THE YALE LAW JOURNAL

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A Fair Trial Remedy for *Brady* Violations

ABSTRACT. This Note proposes a new remedy for criminal defendants when the government fails to fulfill its constitutional duty to disclose favorable evidence. When evidence that should have been disclosed earlier emerges during or shortly before trial, the court should consider instructing the jury on the duty to disclose and allowing the defendant to argue that the failure to disclose raises a reasonable doubt about the defendant's guilt. Even if rarely granted, this remedy could prevent violations by encouraging prosecutorial vigilance.

AUTHOR. Yale Law School, J.D. expected 2006. I must thank first of all my professors Deborah Cantrell and Dennis Curtis and my editor Erin Roeder for so thoughtfully commenting on numerous drafts. I am also grateful to Aaron Crowell, Charlotte Dewar, Justin Florence, David Harris, Daniel Korobkin, Timothy O'Toole, Ronald Sullivan, and Edward Ungvarsky for their insights and encouragement.

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INTRODUCTION

Forty years after the Supreme Court held in *Brady v. Maryland* that the Constitution requires the government to disclose favorable evidence to criminal defendants,[1] prosecutors still frequently fail to perform this duty.[2] Such failures violate defendants' rights to due process of law under the Fifth and Fourteenth Amendments and thwart the various protections that together constitute the fundamental right to a fair trial under the Sixth Amendment. By directly handicapping the defense, *Brady* violations also diminish the ability of the criminal justice system to distinguish accurately between the guilty and the innocent.

Nevertheless, most *Brady* violations pass undiscovered or without remedy. When favorable evidence remains buried, defendants do not know that their rights were violated. And even when suppressed evidence does come to light, reviewing courts usually deem suppressions "harmless" and uphold the convictions.[3] Thus, not only are defendants' rights rarely vindicated, but also the government rarely suffers a serious penalty for its misconduct.

Because *Brady* and its progeny accord prosecutors nearly unchecked discretion, reducing the number of violations requires changing the way individual prosecutors approach their *Brady* duties: the rigor with which they look for *Brady* evidence in the government's possession, the amount of time they spend imagining how a piece of evidence might be favorable to the defense, and the consideration they give to the consequences of disclosing too little. A remedy that vindicates the rights of defendants and also entails immediate consequences for prosecutors — a remedy at trial — might accomplish this fundamental change.

This Note proposes such a remedy: When the defendant learns during or shortly before trial that the government failed to disclose significant favorable evidence, the court should consider instructing the jury on *Brady* law and granting the defendant permission to argue that the failure raises a reasonable doubt about the defendant's guilt. Part I briefly describes the status quo. Part II proposes the fair trial remedy. Part III suggests how the remedy might come into use.

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

2. *See infra* notes 10-13 and accompanying text.

3. *See infra* notes 20-27 and accompanying text.

I. THE DIMENSIONS OF THE PROBLEM

In 1963, the Supreme Court ruled in *Brady* 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."[4] *Brady*'s significance lies in the phrase "irrespective of the good faith or bad faith": the Court had earlier ruled that a person's due process rights are violated when the government deliberately suppresses favorable evidence.[5]

The Court has since ruled that the Constitution requires disclosure of impeachment evidence,[6] evidence possessed by the government even if not by the prosecutor,[7] and evidence not specifically requested by the defense.[8] The standard by which today's courts of appeal judge *Brady* claims was first enunciated in *United States v. Bagley* in 1985: A conviction must be overturned "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."[9]

The range and frequency of prosecutors' failures to disclose *Brady* evidence have been widely lamented.[10] A treatise on prosecutorial misconduct states that

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

5. *See* Pyle v. Kansas, 317 U.S. 213, 216 (1942) (holding that a person's due process rights are violated when "imprisonment resulted from perjured testimony, knowingly used by the State authorities . . . and from the deliberate suppression by those same authorities of evidence favorable to him"); Mooney v. Holohan, 294 U.S. 103, 112 (1935) (holding that it violates due process "if a State has contrived a conviction through . . . a deliberate deception of court and jury by the presentation of testimony known to be perjured").

6. Giglio v. United States, 405 U.S. 150 (1972).

7. *See* Kyles v. Whitley, 514 U.S. 419, 438 (1995).

8. United States v. Agurs, 427 U.S. 97, 107 (1976).

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

10. *See, e.g.*, BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 246 (2000) (finding prosecutorial misconduct a cause of wrongful conviction in forty-two percent of sixty-two cases examined); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 56-60 (1987) (finding and discussing prosecutorial suppression of exculpatory evidence in 35 out of 350 cases of wrongful conviction); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697-703, 731-33 (1987) (noting the "disturbingly large number of published opinions" involving "deliberately suppressed unquestionably exculpatory evidence" that nevertheless did not result in disciplinary action against prosecutors, classifying typical *Brady* violations, and arguing that further deterrents are necessary); Joseph R. Weeks, *No Wrong Without a*

"[a] prosecutor's violation of the obligation to disclose favorable evidence accounts for more miscarriages of justice than any other type of malpractice, but is rarely sanctioned by courts, and almost never by disciplinary bodies."[11] The very nature of *Brady* violations—that evidence was suppressed—means that defendants learn of violations in their cases only fortuitously, when the evidence surfaces through an alternate channel. Nevertheless, a recent empirical study of all 5760 capital convictions in the United States from 1973 to 1995 found that prosecutorial suppressions of evidence accounted for sixteen percent of reversals at the state postconviction stage.[12] And a study of 11,000 cases involving prosecutorial misconduct in the years since the *Brady* decision identified 381 homicide convictions that were vacated "because prosecutors hid evidence or allowed witnesses to lie."[13] That study's authors note, however, that their findings represent "only a fraction" of the amount of serious misconduct, because so much misconduct is undetected.[14]

Commentators have variously attributed these violations to excessive caseloads and inexperience;[15] the desire to win for professional or political gain;[16] aspirations to "do the higher justice" by ensuring the conviction of the guilty even at the cost of suppressing evidence;[17] and the inherent conflict between prosecutors' habitual role as "zealous advocates" and the task of

Remedy: The Effective Enforcement of the Duty of Prosecutors To Disclose Exculpatory Evidence, 22 OKLA. CITY U. L. REV. 833, 836, 844-48, 869-71, 933-34 (1997) (arguing that the current *Brady* doctrine results in "the almost routine violation of the fundamental guarantee of a fair trial"); Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at A1 (summarizing the results of the reporters' nationwide study of prosecutorial misconduct in homicide cases).

11. BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT ix (2d ed. 2005).

12. James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1846, 1850 (2000).

13. Armstrong & Possley, *supra* note 10.

14. *Id.*

15. Alexandra White Dunahoe, *Revisiting the Cost-Benefit Calculus of the Misbehaving Prosecutor: Deterrence Economics and Transitory Prosecutors*, 61 N.Y.U. ANN. SURV. AM. L. 45, 62-63 (2005); Armstrong & Possley, *supra* note 10 (noting comments of the New Orleans District Attorney that: "Turnover is rampant. He has 80 prosecutors, and this year, 30 are new. Next year, 30 more will be new. His prosecutors average 30 jury trials year—a daunting caseload—and they can find it difficult to keep track of what evidence has been disclosed in every case they handle . . . .").

16. Dunahoe, *supra* note 15, at 59-60; Rosen, *supra* note 10, at 732.

17. Weeks, *supra* note 10, at 834-35; *see also* Rosen, *supra* note 10, at 732 ("It is also likely that in most cases the prosecutor believes the defendant is guilty, and therefore might be motivated by the concern that, in one sense, justice will not be served by revealing evidence which will increase the probability that the defendant will go free.").

searching for evidence that might jeopardize their own cases.[18] Even cognitive psychology has been brought to bear, with one scholar hypothesizing that prosecutors' belief in the guilt of those they prosecute may pose a fundamental psychological obstacle to their grasping the exculpatory value of evidence.[19]

When a prosecutor is inclined against disclosing a piece of arguably favorable evidence, few considerations weigh in favor of disclosure. Trial courts are reticent to grant motions to compel disclosure of alleged *Brady* evidence,[20] examine government files,[21] or hold prosecutors in contempt.[22] Defendants only rarely unearth suppressions.[23] And, even when they do, their convictions are rarely overturned because they face a tremendous burden on appeal[24]: showing that the suppression raises a "reasonable probability that, had the

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18. United States v. Bagley, 473 U.S. 667, 696-97 (1985) (Marshall, J., dissenting); *see also* Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 650-55 (2002); Weeks, *supra* note 10, at 843-44.

19. Sundby, *supra* note 18, at 655 ("[R]esearch on 'cognitive conservatism' . . . consistently shows that individuals are resistant to changing an existing view of facts and, consequently, try to incorporate new information in a way that confirms the pre-existing view.").

20. *See, e.g.*, United States v. Blackley, 986 F. Supp. 600 (D.D.C. 1997) (refusing to grant a motion to compel), *aff'd on other grounds*, 167 F.3d 543 (D.C. Cir. 1999); *see also id.* at 607 ("This court simply responds to defendant's claim of under inclusiveness by noting that if the sword of Damocles is hanging over the head of one of the two parties, it is hanging over the head of [the government]. *Brady* is first and foremost a *post-trial* remedy, and the penalty for failing to disclose material exculpatory evidence relevant to a finding of guilt or punishment is the setting aside of a conviction on appeal.").

21. Trial courts have a host of reasons for opposing review in camera. *See* 5 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 24.3(b), at 488-89 (2d ed. 1999). Nevertheless, at least one commentator has proposed that courts take on the burden in order to improve defendants' access to favorable evidence. Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391 (1984).

22. *See* Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 893-97 (1995).

23. *See* Weeks, *supra* note 10, at 869 ("For every one of these cases, we have every reason to suspect that there are many more in which the prosecutor's refusal to disclose the exculpatory evidence was never discovered by the defendant or his attorney.").

24. The obstacle to *Brady* enforcement posed by the *Bagley* standard has been widely discussed. *See, e.g.*, Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 438 (1992) (concluding that when a prosecutor has sufficient evidence to convict, "under the Supreme Court's current disclosure rules, the prosecutor's decision to suppress favorable evidence would be a perfectly rational, albeit unethical, act"); Meares, *supra* note 22, at 910; Rosen, *supra* note 10, at 705-08 (noting that the *Bagley* standard applies "no matter how flagrant or intentional the prosecutor's misconduct"); Sundby, *supra* note 18, at 645-58; Weeks, *supra* note 10, at 902 (citing the immunity of prosecutors to civil suits along with the materiality standard as the "primary obstacles" to reducing prosecutors' *Brady* violations).

evidence been disclosed to the defense, the result of the proceeding would have been different."[25] Finally, lawyers' professional associations do not frequently discipline prosecutors for even the most egregious *Brady* violations.[26] Accordingly, it is not surprising that one commentator has gone so far as to call the *Brady* right "a right that almost begs to be violated," arguing that "as a practical matter, there is almost nothing that presently prevents the prosecutor disposed to do so from routinely withholding exculpatory evidence."[27]

Brady v. Maryland declares that the principle behind overturning convictions for the suppression of favorable evidence 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."[28] Rather than only being remedied in rare cases by a new trial, *Brady* violations should be prevented in the first place, so that all defendants enjoy their rights to a fair trial under the Fifth, Sixth, and Fourteenth Amendments. In the next two Parts, this Note will offer one way this might be accomplished.

II. A FAIR TRIAL REMEDY

I propose that when suppressed favorable evidence comes to light during or shortly before a trial, the trial court should consider instructing the jury on *Brady* law and allowing the defendant to argue that the government's failure to disclose the evidence raises a reasonable doubt about the defendant's guilt. I call this a "fair trial remedy," because instead of curing the *Brady* violation

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

26. A comprehensive search in 1987 revealed only nine cases in which any state bar disciplinary committee even considered disciplining a prosecutor for *Brady*-related misconduct. Rosen, *supra* note 10, at 720. The *Chicago Tribune*'s study found that none of the prosecutors involved in the 381 vacated homicide convictions was disbarred or given "any kind of public sanction from a state lawyer disciplinary agency." Only one prosecutor was fired, "but appealed and was reinstated with back pay," and only one prosecutor's law license was suspended—due to other misconduct. The reporters concluded: "It is impossible to say whether any of the prosecutors received any professional discipline at all, because most states allow agencies to discipline lawyers privately if the punishment is a low-grade sanction like an admonition or reprimand." Armstrong & Possley, *supra* note 10.

27. Weeks, *supra* note 10, at 836, 835.

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

through reversal on appeal, the remedy corrects the trial itself.[29] In contributing to a jury's decision to acquit, the remedy would provide more immediate relief than a postconviction reversal. Yet, because the remedy would not free or even grant a new trial to defendants of whose guilt the government has sufficient evidence, the remedy would not run afoul of those who decry the social costs of other "punishments" for prosecutors, such as overturning convictions or dismissing charges.[30]

A. The Remedy in Practice

The remedy would be structurally similar to the "missing evidence" and "missing witness" doctrines. Each side in a criminal case has long been allowed to argue that the failure of a party to produce a witness or evidence when that party might be naturally expected to do so creates an inference that the missing testimony or evidence would have been unfavorable to that party.[31] This adverse inference may then, with the court's permission, be argued in closing and addressed by a jury instruction. The prerequisites are a showing that the testimony would have "elucidated the transaction"—i.e., that it would not simply have been cumulative—and that the evidence or witness was "peculiarly" available to the nonproducing party.[32]

The corresponding *Brady* remedy would require defendants to establish that favorable evidence in the government's possession had been suppressed, and that the suppression had significantly hampered the defense's investigation and preparation for trial. The defense would also have to show

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29. The idea of a "fair trial remedy," of trying to fix a pretrial constitutional error at trial, was first suggested to me by its mention in the speedy trial context in AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 101 (1997).

30. *See, e.g.*, Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713 (1999). Henning seems to cry out for a fair trial remedy:

> [P]unishing a prosecutor by granting the defendant relief, such as excluding evidence or dismissing charges, does not necessarily vindicate the interests of the community. Instead, it may produce a windfall for the defendant. A remedy granted solely to deter future prosecutorial misconduct can lead to incongruous results, such as the dismissal of charges when it is likely that the defendant is guilty of the crime, or reversal of a conviction when the proceeding was otherwise fair. Nevertheless, finding improper intent without meting out punishment gives the impression that the courts are powerless in the face of prosecutorial misuse of authority.

Id. at 717 (footnote omitted).

31. *See* 29 AM. JUR. 2D *Evidence* § 247, at 259-61 (2005).

32. Graves v. United States, 150 U.S. 118, 121 (1893).

that the suppressed evidence was not merely cumulative of other favorable evidence in the defense's possession, and the defense did not have access to the suppressed evidence and could not reasonably have been expected to find the evidence through other channels.

The remedy would exist primarily for the benefit of defendants when the government's tardiness[33] or failure to disclose favorable evidence permanently prejudiced the defense. Permanent prejudice might consist of the disintegration of tangible evidence or the death or disappearance of a witness or alternative suspect. In such cases, neither granting a continuance for further investigation nor the fact that the defendant may be able to make some use of the belatedly disclosed evidence is a sufficient remedy.[34]

Because *Brady* holds prosecutors responsible for disclosing not only the favorable evidence in the prosecutor's files, but also favorable evidence possessed by other government agencies,[35] this remedy would be available no matter where within the government the undisclosed evidence had lain. As Justice Souter wrote in *Kyles v. Whitley*,

> procedures and regulations can be established to carry [the prosecutor's] burden and to insure communication of all relevant information on each case to every lawyer who deals with it. Since, then, the prosecutor has the means to discharge the government's *Brady*

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33. Most jurisdictions have the vague requirement that prosecutors carry out *Brady* disclosures in a sufficiently timely fashion to allow the defense to use the favorable material effectively in the presentation of its case. *See* YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 1198 (10th ed. 2002). Most courts have held that disclosure at any time prior to or during trial is timely unless the defendant can prove prejudice from the delayed disclosure. *See, e.g.*, Ebron v. United States, 838 A.2d 1140, 1155-56 & n.13 (D.C. 2003) (asserting that "prosecutors are expected to resolve all reasonable uncertainty about the potential materiality of exculpatory evidence in favor of *prompt* disclosure," but upholding the conviction because the defense had not shown prejudice from the belated disclosure of nearly $90,000 in payments to two witnesses (internal quotation marks omitted)). A fair trial remedy would allow defendants to attempt this showing of prejudice before or during trial.

34. The requirement of permanent prejudice thus circumvents the objection that cross-examining a government witness using belatedly disclosed *Brady* material is adequate to remedy prejudice posed by delay. *Cf.* United States v. Gaytan, No. 95-10210, 1996 U.S. App. LEXIS 10238, at *5 (9th Cir. Apr. 18, 1996) ("The Government's disclosure in this case, while unquestionably untimely and inconvenient to the defense, provided additional impeachment evidence against the Government's primary witness. It occurred during direct examination of the witness, and the defense was able to utilize the revelation to its advantage during cross-examination. Thus, the Government's mistake was easy to remedy.").

35. *See* Kyles v. Whitley, 514 U.S. 419, 437-38 (1995).

> responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.[36]

The defense could request the remedy in a motion before trial or, if the suppression came to light during the trial, outside the jury's presence. If the defense made the requisite showings, it would be within the trial court's discretion to permit a *Brady* argument in closing and a jury instruction similar to the following:

> In this case, the government failed to turn over promptly, as required by law, a piece of evidence favorable to the defense, namely [evidence], of which the defense learned only on [date], when [means of disclosure]. Although this delay does not necessarily bear on the guilt or innocence of the defendant, you may, if you think it appropriate in light of all the evidence, take into account the possible harm to the defense caused by this delay when evaluating whether the government has proven the defendant's guilt beyond a reasonable doubt.

Even in the case of an egregious suppression, the trial court would have discretion not to grant the remedy, depending on the court's assessment of the suppression's evidentiary relevance and the possible unfair prejudice to the government of revealing the suppression's existence to the jury.[37] To reduce the unfair prejudice to the government, the court might strictly limit the scope of the defendant's *Brady* argument to the harm caused by the delayed disclosure, rather than allowing the defendant to suggest, for instance, that the government suppressed the favorable evidence out of desperation at the weakness of its own case. Moreover, the trial court would retain the option of granting a continuance or dismissing the charges. Under federal and some state laws, neither the government nor the defense would likely be permitted to appeal the trial court's interlocutory order on this issue.[38]

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36. *Id.* at 438 (internal quotation marks and citation omitted, alteration in original)); *cf.* Sundby, *supra* note 18, at 659-60 ("Perhaps *Brady*'s most important pre-trial function is that it stresses the prosecutor's responsibility for and the need to be aware of all evidence within the government's possession.").

37. *See* FED. R. EVID. 402-403.

38. Traditionally, the state and federal governments are allowed to appeal rulings in criminal cases only with express statutory authority, *see* Arizona v. Manypenny, 451 U.S. 232, 245 (1981), which would not exist in this context, at least initially. The law on appeals by

Defendants who were convicted despite receiving the remedy could still argue on appeal that the *Brady* error rose to the level of a *Bagley* violation, meriting a reversal of the conviction, because the prejudice to the defense raised a reasonable probability of a different result. Undoubtedly, winning this argument would be extraordinarily difficult—more so than meeting the *Bagley* standard in a typical *Brady* case.[39] But the defendants for whom this remedy is designed would not have typical *Brady* appeals to begin with, because in their cases the suppression emerged before or during trial. Even without the fair trial remedy, the obstacle posed by the *Bagley* standard to such defendants is likely insurmountable, because the defense had the opportunity to make some use of the favorable evidence at trial.[40] The fair trial remedy, while perhaps adding to the *Bagley* burden on appeal, would introduce the possibility of circumventing *Bagley* completely: If the remedy led a jury to find that the government had not proven guilt beyond a reasonable doubt, the defendant would never face any appellate burden whatsoever.

B. The Remedy as Cure

The proposed remedy would delegate to juries a task currently assigned to appellate courts. Before the hindsight-burdened reassessment on appeal,[41] the jury would consider the possible prejudice to the defense resulting from the *Brady* violation in light of the evidence presented at trial. The jury would know that the government had illegally hindered the defense and would be exhorted by defense counsel to acquit the defendant in part on the basis of the suppression, because the suppressed evidence itself raised a reasonable doubt

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defendants varies among the states, but, in federal court, the Supreme Court's holding in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949), does not appear to permit an appeal of this decision.

39. *See supra* note 24 (addressing the difficulty of meeting the *Bagley* standard in the ordinary cases in which suppressions are discovered after conviction).

40. It is not even clear that courts would consider *Bagley* arguments in such cases. The evidence has been "disclosed" to the defense, in the sense that the defense knows of the evidence during at least a portion of the trial, even if the evidence was not disclosed in accordance with the jurisdiction's *Brady* law and rules. Under *Bagley*, the defendant must show a "reasonable probability that, *had the evidence been disclosed to the defense*, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985) (emphasis added).

41. *See* Capra, *supra* note 21 (discussing the problem of review based on what the trial might have been and proposing that trial courts review prosecutors' files in camera for *Brady* evidence). *See generally* Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 575-80 (2004) (discussing judges' cognitive biases in conducting harmless error review).

about the defendant's guilt; because the government's failure to disclose the evidence evinced the weakness of its case; or because, if the defendant had known of the evidence earlier, the defendant would have found proof of innocence or at least further evidence to undermine the government's case. The jury might accept one of these arguments, or the jury's generally enhanced scrutiny of the government's case might uncover a reasonable doubt the jury would not otherwise have noticed.

The remedy would give the most aid to defendants in cases in which the government's evidence is not overwhelming—for instance, when the government's case relies heavily on one or two eyewitness identifications. In cases of overwhelming evidence against the defendant, the defendant's *Brady* argument would be unlikely to affect the outcome, but could still remedy the unfairness of the trial. (And because, in these cases, the defendants now lose on appeal for harmless error, the remedy would not leave these defendants worse off.)

Defense counsel might worry that *Brady* arguments could inadvertently shift the burden of proof to the defendant in jurors' minds, by drawing jurors' attention to the possibility of exculpatory evidence, or the lack thereof. This worry might be especially warranted if the suppressed evidence, though favorable, does not strongly undermine the government's case or suggest innocence. Accordingly, whether or not to request the remedy would be a strategic decision.

One might also be concerned that the proposed remedy could harm defendants if their counsel chose to argue prejudice instead of investigating exculpatory *Brady* leads. As it is, however, many criminal defense attorneys lack sufficient time and resources to investigate, and some may be deeply skeptical of their clients' protestations of innocence. Insofar as defense counsel do investigate exculpatory leads today despite these obstacles, it seems unlikely that they would not continue to do so while also arguing prejudice. Furthermore, the court could refuse to allow the defense to argue *Brady* to the jury if the court granted a continuance or found that the date the suppression came to light had given the defense sufficient time to investigate live leads.

C. The Remedy as Deterrent

A fair trial remedy would give criminal trial courts an intermediate remedy when suppressions surface: one likely rarer and more effective than a simple continuance, but not as extraordinary as an outright dismissal of the charges. At the same time, the courts would acquire better means to deter *Brady* violations, a power analogous to civil courts' authority to use discovery sanctions for deterrence purposes. I do not propose that courts should grant

the remedy solely to deter prosecutorial misconduct whether or not the harm warrants the remedy.[42] However, remedying the harm to one defendant might prevent others.

The remedy might deter *Brady* errors in two ways. First, the prospect of adverse consequences at trial might spur individual prosecutors to evaluate more carefully whether evidence is favorable to the defense, to be more diligent about seeking *Brady* evidence from elsewhere in the government, and to disclose promptly. Second, if prosecutors do suffer lost convictions, jury nullification, or public outcry, their offices might be provoked into developing better bureaucratic infrastructures for gathering and disclosing *Brady* evidence, both within their offices and in their relationships with police departments.[43]

Although the fair trial remedy would be granted only rarely, even the risk of its being granted might reduce prosecutorial *Brady* negligence. As Bennett L. Gershman has written, "[t]hat prosecutors actually do assess the risks and benefits associated with misconduct is an intuitively, anecdotally, and empirically well-founded conclusion."[44] Yet, as it stands now, there are nearly no adverse consequences for prosecutors' derogation of their *Brady* duties: Even when prosecutors make egregious *Brady* judgments that "cannot be reconciled with . . . common sense,"[45] courts do not dismiss the charges. The fair trial remedy would introduce an adverse consequence: Hearing about the prosecutors' *Brady* error would draw the jurors' attention to evidence favorable to the defense and might lead jurors to examine more scrupulously other elements of the government's case.

Studies of the traditional means of deterring prosecutorial misconduct suggest that this remedy is well tailored.[46] A recent cost-benefit analysis, for instance, concluded that "any attempt to curb prosecutorial abuse must focus on modifying the cost-benefit calculus of those responsible for its existence," and that "where individual discretionary choices are the culprit, the sanction

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42. *Cf.* Henning, *supra* note 30 (criticizing the "incongruous results" of reversing a conviction solely for the purpose of deterring prosecutorial misconduct).

43. *See supra* notes 35-36 and accompanying text (discussing the prosecutor's responsibility for all relevant information in the government's possession).

44. Gershman, *supra* note 25, at 430.

45. Bennett v. United States, 797 A.2d 1251, 1254, 1256 (D.C. 2002) (commenting on a prosecutor's judgment that a key witness's previous lie about seeing another murder was "irrelevant" and not material under *Brady*).

46. *See* Dunahoe, *supra* note 15 (analyzing the deterrence value of various penalties for prosecutorial misconduct); Meares, *supra* note 22, at 891-901 (concluding that the current means of controlling prosecutorial misconduct are "very weak" and proposing financial incentives as a solution).

must be . . . individualized."[47] Another scholar has similarly described contempt as a "more attractive" deterrent for prosecutorial misconduct than reversal, because it "is directed specifically at the misconduct of the prosecutor" and is less expensive for the criminal justice system than a new trial.[48] Like contempt, the fair trial remedy would also be directed at the individual prosecutor and would cost the court little or nothing to grant.

But there are reasons to doubt whether the proposed remedy would actually deter *Brady* violations. Sanctions for discovery violations in the civil context have not ended discovery abuse, despite the fact that the Supreme Court has explicitly authorized their use for deterrence purposes.[49] Under Federal Rule of Civil Procedure 37, courts may, for instance, deem the violators to have made admissions in their opponents' favor on contested issues, disallow certain claims or defenses or evidence, strike pleadings, dismiss or default, treat the violation as contempt, require the party to pay expenses caused by the violation, or instruct the jury on misconduct.[50] Scholars attribute the failure of these sanctions to the unwillingness of trial courts to dismiss cases or enter default judgments, and, when they do impose sanctions, the possibly excessive frequency with which appellate courts overturn them.[51] The

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47. Dunahoe, *supra* note 15, at 50; *see also id.* at 109-10 (describing the author's criteria: "congruency, individuality and efficiency").

48. Meares, *supra* note 22, at 894 (noting, however, that contempt proceedings are still "not cheap").

49. *See* Nat'l Hockey League v. Metro. Hockey Club, 427 U.S. 639, 643 (1976) (per curiam) ("[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of a deterrent.").

50. FED. R. CIV. P. 37; *see also* Stephen R. Bough, *Spitting in a Judge's Face: The 8th Circuit's Treatment of Rule 37 Dismissal and Default Discovery Sanctions*, 43 S.D. L. REV. 36, 39 (1998) (discussing the range of sanctions).

51. *See* Bough, *supra* note 50 (arguing that the Eight Circuit too hastily overturns discovery sanctions); Jodi Golinsky, *The Second Circuit's Imposition of Litigation-Ending Sanctions for Failures To Comply with Discovery Orders: Should Rule 37(b)(2) Defaults and Dismissals Be Determined by a Roll of the Dice?*, 62 BROOK. L. REV. 585, 590-95 (1996) (lamenting the lack of uniformity of enforcement among circuits and arguing for clearer standards); Barbara J. Gorham, Fisons*: Will It Tame the Beast of Discovery Abuse?*, 69 WASH. L. REV. 765, 765 (1994) (exploring a Washington Supreme Court case affirming a dismissal for discovery abuse against what the author describes as "the backdrop of the historic failure of courts to impose meaningful sanctions for discovery abuse"); Florrie Young Roberts, *Pre-Trial Sanctions: An Empirical Study*, 23 PAC. L.J. 1, 82 (1991) (discussing a study of pretrial sanctions in the Central District of the Los Angeles County Superior Court and finding that "certain trends were evident which revealed that the judges may not be using their power to sanction to the full extent possible in order to prevent discovery and other pre-trial abuse").

first systematic empirical study of motions for monetary discovery sanctions found that in approximately forty-eight percent of cases in Los Angeles, trial courts granted the motion on the violation, but did not impose the party's requested monetary sanction.[52] Moreover, the study found that when monetary sanctions were imposed, they were 53.3% smaller on average than requested—so small as to be ineffective, the study's author suggested.[53]

Like monetary sanctions in the civil context, a fair trial remedy would only be effective as a remedy or a deterrent if courts actually granted the remedy when warranted. Yet the number of cases in which a criminal trial court would be presented with even the opportunity to implement the remedy proposed in this Note would be few. First, nearly nine out of ten criminal cases result in plea bargains rather than trials.[54] Second, prosecutors suppress favorable evidence in only a fraction of the cases that do go to trial, and only another smaller fraction of these suppressions is discovered before the jury's verdict. Third and finally, defendants aware of suppressions would have to be able to show sufficient prejudice to warrant courts' granting the remedy.

Even if used infrequently, however, a fair trial remedy might prove a more effective deterrent than Rule 37 sanctions due to the nature of the remedy proposed and differences between the two types of misconduct. First, unlike the harsher discovery sanctions, the remedy would neither deprive a litigant of her day in court nor relieve one side of its burden of proof on a particular issue. Rather, the *Brady* argument and instruction would more generally emphasize to the jury the need to scrutinize the government's case. Accordingly, then, criminal courts might be more inclined to grant this remedy than civil courts are to dismiss cases or relieve a party of part of its burden of proof in response to discovery violations.

Second, prosecutors might be more susceptible to deterrence than civil litigants are. Although impossible to prove, the role of simple negligence may be relatively greater—and of bad faith lesser—in the *Brady* context than in the civil context. That is, even if some *Brady* violations are the product of strategic considerations, patently unlawful strategic behavior may be less pervasive among prosecutors than among civil litigators; prosecutors are, after all, charged with doing justice.[55] Even the most strident critics of prosecutors'

52. Roberts, *supra* note 51, at 82-83.

53. *Id.* at 83.

54. Sundby, *supra* note 18, at 658-59 (noting that, although the Supreme Court has not held that *Brady* "could never apply to a guilty plea, the Court also repeatedly emphasized that *Brady* was a *trial*-related right distinct from the decision to plead guilty" (citing United States v. Ruiz, 536 U.S. 622 (2002)).

55. *See* Berger v. United States, 295 U.S. 78, 88 (1935).

Brady failures acknowledge that many violations likely come about in spite of prosecutors' good intentions.[56] If *Brady* violations are not usually the result of a conscious choice made in bad faith, a small increase in vigilance across the board could help many defendants. The hope is that the very existence of the remedy would cause prosecutors to take more care in carrying out their *Brady* duties out of heightened fear of imperiling their convictions.

Admittedly, the effectiveness of the remedy as a deterrent would be hard to prove. Because only a small portion of *Brady* misconduct is both known to the defense and memorialized in public records, measuring *Brady* misconduct before and after the remedy's enactment would be extremely difficult. But one could take a random sample of serious felony cases before and after the remedy's implementation and measure the length of time between *Brady* demand letters and the government's responses, the length of time before trial of *Brady* disclosures, and the frequency of recorded unsolicited disclosures. Alternatively, one could evaluate the effectiveness qualitatively, interviewing defense counsel, prosecutors, and judges and investigating whether individual prosecutors' offices—and police stations—had taken steps to improve *Brady* compliance through better bureaucratic mechanisms and increased training.

III. HOW MIGHT THE REMEDY BE ESTABLISHED?

The fair trial remedy might be established by legislation, amendments to the rules of criminal procedure, or litigation in various courts. For a host of reasons, litigation seems the most likely means.

A. Rule Changes

The chances of implementing this reform through legislation or voluntary rule changes are slim. For advocates of *Brady* reform, the proposed fair trial remedy might seem to yield too little benefit: Though it might widely deter *Brady* misconduct, on its face it is limited in application to a small set of cases. Advocates might prefer more radical reforms to reduce prosecutorial discretion. For instance, in 1998 the District of Massachusetts promulgated "the most extensive local criminal discovery rules in the nation."[57] The Massachusetts rules greatly reduce prosecutorial discretion, requiring the government to disclose at least twenty-one days before trial, inter alia, any statement made by

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56. *See supra* notes 15-19 and accompanying text.

57. Am. Coll. of Trial Lawyers, *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Civil Procedure 11 and 16*, 41 AM. CRIM. L. REV. 93, 105 (2004)

any person that is inconsistent with statements made by witnesses to be called by the government and "[a] written description of the failure of any percipient witness identified by name to make a positive identification of a defendant."[58] This unique rule was adopted largely in response to a judge's outrage at the revelation that the government had literally shredded *Brady* evidence.[59] Conceivably, other jurisdictions in the wake of similar scandals might take action along these lines or those recommended by the ABA Standards for Criminal Justice.[60]

The spread of the Massachusetts rules to other jurisdictions might go a long way toward reducing *Brady* violations by defining precisely for prosecutors the broad range of evidence they must disclose. However, insofar as other jurisdictions continue to rely solely on prosecutors' discretion to judge the favorability of evidence to the defense, and as long the *Bagley* harmless error standard governs on appeal, prosecutors will fail to carry out their *Brady* duties—and fail with impunity. The aim of the fair trial remedy is to curtail this impunity and deter violations by curing defendants' *Brady* harms in the rare cases when *Brady* suppressions come to light before conviction.

B. Brady *Litigation*

Given that the proposed reform is a trial remedy, litigation seems a more likely way to bring it about. This might well occur in state courts, with piecemeal change. Litigators could find cases in which the defense was irremediably prejudiced by the government's delay in disclosing *Brady* evidence, and then seek to argue *Brady* to the jury and request the jury instruction. Conceivably, some individual trial courts frustrated by *Brady* violations might grant the novel remedy.[61] There is no obvious legal bar to the trial court's implementing it, and some states' rules of criminal procedure do

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58. D. MASS. LOCAL R. 116.2(B)(1)(f) (governing the disclosure of exculpatory evidence).

59. Am. Coll. of Trial Lawyers, *supra* note 57, at 105. The judge cited "a pattern of sustained and obdurate indifference to, and un-policed subdelegation of, disclosure responsibilities by the United States Attorneys Office," and ordered both a new trial and the deposition of the government's principal witness by the defense. United States v. Mannarino, 850 F. Supp. 57, 59 (D. Mass. 1994).

60. ABA CRIMINAL JUSTICE STANDARDS COMM., ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY § 11-2.1(a) (3d ed. 1996) (requiring many disclosures "within a specified and reasonable time prior to trial," including the names and addresses and written statements of "all persons known to the prosecution to have information").

61. One exasperated New Orleans judge who threw out three murder convictions in the 1990s for suppressing evidence has reportedly gone so far as to order prosecutors to take law classes. Armstrong & Possley, *supra* note 10.

specifically provide for "such other order as [the court] deems proper" in response to a prosecutor's failure to perform disclosure duties.[62] For instance, when the Supreme Court ruled that the Due Process Clause does not require reversal for the government's failure to preserve merely potentially exculpatory evidence,[63] the trial court below had allowed the defendant to argue in closing that testing of the destroyed evidence would have proven his innocence, and the court had instructed the jury that "[i]f you find that the State has . . . allowed to be destroyed or lost any evidence whose content or quality are in issue, you may infer that the true fact is against the State's interest."[64]

If trial courts refused to grant the remedy, and such a case reached a state or federal court of appeals, the court could vacate the sentence and order a new trial with the fair trial remedy. The court could reason that, unlike some pretrial constitutional violations in which the harm occurs entirely before and independent of the trial,[65] *Brady* errors harm the accuracy and fairness of the trial itself and implicate defendants' fundamental rights under the Fifth, Sixth, and Fourteenth Amendments. Therefore, trial courts should preemptively correct the trial itself rather than allowing it to go forward unconstitutionally.

Ideally, the Supreme Court would establish the remedy, so that it would be available across the country.[66] An opportunity for the Court to consider this remedy might arise if litigators capitalized on the Court's conflicting dicta regarding the standard prosecutors should apply in deciding whether to disclose favorable evidence. In *Kyles v. Whitley*, Justice Souter implied that the *Bagley* standard—"reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"[67]—is both the standard of review and the standard to be applied, pretrial, by prosecutors.[68] But prosecutors' applying *Bagley*'s "reasonable probability"

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62. CONN. SUPER. CT. R. § 40-5(8).

63. Arizona v. Youngblood, 488 U.S. 51 (1988).

64. *Id.* at 59-60 (Stevens, J., concurring) (quoting the transcript in arguing that it was unlikely that the evidence's destruction prejudiced Youngblood's case).

65. For example, most Fourth Amendment violations would fall into this category.

66. The Supreme Court has not foreclosed preconviction avenues to enforcing defendants' rights under *Brady*. *United States v. Agurs*, for instance, contemplates at least limited in camera review of the government's evidence to determine whether alleged undisclosed evidence falls under *Brady*. 427 U.S. 97, 106 (1976).

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

68. Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached.").

standard seems inapt, because *Bagley*'s "reasonable probability" is a retrospective judgment about what happened at trial.[69] The standard might better be phrased for prosecutors in a different verb tense, requiring them to turn over evidence which, were it disclosed to the defense, would have a reasonable probability of affecting the outcome of the trial. But, not yet knowing the defense's case, how could a prosecutor judge the probabilities?

Justice Stevens has grasped this distinction between retroactive *Brady* judgments on appeal and the judgments of prosecutors, whose failures to disclose can change what takes place at the trial. In *Strickler v. Greene*, Justice Stevens wrote that even when suppressed evidence does not raise a doubt sufficient to require reversal, the suppression is still a violation of prosecutors' "broad obligation to disclose exculpatory evidence."[70] Recently, in granting a criminal defendant's pretrial motion to compel disclosure of favorable evidence in a securities case, a federal district court conducted an analysis along similar lines, finding that "the definitions of materiality as applied to appellate review are not appropriate in the pretrial discovery context."[71] Instead, the court relied on "the plain meaning of 'evidence favorable to an accused' as discussed in *Brady*."[72]

Seizing on Justice Stevens's and lower courts' analyses, the Supreme Court could hold that it is unconstitutional to proceed with a trial in which a severely prejudicial suppression has been discovered but not remedied. The Court could suggest the fair trial remedy as one means—though not dictated in particular by the Constitution—by which to correct what would otherwise be an unconstitutional trial. If lower courts followed the Supreme Court's lead, the remedy would become a nonconstitutional remedy to secure defendants' *Brady* rights. The remedy's nonconstitutional status would mean that, if legislators objected to its abuse, they could overturn it. However, they would be faced with the alternative of courts being forced to dismiss charges completely in cases of permanent prejudice to the defense.

Courts of appeal would develop a second standard of review for analyzing trial courts' refusal to grant the fair trial remedy. They would likely leave trial courts broad discretion, mirroring the abuse-of-discretion standard for civil

69. Other observers have noted this problem. *See, e.g.*, Kevin C. McMunigal, *The Craft of Due Process*, 45 ST. LOUIS U. L.J. 477, 479 (2001).

70. Strickler v. Greene, 527 U.S. 263, 281 (1999).

71. United States v. Sudikoff, 36 F. Supp. 2d 1196, 1199 (C.D. Cal. 1999).

72. *Id.*

discovery sanctions.[73] A trial court abusing its discretion by denying the remedy even when faced with the most prejudicial and otherwise irremediable suppression would be reversed for having violated the defendant's rights to due process and a fair trial.[74]

CONCLUSION

A prosecutor's duty to ensure "'that justice shall be done'" includes disclosing to the accused the favorable evidence in the government's possession.[75] Although the Due Process Clause may not require reversing convictions for every suppression, the frequency with which prosecutors violate their "broad obligation to disclose"[76] is unjust. A fair trial remedy would correct the injustices inflicted upon a few defendants and, by reminding prosecutors of their duty, could prevent many more.

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73. *See* Nat'l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 642 (1976) (per curiam). Abuse of discretion is also the standard when criminal courts deny a defendant a jury instruction on a defense for lack of factual basis. *See* United States v. Gomez-Osorio, 957 F.2d 636, 642 (9th Cir. 1992) ("In general, [a] defendant is entitled to have the judge instruct the jury on his theory of defense, provided that it is supported by law and has some foundation in the evidence. Logically, if the parties dispute whether the required factual foundation exists, the court should apply an abuse of discretion standard of review." (internal quotation marks omitted)); *accord* Mathews v. United States, 485 U.S. 58, 63 (1988).

74. By "otherwise irremediable," I mean otherwise irremediable by a lesser remedy, such as a continuance; in all cases, outright dismissal of the charges would remain an alternative.

75. United States v. Bagley, 473 U.S. 667, 675 n.6 (1985) (quoting Berger v. United States, 295 U.S. 78, 88 (1935)).

76. Strickler v. Greene, 527 U.S. 263, 281 (1999).