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ETHICS, FEDERAL PROSECUTORS, 
AND FEDERAL COURTS: 
SOME RECENT PROBLEMS

Lee A. Adlerstein*

Ethics, for the federal prosecutor, can be analyzed only in the context of the multifaceted role of the prosecutor in the federal system. The prosecutor is, in all instances, an attorney admitted to the bar of at least one state. As an attorney, the prosecutor must adhere to all the standards of the legal profession pertaining to conduct both in and out of court. In addition, the prosecutor is invested with the responsibility of representing the sovereign and is therefore held to standards to which other attorneys are not as clearly bound. As a practical matter, the prosecutor's work and ethics come under judicial scrutiny more often than the conduct of

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2. The Preliminary Statement to the ABA Code of Professional Responsibility (1976) states: "[T]he Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities." Id. (footnotes omitted).

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id. at 88.
other attorneys. With the prosecutor's office often in the same building as the federal judges and courtrooms, and given the priority assigned by the courts to criminal cases, the prosecutor's work is almost constantly exposed to judicial review. The degree of this exposure is determined by the prosecutor and not by the court, since the decision of when and whom to prosecute lies exclusively with the executive branch of the government operating through the prosecutor's office. Accordingly, comment on the ethics of the federal prosecutor has become common fare in federal judicial opinions. Almost no aspect of the job of the federal prosecutor has escaped judicial attention: the interviewing of witnesses, conduct of proceedings before the grand jury, applications for arrest and search warrants, statements made in court and during trial.

4. The Speedy Trial Act of 1974, 18 U.S.C. § 3161-3174 (Supp. V 1975), imposes severe time limitations on courts within which criminal cases must be tried. Such a requirement almost always causes the criminal docket to be given time priority over the court's civil calendar.

5. Normally, the prosecutor has unfettered discretion concerning whom to prosecute, unless the prosecutor has selectively prosecuted a defendant on a discriminatory basis, invidiously, and in bad faith. See Oyler v. Boles, 368 U.S. 448, 456 (1962); United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974). See also Bordenkircher v. Hayes, 98 S. Ct. 663 (1978), wherein the Supreme Court recently stated that "the decision whether or not to prosecute . . . generally rests entirely in [the prosecutor's] discretion." Id. at 668 (footnote omitted).


8. The courts have prescribed tests for the reliability of informants who contribute information used to obtain search warrants and for the particularity of the information which the prosecutor must supply to the judge or magistrate who issues the warrant. Spinelli v. United States, 393 U.S. 410, 413-18 (1969); Aguilar v. Texas, 378 U.S. 108, 114-15 (1964); United States v. Karathanos, 531 F.2d 26, 29-30 (2d Cir.), cert. denied, 428 U.S. 910 (1976).

9. See Doyle v. Ohio, 426 U.S. 610 (1976) (prosecutor's comment on defendant's failure to give postarrest statement); Griffin v. California, 380 U.S. 609, 615 (1965) (fifth amendment forbids prosecutor to comment on failure of defendant to testify); United States v. Dailey, 524 F.2d 911, 916-17 (9th Cir. 1975) (prosecutor's
statements made to the press,\(^{10}\) the giving of information to or the withholding of information from the defendant's attorney,\(^ {11}\) the wording of indictments,\(^ {12}\) as well as the making of agreements with witnesses and defendants.\(^ {13}\)

Under these conditions, the federal prosecutor has every reason to adhere closely to the standards that the courts set out for the prosecutor's office. As prosecutors on the federal level become increasingly active and aggressive, and cases against persons with stature in the community are brought,\(^ {14}\) there is a strong practical as well as moral motive to adhere to specified ethical standards, however exacting such standards might be. No single prosecution is worth the loss of credibility and status that will attend the dismissal of a case.

\(^{10}\) See United States v. Mase, 556 F.2d 671, 675 (2d Cir. 1977); United States v. Bando, 244 F.2d 833, 837-38 (2d Cir.), cert. dened, 355 U.S. 844 (1957); ABA, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS § 1.1 (Approved Draft 1968).

\(^{11}\) See, e.g., United States v. Miranda, 526 F.2d 1319, 1324-25 (2d Cir. 1975) (Government lost tape of conversation containing defendant's voice); United States v. Bolden, 514 F.2d 1301, 1312 (D.C. Cir. 1975) (Government not obligated to provide defense with witness list in noncapital case). See also United States v. Cannone, 528 F.2d 296, 298 (2d Cir. 1975) (district court committed reversible error in sustaining defense's motion for pretrial discovery of identity of Government witnesses).


\(^{13}\) See Hutto v. Ross, 429 U.S. 28 (1976) (prosecutor may use defendant's confession though made at time of guilty plea that has since been withdrawn as long as it was voluntarily given); Santobello v. New York, 404 U.S. 257, 262-63 (1971) (prosecutor must adhere to promise to defendant); United States v. Papa, 533 F.2d 815 (2d Cir. 1976) (court will analyze scope of guilty plea agreement between defendant and prosecutor); United States v. Nussen, 531 F.2d 15 (2d Cir. 1976) (court will analyze scope of agreement between defendant and government agent). Compare United States v. Garcia, 519 F.2d 1343 (9th Cir. 1975) (indictment obtained in express violation of agreement between Government and defendant is invalid) with United States v. Eucker, 532 F.2d 249, 256 (2d Cir. 1976), cert. denied, 429 U.S. 1044 (1977) (Government need not carry out arrangement where defendant failed to testify as he had promised).

\(^{14}\) The prosecution of persons in high income groups, who are seen as a separate category of offenders, has attracted increasing interest, and courts have been under pressure to prosecute such persons more vigorously. See Seymour, Social and Ethical Considerations in Assessing White-Collar Crime, 11 AM. CRIM. L. REV. 821 (1973).
of a case for even an unwitting breach of standards. The idea is therefore enticing that the prosecutor, when faced with an ethical problem, should choose the safest approach from the point of view of ethics. A “safe” approach requires the prosecutor to be open in giving information to the court and to the defendant in a particular case, though not to the press. Such an approach also involves recognizing that agreements with particular witnesses or defendants exist, even when such agreements are nonspecific and adhering to promises, however vague, even when the other party has not completely fulfilled his part of the arrangement.

The concept of prosecutorial ethics, however, has another side that extends beyond internal job standards. The prosecutor has a duty to the community to assure that perpetrators of crime are convicted and punished. The execution of this responsibility may be thwarted by defendants who, if given too much information about a case before trial, can suborn perjury or endanger and intimidate witnesses, as well as fabricate evidence. The interests of the community are further disserved when a prosecutor grants promised favors to persons who have not genuinely earned such favors. The devaluation of the prosecutor’s credibility among those who engage in or witness crime and their attorneys can only weaken the effectiveness of the prosecutor and encourage many to flout the law.

In view of the ethical dilemma that is often faced, it would be helpful for the prosecutor to have a body of standards to which he could refer for guidance in particular situations. As we have seen, the courts have not been reluctant to admonish prosecutorial conduct on a case-by-case basis, but this is not the same as establish-

15. A problem of loss of credibility due to deceptive prosecutorial tactics occurred with respect to the Office of the New York State Special Prosecutor. See Nitgrone v. Murtagh, 46 App. Div. 2d 343, 347-48, 362 N.Y.S.2d 513, 516-18 (2d Dep’t 1974). The courts have many weapons which may be used against the errant prosecutor: reversal of conviction and order of new trial; dismissal of indictment; suppression of evidence; release of jailed prisoner for delay; order of contempt; directed verdict of acquittal; published criticism; and postconviction vacation of sentence. Though the courts would appear to have easy mastery over the activities of the prosecutor, the prosecutor maintains the crucial advantage of control over the information which comes before the court.


ing broadly applicable standards. Accordingly, the purpose of this article is to delineate the ethical standards set out for prosecutors in two problem areas cited in this introduction, pretrial discovery and plea negotiations, to discuss the implications of recent court opinions in these areas, and to determine whether a coherent written body of standards is needed or whether the purposes of the law will best be served by carefully laid out procedures apart from standards.

PRETRIAL DISCOVERY

Pretrial Disclosure of Witness Identity

The Second Circuit recently decided *United States v. Tolliver*, which constitutes a microcosm of the ethical problems confronted by a prosecutor in the area of pretrial discovery. The facts of the case were rather simple. Defendant Tolliver was waiting in his car in the vicinity of a Long Island, New York bank. A witness, Zima, saw two men who had made their getaway from the armed robbery of the bank leave the getaway car and enter the car where Tolliver was seated. Zima alerted a local police unit, and Tolliver, with one of the other men, was stopped a short while later while driving away from the vicinity. The third man, who Zima saw entering Tolliver's car, was not apprehended. Since the guns that had been used in the bank robbery and the $17,000 in cash stolen from the bank were not found in Tolliver's car, it was assumed that such items were in the hands of the third man when the man was dropped off by Tolliver. Tolliver and the other man who was apprehended were indicted by a federal grand jury for bank robbery and for conspiracy to rob a bank. Tolliver, who had not been inside the bank when it was robbed, was indicted on an aiding-and-abetting theory, in that he was accused of assisting the robbers in

18. The ABA has propounded standards for the prosecution, which generally have followed the case law. See ABA, STANDARDS RELATING TO THE PROSECUTION FUNCTION (Approved Draft 1971); id. § 1.1 (bar to prosecution of person known by prosecutor to be innocent); id. § 3.11 (requirement of disclosure of evidence which would “tend to negate the guilt of the accused or mitigate the degree of the offense or reduce the punishment”); id. § 3.9 (discretion in charging decision); id. § 4.1(c) (may not make false statements in course of plea discussion); id. § 5.6(a) (may not knowingly use false evidence); ABA, STANDARDS RELATING TO PLEAS OF GUILTY (Approved Draft 1968); id. § 3.1 (propriety of plea discussions and plea agreements).

19. 569 F.2d 724 (2d Cir. 1978).

20. The aiding-and-abetting theory is incorporated into federal criminal law by 18 U.S.C. § 2 (1970), which provides:
their getaway from the bank.

Prior to the trial, the United States district court judge to whom the case had been assigned suggested to the Government that it conduct a lineup to test Zima's identification of Tolliver. Such a lineup was held shortly before the trial. The manner in which the lineup was conducted, as it related to the area of pretrial discovery, became the principal issue before the court of appeals. The issue arose upon the objection of Tolliver's attorney, who was present when Zima viewed the lineup array, but who was not permitted by the Government to hear Zima questioned on whether he was capable of making an identification. Tolliver's attorney argued that it was unlawful for the Government to preclude the defense's attendance at such an important interview of Zima. The conduct of the lineup was claimed by Tolliver's counsel to have violated Tolliver's right to counsel at a critical stage of a criminal proceeding, under the sixth amendment. The Government responded that the "critical stage" of the proceeding ended upon Zima's leaving the lineup room immediately prior to his questioning. The Government argued that after the lineup physically involving Tolliver had ended, Tolliver's attorney had no right to be present during Zima's questioning since such questioning was an interview by the Government of its witness. The Government asserted that defense counsel normally does not attend conversations between Government officers and witnesses to crime, inasmuch as such a procedure would greatly chill the Government's investigation.

The issue before the court went beyond the question whether Tolliver's attorney should have been permitted to attend Zima's interview. The court questioned whether the Government was correct in withholding Zima's identity from defense counsel, thereby making it impossible for counsel to question Zima directly on the manner in which the postlineup interview was conducted, and to find out directly from Zima whether Zima had been able to make an identification at the lineup. As it turned out, the first time

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.


22. United States v. Tolliver, 569 F.2d 724, 728 (2d Cir. 1978).
that defense counsel heard Zima's name and had an opportunity to question him was at the pretrial suppression hearing that was held following defense counsel's objection to the lineup procedures. The Government argued that revealing Zima's identity prior to trial would have endangered Zima.

Upon appeal from Tolliver's conviction on both bank robbery and conspiracy charges, the Second Circuit stated that it was troubled by the issues that were presented in the case since both sides to the controversy expressed legitimate interests. The court determined that the law should compromise between the positions of the two parties. The court held that it was permissible for defense counsel to have been excluded from the post-lineup interview so long as a recording of the interview was made which could later be reviewed by defense counsel and the court. With respect to disclosure of the identity of the witness, the court held that the Government would, in future cases, be required to apply to the court in advance of the lineup for a court order permitting nondisclosure. Without such a court order, which could be obtained on a showing of danger to the witness in the event of disclosure, the Government would be required to reveal the identity of the witness to the defense. In formulating these holdings, the court analyzed the competing legitimate interests of both the prosecution and the defense with respect to discovery in criminal cases.

The court commenced its analysis by underscoring the irony that in criminal cases, where constitutional safeguards of the rights of the defendant are strict, discovery on behalf of the defendant is more limited than discovery received by a party in a civil case. The court observed that the reason for limiting discovery in a criminal case is that

23. Courts have recognized the power of a federal district court judge in appropriate cases to order the Government to provide a witness list for the defense. Since such an order involves requiring the Government to take a step of potentially crucial impact on witnesses, such orders have been held to be appealable as final orders. See United States v. Cannone, 528 F.2d 296, 298-301 (2d Cir. 1975); United States v. Richter, 488 F.2d 170, 173-75 (9th Cir. 1973); United States v. Battisti, 486 F.2d 961, 966 (6th Cir. 1973).


25. Id.

26. Id. at 729-30.

27. Courts have recognized that under the confrontation clause, U.S. CONST. amend. VI, the standards for admission of at least hearsay evidence are more strict in criminal cases than in civil cases. See, e.g., United States v. Oates, 550 F.2d 45, 80-84 (2d Cir. 1977); United States v. Medico, 557 F.2d 309, 314 n.4 (2d Cir. 1977).

there is more likelihood of the subornation of perjury by bribery or threat in criminal cases, and that where certain defendants who have been committed to a life of violence are involved, the danger to the safety of the witness outweighs total discovery as a preliminary requirement of fair trial.\textsuperscript{29}

Such a state of affairs, the court observed, has caused limitations on pretrial discovery even to "the docile type of criminal defendant who would harm no one by physical violence."\textsuperscript{30} It was noted by the court, moreover, that it "could hardly suggest a neutral principle that separates the potentially violent defendant from others. It has always been the burden of the non-violent criminal to suffer from some of the restrictions imposed for fear of harm from the violent."\textsuperscript{31}

Furthermore, the court stated that the rationale for limiting criminal pretrial discovery, to protect Government witnesses, applies equally to the two major categories of witnesses: informants and "good citizen"\textsuperscript{32} observers of crime. The court cited the Government's "informer's privilege,"\textsuperscript{33} recognized by the Supreme Court in \textit{Roviaro v. United States},\textsuperscript{34} and stated that the principles of \textit{Roviaro} should apply with equal persuasiveness to the "good citizen" witness:

\begin{quote}
The reason for recognizing the so-called "informer's privilege" of the Government is not merely to preserve the informant for unexposed recurrent employment, but also to protect his life. The latter consideration may be as true of an eyewitness to a crime of violence who, aside from the actual danger to his life if exposed early, may also, in such circumstances, die a thousand deaths before the trial, and come to see a menacing figure in every shadow.\textsuperscript{35}
\end{quote}

The court conceded, as part of its foregoing conclusions, that no system could be devised to assure a defendant of every reasonable opportunity to learn of the Government's case prior to trial which would not also risk the lives of Government witnesses and give the defendant an unnecessary opportunity to suborn perjury. The court

\begin{footnotes}
\item[29.] \textit{Id.} at 728-29 (emphasis in original).
\item[30.] \textit{Id.} at 729.
\item[31.] \textit{Id.}
\item[32.] \textit{Id.}
\item[33.] \text{Rosario v. United States, 353 U.S. 53, 61-62 (1957).}
\item[34.] \text{353 U.S. 53 (1957).}
\item[35.] \text{United States v. Tulliver, 569 F.2d 724, 729 (2d Cir. 1978).}
\end{footnotes}
recognized that "[i]n the end, there must be some ultimate re-
liance on the ethics of the prosecutor." 36

The approach of the court in Tolliver, in recognizing the ulti-
mate responsibility of the prosecutor while imposing mechanisms
for court review of the prosecutor's pretrial discovery decisions, has
been adopted by other courts in other contexts of the criminal pre-
trial discovery process. Courts have made clear that in instances
where the prosecutor has a close call to make on whether the law
obligates the Government to disclose material to the defense, the
material should at least be submitted to the court in camera for it
to determine whether the material should be disclosed to the de-
fense. 37 Difficulties have arisen where the prosecutor has failed to
disclose material to either the court or the defense, and the exis-
tence of such material, which the prosecutor might arguably have
been responsible to disclose, has surfaced after a criminal convic-
tion.

The Law of Pretrial Disclosure

Before evaluating the case law in this area, it is useful to re-
view the sources within the law for the obligation of the prosecutor
to make pretrial disclosures. Apart from the general obligation of
the Government to make its nonendangered witnesses available to
the defense, 38 the three main sources of obligation are rule 16 of
the Federal Rules of Criminal Procedure, 39 the Jencks Act (18
U.S.C. § 3500), and, grounded in the due process clauses of the

the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of his prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) Grand Jury Transcripts. Except as provided in Rule 6 and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

40. The Jencks Act, 18 U.S.C. § 3500 (1970), provides in part:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
fifth and fourteenth amendments, the rule of Brady v. Maryland.\textsuperscript{41} Rule 16 of the Federal Rules of Criminal Procedure deals primarily with the defendant's own statements or other property in the possession of the Government, as well as material which has a physical dimension such as physical and forensic evidence, and evidence of scientific or medical (including mental) tests administered in connection with a case. While there are sometimes disputes between the Government and the defense on whether specific material falls within the purview of rule 16,\textsuperscript{42} the provisions of the rule are rather clear and do not usually pose ethical problems for the prosecutor.

The Jencks Act provides for disclosure to the defense by the Government of any statement made by a Government witness which relates to the testimony of that witness.\textsuperscript{43} The Act provides, however, that the prosecutor is not required to turn over such

\begin{quote}
(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.
\end{quote}

\textsuperscript{41} 373 U.S. 83 (1963).

\textsuperscript{42} Recent cases dealing with interpretation of the word "statement" under FED. R. CRIM. P. 16 include: United States v. Pineros, 532 F.2d 868 (2d Cir. 1976); United States v. Walk, 533 F.2d 417 (9th Cir. 1975); United States v. Miranda, 526 F.2d 1319, 1324-25 (2d Cir. 1975) (tape recording of defendant's voice during drug deal); United States v. Lewis, 511 F.2d 798, 801-03 (D.C. Cir. 1975); United States v. Krilich, 470 F.2d 341, 351 (7th Cir. 1972).

\textsuperscript{43} See note 40 \textit{supra}.
material until after the witness has testified on direct examination.\textsuperscript{44} While there are many cases dealing with the question whether a particular document comprises a statement of a particular witness for purposes of the Act,\textsuperscript{45} this area too does not often involve an issue of ethics. Again, the court-recommended practice is for the prosecutor to turn material on which a close call may be made over to the court for in camera inspection.\textsuperscript{46}

The area encompassed by the rule of \textit{Brady v. Maryland}\textsuperscript{47} has been the area of primary difficulty for the prosecutor in the field of pretrial disclosure. \textit{Brady} involved a Maryland state conviction for murder wherein defendant was sentenced to death. Although Brady did not dispute at trial that he had been involved in the killing, he contended that an accomplice, and not he, had actually strangled the victim. The Maryland authorities had in their possession a statement by Brady’s accomplice that the accomplice had done the killing. Before trial, Brady requested copies of any statements his accomplice may have made, but such material was withheld from Brady and his counsel. The United States Supreme Court affirmed the decision of the Maryland Court of Appeals in holding that the due process clause of the fourteenth amendment required that Brady be given his accomplice’s statement since, if Brady had had the use of the statement at trial, he might have convinced the jury that it should not sentence him to death.\textsuperscript{48}

In arriving at this ruling, the Court enunciated a new general rule with enormous significance for the responsibilities of the prosecutor. The Court stated that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”\textsuperscript{49} The rule has been expanded by courts to include an obligation by the prosecutor to turn over to the defense all information that might be materially helpful to the defense of the case, including information which could be used to impeach the character of

\textsuperscript{44} See id.


\textsuperscript{46} See note 37 supra and accompanying text.

\textsuperscript{47} 373 U.S. 83 (1963).

\textsuperscript{48} Id. at 86-87.

\textsuperscript{49} Id. at 87.
the Government’s witnesses. It can readily be seen that the Brady rule presents the prosecutor with a difficult task, for the prosecutor must evaluate his case from the viewpoint of the defendant, and on the basis of such review, he must make disclosures which may be damaging to the prosecutor’s case. The prosecutor must perform this task regardless of the full panoply of information available to him about the defendant’s guilt, and despite the existence of credible evidence which the defense may be entitled to suppress from use at trial. Regardless of how strong the evidence of guilt in the hands of the prosecutor is, the prosecutor must perform his Brady responsibility from the viewpoint of the trial itself and not from the viewpoint of other facts within his knowledge. Hence, suppose that X, a man with brown hair, is indicted for bank robbery and accurately described by Y, a bank witness. The police seize the robbery money and robbery gun with X’s fingerprints from X’s apartment, but the warrant obtained by the police turns out to be deficient, so that the money and gun cannot be used as evidence at the trial.51 Z, a second bank witness, tells the police that he saw that the bank robber had blond hair. Regardless of the certainty of X’s guilt, the prosecutor, under Brady, must reveal Z’s statement to X’s attorney, since Z’s information, however erroneous, is clearly helpful to X’s defense. Such an anomalous situation, set up by our legal system, is sufficient to turn the hair of many prosecutors white.

Accordingly, it is not surprising that despite courts’ admonition that prosecutors should resolve close Brady questions by supplying potential Brady evidence to the court in camera,52 allegations may surface after conviction of intentional or negligent failure by the prosecutor to turn such material over to the defense. In this connection, courts have been confronted with three variables. The first variable is the degree to which the prosecutor’s failure to disclose material to the defense is the result of the prosecutor’s deliberate withholding. The second variable is whether, and with what degree of clarity, the defense has asked for evidence helpful to its position. The third variable is the degree to which, if disclosed to skillful


51. The exclusionary rule has been held to apply to all cases where police have failed to abide by the requirements of the fourth amendment, irrespective of their good faith. See Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

52. See note 37 supra and accompanying text.
defense counsel, the nondisclosed evidence would have influenced the outcome of the trial\textsuperscript{53} to the defendant's advantage.

\textit{The Second Circuit Approach}

Four Second Circuit decisions illustrate how federal courts have grappled with cases engendered by \textit{Brady}. United States v. Keogh\textsuperscript{54} involved a New York State judge who was convicted in federal court for accepting bribes. After Keogh's conviction had been affirmed on appeal, evidence surfaced of the existence of an FBI report which had not been disclosed to the defense by the Government. Arguably, the report could have shown that the individual accused by the Government of bribing Keogh on behalf of third persons deposited the bribe money in his own bank account rather than actually giving it to Keogh. After learning of this report, Keogh petitioned the district court for a writ of coram nobis to have his conviction overturned. The district court judge who tried the case denied Keogh's petition on the ground that the newly uncovered evidence would not have caused the jury to decide the case differently.\textsuperscript{55} This district court decision was then appealed to the Second Circuit which, in an innovative opinion by Judge Friendly, remanded the case to the district court for an evidentiary hearing to determine how the evidence could have been used by the defense, and to determine the extent to which the Government may have intentionally suppressed the evidence from the defense's view.\textsuperscript{56} The court initially set out the contentions of both parties in its opinion: Keogh argued that the evidence could have led the jury to acquit, and that this was sufficient for overturning the conviction.\textsuperscript{57} The Government, with which the district court judge had agreed, contended that the evidence was insufficient to require reversal, unless such evidence would have created a reasonable doubt of guilt for the jury. The court commented upon these respective positions:

\begin{quote}
[W]e doubt that either of the extreme positions urged upon us is where the balance should, or will, ultimately be struck. Too
\end{quote}

\textsuperscript{53.} Defendants have been allowed to withdraw their pleas of guilty, but only where the \textit{Brady}-type violation can be said to constitute coercion or deceit. \textit{See} United States v. Leming, 532 F.2d 647, 649 (9th Cir. 1975), cert. denied, 424 U.S. 978 (1976); United States v. Paglia, 190 F.2d 445 (2d Cir. 1951).
\textsuperscript{54.} 391 F.2d 138 (2d Cir. 1968).
\textsuperscript{56.} United States v. Keogh, 391 F.2d 138, 146 (2d Cir. 1968).
\textsuperscript{57.} \textit{Id.}
many opposing forces are at play. In seeking a workable solution courts must consider not only the maximizing of protection to convicted defendants but the avoidance of impossible burdens on prosecutors and the need to preserve the finality of convictions rendered after trials as nearly faultless as human frailties will permit. 58

In relating its announced balancing policy to Keogh itself, the court found it useful to group cases in which the Brady issue might arise into three categories: (1) cases in which the prosecutor, irrespective of whether the defense had requested a certain kind of evidence, failed "to disclose evidence whose high value to the defense could not have escaped the prosecutor's attention." 59 In the court's view, convictions in such cases clearly require reversal; 60 (2) cases such as Brady, where the prosecutor failed to disclose, either carelessly or deliberately, information that had been specifically requested by the defense and which information was material either to the defendant's guilt or to his punishment. The court saw reversal of convictions in such cases as mandated; 61 and (3) cases "where the suppression was not deliberate . . . and no request [by the defense for the evidence] was made, but where hindsight discloses that the defense could have put the evidence to not insignificant use." 62 For the defendant to establish grounds for reversal in such cases, the court found that "the standard of materiality must be considerably higher." 63 In so ruling, the court, as it was to reiterate ten years later in Tolliver, expressed the necessity for ultimate reliance on the ethics of the prosecutor:

Deliberate prosecutorial misconduct is presumably infrequent . . . . To invalidate convictions in such cases because a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict would create unbearable burdens and uncertainties. 64

The court remanded Keogh to the district court for determination of the materiality of the undisclosed report, of whether the Government had recognized the value of the report, and of whether the Government had sought to suppress it from use by the de-

58. Id.
59. Id. at 147.
60. Id. at 146-47.
61. Id. at 146.
62. Id. at 147.
63. Id.
64. Id. at 148.
The court in Keogh, however, overlooked the possibility of a fourth category of Brady-type cases: where the prosecution deliberately conceals evidence which could, rather than could not, have escaped the prosecutor's attention.

In Grant v. Allredge, a bank robbery case, defendant Grant moved prior to his trial for the production of all evidence in the Government's files which was favorable to him. The Government failed, prior to trial, to turn over to the defense evidence that one of the witnesses in the bank had chosen the photograph of a suspect other than Grant from a photo spread. The defendant was merely told that the witness had been unable to make an identification of the defendant. If this other suspect had indeed been the robber, Grant could not have been guilty. After the bank witness testified at trial, the identification of the second suspect was turned over to the defense as Jencks Act material. The court of appeals in effect placed the case in the first of the three categories enumerated in Keogh, as involving deliberate withholding from the defense of information that the Government should have known would be helpful to the defense in preparing its case. The court made clear that by giving the information to the defense during the trial as Jencks Act material, the Government had not cured the error. The court explained:

Here it was imperative that upon request prior to trial the complete details of the Walsh identification . . . be disclosed. Although it well may be that marginal Brady material need not always be disclosed upon request prior to trial, . . . [t]his information, so withheld by the Government, would have had a "material bearing on defense preparation." 68

The court reversed Grant's conviction even though the Government claimed that it had evidence that the second suspect had not

65. Id. at 149.
66. 498 F.2d 376 (2d Cir. 1974).
67. The circuits have uniformly held that where Brady material is also Jencks Act material, the evidence may be treated as other Jencks Act evidence as to the lack of a requirement of disclosure prior to cross-examination of the witness. See, e.g., United States v. Scott, 524 F.2d 465, 467-68 (5th Cir. 1975); United States v. Prieto, 505 F.2d 8 (5th Cir. 1974); Krilich v. United States, 502 F.2d 680, 682 (7th Cir. 1974), cert. denied, 402 U.S. 982 (1975); United States v. Polizzi, 500 F.2d 856, 892-93 (9th Cir.), cert. denied, 419 U.S. 1120 (1974); United States v. Catalano, 491 F.2d 268, 274-75 (2d Cir.), cert. denied, 419 U.S. 825 (1974).
committed the robbery. The Grant court thus reminded the prosecutor faced with a decision of whether to turn over Brady material to focus his attention upon the usefulness of the material to the defense at trial, irrespective of other information known to the Government.

The Second Circuit next refined its approach to Brady cases in United States v. Hilton, where it was compelled to consider the fourth category of cases. In the Hilton case, the Government's major witness to a bank robbery had written the prosecutor a letter prior to the trial. In his letter he asked the prosecutor to help him secure a transfer from one penal institution to another, and stated "I am ready to go with you this time on the Government vs. Hilton and I will continue to do so as long I know [sic] that people are trying to help me." The Government did not turn a copy of the letter over to the defense either prior to or during trial, but disclosed its existence after Hilton's conviction. A hearing was held before the district judge who had tried the case to determine whether the letter, if available to the defense during the trial, could have been used to impeach the Government's witness and could have created a reasonable doubt in the jurors' minds. The trial judge concluded "that the letter would have offered nothing of significance to defense counsel for cross-examination purposes." The court of appeals remanded the case to the district court for a further hearing on whether the Government's failure to produce the letter had been "deliberate" or "inadvertent," explaining:

If the Government deliberately suppresses evidence or ignores evidence of such high value that it could not have escaped its attention, a new trial is warranted if the evidence is merely material or favorable to the defense. But if the government's failure to disclose is inadvertent, a new trial is required only if there is a significant chance that this added item, developed by skilled counsel, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.

The court thus refused, prior to a further hearing, to accept Hilton into the third category of Brady-type cases it had described in Keogh. In the third Keogh category, the court had specified that

69. Id. at 383.
70. 521 F.2d 164 (2d Cir. 1975), cert. denied, 425 U.S. 939 (1976).
71. Id. at 166 n.1.
72. Id. at 166.
73. Id. (footnote omitted).
the materiality of the evidence to guilt or punishment would be
decisive where the Government had not deliberately withheld
Brady-type evidence. Keogh had left open the question whether a
defective conviction in a Brady-type case due to deliberate pros-
secutorial withholding of Brady material could be purged by a judi-
cial determination that the material, had it been available to the
defense, could not realistically have changed the result. In Hilton
the court made clear that in the fourth category of cases, the focus
would be on the prosecutor’s thought processes, specifically whether
the nondisclosure of evidence was deliberate or inadvertent.74 The
change of focus from the materiality of evidence, stressed in
Keogh, to the prosecutor’s thought processes is significant. Be-
cause of the complex nature of investigations and trials, most
Brady-type evidence that the prosecutor encounters is of the Keogh
variety in that it may be useful to the defense, rather than of the
Grant variety which definitely would be useful to the defense.
Hence, at least within the jurisdiction of the Second Circuit, Hilton
broadened the prosecutor’s responsibility and created new pitfalls
for the prosecutor.

In United States v. Morell,75 the Second Circuit continued to
emphasize the element of willfulness in the decision of the pros-
secutor to withhold evidence in Brady-type cases. The Morell
defendant was convicted for engaging in illegal drug transactions. The
Government’s principal witness, Valdez, testified about his direct
transactions with Morell. The Government revealed to the court and
to defense counsel, who had made specific requests in connection
with Valdez, that Valdez had himself been convicted for drug traf-
ficking, had been sentenced to probation, was cooperating with the
Government to obtain leniency for himself, and had received $1500
from the Government in connection with the Morell case. How-
ever, the Government neglected to reveal either before or during
the trial other facts about Morell which would have been useful to
the defense, particularly that the Government had done several
favors for Valdez including delaying his wife’s deportation in an

74. Circuits other than the Second Circuit have not stressed the deliberateness
of the prosecutor’s conduct, especially where the withheld evidence would not have
created a “significant chance” of acquittal had such evidence been in the hands of
the defense. See United States v. Miller, 529 F.2d 1125 (9th Cir.), cert. denied, 426
U.S. 924 (1976); United States v. Evans, 526 F.2d 701 (5th Cir.), cert. denied, 429
U.S. 818 (1976); Ogden v. Wolff, 522 F.2d 816 (8th Cir. 1975), cert. denied, 427 U.S.
911 (1976); Shuler v. Wainwright, 491 F.2d 1213, 1223 (5th Cir. 1974).
75. 524 F.2d 550 (2d Cir. 1975).
unrelated matter and obtaining an early release from probation for Valdez. Nevertheless, the district court denied Morell’s motion for a new trial.

On appeal, the Second Circuit remanded the case to the district court for a hearing and restated its formulations of Brady principles.76 The court stated: “The standards governing the grant of a new trial vary according to the extent of the government’s culpability,”77 and outlined two broad groups of Brady cases. In cases where the “prosecutor has intentionally suppressed evidence or ignored evidence whose high value to the defense could not have escaped his attention, a new trial is warranted if the evidence is merely material or favorable to the defense.”78 In cases where the Government’s failure to disclose is not deliberate but “inadvertent or negligent, a new trial is required only if there is a ‘significant chance that this added item, developed by skilled counsel as it would have been [,] could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.’”79 The court remanded the case for a hearing on the issue of the prosecutor’s thought processes. On the issue of materiality of the evidence, the court determined that the evidence was not so strong on behalf of the defense as to require reversal of the conviction if the failure of the prosecutor to disclose the evidence was found to have been unintentional.80 The court reasoned that the defense had had adequate material with which to impeach Valdez during the trial, and that the additional evidence was largely cumulative.81 The Second Circuit thus continued to stress the issue of prosecutorial conduct at least along with the question of the materiality of the evidence.

The Supreme Court Approach

In United States v. Agurs,82 the United States Supreme Court sought to clarify and rechannel the development of law in the Brady area. In Agurs the defendant was convicted of second-degree murder in the District of Columbia despite the assertion of self-

76. Id. at 553-55.
77. Id. at 553.
78. Id. (citations omitted).
79. Id. (quoting United States v. Miller, 411 F.2d 825, 832 (2d Cir. 1969)) (citations omitted). Note the similarity of the language quoted with that found in Ogden v. Wolf, 522 F.2d 816 (8th Cir. 1975), cert. denied, 427 U.S. 911 (1976).
81. Id.
defense made by her counsel. Evidence had been presented establishing that there had been a fight between the defendant and the victim immediately prior to the victim's death. After conviction, the defense moved for a new trial on the grounds that the victim "had a prior criminal record that would have further evidenced his violent character."\(^{83}\) The Government asserted that it had not been obligated to turn over the arrest record to the defense since there had been no request for such evidence.\(^{84}\) The district court denied the motion on the basis that the new evidence was not sufficiently material to have created an opportunity for the defense to achieve a different result, but the United States Court of Appeals for the District of Columbia Circuit reversed the conviction.\(^{85}\) In the words of the Supreme Court: "The court [of appeals] found no lack of diligence on the part of the defense and no misconduct by the prosecutor in this case. It held, however, that the evidence was material, and that its nondisclosure required a new trial because the jury might have returned a different verdict if the evidence had been received."\(^{86}\) The Supreme Court reversed the decision of the court of appeals on the ground that "that court . . . incorrectly interpreted the constitutional requirement of due process."\(^{87}\)

The Supreme Court, in outlining the rationale for its decision in \textit{Agurs}, divided the cases in the \textit{Brady} area into three categories.\(^{88}\) In the first category of cases, which the Court stated was typified by an old case, \textit{Mooney v. Holohan},\(^{89}\) the prosecution deliberately withholds from the defense that the Government's case has included perjured testimony, where the prosecutor knew or should have known of the perjury. The Court determined such situations to represent a "corruption of the truth-seeking function of the trial process."\(^{90}\) Such situations are impermissible if the evidence could be shown to have any "reasonable likelihood that the false testimony could have affected the judgment of the jury."\(^{91}\)

\(^{83}\) \textit{Id.} at 100.
\(^{84}\) \textit{Id.} at 101.
\(^{87}\) \textit{Id.}
\(^{88}\) \textit{Id.} at 103-07.
\(^{89}\) 294 U.S. 103 (1935).
\(^{91}\) \textit{Id.} at 103 (footnote omitted).
Agurs, however, like the cases from the Second Circuit that this article has reviewed, did not contain such elements.

The second category of cases was termed by the Court to be represented by Brady itself.\textsuperscript{92} In such cases, the prosecutor withholds material from the defense despite a specific defense request for such materials. In such cases, a conviction must be reversed if the material requested "might have affected the outcome of the trial."\textsuperscript{93} In its opinion in Agurs, the Court made clear that the prosecutor has an obligation to give a defendant, in the absence of any request for Brady material, evidence that "is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce."\textsuperscript{94} In the third category of cases, represented by Agurs and parenthetically by Grant, there is no request as in Brady for the type of evidence at issue, and the evidence is not clearly supportive of a claim of innocence. In such cases, the Court, while warning that "the prudent prosecutor will resolve doubtful questions in favor of disclosure,"\textsuperscript{95} expressed its reluctance to have courts second-guess the decision of prosecutors not to disclose evidence, the significance of which may not be apparent until the end of a trial. Hence, the Court determined that the test in these doubtful cases should be one of materiality of the evidence to show innocence rather than the prosecutor's intention:\textsuperscript{96} "[T]he prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."\textsuperscript{97} The Court explained that in cases of the Agurs variety, there is no need for reversal of convictions if the evidence withheld merely might have, rather than would have, affected the outcome of the trial.\textsuperscript{98} The Court then announced the following standard:

\begin{quote}
[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is
\end{quote}

\begin{footnotes}
\item[92] Id. at 104.
\item[93] Id.
\item[94] Id. at 107.
\item[95] Id. at 108.
\item[96] Id. at 112.
\item[97] Id. at 108.
\item[98] Id. at 109.
\end{footnotes}
already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.  

In view of the evaluation of the trial judge in *Agurs* that the evidence of the victim’s prior record would not have created a reasonable doubt, the Court allowed the conviction to stand.  

The dissent by Justice Marshall, joined by Justice Brennan, greatly emphasized that the Court in *Agurs* left no sanction for the fourth category of cases, typified by *Morell*, where a prosecutor deliberately withholds exculpatory evidence which probably would have been insufficient to leave a reasonable doubt in the jurors’ minds.  

The dissent observed that the standard of materiality set up by the *Agurs* majority is identical to the standard for materiality that must be met by a defendant requesting a new trial, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, on the ground of newly discovered evidence that was not in the possession of the Government. Such a situation, imposing no sanction for prosecutorial misconduct, might invite prosecutorial carelessness and chicanery. In the words of the dissent:

> Under today’s ruling, if the prosecution has not made knowing use of perjury, and if the defense has not made a specific request for an item of information, the defendant is entitled to a new trial only if the withheld evidence actually creates a reasonable doubt as to guilt in the judge’s mind. With all respect, this rule is completely at odds with the overriding interest in assuring that evidence tending to show innocence is brought to the

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99. *Id.* at 112-13 (footnote omitted).
100. *Id.* at 114.
101. *Id.* (Marshall, J., dissenting).
102. *Id.* at 114-16 (Marshall, J., dissenting). *Fed. R. Crim. P.* 33 provides:

> The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

Under rule 33, a criminal conviction will be overturned due to the discovery of new evidence if the evidence is “of such a nature that it would probably produce a different verdict in the event of a retrial.” *United States v. DeSapio*, 456 F.2d 644, 647 (2d Cir.), *cert. denied*, 406 U.S. 933 (1972).
jury's attention. The rule creates little, if any, incentive for the prosecutor conscientiously to determine whether his files contain evidence helpful to the defense. Indeed, the rule reinforces the natural tendency of the prosecutor to overlook evidence favorable to the defense, and creates an incentive for the prosecutor to resolve close questions of disclosure in favor of concealment.103

The dissent called for the Court to set the same standards as the Second Circuit announced in Morell: that in the case of deliberate prosecutorial failure to turn over to the defense potentially helpful evidence, or in the case of negligent failure to disclose where "there is a significant chance that the withheld evidence, developed by skilled counsel, would have induced a reasonable doubt in the minds of enough jurors to avoid a conviction,"104 the conviction will be overturned.

Based on the foregoing analysis of the opinions from the Second Circuit and based upon the dissent in Agurs, it is apparent that the Court in Agurs did not sufficiently consider the need to check the exercise of prosecutorial discretion in the Brady area with what the Second Circuit calls "prophylactic" measures.105 Without the knowledge that the decision to withhold material that can be exculpatory will be reviewed from the perspective of the prosecutor's conduct, the prosecutor may well believe that he is placed at no real risk by resolving close questions in favor of nondisclosure. The admonition of the majority of the Supreme Court that the "prudent prosecutor will resolve doubtful questions in favor of disclosure"106 has been given no teeth and may well be disregarded with impunity. At least insofar as his Brady responsibility is time-consuming, the prosecutor, facing the panoply of expanded defendants' rights and often possessing information on the criminality of a defendant far beyond that which can be presented in court, can hardly be blamed for giving a lower priority to his Brady responsibility than he did prior to Agurs.

The state of the law after Agurs can be depicted graphically. As the chart on page 779 indicates, the prosecutor need not worry about court sanction or automatic reversal for his inadvertent failure to disclose Brady material, nor need the prosecutor worry about the wisdom of his decision on close Brady questions in the

104. Id. at 122 (Marshall, J., dissenting).
absence of specific requests for such material by defense counsel. In fact, the prosecutor may prevail even where nondisclosed evidence is found to be material. Until Agurs, the prosecutor could not be assured that a conviction would stand if he had treated the defendant unfairly during prosecution. Under the Second Circuit decisions, the prosecutor's fairness was reviewed on the basis of whether the prosecutor's conduct was fair at the time it took place, irrespective of whether the unfair conduct determined the outcome of the case. After Agurs, the prosecutor knows that any unfairness or carelessness in which he may engage during a criminal proceeding can well be cured or ignored if the conviction is based on strong evidence. The courts' deemphasizing the focus on whether the conduct of the prosecutor was fair at the time it took place is unfortunate, and likely to breed carelessness and unfairness.

GUilty Plea Procedure and Policy

The United States Supreme Court has termed plea bargaining one of the important components of the American system of criminal justice.\textsuperscript{107} Plea bargaining, the mechanism wherein criminal defendants waive their right to a jury trial in exchange for an agreement by the prosecutor to allow the defendant to plead guilty to lesser charges, is a frequently used procedure for two primary reasons. First, it reduces uncertainty in the criminal justice process. With plea bargaining there is no risk of a complete acquittal of the defendant, and no risk to the defendant of conviction of a greater number or more serious charges than the defendant finds palatable. Second, guilty pleas save the parties and the court the time and expense of trial. Plea bargaining is necessitated by the present heavy criminal caseload in the federal courts. This caseload would become even more unmanageable if there were fewer guilty pleas.\textsuperscript{108} Moreover, the structure of the federal criminal code encourages defendants to plead guilty. In offenses involving a series of transactions, federal law often permits a separate charge, through a separate count of an indictment, for each separate transaction. Ad-


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ditionally, a particular single transaction might come within the elements of more than one specified crime in the criminal code. Hence, if a defendant has, for instance, obtained three United States treasury checks stolen from the federal mail, falsely endorsed the checks, and cashed them, the defendant would be subject to three separate counts for possession of stolen United States mail. In addition, forging an endorsement on a federal check is a separate offense, as is fraudulently cashing the federal check. Thus, six counts could be added to the initial three to make a total of nine counts which could be brought by the prosecutor. If the defendant were convicted on all nine counts, the defendant would be theoretically exposed to fifty-four years in jail: five years for each stolen mail count, ten years for each forgery count, and three years for each uttering count.\textsuperscript{109} This sentencing situation is permitted by federal law, which allows consecutive sentencing for multiple offenses, even when such offenses involve a single series of transactions.\textsuperscript{110} In practice, however, the courts sentence concurrently in such cases.\textsuperscript{111} Even though the courts sentence concurrently, defendants most often plead guilty to one or just a few of the counts which could have been brought against them. There are two reasons for this. First, the guilty plea removes the question whether, in a particular case, the prosecutor would press the maximum charges. Second, conviction on multiple counts stigmatizes the defendant within the community by making it appear that he has engaged in repeated criminal conduct. Third, the United States Parole Board often gives more lenient treatment to prisoners who have not been found guilty of multiple offenses than to those who have been found guilty of multiple offenses.\textsuperscript{112} Fourth and foremost, experience has shown that the court will sentence persons who plead guilty with more leniency than it

\begin{footnotesize}
\begin{enumerate}
\item[109.] The statute covering knowing possession of stolen mail, 18 U.S.C. § 1708 (1970), provides for a maximum sentence of five years imprisonment and/or a $2000 fine; id. § 495, covering forgery of government instruments, carries a maximum sentence of 10 years imprisonment, and/or a $1000 fine; id. § 479, covering the uttering of forged government instruments, carries a maximum sentence of three years imprisonment and/or a $3000 fine.
\item[111.] See generally Iannelli v. United States, 420 U.S. 770 (1975).
\item[112.] See generally 18 U.S.C. §§ 4205, 4161, 4164 (1970); \textit{see also} Clark v. Stevens, 291 F.2d 388 (6th Cir. 1961).
\end{enumerate}
\end{footnotesize}
does those who go to trial. The American Bar Association standards allow this policy even though it appears to some critics to penalize those who exercise their constitutional right to trial by jury. This policy might be defended on the ground that a guilty plea indicates that the deterrent effect of the criminal law has begun to work upon a defendant and that rehabilitative incarceration is not necessary in such a case.

Procedural Standards for Plea Proceedings

Plea bargaining requires the surrender of key constitutional rights: the right to a trial by jury, the right of the defense to present its own witnesses and cross-examine Government witnesses, and the requirement that the Government prove its case beyond a reasonable doubt. Because a guilty plea sacrifices constitutional rights, rules have been created to prevent the prosecutor from unfairly arranging or enticing a guilty plea by pressuring a defendant. The initial source of such safeguards is Rule 11 of the Federal Rules of Criminal Procedure. In recent years, there have been many cases wherein prosecutors and the courts have been warned to exercise the utmost degree of care in proceedings in which guilty pleas are entered. The courts have made clear that a written transcript must be made of such proceedings so that there can later be no doubt that the requirements of rule 11 were obeyed. Further, the courts have been strict in requiring the trial judge to describe to the defendant the nature of the charge being pleaded to by the defendant. Likewise, explanations of the consequences of the plea must be complete, and there must be a

113. ABA, STANDARDS RELATING TO PLEAS OF GUILTY § 1.8 (Approved Draft 1968) provides: "It is proper for the court to grant charge and sentence concessions to defendants who enter a plea of guilty or nolo contendere when the interest of the public in the effective administration of criminal justice would thereby be served." See also 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 171, at 354 n.2 (1969); id. § 172, at 363 n.24.

114. FED. R. CRIM. P. 11 was amended in 1975 specifically to provide that a trial judge must warn a defendant of the rights being surrendered. See also United States v. Journet, 544 F.2d 633 (2d Cir. 1976) (strict adherence by court required by amended rule 11).


116. See notes 117-21 infra and accompanying text.


118. See Irizarry v. United States, 508 F.2d 960 (2d Cir. 1974).
clear admission of guilt by a defendant before the court can allow a guilty plea to be entered.\textsuperscript{119} The court must also ascertain that the defendant is satisfied with his legal representation, has had a full opportunity to confer with his counsel about the case at the time that the plea is offered,\textsuperscript{120} and is in full possession of his faculties at the time the guilty plea is entered.\textsuperscript{121}

**Bargaining Power and Public Policy**

The existence of a guilty plea mechanism increases the power of the prosecutor. Because most defendants want to gain the benefit that pleading guilty may afford them, the prosecutor is often in a position to ask for more from the defendant than a mere guilty plea. Guilty plea arrangements frequently include the promise of cooperation by the defendant with the Government. This cooperation may take various forms: (1) testimony against a codefendant; (2) debriefing in the presence of government agents to allow the Government to discover everyone who is involved in a crime; (3) undercover work in assisting the government in discovering persons who were engaged in various kinds of criminal enterprises.\textsuperscript{122}

Hence, the defendant who engages in crime with others may be in a difficult position: No attractive plea will be offered by the prosecutor unless the defendant turns in his fellow criminals. For example, suppose that on a given day two bank robberies occur within the jurisdiction of a particular United States district court. In the first robbery, an armed man acting alone entered a bank, demanded money which he received, and was captured during his getaway attempt without further violence. In the second robbery, the identical sequence of events occurs, except that the robber is observed being driven away from the bank by a confederate. Assuming that the criminal records of the defendants in each case are identical, it is possible that in the first case the prosecutor will be more lenient in allowing a guilty plea to a lesser charge than he will be in the second case. This is because in the second case the prosecutor is likely to require the cooperation of the bank robber in

\textsuperscript{119} See, e.g., United States v. Untiedt, 479 F.2d 1265, 1266 (8th Cir. 1973).

\textsuperscript{120} See, e.g., Colson v. Smith, 438 F.2d 1075, 1079 (5th Cir. 1977).

\textsuperscript{121} See Manley v. United States, 396 F.2d 699 (5th Cir. 1968); Budivel v. United States, 345 F.2d 877 (9th Cir. 1965).

\textsuperscript{122} This article has heretofore discussed cases reflecting that, after a guilty plea is entered following a promise of cooperation by a defendant with the Government, the Government’s duty to perform its part of the agreement is predicated on the carrying out of the agreement by the defense.
capturing his confederate as a prerequisite for a guilty plea. The
different treatment of the two cases does not present an ethical
problem because this policy is in the public interest. Suppose,
however, that the bank robber in the first case shoots and wounds
a customer of the bank during the robbery and that the facts of the
second case are identical to those given in the earlier sequence.
The prosecutor may still treat the perpetrator of the first crime
more leniently in arranging a guilty plea arrangement than he
treats the perpetrator of the second crime, even though the per-
petrator of the first crime engaged in a more violent crime. This is
because the capture of an individual at large and possibly danger-
ous takes precedence over the niceties of a case comparison. The
ethical question that arises from this kind of prosecutorial determi-
nation is not easily soluble: whether the individual involved in the
second crime deserves to be treated more leniently than the indi-
vidual involved in the first crime. However, under present law the
prosecutor’s decision as to what charges to bring in the two situa-
tions will be upheld by the court.123 Even though the prosecutor
may hold out for a stiff plea with respect to the defendant whose
cooperation is needed, the difference in the severity of the crimes
of the defendants may eventually be reflected through the sentences
that the court imposes.

Recent Court Approaches

Prosecutorial discretion in plea bargaining presents no ethical
difficulty so long as the prosecutor acts reasonably in view of the
severity of the crime that has been committed. However, substan-
tial ethical questions arise in cases where, to secure a plea of
guilty, the prosecutor has found it expedient to warn the defendant
that the charges against him will be increased from those originally
contemplated by the prosecutor if no guilty plea is offered. The
courts have recently dealt with several cases of this type, but with-
out a consistent approach. United States v. Lippi124 represents a
restrictive view of the prosecutor’s power to suggest that heavier
charges be brought should a guilty plea not be offered. Defendant
Lippi was a postal employee who was arrested by postal inspectors
and charged, in the complaint filed upon his arrest, with obstruction
of the mails. This charge was a misdemeanor, which, if it had be-

123. At least one court has held that there is no absolute constitutional right to
come a formal Government charge, could have brought a maximum jail sentence of six months. Faced with such a charge, the defendant could elect to be tried before a United States district court judge without a jury, or before a United States magistrate. The United States attorney's office had a policy of encouraging cases such as that of Lippi to be brought before a magistrate rather than before a district court judge.

The prosecutor knew at the time of Lippi's arrest and arraignment on a misdemeanor that Lippi had been a postal employee and could have been charged with a felony. The prosecutor learned after the arraignment, however, that Lippi had been involved in other instances of check theft. After learning this information, and determining that all potential counts against Lippi would be resolved by a plea to the one misdemeanor with which Lippi was originally charged, the prosecutor exercised his discretion. The prosecutor stated that Lippi would be permitted to plead to a one-count misdemeanor to cover all charges that the Government could bring against him. However, the prosecutor added that if Lippi did not plead guilty, he would be charged with an indictment containing several felony counts. The defense attorney responded that Lippi would have a greater chance for leniency if he were before a United States district court judge on a misdemeanor charge rather than before a United States magistrate.

After the defense attorney's rejection of the Government's proposal, the prosecutor presented the matter to a federal grand jury which returned a six-count indictment against Lippi, each count charging him with theft of mail by a postal employee. The maximum sentence on each count was five years. Hence, rather than face the six-month maximum sentence that he would have faced if he had pleaded guilty to a misdemeanor, Lippi now faced a theoretical maximum sentence of thirty years. Lippi's attorney moved to dismiss the indictment on the ground that the increased charge constituted retaliation by the Government against Lippi for his refusal to plead guilty and, hence, a violation of his right to due process of law under the fifth amendment.

The court, following two Supreme Court cases which were analogous to Lippi's, determined that the prosecutor's conduct in Lippi's case had subjected the defendant to a realistic apprehension of retaliation by the Government and that dismissal of the Lippi indictment was required. In the two Supreme Court cases,

125. See id. at 808 & n.2.
126. Id. at 816.
North Carolina v. Pearce and Blackledge v. Perry, the sentences of convicted defendants were increased after those defendants had asserted their rights to have their convictions reviewed by appellate tribunals. In those cases, the Court held that the possibility of greater punishment after the exercise of the constitutional right to an appeal would have a chilling effect on the exercise of such rights. The court in Lippi held that Lippi, like the defendants in Pearce and Perry, was more harshly punished because he exercised his rights. In Lippi, although the right exercised was the right to a trial rather than the right to an appeal, the court found the distinction insignificant. The court in Lippi also cited two court of appeals opinions, United States v. Jamison and United States v. Gerard, for the proposition that even if the prosecutor did not know the full extent of the defendant's crime when charges were originally brought, the prosecutor would in effect be retaliating against the defendant contrary to the requirements of due process, to the extent that the charges were brought against the defendant upon the prosecutor's learning that the defendant intended to exercise a procedural right.

The court in Lippi made clear that it did not view the prosecutor who began with severe charges and offered to bring them down as acting in violation of the Constitution. The court limited its holding to instances where a prosecutor "threaten[s] a defendant that a failure to waive statutory or constitutional procedural right[s] will result in increased or additional charges being filed against him." The court in Lippi acted against the background which had been created by Williams v. McMann. Williams reached the federal courts on a habeas corpus petition from a New York state conviction. Williams had been indicted by a New York state grand jury for selling a package of heroin. A plea agreement was reached between Williams and his attorney and the state prosecutor wherein Williams pleaded guilty to the lesser charge of attempting to sell narcotics. Williams was promised that his sentence would be

130. Id. at 815.
131. 505 F.2d 407 (D.C. Cir. 1974).
132. 491 F.2d 1300 (9th Cir. 1974).
134. Id. at 816.
a three-to-seven-year jail term and Williams was sentenced accordingly.

After Williams commenced his jail sentence, it was discovered that he had a prior felony conviction. New York law requires that a person with a prior felony conviction be sentenced to three-and-three-quarter to fifteen years imprisonment. Upon discovery of the felony conviction, in view of the requirements of New York state law, Williams was brought back to be resentenced. Because the exposure that he faced on resentencing was greater than that which he had been promised when he originally pleaded guilty, Williams asked to withdraw his plea, and the court granted his request. Williams was then tried on the original charge on which he had been indicted, that is, the sale of heroin, and was convicted by a jury. On his resentencing, Williams's attorney for the first time challenged the legality of the earlier felony conviction. The prosecutor elected not to challenge this new assertion and Williams was sentenced as a first felony offender under the conviction for the sale of narcotics. On his conviction as it then stood, the judge was required to sentence Williams to a five-to-ten-year jail sentence which was in fact imposed. Williams appealed this sentence on the charges for which he was tried on the ground that he had not been afforded due process, in that he had been found guilty twice after having committed only one offense, and that the second time he was convicted, he received a more serious sentence than he had received on the first occasion. In making his argument, Williams relied on the holding in Pearce.

The court, however, did not find that Pearce compelled a result in Williams's favor. The court found that unlike the situation in Pearce, there was ample justification for the second more severe sentence of Williams in that Williams had been convicted when tried on a charge more serious than that to which he had originally pleaded guilty. The court, however, went on to discuss whether the prosecutor had acted properly in exposing Williams to a more severe charge than that to which he had originally allowed Williams to plead guilty. The court found that the prosecutor had not acted improperly when he determined that Williams should be

136. Id. at 104.
137. Id.
138. Id.
139. See text accompanying notes 127-29 supra.
tried on the more serious charge for which he had been indicted after Williams decided to withdraw from his part of the guilty plea arrangement. The court further found that to accept Williams's position would be to "encourage gamesmanship of a most offensive nature." The court stated that it did not look kindly upon the possibility that a defendant who had found a legal excuse to back out from a guilty plea arrangement could then suggest that he could not be sentenced to a greater sentence than he had received under the guilty plea arrangement. In the court's view, this would open the door to defendants deliberately attempting to make guilty plea arrangements which could later be challenged and give them the opportunity to stand trial. The court found that Pearce could be distinguished on the ground that Pearce did not involve a guilty plea and a voluntary surrender of constitutional rights.

In United States v. Ruesga-Martinez, the Ninth Circuit joined the Lippi approach and rejected the approach taken by the Second Circuit in Williams. The defendant in Ruesga-Martinez was an alien who had previously been deported from the United States. Upon his reentry, he was brought before a United States magistrate and charged by the United States attorney with entering the United States illegally, a misdemeanor for which a maximum sentence of not more than six months and a maximum fine of not more than $500 or both may be imposed. The United States attorney could have charged the defendant with the more serious crimes of entry into the United States for a second time and reentry after deportation. After the defendant was brought before the United States magistrate, he was asked whether he wished to waive his right to a trial before a United States district court judge on the misdemeanor and be tried instead before a United States magistrate. The defendant chose to have his case handled by a United States district court judge. After this decision by the defendant, the United States attorney brought the defendant's case before a United States grand jury which returned a two-count felony indictment against the defendant charging him with entry into the United States without being admitted as a lawful permanent resident or with reentering the United States after being deported.

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141. Id. at 106.
142. Id.
143. Id. at 106-07.
144. 534 F.2d 1367 (9th Cir. 1976).
146. United States v. Ruesga-Martinez, 534 F.2d 1367, 1368 (9th Cir. 1976). The procedure by which a defendant charged with a misdemeanor may be tried before a United States magistrate is set out at 18 U.S.C. §§ 3401, 3402 (1970).
United States illegally for a second time and reentry after deportation.\textsuperscript{147} The defendant moved to have the indictment dismissed on the ground that the United States attorney had raised the charges against him only after the defendant had chosen to exercise his statutory right to trial before a United States district court judge.\textsuperscript{148} The district court denied the motion for dismissal of the indictment, ruling that the United States attorney was within his power in bringing the indictment.\textsuperscript{149} Upon appeal, the Ninth Circuit reversed the district court decision and ordered the indictment dismissed.\textsuperscript{150} The court reasoned that the United States attorney's increase of the charges against the defendant after the defendant had chosen to exercise his right to a trial before a United States district court judge gave the appearance of retaliating for the exercise of that right, and such retaliation is impermissible under \textit{Pearce} and \textit{Perry}.\textsuperscript{151} The court stated:

The prosecution bears a heavy burden of proving that any increase in the severity of the alleged charges was not motivated by a vindictive motive. We do not question the prosecutor's authority to bring the felony charges in the first instance . . . . But when, as here, there is a significant possibility that such discretion may have been exercised with a vindictive motive or purpose, the reason for the increase in the gravity of the charges must be made to appear.\textsuperscript{152}

The court determined that although no vindictive purpose had been shown in \textit{Ruesga-Martinez}, the indictment should be dismissed.\textsuperscript{153} Thus, there is some conflict between the Ninth and Second Circuit positions with respect to increased charges after the consummation of a guilty plea arrangement.

\textbf{The Supreme Court Approach}

On January 18, 1978, the Supreme Court in \textit{Bordenkircher v. Hayes},\textsuperscript{154} sanctioned the exercise of prosecutorial power where a defendant had declined to plead guilty to lenient charges and then had more serious charges brought against him by the prosecutor.
In that case, defendant Hayes was indicted by a Kentucky state grand jury on a charge of cashing a forged check. A conviction on this charge carries a minimum sentence of two years and a maximum sentence of up to ten years in prison. After Hayes was arraigned on the charge, the prosecutor spoke to Hayes’s counsel and offered to recommend a sentence of five years in prison if Hayes would plead guilty to the charge. The prosecutor also stated that he would not charge Hayes with an indictment under the Kentucky Habitual Criminal Act, which would subject Hayes to a mandatory sentence of life imprisonment since he had had two prior felony convictions. The prosecutor made clear that he would reinstate Hayes on these more severe charges if Hayes refused to plead guilty. In the Court’s words, Hayes “chose not to plead guilty,” and the prosecutor, true to his word, obtained the more severe indictment. It was established that the parties knew of Hayes’s prior felony convictions at the time that the prosecutor brought the original lenient charges and at the time that the prosecutor spoke to Hayes’s attorney. Tried on the more serious charges, Hayes was found guilty and sentenced to life imprisonment. Hayes appealed his conviction by way of the federal writ of habeas corpus to the United States District Court for the Eastern District of Kentucky, which court found that there had been no violation of his constitutional rights. The Sixth Circuit reversed this District Court decision, holding that the conduct of the prosecutor with respect to Hayes was in violation of the principles of Perry. On appeal from the determination of the Sixth Circuit, the Supreme Court upheld the conduct of the prosecutor. The Court found that the conduct of the prosecutor in Hayes was not essentially different from the conduct of the prosecutor in a case where the more severe charges are brought initially and the prosecutor offers to drop them for more lenient charges. The Court emphasized that the prosecutor in Hayes made clear to the defense attorney at the outset of plea negotiations that more severe charges could and would be brought against the defendant. The Court stated that the case was not
one where the prosecutor determined to retaliate against the defendant because of a break in the plea negotiations or a failure to achieve agreement on a plea.\textsuperscript{161} The Court distinguished \textit{Pearce} and \textit{Perry} on the ground that in those cases the defendants were attacking the legality of a conviction.\textsuperscript{162} In \textit{Pearce} and \textit{Perry}, the Court stated that the prosecutor and the defense did not have mutual bargaining power as in the plea bargaining situation. The Court in \textit{Hayes} found that there had been no retaliation by the prosecutor and stated that “in the ‘give-and-take’ of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution’s offer.”\textsuperscript{163} The Court went on to state that “acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process.”\textsuperscript{164} The Court stressed that since it had put its own imprimatur on the plea bargaining process, certain practical steps must be permitted, such as allowing the prosecutor to persuade a defendant to plead guilty in exchange for the prosecutor’s promise not to bring more substantial charges.\textsuperscript{165} The Court explained that prosecutors should act forthrightly in their dealings with the defense, and that an enlargement of defendants’ rights to include an imagined requirement that a prosecutor remain with original charges that are more lenient than those later brought would “only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged.”\textsuperscript{166} This language, reminiscent of the language of the Second Circuit in \textit{Williams}, puts the Supreme Court on the side of those who would not further restrict prosecutorial discretion in plea bargaining.

The dissent in \textit{Hayes} by Justices Blackmun, Brennan, and Marshall emphasized that the Court appeared to be departing at least in part from \textit{Pearce} and \textit{Perry}.\textsuperscript{167} The dissenters emphasized that the possibility of retaliation had been clearly shown in \textit{Hayes} and that the defendant in that case was being penalized for exercising his right to stand trial.\textsuperscript{168} The approach of the dis-

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\textsuperscript{161} \textit{Id.} at 666.
\textsuperscript{162} \textit{Id.} at 667-68.
\textsuperscript{163} \textit{Id.} at 668.
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Id.} at 668-69.
\textsuperscript{166} \textit{Id.} at 669.
\textsuperscript{167} \textit{Id.} (Blackmun, J., dissenting).
\textsuperscript{168} \textit{Id.} at 669-70 (Blackmun, J., dissenting).
\end{flushleft}
senters in Hayes was very much like the approach of the Court in Ruesga-Martinez. Justice Powell, in a separate dissent in Hayes, relied upon the fact that the defendant has been sentenced to life imprisonment. Justice Powell emphasized that by bringing severe charges, not explained in terms of public policy or public good which led to the imposition of a life sentence, the prosecutor was retaliating for the defendant's decision to go to trial.

The Effect of Bordenkircher v. Hayes

The net effect of Hayes is to allow the prosecutor to raise the ante on the defendant to obtain a guilty plea from him. It appears that after Hayes, the burden will now be on the defendant to show that the prosecutor has retaliated against him for exercising a constitutional right. Under Hayes, the appropriateness, soundness, and fairness of the prosecutor's final charge, as long as it is legally permissible, will not be challenged even if that charge is brought subsequent to a breakdown in plea negotiations. Hence, the prosecutor, already possessing substantial leverage in obtaining guilty pleas is, through Hayes, provided with an even more powerful tool by which to obtain such pleas. The prosecutor in Hayes, like those in Ruesga-Martinez and Lippi, had originally wanted to bring a light charge against the defendant and thereby avoid the convoluted, time-consuming route of a full jury trial on full charges. As mentioned earlier, prosecutors are reluctant to bring harsh charges initially because they are not always certain that the prosecution of such charges lies in the public interest. Thus, the charge initially brought by the prosecutor is very often the fairest and most reasonable from the viewpoint of public policy. In Hayes, the Supreme Court has given the prosecutor maximum leverage in the plea bargaining process. The prosecutor can originally bring a light charge, try to persuade the defendant to plead guilty to such charge, and if he cannot obtain the plea, bring more severe charges.

CONCLUSION

The United States Supreme Court in two recent decisions, Agurs and Hayes, has narrowed the scope of judicial review of the

169. Id. at 671-72 (Powell, J., dissenting).
170. Id. at 672 (Powell, J., dissenting).
171. Such was the case in Lippi, where the prosecutor's office had a policy of bringing a Lippi-type violation before the magistrate. See United States v. Lippi, 435 F. Supp. 808 (D.N.J. 1977).
discretionary decisions of the prosecutor. The burden has now been placed squarely on the defense to show, in the discovery area, that the prosecutor has deliberately withheld evidence which would have been of assistance to a defendant in defending a criminal case. As to bringing charges, an area linked to that of plea bargaining, the burden has been placed on the defense to show that the prosecutor has deliberately retaliated against the defendant's decision not to plead guilty by raising the charges against the defendant. These cases have broadened prosecutorial discretion; they necessitate the prosecutor's policing of his exercise of discretion. The American Bar Association standards respecting the prosecutor's Brady responsibilities and his bringing of appropriate charges fail to serve as a guide for the prosecutor; the standards are vague and can be easily bent on a case-by-case basis.  

The only solution which the judicial system has presented for policing the decisionmaking authority of the prosecutor is eventual judicial review with the possibility of sanctions against the prosecutor. While imperfect, this device can be effective by discrediting the prosecutor whose cases are dismissed and whose charges are reduced. The prosecutor would rather adhere to court-enforced standards than risk losing his credibility with the court and the public. Unfortunately, the new decisions of the Supreme Court merely underscore the need for closer review of the prosecutor; they fail to provide adequate procedures for postconviction review of prosecutorial unfairness.

172. See notes 16 & 18 supra and accompanying text.