak case, where the prosecutor likely would not have been able to obtain a conviction without the misconduct, even if the misconduct is discovered and the conviction is reversed, the prosecutor is in no worse a position than if he had not committed the misconduct. *Id.*

88. This constitutes a “rematch,” as David L. Botsford and Stanley G. Schneider term it in their article. See David L. Botsford & Stanley G. Schneider, *The “Law Game”: Why Prosecutors Should Be Prevented from a Rematch; Double Jeopardy Concerns Stemming from Prosecutorial Misconduct*, 47 S. TEX. L. REV 729 (2006). Botsford and Schneider argue that retrial of a defendant should be barred under the Fifth Amendment double jeopardy clause after a *Brady* violation is discovered. *Id.* at 730. A similar argument is made by Adam M. Harris, in his student note. See Adam M. Harris, *Note, Two Constitutional Wrongs Do Not Make a Right: Double Jeopardy and Prosecutorial Misconduct Under the Brady Doctrine*, 28 CARDozo L. REV. 931 (2006).

89. This is not to suggest that most prosecutors reject their constitutional and ethical obligations under *Brady*. Yet, from a purely rational viewpoint, one can understand how a less than ethical prosecutor could decide to suppress evidence.

90. In *United States v. Lewis*, 368 F.3d 1102 (9th Cir. 2004), where the Ninth Circuit considered and rejected the argument that a *Brady* violation may act as a double jeopardy bar to a second trial, there were two alleged *Brady* violations. The second violation was disclosed voluntarily by the prosecution. *Id.* at 1104. *Imbler v. Pachtman*, 424 U.S. 409 (1976), is another case in which the suppression of exculpatory evidence was revealed by the prosecution.
to encourage prosecutors to come forward when a *Brady* violation is discovered, all cases in which the prosecutor discloses a *Brady* violation could be deemed to fall outside of the proposed rule. Treating all prosecutors within an office as a single entity, this exception to the proposed rule would apply where the prosecutor who discloses the *Brady* violation is not the same prosecutor who committed the violation. Even if the prosecutor who committed the violation acted intentionally and willfully, the voluntary disclosure of the violation by a second prosecutor would trigger the standard remedy of a new trial, rather than dismissal of the indictment with a bar to retrial. The rationale behind this aspect of the proposed rule is to encourage disclosure of *Brady* material, even post-conviction.

Third, given the implications of allowing a defendant to go free due to improper conduct by prosecutors, there would likely be an increased vigilance in prosecution offices about not committing *Brady* violations. One can presume that the district attorney of a jurisdiction, especially where that official is elected by popular vote, would not sit idly by if indictments were being dismissed because of unethical conduct by prosecutors in her office. As a result, the deterrent effect of the proposed rule on individual prosecutors would be amplified by stricter oversight by prosecutors acting in a management role.

Fourth, if *Brady*'s strict materiality standards are maintained, there should be no risk that the guilty defendant who is the victim of the suppression of inconsequential evidence would receive the windfall of dismissal of the indictment. Because a *Brady* violation requires a showing that, absent the suppression of evidence, there is a reasonable probability that the result of the proceeding would have been different, the suppression of inconsequential evidence does not even trigger the *Brady* rule, much less the remedy proposed in this article. That is not to say that the proposed rule would only be applicable where the defendant is demonstrably innocent of the crime of which she was convicted. Assuming there is a societal cost to allowing a possibly guilty person to go free as a punishment for serious misconduct by a prosecutor, this proposal does not eliminate

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this cost.\textsuperscript{92}

1. Lessons from the Exclusionary Rule

Exclusionary rule\textsuperscript{93} jurisprudence provides a useful analytical framework for the development and implementation of the proposed rule. The exclusionary rule was designed to deter police officers from violating certain constitutional rights of defendants. The deterrent effect is achieved by penalizing police officers when they violate the constitutional rights at issue by suppressing otherwise admissible evidence.\textsuperscript{94} The proposal presented here acts in a similar fashion by penalizing the prosecution when it intentionally violates the \textit{Brady} rule.

In general terms, the exclusionary rule renders inadmissible at trial in the prosecution's case in chief\textsuperscript{95} evidence obtained in violation of the Fourth Amendment's prohibition against unreasonable searches and seizures.\textsuperscript{96} The Supreme Court has stated that the "prime purpose" of the rule, if not the sole one, "is to deter future unlawful police conduct."\textsuperscript{97} As the Court has explained, this purpose is meant "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."\textsuperscript{98}

Consistent with the notion that the purpose of the exclusionary rule is to encourage police officers to abide by the Fourth Amendment's prohibition against unreasonable

\begin{itemize}
\item \textsuperscript{92} This limitation is discussed further below. See \textit{infra} Part IV.2.
\item \textsuperscript{93} \textit{See} Mapp v. Ohio, 367 U.S. 643 (1961). \textit{Mapp} holds that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." \textit{Id.} at 655. The \textit{Mapp} holding extended to the States the longtime rule of the federal courts. \textit{See} Weeks v. United States, 232 U.S. 383 (1914).
\item \textsuperscript{94} \textit{See}, \textit{e.g.}, Arizona v. Evans, 514 U.S. 1, 15 (1995).
\item \textsuperscript{95} Such evidence is admissible to impeach the defendant. \textit{See} Harris v. New York, 401 U.S. 222 (1971).
\item \textsuperscript{96} The Fourth Amendment states:
\begin{quote}
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
\end{quote}
\textit{U.S. CONST.} amend. IV.
\item \textsuperscript{97} United States v. Calandra, 414 U.S. 338, 347 (1974).
\item \textsuperscript{98} Elkins v. United States, 364 U.S. 206, 217 (1960).
\end{itemize}
searches and seizures, the Court has established "good faith" exceptions to the exclusionary rule. In United States v. Leon, the Court held that where a police officer violates the Fourth Amendment, but acts in good faith reliance on a search warrant issued by a detached and neutral magistrate, the exclusionary rule does not apply. Similarly, when a police officer acts in good faith reliance on a substantive criminal law statute that subsequently is declared unconstitutional, the illegally obtained evidence is not rendered inadmissible by the exclusionary rule.

Notable to the Leon decision is the extent to which the Court explicitly considered the deterrent impact of the exclusionary rule, and weighed it against what it termed a "competing" interest in making sure guilty people are not set free simply because of errors by the police. The Court explained that "particular when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such

99. In Stone v. Powell, which held that state Fourth Amendment violations are not cognizable on federal habeas review, the Court discussed at length the two rationales previously recognized for the exclusionary rule: judicial integrity and deterrence of police conduct in violation of the Fourth Amendment. Stone v. Powell, 428 U.S. 465, 485–86 (1976). Recognizing the various exceptions and limitations to the exclusionary rule, the Court concluded that the "primary justification for the exclusionary rule then is the deterrence of police conduct that violates Fourth Amendment rights." Id. at 486. Among the exceptions and limitations discussed were (1) the requirement that a defendant lodge an objection to the introduction of illegally obtained evidence, see Henry v. Mississippi, 379 U.S. 443 (1965); (2) standing limitations of who may challenge the admission of illegally obtained evidence, see Alderman v. United States, 394 U.S. 165 (1969); (3) the use of illegally obtained evidence in grand jury proceedings, see United States v. Calandra, 414 U.S. 338 (1974); and (4) the use of illegally obtained evidence for impeachment of the defendant, see Walder v. United States, 347 U.S. 62 (1954).

100. Notably, the trend under the exclusionary rule has been to evaluate the remedial objectives of the rule before applying it to a given Fourth Amendment violation. As the Supreme Court stated in United States v. Janis, "if... the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted." United States v. Janis, 428 U.S. 433, 454 (1976).

101. In articulating this "good faith" standard, the Court stated that "dishonest or reckless" activity by the police in preparing the affidavit in support of the search warrant at issue, would fall outside the definition of "good faith." United States v. Leon, 468 U.S. 897, 926 (1984).

102. Id. at 920–21.


104. Leon, 468 U.S at 900.
guilty defendants offends basic concepts of the criminal justice system.” In keeping the exclusionary rule narrow in its application, the Court has applied it only to “those areas where its remedial objectives are thought most efficaciously served.” In fashioning the “good faith” exception, the Supreme Court has explained that evidence should be suppressed only where the Fourth Amendment violation is “substantial and deliberate.”

The Court stated in its most recent discussion of the exclusionary rule that the issue of whether a Fourth Amendment violation should result in suppression of evidence “turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct.” This standard is also appropriately applied in the context of Brady violations. As has been the case with the exclusionary rule and police behavior, it would likely have an appropriate deterrent impact on prosecutors.

2. The Proposed Rule: Implementation and Limitations

Central to the application of the proposed rule is a determination that the prosecutor acted willfully in suppressing exculpatory evidence that meets the Brady materiality standard. Most often, therefore, an evidentiary hearing would be necessary to establish whether the prosecutor’s conduct was, in fact, willful. One of the facts that should be considered at such a hearing is whether the prosecutor in question has repeatedly been found to violate Brady. There should be a high bar to meeting the willfulness standard. If dismissal of the indictment were the consequence in a great number of Brady violation cases, there could be an unintended disincentive for courts to find any

105. Id. at 907–08.
106. Stone v. Powell, 428 U.S. 465, 486–87 (1976). In Stone v. Powell, the Court held that the exclusionary rule does not apply to state convictions on federal habeas review where the defendant had a full and fair opportunity to litigate the claim in state court. Id. at 494.
109. One could imagine, however, that on occasion, the prosecution would concede willfulness, especially under circumstances where the discovery of the Brady violation also demonstrates willful conduct by the prosecutor and the prosecutor has no legitimate defense.
Brady violations, for fear that guilty individuals would improperly go free. In addition, if a prosecutor commits a Brady violation unintentionally, the deterrent effect of dismissing the indictment would not exist. Put simply, one cannot be deterred if one acts without intent.\textsuperscript{110}

A high bar to establishing willfulness is also appropriate given the severity of the sanction to the prosecution, and society, where the defendant may have committed the crime. This is especially important given that there is an alternative, less severe remedy already in place: a new trial for the defendant. In setting a new trial as the norm in terms of remedy, the Supreme Court explained that it was doing so because of the harm to a defendant when the prosecution suppresses material evidence.\textsuperscript{111} It is for this reason that the Brady rule applies to both intentional and unintentional suppression of evidence—as a defendant is equally harmed no matter what the cause of the suppression. Yet, as the intended function of the proposed rule is to deter future misconduct by prosecutors, it should be applied only in situations where the deterrent value is high.

One likely objection to the proposed rule is the possibility that some guilty defendants would receive the "windfall" of dismissal of the indictment because of the prosecutor's bad intent in suppressing material evidence. This possibility seems somehow random and unfair as the defendant who is the victim of an intentional Brady violation is subjected to no greater harm than the defendant who is the victim of an unintentional Brady violation, in terms of one's ability to defend against the charges at issue.

A similar concern exists with the exclusionary rule\textsuperscript{112} but, because of its deterrent impact, the exclusionary rule has been maintained. In both scenarios, the deterrent effect will only be operative if the prosecution, in the case of Brady violations, and the police, in the case of the exclusionary rule, are actually harmed in some cases. And such harm simply

\textsuperscript{110} There is a contrary position, however, that the deterrent effect of dismissing the indictment would encourage prosecutors to be more careful in general about their Brady obligations.

\textsuperscript{111} See Brady v. Maryland, 373 U.S. 83, 87 (1963).

does not exist in cases in which the defendant did not commit the crime. The prosecutor, and the police, do not benefit from the prosecution, or arrest, of an innocent individual.

Given already-existing restrictions contained in the *Brady* rule, there is a minimally legitimate concern that an "undeserving" defendant will reap the benefit of the proposed rule. Most significantly, there is *Brady*'s materiality standard—only where there is a "reasonable probability" that the suppressed evidence would have affected the outcome of the proceeding is the evidence within the *Brady* rule. As a result, suppression of trivial or inconsequential evidence does not trigger the *Brady* rule at all.

Furthermore, dismissal of the indictment where the prosecution has willfully suppressed material evidence presents less of a societal harm, in terms of the possibility of freeing a guilty person, than the typical operation of the exclusionary rule. With the exclusionary rule, the evidence at issue is always that which is beneficial to the prosecution, i.e. suggestive of guilt. By contrast, *Brady* evidence must be beneficial to the defense. Thus, there is often a link between suppression of *Brady* evidence and the conviction of an innocent person, while the opposite is true of the exclusionary rule.

Though there are certainly cases where suppressed evidence is material under the *Brady* standard, but there are other strong indicators of guilt. For example, in a case with strong forensic evidence, but only one eyewitness, the suppression of evidence that seriously undermines the eyewitness's credibility would likely be deemed a *Brady* violation. Under the proposal presented here, if the suppression were willful, the indictment would be dismissed.

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and the defendant would go free, notwithstanding the strong forensic evidence.

Further, a rule with such significant repercussions is also arguably more necessary in the context of a self-policing rule, such as *Brady*, than where there is some other body or party that can oversee compliance with the rule, such as is the case with the exclusionary rule. When a defendant is illegally searched, the defendant is aware of the facts necessary to establish this as a matter of law and can take appropriate action. But, when a prosecutor suppresses exculpatory, material evidence, the defendant is unaware.115

Given that the proposed rule borrows much of the analytical framework of the exclusionary rule, an additional limitation to its adoption stems from the controversial nature of the exclusionary rule.116 The debate about the exclusionary rule, including its purported deterrent effect, began prior to the rule's adoption and continues to this day.117 Given the controversy, one would expect hesitancy about applying a similar rule in another context.

That said, many of the concerns about the exclusionary rule are not present when applied to intentional *Brady* violations. First, as is discussed above, the rule has more of an inverse relationship to the truth-seeking function of a criminal trial than does the exclusionary rule. Second, the rule would only apply in cases of intentional, willful violations by the prosecution.118 Third, many commentators have

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115. If the defendant is otherwise aware of suppressed, material evidence, it falls outside the *Brady* rule. See supra note 11.
116. See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); Donald Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1, 5–6, 10–11 (2001) (discussing criticism of the exclusionary rule on the bases that it, *inter alia*, undermines the search for truth by excluding relevant evidence; encourages police perjury as a way of circumventing the rule; does nothing to protect the innocent victim of police misconduct; does not sufficiently deter police misconduct; and, on the other hand, “over-deters”); Myron W. Orfield, Jr., *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1016 (1987) (“The exclusionary rule is one of the most controversial and divisive issues in American constitutional law.”).
118. While the exclusionary rule does not apply to certain cases of “good faith,” see supra Part IV.1, there is no blanket “good faith” exception to the exclusionary rule. Thus, its reach is broader than that of the proposed rule, which requires a showing of bad faith.
suggested that the exclusionary rule has resulted in police officers committing perjury in order to avoid the suppression of inculpatory evidence.119 This perjury typically takes the form of police officers lying about where evidence was located before being seized,120 or what the defendant was doing prior to being searched.121 In contrast, with the proposed Brady rule, the fact of the suppression of material evidence would not be in dispute for purposes of the rule's application; this determination would be made according to traditional Brady analysis. The single issue to be determined at an evidentiary hearing would be the intent of the prosecutor in suppressing evidence. Thus, the potential for perjury would be far more limited than in the application of the exclusionary rule. Further, the exemption of prosecutors from the rule's application where they disclose the Brady violation122 provides an opposite incentive mechanism to that of the exclusionary rule.

Another potential criticism of the proposed rule arises where a willful Brady violation is the behavior of a "rogue" prosecutor, acting in contravention of the clear policies of the office in which she is employed. The prosecutor's office specifically, as well as society at large, is harmed if this rogue prosecutor's Brady violation is subsequently discovered by the defense and, after a judicial finding of willfulness, the indictment is dismissed. Imagine if this rogue prosecutor commits the willful Brady violation during her first trial, and it is never discovered. During her second trial, she is poised to commit another Brady violation, but discloses this fact to a colleague, and is fired by the district attorney. In this situation, the district attorney has done the right thing, but is still harmed when the indictment in the first case is dismissed.123 This seemingly unfair scenario, however, is an

119. See Dripps, supra note 116.
120. A police officer might, for example, testify that evidence was in "plain view," see Coolidge v. New Hampshire, 403 U.S. 443 (1971), when it was in fact hidden on the person of the defendant.
121. A police officer might, for example, testify that the defendant appeared to be armed with a weapon, and was thus subject to a safety frisk, see Terry v. Ohio, 392 U.S. 1 (1968), when the officer knew the defendant did not actually possess a weapon.
122. See supra Part IV.
123. Although, in such a situation, the district attorney's office is on notice that the "rogue" prosecutor was inclined to suppress material evidence, and could review the file from the first trial to determine whether a Brady violation
unavoidable, but rare, consequence of the deterrent value of the proposed rule. One would hope that the threat of dismissal of the indictment where there has been a willful Brady violation would foster greater oversight of “rogue” prosecutors. 124

V. CONCLUSION

Brady violations are harmful to the United States system of justice both because they can cause wrongful convictions, and because they undermine fundamental notions of fairness. The current system, which is essentially self-policing, is not sufficiently effective in forcing prosecutors to adhere to their constitutional obligation to provide the defense with all exculpatory evidence. The criminal justice system, and society in general, benefit from innovations that reduce the risk of wrongful convictions and increase public confidence in the system. The proposal presented here is just one of many such innovations—those already presented in the literature and those to come.

was committed. If this was done and the Brady violation from the first trial was discovered, under this proposal, if the district attorney’s office disclosed the Brady violation to the court, the traditional Brady remedy of a new trial would apply, rather than the extreme sanction of dismissal of the indictment.

124. This issue relates to an additional criticism of the exclusionary rule, that it discourages police officers from taking risks when conducting investigations. While under the proposed rule, prosecutors might become more cautious in abiding by their Brady violations, there would be no harm to this side effect, as there is when the police become more cautious in investigating crime.