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I. Introduction

On March 2, 1995, Michael Gerardi took Connie Babin out on their first date to the Port of Call Restaurant in the French Quarter in New Orleans. After dinner, they were walking toward the car when three black, teenage boys walked toward them. One teenager approached Gerardi, who yelled at Babin to run. She did, but turned around to see the teenager shoot Gerardi in the face. Three weeks later, Babin positively identified sixteen-year-old Shareef Cousin as the gunman from a photographic line-up.[1]

The public pressure to convict was enormous. Most residents of New Orleans no doubt remember hearing of the crime. An innocent person, shot in the face after leaving a popular restaurant, evokes the sentiment that it could have been any one of us. Veteran prosecutor Roger Jordan was assigned the task of getting the death penalty for the perpetrator.

At trial, the prosecution's case consisted of Babin's positive identification and two tentative photographic identifications of Cousin: one by a cook who had seen three black males loitering nearby about thirty seconds before the shooting, and the other by a member of a tour who saw three black men running away after the shooting. The defense presented a powerful alibi consisting of a videotape of a basketball game showing Cousin playing basketball the night of the crime. Two recreation department supervisors, Cousin's coach, and an opposing team player all testified that the game started and ended late, and the coach testified that he dropped Cousin at his home at 10:45 p.m.[2] The shooting

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1. State v. Cousin, 710 So. 2d 1065, 1066-67 (La. 1998).

2. *Id.* at 1067.

occurred well before then, and Cousin lived across town from the crime scene. Nonetheless, the jury convicted Shareef Cousin of first-degree murder and sentenced him to death. In 1996, he became the youngest member of Louisiana's death row population.

In his zeal to convict Cousin, Roger Jordan did not inform the defense that on the night of the murder, Babin told the police that she did not get a good look at the gunman's face and probably would not be able to identify him, and that in an interview three days later, she said that she was not wearing her glasses or contact lenses on the night of the murder and could only see patterns and shapes.[3]

Shareef Cousin was fortunate enough to have the help of the tenacious, no-holds-barred, bridge-burning capital defense lawyer Clive Stafford-Smith. Because of Stafford-Smith's involvement, the exculpatory evidence was uncovered, leading to the case's ultimate dismissal and a civil suit against Jordan. Jordan was awarded absolute immunity, however, and the suit was dismissed.[4] Stafford-Smith had also referred Jordan to the bar for an ethical violation.

In August 2004, the Louisiana attorney disciplinary board cleared Roger Jordan of misconduct in connection with the Cousin case. Scores of judges and lawyers, including defense attorneys and prosecutors, testified that Jordan was a professional and honest prosecutor.[5] Jordan testified that he withheld the statement because parts of it were inculpatory, and, therefore, he deemed the statement unhelpful to the defense.[6] The board held that Jordan "did not act dishonestly or selfishly and the evidence has established that he acted in good faith and without intent."[7] Although Jordan testified self-servingly at the hearing that he now had an "open-file" discovery policy,[8] even if that were true, what incentive does he have to do so?

Although the story of Jordan's "exoneration" angered me and inspired this article, sadly, I was not remotely shocked. Assuming that Cousin was innocent of the crime, he is simply another statistic[9]—one more story of a prosecutor withholding exculpatory information from the

3. *Id.* at 1066.

4. *See* Cousin v. Small, 325 F.3d 627, 635 (5th Cir. 2003). The withholding of favorable evidence was a persistent pattern of the prosecutors serving under then Orleans Parish District Attorney Harry Connick, Sr. *See* James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2100 n. 173 (citing sources for this proposition).

5. Gwen Filosa, *Review Board Clears Prosecutor*, THE TIMES PICAYUNE, Sept. 25, 2004.

6. *Id.*

7. *Id.*

8. *Id.*

9. *See* Death Penalty Information, *Innocence: Freed From Death Row*, at http://www.deathpenaltyinfo.org/article.php?scid=6&did=110 (last visited Feb. 7, 2005) (listing Cousin's name at number 75).

defense without consequence.

When the United States Supreme Court pronounced and refined a due process violation for the failure to disclose exculpatory information to the defense, it expressed faith that "the prudent prosecutor will resolve doubtful questions in favor of disclosure"[10] and that "a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence."[11] To the contrary, suppression of evidence favorable to the accused is a system-wide norm which is accepted and condoned legally, ethically, and socially. It is not merely the practice of the ignorant or the miscreant, but a widespread phenomenon.

The way in which the Supreme Court has chosen to define the prosecutorial duty to disclose favorable evidence gives the prosecution broad discretion to withhold favorable evidence.[12] The usual debate over the exercise of prosecutorial discretion circles around prosecutors' overwhelming and unilateral power to screen, charge, and define sentences for criminal defendants.[13] The *Brady* doctrine,[14] however, presents an entirely different brand of prosecutorial discretion. I call it "core discretion" because it occurs at the core, or the heart, of the prosecutor's role as an advocate. Through core discretion, the prosecutor can unilaterally decide that the jury will never hear relevant evidence helpful to the defense. It is discretion to limit and frame the defense presentation.

Why does the Court allow, and in fact endorse, this discretion? Why do prosecutors, even good prosecutors, err on the side of nondisclosure despite the presence of an ethical obligation to disclose? This article suggests the answers to these questions lie in the exultation of the prosecutorial role as zealous advocate and the systemic devaluation of claims of innocence. I begin by discussing the expectation that the "ethical" prosecutor is a realizable model for the "good" prosecutor. Such an expectation is a pipe dream. Rather, the

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

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

12. The legal standard governing disclosure of favorable information "must accordingly be seen as leaving the government with a degree of discretion." *Kyles*, 514 U.S. at 437.

13. *See, e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001); H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695 (2000); Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207 (2000); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851 (1995); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393 (1992); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981).

14. In *Brady v. Maryland*, 373 U.S. 83 (1963), the Court identified the withholding of material evidence favorable to the defense as a due process violation.

good prosecutor in our adversarial system of justice, as designed and encouraged, is the zealous advocate. Relying on the image of the prosecutor as "doing justice" distracts from finding a real solution to the problem of nondisclosure. The practice of withholding favorable evidence is encouraged by the courts and the guardians of ethics. Assuming disclosure of favorable evidence is a goal to be achieved, it is virtually impossible to envision a solution that works within our adversarial system of justice. This article recommends looking across the Atlantic for a model that challenges our assumption that an office of public prosecution is essential to a "good" system of justice.

II. The Good Prosecutor as Ethical Prosecutor

Who is a "good" prosecutor is an intensely value-laden judgment. As a defense attorney, I thought the good prosecutor was the one who gave me a break now and then, did not seem to take the case personally, and exhibited some humanity toward my client. The public likely thinks the good prosecutor is the one who puts the most people behind bars for the longest time. Certainly that is how prosecutors are elected. The prosecutor's office likely thinks that the good prosecutor is the one who works quickly, disposing of as many cases as possible through plea bargains.

Legal scholars, being the ivory-tower thinkers that we are, tend to coalesce around an image of the good prosecutor as the "ethical" prosecutor. The "ethical" prosecutor literally follows the letter of the ethics code and pays particular attention to the code provisions directly addressing the prosecutorial role. First and foremost, the prosecutor has an obligation to "do justice."[15] The Court's only extended discussion of this duty to "do justice" was in the lofty phrasing of *Berger v. United States*:

> 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

15. The prosecutorial role as a "minister of justice" is set out in the comment to Rule 3.8 of the Model Rules of Professional Conduct: "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. (2004). *See also* Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 314 (2001) (suggesting that prosecutorial duty to truth comes from role as minister of justice, *Brady* duty, domination of the system, monopoly of fact-finding, and role as representative of the government).

> peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape nor innocence suffer.[16]

Although the standard is nebulous, it must have content above and beyond the ethical duties of all other lawyers because it applies to prosecutors alone. Fred Zacharias has formulated a concept of "doing justice" that gives it such content. He has suggested that a prosecutor's duty before trial is to screen out the innocent, and, once at trial, to ensure that the basic elements of an adversary system exist.[17] Hence, a prosecutor who sees a defense attorney sleeping through his client's trial, for example, should bring this to the court's attention, rather than simply marvel at the sight.[18]

The professional codes are clear about one aspect of the requirement to do justice. It is the prosecutor's ethical duty to "make timely disclosure to the defense all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."[19] Therefore, the good "ethical" prosecutor discloses this evidence. A former prosecutor-turned-judge calls it the "ouch test": "If a prosecutor is looking at [his or her] case and says 'Ouch, that hurts,' that means it should be turned over to the defense. Basically, anything that hurts the prosecution's case is arguably favorable to the defense."[20] Or, in the words of an Assistant United States Attorney, "when you are looking at *Brady*, if you have to think about whether it should be disclosed, it probably needs to be disclosed."[21]

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

17. Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?* 44 VAND. L. REV. 45, 49 (1991).

18. *See id.* at 68-74 (discussing prosecutor's duty when defense underperforms).

19. MODEL RULE OF PROF'L CONDUCT R. 3.8(d) (2004). *See also* MODEL CODE OF PROF'L RESPONSIBILITY D.R. 7-103(B) (1983)

> A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

Id.

> A prosecutor should not intentionally to fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate as to the offense charged or which would tend to reduce the punishment of the accused.

A.B.A. STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION, STANDARD 3-3.11(a).

20. The Honorable Gerrilyn G. Brill, Magistrate Judge for the Northern District of Georgia and former Assistant United States Attorney, comments published in *Panel Discussion: Criminal Discovery in Practice*, 15 GA. ST. U.L. REV. 781, 793 (1999) (hereinafter *Panel Discussion*).

21. Art Leach, Assistant United States Attorney, comments published in *Panel*

Scholars hope and expect most prosecutors will think and operate in accordance with these principles. This expectation is skewed by the fact that many of the legal scholars writing in the area of prosecutorial discretion are former Assistant United States Attorneys ("AUSA"s).[22] It is enormously important to point out that neither an AUSA nor a former AUSA-turned-academic is an average prosecutor. The typical AUSA has graduated from a good law school near the top of his class. He[23] did not simply want to be a prosecutor; he wanted to be a federal prosecutor. Federal prosecutors are an elite group with enormous prestige. The young Assistant receives training, has a supervisor, and has an army of federal agents at his disposal. It does not take long for him to realize the incredible power of his position. The federal prosecutor has virtually unchecked discretion to screen, charge, and determine the sentence of the defendants who are at his mercy.

Hence, the federal prosecutor has a vested interest in seeing himself as just. Gifted with all of the prestige and power of the office, if forced to describe himself or his colleagues, he must say he is worthy of the power. He must show that the public can trust him, or he will be forced to cede his discretion. While former-AUSAs-turned-academics are more reflective about the amount of power and discretion given to the office, and are more understanding of the dangers of abuse, at bottom, they believe the "ethical prosecutor" exists and can be cultivated. For example, Bruce Green, a former AUSA, and Fred Zacharias express some confidence that:

> Sometimes, we can trust prosecutors to behave ethically. We get this notion from two sources. First, as government officials, we hope and expect that prosecutors will serve the government's interests, which in the law enforcement context include "justice." Second, we know that lawyers who choose careers in law enforcement rather than the more lucrative private sector often make that choice because of a desire to serve the public.[24]

Green and Zacharias believe that because of the federal prosecutor's "perception of independence" and "sense of moral superiority," he tends

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Discussion, supra note 20, at 806.

22. For example, a quick scan of faculty bios revealed that Stephanos Bibas, Ronald Wright, Tracey Meares, Gerard Lynch, and Bruce Green were all federal prosecutors—either AUSAs or Department of Justice prosecutors.

23. I use "he" instead of "she" for the prosecutor because, while less politically correct, it is more accurate. My own personal experience as a defense attorney bears this out, and a Bureau of Justice Statistics Survey found that local prosecutors were seventy percent male and eighty-eight percent white. *See* Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 734 (1996) (citing study).

24. Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 449 (2002).

to self-regulate.[25] Richard Uviller[26] goes so far as to say that he considers prosecutors to be "by and large the flower of the bar," filled with the "heady wine" of being told by their superiors, "[d]o only what you think is right; bend every professional effort to achieve an outcome that you think best comports with justice within the constraints of the law."[27] The prosecutor who does so is the good, the worthy, and the "ethical" prosecutor.[28]

The federal prosecutor may in fact be in a position to show some ethical restraint to his prosecutorial zeal. The run-of-the-mill federal case is a victimless drug or weapons charge that has been sealed up tightly by federal law enforcement before it reaches his desk. Most of the cases are slam-dunk convictions. He may need not stretch to the limit every exercise of discretion and every rule favorable to the prosecution in order to gain a conviction.[29] Hence, it may be that some federal prosecutors occasionally serve the role of an "ethical" prosecutor, but this image, I submit, is far from reality.

III. The Good Prosecutor as Worthy Adversary

I have a different vision of the good prosecutor because in my eight years as a criminal defense attorney, I met many prosecutors in different jurisdictions, and I never met the "ethical" prosecutor, in the sense envisioned by the ethics code.

Most crimes are handled by local prosecutors,[30] who hail from a very different place than federal prosecutors. The typical state

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25. *Id.* at 450.

26. While Richard Uviller was a New York County prosecutor, and not an AUSA, his practice was during the late 1950s and 1960s, when prosecutors' offices were a kinder, gentler version of their current incarnation.

27. Uviller, *supra* note 13, at 1702.

28. *See also* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2131 (1998) (Lynch was a former AUSA) ("The prosecutor in particular does not see herself as an interested party seeking personal advantage, or even as a representative of the narrow interests of another. Rather, she will typically define herself as a public official, seeking 'justice' or 'the public interest.'"); *id.* at 2150 ("[W]e should not be entirely cynical about the possibility that government officials can conduct themselves with fairness and in the broadest public interest . . . it is a simple fact that most do.").

29. *See, e.g.*, Ellen S. Podgor, *Criminal Discovery of Jencks Witness Statements: Timing Makes a Difference*, 15 GA. ST. U.L. REV. 651 (1999) (survey of AUSA practices showed most gave witness statements earlier than required under Jencks Act); Milton C. Lee, Jr., *Criminal Discovery: What Truth Do We Seek?* 4 U.D.C. L. REV. 7, 15 (1998) (citing ABA survey where sixty-six percent of AUSAs responding reported giving more discovery than required under the federal rules) (citation omitted).

30. *See* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2565-66 (2004) (noting federal government is a relatively smaller player; federal prisons house nearly 160,000 inmates, while state penitentiaries and jails house 1.9 million inmates) (citation omitted).

prosecution is much messier than a federal prosecution. The police work is sloppier, the resources are limited, and the case loads are heavy. In many of the crimes, victims push for prosecution, the press follows every homicide or rape, and the boss needs a high record of convictions for re-election.[31] The typical local prosecutor does not have the luxury, the time, or the inclination to draw his sense of power from exercising discretion in favor of the defendant. He will only be noticed, climb the career ladder, or become a member of elected office himself if he racks up the convictions.

The local prosecutor has plenty of power: power to pursue or dismiss charges, power to offer pleas and immunity, power of superior information, power of reputation, and power of lording it over the guilty, the pitiful, and the shamed. I never met a prosecutor who did not love the power he was able to cultivate. I have come to believe it is a matter of human nature rather than a despicable display: no rational human being can resist the temptation to enjoy and pursue this power. And it is not like the power of teacher over student, where the teacher may be inclined to show mercy toward the student. Rather, the prosecutor is placed in an adversarial process, in which he must pursue his side with adversarial zeal if the process is to work as designed. He has little problem mustering this zeal because he, the public, and the courts believe he wears the white hat. The combination of power and white hat justice form the intoxicating milieu of the prosecutor's office.

The prosecutor does not even think about "doing justice" in the sense the ethics professors envision. What prosecutor would not believe he is doing justice by fulfilling his concomitant duty to be a zealous advocate?[32] Isn't the whole idea of becoming a prosecutor to put the bad guys behind bars and keep the public safe? And didn't the prosecutor sign up for an adversarial system of justice? Most prosecutors would be surprised to find out that the admonishment to "do justice" involves keeping one eye on the defendant's rights.[33] In an adversarial system of justice, one would think that is the defendant's lawyer's responsibility:

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31. *See* Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323, 330 (2004) (finding prosecutors face pressure mostly from victims and a public concerned about becoming victims); *id.* at 342 (noting street crime risks are more "vivid" than corporate crime causing more public demand for harsh punishment and full prosecution) (citation omitted).

32. *See* Abbe Smith, *Can You Be A Good Person and A Good Prosecutor?* 14 GEO. J. LEGAL ETHICS 355, 378 (2001) ("[W]hat prosecutor doesn't think that he or she is 'seeking justice,' doing 'right,' or doing 'good'? . . . [T]oo often righteousness becomes self-righteousness.") (citation omitted).

33. *See* Zacharias, *supra* note 17, at 52 ("The codes are concerned specifically with structuring adversarial practice. They do not exempt prosecutors from the requirement of zealous advocacy.").

"asking prosecutors simultaneously to advocate within a process and assure that the process is fair is inherently contradictory—and perhaps hopeless."[34] The general feeling is that defendants and their attorneys are slimy, guilty cohorts,[35] and the idea of helping the defense seems almost antithetical to justice. Once the adversarial process has begun, we should fully expect the normal, human, and good prosecutor to have the single-minded goal of winning the case for the prosecution.[36] That is the prosecutor our system of justice cultivates and encourages.

I have come to believe that the good prosecutor, if one exists, is the worthy adversary. He is "zipped, buckled, and helmeted into [his] flight suit"[37] from the moment he is handed the case file, with the exception of a few older prosecutors who have been around the block enough times to have mellowed.[38] The good prosecutor pursues convictions above all else.[39] Discovery from the good prosecutor is not free-flowing, motions hearings are hard-fought, and plea bargains are take-it or leave-it. If the case is weak, the good prosecutor does not believe it is because the defendant is innocent. It simply means the prosecution cannot muster the proof and must plead the case to gain a conviction. If the case is weak but high profile, the good prosecutor takes the case to trial because the public demands it, and his reputation depends upon winning it.[40] The good prosecutor is well-prepared, fights hard, and gives up little ground.

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34. *Id.* at 104. The dual obligation was highlighted in *Berger v. United States*: "[The prosecutor] 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." 295 U.S. at 88.

35. *See* Smith, *supra* note 32, at 357 ("Defenders become accustomed to having our morals challenged; it is an occupational hazard.") (citation omitted).

36. *See* Zacharias, *supra* note 17, at 107 ("[T]he codes expect prosecutors to accomplish the balance of roles in the setting least conducive to reflective thought. Nowhere do lawyers' competitive juices flow more freely than at trial. Winning is at a premium.").

37. Uviller, *supra* note 13, at 1696.

38. *Accord* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2475 (2004) ("New prosecutors may be systematically harsher, while veterans may mellow with time.") (citation omitted).

39. *See* Smith, *supra* note 32, at 390 ("The pressure [to win] is both external, the result of the inherently political nature of prosecution, and internal, the result of policies relating to salary and promotion.") (citation omitted); Meares, *supra* note 13, at 900 ("The prosecutor's professional success inevitably is linked to success at trial and on appeal. Winning trials and appeals is rewarded by promotions over time. Even more important than office promotions may be the respect and admiration of her peers that the prosecutor acquires when she wins cases."); Zacharias, *supra* note 17, at 108 ("Prosecutors who restrain themselves may convict at a lower rate and thus appear less competent to their superiors."); Bibas, *supra* note 38, at 2471 ("Favorable win-loss statistics boost prosecutors; egos, their esteem, their praise by colleagues, and their prospects for promotion and career advancement.").

40. *See* Stuntz, *supra* note 30, at 2563 (arguing that public pressure has prosecutors taking most murder cases to trial leading to a higher acquittal rate for murders than other felonies) (citation omitted).

In other words, the good prosecutor is the star of the prosecutor's office and the defense attorney's worst nightmare.

IV. Brady and the Good Prosecutor

If the good prosecutor were the ethical prosecutor, he would disclose to the defense all information favorable to the defense, without hesitation. He would seek such information from any government official who touched the case. If in doubt, he would err on the side of disclosure. Consistent with "doing justice," such disclosure ensures that the adversarial process is fair. In reality, however, the good prosecutor must do none of these things to be a worthy adversary, according to the Supreme Court of the United States.

It may be that the Warren Court originally intended to place the prosecutor in the ethical role. In *Brady v. Maryland*, the Court broke new ground by holding 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 the bad faith of the prosecution."[41] By every indication, the term "material" was used consistently with the *Black's Law Dictionary* definition as "significant" and "essential."[42] The Court did not analyze the evidence withheld in *Brady*—a confession by the co-defendant that he committed the murder—based on its prejudicial value, or how it would have affected the outcome of the case. Rather, the Court simply referred to its prior holdings in a way that made it appear that the suppression of the favorable evidence itself amounted to a due process violation.[43] The Court emphasized the role of the ethical prosecutor, saying that "[a] prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty . . . casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice[.]"[44] Hence "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair[.]"[45]

In any event, this view of the good prosecutor as the ethical prosecutor was undone by the march of *United States v. Agurs*,[46] *United*

41. 373 U.S. 83, 87 (1963).

42. BLACK'S LAW DICTIONARY 991 (7th ed. 1999).

43. The Court summarized *Mooney v. Holohan*, 294 U.S. 103, 112 (1935), *Pyle v. Kansas*, 317 U.S. 213, 215-16 (1942), and *Napue v. Illinois*, 360 U.S. 264, 269 (1959), as simply holding that presenting false testimony or allowing it to go uncorrected amounted to a due process violation. The Court did not mention a prejudice test. 373 U.S. at 86-87.

44. 373 U.S. at 87-88.

45. *Id.* at 87.

46. 427 U.S. 97 (1976).

States v. Bagley,[47] and *Kyles v. Whitley*.[48] *Agurs* began the process of incorporating a prejudice component into the trial standard; *Bagley* refined it. In *Bagley*, the Court held that favorable evidence is "material," and constitutional error results from its suppression, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[49] This standard reinforced the image of the good prosecutor as the worthy advocate.[50] Remarkably, the Court incorporated the prejudice showing that must be made on appeal into the standard to be applied by the players at trial, saying in *Agurs*, "[l]ogically, the same standard must apply at both times."[51] Logically?

Typically, the analysis of a violation of defendant's constitutional rights proceeds in a two-step process. First, was there a constitutional error; and second, was that error prejudicial such that reversal is required? For example, if a trial court admits hearsay evidence which violates the right to confrontation, constitutional error is present. Only upon appeal will the appellate court, looking at the entire record, decide whether the error was harmless.[52] The different standard of error at trial encourages the prosecution and the court to avoid error, and the issue of whether that error is harmless is best left to the appellate court having the benefit of the entire record on appeal.

Instead, *Bagley* directly places the prosecutor in the role of the architect of the proceeding. The prosecutor can withhold the evidence if he or she believes there would not be a reasonable probability that the disclosure would have affected the jury's verdict. In the words of the Court in *Kyles*, it is a legitimate exercise of the prosecutor's discretion:

> While the definition of *Bagley* materiality . . . must accordingly be seen as leaving the government with a degree of discretion, it must

47. 473 U.S. 667 (1985).

48. 514 U.S. 419 (1995).

49. *Bagley*, 473 U.S. at 682.

50. I am inclined to agree with John Douglass, who wrote that "the Court's narrow view of 'materiality' under *Brady* has been one of the largest disappointments of the last quarter century." John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 442 (2001).

51. 427 U.S. at 108. In *Bagley*, the Court relegates to a footnote its reasoning that "a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments." 473 U.S. at 675 n.7. It is hard to imagine what is so impossible about reviewing the file and turning over evidence that tends to exculpate the accused.

52. For example, in *Crawford v. Washington*, 541 U.S. 36 (2004), the admission against the defendant of the testimonial statement of a witness where the defendant had not had an opportunity for cross-examination was a violation of the Confrontation Clause. Whether it was reversible error was a secondary inquiry.

> also be understood as imposing a corresponding burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make the disclosure when the point of "reasonable probability" is reached.[53]

Calling that responsibility a "burden" is like calling the police officer's discretion to stop and frisk based on a "reasonable suspicion" rather than according to bright line rules a "burden." The rational prosecutor welcomes that "burden" over a rule requiring that he turn over all favorable information. His duty is discretionary and greatly reduced: "[A]bsent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose."[54]

Furthermore, the Court in *Bagley* adopted a standard for appellate review that also reinforced the good prosecutor as worthy advocate and not as ethical prosecutor. The usual appellate standard for constitutional violations encourages avoiding the error in the first instance. Under *Chapman v. California*,[55] if a constitutional error has occurred, then the beneficiary of the error—the prosecution—has the burden of showing beyond a reasonable doubt that the absence of the error would not have changed the outcome of the trial.[56] By lowering the prejudice standard on appeal and shifting the burden of proof to the defense, the Court in *Bagley* furthered the entrenchment of the prosecutorial exercise of discretion in favor of withholding the evidence.

The Court's admonishments that "the prudent prosecutor will resolve doubtful questions in favor of disclosure"[57] and that "a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence"[58] are either ignorant or disingenuous. The prudent prosecutor will do no such thing. The Court's use of the word "prudent" here connotes the prosecutor who wants to seal a conviction and would not engage in behavior that risks the security of that conviction. However, the Court's holdings have set up exactly the opposite incentive.[59]

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53. 514 U.S. at 437.

54. *Agurs*, 427 U.S. at 107-08.

55. 386 U.S. 18 (1967).

56. In *Bagley*, Justice Marshall called for the *Chapman* standard of review in dissent. 473 U.S. at 696 (Marshall, J., dissenting).

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

58. *Kyles*, 514 U.S. at 439.

59. *See* Gershman, *supra* note 13, at 439 ("[B]y avoiding any inquiry into the prosecutor's culpability, and focusing entirely on the materiality of the evidence, the Court encourages prosecutors, even ethical prosecutors, to withhold evidence.").

For example, imagine that the prudent prosecutor is in possession of information that one of the two eyewitnesses to a robbery initially gave the police a description of the perpetrator of the crime that was inconsistent with the appearance of the defendant. The eyewitness described the person as 5'8" tall, with a medium build. The defendant is 5'11" tall and thin. That same eyewitness, however, picked the defendant out of a lineup and indicated she was sure that the defendant was the robber. The other eyewitness gave a general description that fit the defendant and also picked the defendant out of a lineup. The prudent prosecutor, convinced of the defendant's guilt, will not disclose that information.

Several rational reasons explain this decision. First, he is convinced of the defendant's guilt and he is certain that a defense attorney will use this information to attempt to create reasonable doubt where none exists. The prudent prosecutor believes people misgauge the actual height and weight of a person for many reasons, and a minor discrepancy should not derail the prosecution. Second, the prudent prosecutor has read *Bagley* and *Kyles* and realizes he has discretion to wait to disclose until he feels a reasonable probability exists that the information would change the outcome of the case.[60] He does not believe this inconsistency creates a reasonable probability, and who is to fault his discretion?[61]

Third, the prudent prosecutor also knows that, because he has no obligation to disclose this evidence, it may never be discovered and, therefore, will never make its way into an appeal of the conviction.[62] Fourth, he knows that even if it is discovered post-trial, an appellate court is likely to view this evidence as harmless in hindsight.[63] The burden will be on the defendant and appellate courts have shown

60. *See* American College of Trial Lawyers, *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 93, 104 (2004) [hereinafter *Proposed Codification*] ("This Committee, a majority of whose members practice in the federal courts, believes that across the country federal prosecutors routinely defer Brady disclosure unless ordered by the trial court.").

61. *See, e.g.*, Garrison v. Maggio, 540 F.2d 1271, 1272-74 (5th Cir. 1976) (where prosecutor withheld the fact that shortly after the robbery, the victim described the robber as 6'1" and slender, whereas Garrison was 5'5" and stocky, court found that "[t]he categories of the report [were] not in themselves exculpatory" but "merely indicate[d] that the victim may have previously offered a somewhat different version of the crime.").

62. *See* Green & Zacharias, *supra* note 24, at 470 (arguing prosecutors are less likely to self-regulate when there is a lower likelihood of the misconduct becoming known); Meares, *supra* note 13, at 909 (stating it is "probably fair to say that many instances of *Brady*-type misconduct are never discovered and hence never reported").

63. *See* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 707-08 (1987) ("[A] prosecutor knows that a decision to withhold or falsify evidence, even if discovered, will not necessarily result in a reversal of the conviction.").

themselves to be predisposed to upholding convictions.[64] The remote prospect of a reversal at some point in the future is hardly a deterrent now, when faced with a discretionary decision which will help him get a conviction.[65] In any case, a reversal simply calls for a retrial, so that the prosecutor is put in essentially the same position he was in prior to the error.[66]

Fifth, the prudent prosecutor is unconcerned about an ethical violation.[67] Even assuming the prosecutor is aware of his duty to disclose favorable evidence under the professional codes (which may be a stretch[68]), he has never heard of a prosecutor being disciplined for his exercise of discretion in withholding evidence. In 1987, Richard Rosen combed the universe of written disciplinary decisions and found only *nine* which even involved a referral of a prosecutor for withholding exculpatory evidence. In only one of those was the prosecutor given a

64. *See* Meares, *supra* note 13, at 900-01 (arguing that the effectiveness of a reversal as a sanction is "tempered greatly" by the harmless error rule, as appellate courts regularly uphold convictions in the face of prosecutorial misconduct); Douglass, *supra* note 50, at 472 ("[R]eview after-the-fact will almost never be as generous to a defendant as judicial consideration of a disclosure issue before trial."); Gershman, *supra* note 13, at 425 (arguing that harmless error rule "informs prosecutors that they can weigh the commission of evidentiary or procedural violations not against a legal or ethical standard of appropriate conduct, but rather, against an increasingly accurate prediction that the appellate courts will ignore the misconduct when sufficient evidence exists to prove the defendant's guilt."); Barbara Babcock, *Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1154-55 (1982) (stating lower courts never find impeachment evidence material). *See also* Rose v. Clark, 478 U.S. 570, 588-89 (1990) (Stevens, J., concurring) ("[A]n automatic application of the harmless error review in case after case, and for error after error, can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever-present and always powerful interest in obtaining a conviction in a particular case.").

65. *See* Rosen, *supra* note 63, at 731-32 (arguing that weighed against the fairly nonexistent incentives to refrain from a *Brady* violation "is the instant, concrete advantage of gaining a conviction.").

66. *See* Green & Zacharias, *supra* note 24, at 403-04 (suggesting that reversals do not deter prosecutors because there are no consequences to the individual prosecutor—appellate reversals rarely identify the misbehaving prosecutor by name, and reversals may occur after the prosecutor has left office).

67. The prosecutor can also rest easy about a civil suit. In *Imbler v. Pachtman*, 424 U.S. 409 (1976), the Supreme Court held that prosecutors are not subject to civil actions for damages arising from their wrongful conducts as advocates, including *Brady* violations.

68. For example, the American College of Trial Lawyers expressed that federal prosecutors do not appear to understand their duty. *Proposed Codification*, *supra* note 60, at 103-04 ("A number of prosecutors have interpreted *Brady* narrowly and believe that a prosecutor's *Brady* obligation is limited solely to turning over information that someone other than the defendant has confessed to the crime at issue. Many prosecutors do not focus on the critical language of the *Brady* decision, which required disclosure of evidence that tends to exculpate or reduce one's penalty. . . . Still others do not view *Giglio* or impeachment material as part of the *Brady* exculpatory disclosure obligation.").

major sanction, and then, only a suspension.[69] The message sent is that, although it is a rule on the books, the disciplinary authorities do not believe its violation worthy of condemnation.

The barriers to enforcement of the ethical rule are enormous. First, a third party must have the time, wherewithal, and inclination to refer the prosecutor. The only third party who might have an interest is a defendant, who likely is focused on reversing his conviction and does not have the resources to engage an attorney to handle the ethical claim.[70] Even if referred, all incentives point in favor of letting the prosecutor off the hook. If the appellate courts have already determined that the nondisclosure did not amount to a constitutional violation, it is unlikely that the ethical board or the overseeing court will find fault with the prosecutor, despite a technical violation of the rules.[71] Politics, separation of powers, and judicial restraint all play a role.[72]

Even if an appellate court did find a constitutional violation, political and societal pressures demand exoneration. Take Roger Jordan, for example: defense attorneys, judges and prosecutors all felt compelled to defend him. Who is going to be responsible for taking down an active prosecutor? And if that prosecutor is not active anymore, why bother? In Roger Jordan's case, the disciplinary authorities also seemed to require malicious intent to withhold the evidence, a standard that will be impossible to show in the course of a discretionary decision. It is a nod to adversarial zeal. The prosecutor was not malicious—he was simply fulfilling his role to interpret the law and the facts in a manner most consistent with convicting the guilty.

Is the prosecutor blameworthy for thinking in these strategic terms? The vision of the good prosecutor as the "ethical" prosecutor says yes. When we view Roger Jordan's behavior in the abstract, it seems despicable, unconscionable, and perverse.[73] But Roger Jordan simply

69. *See* Rosen, *supra* note 63, at 730 (finding that, of the other eight, three resulted in no disciplinary action, four received minor sanctions—one reprimand, one caution and two censures—and one was on appeal).

70. *Id.* at 694, 734 (stating that criminal defendants rarely have incentives or resources to pursue complaints to the bar).

71. For example, the Chief Disciplinary Counsel for Louisiana is not a neutral observer, but an employee of the Louisiana Supreme Court, further entrenching the bias to affirm.

72. *See* Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 757-62 (2001) (barriers to enforcement include that prosecutorial misconduct is more typically driven by "an excess of zeal in pursuing the public good"; there are alternative remedies such as appellate reversal; the bar may feel politically constrained as state prosecutors are elected officials; and individual prosecutors who commit misconduct may no longer be prosecutors by the time the bar acts, so there is no need for specific deterrence).

73. Beyond a shadow of a doubt, he should have been disbarred and hung out to dry.

did what the adversarial system—and the Supreme Court—directed, invited, and encouraged him to do. We need to shift the critique away from the prosecutor and onto the system. The description of the prosecutor's behavior as misconduct marginalizes it, makes it seem less than mainstream, and suggests that the solution simply lies in encouraging badly behaving prosecutors to be good.

Withholding favorable evidence, however, seems to be the norm. One recent study reported that convictions in 381 homicide cases nationwide had been reversed because prosecutors concealed evidence suggesting the defendants' innocence or presented evidence they knew to be false.[74] Of the first seventy exonerations of prisoners through DNA testing nationwide, 34% involved prosecutorial misconduct;[75] and of the instances of prosecutorial misconduct in the 152 exonerations occurring between 1989 and 2004,[76] 37% were due to the suppression of exculpatory evidence.[77] These, of course, are only the cases where somehow the nondisclosure came to light. Most cases of nondisclosure likely go undiscovered.

Good reason exists to believe that nondisclosure pre-plea is rampant. Since the Supreme Court held in *United States v. Ruiz*[78] that disclosure of *Brady* information pre-plea is not constitutionally mandated, prosecutors have received the green light to withhold the information. Considering that in the weakest cases the prosecutor is likely most interested in obtaining a plea,[79] these cases are the ripest for the existence of favorable evidence and for conviction of an innocent defendant.[80] Nonetheless, the message from the Supreme Court is that

74. Gershman, *supra* note 15, at 312-13.

75. *See* Innocence Project, at http://www.innocenceproject.org/causes/index.php (last visited Feb. 11, 2005) (the Innocence Project at the Benjamin N. Cardozo School of Law is a non-profit legal clinic handling cases where post-conviction DNA testing can lead to conclusive proof of innocence).

76. *See id.* at http://www.innocenceproject.org/case/display_cases.php?sort=year_exoneration (last visited Feb. 11, 2005).

77. *See id.* at http://www.innocenceproject.org/causes/policemisconduct.php (last visited Feb. 11, 2005).

78. 536 U.S. 622 (2002).

79. *See* Vorenberg, *supra* note 13, at 1535 (pointing out that prosecutors may offer the greatest incentives to defendants with the greatest chance for acquittal).

80. *See* Bibas, *supra* note 38, at 2473 (arguing that a prosecutor can "shade weak trials, police misconduct, and credible claims of innocence from view" by bargaining them away); *id.* at 2495 (claiming that prosecutorial bluffing is effective against innocent defendants, who are on average more risk averse than guilty); Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 995 (1989) (expecting that *Brady* cases will tend to be resolved by plea negotiation); *id.* at 992 (finding that questionable guilt, strong inducements to plead guilty, and overestimation of the government's chances for conviction in *Brady* cases increases risk of convictions of innocent defendants through pleas); Douglass, *supra* note 50 (arguing that the accuracy of plea of guilty is implicated by *Brady* withholding); Corinna Barrett Lain, *Accuracy*

convictions through pleas are to be encouraged and that the good prosecutor should do nothing to reduce his chances of getting a plea bargain in a weak case.

Therefore, we have a criminal justice system which encourages adversarial zeal in its prosecutors to the tune of withholding favorable evidence. To hold our noses at such conduct on the part of prosecutors is unrealistic. To blame the prosecutor ignores fundamental problems inherent in our adversarial system of justice that assumes the average criminal defendant is guilty and encourages prosecutors to pursue convictions in the name of justice.

V. Is the Good Prosecutor Right?

The discussion thus far has proceeded from an assumption we might question: that disclosure of favorable evidence is good. Given the Supreme Court's indifference, if not hostility, to the ethical duty to disclose exculpatory evidence, and the ethics boards' ignorance of the claims, are we off base? Should the presumed ethical norm be discarded in favor of the legal and societal norm?

The answer would seem to lie in the valuation of two benefits that seem impossible to quantify in any universal terms: fairness and accuracy. Both would seem to militate in favor of disclosure as a general rule. But, I suspect prosecutors and courts[81] do not believe it. By and large, criminal defendants are guilty, and attempts to level the playing field are simply opportunities for the guilty defendant to take advantage of the process. Consider Learned Hand's comments eighty years ago:

> Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and to make his defense fairly or foully, I have never been able to see.[82]

That sentiment is alive and well today in the courts. Assuming that the vast majority of those accused of crime are guilty,[83] giving the defense

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Where It Matters: Brady v. Maryland in the Plea Bargaining Context, 80 WASH. U. L.Q. 1 (2002) (same).

81. Most judges were former prosecutors and retain their prosecutorial bias. *See* Meares, *supra* note 13, at 912 (explaining the court bias in favor of prosecutors).

82. United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

83. *See* Smith, *supra* note 32, at 384 ("Notwithstanding the legal presumption of innocence, the cultural and institutional presumption in most prosecutors offices is that everybody is guilty.").

fodder to create reasonable doubt simply undermines justice.[84] For example, the concern over expanding discovery has always been that it simply allows the defendant to tailor his defense to the evidence and promotes perjury.[85]

If we could say with some assurance that enforcing the ethical rule of disclosure would mean that guilty persons go free while innocent persons are unaffected, then perhaps there would be no need for the rule, and its current undervaluation and under-enforcement is justified. But, this assumption has been undone through the advent of DNA testing. We now know that prosecutors have withheld favorable evidence in many of the cases where an innocent person was convicted. We have never had access to such data before. And withholding favorable evidence goes hand-in-hand with innocence cases. The evidence is most likely to exist and to be withheld in the weakest cases—guilty pleas and high stakes cases which the prosecutor must take to trial. Until recently, no one had to believe the assertion that innocent people were convicted, although the notion existed. Now, the public imagination has been captured by the innocence cases that have come to light and that can only be a small percentage of the wrongfully convicted.

Despite the instincts of the good prosecutor and the former-prosecutor-turned judge that only the guilty benefit from a rule of disclosure, it appears that the risk of convicting innocent people through withholding of favorable evidence is intolerably high.[86]

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84. *See* Gershman, *supra* note 15, at 353 ("Because of politics, institutional pressures, adversarialness, self-righteousness, and arrogance ... prosecutors may sincerely believe that defendants probably are guilty, will tend to overlook or ignore exculpatory hypotheses, and will place winning a case above any other litigation value."); Rosen, *supra* note 63, at 732 ("It is also likely that in most cases the prosecutor believes the defendant is guilty, and therefore might be motivated by the concern that, in one sense, justice will not be served by revealing evidence which will increase the probability that the defendant will go free."); Randolph N. Jonakait, *The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550, 553-54 (1987) (stating that from a prosecutor's standpoint, "[h]e cannot believe that he is playing a role in convicting innocent people" by offering good deals in weak cases; "the prosecutor naturally tends to view weaknesses in his case not as possible indicators of innocence but merely as a possible failure of proof.").

85. *See* William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L.Q. 1, 6 (1990) (enumerating those concerns). That these concerns are alive and well is clear in the comments of Magistrate Judge Gerrilyn Brill, a former prosecutor, who said that giving the defendant witness statements in advance of trial meant that "the defendants will become more creative in creating their own evidence; that it will not, in the long run, lead to the truth." *Panel Discussion*, *supra* note 20, at 814.

86. *See* Gershman, *supra* note 13, at 439 ("It is not an understatement to say that prosecutorial suppression of evidence presents perhaps one of the principal threats to a system of rational and fair fact-finding.").

VI. Now What?

It is difficult to envision an effective solution to this enormously intractable problem. Most of the solutions scholars have proposed, although noble, will not succeed given our adversarial system of justice and society's deeply ingrained norms about the proper role of the prosecutor as zealous advocate.

First, Fred Zacharias proposes simply educating and encouraging prosecutors to "do justice."[87] It may be true that enormous numbers of local prosecutors do not really understand *Brady* or know the ethical rules of professional conduct. However, it should be obvious by now that I do not believe that education matters. Even if a prosecutor knows the rules, he knows that the rules work in his favor. The *Brady* standard at trial means that the prosecutor can withhold favorable evidence on the theory it would not have affected the outcome of the trial, knowing this is in fact what appellate courts usually find in similar circumstances. The ethical rules are not enforced. I believe it is impossible to change the rules of the game simply through education about ethical obligations if education means an attempt to change the culture of the office through training and explicit direction.[88]

Second, legal commentators suggest that ethical violations should be more vigorously pursued.[89] This suggestion is true enough, but considering that violations are not so pursued, the question of how to motivate the would-be motivators remains. As long as prosecutors are encouraged, directly or indirectly, to seek convictions as the first order of justice, few are going to step in to discipline them.

Third, of course, the courts could create better legal standards for the due process violation than those set as the floor in *Bagley*. The better standard would require that a due process error occurs at trial if favorable

87. *See* Zacharias, *supra* note 17, at 49. *See also* Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 546 (1996) (arguing that prosecutors need to be educated to "avoid behavior, such as score-keeping, that makes criminal trials resemble sporting matches."); Lynch, *supra* note 28, at 2149 (maintaining that prosecutors should be trained to approach their decisions "in a spirit of fairness and neutrality").

88. The most recent suggestion from the Green-Zacharias team is that prosecutors' offices should develop standards of neutrality to help guide the prosecutors in exercising their discretion. Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 904. I find this suggestion far removed from the problem at hand. If prosecutors do not follow the clear cut ethical standard to disclose exculpatory information, the problem does not lie in creating clearer standards for "doing justice."

89. *See* Rosen, *supra* note 63, at 735-36 (suggesting that bar counsel comb the appellate cases for *Brady* violations and institute proceedings themselves and start punishing more harshly for Brady). *See also* Zacharias, *supra* note 72, at 775 (suggesting that disciplinary authorities may need to consider targeting supervisors who encourage the "ethos" of the office rather than line attorneys).

information is withheld. Then, on appeal, the *Chapman* "harmless beyond a reasonable doubt" standard would apply.[90] Although this would certainly help to lead to the right results, it still may not deter prosecutors from withholding the evidence since reversals remain remote to convictions, both in time and in actuality. The favorable evidence may never be discovered, and appellate courts will still work hard to find the error harmless, given their current predisposition.

Fourth, we could consider a policy of qualified immunity, rather than absolute immunity, in civil suits against prosecutors who knowingly withhold favorable evidence. Even if that were a realistic option, the barriers to suit would be practically insurmountable. For the same reasons defendants do not have the time, wherewithal, and money to bring a disciplinary action, they will not bring civil suits. Also, civil liability would mimic the criminal standards for disclosure, so that unless the appellate court in the criminal case found reversible error, no civil liability would follow.

Fifth, at the very least, we could make nondisclosure a rule violation. Currently, the discovery of favorable evidence appears nowhere in Federal Rule of Criminal Procedure 16, governing discovery in federal cases, or Rule 11, governing plea bargains.[91] However, although helpful in terms of educating prosecutors to their responsibilities, a rule would go no further than that.

Because of the reticence to impose sanctions on the prosecutor, it is worth considering lesser sanctions that the courts might actually pursue. For example, if a case is reversed on appeal due to a *Brady* violation, the court could order that, on retrial, the defendant should get open discovery, or a deposition of the witness who was the subject of the withheld information. The hope is that by putting the prosecutor in a worse position on retrial, maybe he will reconsider his decision. Even if the prosecutor did not reconsider, at least the defendant would receive a benefit. However, such sanctions cannot be mandated, but merely suggested.[92]

Tracey Meares has proposed the innovative idea of financial incentives to guide prosecutors. However, it is difficult to envision how that would work in a *Brady* situation. She proposes that a prosecutor be

90. *See also* Rosen, *supra* note 63, at 736 (suggesting a bad faith standard in *Brady* cases requiring reversal).

91. *See* FEDERAL RULES OF CRIMINAL PROCEDURE, RULES 11, 16. *See also Proposed Codification, supra* note 60, at 95 (proposing amendments to Rules 11 and 16 to define favorable information to an accused and require disclosure of information in writing within 14 days of request).

92. Tracey Meares has pointed out that few courts exercise contempt power against prosecutors and the Supreme Court has limited the use of the courts' supervisory power over prosecutorial misconduct. Meares, *supra* note 13, at 891, 894.

financially rewarded if his conviction makes it through appellate court without error.[93] As we have seen, a prosecutor can feel pretty secure about withholding favorable evidence and making it through appeals without a finding of error, either because the evidence was never discovered or because the court found a reasonable probability that the jurors would still have found the defendant guilty.

The problem with all of the above solutions is that they occur within the framework of the adversarial system as we know it. Is it at all possible to envision a change to the system which might make a difference to the incentives? Although I do not believe this will happen in my lifetime, I do believe eliminating the institution of the public prosecutor could be an effective solution. Although we usually consider that we made progress as a nation by creating a public prosecutor, we must see that we have created a permanent, vested adversary to the defendant and his representative. Most prosecutors are worlds apart from the defense attorneys who are their adversaries. The views of fairness and justice clash enormously.

In England, the Crown Prosecution Service ("CPS") is the equivalent of our public prosecutors' offices. However, the CPS lawyers, who are solicitors, normally retain barristers to conduct the actual court proceedings in Crown Court.[94] The barristers are private attorneys with their own practices who may appear for the prosecution when retained by a CPS lawyer and who may, on another day, appear in court on behalf of a criminal defendant.[95] Barristers "are therefore considered more objective and less identified with the parties"[96] than CPS lawyers. The ethical code that applies to the prosecuting barrister states that he "should not regard himself as appearing for a party. He should lay before the Court fairly and impartially the whole of the facts which comprise the case for the prosecution and should assist the Court on all matters applicable to the case."[97] Those who have experienced the English system firsthand confirm that, in fact, the prosecuting barristers are far less vested and have a far broader perspective on the system than American prosecutors.[98] Although the English system appears to be the unwitting byproduct of the division of duties between solicitors and

93. *See id.* at 902.

94. This occurs because generally only barristers have a right to appear in Crown Courts. Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 FORDHAM L. REV. 1379, 1443 n.329 (2000).

95. *See id.* at 1442-43 (describing system).

96. *Id.* at 1443.

97. *Id.* (quoting Code of Conduct of the Bar of England and Wales, Standard 11.1).

98. Conversations with Professor Geoffrey Bennett, Director, Notre Dame London Law Centre, a co-contributor to this forum; and Richard Bourke, former barrister in Australia and current capital defense lawyer in Texas.

barristers, the result is an adversary who is far more likely to have fairness on his agenda.

Short of a drastic change in the competitive culture of American prosecution, however, I am left with the sinking feeling that the status quo will remain until the number of innocent persons wrongfully convicted reaches a magical number that we, as a nation, decide we simply cannot tolerate. Unfortunately, representation of the guilty will never be a popular cause. Hence, for now, the Supreme Court in *Ruiz* can fool itself and most everyone else that only a guilty man pleads guilty, and that the discovery of favorable evidence is an undeserved windfall to the guilty defendant. The good prosecutor can live a long and prosperous life with the words of Learned Hand guiding his conscience.