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Revisiting Prosecutorial Disclosure

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After the exoneration of more than 200 people based on post-conviction DNA evidence, a growing movement against wrongful convictions has called increased attention to the prosecutorial suppression of material exculpatory evidence. Commentators frequently study prosecutorial failures to disclose as a form of intentional misconduct, coloring both the description of the problem and the recommended solutions. This Article, in contrast, explores how even ethical prosecutors might fail to disclose exculpatory evidence because of flaws in the Brady *doctrine itself—specifically, the Court's limitation of the doctrine to "material" exculpatory evidence. The materiality standard amplifies cognitive biases that distort even an ethical prosecutor's application of* Brady*, leading to systematic under-disclosures of exculpatory evidence. The doctrine also inflates the tension between a prosecutor's dual obligations to protect the innocent while punishing the guilty, causing conscientious prosecutors to conclude they are "doing justice" by suppressing exculpatory evidence that does not appear to be material. Accordingly, it is the doctrine itself that must be reexamined.*

This Article proposes a prophylactic open file rule to effectuate defendants' Brady *rights. This doctrinal move would expand defendants' federal constitutional rights to discovery, while respecting the Court's long-established view that only access to material exculpatory evidence is essential to due process. The Article situates the proposal within a jurisprudence of constitutional criminal procedure that often favors clear rules over open-ended standards, and compares the current need to safeguard defendants'* Brady *rights to the necessity more than forty years ago to shift to a rule-based approach in* Miranda v. Arizona *to regulate custodial interrogations.*

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INTRODUCTION

When the Supreme Court announced its landmark decision in *Brady v. Maryland*,[1] it did so in grand language:

> Society wins not only when the guilty are convicted, but also when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts." A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice. . . .[2]

For the first time, the Court recognized a constitutional dimension to discovery in criminal cases and held that prosecutors have an obligation under due process to disclose to the defense upon request any favorable evidence that is "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[3]

Forty-five years later, what once promised to be a "criminal procedure superhero"[4] has become a target of the current movement against wrongful convictions, as prosecutorial failure to disclose exculpatory evidence has been identified as a leading contributor to criminal convictions of the innocent.[5] Much of the blame for *Brady*'s failure to protect the innocent has been laid at the doors of the prosecutors charged with the doctrine's effectuation. Commentators argue that *Brady* has become a "paper tiger,"[6] frequently and blatantly disregarded by prosecutors who have come to realize that they can suppress exculpatory evidence with few repercussions other than higher rates of conviction.[7] Proposals for reform correspondingly focus on the ethics of prosecutors, calling, for example, for judicial oversight of prosecutorial disclosure,[8]

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1. 373 U.S. 83 (1963).

2. *Id.* at 87–88.

3. *Id.* at 87.

4. Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 643 (2002).

5. *See* Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 686 (2006) ("Reflecting on this landmark decision forty-three years later, one is struck by the dissonance between *Brady*'s grand expectations to civilize U.S. criminal justice and the grim reality of its largely unfulfilled promise.").

6. *See* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 707–08 (1987).

7. *See infra* notes 47–53 and accompanying text.

8. Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1636–38 (2005) (advocating judicial inspection of law enforcement investigatory files); Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 427–28 (1984) (proposing *in camera* hearings in which the adjudicator would select for presumptive disclosure all evidence "favorable to the defendant's preparation or presentation of his defense").

increased enforcement of ethical rules that require prosecutorial disclosure of all evidence favorable to the defense,[9] and financial incentives to encourage prosecutors to disclose exculpatory information.[10]

Without disputing the importance of a justice-oriented culture among prosecutors, this Article argues that *Brady* has failed in its promise to protect the innocent, not just because prosecutors violate the doctrine, but because of the limited scope of the doctrine itself. Specifically, the caveat in *Brady* that prosecutors must disclose exculpatory evidence only when it is "material either to guilt or to punishment"[11] has hindered defendants' access to the kind of exculpatory evidence whose disclosure *Brady* held to be fundamental to due process.

Although the word "material" might at first blush seem so *im*material in the original *Brady* opinion, surrounded as it was by such sweeping and ambitious rhetoric, that single word has since proven a significant restriction on a prosecutor's constitutional duty to disclose exculpatory evidence. *Brady*'s progeny have made clear that prosecutors are not constitutionally obligated to disclose all exculpatory evidence, or even all relevant exculpatory evidence.[12] In fact, the definition of "material" exculpatory evidence is so restrictive that it is probably best articulated not as a duty of the prosecutor to disclose, but as a narrow exception to a prosecutor's general right to withhold evidence from the defense. Under *Brady*'s progeny, a prosecutor can constitutionally withhold all evidence, except for exculpatory evidence that "creates a reasonable doubt that did not otherwise exist."[13]

This Article advocates a doctrinal move that would expand defendants' federal constitutional rights to discovery, while respecting the Court's long-established view that only access to material exculpatory evidence is essential to due process. The Article finds the necessary doctrinal move in the form of prophylactic rules, which, by definition, respect the conceptual boundaries of defendants' core constitutional rights, and yet permit the creation of rules designed to effectuate the exercise of those rights. Although a defendant's core right to discovery under due process entitles him only to evidence that is both exculpatory and material, the *Brady* doctrine alone is insufficient to ensure the protection of that core right. After forty-five years of jurisprudence under *Brady*, the judiciary has failed to provide coherent guidelines to prosecutors who remain uncertain of the scope of their disclosure obligations. Moreover, as this Article explores in more detail, the current constitutional standard amplifies cognitive biases that will distort even an ethical prosecutor's application of *Brady* and systematically lead to under-disclosure of exculpatory evidence. The current materiality standard also inflates tensions between a prosecutor's obligations to protect the innocent and convict the guilty. A prosecutor seeking to balance her dual roles may conclude that she is "doing justice" by suppressing exculpatory evidence that does not appear to meet the Court's definition of materiality. As a result of both of these problems, even

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9. *See infra* note 57 and accompanying text.

10. Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 910 (1995) (proposing financial incentives for good prosecutorial conduct, including the disclosure of favorable evidence to the defense).

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

12. *See infra* notes 26–34 and accompanying text.

13. United States v. Agurs, 427 U.S. 97, 112 (1976).

conscientious prosecutors might fail to disclose even the narrow band of evidence to which defendants are entitled under *Brady*. Accordingly, as a necessary means of protecting defendants' *Brady* rights, prosecutors should be required to disclose more broadly.

The Article proceeds in four parts. Part I provides a brief overview of the prosecutor's constitutional obligation to disclose, which applies only to evidence that is both exculpatory and material. Part II explores the ways in which the materiality requirement hinders *Brady*'s original objective of protecting the fairness of criminal trials. Part III compares this Article's call for a prophylactic rule to protect *Brady* rights to the rule created in *Miranda v. Arizona*[14] to protect a defendant's privilege against self-incrimination. It analogizes the current need to safeguard defendants' access to material exculpatory evidence to the necessity more than forty years ago to shift to a rule-based approach to regulate custodial interrogations. It also situates the Article's proposal more broadly into a jurisprudence of constitutional criminal procedure that often favors clear rules over open-ended standards. Finally, Part IV explores the proper scope of a prophylactic rule to govern prosecutorial disclosure and concludes that a defendant's access to true *Brady* material can be ensured only through open file discovery, in which prosecutors turn over both inculpatory and exculpatory evidence. The Article concludes with proposals to reduce the costs of the proposed prophylactic rule.

I. THE FAILURE OF *BRADY*: THE MATERIALITY REQUIREMENT

The Court's landmark decision in *Brady*, as well as the moral tone of the language in which it was couched, held the promise of transforming the role of prosecutors in American criminal trials.[15] Presumably if due process could not tolerate prosecutors as architects of one-sided trials, then the Constitution would require them instead to be protectors of their own opponents in the courtroom—guardians of fairness rather than mere participants in the gamesmanship of the adversarial process.[16] Some of *Brady*'s progeny might appear to buttress this ambitious vision, requiring prosecutors to disclose not only directly exculpatory evidence but also evidence that can be used to impeach government witnesses;[17] to disclose not only upon request but on their own initiative;[18] and to disclose all *Brady* evidence in the government's possession, even if the prosecutor is unaware of it.[19]

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14. 384 U.S. 436 (1966).

15. *Brady* marked, as Stephanos Bibas has put it, "a potentially revolutionary shift from traditionally unfettered adversarial combat toward a more inquisitorial, innocence-focused system." Stephanos Bibas, Brady v. Maryland*: From Adversarial Gamesmanship Toward the Search for Innocence?*, *in* CRIMINAL PROCEDURE STORIES 129 (Carol Steiker ed., 2006).

16. *See* Sundby, *supra* note 4, at 644 (noting that *Brady* could have been "the constitutional superhero that . . . embodied the prosecutor's ethical duty to pursue 'justice' and not simply victory in the courtroom").

17. United States v. Bagley, 473 U.S. 667, 683–84 (1985) (requiring the government to disclose evidence of charging or sentencing concessions to government witnesses if the evidence materially affected the outcome); Giglio v. United States, 405 U.S. 150, 153–55 (1972) (extending the *Brady* rule to evidence that could be used to impeach government witnesses).

18. *Agurs*, 427 U.S. at 107 (extending the prosecutor's constitutional duty to disclose

As lofty as *Brady*'s transformative potential is in theory, other aspects of the doctrine have significantly undermined its practical impact. Much of *Brady*'s restricted doctrinal scope is attributable to its treatment by the Court as a trial right in a criminal justice system in which ninety-five percent of criminal convictions are obtained by guilty plea.[20] Despite the prevalence of plea bargaining, the Court has shaped prosecutors' disclosure obligations to apply only when a case is brought to trial. For example, the Court has created no temporal aspects to *Brady*'s requirements, suggesting that as long as prosecutors produce all material exculpatory information prior to *trial*, they have met their due process obligations.[21]

This Article focuses on the limitation of a prosecutor's disclosure obligation, even in cases that proceed to trial, to exculpatory evidence that is "material." The Court's original announcement in *Brady* that due process required prosecutors to turn over all exculpatory evidence "material either to guilt or to punishment"[22] was accompanied by language suggesting that favorable evidence would be considered material as long as it was not irrelevant.[23] For example, the Court's description of evidence that "if made available, would *tend to* exculpate"[24] sounds not unlike the definition of relevance under Rule 401 of the Federal Rules of Evidence, a permissive standard that includes

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material exculpatory evidence even when the defense has made no request for such information).

19. Kyles v. Whitley, 514 U.S. 419, 437 (1995) (holding the prosecution accountable for all *Brady* material in the possession of law enforcement officials).

20. *See generally* Bibas, *supra* note 15, at 149–51 (criticizing *Brady*'s lack of focus upon a defendant's innocence in part because the doctrine is designed for trials when ninety-five percent of convictions are based on guilty pleas); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 352 (noting that "the *Brady* duty does not apply, at least regarding exculpatory impeachment evidence, unless the defendant goes to trial"); Kevin C. McMunigal, *Guilty Pleas,* Brady *Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. REV. 651, 656–62 (2007) (arguing that the failure to disclose exculpatory evidence in the plea bargaining context can lead to factually inaccurate guilty pleas); Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 554–61 (noting that counsel's ability to negotiate plea bargains can be impaired when its access to evidence is limited).

21. Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1150 (2005). Although some lower courts have attempted to accelerate the timing of *Brady*'s requirements to apply to plea bargaining, *see* Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995); Banks v. United States, 920 F. Supp. 688, 691 (E.D. Va. 1996); Fambo v. Smith, 433 F. Supp. 590, 599 (W.D.N.Y. 1977), *aff'd*, 565 F.2d 233 (2d Cir. 1977), the Supreme Court is unlikely to follow suit, at least with respect to all *Brady* evidence. In *United States v. Ruiz*, 536 U.S. 622 (2002), the Court rejected a defendant's challenge to a guilty plea that was contingent on the government's refusal to disclose impeachment evidence and evidence relevant to affirmative defenses. Although the Court recognized the government's obligation to disclose evidence bearing on a defendant's "factual innocence" during plea negotiations, *id.* at 625, it otherwise characterized *Brady* narrowly. In its unanimous opinion, the Court noted that "impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary*." *Id.* at 629 (emphasis in original).

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

23. *See* Sundby, *supra* note 4, at 646 (setting forth a "perfectly plausible reading" of materiality that would require the prosecution to turn over favorable evidence as long as it was relevant).

24. *Brady*, 373 U.S. at 87–88 (emphasis added).

any evidence "having *any tendency* to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence."[25]

However, *Brady*'s progeny make clear that the doctrine requires far less of prosecutors. In *United States v. Agurs*,[26] for example, the Court expressly rejected the argument that prosecutors have an obligation to disclose exculpatory evidence whenever it "might" affect a jury.[27] In reasoning that revealed skepticism about the competence of jurors, the Court maintained that jurors might be swayed by "improper or trivial" factors just as much as by "legitimate doubt."[28] Because of the unreliability of easily manipulated jurors, requiring the prosecution to disclose everything that might influence a jury would amount to a constitutionally mandated open file policy,[29] which the Court has repeatedly refused to impose as a component of due process.[30]

Instead, the Court held in *United States v. Bagley*[31] that prosecutors are obligated to turn over exculpatory evidence "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."[32] A "reasonable probability" under *Bagley* is "a probability sufficient to undermine confidence in the outcome."[33] Although the defendant need not prove by a preponderance of the evidence that the undisclosed information would have changed the trial's outcome, he is required to show that "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[34]

As a type of harmless error standard governing the availability of post-conviction relief, *Bagley*'s[35] materiality standard might be a sensible approach to ensuring that reliable convictions are not unnecessarily overturned on the basis of immaterial evidence. But to see the materiality requirement merely as a limit on a defendant's remedies is again to inflate the scope of the *Brady* doctrine itself. *Bagley*'s materiality standard is not simply a harmless error test to determine whether a conviction should be reversed because of a prosecutor's failure to disclose. It is the governing standard to

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25. FED. R. EVID. 401 (emphasis added).

26. 427 U.S. 97 (1976).

27. *Id.* at 108–10.

28. *Id.* at 109.

29. *Id.*

30. *Id.*; Pennsylvania v. Ritchie, 480 U.S. 39, 59 (1987) ("A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the Commonwealth's files."); Illinois v. Moore, 408 U.S. 786, 795 (1972) (holding that there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case").

31. 473 U.S. 667 (1985).

32. *Id.* at 682.

33. *Id.* (citation omitted).

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

35. The materiality standard arose from the Court's decisions in *Brady*, *Agurs*, and *Bagley*. However, for labeling purposes, this Article, like others, credits the current standard of materiality to *Bagley*, the most recent case in the trilogy and the one in which the Court made clear that materiality was the touchstone for determining disclosure, whether the defense requested the discovery of exculpatory evidence or not, and regardless of how specific the defense's request. *See Bagley*, 473 U.S. at 682.

determine whether a prosecutor has in fact committed error.[36] In other contexts, the standards that determine the availability of an appellate remedy are distinguishable from the standards that determine whether an error was committed in the first place. For example, to reverse a defendant's conviction for ineffective assistance of counsel, the second prong of *Strickland v. Washington*'s[37] two-prong test requires proof of a reasonable probability that the result of the proceedings would have been different but for the attorney's defective performance; however, the first prong requires that the trial attorney provided reasonably effective assistance.[38] Similarly, a defendant against whom illegally seized evidence was admitted at trial will not obtain appellate relief if he would have been convicted even in the absence of the evidence;[39] however, the admission of the illegally seized evidence at trial is nevertheless error.

Bagley, in contrast, sets forth a single standard of materiality that determines both whether a conviction should be reversed if the prosecutor fails to disclose evidence *and* whether the prosecutor is required to disclose the evidence at all. It is not uncommon for commentators to use the term "*Brady* evidence" to encompass all evidence favorable to the defense, whether material under the Court's jurisprudence or not. That nomenclature, however, inaccurately describes a prosecutor's constitutional duty to disclose. Unless exculpatory evidence is material, due process does not require its disclosure, and the evidence is not, in any fair sense, "true" *Brady* evidence.[40] "True" *Brady* evidence is both exculpatory and material, and must be disclosed to the defense. In contrast to true *Brady* evidence is what this Article will refer to as "*Brady*-type"[41] evidence, which is favorable to the accused but not material, and therefore outside of *Brady*'s disclosure mandate.

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36. Eugene Cerruti, *Through the Looking-Glass at the* Brady *Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process*, 94 KY. L.J. 211, 213–14 (2005) (noting that the *Brady* doctrine imposes a review standard higher than harmless error because a prosecutor's failure to disclose exculpatory evidence "becomes error only when a reviewing court concludes that the nondisclosure of its own accord has produced a wrongful conviction at trial").

37. 466 U.S. 668 (1984).

38. *Id.* at 687–94.

39. Chambers v. Maroney, 399 U.S. 42, 52–53 (1970) (applying harmless error review to admission of evidence obtained in violation of the Fourth Amendment).

40. For example, the Court wrote in *Kyles* that the materiality requirement "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." *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995) (citing MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2004); ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION 3–3.11(a) (3d ed. 1993)).

41. I attribute this term to Richard Rosen, who has described "*Brady*-type misconduct" as a prosecutor's failure to comply with ethical rules that require disclosure of all favorable evidence to the defense, even if the evidence does not rise to the level of materiality required by *Bagley*. Rosen, *supra* note 6, at 696; *see also* Meares, *supra* note 10, at 909 n.232 (using same terminology and attributing it to Rosen). For a discussion of the ethics rules requiring prosecutorial disclosure beyond *Brady*, see *infra* notes 78 and 96–100 and accompanying text. Here, I use the adjective "*Brady*-type" to describe not misconduct arising from the nondisclosure of immaterial exculpatory evidence, but the evidence itself.

Thus, in light of the true nature of *Brady* evidence, a literal application of *Brady* requires little disclosure from prosecutors. If a conscientious prosecutor faces exculpatory evidence that would shake her faith in any conviction she might obtain without the evidence, then she will presumably dismiss charges against the defendant. This would render disclosure of the evidence, and *Brady* itself, irrelevant.[42] On the other hand, if the exculpatory evidence does *not* undermine her belief in the defendant's guilt, she is likely to conclude that the evidence will not affect the jury's determination either. Accordingly, she would treat the evidence as immaterial and therefore not within her *Brady* obligation.[43] *Brady* becomes relevant only in a narrow category of cases: those in which a prosecutor perceives a significant risk that an appellate court might lose faith in the reliability of a conviction in light of the evidence at issue, but nevertheless continues to believe both that the defendant is guilty and that she can prove her case beyond a reasonable doubt despite the exculpatory evidence.[44]

II. CRITICISM OF THE MATERIALITY REQUIREMENT

Scholars have broadly condemned *Bagley*'s materiality requirement.[45] Traditionally, and most commonly, scholars have focused less on the *Brady* doctrine itself than on the prosecutors whom *Brady* governs, arguing that the materiality requirement enables overzealous prosecutors to avoid their constitutional and ethical obligations to disclose exculpatory evidence to the defense. Not surprisingly, the reform proposals arising from this literature tend to focus on measures designed to improve prosecutorial ethics and deter prosecutorial misconduct.[46] This Article does not dispute that prosecutors should "do justice," and that law reforms should deter misconduct and incentivize ethical conduct. However, it argues that even virtuous prosecutors trying to do justice can err in their good-faith attempts to apply the doctrine on its own terms. Accordingly, *Brady*'s failure ultimately rests with the materiality requirement itself, not just the prosecutors who must apply it.

A. The Focus on Prosecutorial Evasion of Brady

Much of the literature on prosecutorial decision making depicts prosecutors as zealous (and overzealous) advocates, motivated primarily to obtain and maintain the

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42. Sundby, *supra* note 4, at 651–52.

43. Bibas, *supra* note 15, at 140 (noting that prosecutors may conclude that a piece of evidence that does not shake their doubts about guilt will not matter to jurors either, "so the rate of *Brady* disclosures could approach zero").

44. *See, e.g.*, Leipold, *supra* note 21, at 1150 (stating that *Brady* asks "well-intentioned prosecutors . . . to identify evidence that will help the defense *after* they have concluded that the evidence supports a conviction beyond a reasonable doubt") (emphasis in original); Sundby, *supra* note 4, at 653 (recognizing that "true" *Brady* material exists in "a narrow band of cases indeed").

45. *E.g.*, Gershman, *supra* note 5, at 718; Rosen, *supra* note 6, at 697; Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 870 (1997).

46. *See infra* notes 56–61 and accompanying text.

high conviction rates that earn them attention, praise, and future career success.[47] Perhaps not surprisingly, the evaluation of a prosecutor's duty to disclose from this perspective is a negative one, not because of the limited scope of the duty itself, but because of the ease with which it can be evaded by prosecutors who value the next conviction more than their obligations under *Brady*. With no oversight of their determination of whether exculpatory evidence rises to the level of materiality, the argument goes, prosecutors know they are their own watchers.[48] If they intentionally suppress evidence that might jeopardize a conviction, they can do so in the comfort of knowing there is little chance the evidence will ever come to light and therefore only a remote possibility of a challenge to their decision to withhold it.[49]

Moreover, even if the defense does happen to learn about the prosecutor's failure to disclose, the prosecutor can rely on *Bagley*'s materiality standard on appeal and hope that the exculpatory evidence does not rise to the level of true *Brady* material.[50] Based

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47. *See, e.g.*, Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2471 (2004) ("Favorable win-loss statistics boost prosecutors' egos, their esteem, their praise by colleagues, and their prospects for promotion and career advancement."); Meares, *supra* note 10, at 900 ("The prosecutor's professional success inevitably is linked to success at trial and on appeal."); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 390 (2001) ("The desire to win inevitably wins out over matters of procedural fairness, such as disclosure."); Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 D.C. L. REV. 275, 278 (2004) (stating that "a team of police and prosecutors were so convinced of their righteousness that they were willing to do anything to get their man" (quoting BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE 175–76 (2000))); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 108 (1991) ("Prosecutors who restrain themselves may convict at a lower rate and thus appear less competent to their superiors.").

48. Stephen A. Saltzburg, *Perjury and False Testimony: Should the Difference Matter So Much?*, 68 FORDHAM L. REV. 1537, 1578–79 (2000) ("In our adversary system, any limitation like 'materiality' invites prosecutors and their law enforcement assistants to make their own biased judgments about materiality."); Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1393 (1991) (noting that prosecutors have exclusive access to their evidence and an incentive to withhold it).

49. Brown, *supra* note 8, at 1637 ("The *Brady* rule currently works poorly because prosecutors decide both what is material and what is exculpatory. . . . [O]dds are that if a prosecutor does not disclose it, the evidence will never be uncovered."); Findley & Scott, *supra* note 20, at 351–52 (observing that *Brady* violations are brought to light only "through some fortuity that usually occurs sometime after trial"); Gershman, *supra* note 5, at 687 ("*Brady* is . . . virtually unenforceable when violations are hidden."); Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 470 (2002) (citing the failure to disclose exculpatory evidence as an example of when prosecutors are less likely to self-regulate because misconduct "stands some chance of remaining secret"); Meares, *supra* note 10, at 909 (noting that "it is probably fair to say that many instances of *Brady*-type misconduct are never discovered and hence never reported").

50. Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 438 (1992) (stating that, in practice, if "a conviction results, reversal will not be ordered unless an appellate court can conclude that the trial jury probably would have acquitted the defendant had the evidence been disclosed"); Gershman, *supra* note 5, at 715 (arguing that *Brady* invites prosecutors to "withhold with impunity" due to a "rational belief" that the appellate court will

on the empirical evidence, this gamble will usually pay off. Judges are predisposed to affirming convictions. They are flooded by meritless criminal appeals and habeas cases, making them quick to assume that a retrial would be a waste of time.[51] They may also suffer from hindsight bias, the tendency for people to overestimate the ex ante likelihood of an event that has already occurred.[52] Because the government has already obtained a conviction, appellate judges might view that result as inevitable.[53] It is perhaps unsurprising, then, that only a small percentage of defendants successfully demonstrate a reasonable probability that withheld evidence would have affected the result of their proceedings.[54] Finally, even if the defense manages both to discover the undisclosed evidence and to persuade a reviewing court that the evidence is material, the prosecutor can simply retry the defendant, placing the prosecutor in roughly the same position she would have found herself had she disclosed the evidence in the first place.[55]

Given the role that prosecutorial ethics (and the lack thereof) play in the prevailing description of *Brady*'s shortcomings, most of the corresponding proposals to improve defendants' access to exculpatory evidence have predictably focused on the values of prosecutors. Although reform proposals vary in their emphases, a common underlying assumption is that prosecutors who care more about justice than their personal conviction rates will disclose broadly. Accordingly, scholars have invited changes to the prosecutorial culture that might cause prosecutors intrinsically to value doing

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find no reasonable probability of a different result); Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 PENN. ST. L. REV. 1133, 1145–46 (2005) (stating that prosecutors know courts are quick to view withheld evidence "as harmless in hindsight"); Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 35 (2001) (noting the difficulty of showing materiality on appeal); Rosen, *supra* note 6, at 707–08 ("[A] prosecutor knows that a decision to withhold or falsify evidence, even if discovered, will not necessarily result in a reversal of the conviction.").

51. Bibas, *supra* note 15, at 143 (noting that "jaded judges find it hard to spot the occasional innocence needle in the haystack"); Hoeffel, *supra* note 50, at 1145–46 (stating that "appellate courts have shown themselves to be predisposed to upholding convictions").

52. *See* Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 288, 298 (1975); Baruch Fischhoff & Ruth Beyth, *"I Knew it Would Happen": Remembered Probabilities of Once-Future Things*, 13 ORGANIZATIONAL BEHAVIOR & HUM. PERFORMANCE 1 (1975).

53. For a more thorough discussion of how hindsight bias can affect appellate judges in the *Brady* and ineffective assistance of counsel contexts, respectively, see Bibas, *supra* note 15, at 143–44 and Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 2–7.

54. One study located only 270 federal and state court cases in the last forty years to result in either a reversal of conviction or a new hearing due to withheld *Brady* material. Richard A. Serrano, *Withheld Evidence Can Give Convicts New Life*, L.A. TIMES, May 29, 2001, at A1 (citing the Habeas Assistance and Training Project study). More recently, Professor Bibas examined 210 *Brady* cases decided in 2004 and concluded that less than twelve percent of them succeeded. Bibas, *supra* note 15, at 144–45.

55. Hoeffel, *supra* note 50, at 1146 (noting that "a reversal simply calls for a retrial, so that the prosecutor is put in essentially the same position he was in prior to the [*Brady*] error"); Weeks, *supra* note 45, at 870 (arguing that *Brady* incentivizes nondisclosure because the defense must first discover the evidence, then must demonstrate materiality, and can be retried in any event).

justice.[56] Others have proposed ways of altering the values of prosecutors extrinsically. For example, calls for increased enforcement of the ethical rules governing prosecutorial disclosure are seemingly unanimous.[57] Other commentators argue that *Brady* violations warrant not only professional discipline, but also civil[58] and even criminal liability.[59] Still others have argued that as a disincentive to the risk-taking that *Brady* currently encourages in prosecutors, the Fifth Amendment's prohibition against double jeopardy should prohibit the government from retrying a defendant if his conviction is reversed because of a *Brady* violation.[60] Emphasizing the carrot in addition to the stick, Tracey Meares has suggested financial rewards for good prosecutorial conduct, including the disclosure of *Brady*-type evidence to the defense.[61]

Without disputing the importance of an ethical prosecutorial culture or the need for increased sanctions against unethical prosecutors, some scholars have begun to question whether *Brady*'s failure to provide defendants access to exculpatory evidence is more attributable to the doctrine itself than to the prosecutors who implement it.[62] Here, prosecutors are depicted not exclusively as overzealous advocates indifferent to the rights of criminal defendants, but also as well-intentioned lawyers struggling to

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56. *See* Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 546 (1996) (arguing that prosecutors should be taught to "avoid behavior, such as score-keeping, that makes criminal trials resemble sporting matches"); Zacharias, *supra* note 47, at 109 (noting that supervisors in prosecutors' offices can instill a culture of promoting justice through training and other institutional reforms).

57. *See* Rosen, *supra* note 6, at 736 (calling for more stringent enforcement of breaches in prosecutorial ethics resulting from *Brady* violations); Yaroshefsky, *supra* note 47, at 297–98 (advocating the creation of independent commissions to enforce disciplinary rules against prosecutors); Michael E. Gardner, Note, *An Affair to Remember: Further Refinement of the Prosecutor's Duty to Disclose Exculpatory Evidence*, 68 MO. L. REV. 469, 480 (2003) ("The obvious solution to the problem is rigorous enforcement of each of the states' respective rules of professional conduct.").

58. *See* Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 147–48 (arguing that prosecutors should not enjoy immunity for *Brady* violations); Weeks, *supra* note 45, at 933–34 (arguing that prosecutors should face personal liability "for the most provable, deliberate, and egregious violations"). *But see* Hoeffel, *supra* note 50, at 1152 (considering but rejecting civil suits as a *Brady* reform because "the barriers to suit would be practically insurmountable").

59. Shelby A.D. Moore, *Who Is Keeping the Gate? What Do We Do When Prosecutors Breach the Ethical Responsibilities They Have Sworn to Uphold?*, 47 S. TEX. L. REV. 801, 826–31 (2006) (suggesting increased use of criminal sanctions against prosecutors who intentionally violate constitutional rights).

60. *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); 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, 944–53 (2006).

61. Meares, *supra* note 10, at 910.

62. *See* Alafair S. Burke, Comment, Brady*'s Brainteaser: The Accidental Prosecutor and Cognitive Bias*, 57 CASE W. RES. L. REV. 575 (2008); Sundby, *supra* note 4, at 644 ("wonder[ing]" if complaints about *Brady* violations were more attributable to the standard itself than "to prosecutors failing to live up to their constitutional duties").

apply an unworkable standard.[63] The materiality standard serves as a single doctrine both to govern prosecutorial disclosure and to determine whether a conviction should be reversed based on a prosecutor's failure to disclose.[64] However, the standard is written solely from the perspective of an appellate court reviewing a trial record post-conviction. The standard is considerably less helpful to prosecutors trying to decide whether to disclose evidence prior to trial. By its own terms, the materiality standard requires a prosecutor to compare the evidence at issue to "the whole case"[65] absent that evidence (even though the case has not yet been tried), and then determine whether the evidence is significant enough to undermine confidence in a conviction based on that case [66] (even though a conviction has not yet been obtained). Because the doctrine requires prosecutors making a prospective decision to apply a retrospective standard, even well-intentioned prosecutors can have difficulties following the law. If conscientious prosecutors who are trying to do justice are likely to err, then proposals for reform must look to the doctrine itself and not exclusively to improvements in prosecutorial ethics.

B. Why Ethical Prosecutors Might Under-Disclose

Why then, should we criticize the materiality standard instead of the prosecutors who apply it? After all, well-intentioned prosecutors can simply opt to disclose evidence more generously than the Constitution mandates. Indeed, in defending the materiality requirement, the Court has assumed that conscientious prosecutors will engage in what this Article will refer to as "over-disclosure,"[67] disclosing not only true

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63. *See* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1607 (2006) (noting that *Brady* requires prosecutors to "engage in a bizarre kind of anticipatory hindsight review"); John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 471 (2001) ("It seems curious, to say the least, that a prosecutor has a constitutional obligation *before* trial to disclose a category of information that cannot be defined until *after* trial.") (emphasis in original); Findley & Scott, *supra* note 20, at 352 ("[T]he *Brady* test oddly imposes a retrospective analysis on decisions that must be made prospectively, pretrial."); Sundby, *supra* note 4, at 658 (maintaining that the materiality requirement results in "a somewhat odd and circular spectacle: a pre-trial obligation that is defined through speculation on a post-trial result").

64. *See supra* notes 35–41 and accompanying text.

65. *See* Kyles v. Whitley, 514 U.S. 419, 435 (1995).

66. United States v. Bagley, 473 U.S. 667, 682 (1985) (holding that evidence must be disclosed under *Brady* only if it creates "a probability sufficient to undermine confidence in the outcome").

67. By "over-disclosure," I do not intend to suggest that the disclosure is over and above what is normatively preferred. Instead, the term refers to a prosecutor disclosing favorable evidence that does not create a reasonable probability of a different result and is therefore not required to be disclosed under *Brady*. *See* Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965, 977 (1984) (noting that an appellate court would not reverse a conviction based on a prosecutor's violation of Model Code of Professional Responsibility Disciplinary Rule 7-103 if it did not also violate the more restrictive standard under *Brady*); Sundby, *supra* note 4, at 650 (noting that the Court's case law distinguishes "between what is ethically desirable as prosecutorial discovery and what is constitutionally

Brady material, but also at least some non-material *Brady*-type evidence. For example, the Court wrote in *Agurs* that "the prudent prosecutor will resolve doubtful questions in favor of disclosure."[68] Similarly, in *Kyles v. Whitley*,[69] the Court reasoned that "a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence."[70] Many scholars also assume that prosecutors who value justice over their conviction records will over-disclose.[71]

The view that virtuous prosecutors can avoid *Brady* errors by simply over-disclosing has considerable appeal. After all, as ministers of justice,[72] prosecutors have a duty to ensure that defendants receive fair trials.[73] As the Court so famously wrote in *Berger v. United States*,[74] the prosecutor "is in a peculiar and very definite sense the servant of the law."[75] It is her responsibility not to win a case, but to see that justice is done.[76] Accordingly, although she "may strike hard blows," she "is not at liberty to strike foul ones."[77] Moreover, independent of *Brady*, ethical rules governing prosecutors require them to disclose to the defense all favorable evidence, without any restriction that the evidence be material.[78]

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required").

68. United States v. Agurs, 427 U.S. 97, 108 (1976).

69. 514 U.S. 419 (1995).

70. *Id.* at 439.

71. Hoeffel, *supra* note 50, at 1142 ("If the good prosecutor were the ethical prosecutor, he would disclose to the defense all information favorable to the defense, without hesitation.... If in doubt, he would err on the side of disclosure."); Johns, *supra* note 58, at 147 (arguing for the eradication of prosecutorial immunity for *Brady* violations and noting that prosecutors "can simply err on the side of caution and disclose more evidence than is actually required"); Samuel J. Levine, *Taking Prosecutorial Ethics Seriously: A Consideration of the Prosecutor's Ethical Obligation to "Seek Justice" in a Comparative Analytical Framework*, 41 HOUS. L. REV. 1337, 1356 (2004) (maintaining that ethical prosecutors "resolv[e] uncertainties in favor of protecting the constitutional rights of the criminal defendant"); Sundby, *supra* note 4, at 660 (noting that prosecutors are likely to disclose more than what is required "to be on the safe side and out of a sense of ethical obligation").

72. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2004) (characterizing the prosecutor as "a minister of justice" with "specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence"); *see also* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (2004) (stating that the prosecutor's "duty is to seek justice"). *See generally* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 11.01–.16 (2d ed. 2002) (describing "special ethical rules" applicable to prosecutors).

73. Zacharias, *supra* note 47, at 49 (stating that prosecutors should do justice by not trying innocent defendants and by ensuring that fair trials are provided to the rest).

74. 295 U.S. 78 (1935).

75. *Id.* at 88.

76. *Id.*

77. *Id.*

78. Disciplinary Rule 7-103(B) requires prosecutors to make "timely disclosure ... of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment." MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103(B) (2004). The Model Rules impose an almost identical obligation. *See* MODEL RULES OF PROF'L CONDUCT RULE 3.8(d) cmt. 3 (2004) (requiring prosecutors to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense,

This portrait of conscientious prosecutors ensuring fair trials, regardless of the limits of applicable constitutional requirements, is an attractive one. However, the portrait rests on two implicit assumptions. First, reliance on prosecutorial ethics to repair *Brady* assumes that prosecutors will recognize when they have been thrown a difficult *Brady* question. Prosecutors seeking to "resolve doubtful questions"[79] or to avoid "tacking too close to the wind"[80] by erring on the side of disclosure must first recognize that the materiality of a given piece of evidence presents a close question. Second, it assumes that ethical prosecutors will necessarily view over-disclosure in such cases as "doing justice." Each of these assumptions is questionable.

1. Prosecutors, *Brady*, and Cognitive Bias

As an initial matter, prosecutors may withhold material exculpatory evidence without recognizing its full exculpatory value. Were the materiality standard merely difficult to apply, we might safely assume that prosecutors would at least realize when they were caught at the doctrine's blurry edges. However, *Bagley*'s materiality standard amounts not simply to a challenging doctrine, under which prosecutors are just as likely to misapply the standard in one direction as the other. Instead, the doctrine acts upon cognitive biases from which prosecutors, like all human decision makers, suffer.[81] Specifically, *Brady* amplifies confirmation bias, selective information processing, and the resistance to cognitive dissonance in a manner that guarantees that when prosecutors err in applying *Bagley*'s materiality standard, they will do so by systematically underestimating, not overestimating, materiality.[82]

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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"). For a discussion of the weaknesses of ethical rules as the sole mechanism through which to expand prosecutorial disclosure beyond *Brady*, see *infra* notes 96–100 and accompanying text.

79. United States v. Agurs, 427 U.S. 97, 108 (1976).

80. Kyles v. Whitley, 514 U.S. 419, 439 (1995).

81. A growing literature seeks to explain prosecutorial decision making in terms of human cognition rather than intentional or reckless prosecutorial misconduct. *See generally* Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 479 (2006); Bibas, *supra* note 47, at 2496–2519; Burke, *supra* note 62; Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 195–200 (2007); Findley & Scott, *supra* note 20; Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 140–41 (2004); Myrna Raeder, *What Does Innocence Have to Do with It?: A Commentary on Wrongful Convictions and Rationality*, 2003 MICH. ST. L. REV. 1315, 1327.

82. Without exploring the cognitive mechanisms that can distort prosecutors' applications of the *Brady* standard, others have noted that the doctrine requires objectivity that seems intuitively unlikely. *See* Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1375 (1997) (noting that when prosecutors believe a defendant is guilty, they are likely to view evidence favorable to the defense "as a 'red herring' with which defense counsel may make mischief"); Hoeffel, *supra* note 50, at 1145 (stating that the prosecutor "is convinced of the defendant's guilt and he is certain that a defense attorney will use this information to attempt to create reasonable doubt where none exists"); Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550, 553–54 (1987) "[T]he prosecutor naturally tends to view weaknesses in his case not as possible indicators of innocence but merely as a possible failure of proof . . . ."); Sundby,

Confirmation bias is the well-documented tendency to favor evidence that confirms one's working hypothesis.[83] For example, researchers have found that subjects asked to determine whether a person is an extrovert ask questions such as, "What would you do if you wanted to liven things up at a party?"[84] Any answer to this question could only support, and never disprove, the theory that the person being questioned was an extrovert.

When a prosecutor initially reviews a case file, she does so to test the hypothesis that the defendant is guilty. Because of confirmation bias, she is likely to search the investigative file for evidence that confirms the defendant's guilt to the detriment of any exculpatory evidence that might disprove the working hypothesis. She may, for example, take note of the defendant's confession without questioning the circumstances under which it was elicited or a lack of self-verifying detail within the confession. She might search for a positive identification by an eyewitness without scrutinizing the reliability of the procedure used to obtain the identification.

Once the prosecutor has conducted a search of the file and determined that the defendant is guilty, she becomes subject to selective information processing. Selective information processing is the tendency for people to accept at face value information that is consistent with their existing beliefs, while devaluing inconsistent information.[85] Because the prosecutor now believes that the defendant is guilty, she will tend to give more weight to evidence that buttresses her existing beliefs than to contradictory evidence. In other words, she will accept at face value any new inculpatory evidence, for example the testimony of an additional witness against the defendant, but she is likely to cast aside potentially exculpatory evidence as unreliable or irrelevant, such as evidence suggesting that the witness may be biased.[86]

A prosecutor's evaluation of potential *Brady* material may also be skewed by a resistance to cognitive dissonance. The cognitive literature demonstrates that people routinely adjust their beliefs to reconcile what would otherwise be a dissonance

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supra note 4, at 654 (noting that *Brady* requires "a Zen-like state of harmonizing objective and subjective beliefs"); Weeks, *supra* note 45, at 843 ("[T]he kind of objective determination of materiality required by *Bagley* is capable of being made only by saints.").

83. *See* PETER C. WASON & PHILIP N. JOHNSON-LAIRD, PSYCHOLOGY OF REASONING: STRUCTURE & CONTENT (1972); *see also* ZIVA KUNDA, SOCIAL COGNITION: MAKING SENSE OF PEOPLE 112–17 (1999); J. Klayman & Y. Ha, *Confirmation, Disconfirmation, and Information in Hypothesis Testing*, 94 PSYCHOL. REV. 211 (1987).

84. Mark Snyder & William B. Swann, Jr., *Hypothesis-Testing Processes in Social Interaction*, 36 J. PERSONALITY & SOC. PSYCHOL. 1202, 1204 (1978).

85. *E.g.*, Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979).

86. For a more thorough discussion of confirmation bias, selective information processing, and the ways in which these biases can affect prosecutorial disclosure of exculpatory evidence, see Burke, *supra* note 62, at 577–80. *See also* Alafair S. Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. & LIBERTY 512, 518 (2007); Susan S. Kuo & C.W. Taylor, *In Prosecutors We Trust: UK Lessons for Illinois Disclosure*, 38 LOY. U. CHI. L.J. 695, 706–07 (2007) ("The quest for success can affect a prosecutor's ability to objectively weigh the materiality of potentially exculpatory evidence, a phenomenon referred to as 'tunnel vision' or 'confirmatory bias.'"); Sundby, *supra* note 4, at 655 (noting that cognitive biases could impede prosecutors from recognizing materiality).

between their beliefs and their behavior.[87] Consider how this phenomenon might apply to a prosecutor who pursued charges against a defendant only to be confronted later with evidence suggesting the defendant's innocence. To avoid the cognitive dissonance of having to admit that she may have charged an innocent person, the prosecutor is likely to discount the exculpatory value of the new evidence and overestimate the strength of her original case against the defendant.

In sum, *Brady* invites cognitive error. If a prosecutor is confronted with evidence that falls short of a defense smoking gun and is only arguably "material," she may not recognize the closeness of the *Bagley* question. Not only will she fail to over-disclose, but she might also under-disclose by withholding true *Brady* evidence.

2. What is Doing Justice?

Relying on virtuous prosecutors to over-disclose also assumes that over-disclosure is necessarily a component of "doing justice." This assumption, however, ignores the tension between prosecutors' dual roles.[88] Although the literature on prosecutorial ethics understandably emphasizes the prosecutor's role to guard against wrongful convictions, prosecutors are also members of law enforcement, charged with obtaining warranted convictions. Their "twofold" objective is to ensure "that guilt shall not escape" nor "innocence suffer."[89] Prosecutors take seriously the mandate that they do justice, but, because of their dual roles, they are likely to define "justice" with reference to the Supreme Court's criminal procedure jurisprudence. A prosecutor seeking to balance her conflicting roles to convict the guilty while providing fair process might rationally conclude that her obligation is to ensure that defendants receive the rights to which they are due—but no more.

Janet Hoeffel illustrates this tension:

> The prosecutor does not even think about "doing justice" in the sense the ethics professors envision. What prosecutor would not believe he is doing justice by fulfilling his concomitant duty to be a zealous advocate? Isn't the whole idea of becoming a prosecutor to put the bad guys behind bars and keep the public safe?[90]

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87. *See* Leon Festinger & James M. Carlsmith, *Cognitive Consequences of Forced Compliance*, 58 J. ABNORMAL & SOC. PSYCHOL. 203, 204–06 (1959).

88. Bibas, *supra* note 15, at 132 ("Though conscientious prosecutors also want to free the innocent and show mercy on sympathetic guilty defendants, at root, they see their job as convicting and punishing the guilty."); Bruce A. Green, *Why Should Prosecutors "Seek Justice?"*, 26 FORDHAM URB. L.J. 607, 608 (1999); Peter Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 405; Zacharias, *supra* note 47, at 48 (noting tension between prosecutors' obligations to vindicate defendants' rights and their responsibility to the public to convict criminals).

89. Berger v. United States, 295 U.S. 78, 88 (1935).

90. Hoeffel, *supra* note 50, at 1140. Hoeffel goes on to argue that "asking prosecutors simultaneously to advocate within a process and assure that the process is fair is inherently contradictory—and perhaps hopeless." *Id.* at 1141. Instead, "we should fully expect the normal, human, and good prosecutor to have the single-minded goal of winning the case for the prosecution." *Id.* Accordingly, Hoeffel urges a move away from the adversarial process in criminal cases to a more inquisitorial system. *Id.* My point is a more limited one. Rather than

Indeed, even the Supreme Court has written that while the prosecutor has a duty to prevent a wrongful conviction, it is also her duty "to use every legitimate means to bring about a just one."[91] Reversing the emphasis of the Court's famous mandate in *Berger*, a diligent prosecutor might remind herself that she cannot strike "foul" blows, but she may strike "hard" ones.[92] She must ensure that the defendant's rights are respected, but she has no obligation to construe those rights any more generously than has the Supreme Court to whom such constitutional questions are entrusted. Indeed, to do so might *undermine* the prosecutor's responsibility to do justice.

To assume that all justice-doing prosecutors will necessarily err on the side of caution and generously disclose evidence to the defense ignores the dual responsibilities of prosecutors. The following anecdote might help to illustrate the gap between real-world prosecutions and the idealistic notion that conscientious prosecutors should disclose more than *Brady* requires of them. In on-campus interviews at the law school where I teach, one local prosecutor's office presents job applicants with the following hypothetical:

> You have a trial scheduled on Tuesday morning on a robbery charge arising from a purse snatching. At the end of business Monday, the defense attorney rejects the state's most recent pretrial offer. Late Monday night, you get a phone call from the victim's daughter; her mother—your eyewitness—has passed away. You can't prove your case without the victim's testimony. Tuesday morning, the defense attorney calls you and says, "My client chickened out. He'll take the deal if it's still on the table." Do you let the defendant enter his plea, or do you tell the defense attorney that the witness is dead, revealing that you are unable to proceed to trial?

What, my students ask me, is the "right" answer? Being a law professor, I refuse to answer the question and force them to answer it themselves. The typical response goes something like this:

> *Brady* is about preventing wrongful convictions and is therefore intended to cover evidence that is material to a determination of the defendant's factual guilt or innocence or to a determination of the degree of punishment upon conviction.[93] *Brady* does not require me to disclose tactical observations about the strength of my case or my preparedness for trial. Nevertheless, I would tell the defense attorney this was her client's lucky day, because the system is made up of repeat players, and I want that lawyer to trust me in the future and know that I am one of the good ones.

At that point, I congratulate my student for the thoughtful and well-reasoned response. I then change the hypothetical from a robbery to a rape case. And the witness died

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reject the notion that prosecutors might concern themselves with the rights of defendants, I seek only to establish that, because of their co-existent responsibility to enforce penal laws, prosecutors will not be quick to construe a defendant's rights more generously than the courts whose job it is to define them in the first place.

91. *Berger*, 295 U.S. at 88.

92. *Id.*

93. *See supra* note 21 (discussing *Brady*'s limits in the plea bargaining context).

because the trauma of her victimization drove her to suicide. "Now," I ask, "do you still tell the defendant it's his lucky day?"

The lesson, I hope, is an obvious one. It is one thing to say in the abstract that virtuous prosecutors should give defendants more than that to which the law entitles them. It is another to apply that principle to the kinds of cases that prompt prosecutorial stinginess.[94] Prosecutors are entrusted to protect the public, and even conscientious prosecutors might reason that they stand on solid moral ground in disclosing only true *Brady* material but nothing more.[95]

Even the existence of ethical rules requiring disclosure beyond *Brady* does not ensure against under-disclosure. Because prosecutors are members of law enforcement, empowered by the executive branch, they may see themselves bound only by constitutional and statutory authorities, not by the rules that regulate other lawyers.[96] Moreover, because the substantive training that they receive reflects this culture,[97] many prosecutors do not even realize that ethics rules require disclosure beyond true *Brady* material.[98] The widespread failure of bar authorities to discipline prosecutors—both for *Brady*-like violations[99] and even for true *Brady* violations[100]—only contributes to prosecutors' cultural isolation from the rules of the profession.

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94. *See* Burke, *supra* note 81, at 189–90 (discussing how a prosecutor's "passion" for a case can lead the prosecutor to treat the case differently from other files in her caseload).

95. Gershman, *supra* note 5, at 715–16 (maintaining that evidence may be withheld even "by ethical prosecutors who attempt to balance their obligation to seek a conviction and at the same time fulfill their constitutional obligation under *Brady*"); Rosen, *supra* note 6, at 732 ("It is also likely that in most cases the prosecutor believes the defendant is guilty, and therefore might be motivated by the concern that, in one sense, justice will not be served by revealing evidence which will increase the probability that the defendant will go free.").

96. John M. Burkoff, *Prosecutorial Ethics: The Duty Not "To Strike Foul Blows"*, 53 U. PITT. L. REV. 271, 274–75 (1992) (noting that prosecutors' groups and especially the Department of Justice have criticized the American Bar Association's attempts to regulate the conduct of prosecutors); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 761 (2001) (noting that bar authorities acting under the power of the judiciary may be reluctant to discipline prosecutors because of concerns about the separation of powers).

97. *See* Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 686 (noting the lack of training in prosecutorial ethics); Steele, *supra* note 67, at 966 (observing that "prosecutors may have developed a sense of insulation from the ethical standards of other lawyers" because of the "scant attention" paid to the ethics of prosecutors).

98. Burke, *supra* note 63, at 1629; Hoeffel, *supra* note 50, at 1146 (calling the assumption that prosecutors are aware of their obligation to disclose favorable evidence under the professional codes "a stretch"). The author is willing to confess in this footnote that, as a practicing prosecutor for nearly five years, she was unaware of any discovery obligations beyond those articulated in *Brady* and the local rules of criminal procedure.

99. Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1593 (maintaining that "courts and disciplinary authorities do not sanction prosecutors for failing to disclose evidence as required by the rule but not by other law").

100. Gershman, *supra* note 5, at 687 ("*Brady* is insufficiently enforced when violations are discovered, and virtually unenforceable when violations are hidden."); Rosen, *supra* note 6, at 697; Weeks, *supra* note 45, at 898 ("[T]he disciplinary process has been almost totally ineffective in sanctioning even egregious *Brady* violations."); Yaroshefsky, *supra* note 47, at 281–82; Zacharias, *supra* note 96, at 755.

C. Repairing the Doctrine

The *Brady* doctrine has failed to live up to its vision of providing defendants access to exculpatory evidence.[101] Even if one accepts the Court's premise that due process entitles defendants only to *material* exculpatory evidence, the Court's standard of materiality invites prosecutors to systematically undervalue it. Because of cognitive biases, prosecutors will overestimate the strength of their case in the absence of the evidence at issue, underestimate the potentially exculpatory value of the evidence, and therefore fail to recognize materiality even when it exists. Prosecutors seeking to do justice may also feel obligated to use every legally permissible maneuver to convict a defendant they believe is guilty, and therefore will not necessarily disclose exculpatory evidence to the defense if they believe the evidence is immaterial.

Simply to ensure that defendants receive the material exculpatory evidence to which the Court believes they are entitled, the legal standards governing prosecutorial disclosure must be changed. This Article is not alone in its call for a broadening of prosecutors' disclosure obligations beyond material exculpatory evidence. Several scholars have argued that the materiality standard is too rigid and that defendants should be entitled under due process to receive all evidence that is favorable to the defense.[102] However, changing the scope of the minimum disclosure that is required by due process presents both theoretical and practical hurdles. As a theoretical matter, it is difficult to maintain that withholding a single piece of favorable evidence necessarily deprives the defendant of his basic right to a fair trial under due process. For example, suppose the defendant is charged with robbing a bank. In a well constructed line-up, all fifteen witnesses identified the defendant as the culprit. When the defendant was arrested outside the bank, he was carrying the stolen cash, complete with the dye pack inserted into the money bag by the teller. The defendant's fingerprints were found on the demand note. Suppose also that the bank teller, one of the fifteen witnesses, was intoxicated, and the prosecutor suppresses this fact from the defense. In some sense, the withheld intoxication evidence is favorable to the defense; it could be used at trial to undermine the teller's eyewitness identification. Nevertheless, if the trial was in all other respects an ideal process, it would be difficult to argue that the defendant's trial was so flawed that it constitutes a "failure to observe that fundamental fairness

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101. *See* Bibas, *supra* note 15, at 129–30 (noting that *Brady* has failed to transform criminal procedure in practice); Capra, *supra* note 8, at 397 (arguing that "the spirit of *Brady*, based as it is on equality of access to exculpatory evidence before and during trial, cannot be effectuated by putting the pre-trial burden of determining favorability on the prosecutor"); Sundby, *supra* note 4, at 644 (lamenting the fact that "*Brady* is not the constitutional superhero that I once thought").

102. *See* Findley & Scott, *supra* note 20, at 352 (stating that the dissent in *United States v. Bagley*, 473 U.S. 667, 695–96 (1985) (Marshall, J., dissenting), which would have required disclosure of all evidence "that might reasonably be considered favorable to the defendant's case," "might have had it right"); Hoeffel, *supra* note 50, at 1151–52 (describing a rule requiring disclosure of all "favorable information" as more favorable than *Brady*); Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defense*, 74 YALE L.J. 136 (1964) (arguing prior to the Court's definition of "materiality" that a prosecutor's disclosure obligations under *Brady* should be measured by the impact of evidence on a defendant's ability to prepare for trial).

essential to the very concept of justice."[103] It is precisely because the minimal requirements of due process can be met without full disclosure of wholly immaterial evidence that the Court adopted the materiality requirement.[104] Moreover, as a practical matter, even if a litigant persuasively argued that every deprivation of favorable evidence amounted to an automatic due process violation, the Court would be unlikely to reverse a long list of precedent.[105]

To avoid revisiting Supreme Court precedent, other scholars have advocated for legal changes outside the Court's constitutional jurisprudence, such as amendments to the rules of criminal procedure[106] or the recognition of broader discovery rights in state constitutions.[107] Although these reforms could broaden disclosure, they require state-by-state legislation or litigation and therefore lack the sweeping impact of a change to federal constitutional doctrine. This Article's alternative proposal for legal reform is the creation of a prophylactic rule to protect defendants' rights under due process to receive material exculpatory evidence.[108]

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103. Lisenba v. California, 314 U.S. 219, 236 (1941).

104. *See* United States v. Agurs, 427 U.S. 97, 112 (1976) (holding that the standard for determining materiality "must reflect our overriding concern with the justice of the finding of guilt").

105. *See, e.g.*, *Bagley*, 473 U.S. at 682 (holding that exculpatory 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"); *Agurs*, 427 U.S. at 114 (holding that the prosecutor's failure to disclose evidence did not deprive the defendant of a fair trial under due process because it did not create a reasonable doubt when viewed "in the context of the entire record"); Brady v. Maryland, 373 U.S. 83, 87 (1963) (requiring disclosure of evidence "material to guilt or to punishment").

106. *See* Gershman, *supra* note 5, at 725 ("[B]roadening the discovery rules in criminal cases might insure greater compliance by prosecutors with their disclosure obligations under *Brady v. Maryland*."); Hoeffel, *supra* note 50, at 1152 ("[A]t the very least, we could make nondisclosure a rule violation."). Currently, neither Rule 16 nor Rule 11 of the Federal Rules of Criminal Procedure, governing discovery and plea bargains in federal criminal cases, respectively, requires the disclosure of exculpatory evidence. *See* FED. R. CRIM. P. 11, 16; *cf.* Am. Coll. of Trial Lawyers, *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 93 (2004).

107. Weeks, *supra* note 45, at 903–14 (looking to state law to find broader disclosure rights than *Brady* provides).

108. One scholar has previously suggested a prophylactic rule requiring open file discovery to remedy state interference with defense counsel's duty to investigate. *See* Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1153–54 (2004). She did not, however, analyze a prophylactic rule designed to effectuate core *Brady* rights.

III. A CASE STUDY IN PROPHYLACTIC RULES: *MIRANDA V. ARIZONA*

Although scholars use different terminology to define prophylactic rules,[109] the term is generally understood to describe rules that, in order to protect a constitutional right, provide protection above and beyond the guarantees bestowed by the underlying constitutional right itself.[110] Because prophylactic rules are distinguishable from the core rights they are designed to protect, this doctrinal approach to prosecutorial disclosure would permit the creation of broad discovery obligations while respecting the Court's limitation of a defendant's "core" discovery rights to only material exculpatory evidence.

Although criminal procedure jurisprudence "is rife with prophylactic rules,"[111] perhaps no prophylactic rule is as famous as the rule crafted by the Court in *Miranda v. Arizona*.[112] This Part first summarizes the Court's jurisprudence concerning custodial interrogations as a paradigmatic example of the judiciary's use of prophylactic rules. It then situates *Miranda* into a broader context of the Court's use of bright-line rules in constitutional criminal procedure and argues that the same considerations that justify a rule-based approach to criminal procedure in *Miranda* and other contexts justifies a prophylactic rule requiring disclosure from prosecutors beyond material exculpatory evidence.

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109. *See, e.g.*, Susan R. Klein, *Identifying and (Re)Formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1032 (2001) ("A 'constitutional prophylactic rule' is a judicially-created doctrinal rule or legal requirement determined by the Court as appropriate for deciding whether an explicit or 'true' federal constitutional rule is applicable."); Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66 TENN. L. REV. 925, 926 (1999) (describing prophylactic rules as "those risk-avoidance rules that are not directly sanctioned or required by the Constitution, but that are adopted to ensure that the government follows constitutionally sanctioned or required rules"); *cf.* Evan Caminker, Miranda *and Some Puzzles of "Prophylactic Rules"*, 70 U. CIN. L. REV. 1, 1 n.2 (2001) (arguing that the term "prophylactic rule" is "generally more misleading than helpful," but describing the term as referring to "doctrinal rules self-consciously crafted by courts for the instrumental purpose of improving the detection of and/or otherwise safeguarding against the violation of constitutional norms").

110. *See* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 21–22 (1975); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 195, 208 (1988). *But see* Caminker, *supra* note 109, at 28 n.91 (arguing that the notion that prophylactic rules over-protect is misplaced, because if the rules dictate what is constitutionally required, then the underlying right that provides less protection actually under-protects).

111. Klein, *supra* note 109, at 1042–44 (listing the following among other examples of prophylactic rules: the Fourth Amendment's warrant rule, the automobile inventory exception to the warrant rule, *Miranda*, the Double Jeopardy Clause's prohibition against imposing multiple punishments in a single trial, and the Sixth Amendment's presumption of incompetency if a defense attorney has an actual conflict of interest due to multiple representation).

112. 384 U.S. 436 (1966).

A. The Road to Miranda

The justifications for the Court's creation of a prophylactic rule in *Miranda* are best understood in relation to the prior regime governing police interrogation of suspects.[113] Prior to *Miranda*, the admissibility of an unindicted suspect's confession turned solely on a case-by-case determination of whether the confession was voluntary or was instead the involuntary product of police coercion. The origins of the Court's "voluntariness" test can be traced to the Court's 1897 decision in *Bram v. United States*,[114] in which the Court held that an involuntary confession violated the Fifth Amendment's prohibition against compelled incrimination.[115] The immediate impact of *Bram* was limited, however, because the self-incrimination clause was not incorporated into the Fourteenth Amendment and made applicable to the states until 1964.[116] That did not, however, leave interrogations by state actors entirely beyond the Court's reach.

1. Due Process Protections

The facts that triggered the Court's involvement in state confessions were horrific. In *Brown v. Mississippi*,[117] three African-American suspects confessed to murder after they were physically beaten by police cooperating with white vigilantes. One defendant was first attacked by a group of white men, hung from a tree, and whipped, but nevertheless maintained his innocence. He confessed only after the arresting police officer whipped him again and declared that the attacks would continue until he confessed. The other two men were also tortured, laid over chairs at the jail, and whipped bare-backed until they confessed.[118]

Without the Fifth Amendment's self-incrimination clause to rely on, the Court turned to the basic rights of due process:

> The rack and torture chamber may not be substituted for the witness stand. The State may not permit an accused to be hurried to conviction under mob domination—where the whole proceeding is but a mask—without supplying corrective process. . . . The due process clause requires "that state action . . . shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.[119]

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113. *See* Paul G. Cassell, *The Statute That Time Forgot: 18 U.S.C. § 3501 and the Overhauling of* Miranda, 85 IOWA L. REV. 175, 192 (1999) ("The dramatic changes wrought by *Miranda* are best understood by comparing the new rules to those in place before the decision."). For a brief but excellent overview of *Miranda*'s historical context, see JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 388–92 (2d ed. 2000).

114. 168 U.S. 532 (1897).

115. U.S. CONST. amend. V.

116. Malloy v. Hogan, 378 U.S. 1, 8 (1964) (holding Fifth Amendment privilege against self-incrimination applicable to state court proceedings).

117. 297 U.S. 278 (1936).

118. *Id.* at 281–82.

119. *Id.* at 285–86 (citations omitted).

After *Brown*, then, the admissibility of an unindicted defendant's confession was determined through a case-by-case determination of voluntariness, whether the defendant challenged his confession under the Due Process Clause or, in federal cases, as a violation of the privilege against self-incrimination.

In the twenty-eight years following *Brown*, the Court reviewed thirty-five additional confession cases. Although few of them involved physical violence rising to the level seen in *Brown*, the continuous stream of cases made clear that the Court's decision in *Brown* had not put to rest concerns about police misconduct or coercive interrogations. In the ensuing years, the Court saw confessions induced with threats of violence by third parties,[120] the denial of food,[121] and sleep deprivation.[122] The Court also began to recognize that psychological tactics alone could render confessions involuntary, especially when the accused was confined incommunicado, separated from friends, family, and attorneys.[123]

The case-by-case nature of the determination required by the Court's voluntariness standard encouraged interrogators to push the constitutional envelope. Because the voluntariness of a confession could be determined only in the context of the "totality of the circumstances," law enforcement was left with little guidance about what tactics were permissible. Instead, the Court sent what Professor Schulhofer has called "a fatally mixed message" to police.[124] On the one hand, a skilled interrogator's job is to persuade recalcitrant suspects to "come clean."[125] On the other hand, he is not to overcome the suspect's will.[126] The Court's case-by-case approach to determining voluntariness rendered coerced confessions inevitable, "not because some officers will deliberately flau[n]t the law but because even the best of professionals will inevitably misjudge the elusive psychological line."[127]

2. The Search for Rules

The first clear indication that at least a plurality of the Court was looking for a different doctrinal regime to govern interrogations came in *Spano v. New York*,[128] in which the Court held that a young, uneducated, emotionally unstable immigrant's confession was involuntary when numerous officers had questioned him incommunicado throughout the night, ignoring his repeated requests for counsel. Although the majority's opinion applied the prevailing "totality of circumstances"

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120. Payne v. Arkansas, 356 U.S. 560, 564–65 (1958) (defendant with fifth grade education was told that thirty to forty people would be waiting for him if he did not confess).

121. *Id.* at 564 (defendant denied food for twenty-four hours).

122. Ashcraft v. Tennessee, 322 U.S. 143, 149–52 (1944) (thirty-six hours of sleep deprivation led to defendant's alleged confession).

123. *See, e.g.*, Watts v. Indiana, 338 U.S. 49, 53 (1949) ("When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or a mental ordeal.").

124. Steven J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 554 (1996).

125. *Id.* at 555.

126. *See* Brown v. Mississippi, 297 U.S. 278, 287 (1936).

127. Schulhofer, *supra* note 124, at 555.

128. 360 U.S. 315 (1959).

standard under due process,[129] Justice Douglas's concurring opinion, joined by Justices Black and Brennan, emphasized Spano's requests for counsel and the fact that he had already been indicted, not merely arrested, when he confessed.[130] Justice Stewart's separate concurring opinion, joined by Justices Douglas and Brennan, also emphasized the importance of lawyers in the interrogation room and would have held that the right to counsel protected defendants not only during trial but also "under midnight inquisition in the squad room of a police station."[131]

Five years later, a majority of the Court followed the trail blazed by *Spano* and applied the Sixth Amendment's right to counsel to the interrogation room. In *Massiah v. United States*,[132] the defendant had been indicted in a drug conspiracy, had retained counsel, and was released on bail when the government arranged for the defendant's co-conspirator to wear a wire during a conversation with the defendant, permitting the government to surreptitiously listen to the defendant's statements. Although the statements were made voluntarily, without police coercion, and therefore, with no violation of due process, the Court reached to the Sixth Amendment's right to counsel to hold that the government could not use against the defendant a statement "deliberately elicited from him after he had been indicted and in the absence of his counsel."[133]

In *Escobedo v. Illinois*,[134] the Court went still further in a 5-4 decision, extending the reach of the Sixth Amendment's right to counsel to a suspect who had not yet been formally charged. After Escobedo was arrested for murder, he asked for a lawyer several times, to no avail.[135] A lawyer retained by his family even appeared at the police station on Escobedo's behalf, but his repeated requests to confer with his client were denied.[136] Instead, police interrogated Escobedo incommunicado, in handcuffs while standing, confronted him with incriminating information, and gave him false promises of freedom and immunity if he confessed.[137] The Court probably could have suppressed the confession on due process grounds—*probably* because of the inherent uncertainties in that case-by-case determination. However, the Court instead relied on the Sixth Amendment, even though Escobedo, unlike the defendant in *Massiah*, had not yet been formally charged, and even though the Sixth Amendment confers the right to counsel only upon "the accused" in a "criminal prosecution."[138] Stretching the Sixth Amendment's language to its limits, the Court held that when Escobedo's requests for a lawyer were denied, the police investigation was "no longer a general inquiry into an unsolved crime,"[139] but instead a "focus on a particular suspect,"[140] rendering

129. *See id.* at 323–24.
130. *See id.* at 325–26.
131. *Id.* at 327.
132. 377 U.S. 201 (1964).
133. *Id.* at 206.
134. 378 U.S. 478, 485 (1964).
135. *Id.* at 481.
136. *Id.* at 480–81.
137. *Id.* at 479–83.
138. U.S. CONST. amend. VI.
139. *Escobedo*, 378 U.S. at 490.
140. *Id.*

Escobedo the "accused," and thus protected by the Sixth Amendment's right to counsel.[141]

3. A Fifth Amendment Prophylactic

In the two years following the Court's decision in *Escobedo,* lower courts struggled to determine the scope of the Court's "focus" test. When the Court granted certiorari in *Miranda*, the case was expected to provide the Court an opportunity to clarify the reach of *Escobedo*,[142] which the lower court had held did not extend to suspects who, like Miranda, did not explicitly request an attorney. Instead, the Court shifted course in *Miranda*, still emphasizing the role of counsel in the interrogation room, but this time doing so not under the Sixth Amendment's right to counsel, but under the Fifth Amendment's privilege against self-incrimination. The Court was now positioned to use the Fifth Amendment privilege as a doctrinal basis to reach interrogations by state actors, having incorporated the right in 1964.[143] Anchoring its opinion around the Fifth Amendment also permitted the Court to regulate pre-indictment interrogations on a sounder constitutional basis than the Sixth Amendment logic of *Escobedo*, which had fallen under considerable criticism.[144]

Emphasizing the potential for coercion inherent in the psychological strategies employed by interrogators, the Court announced a new rule in *Miranda*: statements obtained through custodial interrogation are inadmissible against the defendant unless the police use procedural safeguards to notify the suspect of his right to silence and to ensure the suspect an opportunity to exercise that right.[145] While acknowledging the possibility that law enforcement might devise alternative procedures, the Court's admonition that the procedures had to be "at least as effective" as those set forth by the Court rendered *Miranda*'s now famous warnings—along with the accompanying promise of a lawyer—a prerequisite to custodial interrogation.[146] In short, the Court created an irrebuttable presumption that any confession was coerced if obtained during custodial interrogation without first informing the defendant of his right to remain silent and his right to an attorney for the purpose of deciding whether to exercise that right.[147]

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141. *Id.* at 491.

142. *See* Miranda v. Arizona, 384 U.S. 436, 440–42 (1966); *see also* George C. Thomas III, *Missing* Miranda*'s Story*, 2 OHIO ST. J. CRIM. L. 677, 681 (2005) (book review) (noting that Court watchers expected *Miranda* to clarify the reach of *Escobedo*).

143. *See* Malloy v. Hogan, 378 U.S. 1 (1964).

144. *Cf.* Thomas, *supra* note 142, at 681 (recounting the history of *Miranda* and noting that "*Escobedo* was a 5-4 case with a wobbly superstructure based on the Sixth Amendment, which by its terms applies only to an 'accused' against whom a 'criminal prosecution' has begun").

145. *Miranda*, 384 U.S. at 444.

146. *Id.* at 467.

147. *See* Cassell, *supra* note 113, at 193 ("The *Miranda* decision largely replaced [the] case-by-case voluntariness analysis with general procedural requirements governing law enforcement questioning of suspects in custody.").

B. Rules Over Standards in Criminal Procedure

In a long line of cases following *Miranda,* the Court emphasized the prophylactic nature of the rule, repeatedly separating the Fifth Amendment's privilege against self-incrimination from the rule created in *Miranda* to safeguard that privilege.[148] Although the explicitly prophylactic nature of *Miranda* rendered it controversial, in many ways the Court's shift from a case-by-case determination of voluntariness to per se rules to regulate confessions can be seen as just one example of the Court's frequent preference for rules over standards[149] in constitutional criminal procedure.[150]

Consider, for example, the use of rules in the Court's Fourth Amendment jurisprudence. The Fourth Amendment's overarching guarantee is a standard that

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148. *See, e.g.*, Oregon v. Elstad, 470 U.S. 298, 303–04 (1985) (holding that the fruits of the poisonous tree doctrine did not apply to *Miranda* violations because *Miranda* violations are not violations of the Fifth Amendment); New York v. Quarles, 467 U.S. 649, 651, 668–69 (1984) (concluding that "overriding considerations of public safety" could justify the failure to provide *Miranda* warnings because the *Miranda* doctrine was not constitutionally required); Michigan v. Tucker, 417 U.S. 433, 446–48 (1974) (permitting the government to use evidence derived from a *Miranda*-defective statement, but not the suspect's defective statement itself, because the government did not violate the Fifth Amendment privilege, "but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege"); Harris v. New York, 401 U.S. 222, 224–26 (1971) (permitting the government to use a *Miranda*-defective statement, but not an involuntary statement, to impeach the defendant's testimony at trial). Although the Court has subsequently made clear that *Miranda*'s safeguards are constitutionally required, Dickerson v. United States, 530 U.S. 428, 444 (2000), the doctrine is still properly characterized as a prophylactic rule, distinguishable from the "core" right to be free of compelled testimony. *See* United States v. Patane, 542 U.S. 630, 636–37 (2004) (characterizing *Miranda* as a prophylactic rule); Chavez v. Martinez, 538 U.S. 760, 772–73 (2003) (Thomas, J., plurality opinion) (characterizing *Miranda* as a "prophylactic measure" to protect the "core" privilege not to be a witness against oneself at a criminal trial); *Dickerson*, 530 U.S. at 442 (justifying *Miranda* as necessary to ensure that involuntary custodial confessions were not overlooked in the "traditional totality-of-the-circumstances test").

149. The distinction between rules and standards is a familiar one. Rules attempt to define law with clarity and predictability, while standards require direct application of the policies and goals underlying the law. *See generally* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–89 (1976); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) (noting that a standard "tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation," while a rule "binds a decisionmaker to respond in a determinate way to the presence of delimited triggering facts" (footnote omitted)).

150. A considerable amount of literature questions the distinction between so-called prophylactic rules, which trigger controversy, and the general use of rule-like constitutional law. *See, e.g.*, Caminker, *supra* note 109, at 25 (suggesting that "there really isn't any such thing as a distinctively prophylactic rule that is in any important way distinguishable from the more run-of-the-mill doctrine that courts routinely establish and implement regarding every constitutional norm"); Klein, *supra* note 109, at 1037; Strauss, *supra* note 110, at 190 ("'Prophylactic rules' are not exceptional measures of questionable legitimacy but are a central and necessary feature of constitutional law."); Michael J. Zydney Mannheimer, *Ripeness of Self-Incrimination Clause Disputes*, 95 J. CRIM. L. & CRIMINOLOGY 1261, 1282 (2005) ("The Court has created many prophylactic rules that are constitutionally based.").

requires all searches and seizures to be "reasonable."[151] However, the Court has grounded that standard in a general rule that searches and seizures, to be reasonable, must be supported by a warrant issued upon probable cause.[152] The Court has also recognized numerous exceptions to the warrant rule, and, here again, the Court has often turned to rules over standards.

Although many of the exceptions to the warrant rule use standard-like approaches, requiring case-by-case fact-finding, many more use a rule-like approach, providing certainty about the scope of the exception at the expense of ensuring that the government's conduct is reasonable on the facts of an individual case. For example, the exigency exception to the warrant requirement is defined with reference to a standard.[153] Police may search without a warrant when the facts of an individual case give rise to a reasonable belief that evidence will be destroyed, a suspect will escape, or the public or police will be at risk if the police stop to complete the warrant process.[154] Despite the existence of this standard-based exception to the warrant requirement, the Court has recognized other, rule-like exceptions that are grounded in underlying concerns about exigency, such as the search incident to arrest doctrine[155] and the automobile exception.[156] Rather than require the government to litigate, case by case, the exigent circumstances presented by the search of an arrestee or a "readily movable"[157] vehicle, the Court has carved out bright line rules rendering these searches reasonable, even when it may be unreasonable to believe that an individual arrestee might destroy evidence[158] or that an individual vehicle might elude police.[159] The Court has also opted for bright-line rules when delineating the scope of exceptions to the warrant requirement. For example, a search incident to arrest extends to the so-called "grab area" within a suspect's reach.[160] For suspects arrested in cars, the Court has adopted a bright-line rule that the lawful search area includes the entire passenger compartment, no matter how short the arrestee's arms and no matter how cavernous the vehicle.[161]

Because of the gap between rules and their underlying justifications, rule-like exceptions to the warrant requirement will inevitably sweep in searches that are not reasonable on their individual facts. Nevertheless, bright-line rules are attractive, particularly in the criminal procedure context, because they give clear notice to police

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151. U.S. CONST. amend. IV.

152. *See, e.g.*, Johnson v. United States, 333 U.S. 10, 14–15 (1948); *see also* Klein, *supra* note 109, at 1042 (characterizing the Fourth Amendment's warrant rule as a prophylactic rule).

153. *See* Warden v. Hayden, 387 U.S. 294, 299–300 (1967).

154. *See id.* at 298–300.

155. *See* United States v. Robinson, 414 U.S. 218, 232–33 (1973); Chimel v. California, 395 U.S. 752, 762–63 (1969).

156. *See* Carroll v. United States, 267 U.S. 132, 146–47 (1925).

157. *See* Chambers v. Maroney, 399 U.S. 42, 48–51 (1970).

158. In *Robinson,* for example, there was no reason to believe the defendant was carrying either evidence or weapons. *See Robinson*, 414 U.S. at 236. Nevertheless, the Court held that the mere arrest of the defendant rendered a search of his person reasonable without a warrant or probable cause. *Id.*

159. *See Chambers*, 399 U.S. at 51–52 (upholding the search of an impounded vehicle without a warrant).

160. *Chimel*, 395 U.S. at 763.

161. *See* New York v. Belton, 453 U.S. 454, 460–61 (1981).

about the scope of their authority and to individuals about the scope of their constitutional protection.[162] The Court has carved out per se rules rendering searches incident to arrest and searches of automobiles reasonable, not because exigent circumstances would justify the government's conduct in every such case, but because of the belief that there will be exigent circumstances in *enough* of the cases to justify the rule.

In these Fourth Amendment examples, the effect of bright-line rules was to expand the scope of police authority and to constrict the constitutional rights of individuals beyond the baseline established by standard-like doctrines.[163] In contrast, the prophylactic rule drawn by the Court in *Miranda* expanded the rights of individuals and limited the admissibility of confessions compared to the baseline established by the "core" Fifth Amendment privilege against compulsory testimony.[164] In other respects, however, the construct invoked by the Court in *Miranda* was unspectacular given the frequency with which the Court's criminal procedure jurisprudence has exchanged the precision of case-by-case standards for the clarity and predictability of bright line rules.[165]

Furthermore, by the time the Court granted certiorari in *Miranda,* it had concluded that a rule-based approach was necessary to regulate custodial interrogations. The standard-based approach, in which confessions were evaluated for voluntariness under the totality of the circumstances, had proven unsatisfactory.[166] The incommunicado nature of many investigations, combined with the subtle psychological ploys used by police, rendered it difficult for reviewing courts to recreate the interrogations to determine whether they were coercive.[167] As a consequence, case-by-case adjudications of voluntariness were likely to have a high error rate, with courts failing to discern coercion even where it existed. Moreover, with so many factors thrown into the "totality of circumstances" mix—a test in which "[a]lmost everything was relevant, but almost nothing was decisive"[168]—and with the limited number of decisions the Court

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162. *Id.* at 458–60.

163. Professor Klein has distinguished between prophylactic rules and "constitutional safe harbor rules." Klein, *supra* note 109, at 1033. While prophylactic rules, such as *Miranda*, over-protect constitutional rights and prohibit some government behavior that would otherwise be permitted without the rule, "safe harbor rules" potentially under-protect the right at issue and allow government behavior that would otherwise be prohibited without the rule. *Id.*

164. *See* Oregon v. Elstad, 470 U.S. 298, 306–07 (1985) ("The *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself."); *cf.* Klein, *supra* note 109, at 1038–44 (discussing multiple examples of prophylactic rules in criminal procedure).

165. *See* Klein, *supra* note 109, at 1039–40 (noting that "[d]espite its failing in particular cases," the *Miranda* rule "instrumentally advances Fifth Amendment values because, in most cases, it will be difficult for the Court to determine after the fact whether persistent attempts by officials to persuade a defendant to waive his right resulted in compulsion"); Strauss, *supra* note 110, at 196 (justifying the rationale of *Miranda* because "the absence of relatively clear rules creates a danger of impermissible official action and makes it more difficult for a reviewing court to detect such action").

166. *See* DRESSLER, *supra* note 113, at 389.

167. *See* Miranda v. Arizona, 384 U.S. 436, 445 (1966) (noting the difficulty of describing what occurs during an interrogation).

168. Yale Kamisar, Gates, *"Probable Cause," "Good Faith," and Beyond*, 69 IOWA L. REV.

could feasibly announce, a coherent definition of "voluntary" had failed to emerge.[169] Police were therefore left with inadequate guidance about the line that divided savvy interrogation from unconstitutional coercion.[170] The Court adopted a bright-line rule in *Miranda* not because all unwarned confessions are involuntary, but because something other than a case-by-case inquiry into voluntariness was necessary to protect defendants from coercive interrogation.[171]

The same necessities that pushed the Court to adopt a rule-like approach to interrogations in *Miranda* justify a rule-based approach to prosecutorial disclosure. The details surrounding an interrogation are difficult to replicate, but *Bagley*'s materiality requirement expects defendants to "re"-create an event that never even occurred—a trial in which the defendant had access to the exculpatory evidence at issue. Just as bright line rules were necessary to protect defendants from the inherent psychological pressures of custodial interrogation, bright lines are necessary to mitigate the influence of cognitive biases on prosecutors' disclosure decisions.[172] Similar to the conscientious police who were confused by a "fatally mixed message"[173] that they should get their confession but respect the suspect's free will, well-intentioned prosecutors are torn between their dual obligations to punish the guilty while protecting the innocent.[174]

And just as the "totality of circumstances" test proved too fact-specific to provide a coherent body of case law to regulate confessions, case-by-case determinations of the materiality of undisclosed evidence have failed to produce clear guidelines for prosecutorial disclosure of exculpatory evidence. Forty-five years have passed since the Court announced its decision in *Brady,* and yet the widespread failure of prosecutors to disclose *Brady* material is well known.[175] Moreover, the costs of *Brady* violations are intolerably high. The exonerations of more than two hundred criminal defendants based on post-conviction DNA evidence[176] have forced an

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551, 570 (1984).

169. *See* Joseph D. Grano, *Voluntariness, Free Will, and the Law of Confessions,* 65 VA. L. REV. 859, 863 (1979); Klein, *supra* note 109, at 1035–36.

170. *See* Klein, *supra* note 109, at 1035–36; Schulhofer, *supra* note 124, at 555–56.

171. Scholars generally agree that the Court should create prophylactic rules only when necessary. Klein, *supra* note 109, at 1068 (maintaining that the Court should create prophylactic rules "only when absolutely necessary"); Landsberg, *supra* note 109, at 926 ("Necessity is the basis for fashioning a prophylactic rule."); Mannheimer, *supra* note 150, at 1282 ("Only when strict necessity dictates the need for a prophylactic rule may the Court impose such a judge-made rule on the other branches of government and the States.").

172. See *supra* Part II.B for a discussion of the ways in which the materiality standard amplifies cognitive biases and invites prosecutors to under-disclose.

173. Schulhofer, *supra* note 124, at 554.

174. See Part II.B.2 for a discussion of the tension between prosecutors' dual roles.

175. *See* Gershman, *supra* note 5, at 688 ("[I]t is readily apparent that *Brady* violations are among the most pervasive and recurring types of prosecutorial violations."); Hoeffel, *supra* note 50, at 1148 ("Withholding favorable evidence . . . seems to be the norm."); Johns, *supra* note 58, at 146 ("Unfortunately, *Brady* violations are one of the most common forms—if not *the* most common form—of prosecutorial misconduct, yet discipline is rarely imposed." (emphasis in original)); Yaroshefsky, *supra* note 47, at 281–82 (discussing reported decisions finding prosecutorial suppression of exculpatory evidence in the Bronx District Attorney's Office).

176. Innocence Project, Know the Cases, http://www.innocenceproject.org/know/ (listing 223 exonerations since 1977).

acknowledgement not only that our criminal justice system convicts the innocent,[177] but also that prosecutorial suppression of *Brady* material constitutes a leading cause of wrongful convictions.[178] Empirical evidence from the Innocence Project suggests that nearly half of the cases in which innocent defendants have been exonerated based on post-conviction DNA evidence involved prosecutorial misconduct, and more than a third of the misconduct involved the nondisclosure of exculpatory evidence.[179] Another set of researchers found that sixteen to nineteen percent of reversals in capital cases were attributable to the nondisclosure of exculpatory evidence.[180]

The *Brady* doctrine has failed to accomplish its objective of providing defendants access to material exculpatory evidence, and the costs of that failure are borne not by

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177. Richard A. Rosen, *Reflections on Innocence,* 2006 WIS. L. REV. 237, 237 (describing today as "an exciting new period of American criminal justice, one directly related to the acknowledgment that we convict innocent people"); *see also* PETER J. NEUFELD & BARRY C. SCHECK, THE FIRST NATIONAL DEFENSE SYMPOSIUM ON DNA: UNDERSTANDING, CHALLENGING AND CONTROLLING THE NEW EVIDENCE OF THE 90'S xxix (1990) (stating that "the extent of factually incorrect convictions in our system must be much greater than anyone wants to believe"); David Feige, *The Way We Live Now: The Dark Side of Innocence*, N.Y. TIMES, June 15, 2003, § 6 (Magazine), at 15 (declaring that "[a]n entire innocence movement is afoot").

178. Gershman, *supra* note 50, at 439 ("It is not an understatement to say that prosecutorial suppression of evidence presents perhaps one of the principal threats to a system of rational and fair fact-finding."); Hoeffel, *supra* note 50, at 1150 ("Despite the instincts of the good prosecutor and the former-prosecutor-turned judge that only the guilty benefit from a rule of disclosure, it appears that the risk of convicting innocent people through withholding of favorable evidence is intolerably high.").

179. The Innocence Project is a litigation and public policy organization that, as of October 18, 2008, had assisted in 223 exonerations based on newly tested DNA evidence. *See* Innocence Project, http://www.innocenceproject.org/. The Innocence Project reports that prosecutorial misconduct played a role in thirty-three of the first seventy-four DNA exonerations, and thirty-seven percent of the misconduct involved suppression of exculpatory evidence. *See* The Innocence Project, Understand the Causes: Forensic Science Misconduct, http://www.innocenceproject.org/understand/Government-Misconduct.php; *see also* BARRY SCHECK, PETER NEUFELD & JIM DWYER, ACTUAL INNOCENCE app. 2 (2000) (reporting that twenty-six of sixty-two wrongful conviction cases involved prosecutorial misconduct and that forty-three percent of those cases involved suppression of exculpatory evidence); Hugo Adam Bedeau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases,* 40 STAN. L. REV. 21, 57 tbl. 6 (1987) (reporting that thirty-five of 350 wrongful convictions resulted from prosecutorial suppression of evidence); Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at 3 (reporting that 381 homicide convictions nationwide had been reversed because prosecutors failed to disclose exculpatory evidence or presented evidence they knew to be false).

180. The study initially found that sixteen percent of reversals in capital cases resulted from "prosecutorial suppression of evidence that the defendant is innocent or does not deserve the death penalty." James S. Liebman, Jeffrey Fagan, Valerie West & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1850 (2000). In an update to the same study, the researchers reported that the suppression of exculpatory and mitigating evidence was a factor in nineteen percent of capital case reversals. JAMES S. LIEBMAN, JEFFREY FAGAN, ANDREW GELMAN, VALERIE WEST, GARTH DAVIES & ALEXANDER KISS, A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT (2002), *available at* http://www2.law.columbia.edu/brokensystem2/report.pdf.

the guilty, but by the innocent. Only a rule requiring prosecutors to disclose more than true *Brady* material will protect a defendant's right to receive the evidence to which he is entitled under due process.

IV. A PROPHYLACTIC RULE TO GOVERN PROSECUTORIAL DISCLOSURE

A separate issue from the appropriateness of a prophylactic rule to over-protect *Brady* rights is the question of the proper scope of the rule. Central to the shaping of the prophylactic rule is a balancing of its costs and benefits.[181] This Part proposes two potential rules—one with a close nexus to *Brady,* and one, more expansive—and concludes that the modest version may not suffice to protect the core *Brady* right. It then turns to a discussion of how the costs of broader over-protection could be reduced.

A. The Rule

One possible prophylactic approach would be to require prosecutors to disclose all exculpatory evidence, whether they believe it meets the materiality standard or not. Such a requirement would mirror ethical rules already in place but elevate them to the level of constitutional criminal procedure.[182] A prophylactic rule requiring prosecutors to disclose to the defense all evidence that might reasonably be considered exculpatory has considerable attraction.

First, such a rule would reduce the distorting effects of the cognitive biases that are triggered by the materiality standard when prosecutors are forced to weigh the potential exculpatory value of the evidence at issue against the strength of what would otherwise be the government's case against the defendant.[183] Social scientists have found that forcing subjects to articulate opposing viewpoints reduces the effects of cognitive bias.[184] Relying on this social science evidence, an emerging literature focusing on the

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181. *See* Landsberg, *supra* note 109; David A. Strauss, Miranda, *the Constitution, and Congress*, 99 MICH. L. REV. 958, 962–63 (2001) (using a cost-benefit analysis to defend *Miranda*).

182. See *supra* notes 78 and 96–100 and accompanying text for a discussion of the ethical rules governing prosecutorial disclosure.

183. See *supra* Part II.B.1 for a discussion of the effects of cognitive bias on prosecutorial disclosure under *Brady*.

184. Craig A. Anderson & Elizabeth S. Sechler, *Effects of Explanation and Counterexplanation on the Development and Use of Social Theories*, 50 J. PERSONALITY & SOC. PSYCHOL. 24, 27–29 (1986) (finding that subjects' generation of counterarguments reversed the effects of bias-induced beliefs); Joel Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL'Y & L. 677, 691 (2000) (concluding that belief perseverance can be reduced if people articulate arguments in support of contrary beliefs); Charles G. Lord, Mark R. Lepper & Elizabeth Preston, *Considering the Opposite: A Corrective Strategy for Social Judgment*, 47 J. PERSONALITY & SOC. PSYCHOL. 1231, 1239 (1984) (concluding that induced counterargument helped mitigate the effects of confirmation bias and selective information processing); Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 188 (1998) (suggesting that the articulation of counterarguments can reduce

distorting effects of cognitive bias in prosecutors emphasizes that prosecutors should routinely "switch sides" on their files and review cases from the perspective of defense counsel.[185] However, the current materiality standard invites prosecutors to weigh the exculpatory value of the evidence at issue from their own perspective. In contrast, a rule mandating disclosure of all evidence that might reasonably be seen as favorable to the defense's case requires the prosecutor to step into the shoes of the defense lawyer, thereby reducing the distorting effects of their personal opinion that the defendant is guilty.[186]

A prophylactic rule requiring prosecutors to disclose all favorable evidence would also reduce at least some of the tension that conscientious prosecutors experience as they seek to balance their dual roles as protectors of the innocent and prosecutors of the guilty.[187] Because the *Brady* doctrine currently entitles defendants to receive exculpatory evidence only if it undermines confidence in the resulting criminal conviction, the doctrine permits prosecutors to justify the suppression of other exculpatory evidence as a legally permissible tactic—a hard blow, but not a foul one. A rule grounded in constitutional criminal procedure that entitles defendants to receive all exculpatory evidence would force prosecutors to redefine the scope of the disclosure they must provide in order to do justice.

A final advantage of a prophylactic rule requiring disclosure of all exculpatory evidence, regardless of materiality, is that it hews closely to the core right that it seeks to protect. The cost of any rule-based doctrine is that it inevitably sweeps into its scope cases that might not conform to the rule's underlying justifications on the individual facts of the case. A prophylactic rule requiring disclosure of all favorable evidence has a close nexus to a defendant's core right under due process to receive material exculpatory evidence and therefore has relatively few costs. Indeed, the dissent in *Bagley* would have construed *Brady* itself to require disclosure of "*all* information . . . that might reasonably be considered favorable to the defendant's case."[188] The only

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overconfidence). *See generally* Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67, 133 & n.207 (reporting that "asking or directing experimental subjects to consider alternative or opposing arguments, positions, or evidence has been found to ameliorate the adverse effects of several biases").

185. *See* Bibas, *supra* note 47, at 2523–24; Burke, *supra* note 63, at 1618 (advocating the practice of switching sides); Findley & Scott, *supra* note 20, at 371–72 (advocating mechanisms to encourage counterargument throughout investigation and prosecution); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1094 (2000) (suggesting in the civil context that negotiating parties could reduce the effects of cognitive bias by analyzing disputes "through the eyes of their opponents"); Michael J. Saks & D. Michael Risinger, *Baserates, The Presumption of Guilt, Admissibility Rulings, and Erroneous Convictions*, 2003 MICH. ST. L. REV. 1051, 1056–57 (observing that others have previously suggested that investigators neutralize their "presumption of guilt" by searching for exculpatory evidence).

186. Burke, *supra* note 63, at 1631 (arguing that a disclosure standard requiring prosecutors to review evidence from the defense's perspective would "avoid the recipe for cognitive disaster that is inherent in the current *Brady* standard").

187. See *supra* Part II.B.2 for a discussion of how conscientious prosecutors might believe that they "do justice" by withholding exculpatory evidence that is not material.

188. United States v. Bagley, 473 U.S. 667, 695–96 (1985) (Marshall, J., dissenting).

"cost" to a prophylactic rule[189] requiring the same would be the disclosure of *Brady*-like evidence—that is exculpatory but not material evidence. But this is not a significant cost. If the evidence is immaterial, then by definition it will not create a reasonable doubt, and therefore its disclosure will not thwart the government's case against the defendant. Moreover, the Court's view that prudent prosecutors will err "in favor of disclosure"[190] and "disclose a favorable piece of evidence"[191] reflects the belief that the disclosure of immaterial exculpatory evidence not only imposes few costs, but is actually preferred. As the Court wrote in *Kyles,* a prudent prosecutor's decision to over-disclose "will serve to justify trust in the prosecutor . . . [and] will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations."[192]

The problem with a prophylactic rule requiring disclosure of only exculpatory evidence is that it ultimately fails to protect the core right that it seeks to ensure. Despite its prophylactic structure, the "rule" still uses a standard-like approach to disclosure, distinguishing exculpatory evidence from other evidence not subject to disclosure. This formulation relieves prosecutors of the decision of whether exculpatory evidence is material, but still leaves them to determine whether the evidence is favorable to the defense in the first instance.[193] Because the prosecutor is unaware of the facts known to the defense, or the defense's theory of the case, she may fail to appreciate the favorability of evidence.[194] For example, in a murder case in which the police seize from the defendant's car the murder weapon and evidence tying the defendant to the victim, there would be no apparent exculpatory value to the fact that police originally focused on the defendant because a witness named Jim Smith tipped them off to the defendant's involvement. If, however, unbeknownst to the

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189. The costs of complying with the rule (over-disclosure) must be separated from the costs of providing a remedy for rule violations. The ability to separate prophylactic rules from post-conviction remedies is discussed *infra* in Part IV.B.2.

190. United States v. Agurs, 427 U.S. 97, 108 (1976).

191. Kyles v. Whitley, 514 U.S. 419, 439 (1995).

192. *Id.* at 439–40.

193. *See id.* at 439 (noting that "even if" due process required the government to disclose all exculpatory evidence, prosecutors "would still be forced to make judgment calls about what would count as favorable evidence").

194. It was partially this concern that motivated Justice Marshall's dissents from the cases defining the current materiality standard. *See* United States v. Bagley, 473 U.S. 667, 698 (Marshall, J., dissenting) ("Evidence that is of doubtful worth in the eyes of the prosecutor could be of inestimable value to the defense . . . ."); *Agurs*, 427 U.S. at 117 (Marshall, J., dissenting) ("[E]ven a conscientious prosecutor will fail to appreciate the significance of some items of information."); *see also* Bibas, *supra* note 15, at 143 (noting that prosecutors have a "poor sense" of both the government's and the defense's evidence until trial and will therefore "have difficulty forecasting before trial what evidence will in retrospect seem to have been material"); Johns, *supra* note 58, at 147–48 ("Marginal evidence—viewed through the eyes of defense counsel—might be the key to unraveling the case and exonerating the accused."); Prosser, *supra* note 20, at 569 (noting that prosecutors might be incapable of assessing the materiality of evidence to the defense when they lack knowledge that the evidence corroborates the defendant's version of events); Stacy, *supra* note 48, at 1393 ("A prosecutor's lack of information about the planned defense and partisan inclinations impede her from making an accurate and objective assessment of the evidence's effect on the outcome.").

government, Jim Smith and the defendant are sworn enemies in a lifelong feud that makes the Hatfields and McCoys look like good neighbors, the origin of the investigation could prove to be the lynchpin in a claim that the defendant was framed and the evidence against him planted. Because prosecutors lack the knowledge necessary to recognize the exculpatory nature of the evidence they hold, the only means of ensuring that defendants receive the material exculpatory evidence to which they are entitled under *Brady* is to require "open file" discovery[195] in which prosecutors disclose all evidence known to the government, whether it seems to inculpate or exculpate.[196]

Of course, an expansion of the gap between a prophylactic rule and the core right it protects comes with corresponding costs. Unlike a prophylactic rule applying only to exculpatory evidence, mandated open file disclosure sweeps well past a defendant's core due process right to receive material exculpatory evidence, and therefore imposes additional costs. However, just as the Court has fashioned ways of reducing the costs of the *Miranda* rule, the costs of open file discovery can be mitigated as well.

B. Reducing the Costs of a Prophylactic Rule

A prophylactic rule requiring prosecutors to disclose all evidence to the defense poses two separate cost concerns. The first is the cost of the disclosure of evidence itself. Although seemingly inculpatory evidence may in some cases turn out to be true *Brady* material—both exculpatory and material—in most cases, seeming inculpatory evidence will be simply that. The second cost concern is the cost of remedying rule violations. By definition, *Brady* permits reversal of only those convictions rendered factually questionable by the undisclosed evidence. However, if a prophylactic rule requires broader prosecutorial disclosure, defendants will seek post-conviction relief even when the undisclosed evidence does not undermine the conviction's reliability. Each of these concerns, and approaches to mitigate the potential costs, are discussed in turn.

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195. Several scholars have previously called for open file discovery. Comment, Brady v. Maryland *and the Prosecutor's Duty to Disclose*, 40 U. CHI. L. REV. 112, 113 (1972) ("[T]he prosecutor's entire file should, except in special cases, be open to defense inspection."); Peter A. Joy, Brady *and Jailhouse Informants: Responding to Injustice*, 57 CASE W. RES. L. REV. 619, 641 (2007) ("The surest way to meet and exceed *Brady* disclosure obligations is to adopt an 'open file' discovery policy."); Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 276 (2006) (recommending that prosecutors use open file policies to reduce "prosecutorial adjudication" and prevent coercive plea bargaining); James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2145–56 (2000) (calling for open file access in capital cases). *But see* Bennett L. Gershman, *Litigating* Brady v. Maryland*: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 544–46 (2007) (warning of the "opportunities for gamesmanship" under even open file policies).

196. *See* FED. R. CRIM. P. 16(a)(2) (excluding from the government's discovery obligations "reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case").

1. Reducing the Costs of Mandatory Disclosure

Whereas the disclosure of exculpatory evidence imposes few (or no) costs, the disclosure of inculpatory evidence is considerably more controversial. Because criminal defendants have limited obligations to disclose information to the government, a sense of fair play suggests that prosecutors should generally be entitled to withhold discovery as well.[197] Opponents of broad discovery in criminal cases also argue that defendants will abuse their access to the government's evidence by intimidating the witnesses against them and tailoring their defense through perjury and the subornation of perjury.[198] However, experience with broad criminal discovery suggests that these risks are overstated. Several states mandate broad disclosure in criminal cases,[199] and the European continental justice system permits defendants the same access to evidence as the prosecution.[200] As Richard Rosen has noted, "[t]here is not a shred of evidence that these criminal justice systems have suffered any drop in efficiency as a result."[201]

Furthermore, many prosecutors already voluntarily disclose more than *Brady* requires them to. At the very least, some may disclose *Brady*-like evidence to avoid *Brady* violations and to comply with their ethical obligations to disclose all favorable evidence.[202] Others go still further and provide the open file discovery that the Court has refused to mandate as a requirement of due process.[203] The voluntary adoption of

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197. Givelber, *supra* note 82, at 1387.

198. William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L.Q. 1, 6 (1990) (expressing concerns about defendants tailoring their defense); Givelber, *supra* note 82, at 1387 (noting that the traditional justifications for limiting a defendant's disclosure rights were concerns about witness intimidation and perjury).

199. *E.g.*, N.C. GEN. STAT. § 15A-903(a)(1) (1999) (requiring disclosure of "the complete files of all law enforcement and prosecutorial agencies involved"); MINN. R. CRIM. P. 9.01(1) (requiring broad disclosure, including witness statements, the names of grand jury witnesses, all documents and tangible objects related to the case, and reports of examinations or tests); N.J. R. CT. 3:13-3 (requiring broad discovery in criminal cases); *see* Tara L. Swafford, *Responding to* Herrera v. Collins*: Ensuring That Innocents Are Not Executed*, 45 CASE W. RES. L. REV. 603, 633–34 n.214 (1995) (reporting that Maryland, Florida, Colorado, Oregon, New Hampshire, and Alabama require open file discovery in capital cases).

200. Richard S. Frase, *The Search for the Whole Truth About American and European Criminal Justice*, 3 BUFF. CRIM. L. REV. 785, 807–08 (2000); Kuo & Taylor, *supra* note 86, at 706–07; Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 413 (1992).

201. Rosen, *supra* note 177, at 274.

202. *See* Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553, 562–63 (1999) (discussing how ethical rules require prosecutors to fill the "gaps" in constitutional requirements); Sundby, *supra* note 4, at 660.

203. William Bradford Middlekauff, *What Practitioners Say About Broad Criminal Discovery Practice*, CRIM. JUST., Spring 1994, at 14, 55 (reporting that approximately three quarters of federal prosecutors stated in a 1984 survey that they turn over more evidence than legally required and that forty-two percent used an open file policy); Prosser, *supra* note 20, at 593–94 (summarizing evidence showing that both individual prosecutors and numerous jurisdictions report having open file policies).

open file policies by prosecutors is a strong indication that the costs of such disclosure are either negligible or outweighed by other gains. One advantage of open file discovery is that it reflects the commitment of a prosecutor's office to transparency, which in turn promotes the appearance of prosecutorial accountability and institutional fairness.[204] Open file discovery is also thought to bring more pragmatic advantages. Defendants confronted with the evidence against them may be quicker to plead guilty if the evidence is strong, or to argue persuasively for dismissal if the evidence is weak, leading to the earlier resolution of cases and the elimination of unnecessary trials.[205] Those cases that do proceed to trial may be litigated more efficiently because the defense attorney will have had an opportunity to identify the central issues in the case prior to trial.

Open file discovery can require prosecutors to disclose evidence that would be problematic in the defendant's hands, but protective orders and other measures can mitigate those costs. Even the *Miranda* rule contains a public safety exception permitting the government to forego *Miranda* warnings in exigent circumstances.[206] Similarly, a prophylactic rule mandating broad disclosure should contain an exception for cases in which disclosure would endanger witnesses, interfere with an ongoing investigation, or otherwise jeopardize a governmental interest.[207] Model Rule 3.8, for example, which already requires disclosure of all evidence favorable to the defense, enables prosecutors to seek protective orders when disclosure "could result in substantial harm to an individual or to the public interest."[208] A similar exception to the proposed prophylactic rule would reduce the costs of open file discovery by simply shifting to the government the burden of demonstrating why evidence should not be disclosed to the defense.[209]

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204. For a general discussion of the importance of transparency to prosecutorial accountability, see ANGELA DAVIS, ARBITRARY JUSTICE (2007); Stephanos Bibas, *Transparency and Participation in Criminal Procedure,* 81 N.Y.U. L. REV. 911 (2006); Medwed, *supra* note 81, at 177–78 (advocating transparency in prosecutorial policies).

205. Martha Rayner, *New York City's Criminal Courts: Are We Achieving Justice?*, 31 FORDHAM URB. L.J. 1023, 1062 (2004) ("[O]pen file discovery could alleviate the need for some court appearances and contribute to earlier resolutions of cases based on the merits.").

206. New York v. Quarles, 467 U.S. 649, 655–56 (1984).

207. Prosser, *supra* note 20, at 595 (arguing that the presumption should be in favor of disclosure unless the government establishes why information should not be disclosed); Rosen, *supra* note 177, at 273 (arguing that "the presumption should change to favor disclosure rather than secrecy"); H. Lee Sarokin & William Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 RUTGERS L. REV. 1089, 1109 (1991) (arguing that early and complete disclosure should be required unless the government demonstrates risks of such disclosure).

208. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) cmt. 3 (2004).

209. Put another way, the proposed prophylactic rule would establish only a rebuttable presumption that evidence in the prosecutor's file is discoverable. *See* Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 147–48 (1985) (noting that prophylactic rules are less objectionable when their presumptions are rebuttable).

2. Reducing the Costs of the Remedy

A separate potential cost to the proposed prophylactic rule is the cost of its enforcement through post-conviction relief. Because *Bagley*'s materiality standard combines the normative standard governing prosecutorial disclosure with the post-conviction standard for appellate relief, the demonstration of a *Brady* violation automatically leads to a reversal of the defendant's conviction. Moreover, because there is an unlawful failure to disclose under *Brady* only if there is a reasonable probability that the undisclosed evidence would have affected the verdict,[210] the only convictions disrupted on appeal are those whose outcomes are of dubious reliability.[211]

The Court has defended the *Bagley* materiality standard by arguing that any broader obligation to disclose would jeopardize the finality of reliable convictions.[212] However, this argument is circular in its assumption that the remedy for a failure to disclose would necessarily be the reversal of the defendant's conviction. In reality, *Bagley*'s blurring of the normative standard with the standard for post-conviction relief stands out among criminal procedure doctrines as "bizarre,"[213] "curious,"[214] and "odd."[215] Outside the *Brady* context, the determination of whether a constitutional error has occurred is separate from the determination of whether the error requires reversal. Although structural defects that infect the entire trial process result in automatic reversal,[216] other trial errors are reviewed for harmless error.[217] Accordingly, if the proposed prophylactic rule were adopted, appellate courts would differentiate between true *Brady* violations and violations of the prophylactic rule. If the prosecutor's failure to disclose rose to the level of a true *Brady* violation, the conviction would be automatically reversed, as it is under current doctrine.[218] If instead the prosecutor violated only the open file prophylactic rule designed to effectuate defendants' core

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210. United States v. Bagley, 473 U.S. 667, 682 (1985).

211. The Court made clear in *Brady* that its motivation was "not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." Brady v. Maryland, 373 U.S. 83, 87 (1963); *see* Steele, *supra* note 67, at 976 (noting that appellate courts reviewing claims of prosecutorial misconduct are concerned with the conviction's validity, rather than "the prosecutor's conduct per se").

212. *See Bagley*, 473 U.S. at 675 n.7 (noting that "a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments.").

213. Burke, *supra* note 63, at 1607.

214. Douglass, *supra* note 63, at 471.

215. Sundby, *supra* note 4, at 658.

216. The Court has recognized that, unlike usual trial errors, "structural defects in the constitution of the trial mechanism," such as the deprivation of the right to counsel, defy harmless error review and thereby require automatic reversal. Arizona v. Fulminante, 499 U.S. 279, 309 (1991).

217. *See generally* Chapman v. California, 386 U.S. 18, 24 (1967) (holding that constitutional error is harmless if an appellate court is persuaded beyond a reasonable doubt that it did not contribute to the conviction).

218. *See* Kyles v. Whitley, 514 U.S. 419, 435 (1995) ("[O]nce a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review.").

Brady rights, the appellate court would affirm the conviction if the failure to disclose was harmless.[219]

Some might argue that the use of harmless error review for rule violations would reduce the rule's costs at the expense of its utility, eviscerating the rule of any bite. Prosecutors might ignore the prophylactic rule, knowing that the resulting conviction would stand unless the violations rose to the level of a *Brady* error. This concern, however, misses two points. First, it overlooks the impact on conscientious prosecutors of a clear rule requiring broad disclosure, even if the rule carries no consequences if violated. Currently, *Bagley's* materiality standard amplifies cognitive biases that can cause ethical prosecutors to under-disclose.[220] It also enables prosecutors to believe that they are doing justice if they simply turn over *Brady* material, to the detriment of other discovery.[221] A clear rule requiring broad disclosure would expand discovery by defendants, even if the rule contained no remedy at all.

Moreover, harmless error review provides defendants remedies beyond those provided by the *Brady* doctrine, because *Bagley*'s materiality standard is more stringent than traditional harmless error review. Under the materiality standard, a prosecutor's failure to disclose evidence constitutes error and requires reversal only when the defendant establishes a reasonable probability that the outcome of the proceedings would have been different if the evidence had been disclosed.[222] In contrast, harmless error review requires the government to prove beyond a reasonable doubt that the constitutional error was harmless.[223] Even if the defendant challenges the constitutional error in a habeas corpus case, the conviction will be set aside if the error "had substantial and injurious effect or influence in determining the jury's verdict,"[224] a standard that the Court has noted is less stringent than *Bagley*'s materiality standard.[225] Therefore, a prosecutor who intentionally withheld discoverable evidence would be placing any eventual conviction in considerable jeopardy.

CONCLUSION

Forty-five years of experience since the Court's decision in *Brady* has proven that the criminal justice system convicts the innocent more than any of us wants to admit, and that prosecutorial failure to disclose material exculpatory evidence is a significant contributor to wrongful convictions. This Article has advocated the recognition of a

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219. This distinction would be similar to the Court's distinction between *Miranda* violations and due process violations in the confessions context. *See supra* notes 145–48 and accompanying text.

220. *See supra* Part II.B.1.

221. *See supra* Part II.B.2.

222. United States v. Bagley, 473 U.S. 667, 682 (1985).

223. Chapman v. California, 386 U.S. 18, 24 (1967).

224. Brecht v. Abrahamson, 507 U.S. 619, 623 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

225. The Court later rejected the *Kotteakos* standard for relief, stating, "Unless every nondisclosure is regarded as automatic error, the constitutional standard of materiality must impose a higher burden on the defendant." United States v. Agurs, 427 U.S. 97, 112 (1976); *see also* Kyles v. Whitley, 514 U.S. 419, 436 (1995) (observing that the materiality standard requires more of defendants than review under *Brecht* and *Kotteakos*).

prophylactic rule to protect defendants' rights under due process to receive from the government any evidence that undermines confidence in their guilt.

One version of a prophylactic rule to effectuate *Brady* rights would require prosecutors to disclose all exculpatory evidence, regardless of whether they believe it rises to the level of materiality as defined by *Bagley*. Such a rule would be a modest reform, requiring of prosecutors only what is already mandated by ethical rules and what the Court has already suggested is the "prudent" approach. [226] It would also provide increased protection of core *Brady* rights in two ways. It would require prosecutors to view the importance of the evidence at issue from the perspective of a defense attorney, mitigating the cognitive biases that can contribute to *Brady* violations. It would also relieve some of the current tension between a prosecutor's dual roles to both protect the innocent and convict the guilty by making clear that disclosure beyond material exculpatory evidence is part of doing justice.

Ultimately, however, a prophylactic rule applying only to exculpatory evidence falls short of its objective. Because prosecutors are unaware of facts known to the defendant and the theory of the defense's case, they may overlook the exculpatory value of seemingly inculpatory facts. Accordingly, and more ambitiously, this Article has urged a prophylactic rule requiring open file discovery in which prosecutors disclose not only exculpatory evidence, but all of the evidence against the defendant. Admittedly, broadening the gap between the scope of the prophylactic rule and its underlying core right increases the potential costs of the rule. However, the costs of open file discovery can be reduced by permitting exceptions to the rule and by separating the rule from post-conviction remedies. Any remaining costs of open file discovery are negligible compared to the proven and intolerable costs of the current regime: avoidable convictions of the innocent.

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226. *Agurs*, 427 U.S. at 108.