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RIGHTEOUS INDIGNATION: PROSECUTORIAL MISCONDUCT, BRADY, AND THE COGNITIVE LIMITS OF SELF-POLICING

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INTRODUCTION

In recent years, with a growing nationwide focus on wrongful convictions and mass incarceration, scholars and commentators have begun to evaluate the role of the prosecutor, including an assessment of the power of the prosecutor and the problems caused when that power is abused. These critiques have not been met with universal agreement. Instead, there has been a concerted backlash from prosecutors, courts, and some scholars, contending that prosecutors are wrongly maligned and that reform (if indeed any reform is needed) should focus on other actors in the system.

Tennessee has recently witnessed this process of critique and backlash in two separate ways. In 2018, one East Tennessee prosecutor, in the pages of this law review, published an impassioned rebuttal to claims that prosecutorial misconduct is a significant problem.[1] In a wide-ranging article covering a variety of

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topics, Timothy C. Harker seeks to drive home three related insights. First, he contends that there is little evidence that prosecutorial misconduct is widespread.[2] He characterizes the claims regarding prosecutorial misconduct as a "myth," contending that the critics lack a proper empirical basis.[3] Second, he argues that the absence of empirical evidence is consonant with his personal perceptions regarding the probity of prosecutors.[4] He notes that he has "interacted with hundreds" of prosecutors, "virtually all of whom were uniformly ethical and honest."[5] Third, based on these points, he concludes that fault for wrongful convictions, mass incarceration, and any other ill in the system lies elsewhere.[6] He asserts that, based on his research and experience, prosecutorial misconduct occurs with "trivial infrequency," and thus "[r]eformers should look elsewhere within the criminal justice system for opportunities for improvement."[7]

This Article is not the place for a full rebuttal to Mr. Harker, whose article ranges widely over a variety of topics. It does, however, accept his invitation to re-assess the available empirical evidence regarding prosecutorial misconduct, to determine whether his claim that it is of "trivial" frequency is borne out.[8] The evaluation of available information supports the conclusion that, while exact numbers cannot be placed on the scale, prosecutorial misconduct is nonetheless a problem requiring attention, given both the evidence of its wide-spread nature and of its unique destructiveness to our justice system.

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1. Timothy C. Harker, *Faithful Execution: The Persistent Myth of Widespread Prosecutorial Misconduct*, 85 TENN. L. REV. 847 (2018).

2. *See id.* at 853–55.

3. *See id.* at 848, 853–55.

4. *See id.* at 895. Harker is not alone in fighting back against perceived attacks. Many similar points were made by a former prosecutor, who characterized the critiques as taking the position that: "Prosecutors are the Darth Vader of academic writing: mysterious, powerful and, for the most part, bad." Jeffrey Bellin, *Locked In: The True Causes of Mass Incarceration: And How to Achieve Real Reform*, 116 MICH. L. REV. 835, 837 (2018); *see also* Jerry P. Coleman & Jordan Lockey, Brady *"Epidemic" Misdiagnosis: Claims of Prosecutorial Misconduct and the Sanctions to Deter It*, 50 U.S.F. L. REV. 199, 243–44 (2016) (a similar article written by a former prosecutor).

5. Harker, *supra* note 1, at 895.

6. *See id.*

7. *Id.*

8. *See id.*

Second, this Article discusses a related second topic, the application of *Brady v. Maryland*[9] to pretrial disclosures by prosecutors. Reformers have suggested that the *Brady* standard be modified for purposes of pre-trial disclosures.[10] Harker claims that this proposed reform is seeking a solution to a non-existent problem.[11] This Article discusses recent litigation in the state and federal courts of Tennessee regarding the interaction between the *Brady* standard and the ethical rules governing the conduct of prosecutors. This issue arose after the publication of Harker's article when the Board of Professional Responsibility of the State of Tennessee took the position that the ethical rules required that prosecutors, in providing discovery of exculpatory information to defendants, go beyond the constitutional minimum of *Brady*.[12] The prosecutors in Tennessee, including the state District Attorney General's Conference and the three United States Attorney Offices in Tennessee, vigorously opposed this position and succeeded in convincing the Tennessee Supreme Court to vacate the Board's opinion.[13] The federal judges in the Eastern District of Tennessee, however, immediately informed the federal prosecutors that they agreed with the Board's opinion, which prompted a letter from the United States Attorney's Office renewing the disagreement.[14]

This Article concludes that, while *Brady* violations are uniquely difficult to count, *Brady* violations are a significant problem, especially given the immense consequences of any individual violation; that *Brady* is poorly-designed to apply to the pre-trial context, and when applied there invites abuse or mistake; and that the position of the judges of the Eastern District of Tennessee furthers the interests of the public.

I. OVERVIEW OF HARKER'S ARTICLE

Harker addresses a variety of topics, examining the extant literature and some case studies in support of his claim that there is little evidence of prosecutorial misconduct in the American justice

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9. 373 U.S. 83 (1963).

10. *See generally, e.g.*, Janet C. Hoeffel & Stephen I. Singer, *Activating a* Brady *Pretrial Duty to Disclose Favorable Information: From the Mouths of Supreme Court Justices to Practice*, 38 N.Y.U. REV. L. & SOC. CHANGE 467 (2014).

11. *See* Harker, *supra* note 1, at 895.

12. *See infra* Part VI.

13. *See In re* Petition to Stay the Effectiveness of Formal Ethics Opinion 2017-F-163, 582 S.W.3d 200, 202 (Tenn. 2019); *infra* Part VI.

14. *See infra* Section VI.C.

system.[15] He concludes that the vast majority of criminal prosecutions in the country are untainted by prosecutorial misconduct, and the studies identifying prosecutorial misconduct, which identify and discuss a limited number of cases, actually prove the opposite of their intended purpose.[16] He asserts that those few studies have been unthinkingly relied upon by critics of prosecutors without being closely examined.[17] He claims not merely that the critics have not proven what he would consider to be significant numbers of cases infected by prosecutorial misconduct, but further that the evidence shows that such significant misconduct does not exist.[18]

Harker then goes beyond a discussion of empirical evidence of prosecutorial misconduct to take in a number of separate subjects related to prosecutorial misconduct. He discusses plea bargaining;[19] selective prosecution;[20] criminalization of *malum prohibidum* conduct;[21] and overcharging.[22] In his view, these issues are not properly considered prosecutorial misconduct at all.[23] Lastly, Harker addresses a number of proposed reforms by critics of prosecutors, including the proposal to alter the standard of *Brady* to require reversal, regardless of traditional materiality, if a prosecutor intentionally suppressed any exculpatory evidence.[24] He claims that this proposed rule, which departs from *Brady* to focus on the intentions of the prosecutor, would not be workable.[25] He asserts

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15. Harker, *supra* note 1, at 852–66.
16. *See id.* at 853–54.
17. *See id.* at 860.
18. *See id.* at 852–66, 895.
19. *Id.* at 872–76.
20. *Id.* at 876–79.
21. *Id.* at 879–80.
22. *Id.* at 880–84.
23. As to plea bargaining, he notes that bargaining by prosecutors is an important part of the criminal justice system, necessary for its proper functioning, rather than the locus of abuse of power. As to selective prosecution and over-criminalization, he contends that the problem lies not with prosecutors but with the public (which misunderstands the basis of prosecutions) and with the legislature (which writes the over-inclusive laws). Finally, as to overcharging, he dismisses it as primarily a misunderstanding: prosecutors are required to charge multiple counts in certain cases for legal reasons, and ultimately such multiple charging has little practical effect given that sentencing is based on sentencing guidelines that group relevant conduct. *See id.* at 872–84.
24. *Id.* at 885 (citing Richard Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 737 (1987)).
25. *Id.* at 890.

that the proposal is part of an effort to "penalize even the most trivial 'abuses' by reversal."[26] Yet in his view, such a dramatic remedy is unnecessary in light of the absence of evidence of prosecutorial misconduct.[27]

II. EVALUATION OF STUDIES OF THE FREQUENCY OF PROSECUTORIAL MISCONDUCT

Nearly thirty years before the Supreme Court decision in *Brady v. Maryland*, the Court rebuked prosecutors engaging in improper behavior and sought to provide them guidance in their duties, charging, "[W]hile 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."[28] In the eighty-five years since the *Berger* decision, courts, legislatures, boards of professional responsibility, and academics have examined prosecutorial misconduct, reprimanded prosecutors engaging in misconduct, and drafted rules and guidelines to curb prosecutorial misconduct.[29] In this section, we seek to respond to Harker's

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26. *Id.* at 887.

27. *See id.* at 895. Harker also discusses the use of grand juries, noting that some critics regard grand juries as part of the problem and others as part of the solution, that some critics claim presentations to grand juries should be more complete and others criticize prosecutors who make such presentations as avoiding their own duties. *See id.* at 890–93. Lastly, he discusses the use of prosecutorial review commissions. He regards the lack of action taken some units as "confirm[ing] the absence of systemic prosecutorial misconduct." *Id.* at 894. As to other review boards containing lay-persons, he argues that lay-persons are poorly qualified to pass on "complex legal issues." *Id.*

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

29. *See, e.g.*, United States v. Tavera, 719 F.3d 705, 708 (6th Cir. 2013) (holding that the United States Attorney's failure to disclose exculpatory statements to the defense constituted a material violation of *Brady* and warranted reversal); H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51 (2013); Nicholas Chan, *New York Governor Signs Bill Creating Prosecutorial Misconduct Review Panel*, JURIST (Mar. 28, 2019, 10:34 AM), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor/; *Rule 3.8: Special Responsibilities of a Prosecutor*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor/ (last visited Mar. 19, 2020).

discussion of the empirical studies on prosecutorial misconduct and discuss additional related evidence.

A. Harker's Discussion of Empirical Studies on Prosecutorial Misconduct

Harker centers his evaluation of empirical information not on a full survey of the existing literature, but rather on a response to a single critical article by Margaret Johns.[30] According to Harker, that article relied upon four studies to conclude that prosecutorial misconduct was widespread.[31] Harker reviews these four studies: (1) The Center for Public Integrity's report on prosecutorial misconduct and harmful error findings;[32] (2) The Innocence Project's studies of prosecutorial misconduct;[33] (3) Liebman, Fagan, West, and Lloyd's pivotal study on error in the capital punishment system;[34] and (4) The Chicago Tribune's 1999 multi-part investigation of prosecutorial misconduct.[35] In Harker's view, these studies do not support the conclusions drawn by Johns's article; in fact, he suggests these studies support the general proposition that critics of prosecutors lack any firm empirical basis for their arguments.[36]

A few points are appropriate as to each of the challenged studies relied upon by Johns. As to the Center for Public Integrity, Harker writes:

> That study, already fifteen years old, found "over two thousand appellate cases since 1970 in which prosecutorial misconduct led to dismissals, sentence

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30. Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53.

31. *See* Harker, *supra* note 1, at 860–61.

32. *See* Johns, *supra* note 30, at 860 (citing *Harmful Error: Investigating America's Local Prosecutors*, CTR. FOR PUB. INTEGRITY (June 26, 2003) [hereinafter *Harmful Error*], https://publicintegrity.org/topics/politics/state-politics/harmful-error/).

33. *See* Johns, *supra* note 30, at 860–61 (citing BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000); INNOCENCE PROJECT, https://innocenceproject.org/ (last visited Aug. 1, 2020)).

34. *See* Johns, *supra* note 30, at 861 (citing James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973 1995*, 78 TEX. L. REV. 1839 (2000)).

35. Johns, *supra* note 30, at 61 (citing Maurice Possley & Kenneth Armstrong, *Trial and Error*, CHI. TRIB., (Jan. 10-14, 1999), https://www.chicagotribune.com/chi-020103trial-gallery-storygallery.html).

36. *See* Harker, *supra* note 1, at 861, 865–66.

> reductions, or reversals." Stated otherwise, the study found that, on average, there were approximately sixty instances of "proven" prosecutorial misconduct per year (between 1970 and 2003) in the entire United States.[37]

He then concludes that "the average of sixty instances of prosecutorial misconduct per year . . . constitute a negligible fraction of the total annual felony prosecutions," especially when compared to the millions of felony convictions each year.[38] In doing so, he engages in a sleight-of-hand representative of his approach. The Center for Public Integrity did not claim that its statistics capture all cases of prosecutorial misconduct.[39] In fact, it claimed the exact opposite.[40] Contrary to Harker's conclusion, finding sixty instances of prosecutorial misconduct each year is not the same as finding that there are *only* sixty instances of misconduct each year. Thus, to compare the number of cases of prosecutorial misconduct documented in that study with the raw number of total prosecutions is to compare apples to oranges. The relevant fact to draw from this study is not the precise number of cases of prosecutorial misconduct, but that such misconduct unquestionably exists in non-trivial amounts.

Harker next discusses the Innocence Project Study.[41] At the time of its writing, in August 1999, the authors noted that DNA testing provided "stone-cold proof that sixty-seven people were sent to

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37. *Id.* at 853 (quoting David Keenan et al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J.F. 203, 209–10 (2011)).

38. *Id.* at 854.

39. *See Harmful Error*, *supra* note 32.

40. The Center for Public Integrity provided the following disclaimer:

> The Center's listing of mistrials and appellate reversals is by no means complete. While legal databases like Lexis and Westlaw contain appellate rulings, some remain unpublished—and thus would not be part of any legal database. And, short of visiting every courthouse in the country, there is no way to determine how many cases are dismissed or ruled mistrials by trial judges (thus never reaching the appellate courts) because of a prosecutor's misconduct.

Methodology, the Team for Harmful Error, CTR. FOR PUB. INTEGRITY (June 26, 2003), https://publicintegrity.org/politics/state-politics/harmful-error/methodology-the-team-for-harmful-error/.

41. Harker, *supra* note 1, at 861–62 (discussing SCHECK ET AL., *supra* note 33).

prison and death row for crimes they did not commit."[42] Later in the study, in a chart that examines factors that lead to wrongful convictions, the study found that prosecutorial misconduct was at least one factor that contributed to wrongful convictions in twenty-six of sixty-two cases.[43] To paint it more starkly, in about four out of every ten wrongful conviction cases examined by the study, prosecutorial misconduct was a contributing factor.[44] Beyond misquoting sixty-seven as seventy-six,[45] Johns's summary of the Innocence Project data is entirely correct: a number of individuals have been fully exonerated by DNA, and prosecutorial misconduct contributed to that outcome in "many" of those cases.[46] Harker's criticism that Johns "clearly failed to read" the book, as she did not realize that it was about DNA testing in exoneration rather than prosecutorial misconduct, is belied by the fact that Johns never claimed that the book was solely about prosecutorial misconduct.[47] The relevant point is that in this subset of cases involving defendants that are now known to be innocent through DNA evidence, prosecutorial misconduct was a significant contributor to the conviction.

The third study considered is the Liebman study, which examines the "overall error rate" in all capital convictions in a twenty-three year period, from 1973 to 1995.[48] The study concludes that the overall error rate (necessitating the conviction's reversal) for the nation's 4,578 capital convictions that underwent inspection on state direct appeal, state post-conviction, or federal habeas review was 68% during the study period.[49] Within that 68%, the study attributes 16%, or about 498 cases, to prosecutorial misconduct,

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42. SCHECK ET AL., *supra* note 33, at xiv.

43. *Id.* at app. 2, 263. Earlier in the study, the authors discuss sixty-seven cases of wrongful conviction, but the chart only examines factors leading to wrongful convictions in sixty-two cases. *Compare id.* at xiv, *with id.* at app. 2, 263. Even assuming prosecutorial misconduct was not a factor in the five cases excluded from the chart, prosecutorial misconduct would remain a factor contributing to wrongful convictions in approximately 38.8% of cases.

44. *See id.* at app. 2, 263.

45. Johns, *supra* note 30, at 61 (quoting SCHECK ET AL., *supra* note 33, at xiv).

46. *See id.* at 57–58.

47. Harker, *supra* note 1, at 862; Johns, *supra* note 30, at 60–61.

48. Liebman et al., *supra* note 34, at 1849–50. Liebman defines "overall error rate" as the "frequency with which capital judgments that underwent full inspection were overturned at one of the three stages due to serious error." *Id.* at 1849. These three stages are state direct appeal, state post-conviction, and federal habeas review. *Id.* at 1849 n.36.

49. *Id.* at 1847, 1850.

defined as "prosecutorial suppression of evidence that the defendant is innocent or does not deserve the death penalty."[50] That is 498 people who were originally sentenced to die, whose convictions were overturned due to prosecutorial misconduct.[51] What is more, and a point that Harker obscures, is that on re-trial, 82% of people originally sentenced to die (408 human beings!) were found not to have deserved the death penalty.[52] Within those 408 people, approximately 34 were acquitted.[53]

Harker tries to deflect the force of this powerful study by focusing not on the 408 defendants but the 34 who were ultimately acquitted completely.[54] His takeaway is not the alarmingly high percentage of reversals or the hundreds of incidents of prosecutorial misconduct. Rather, he contends that, based on Liebman's data, each year "at most an average of 1.5 innocent defendants were convicted of a capital offense due to either intentional or unintentional prosecutorial misconduct."[55] There are two problems with this analysis. First, again he conflates two separate concepts in reasoning that as the study only located 498 cases of prosecutorial misconduct, then that represents an empirical finding that only 498 such cases (or 34 exoneration cases), and not more, actually exist. Second, by focusing only on cases where the defendant was subsequently fully acquitted, he minimizes the conduct in question. Under Harker's view, it is apparently not problematic (or at the least much less problematic) when a defendant truly guilty only of manslaughter or being an accessory after the fact is sentenced to death due to the improper actions of the prosecutor.[56] Such a

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50. *Id.* at 1850; *see also* Harker, *supra* note 1, at 862 (providing that 498 cases "were attributable to prosecutorial misconduct").

51. *See* Liebman et al., *supra* note 34, at 1850; *see also* Harker, *supra* note 1, at 862.

52. *See* Liebman et al., *supra* note 34, at 1852; *see also* Harker, *supra* note 1, at 862.

53. *See* Liebman et al., *supra* note 34, at 1852; *see also* Harker, *supra* note 1, at 863.

54. *See* Harker, *supra* note 1, at 863 (stating that "only 7% of these cases resulted in" exoneration).

55. *Id.* at 863.

56. *See id.* Harker states that "[w]e can assume that at least some portion of these defendants were convicted of some extremely serious offense on re-trial," yet he makes no attempt to justify this "assum[ption]" or quantify "some portion." *See id.* That is, he suggests that we should overlook the fact that defendants were wrongly sentenced to death based in part on prosecutorial misconduct because of the unexplored possibility that they were nonetheless guilty of "some extremely serious offense on re-trial." *Id.*

difference in outcome appears to be merely a detail to Harker, rather than an instance where someone not guilty of capital murder has been sentenced to death. He describes this system—a system where 498 people would not have been sentenced to die but for the prosecutor's misconduct—as a "success" "from an operational perspective."[57] We refuse to call this a success from any perspective. Indeed, this is powerful evidence of the failures of the system.

Finally, Harker criticizes Johns's reliance on a five-part newspaper series by the *Chicago Tribune*.[58] We agree with Harker on one point: the *Chicago Tribune* series should not be substituted for timely empirical evidence on prosecutorial misconduct.[59] However, we are unwilling to write the series off as valueless. While the data the series presents on conviction reversals due to prosecutorial misconduct in Cook County, Illinois is relevant to contemplation about prosecutorial misconduct, the real value of the series is its recounting of some of the most egregious forms of prosecutorial misconduct. In a particularly horrifying anecdote, the series recounts a competition among Cook County prosecutors called the "Two-Ton Contest," where prosecutors, upon conviction of a defendant, paraded the defendant out of the courtroom and literally weighed the person, and tallied the weight of each defendant.[60] The first prosecutor to convict defendants whose weight totaled two tons (4,000 pounds) won.[61] It bears emphasizing that most of these defendants were African American, and most (or perhaps all) of the prosecutors participating in this competition were white.[62] Behind closed doors, the contest was referred to with a racial epithet as "N***gers by the Pound."[63]

It bears mentioning, too, that during this same period these same local prosecutors were complicit in systematic torture of African American suspects.[64] In recent years, the City of Chicago has finally (albeit reluctantly) acknowledged a pervasive pattern of

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57. *Id.*

58. *Id.* at 863–64 (citing Possley & Armstrong, *supra* note 35 (linking to the multi-part series)).

59. *See id.*

60. Maurice Possley & Ken Armstrong, *Part 2: The Flip Side of a Fair Trial*, CHI. TRIB. (Jan. 11, 1999, 2:00 AM), https://www.chicagotribune.com/investigations/chi-020103trial2-story.html.

61. *Id.*

62. *Id.*

63. *Id.*

64. *See* Flint Taylor, *Racism, Torture and Impunity in Chicago*, NATION (Feb. 20, 2013), https://www.thenation.com/article/racism-torture-and-impunity-chicago/.

police torture, orchestrated by individuals such as former detective Jon Burge.[65] As Flint Taylor notes, "[t]he Cook County prosecutor's office not only countenanced and facilitated the racist pattern of torture; it also aggressively used the confessions so produced to wrongfully convict scores of African-American men, sending a dozen to death row."[66] In one instance, a suspect "at first refused to give a formal confession and instead told the Felony Review prosecutor that he was being tortured, [so] the prosecutor sent [the suspect] back to Burge for more abuse."[67] In another incident, a jail physician directly reported concerns of torture, only to have those concerns ignored by top-level prosecutors who continued with the prosecution of tortured suspects.[68] Perhaps most damning, some prosecutors were allegedly present during the torture of suspects to dutifully collect coerced confessions.[69]

Although Harker is correct to note that we may not draw broad inferences from these incidents, the egregious pattern of official misconduct bears attention and reveals how pervasive patterns of misconduct persist, even as they become "open secret[s]" among prosecutors and law enforcement.[70] Harker's response to the *Chicago Tribune* series is that "nearly every salacious story involved prosecutorial misconduct that occurred prior to 1980."[71] That may well be true, but that is not a sufficient reason to dismiss the import of the revelations regarding prosecutorial misconduct. The unethical behavior of prosecutors in that time period sits uneasily with his anecdotal assertions of the ethical nature of contemporary prosecutors,[72] at least in the absence of a reason to believe that prosecutors now are fundamentally different than prosecutors were in the past.

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65. *See Jon Burge and Chicago's Legacy of Police Torture*, CHI. TRIB. (Sept. 19, 2018, 12:22 PM), https://www.chicagotribune.com/news/ct-jon-burge-chicago-police-torture-timeline-20180919-htmlstory.html.

66. Taylor, *supra* note 64.

67. G. Flint Taylor, *The Chicago Police Torture Scandal: A Legal and Political History*, 17 CUNY L. REV. 329, 332 (2014) (providing a detailed and comprehensive overview of the police torture cases).

68. *Id.* at 332–33.

69. *See* Tillman v. Burge, 813 F. Supp. 2d 946, 966 (N.D. Ill. 2011).

70. Taylor, *supra* note 67, at 335.

71. *See* Harker, *supra* note 1, at 863.

72. *See id.* at 850.

B. Additional Recent Empirical Evidence Regarding Exonerations

Although not discussed by Harker, there is a substantial amount of data regarding wrongful convictions that comes from the National Registry of Exonerations.[73] This data again supports the conclusion that our system is worryingly inaccurate, and one of the prime drivers of that inaccuracy is prosecutorial misconduct.[74] As of November 2020, the Registry had documented a total of 2,688 exonerations, and it attributes "official misconduct" as a factor contributing to a wrongful conviction in 1,462 cases, or 54% of all wrongful conviction cases.[75]

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73. The National Registry of Exonerations is a project of the University of California Irvine Newkirk Center for Science & Society, University of Michigan Law School, and Michigan State University College of Law. *See Our Mission*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/mission.aspx (last visited Aug. 1, 2020).

74. *See % Exonerations by Contributing Factor*, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx (last visited Nov. 1, 2020).

75. *See id.* The National Registry of Exonerations defines "exoneration" as the following:

> A person has been exonerated if he or she was convicted of a crime and, following a post-conviction re-examination of the evidence in the case, was either: (1) declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action. The official action may be: (i) a complete pardon by a governor or other competent authority, whether or not the pardon is designated as based on innocence; (ii) an acquittal of all charges factually related to the crime for which the person was originally convicted; or (iii) a dismissal of all charges related to the crime for which the person was originally convicted, by a court or by a prosecutor with the authority to enter that dismissal. The pardon, acquittal, or dismissal must have been the result, at least in part, of evidence of innocence that either (i) was not presented at the trial at which the person was convicted; or (ii) if the person pled guilty, was not known to the defendant and the defense attorney, and to the court, at the time the plea was entered. The evidence of innocence need not be an explicit basis for the official action that exonerated the person. A person who otherwise qualifies has not been exonerated if there is unexplained physical evidence of that person's guilt.

Glossary, NAT'L REGISTRY EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx#OM (last visited Aug. 1, 2020).

The Innocence Project has also continued to examine the role of prosecutorial misconduct in wrongful convictions and conviction reversals.[76] In the wake of *Connick v. Thompson*,[77] the Innocence Project and partner organizations formed the Prosecutorial Oversight Coalition.[78] The Coalition identified 660 criminal cases over a five-year period (2004–2008) in five states (Arizona, California, Pennsylvania, New York, and Texas) where courts confirmed prosecutorial misconduct.[79] In 133 of the 660 cases, the courts deemed the misconduct so severe as to warrant the reversal of the conviction.[80] Again, unless these hundreds of cases can simply be disregarded, this is a problem requiring evaluation and discussion.

C. Conclusions Regarding Harker's Stance on Prosecutorial Misconduct

1. Harker's Affirmative Conclusion that Prosecutorial Misconduct Is Rare Is Not Supported by the Evidence Cited

Harker notes that in 2007 alone, there were over 2.2 million felony prosecutions in the United States.[81] He extrapolates that given the allegedly low incidence of prosecutorial misconduct discussed above, a "negligible fraction" of cases are marred by

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The Registry defines "official misconduct" as when "[p]olice, prosecutors, or other government officials significantly abused their authority or the judicial process in a manner that contributed to the exoneree's conviction." *Id.*

76. *See generally* INNOCENCE PROJECT, https://innocenceproject.org/ (last visited Aug. 1, 2020).

77. 563 U.S. 51 (2011). In *Connick v. Thompson*, the United States Supreme Court held that a single *Brady* violation committed by one attorney in the New Orleans County District Attorney's Office was insufficient to place the district attorney on notice of the need for further training and therefore the office was not civilly liable based on a failure-to-train theory of municipal liability. *Id.* at 54, 68, 71–72.

78. *See* INNOCENCE PROJECT, PROSECUTORIAL OVERSIGHT: A NATIONAL DIALOGUE IN THE WAKE OF *CONNICK V. THOMPSON* (2016).

79. *Id.* at 12.

80. *Id.* The Coalition reported that type of misconduct acknowledged by courts "varied widely," and included "improper arguments/comments; improper witness examination; *Batson* violations[;] . . . *Brady* violations[;] . . . and violations of a defendant's Fifth Amendment right not to testify, such as improper commentary by the prosecutor as to the defendant's failure to take the stand." *Id.* at 13 (internal citations omitted).

81. Harker, *supra* note 1, at 853.

prosecutorial misconduct.[82] This conclusion is methodologically unsound and specious.

The data does not establish exactly how prevalent prosecutorial misconduct is—that is, we cannot identify the precise number of cases infected by prosecutorial misconduct in the courts each year. Such certainty is virtually impossible to obtain, particularly given that some forms of misconduct such as *Brady* violations may pass without ever being discovered (as discussed *infra*). Presumably the only way to obtain a scientifically valid study of the exact scope of prosecutorial misconduct would be to complete a random sample requiring all prosecutors to hand over their entire files and all information they possess (in their file and elsewhere) in an agreed upon number of randomly selected cases for review by some unbiased, independent entity. That simply is not available nor is it likely that such cooperation would be forthcoming from prosecutors.[83] Even if that were forthcoming, prosecutors who engage in misconduct may not record such misdeeds in a fashion that is readily identifiable through the mere review of a prosecutor's case file. Given these dynamics, we cannot confidently calculate the precise incidence of prosecutorial misconduct. Contrary to Harker's defiant exhortations that such misconduct is infinitesimally rare,[84] the true incidence is simply not known. Although this reality does not absolve commentators of their obligation to produce evidence

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82. *Id.* at 853–54. Harker notes:

> To put the numbers in perspective, there were 2,249,159 total felony convictions in the United States in 2007 alone, the most recent year for which data are available at both the state and federal level. These consist of 72,436 federal felony convictions obtained mostly by the U.S. Attorneys' Offices and 2,176,723 state felony convictions obtained by state and local prosecutors. These numbers demonstrate that the average of sixty instances of prosecutorial misconduct per year—presumably substantiated by real evidence—constitute a negligible fraction of the total annual felony prosecutions. If the frequency of prosecutorial misconduct were actually one hundred times greater than suggested by the available evidence, approximately 99.73% of all felony convictions in 2007 still would have been untarnished by such conduct.

Id. (internal citations omitted).

83. *See, e.g.*, Joaquin Sapien, *Bill Proposes Greater Accountability for New York Prosecutors Who Break the Law*, PROPUBLICA (Aug. 16, 2018, 2:58 PM), https://www.propublica.org/article/bill-proposes-greater-accountability-for-new-york-prosecutors-who-break-the-law (noting that the District Attorneys Association of New York opposed independent oversight of their ethical responsibilities).

84. Harker, *supra* note 1, at 853–54.

documenting the occurrence of prosecutorial misconduct, it also does not provide the absolution of prosecutors which Harker claims. To quote the traditional aphorism, "the absence of evidence is not evidence of absence," and in any event, here, the "evidence of misconduct" is not lacking.[85]

2. Rather, the Evidence Supports a Conclusion that Prosecutorial Misconduct is a Problem that Needs to be Addressed

Quantifying the number of wrongful convictions that result from prosecutorial misconduct is a challenging venture.[86] These convictions, by their very nature, are difficult to detect and even more difficult to litigate.[87] In spite of these difficulties in fully assessing and quantifying the problem, ample evidence demonstrates that prosecutorial misconduct is a driving force behind wrongful convictions.[88]

The National Registry of Exonerations, discussed above, is likely the most comprehensive effort in quantifying the magnitude of wrongful convictions, and it attempts to "provide comprehensive information on exonerations of innocent criminal defendants."[89] The Registry provides that an exoneration occurs when "a defendant who was convicted of a crime was later relieved of all legal consequences of that conviction through a decision by a prosecutor, a governor or a

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85. *In re Deon S.*, No. W2012-01950-COA-R3-PT, 2013 WL 1636436, at *8 n.7 (Tenn. Ct. App. Apr. 17, 2013) (attributing this quote to astronomer Carl Sagan).

86. *See, e.g.*, Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 832–33 (2010).

87. *See* Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1631–32 (2008) (noting the procedural barriers to developing a factual innocence claim); Michael J. Muskat, Note, *Substantive Justice and State Interests in the Aftermath of* Herrera v. Collins*: Finding an Adequate Process for the Resolution of Bare Innocence Claims Through State Postconviction Remedies*, 75 TEX. L. REV. 131, 131–33 (1996) (advocating for more permissive appellate procedures to allow litigants to raise innocence claims based on newly discovered evidence).

88. *See % Exonerations by Contributing Factor*, *supra* note 74 (noting that 54% of wrongful convictions are the result of official misconduct); *see also* Possley & Armstrong, *supra note* 35 (chronicling a pervasive pattern of prosecutorial misconduct and describing 381 cases where defendants' convictions were thrown out due to prosecutors knowingly concealing exculpatory evidence or knowingly presenting false evidence).

89. *Our Mission*, *supra* note 73.

court, after new evidence of his or her innocence was discovered."[90] Between 1989 and November 2020, the Registry has cataloged 2,688 exonerations that meet this definition.[91] These convictions have cost exonerees 24,350 years of their lives.[92] Significantly, the Registry finds that in 1,462 cases, official misconduct was a contributing factor to the wrongful conviction.[93]

While these figures provide a fairly comprehensive accounting of the known incidence of exoneration, the academic literature widely varies in its broader assessment of the incidence of wrongful convictions.[94] At one extreme, some observers estimate that wrongful convictions are extremely rare and may constitute as little as 0.027% of all convictions.[95] Other case studies note that felony wrongful conviction rates may be as high as 3.3%.[96] Extrapolation from these figures is difficult but regardless of the overall incidence of wrongful convictions, the exoneration data suggests that wrongful convictions are the product of prosecutorial misconduct most of the time.[97] This evidence fully justifies efforts to ameliorate and reduce prosecutorial misconduct, particularly that leading to wrongful convictions.

3. Harker's Contention that a Certain Amount of Risk of Harmful Prosecutorial Misconduct is Unavoidable Cannot be Accepted

Harker seems to equate the conviction of the innocent as the cost of doing business and blithely concludes that the risk to innocent defendants is remote.[98] Above, we have disputed the idea that anyone can be certain that convictions based on prosecutorial

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90. SAMUEL R. GROSS & MICHAEL SHAFFER, EXONERATIONS IN THE UNITED STATES, 1989–2012: REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS 7 (2012), https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf.

91. *% Exonerations by Contributing Factor*, *supra* note 74.

92. *Id.*

93. *Id.*

94. *See, e.g.*, Gould & Leo, *supra* note 86, at 832–36 (discussing the prevalence of wrongful convictions).

95. Joshua Marquis, *The Innocent and the Shammed*, N.Y. TIMES (Jan. 26, 2006), https://www.nytimes.com/2006/01/26/opinion/the-innocent-and-the-shammed.html.

96. D. Michael Risinger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 799 (2007).

97. *See % Exonerations by Contributing Factor*, *supra* note 74.

98. Harker, *supra* note 1, at 861.

misconduct are rare. Even if it were rare in some abstract statistical sense, it is nonetheless weighty and significant that our legal system has unjustly deprived thousands of innocent individuals years of their lives. Moreover, it is even more significant that a leading cause of such injustices is the misconduct of prosecutors.[99] This phenomenon is most glaring in the context of capital cases. A startling 82.4% of exonerations of individuals condemned to death between 2007 and 2017 was the result, in whole or in part, of official misconduct.[100] Thus, even if Harker is correct in some sense that the conviction of the innocent as a result of prosecutorial misconduct is rare,[101] it is nonetheless a tragic miscarriage of justice that has been well documented. Nor should we disregard the problem as freakishly random. While the data is not comprehensive, a recurring theme emerges—that prosecutorial misconduct plays a significant contributing role to wrongful convictions. Closer scrutiny of the kind given to capital cases to other areas is likely only to disclose more prosecutorial misconduct.

Harker concedes that "the worst kind of prosecutorial misconduct is that which results in the conviction of an innocent defendant."[102] He is quick to dismiss the role of prosecutorial misconduct in wrongful convictions, however, and concludes that relative rarity of such convictions should provide us comfort as the data does not suggest that defendants are "exposed to a real risk of conviction due to prosecutorial misconduct."[103]

This conclusion shows a profound misunderstanding of bedrock principles of the American legal system and betrays a willingness to accept wrongful convictions as collateral damage to the criminal justice system. The Anglo-American legal tradition's protection for the rights of the innocent is most famously encapsulated by Blackstone's ratio that "the law holds that it is better that ten guilty persons escape than that one innocent suffer."[104] This section argues that in spite of the limitations of available data, we can be certain that wrongful convictions resulting from prosecutorial misconduct

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99. *See, e.g.*, *% Exonerations by Contributing Factor*, *supra* note 74.

100. *The Most Common Causes of Wrongful Death Penalty Convictions: Official Misconduct and Perjury or False Accusation*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/dpic-analysis-causes-of-wrongful-convictions (last visited Aug. 1, 2020).

101. *See* Harker, *supra* note 1, at 861.

102. *Id.*

103. *Id.*

104. 4 WILLIAM BLACKSTONE, COMMENTARIES *358 (1893).

occur and these instances frequently betray an alarming dysfunction in the criminal justice system.[105]

We thus disagree with Harker in two ways. First, while the available data does not establish a precise evaluation of the exact scope of prosecutorial misconduct, the data certainly does not establish Harker's contrary conclusion, that prosecutorial misconduct is vanishingly rare; on the contrary, the available data shows that this is a problem of a scale requiring action.[106] Second, we do not accept the proposition that prosecutorial misconduct is simply the cost of doing business and that abridgment of constitutional liberties can be discounted only because in some vague and imprecise sense it is "rare."[107] Harker's effort to deflect further attention from prosecutorial actions is misguided.

III. OUTLINE OF *BRADY* AND ITS PROGENY

One of the best-known and most-discussed categories of prosecutorial misconduct is the suppression of exculpatory evidence, usually discussed in the context of the Supreme Court's decision in *Brady v. Maryland*.[108] As set forth below, the issue of prosecutorial non-disclosure of exculpatory evidence is at the heart of many discussions about the prevalence of prosecutorial misconduct and reforms intended to improve the fairness and accuracy of criminal prosecutions.

A. Definition of Materiality

It is not necessary to comprehensively outline the evolution of the Supreme Court's jurisprudence on prosecutorial disclosures in this Article; however, some background on *Brady* is relevant here. In

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105. *See* Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 436 (2010) ("The problem with *Brady* violations is not the frequency with which they occur, it is the fact that they occur at all. By definition, *Brady* violations involve the withholding of material evidence that has a significant adverse impact on the accuracy of the guilt/innocence determination. Thus, even one *Brady* violation is too many when such misconduct can and does result in a wrongful conviction or a sentence of death.").

106. *See infra* Part IV.

107. *See* Harker, *supra* note 1, at 853–54, 861.

108. 373 U.S. 83 (1963). *See generally* Harker, *supra* note 1, at 884–90 (discussing *Brady* largely in the context of a rejected set of proposed reforms to the *Brady* standard).

Brady, the Court held 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."[109] The Court explained its rationale:

> The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts." A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not "the result of guile," to use the words of the Court of Appeals.[110]

Significantly, the exact definition of materiality was left unresolved by the Court. As commentators have noted, the discussion in *Brady* itself can be read as using materiality as synonymous with relevance.[111] Further decisions, however, developed a much more limited interpretation of materiality. It is

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

110. *Id.* at 87–88.

111. *See* Hoeffel & Singer, *supra* note 10, at 468–75 ("A prosecutor can do no more than speculate on the events of the future trial and the views of unknown jurors about the case."); Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 647 (2002). Hoeffel and Singer characterize the Supreme Court's definition of materiality, as adopted in *Bagley*, as non-binding dictum when applied to the pretrial context. *Id.* at 471. They note comments made by a majority of the Court's justices in oral argument in *Smith v. Cain*, 565 U.S. 73 (2013), indicated that the justices viewed the pre-trial obligation as being different from the post-trial standard. *Id.* at 480. Those discussions, however, did not make it into the final opinion in *Smith*. *Id.*

that development that has both complicated litigation and reduced the impact of *Brady*.

The Court first adopted a multipart test in *United States v. Agurs*,[112] holding: (1) where the suppressed evidence would have shown that the prosecution presented known perjurious testimony, reversal is required if "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury,"[113] (2) where the evidence was directly requested by the defendant, the failure to turn over the evidence is "seldom, if ever, excusable,"[114] and (3) if there was no request for the information by the defendant, reversal was required only where the undisclosed evidence would create a reasonable doubt that did not otherwise exist.[115] However, the analysis in *Agurs* was changed in *United States v. Bagley*,[116] where the Court outlined a single standard for materiality:

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.[117]

In doing so, the Court explicitly relied upon a similar standard developed in the context of the Sixth Amendment right to the effective assistance of counsel in *Strickland v. Washington*.[118]

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

113. *Id.* at 103. The "reasonable likelihood" language stems from *Napue v. Illinois*, 360 U.S. 264, 271 (1959), where it was used in passing. It was then cited in *Giglio v. United States*, 405 U.S. 150, 154 (1972), as setting out the applicable standard for when a new trial is required.

114. *Agurs*, 427 U.S. at 106.

115. *Id.* at 112–13.

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

117. *Id.* at 682.

118. Strickland v. Washington, 466 U.S. 668 (1984). In *Strickland* the Court said that its standard for prejudice was derived from *Agurs* and *United States v. Valenzuela-Bernal*: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694 (citing 458 U.S. 858, 872 (1982) (test for materiality of testimony of witness made unavailable to the defense by deportation); *Agurs*, 427 U.S. at 112–13 (test for materiality of undisclosed exculpatory information). The language of "probability sufficient to undermine

B. Application of Brady *Prior to Pleas*

The Supreme Court's decisions left open the question of whether, and how, the *Brady* principles would apply to a defendant who entered a guilty plea rather than going to trial. The Court addressed a subset of this issue in *United States v. Ruiz*.[119] There, it concluded that disclosure of impeachment information, which would be material under the *Brady* standard,[120] was not required prior to entry of a guilty plea.[121] The Court began by noting that *Brady* was connected to the right to a fair trial.[122] Impeachment evidence, it wrote, "is special in relation to the fairness of a trial, not in respect to whether a plea is *voluntary*."[123] It continued: "It is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant."[124]

The Court further engaged in a balancing of the nature of the private interests at stake; the value of the safeguard; and the impact on the Government's interests.[125] Under this balancing, it concluded that there was diminished value to a defendant of requiring such disclosure, but a significant detriment to the Government. It wrote:

> [A] constitutional obligation to provide impeachment information during plea bargaining, prior to entry of a guilty plea, could seriously interfere with the Government's interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice. The Ninth Circuit's rule risks premature disclosure of Government witness information, which, the Government tells us, could "disrupt ongoing investigations" and expose prospective witnesses to serious harm.[126]

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confidence in the outcome" seems to have been used first in *Strickland* and is not found in any of the predecessor cases on Westlaw.

119. United States v. Ruiz, 536 U.S. 622 (2002).
120. *See id.* at 629; *see also* Giglio v. United States, 405 U.S. 150, 154 (1972).
121. *Ruiz*, 536 U.S. at 633.
122. *Id.* at 628.
123. *Id.* at 629.
124. *Id.* at 630.
125. *Id.* at 631–32.
126. *Id.*

The Court continued by explaining the negative consequences of a contrary rule:

> It could require the Government to devote substantially more resources to trial preparation prior to plea bargaining, thereby depriving the plea-bargaining process of its main resource-saving advantages. Or it could lead the Government instead to abandon its heavy reliance upon plea bargaining in a vast number—90% or more—of federal criminal cases. We cannot say that the Constitution's due process requirement demands so radical a change in the criminal justice process in order to achieve so comparatively small a constitutional benefit.[127]

As discussed further *infra* Section V.D, the issue of whether traditional exculpatory information (not impeachment information) that is material needs to be disclosed prior to a guilty plea has not been decided by the Supreme Court.

IV. FREQUENCY OF *BRADY* VIOLATIONS

Brady violations are among the most pernicious constitutional violations, and one of the most discussed.[128] Curiously, Harker devotes relatively little attention to them, lumping them in with other kinds of misconduct under his overall conclusion that "prosecutorial misconduct of all sorts occurs with trivial infrequency."[129] Even more curiously, he barely mentions, and only in passing, the single most salient fact regarding *Brady* violations: they are, by definition, committed out of the view of the defendant and defense counsel.[130] If defense counsel knows about the suppressed information at or before trial, then it has not been suppressed for purposes of *Brady*.[131] Because of their elusive nature,

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127. *Id.* at 632.

128. *See* Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 U. D.C. L. REV. 275, 278 (2004) (noting that, of cases studied by the Innocence Project, "[t]he vast majority of those instances [of prosecutorial misconduct] were cases of destruction or suppression of exculpatory evidence").

129. Harker, *supra* note 1, at 884–90, 895.

130. *See id.* at 859.

131. *See* Sara Gurwitch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Evidence to the*

Brady violations cut directly against Harker's thesis that the volume of prosecutorial misconduct can be and has been measured and that it has been found to be minimal.[132] No discussion of the frequency of prosecutorial misconduct can be complete without grappling with the problem of undiscovered violations.

Consider a case in which an eyewitness made a statement to a law enforcement investigator that implicated a third party, rather than the defendant, as having been the perpetrator. Then the prosecution goes to trial and convicts the defendant without providing any discovery regarding the eyewitness. How would a defendant or counsel know of this statement in order to make a post-trial *Brady* claim? There are only a few possible ways, none of which seem likely. First, the eyewitness could approach the defense team and tell the defense team that he or she had made exculpatory statements prior to trial. However, if the eyewitness did not approach the defense prior to trial, it is not clear why he or she would do so after trial. Further, the eyewitness might not know that the State had not provided discovery regarding that the statement, and instead assume that defense counsel had simply decided not to call him as a witness.

Second, the defense could learn of the eyewitness from the prosecutor or a law enforcement investigator. However, it is hard to identify an incentive for someone from the prosecution team, having just obtained a conviction by suppressing evidence, to seek out the defense team and tell them about the eyewitness. (Indeed, investigators may not be aware that the statement was not provided to the defense by the trial prosecutor.) If the prosecution team members were aware that the material was material under *Brady* prior to trial, and suppressed the evidence nonetheless, it seems unlikely that they would re-discover their ethical compass after obtaining a conviction. Similarly, if the members of the prosecution team, for some reason, incorrectly believed that the evidence was not material under *Brady*, and thus made a legal decision that it was not discoverable, then it is unclear why they would revisit that analysis after trial.

Third, if the statement was reduced to writing, and included in the prosecution's file, then it might potentially be obtained pursuant to a public records request. Some jurisdictions allow, upon the

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Defense, 50 SANTA CLARA L. REV. 303, 306 (2010) ("Because the essence of a *Brady* violation is that the prosecution has withheld information from both the defense and the court, there is no court that would be aware of such a violation.").

132. *See* Harker, *supra* note 1, at 854, 895.

conclusion of direct appeals, for the prosecution's file to be subject to freedom of information act inquiries.[133] But the percentage of defendants, now possibly incarcerated and not necessarily entitled to appointed counsel, who have the ability to request and review such records would likely be small. And, of course, the statement might not have been documented in the file.

Finally, in the course of re-investigating the case, the defense could independently discover the eyewitness. Few defendants however have the resources to re-investigate cases after conviction, and if the pre-trial investigation did not turn up this witness, it is not probable that a post-trial investigation would either. In sum, if the statement was suppressed prior to and at trial by the prosecution, the odds are that it will continue to be suppressed and the defendant will never know about it. Thus, the defendant will never make a *Brady* claim regarding it.[134]

Because of this dynamic, it is difficult to imagine a way of determining precisely how frequent *Brady* violations occur, as knowledge of those violations will surface largely by happenstance, "serendipity,"[135] "sheer luck,"[136] or perhaps unusually diligent and well-resourced post-trial investigation.[137] Given the practical improbabilities of a defendant discovering a *Brady* violation after

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133. *See, e.g.*, United States v. Bagley, 473 U.S. 667, 671 (1985) (discussing how the Freedom of Information Act could be used to show a *Brady* violation).

134. *See* Bennett L. Gershman, *Litigating* Brady v. Maryland: *Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 537 (2007).

135. *See* Jason Kreag, *Disclosing Prosecutorial Misconduct*, 72 VAND. L. REV. 297, 348 (2019).

136. *See* Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 434 (2010).

137. One of the authors of this Article discovered the basis for a post-trial *Brady* claim only because a cell-mate of the defendant, then serving a lengthy prison sentence, happened years later to be watching television when a news report about a trial witness appeared (a news report that was unrelated to the defendant's case but which mentioned the witness's undisclosed involvement in another case in the same time period). Had the cell-mate been watching a different channel that day, the issue may have escaped discovery forever. *See* Commonwealth v. Smith, 58 N.E.3d 1047, 1053 (Mass. App. Ct. 2016); *see also* David Keenan et al., *The Myth of Prosecutorial Accountability After* Connick v. Thompson*: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. F. 203, 210 (2011) ("the vast majority of known instances of prosecutorial misconduct come to light only during the course of a drawn-out trial or appellate proceeding").

trial, it is reasonable to conclude that known *Brady* violations are only the tip of the iceberg.[138]

V. PROBLEMS WITH THE *BRADY* STANDARD

As noted by Harker, there are many commentators who have offered criticisms of the *Brady* standard and suggestions for reform or alteration.[139] These criticisms include some arguments that *Brady* is not the best way to evaluate post-trial due process claims, but primarily, and of greatest relevance to the instant Article, arguments that *Brady* should not govern the pre-trial decision of whether to disclose evidence, and thus allow a prosecutor to disclose prior to trial only that information which he or she believes meets the *Brady* materiality standard.[140]

The problems with application of the *Brady* standard prior to trial can be approached in three useful ways. First, the *Brady* standard is a post-trial standard of review which is logically ill-suited to use prior to trial.[141] Second, the *Brady* standard places demands on prosecutors that are contrary to human nature.[142] In particular, the article argues that the *Brady* standard is flawed in ways that promote its own violation by leading to systematic under-disclosure. Finally, *Brady* provides little or no protection for wrongful conviction in the vast majority of cases which are resolved by plea agreements.[143] Thus, one of the most crucial pillars of our protections for criminal defendants, in fact, gives no support for the numerical majority of defendants.

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138. *See* United States v. Olsen, 737 F.3d 625, 630 (9th Cir. 2013) (Kozinski, J., dissenting) ("Due to the nature of a *Brady* violation, it's highly unlikely wrongdoing will ever come to light in the first place. . . . In the rare event that the suppressed evidence does surface, the consequences usually leave the prosecution no worse than had it complied with *Brady* from the outset.").

139. *See* Harker, *supra* note 1, at 884 (discussing various perceived substantive or terminological flaws in Richard Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 731 (1987)). Beyond one citation to a subsequent discussion of Professor Rosen's position, Harker does not engage with any of the significant scholarly literature on the subject. *See* Harker, *supra* note 1, at 888–89 (citing Bennett L. Gershman, *Mental Culpability and Prosecutorial Misconduct*, 26 AM. J. CRIM. L. 121, 132 (1998)).

140. *See* Harker, *supra* note 1, at 888–90.

141. *See infra* Section V.A.

142. *See infra* Section V.B.

143. *See infra* Section V.D.

A. Brady *Is an Appellate Standard Adopted for Pre-Trial Use*

The first problem with use of *Brady* for determining the scope of pre-trial disclosure is a logical one. *Brady* is derived from a post-trial, retrospective standard of review.[144] The materiality standard serves to incorporate a harmless error analysis. It is, by definition, impossible for anyone (whether a career prosecutor, a judge, or anyone else) to operate with certainty prior to trial.[145] As described below, this standard requires prosecutors to make evaluations that are cognitively difficult for humans. Equally important, though, it requires them to do so without providing them with the necessary information for making those evaluations. *Brady* requires a measurement of the weight of a given piece of evidence against the totality of other evidence, including evidence known to the defense and in light of the theory of defense.[146] Yet at the time the prosecutors make this decision, they do not know everything that the defense knows and may well not even know the theory of defense. The prosecution also may have a piece of evidence that, unknown to the prosecutor, is the missing piece of the puzzle for the defense theory. The prosecutor may reasonably believe that a piece of evidence is insufficiently probative to meet the materiality standard, due to the strength of the State's case, yet not be aware of other defense attacks on the State's case that will weaken it to the point of breaking. In short, asking a prosecutor to evaluate the materiality of a piece of evidence, prior to trial, is an exercise in information-limited speculation, and is patently impossible to perform reliably. One commentator mildly phrases the problem as follows: "It seems curious, to say the least, that a prosecutor has a constitutional obligation *before* trial to disclose a category of information that cannot be defined until *after* trial."[147]

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144. *See generally* Brady v. Maryland, 373 U.S. 83 (1963).

145. Hoeffel & Singer, *supra* note 10, at 475 ("A prosecutor can do no more than speculate on the events of the future trial and the views of unknown jurors about the case."). Hoeffel and Singer characterize the Supreme Court's definition of materiality, as adopted in *Bagley*, as non-binding dictum when applied to the pre-trial context. *Id.* at 468. They note comments made by a majority of the Court's justices in oral argument in *Smith v. Cain*, 565 U.S. 73 (2013), indicate that the justices viewed the pre-trial obligation as being different from the post-trial standard. *Id.* at 480. Those discussions, however, did not make it into the final opinion in *Smith*. *Id.*; *see also* Sundby, *supra* note 111, at 647.

146. *See Brady*, 373 U.S. at 87.

147. John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 471 (2001).

The genesis of this problem is apparent: the use of the post-trial appellate standard in a pre-trial context.[148] Such appellate standards are everywhere in the law, but are rarely imported directly to cover decision-making in the pre-trial or trial context. Consider an analogy: under the Rules of Evidence, unless they fall under an exception, out-of-court statements introduced for the truth of the matter asserted are barred by the rule against hearsay.[149] Erroneous admission of hearsay evidence is generally reversible error only if it was not harmless.[150] These two inquiries (error and harmlessness) are kept separate.[151] If, however, the Rules of Evidence were changed to state that out-of-court statements introduced for the truth of the matter asserted were barred by the rule against hearsay only if they have a reasonable probability of affecting the outcome, then presumably everyone would agree that the rule was unworkable. There would be no way to know, at the moment of admission, whether a statement was hearsay or not. Indeed, that determination could not be made until the end of trial. Yet that is exactly what happens when *Brady* is applied pre-trial and the appellate standard of review is incorporated into the initial subjective evaluation: there is no way to determine, with certainty, whether any given piece of evidence is material or not until the trial is over.[152]

The puzzle is not whether it is possible to come up with a more logical standard. As discussed below, it is easy to do so by merely removing the materiality requirement. The puzzle is instead why, given the importance of the *Brady* rights to our system, we have persisted with an approach that is logically incoherent.[153] Why have

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148. As one court has memorably written, use of *Brady* in this way would require the prosecution to "look at the case pretrial through the end of the telescope an appellate court would use post-trial." United States v. Safavian, 233 F.R.D. 12, 16 (D.D.C. 2005).

149. *See* FED. R. EVID. 801, 802.

150. *See, e.g.*, United States v. Toney, 161 F.3d 404, 410 (6th Cir. 1998) (applying the harmless error standard in determining whether reversal was required).

151. *See, e.g., id.* (finding error and then determining whether it was harmless).

152. One commentator describes this as an "odd and circular spectacle: a pre-trial obligation that is defined through speculation on a post-trial result." Sundby, *supra* note 111, at 658.

153. *See* Eugene Cerruti, *Through the Looking-Glass at the* Brady *Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process*, 94 KY. L.J. 211, 212 (2005) ("It fails because it was never, or at least not for longer than a moment, designed to succeed.").

we been content to adopt a standard that is "impossible and perverse?"[154]

B. Brady *Imposes Duties of Evaluation on Prosecutors that Are Difficult to Fulfill*

1. Demand Placed on Prosecutors by *Brady*

Secondly, the *Brady* standard, when applied pre-trial, places prosecutors in an unusual position: having determined that a defendant is guilty and deserving of criminal charges, and with institutional and professional pressure to prove the defendant guilty, the prosecutor must step back and make an objective evaluation of the weight of pieces of evidence that tends to show that the defendant is not guilty.[155]

This set of simultaneous considerations thus placed on a prosecutor is perhaps unique in the law. Lawyers are often forced to do things that can frustrate their own interests, but those impositions are generally tightly defined rather than open to interpretation or requiring objective evaluation. As one commentator has phrased it, *Brady* "presents a significant and unique departure from the traditional, adversarial mode of litigation" by placing prosecutors in a "schizophrenic situation" of having to "balance competing and contradictory objectives."[156] Justice Marshall presciently described this problem in his dissent in *Bagley*:

> At the trial level, the duty of the state to effectuate *Brady* devolves into the duty of the prosecutor; the dual role that the prosecutor must play poses a serious obstacle to implementing *Brady*. The prosecutor is by trade, if not necessity, a zealous advocate. He is a trained attorney who must aggressively seek convictions in court on behalf of a victimized public. At the same time, as a

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154. Hoeffel & Singer, *supra* note 10, at 490.

155. *See* Lisa Kern Griffin, *Criminal Adjudication, Error Correction, and Hindsight Blind Spots*, 73 WASH. & LEE L. REV. 165, 179 (2016).

156. Gershman, *supra* note 134, at 533; *see also* Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1609 (2006). Another commentator uses a different metaphor, stating that *Brady* requires a "prosecutor who is capable of a Zen-like state of harmonizing objective and subjective beliefs." Sundby, *supra* note 111, at 653–54.

> representative of the state, he must place foremost in his hierarchy of interests the determination of truth. Thus, for purposes of *Brady*, the prosecutor must abandon his role as an advocate and pore through his files, as objectively as possible, to identify the material that could undermine his case. Given this obviously unharmonious role, it is not surprising that these advocates oftentimes overlook or downplay potentially favorable evidence, often in cases in which there is no doubt that the failure to disclose was a result of absolute good faith. Indeed, one need only think of the Fourth Amendment's requirement of a neutral intermediary, who tests the strength of the policeman-advocate's facts, to recognize the curious status *Brady* imposes on a prosecutor.[157]

Perhaps the most common criticisms of the *Brady* standard focus on the problem of misguided incentives and ease of avoidance. Starkly put, a prosecutor has a strong practical incentive to limit disclosure of exculpatory evidence—evidence which, by definition, will make conviction harder to obtain. At worst, from the perspective of a prosecutor, disclosure can lead to an acquittal, an outcome that the prosecutor likely believes not to be in the public interest and which may come at some professional cost for the prosecutor. At best, it will require the prosecutor to work harder to overcome the force of the disclosed evidence. Further, as outlined above, non-disclosure of exculpatory information may well never come to light. Finally, the remedy for a *Brady* violation, in a situation where the undisclosed evidence nonetheless comes to light, is merely to grant a new trial[158]—technically returning the prosecution to the state that it would have been had the evidence been initially disclosed. The prosecutor is arguably not any worse off than he or she would have

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157. United States v. Bagley, 473 U.S. 667, 696–97 (1985) (Marshall, J., dissenting); *see also* John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 228 (2013) ("Of course, they are officers of the court, but they are also hard-charging, competitive lawyers whose reputations and satisfactions depend on obtaining convictions. To that end, they construct a narrative of the case that aligns the evidence with a verdict of guilty. *Brady* requires not only that zealous prosecutors help the opposition, but that they do so by crediting a version of the evidence at odds with their understanding. Both common sense and cognitive psychology confirm the difficulty of that task.").

158. *See, e.g.*, Giglio v. United States, 405 U.S. 150, 151 (1972) (noting that the remedy for a violation of *Brady* and *Napue* is "to require a new trial").

been if disclosure had been provided initially. With this set of incentives, with much to gain from nondisclosure and little to gain from disclosure, it is not hard to imagine a rational, but not ethical, actor choosing to suppress evidence.

2. *Brady* Imposes Impossible Duties Even for Ethical Prosecutors

To be sure, Harker posits that all prosecutors, at least those he has encountered, are ethical professionals, and thus resistant to the set of incentives that might otherwise encourage willful misconduct.[159] And indeed it seems correct for him to assert that not all prosecutors can be analyzed as the Holmesian "bad man," making purely pragmatic decisions.[160] That is not, however, to say that there are no such prosecutors, or that other prosecutors may not make decisions in that way on occasion.

Yet Harker's answer is inadequate on its own terms with respect to *Brady*. Good faith and good intentions, even if universal, are insufficient to ensure compliance with *Brady*. Even assuming ethical prosecutors seeking to follow the mandates of *Brady*, the *Brady* standard is poorly calibrated for use as a standard for decision-making prior to trial. By placing prosecutors also into the role of independent arbiters of materiality, the *Brady* standard sets them up for failure.[161]

To assert that pre-trial compliance with *Brady* is difficult to implement reliably is not to fault prosecutors but merely to acknowledge human nature.[162] Pre-trial application of *Brady* places on them a set of tasks which contemporary research shows humans are markedly poor at performing. In sum, as the leading scholar on this issue (herself a former prosecutor) has written: "[T]he prosecutor's application of *Brady* is biased not merely because she is a zealous advocate engaged in a 'competitive enterprise,' but because the theory she has developed from that enterprise might trigger cognitive biases, such as confirmation bias and selective information

159. *See Harker*, *supra* note 1, at 895.

160. *Id.* at 860.

161. *See* Gershman, *supra* note 134, at 533; *see also* Burke, *supra* note 156, at 1610.

162. Professor Burke has also noted the virtue, in assessing *Brady* problems, of moving away from a rhetoric of fault, writing: "No-fault rhetoric that assumes prosecutors are trying to protect innocence, but which recognizes the reasons why they might accidentally err, is more likely to activate discussion with prosecutors than fault-based rhetoric." Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119, 2135 (2010).

processing."[163] In short, analysis of the *Brady* standard often devolves into an unproductive disagreement over the extent prosecutors can be trusted to act ethically. Yet the flaws of the *Brady* standard can be seen even entirely apart from that debate.

i. Humans Do Not Process Information in Fully Rational Ways But Instead Pursuant to Predicable Heuristics and Biases

The field of psychology, over the last fifty years, has made immeasurable leaps in evaluating cognition. Developing from the pioneering work of Amos Tversky and Daniel Kahneman, which resulted in the awarding of the Nobel Prize to Kahneman in 2002,[164] scientists have explored the insight that humans do not think or process information in fully rational ways, yet do so in ways that are consistent and even predictable.[165] Fully rational cognition is difficult, if not impossible, and requires significant expenditure of energy, so humans have developed predictable shortcuts for evaluating information and making decisions.[166] These shortcuts—including those known as heuristics and biases—have been the basis for comprehensive study.[167] Such heuristics and biases are relevant to questions throughout the entire legal system, and indeed are particularly worthy of study in the criminal justice realm. Some of the findings, though, have particular relevance to a prosecutor's decision to turn over information pursuant to *Brady*.

An evaluation of the *Brady* standard by a prosecutor, when deciding whether exculpatory information is material and must be disclosed, can be seen as being comprised of three parts: (1) an assessment of the overall strength of the inculpatory case against the defendant; (2) an assessment of the exculpatory value of the evidence in question; and (3) a weighing of the exculpatory value versus the strength of the case. If the inculpatory evidence is sufficiently strong, then it would take a particularly weighty piece of

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163. Burke, *supra* note 156, at 1611; *see also* Kate E. Bloch, *Harnessing Virtual Reality to Prevent Prosecutorial Misconduct*, 32 GEO. J. LEGAL ETHICS 1, 17 (2019); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 311.

164. *Daniel Kahneman Facts*, NOBEL PRIZE, https://www.nobelprize.org/prizes/economic-sciences/2002/kahneman/facts/ (last visited Aug. 1, 2020).

165. *See generally* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1130 (1974) (analyzing the "cognitive biases that stem from the reliance on judgmental heuristics").

166. *See id.* at 1130.

167. *See id.*

exculpatory evidence to qualify as material. Conversely, if the prosecution's case is relatively weak, then any exculpatory information might be reasonably likely to lead to a different result. All three steps—evaluation of inculpatory case; evaluation of exculpatory evidence; and weighing—are subject to cognitive biases that will diminish the reliability of the inquiry.

ii. Bias Affects the Evaluation of the Weight of the Incriminating Evidence

The most fundamental problem in assuming that prosecutors can be objective analysts of the strength of the case against a defendant, or the weight of a given piece of exculpatory evidence, is that humans tend to privilege information that supports their operating theory over evidence that contradicts it. In particular, once there has been an arrest or charge, a prosecutor operating under the theory that the defendant is guilty will prioritize information that supports that conclusion. This is often referred to as "confirmation bias": "the tendency to seek or interpret evidence in ways that support existing beliefs, expectations, or hypotheses."[168] Confirmation bias is "one of the most fundamental tendencies of human cognition."[169] One scholar has stated: "If one were to attempt to identify a single problematic aspect of human reasoning that deserves attention above all others, the *confirmation bias* would have to be among the candidates for consideration."[170]

Confirmation bias can be seen as having two relevant effects. First, in evaluating conflicting information, individuals will both seek out and privilege information that confirms their existing belief. "Because of confirmation bias, [a prosecutor] is likely to search the investigative file for evidence that confirms the defendant's guilt to the detriment of any exculpatory evidence that

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168. Findley & Scott, *supra* note 163, at 309.

169. Karl Ask & Pär Anders Granhag, *Motivational Sources of Confirmation Bias in Criminal Investigations: The Need for Cognitive Closure*, 2 J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING 43, 45 (2005); *see also* Eric Rassin, *Blindness to Alternative Scenarios in Evidence Evaluation*, 7 J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING 153 (2010).

170. Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCHOL. 175, 175 (1998); *see also* Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999, 1014–15 (2009).

might disprove the working hypothesis."[171] Second, confirming information will be overvalued, and conflicting information will be discounted. That is, when evaluating evidence that agrees with one's hypothesis, the effect of that evidence may be larger than is logically appropriate, and when evaluating evidence that does not support one's hypothesis, that evidence will be systematically undervalued. In fact, "people generally require less hypothesis-consistent evidence to accept a hypothesis than hypothesis-inconsistent information to reject a hypothesis."[172]

Finally, the evaluation of the strength of a prosecution case may be affected by a bias known as the "endowment effect."[173] This well-known bias provides that objects already possessed obtain irrational value to the owner.[174] In its most basic formulation, people will demand more to part with an item than they would have been willing to put forth to obtain it in the first place. It is endowed with greater value, apparently, merely because it belongs to them. This theory can be easily applied to prosecutors evaluating "their" case. The mere fact that a prosecutor has been assigned to a case, and is thus responsible for its prosecution, may lead that prosecutor to overvalue the strength of that case versus if they had evaluated it in the abstract.[175] Yet it is in light of that overvalued case that the materiality determination is made.

iii. Bias Affects the Evaluation of the Weight of the Exculpatory Information

As the flip side of these phenomena, as noted above, cognitive bias characteristically brings increased skepticism for unfavorable evidence and imposes a higher standard for negative evidence than

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171. Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 495 (2009).

172. Nickerson, *supra* note 170, at 180.

173. *See* Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1326–28 (1990).

174. *See generally id.* (finding that participants given a mug or chocolate bar at the beginning of the session were less likely to trade what they were given for the opposite item at the end, whereas participants given a choice between the two at the beginning chose between both in roughly equal numbers).

175. The same is, of course, likely true of defense attorneys, and is sometimes referred to as "trial psychosis." *See* Cynthia E. Jones, *Here Comes the Judge: A Model for Judicial Oversight and Regulation of the* Brady *Disclosure Duty*, 46 HOFSTRA L. REV. 87, 105 (2017) (discussing how a trial attorney becomes convinced of her own case).

positive.[176] That is, rather than exhibiting symmetrical skepticism for favorable and unfavorable information, people guilt expend more effort scrutinizing and invalidating evidence that is inconsistent with a preferred hypothesis.[177] Further, people are more adept at generating reasons for skepticism when facing information that was contrary to their previously-held conclusion.[178] As the authors of one study explained: "[P]eople tend to accept information congenial with a preferred conclusion at face value, but spend much effort trying to discredit information that challenges the desired conclusion."[179] Thus, while a prosecutor may accept inculpatory information at face value, he or she will likely seek out explanations to discredit exculpatory information—and may view such explanations are sufficiently persuasive to bring exculpatory evidence below the materiality threshold.

A related phenomenon that can also lead to the undervaluing of exculpatory information is called the "feature positive effect."[180] Researchers have shown that individuals have difficulty in rationally evaluating the *absence* of evidence[181] (such as a witness's failure to make a positive identification in a photo array or law enforcement's failure to find a defendant's fingerprints at the scene). Such information is weighed as being categorically less valuable than positive evidence (an identification, a fingerprint), even if a rational evaluation would consider the evidence of equal probative value.[182] Given that exculpatory information often does not come in the form of positive evidence of innocence but rather of holes in the investigation or in the prosecution's case, the feature positive effect

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176. *See* Burke, *supra* note 156, at 1594.

177. *See* Tamara Marksteiner et al., *Asymmetrical Scepticism Towards Criminal Evidence: The Role of Goal- and Belief- Consistency*, 25 APPLIED COGNITIVE PSYCHOL. 541, 545 (2011).

178. *See* Karl Ask et al., *The 'Elasticity' of Criminal Evidence: A Moderator of Investigator Bias*, 22 APPLIED COGNITIVE PSYCHOL. 1245, 1253–54 (2008). In that study, participants were presented with the background of a hypothetical case investigation and were asked to rate the reliability of additional information that was either consistent with or inconsistent with the guilt of the identified suspect. *Id.* The participants gave greater value to the consistent information; that is, the same piece of evidence (such as a witness' identification decision) was considered less reliable when it challenged the suspicions against a known suspect than when it confirmed the suspicions. *Id.*

179. *Id.* at 1255.

180. Anita Eerland & Eric Rassin, *Biased Evaluation of Incriminating and Exonerating (Non)evidence*, 18 PSYCHOL., CRIME & L. 351, 351 (2012).

181. *Id.* at 356.

182. *See id.*

may play a large part in the *Brady* decision. A prosecutor may view a failure to locate a defendant's fingerprints at the scene as essentially meaningless, and not disclose that unsuccessful efforts were made to locate those fingerprints, while a defense attorney might view that failure as the lynchpin of a defense.

iv. Bias Affects the Balancing and Determination of Materiality

Finally, bias can influence the determination of whether evidence, when weighed against existing incriminating evidence, is sufficiently powerful to meet the *Brady* materiality standard. As set forth above, confirmation bias can inflate the value of incriminating evidence and undervalue the significance of exculpatory information. This confirmation bias can be exacerbated by the order in which the prosecutor learned of the evidence. In many cases, of course, prosecutors receive a case file after an arrest has already been made and charges have been lodged. The facts supporting the charges, laid out in an arrest warrant or affidavit of complaint, may be the first information that the prosecutor reads about the case. It is only later, when reviewing the rest of the file, or directing additional investigation, that the prosecutor may learn of other facts or develop new facts that tend to be exculpatory. Yet studies have shown that this kind of sequential presentation of information will magnify the effects of cognitive bias.[183] That is, a prosecutor might view a piece of exculpatory information as material if he or she learned of it at the same time as she or he learned of the inculpatory evidence in the case; however, if the inculpatory evidence is learned first, and the exculpatory evidence learned later, the perceived weight of the

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183. In a study of 382 college students who were presented with either exonerating or incriminating DNA evidence and an ambiguous alibi, researchers found that the order in which these facts were presented strongly influenced students' determination of guilt. Steve D. Charman et al., *Evidence Evaluation and Evidence Integration in Legal Decision- Making: Order of Evidence Presentation as a Moderator of Context Effects*, 30 APPLIED COGNITIVE PSYCHOL. 213, 217, 220–21 (2016); *see also* Saul M. Kassin et al., *The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions*, 2 J. APPLIED RES. MEMORY & COGNITION 42, 44–45 (2013) (discussing how preconceived beliefs and motivation can produce bias). Other studies have shown that, when searching for information in a sequential fashion, individuals are more likely to seek out evidence that confirms, rather than contradicts, their existing theory. Eva Jonas et al., *Confirmation Bias in Sequential Information Search After Preliminary Decisions: An Expansion of Dissonance Theoretical Research on Selective Exposure to Information*, 80 J. PERSONALITY & SOC. PSYCHOL. 557, 560 (2001).

exculpatory evidence will be diminished.[184] And these effects may be made worse, not better, by the amount of time and effort the prosecutor spends scrutinizing a case. Each close evaluation of the existing evidence may further cement the prosecutor's view of it and thus further minimize the weight of any exculpatory evidence discovered in the future. Counter-intuitively, then, the detail-oriented and diligent prosecutor frequently reviewing his or her file may actually have more difficulty in evaluating new evidence objectively than one who has not been as assiduous.

More fundamentally, the phenomenon of belief perseverance (an outgrowth of the principles identified above) holds that individuals will persist with their beliefs or opinions even when confronted with clearly contradictory evidence.[185] This means not only that individuals will resist new information that conflicts with their opinion; they will also persist with opinions even after new information is received that negates the old information upon which their opinion was initially based.[186] Similarly, research suggests that, once individuals commit to a position (such as when a prosecutor brings charges), the phenomenon of "defensive bolstering" will limit their openness to contrary information: "Instead of engaging in balanced and thorough reasoning, they seek reasons to bolster that decision in an effort to justify their conclusions."[187]

In fact, most strikingly, there is research suggesting that individuals, when confronted with information that tends to dispute an existing opinion, end up holding that opinion even more firmly than before.[188] This is known as the "boomerang" or "backfire" effect, and it emerges when preexisting beliefs are held more strongly in response to new evidence.[189] In one study, subjects reviewed mock news articles that either included a misleading claim by a politician,

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184. *See* Jonas et al., *supra* note 183, at 560.

185. *See* Martin F. Davies, *Belief Persistence After Evidential Discrediting: The Impact of Generated Versus Provided Explanations on the Likelihood of Discredited Outcomes*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 561, 562 (1997).

186. *See id.*

187. O'Brien, *supra* note 170, at 1019.

188. *See* Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. OF PERSONALITY AND SOC. PSYCHOL. 2098, 2105–06 (1979); Charles S. Taber & Milton Lodge, *Motivated Skepticism in the Evaluation of Political Beliefs*, 50 AM. J. POL. SCI. 755, 765, 768 (2006).

189. *See* Armen E. Allahverdyan & Aram Galstyan, *Opinion Dynamics with Confirmation Bias*, 9 PLOS ONE 1, 11 (2014).

or a misleading claim plus a correction.[190] They found that false or unsubstantiated political beliefs were not only difficult to correct but were met by several instances wherein the correction attempt actually increased misperceptions.[191] In another political science study, researchers showed that (until a tipping point is reached) voters become more, not less, entrenched in their support of preferred political candidates when presented by negative information about them.[192] Further, other studies have shown that social interventions to reduce bias are sometimes counterproductive because of the backfire effect.[193] These principles suggest that prosecutors, confronted with exculpatory information, may actually end up being reinforced in their belief of the strength of their case, and thus less likely to regard the exculpatory information as material.

Finally, it should be emphasized that the claim here is not that prosecutors are so heavily invested in their cases that they somehow willfully blind themselves to alternatives, and thus that more fair-minded or less partisan prosecutors can avoid the traps of these cognitive biases. The aforementioned studies indicate that these biases are inherent in human cognition. Indeed, the studies show certain aspects of cognitive bias favoring a given hypothesis even when the individual has no vested interest in the truth of the underlying hypothesis.[194] Which is not to say that being invested in a process is irrelevant. One groundbreaking study has shown that participants who were placed in a position of making a case against a suspect, and who were going to be judged for their persuasiveness in doing so, came themselves to view the evidence against that suspect as more compelling than others.[195] Their desire to be persuasive magnified the confirmation bias effect.[196] Researchers

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190. Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEHAV. 303, 310 (2010).

191. *Id.* at 323.

192. David P. Redlawsk et al., *The Affective Tipping Point: Do Motivated Reasoners Ever "Get It"?*, 31 POL. PSYCHOL. 563, 589 (2010).

193. Aharon Levy & Yossi Maaravi, *The Boomerang Effect of Psychological Interventions*, 13 SOC. INFLUENCE 39, 49 (2018).

194. *See, e.g.*, Eric Rassin et al., *Let's Find the Evidence: An Analogue Study of Confirmation Bias in Criminal Investigations*, 7 J. INVESTIGATIVE PSYCHOL. & OFFENDER PROFILING 231, 232 (2010) ("Even if there is no prior personally relevant reason to confirm a hypothesis, people seem to favour confirmation as the default testing strategy."); *see also* Nickerson, *supra* note 170, at 178.

195. *See* O'Brien, *supra* note 170, at 1028–29.

196. *Id.* at 1029 ("Compared to those in the control condition, participants who expected to persuade others of their opinion about the case interpreted ambiguous or

have further concluded that effects of confirmation bias are independent of intelligence.[197]

C. *The Application of* Brady *to Pre-Trial Disclosures*

For the foregoing reasons, even if Harker is correct that virtually all prosecutors seek to be fair and ethical,[198] application of the *Brady* standard to pre-trial disclosures is a recipe for mistake. Social science research indicates that, when forced to evaluate the strength of exculpatory evidence against the weight of an incriminating case to which the prosecutor has already committed, a prosecutor's evaluation will fall short of the ideal. Further, and crucially, the cognitive failures almost all occur in one direction—overvaluing the incriminating evidence, devaluing and thinking of reasons to discredit the exculpatory evidence. Together they thus reduce the likelihood that a prosecutor will conclude that evidence is material under *Brady*.[199] Unless social science is completely disregarded, we can conclude with confidence that prosecutors making a *Brady* evaluation will, regardless of their good intentions, be less likely to view evidence as material than a defense attorney or even a neutral observer would.

D. *As Currently Interpreted,* Brady *Does Not Apply to Pleas, Which Resolve the Vast Majority of Criminal Cases*

The vast majority of criminal convictions in the United States are derived from plea bargains.[200] In Tennessee in 2018, 5,722

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inconsistent evidence in a way that was more consistent with the initial suspect's guilt.").

197. *See* Keith E. Stanovich et al., *Myside Bias, Rational Thinking, and Intelligence*, 22 CURRENT DIRECTIONS PSYCHOL. SCI. 259, 263 (2013).

198. Harker, *supra* note 1, at 895 ("I have interacted with hundreds of Assistant United States Attorneys, Deputy Attorneys General, Assistant Attorneys General, Assistant Prosecutors, District Attorneys, and Assistant District Attorneys, virtually all of whom were uniformly ethical and honest.").

199. *See* Kassin et al., *supra* note 183, at 44–45.

200. *See* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 5 (2018) (noting that less than 3% of state and federal prosecutions go to trial); Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1064 (2006) ("Any way you slice it, plea bargaining is a defining, if not the defining, feature of the present federal criminal justice system."); Jed S. Rakoff, *Why Prosecutors Rule the Criminal Justice System And What Can Be Done About It*, 111

criminal cases were resolved by trial out of a total of 158,715 filed criminal cases, a mere 3.6%.[201] According to the same data, more than 80% of criminal prosecutions are resolved by plea bargains, although this data arguably underestimates the incidence of plea bargains.[202] In cases that are resolved by plea bargain—again in the vast majority of cases—defendants' right to discovery is extremely limited, if not nonexistent.[203] As one observer noted "[w]hether and how much of the *Brady* doctrine survives *Ruiz* in the context of guilty pleas remains uncertain. It is abundantly clear that the Supreme Court has severely restricted *Brady*'s role in preplea discovery, if it did not eliminate it altogether."[204] *Ruiz* made clear that there is no constitutional obligation to disclose impeachment evidence, even if otherwise material, prior to a guilty plea.[205] The lower courts are split on whether this holding extends to exculpatory, non-impeachment evidence.[206] At the least, the Supreme Court has not held, after *Ruiz*, that disclosure of

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NW. U. L. REV. 1429, 1432 (2017) (noting that only 2.9% of federal defendants go to trial and as low as less than 2% of state defendants may go to trial).

201. ADMIN. OFFICE OF THE COURT, ANNUAL REPORT OF THE TENNESSEE JUDICIARY FISCAL YEAR 2017–2018, at 21 (2018).

202. *Id.* Arguably, these statistics underappreciate the incidence of plea bargains as the data lumps dismissals and nolle prosequi charges together and does not account for the common practice of dismissing numerous counts as part of a plea agreement. *Id.* Furthermore, the use of judicial and pre-trial diversion is in essence a plea agreement, albeit one that leads to dismissal upon the successful completion of a probationary sentence. *See* TENN. CODE ANN. §§ 40-35-105(a)(1)–(5); 40-35-313(a)(1)(A), (a)(2) (2019). Arguably, these dispositions which are disaggregated from plea cases should also be included as plea bargains.

203. *See* United States v. Ruiz, 536 U.S. 622, 630 (2002) (holding that a defendant is not entitled to impeachment evidence prior to a plea); Weatherford v. Bursey, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one."); State v. Willoughby, 594 S.W.2d 388, 390 (Tenn. 1980) (holding that defendants are not entitled to discovery in Tennessee general sessions courts). Tennessee's procedure, which does not directly mandate discovery in general sessions court, is significant due to the use information pleas wherein pleas are negotiated at the general sessions court level and executed in the criminal courts with the authority to enter felony pleas. *See* TENN. CODE ANN. § 40-3-103(c) (2019). Thus, it is not only possible but common for a felony to be adjudicated in Tennessee without ever triggering formal discovery rights.

204. R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429, 1444 (2011).

205. *Ruiz*, 536, U.S. at 633.

206. *See* Alvarez v. City of Brownsville, 904 F.3d 382, 392–94 (5th Cir. 2018).

exculpatory evidence is required prior to pleas.[207] Put differently, the present state of the law means that in the vast majority of prosecutions, *Brady* provides little practical constitutional protection for defendants and prosecutors' obligations to turn over exculpatory evidence may not even be triggered when a defendant seeks to resolve a case through a plea agreement.

Accordingly, readers should query whether, in a system primarily composed of plea agreements and one where the protections of *Brady* may not even apply to most prosecutions, there is any meaningful mechanism to ensure that defendants are provided exculpatory evidence. The *Brady* standard has created a scenario where the emperor wears no clothes. On the one hand, *Brady* presents the laudable goal of providing a defendant a fair trial.[208] But in a system where trials by jury are vanishing, the laudable goal provides little comfort to the vast majority of defendants who resolve their cases through a plea bargain. It makes little sense to conclude that *Brady* provides a workable standard, if in the majority of instances it does not apply and prosecutors need not abide by its mandates.

This provides a final flaw in Harker's empirical claims that the vast majority of prosecutions are untainted by inappropriate action.[209] Aside from the problem mentioned above—that we just do not know the true incidence of misconduct—a more basic problem with Harker's argument is that plea agreements do not provide an opportunity for detection of prosecutorial misconduct. As outlined above, many cases reach a plea agreement without engaging in full discovery. Without such discovery ever occurring, it is impossible to determine what evidence the prosecutor possesses against the defendant, much less whether any of that information was potentially exculpatory. Most plea agreements, moreover, contain express waivers of appellate rights.[210] Without appellate review, the likelihood that prosecutorial misconduct will be unearthed diminishes greatly.[211] In fact, most plea waivers have historically barred defendants from bringing ineffective assistance of counsel

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207. *See Ruiz*, 536 U.S. at 633.

208. Brady v. Maryland, 373 U.S. 83, 87–88 (1962).

209. *See* Harker, *supra* note 1, at 854.

210. *See* Jackelyn Klatte, *Guilty as Pleaded: How Appellate Waivers in Plea Bargaining Implicate Prosecutorial Ethic Concerns*, 28 GEO. J. LEGAL ETHICS 643, 647 (2015).

211. Andrew Dean, *Challenging Appeal Waivers*, 61 BUFF. L. REV. 1191, 1221 (2013) ("[P]rosecutors are put in the position of encouraging the defendant to sign a waiver that precludes an appeal being brought for prosecutorial misconduct.").

claims, and only recently have practices evolved to permit such claims.[212]

At base, Harker's conclusion distorts the reality of prosecutorial misconduct. His approach attempts to persuade us that in the grand scheme of millions of felony prosecutions annually, that misconduct occurs infrequently.[213] We submit that Harker's analysis is fundamentally flawed because it fails to account for the reality that we have a system of plea bargains. The denominator that he identifies—that of more than two million convictions annually[214]—fails to account for the reality that the vast majority of those prosecutions ended in a plea bargain. In a system of pleas, formal discovery is frequently not completed. Precedent suggests that prosecutors have the narrowest of constitutional duties to turn over exculpatory evidence in the case of a plea.[215] In such a system, particularly one characterized by express waivers of appeals, the likelihood that misconduct is ever discovered is low. Most often, the discovery of exculpatory evidence only occurs through the full litigation of appeals and subsequent efforts of counsel.[216] To look at it another way, there is an inherent tension in trumpeting the absence of evidence of prosecutorial misconduct in a regime where one of the most common forms of prosecutorial misconduct, the *Brady* violation, can never arise in most prosecutions.

VI. ETHICAL OBLIGATIONS ON PROSECUTORS IN TENNESSEE

Whether by coincidence or cosmic design, in the year following the publication of Harker's article in the *Tennessee Law Review*, an issue involving the application of the *Brady* standard to pre-trial disclosure played out in the state and federal courts of Tennessee.[217] The litigation focused on whether, as a matter of ethics, prosecutors are required to turn over exculpatory material that would not be covered by *Brady* because, while favorable to the defense, it is not "material" in the *Brady* sense, and whether such disclosure would

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212. *See* Nancy J. King, *Plea Bargains that Waive Claims of Ineffective Assistance Waiving* Padilla *and* Frye, 51 DUQ. L. REV. 647, 648–50 (2013); Klatte, *supra* note 210, at 644.

213. *See* Harker, *supra* note 1, at 853–54.

214. *See id.* at 853.

215. *See* United States v. Ruiz, 536 U.S. 622, 633 (2002).

216. *See, e.g.*, Freshwater v. State, 160 S.W.3d 548, 552 (Tenn. Crim. App. 2004) (recounting instances of suppressed evidence dating back more than 30 years).

217. *In re* Petition to Stay the Effectiveness of Formal Ethics Opinion 2017-F-163, 582 S.W.3d 200 (Tenn. 2019).

have to occur as soon as reasonably practicable (and thus potentially prior to entry of guilty pleas).[218] As explained *infra*, the Tennessee Board of Professional Responsibility issued an ethics opinion interpreting the Rules of Professional Conduct to require such expansive disclosure.[219] The Tennessee Supreme Court, however, vacated that order as an invalid interpretation, and held that, as to disclosure of exculpatory information, the Rules of Professional Conduct require nothing more than the constitutional minimum established by *Brady*.[220]

A. Formal Ethics Opinion – History and Litigation

1. Text of the Rule

Tennessee Rule of Professional Conduct 3.8 provides in pertinent part:

> The prosecutor in a criminal case: . . . (d) shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;[221]

The Rule was adopted in Tennessee in 2003.[222] It aligned verbatim with language of the American Bar Association Model Rule of Professional Conduct.[223]

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218. *See generally id.*

219. Bd. of Prof'l Responsibility of the Supreme Court of Tennessee, Formal Op. 2017-F-163 (2018), https://www.tbpr.org/ethic_opinions/2017-f-163-prosecutors-ethical-obligations-to-disclose-information.

220. *In re* Petition to Stay the Effectiveness of Formal Ethics Opinion 2017-F-163, 582 S.W.3d at 209.

221. TENN. RULES OF PROF'L CONDUCT r. 3.8(d) (2020).

222. *See Learn About the Development of the Rules of Professional Conduct*, TENN. BAR ASS'N, https://www.tba.org/?pg=Development-of-Rules-Professional-Conduct (last visited Aug. 1, 2020).

223. *Compare* TENN. RULES OF PROF'L CONDUCT r. 3.8(d) (2020), *with* MODEL RULES OF PROF'L CONDUCT r. 3.8(d) (AM. BAR ASS'N 2020).

2. American Bar Association (ABA) Interpretation of Model Rule

On July 8, 2009, the ABA Committee on Ethics and Professional Responsibility issued Formal Opinion 09-454, titled "Prosecutor's Duty to Disclose Evidence and Information Favorable to the Defense."[224] The ABA Opinion interpreted Rule 3.8(d) to go beyond the constitutional minimum of *Brady* and require disclosure of exculpatory information that does not meet the materiality standard. It stated, in pertinent part:

> Rule 3.8(d) of the Model Rules of Professional Conduct requires a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, [to] disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor." This ethical duty is separate from disclosure obligations imposed under the Constitution, statutes, procedural rules, court rules, or court orders. Rule 3.8(d) requires a prosecutor who knows of evidence and information favorable to the defense to disclose it as soon as reasonably practicable so that the defense can make meaningful use of it in making such decisions as whether to plead guilty and how to conduct its investigation. Prosecutors are not further obligated to conduct searches or investigations for favorable evidence and information of which they are unaware.[225]

The ABA directly addressed the materiality question, noting that the Model Rule did not include language adverting to the *Brady* standard. It wrote:

> In particular, Rule 3.8(d) is more demanding than the constitutional case law, in that it requires the disclosure of evidence or information favorable to the

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224. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009), https://www.americanbar.org/content/dam/aba/events/professional_responsibility/2015/May/Conference/Materials/aba_formal_opnion_09_454.authcheckdam.pdf.

225. *Id.*

> defense without regard to the anticipated impact of the evidence or information on a trial's outcome. The rule thereby requires prosecutors to steer clear of the constitutional line, erring on the side of caution.[226]

3. Tennessee Board Interpretation of Model Rule

The Tennessee Board of Professional Responsibility issued an advisory ethics opinion on March 15, 2018.[227] It thus entered into a nation-wide discussion of the merits of the ABA approach.[228] The

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226. *Id.* at 4 (internal citations omitted).

227. Bd. of Prof'l Responsibility of the Supreme Court of Tennessee, *supra* note 219. According to the attorney for the Tennessee Board of Professional Responsibility, in response to questioning at oral argument, the opinion arose out of an unsuccessful disciplinary prosecution of a state prosecutor. During that hearing, the panel had questions regarding the scope of prosecutorial obligations which the Board then sought to answer in its opinion. Given the timing, that prosecution in question would seem to be that of Stephen Jones, a Memphis prosecutor who participated in the prosecution of Noura Jackson, whose conviction was vacated for prosecutorial misconduct. *See* State v. Jackson, 444 S.W.3d 554, 598 (Tenn. 2014); Katie Fretland, *Lawyers Clear Prosecutor in Noura Jackson Case*, COM. APPEAL (Mar. 2, 2017), https://www.commercialappeal.com/story/news/courts/2017/03/02/lawyers-clear-prosecutor-noura-jackson-case/97686110/. *See generally* EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 250–70 (2019) (discussing the Noura Jackson case, subsequent Stephen Jones disciplinary trial, and the evolving standards of prosecutorial disclosure of evidence to defense counsel throughout the nation).

228. A number of courts and jurisdictions have indicated, by decision, ethical opinion, or rule commentary, that the ethical obligations for prosecutors should be construed as extending beyond the constitutional limits of *Brady*. *See, e.g.*, McMullan v. Booker, 761 F.3d 662, 676 (6th Cir. 2014) (interpreting Michigan Rule of Professional Conduct 3.8); *In re* Kline, 113 A.3d 202, 213 (D.C. Ct. App. 2015) (interpreting D.C. Rule of Professional Conduct 3.8); United States v. Wells, No. 3:13-cr-00008-RRB-JDR, 2013 WL 4851009, at *4 (D. Alaska Sept. 11, 2013) (interpreting Alaska Model Rule of Professional Conduct 3.8); *In re* Disciplinary Action Against Feland, 820 N.W.2d 672, 677–78 (N.D. 2012) (interpreting North Dakota Rule of Professional Conduct 3.8); United States v. Acosta, 357 F. Supp. 2d 1228, 1232 (D. Nev. 2005) (interpreting Nevada Supreme Court Rule 179(4), derived from Rule 3.8); *In re* Larsen, 379 P.3d 1209, 1216 (Utah 2016) (interpreting Utah Rule of Professional Conduct 3.8); *In re* Quade, Comm. No. 2014PR00076 (Ill. Atty. Reg. & Disciplinary Comm'n Oct. 28, 2015), https://www.iardc.org/HB_RB_Disp_Html.asp?id=11920; Shultz v. Comm'n for Lawyer Discipline of the State Bar of Tex., No. 55649, 2015 WL 9855916, at *1 (Tex. Bd. of Disciplinary App. Dec. 17, 2015); CAL. RULES OF PROF'L CONDUCT r. 3.8(d) cmt. 3 (2018); MASS. RULES OF PROF'L CONDUCT r. 3.8(d) cmt. 3A (2017); N.Y.C. Bar Ass'n Prof'l Ethics Comm., Formal Op. 2016-3 pt. VI (2016), https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2016-3-prosecutors-ethical-obligations-to-disclose-information-favorable-to-the-defense; Va. State Bar

opinion largely followed the language and conclusions of the ABA Formal Opinion.[229] In particular, it adopted the conclusion that Rule 3.8(d) did not have a materiality standard and that it required disclosure of favorable evidence as soon as reasonably possible.[230]

4. Litigation in Tennessee Courts

In October 2018, the Tennessee District Attorney General's Conference (TNDAGC) filed a petition to stay the effectiveness of the Formal Ethics Opinion pending further consideration by the Board of Professional Responsibility.[231] That petition to stay was granted by the Tennessee Supreme Court.[232] The Board of Professional Responsibility then completed its further review process and announced, on December 17, 2018, that it would not be altering its opinion.[233] On January 15, 2019, the TNDAGC filed a petition to vacate the Formal Ethics Opinion.[234] In briefing the case, the TNDAGC was joined by the United States and the Tennessee Attorney General as *amici*.[235]

Standing Comm. on Legal Ethics, Informal Op. 1862, at 2–3 (2012), https://www.vsb.org/docs/LEO/1862.pdf. Other courts and jurisdictions have held the opposite, that the ethical rules are coextensive with the constitutional obligations. *See, e.g.*, *In re* Attorney C, 47 P.3d 1167, 1170 (Colo. 2002); *In re* Seastrunk, 236 So. 3d 509, 518–19 (La. 2017); Disciplinary Counsel v. Kellogg–Martin, 923 N.E.2d 125, 130 (Ohio 2010); State *ex rel.* Okla. Bar Ass'n v. Ward, 353 P.3d 509, 520–21 (Okla. 2015); *In re* Riek, 834 N.W.2d 384, 390 (Wis. 2013).

229 *Compare* Bd. of Prof'l Responsibility of the Supreme Court of Tennessee, *supra* note 219, *with* ABA Comm. on Ethics & Prof'l Responsibility, *supra* note 224.

230. Bd. of Prof'l Responsibility of the Supreme Court of Tennessee, *supra* note 219 ("Based on the text and history of Rule 3.8 of the Tennessee Rules of Professional Conduct there is no evidence that the rule contains an implicit materiality limitation or was otherwise intended to codify constitutional law.").

231. *In re* Petition to Stay the Effectiveness of Formal Ethics Opinion 2017-F-163, 582 S.W.3d 200, 203 (Tenn. 2019).

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 201. Oral argument is also available online. *Oral Arguments*, TENN. STATE CTS., https://www.tncourts.gov/courts/supreme-court/oral-arguments (last visited Aug. 1, 2020). Cases are searchable by date and court. This oral argument was held on May 30, 2019.

5. Tennessee Supreme Court Decision

The Tennessee Supreme Court issued its opinion on August 23, 2019.[236] It rejected the positions taken by the Board of Professional Responsibility. It concluded that Rule 3.8(d) merely served to codify the *Brady* standard, and does not independently require disclosure of non-material exculpatory evidence or disclosure of such evidence "as soon as reasonably practicable."[237] The court pointed to a line of decisions in other states finding, for public policy reasons, that their ethical rules should merely mirror the *Brady* standard.[238] As to the argument regarding the statutory language, the court noted merely that "the history of Rule 3.8(d) in Tennessee support[ed]" its interpretation.[239] It continued: "[N]o entity, including the Board, indicated through its comments to the proposed rule that the provision extended a prosecutor's ethical duties beyond the scope of a prosecutor's legal obligations under *Brady*. Therefore, to now interpret the provision as extending beyond *Brady* effectively amends the Rule."[240]

B. Discussion of the Tennessee Supreme Court Decision Regarding the Ethical Obligations on Prosecutors in Tennessee

The reasoning of the Tennessee Supreme Court in this case as to the policy question was based largely on the dangers of conflicting standards.[241] Adopting logic from other jurisdictions,[242] the court wrote:

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236. *In re* Petition to Stay the Effectiveness of Formal Ethics Opinion 2017-F-163, 582 S.W.3d at 200. One of the authors of this Article, Mr. Harwell, briefed and argued on behalf of *amici curiae* in support of the position of the Board of Professional Responsibility.

237. *Id.* at 206 (citing ABA Formal Ethics Op. 2017-F-163).

238. *Id.* at 208–09.

239. *Id.* at 209.

240. *Id.*

241. *See id.* The Tennessee Supreme Court also evaluated the issue as one not merely of policy but of proper interpretation of the Rules of Professional Conduct. *See generally id.* That assessment, akin to the task of statutory interpretation, is beyond the scope of this Article, as is the issue of whether the Board of Professional Responsibility overstepped its bounds in addressing a legal question properly left to the Supreme Court.

242. *Id.* at 208–09 (quoting *In re* Seastrunk, 236 So. 3d 509, 519 (La. 2017)).

> To say that our ethical rules require prosecutors to consider different standards than their constitutional and legal requirements has the potential to bring about a myriad of conflicts. *See* Michael D. Ricciuti, Caroline E. Conti & Paolo G. Corso, *Criminal Discovery: The Clash Between Brady and Ethical Obligations*, 51 SUFFOLK U. L. REV. 399, 436 (2018) ("[H]aving two competing, mandatory and inconsistent sets of rules simply means that it remains ambiguous which rule prevails, and allows ethics rules to be used as tactical weapons in criminal cases and beyond."). As an example, the United States' amicus brief filed with this Court cited a motion filed in a federal district court requesting that the United States disclose the names of confidential informants and "all information about the Informant that could be useful to the defense." The request for information was not based on the prosecutor's legal duty under *Brady* but pursuant to the prosecutor's ethical obligations under Rule 3.8(d). Thus, based on our review, we decline to interpret Rule 3.8(d) as providing any greater ethical obligation upon prosecutors than the constitutional obligations under *Brady* and its progeny.[243]

This resolution is deeply unsatisfying. It avoids the challenges to the inadequacy of the *Brady* standard by asserting that prosecutors would suffer "uncertainty" and "confusion" if there were "inconsistent" standards imposed on prosecutors.[244] Yet it fails to identify, as in fact do most of the cases on which it relies, what this contradiction actually is. There could, indeed, be a problematic contradiction if there were two rules, one requiring disclosure of certain information and one prohibiting disclosure of that same information. But that is not the regime in question here, which instead involves one rule which requires disclosure of certain information and the other rule which does not require such disclosure. These are complementary rules, or at the least cannot be considered inconsistent. This is merely a situation of one rule providing a minimum floor and another rule providing an additional obligation. The court appears to conclude, in the overused idiom,

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243. *Id.* at 209 (internal citations omitted).

244. *See id.*

that prosecutors cannot walk and chew gum at the same time. Imposing one standard that is a constitutional minimum and an ethical standard that requires more than the constitutional minimum, in the court's mind, would simply be too difficult.

The court provided "as an example," a motion filed in a criminal case involving a request for discovery.[245] Yet it is unclear why the court viewed this as an "example" of conflicting duties. Under *Brady* the information is not required to be disclosed; under the ABA interpretation of Rule 3.8, it might be required to be disclosed. Again, there is no identified conflict, and the court did not further elucidate any conflict.[246]

To the extent it is argued that a defendant could use the ethical rule as a "tactical weapon,"[247] this position makes no logical sense. If Rule 3.8 were interpreted to require disclosure of certain material, it would indeed be odd to find it improper for a defendant to request that the material be disclosed. It would be a counter-intuitive system indeed that would impose an obligation on a party but hold it improper or abusive for another party to request compliance with that obligation.[248]

The court returned again to the danger of confusion when addressing the obligation of timeliness. It correctly pointed out that the Supreme Court, in *Ruiz*, had rejected the argument that discovery of material impeachment information was required prior to a plea.[249] It continued:

> The United States, in its amicus brief, argues that, if we agree with the Opinion's interpretation of timely,

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245. *Id.*

246. To the extent the request in the example involved information about an informant, the court may have in mind some conflict with *Roviaro v. United States*, 353 U.S. 53 (1957), although the court does not refer to *Roviaro* in its opinion. In any event, such would not present a conflict between *Brady* and Rule 3.8, but rather between *Roviaro* and Rule 3.8, and thus seems beside the point.

247. *In re* Petition to Stay the Effectiveness of Formal Ethics Opinion 2017-F-163, 582 S.W.3d at 209.

248. Further, even if it were somehow inappropriate for a defendant to insist on prosecutors following their obligations, that is not necessarily a reason for rejecting a broader interpretation of Rule 3.8. That is, there could be a system where, as a matter of the ethical rules, a prosecutor would be required to turn over all favorable information, but a trial court would only enforce the *Brady* minimum. Such a limitation seems unnecessary but would certainly rebut the unexplained concerns about "weaponization" raised by the Tennessee Supreme Court. *Id.*

249. *Id.* at 210–11.

> prosecutors arguably would be required under our ethical rules to provide material impeachment evidence to a defendant prior to entering a plea agreement, even though the United States Supreme Court has specifically stated that there is no constitutional obligation to do so. This example demonstrates merely one problem with having an ethical obligation that is distinct from a prosecutor's constitutional obligations.[250]

Again, while there may be other policy reasons for not requiring such disclosure, the specific logic offered here makes no sense. The court stated that, if the other interpretation were adopted, prosecutors would be required to do something that is not required by the Constitution.[251] It stated that this is a "problem."[252] Yet prosecutors, like all attorneys, are required to do all sorts of things that are not specifically required by the Constitution. In short, while there may well be other policy or statutory reasons for preferring that the ethical rule simply follow the constitutional minimum, the point here is that the decision was resolved on the basis of reasoning that is illogical.[253]

The concern with the "confusing"[254] and "inconsistent"[255] standards being imposed on prosecutors (where such standards are neither confusing nor contradictory, merely complementary) is all

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250. *Id.* (citing United States v. Ruiz, 536 U.S. 622, 629–32 (2002)).

251. *Id.* at 211 ("This example demonstrates merely one problem with having an ethical obligation that is distinct from a prosecutor's constitutional obligations.").

252. *Id.*

253. Many federal prosecutions, particularly in drug cases, involve many defendants charged as the result of multi-year investigations and are based on many cooperating witnesses and even confidential informants. The Government had a concern that a broader interpretation of the Rule would require that, before any defendants could plead guilty (even those caught red-handed, captured directly on wiretaps and surveillance videos), the Government must give them all possible impeaching information on all of the numerous cooperating witnesses and informants utilized in the whole investigation. That concern is a legitimate one. The Rule, however, offers a solution: application to the court for a protective order relieving the duty of disclosure. That specific problem should not be justification for refusing to adopt a sensible standard for disclosure, particular given that such large prosecutions are in fact a small percentage of all criminal prosecutions in the country.

254. *Id.* at 206 (citing Tennessee Formal Op. 2017-F-163).

255. *Id.* at 209 (quoting Michael D. Ricciuti et al., *Criminal Discovery: The Clash Between* Brady *and Ethical Obligations*, 51 SUFFOLK U. L. REV. 399, 436 (2018)).

the more striking when compared to the obligation imposed by *Brady* in the pre-trial context. As noted above, applying *Brady* prior to trial forces prosecutors to make decisions that are difficult as a matter of common sense and cognitive science and that are made in the absence of full information. Yet there are few complaints from prosecutors or requests for an easier standard (disregarding materiality) to implement. In sum, the prosecutors gladly accept a task (evaluation of the effect of evidence on a trial which has not yet happened) that is literally impossible to perform precisely yet resist imposition of another task of limited difficulty.

The Tennessee Supreme Court purported (like those in several other jurisdictions) to be adopting a protective approach, shielding prosecutors from evaluations that are at best slightly difficult, while in fact imposing on them a remarkably difficult task of foresight that flies in the face of scientific knowledge of human thought processes. This strongly suggests that concern over imposition of unfair obligations on prosecutors is not, in fact, the driving consideration for these positions.

C. Coda: Position of the Federal District Court

Three days after the Tennessee Supreme Court issued its opinion, the Chief Judge of the U.S. District Court for the Eastern District of Tennessee, the Honorable Pamela L. Reeves, sent a letter, on behalf of all the judges in the district, to J. Douglas Overbey, the U.S. Attorney for the Eastern District of Tennessee, addressing the decision of the Tennessee Supreme Court. In that letter, Judge Reeves wrote in part:

> The state court's decision does not control this Court's ethical standards . . . . The RPC and other sources may state minimum standards, but this Court is free to insist upon higher standards. We believe higher standards are especially important in cases where a person's freedom and liberty are at risk.
>
> In this regard, the judges in our district have determined that the laudable sentiments in 2017-F-163 are an expression of what should be expected of attorneys representing the United States in criminal cases. That being the case, it is still our expectation that Assistant United States Attorneys who appear

> before us will disclose exculpatory and mitigating material to a criminal defendant in the manner described in the referenced ethics opinion, and certainly before any guilty plea.[256]

The United States Attorney responded, again by letter, some four days later. He criticized the Tennessee Board of Professional Responsibility Formal Ethics Opinion (FEO), stating:

> Although the FEO may have intended to advance the laudable sentiment of fairness to the accused, it did so in a manner that disrupted the federal criminal justice system's deliberately careful balancing of the interests identified above—especially those of witnesses and victims of crime.[257]

He noted that his office had participated in the litigation of the case in state court and continued by stating:

> Rest assured that the U.S. Attorney's Office does not view the Tennessee Supreme Court's decision as a reason to meet only "minimal standards" of professional conduct. If that is your concern, please allow me to dispel it. In our view, the Tennessee Supreme Court's ruling restored the proper balance of interests in federal criminal cases developed over the past half century through the interweaving of

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256. Letter from the Honorable Pamela Reeves, Chief Judge, E. Dist. of Tenn., to Douglas Overbey, U.S. Attorney, E. Dist. of Tenn. (Apr. 26, 2019) (on file with authors). For a discussion of the general issue of federal courts adopting a different standard than *Brady*, and arguing that the courts should not take that step, see Michael Serota, *Stare Decisis and the* Brady *Doctrine*, 5 HARV. L. & POL'Y REV. 415, 416–417 (2011). On the other hand, for a strong argument criticizing the anti-regulatory rhetoric adopted by prosecutors in fighting expansive interpretation of rules of professional conduct regarding disclosure, see Bruce A. Green, *Prosecutors and Professional Regulation*, 25 GEO. J. LEGAL ETHICS 873, 902 (2012).

257. Letter from Douglas Overbey, U.S. Attorney, E. Dist. of Tenn., to the Honorable Pamela Reeves, Chief Judge, E. Dist. of Tenn. 1 (Aug. 30, 2019), *in* United States' Response to Joint Motion in Limine by Defendants Sylvia Hofstetter, Cynthia Clemons, and Courtney Newman to Compel the Government to Comply with Broader Duty to Disclose Exculpatory Evidence Imposed in the Eastern District of Tennessee, United States v. Hoffstter, No. 3:15-cr-00027-TAV-DCP (E.D. Tenn. Sept. 10, 2019) (Doc. 599-1).

> constitutional doctrine, statutory directive, and procedural rules, but summarily ignored by the vague manner in which the BPR sought to express itself through the FEO.[258]

He then contended that his office would continue to follow the policies of the United States Justice Manual, citing to § 9-5001 *et seq.*[259]

CONCLUSION

We thus come full circle. Like Harker, it appears that U.S. Attorney Overbey believes that others should be content with fulsome protestations of good intentions and high standards. Just as Harker personally vouches for the ethical probity of "hundreds of" prosecutors,[260] Overbey states, "You can be [sure] that . . . our office will . . . aspire to the highest standards of professional conduct."[261] Yet paradoxically those broad assertions of prosecutorial probity are accompanied by the strongest opposition to external evaluation and to reform of governing principles.

We cannot definitely conclude how frequently prosecutorial misconduct occurs. Available evidence leads us to two conclusions, however. First, to the extent data is available, misconduct does occur with sufficient frequency to merit concern and efforts to combat its recurrence. Second, when it does occur, it has pernicious consequences, depriving individuals of years of their lives and undermining our faith in the criminal justice system. Our current framework for preventing and exposing misconduct is unworkable. *Brady* in particular provides an illogical standard for achieving the

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258. *Id.* at 2.

259. *Id.* Interestingly, the letter referred to the provision of the manual requiring an expansive interpretation of materiality under *Brady*. U.S. DEP'T OF JUSTICE, JUSTICE MANUAL § 9-5001(B) (2018), https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings (last visited Aug. 1, 2020) ("prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence"). It did not, however, quote from the provision requiring "[d]isclosure of exculpatory and impeachment information beyond that which is constitutionally and legally required," whereby prosecutors are to turn over "relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal." *Id.* § 9-5001(C).

260. *See* Harker, *supra* note 1, at 895.

261. Letter from Douglas Overbey, *supra* note 257, at 2.

aim of a fair trial and even the most ethical of prosecutors will struggle to comply with its mandates. Even modest reforms are met with resistance and vehement denials that a problem exists. Particularly in the context of pre-trial disclosures of exculpatory information, a change of governing law is necessary to ensure the reliability of our system of criminal justice.

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