THE JURY'S *BRADY* RIGHT

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When prosecutors violate due process by suppressing evidence favorable to criminal defendants in violation of Brady v. Maryland, *their misconduct causes serious harm to defendants and to the criminal justice system. Scholars have focused on these harms, responding by offering proposals designed to increase compliance with the defendant's* Brady *right. Nevertheless, the misconduct*

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continues, evidenced by the steady stream of exonerations and other cases overturned because of Brady *violations. This Article addresses this problem from a different angle. It demonstrates that the narrow focus on harms to the defendant and the system overlooks harms to jurors and the institution of the jury. That is, violations of the defendant's* Brady *right prevent the jury from fulfilling its constitutional role and render it an instrument of the prosecutor's misconduct. To address these overlooked harms, this Article proposes a separate and distinct* Brady*-like right for the jury—the jury's* Brady *right. This Article finds support for this right in the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments. Recognizing this right will reinforce the jury as an essential constitutional actor. Furthermore, even if the Supreme Court is not prepared to recognize a new right in the jury, explicit consideration of the harms to the jury from violations of the defendant's* Brady *right offers promise for increasing compliance with* Brady.

INTRODUCTION

Within minutes of securing a guilty verdict in a Texas murder case, the second chair prosecutor met with some of the discharged jurors, performing what is a customary role, in many jurisdictions, of expressing gratitude for the jury's service.[1] The jury returned its verdict after hearing graphic and disturbing evidence of a husband unleashing a fatal bludgeoning on his wife in the early morning, which, according to the State, was the result of the victim spurning her husband's sexual advances hours earlier.[2] To make matters worse, the State argued, after beating his wife to death, the husband callously left for work, leaving his three-year-old son to wake up alone and discover his mother's body.[3] The crime and the trial captivated a small suburb outside of Austin, Texas, and the young prosecutor was undoubtedly relieved that the jury embraced the State's theory of the case.

In those brief moments with the jurors, the prosecutor—either not realizing the significance of his words or perhaps expressing unintentional candor in the euphoria of the trial victory—also expressed relief that the jury had not been provided all of the information the State collected during its investigation.[4] Specifically, the prosecutor mentioned that a stack of police reports from the lead investigator were never disclosed to the defense, which was a good thing according to the prosecutor, because "if the defense had gotten them, [it] would

[1] Transcript of Record vol. 4 at 356-57, *In re* Hon. Ken Anderson, No. 12-0420-K26 (D. Ct. Williamson Cty. Feb. 6, 2013) (on file with author); *see also* Morton v. State, 761 S.W.2d 876, 881 (Tex. Ct. App. 1988) (affirming conviction on direct appeal and describing prosecution's evidence at trial). The author was part of Michael Morton's defense team at the Innocence Project.

[2] Transcript of Record vol. 4, *supra* note 1, at 206-07.

[3] *Id.* at 207-08.

[4] *Id.* at 357.

have been able to raise even more doubt than [it] did."[5] One of the defense lawyers overheard the prosecutor's comment,[6] which was particularly memorable because the defense team had suspected during the trial that the prosecution was skirting its disclosure obligations.[7]

Armed with the prosecutor's admission to the jurors, the defense filed a motion for new trial seeking a full review of the undisclosed police reports.[8] The trial court denied the motion, but it became the first step in a twenty-five year battle challenging the State's murder case against Michael Morton.[9] Ultimately, after DNA testing and a reinvestigation, the prosecutor's post-trial candor with the jury proved prescient. The jury's determination of guilt was wrong. Michael Morton was innocent.[10] Contrary to the case the prosecution presented to the jury, Morton left home early that morning to begin his shift as the manager of a local grocery store, just as he always did, with his wife and son sleeping in their beds. However, after Morton left, an intruder broke into the home and committed the brutal murder.[11]

Of course, the jury never heard this alternative account, an account we now know to be true. But that was not because Morton's defense team did not argue his innocence at trial—they did. Rather, the jury did not hear the full thrust of the evidence supporting Morton's innocence because the prosecution kept it hidden for over two decades.[12] The suppressed items included, among other things, the very police reports the prosecutor referred to when discussing the case with the jurors moments after the guilty verdict. As we now know, the prosecutor was wrong in one regard: Morton's defense would have been able to do much more than "raise even more doubt" with the police reports.[13] They would have been able to stop the wrongful conviction of an innocent man.

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[5] *Id.*

[6] *Id.*

[7] *Id.* at 353-56. The defense's suspicion was based on the fact that the prosecutor refused to provide them with copies of the defendant's statements to the police, *id.* at 353; failed to disclose the investigator's police report, *id.* at 355; and elected not to call the lead investigator as a witness at the trial, *id.* at 355-56.

[8] *Id.* at 356.

[9] *See generally* MICHAEL MORTON, GETTING LIFE: AN INNOCENT MAN'S 25-YEAR JOURNEY FROM PRISON TO PEACE (2014).

[10] *See Ex parte* Morton, No. AP-76663, 2011 WL 4827841, at *1 (Tex. Crim. App. Oct. 12, 2011) (overturning Morton's conviction based on his innocence).

[11] Pamela Colloff, *The Innocent Man, Part Two*, TEX. MONTHLY (Dec. 2012), http://www.texasmonthly.com/articles/the-innocent-man-part-two/ [https://perma.cc/XAC9-AK5R] (describing DNA testing leading to identification of Mark Alan Norwood as actual perpetrator); *see also* Norwood v. State, No. 03-13-00230-CR, 2014 WL 4058820, at *1 (Tex. Ct. App. Aug. 15, 2014) (affirming Norwood's murder conviction).

[12] *See generally* Colloff, *supra* note 11 (describing process and litigation that uncovered hidden evidence).

[13] Transcript of Record vol. 4, *supra* note 1, at 357.

Twenty-five years later, following years of litigation over whether Morton even deserved the opportunity to conduct the DNA testing that ultimately proved his innocence and identified the actual perpetrator, Morton returned to the trial court in the same suburb for a final hearing in his case. This time, everyone involved knew what the outcome would be—Morton would walk out of the courtroom a free and innocent man. As he prepared to drive away from the courthouse with his family, one of Morton's attorneys, Barry Scheck, approached the truck with a "tear streaked" woman who was "aching with remorse."[14] She was a member of the jury who voted to convict Morton. A retired high school teacher, she explained that for twenty-five years she "told her students how she'd done her civic duty and sent [Morton] to prison."[15] Now, having learned the truth, she was overcome with emotion for her role in the case. Morton told her that "it was okay . . . it wasn't her fault."[16]

Morton spoke the truth. It was not the juror's fault. As a result of the prosecutor's failure to meet his constitutional disclosure obligations, the jury did not know about a police report from the day after the murder in which neighbors reported seeing a suspicious man park a green van near the vacant lot behind the Mortons' home on several occasions before the murder.[17] The neighbors also saw the man walk through the lot to the Mortons' fence.[18] The jury also did not know that, less than two weeks after the murder, the police obtained a transcript of a conversation Morton's son had with his grandmother about the crime.[19] It revealed that Morton's son saw the perpetrator and that the perpetrator was not his father.[20] Not having heard this information, the jury foreperson remembered feeling that Morton's tears at the sight of the crime scene photos were a sign of guilt.[21] The rest of the jurors agreed, "deliberat[ing] for less than two hours, though eleven of them were ready to convict at the start."[22]

Within months of Morton's exoneration, the jury foreperson offered his opinion about the importance the undisclosed evidence would have had on the deliberations.[23] After having been told about the hidden exculpatory evidence, he responded simply, and in understated fashion: "It would have been very

[14] *See* MORTON, *supra* note 9, at 213.

[15] *Id.*

[16] *Id.*

[17] Pamela Colloff, *The Innocent Man, Part One*, TEX. MONTHLY (Nov. 2012), http://www.texasmonthly.com/politics/the-innocent-man-part-one/ [https://perma.cc/UG5E-ZG52].

[18] *Id.* (reporting that one neighbor remembered seeing green van on morning of murder).

[19] Colloff, *supra* note 11.

[20] *Id.*

[21] Colloff, *supra* note 17 (quoting foreperson saying, "I felt like he was crying over what he had done").

[22] *Id.*

[23] *See* Transcript of Record vol. 5 at 157, *In re* Hon. Ken Anderson, No. 12-0420-K26 (D. Ct. Williamson Cty. Feb. 7, 2013) (on file with author).

helpful, yeah. I wish I had been given the opportunity to know this when we were making our decision."[24]

Morton's jurors would have had that opportunity if the prosecutor had complied with his constitutional obligations. The Constitution requires prosecutors to disclose to the defense favorable evidence that is material to guilt or punishment.[25] This is what is referred to as the defendant's *Brady* right, named after the case in which the Supreme Court formally recognized the right, *Brady v. Maryland*.[26]

Unfortunately, despite the fact that the defendant's *Brady* right was first recognized over fifty years ago, prosecutorial suppression of exculpatory evidence like that in Morton's case is all too common.[27] One federal judge characterized widespread *Brady* violations as an "epidemic."[28]

This type of prosecutorial misconduct has garnered extensive interest. Scholars and the judiciary have examined *Brady* from a variety of angles.[29] And they have offered many proposals to encourage prosecutors to comply with *Brady*.[30] However, this coverage has largely ignored *Brady*'s implications from

[24] *Id.* at 172.

[25] *See* Brady v. Maryland, 373 U.S. 83, 87 (1963); *infra* Section I.A (outlining *Brady*'s scope).

[26] 373 U.S. 83 (1963).

[27] *See infra* Section I.B (discussing *Brady* misconduct).

[28] United States v. Olsen, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, C.J., dissenting) ("*Brady* violations have reached epidemic proportions in recent years . . . ."); Lara Bazelon, *For Shame*, SLATE (Apr. 7, 2016, 5:45 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/04/alex_kozinski_and_the_ninth_circuit_s_crusade_against_prosecutorial_misconduct.html [https://perma.cc/FM77-FMAB] (exploring Judge Kozinski's and Ninth Circuit's focus on *Brady* misconduct).

[29] *See, e.g.*, Miriam H. Baer, *Timing* Brady, 115 COLUM. L. REV. 1, 1 (2015) (analyzing "how timing affects the prosecutor's decision to disclose or withhold exculpatory evidence in advance of a criminal trial"); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1610 (2006) (viewing "cognitive psychology as providing a potential basis for explaining the mechanism underlying the prosecutor's bias"); 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. ONLINE 203, 209 (2011) (describing lack of discipline for prosecutors who violate *Brady*); Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1542 (2010) (analyzing *Brady*'s limitations); Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies that Prove that Assumption Wrong*, 80 FORDHAM L. REV. 537, 539-40 (2011) (noting that prosecution offices in author's cited case studies do not "impos[e] sanctions or any other negative consequences on prosecutors who violate *Brady* or related due process rules").

[30] *See, e.g.*, Cone v. Bell, 556 U.S. 449, 470 n.15 (2009) ("As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure."); United States v. Agurs, 427 U.S. 97, 108 (1976) (same); Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*,

the perspective of the jury. This Article fills that void, recognizing that the jury has an interest in evaluating all evidence favorable to the defendant, an interest independent of the defendant's own *Brady* right.

Violations of the defendant's *Brady* right obviously cause acute harms to the defendant. In addition, this type of prosecutorial misconduct harms the jury—both as an institution and as individual jurors. Current conceptions of the defendant's *Brady* right, focused on the harms to the defendant and more general harms to the criminal justice system,[31] address some of the potential harms to the jury, but they do not account for all of the harms the jury faces.[32] This Article proposes recognizing a distinct *Brady*-like right for the jury—the jury's *Brady* right. It finds support for such a right in the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments.[33] Specifically, recognizing the jury's *Brady* right is consistent with the jury's indispensable constitutional role as a check on the power of the State. The jury cannot serve this role when the State withholds evidence favorable to the defense.

A focus on jurors may seem counterintuitive, particularly because so few jury trials take place in today's criminal justice system.[34] The decline in jury trials has caused scholars to look elsewhere to improve the system.[35] However, in the *Brady* context, it is necessary to focus on trials, and thus juries, particularly because the Supreme Court has characterized *Brady* as protecting trial rights.[36]

42 U.C. DAVIS L. REV. 1059, 1059 (2009) ("Because judges are reluctant to publicly shame prosecutors whose cases are reversed, this Article advocates that a neutral set of third parties undertake the responsibility of publicly identifying prosecutors who have committed serious misconduct."); Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xxxii (2015) (calling for independent prosecutorial oversight agencies); Jason Kreag, *The* Brady *Colloquy*, 67 STAN. L. REV. ONLINE 47, 49 (2014) (proposing brief on-the-record colloquy regarding prosecutor's disclosure obligations and practices).

[31] *See Brady*, 373 U.S. at 87 ("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.").

[32] *See infra* Section II.B.

[33] *See infra* Section III.B.

[34] *See, e.g.*, Lafler v. Cooper, 566 U.S. 156, 157 (2012) (recognizing that "criminal justice today is for the most part a system of pleas, not a system of trials"); *cf.* Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1151 (2001) ("The trial right does little good when most defendants do not go to trial.").

[35] *See, e.g.*, Jason Kreag, *Prosecutorial Analytics*, 94 WASH. U. L. REV. 771, 771 (2017) (proposing increased use of data analytics to regulate prosecutorial behavior); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2197 (2014) (arguing that courtroom audience plays essential constitutional role in age with few jury trials).

[36] *See* Dist. Attorney's Office v. Osborne, 557 U.S. 52, 68 (2009) (emphasizing that *Brady* established trial right does not control in post-conviction proceedings). *But see* Buffey v. Ballard, 782 S.E.2d 204, 212-16 (W. Va. 2015) (reviewing jurisdictions that have extended

More generally, I argue that even if the Supreme Court is not prepared to recognize a distinct *Brady*-like right for the jury, focusing on the jury's perspective in the context of the defendant's traditional *Brady* right offers promise for minimizing the type of prosecutorial misconduct that occurred in Morton's case.

This Article proceeds in four parts. Part I describes the defendant's *Brady* right and the extent to which prosecutors fail to respect it. Part II identifies how violations of the defendant's *Brady* right harm the jury, such as by preventing the jury from serving its constitutional role. After recognizing that some of the jury's interests are not protected by the defendant's *Brady* right, Part III proposes a new *Brady*-like right for the jury. It explores the scope of the jury's *Brady* right, the constitutional foundation for the right, and how the right should be implemented. Part IV explores the implications of recognizing such a right.

I. THE DEFENDANT'S *BRADY* RIGHT

A. Brady*'s Scope*

The due process rights outlined in the Fifth and Fourteenth Amendments require prosecutors to disclose to criminal defendants information that is favorable and material.[37] This duty[38] is affirmative,[39] ongoing,[40] and extends to

Brady's principles to plea bargaining and holding that in West Virginia "defendant is constitutionally entitled to exculpatory evidence during the plea negotiation stage").

[37] *See* Brady v. Maryland, 373 U.S. 83, 87 (1963). Other provisions and rules extend the prosecutor's disclosure obligations beyond *Brady*'s constitutional mandates. *See, e.g.*, Connick v. Thompson, 563 U.S. 51, 65-67 (2011) (referencing ethical obligations regarding discovery); *In re* Kline, 113 A.3d 202, 213 (D.C. 2015) (holding that prosecutor's ethical obligations regarding disclosure reach beyond *Brady*); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009), http://www.americanbar.org/content/dam/aba/events/professional_responsibility/2015/May/Conference/Materials/aba_formal_opnion_09_454.authcheckdam.pdf [https://perma.cc/M67F-BKLL] ("Courts as well as commentators have recognized that the ethical obligation is more demanding than the constitutional obligation. The ABA Standards for Criminal Justice likewise acknowledge that prosecutors' ethical duty of disclosure extends beyond the constitutional obligation." (footnotes omitted)).

[38] One notable *Brady* scholar believes it is not accurate to refer to *Brady* as imposing a duty to disclose. *See* Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 483 (2009) (characterizing *Brady*'s reach as "so restrictive that it is probably best articulated not as a duty of the prosecutor to disclose, but as a narrow exception to a prosecutor's general right to withhold evidence from the defense").

[39] *See* United States v. Agurs, 427 U.S. 97, 107 (1976) ("[W]e conclude that there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases . . . in which there has been no request at all.").

[40] Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987) ("[T]he duty to disclose is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress . . . .").

information that might not have reached the prosecutor's file.[41] Favorable evidence includes exculpatory evidence and impeachment evidence.[42] Furthermore, impeachment evidence can take many forms, including evidence that undermines the credibility of a single prosecution witness[43] and evidence that undermines the credibility and thoroughness of the State's entire investigation.[44] In each instance, the favorability determination is context dependent.[45]

Favorable evidence is material if its nondisclosure "undermines confidence in the outcome of the trial."[46] Notably, favorable evidence can be material and thus trigger *Brady*'s disclosure obligations "even if . . . [it] may not . . . affect[] the jury's verdict."[47] That is, a prosecutor may correctly believe it is likely that the jury would convict the defendant even if it had access to the favorable evidence, and yet this does not mean that the favorable evidence is not material.[48] Rather,

[41] *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); *id.* at 421 ("We hold that the prosecutor remains responsible for gauging [materiality] regardless of any failure by the police to bring favorable evidence to the prosecutor's attention.").

[42] *See* United States v. Bagley, 473 U.S. 667, 676 (1985); Giglio v. United States, 405 U.S. 150, 154-55 (1972) (discussing how "nondisclosure of evidence affecting credibility" falls within *Brady* rule).

[43] *See, e.g.*, Smith v. Cain, 565 U.S. 73, 75 (2012) (reversing defendant's murder conviction based on prosecution's failure to disclose impeachment evidence related to prosecutor's key witness); *Giglio*, 405 U.S. at 154 ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within [the *Brady* rule]." (quoting Napue v. Illinois, 360 U.S. 264, 269 (1959))); *Napue*, 360 U.S. at 269 ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.").

[44] *See Kyles*, 514 U.S. at 445 (noting that potential *Brady* evidence includes information that provides defendants opportunity to question "thoroughness and even the good faith of the [police] investigation").

[45] *Id.* at 439 ("[T]he character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record.").

[46] *Id.* at 434 (quoting *Bagley*, 473 U.S. at 678). In *In re Kline*, the D.C. Court of Appeals noted the evolution of the definition of "materiality" in the *Brady* context. 113 A.3d 202, 207 (D.C. 2015) ("While the Supreme Court in *Brady* promulgated a definition of exculpatory material for disclosure purposes—evidence that is 'material to guilt or innocence'—it was not until *Bagley* that the term 'material' was defined as prejudice sufficient to support a belief that had the information been disclosed, the outcome of the trial likely would have been different.").

[47] Wearry v. Cain, 136 S. Ct. 1002, 1006 n.6 (2016) (per curiam).

[48] *See Smith*, 565 U.S. at 75 (clarifying that *Brady*'s materiality standard does not turn on whether it is "more likely than not [that a defendant would] have received a different verdict with the evidence" (quoting *Kyles*, 514 U.S. at 434)).

Brady's materiality standard turns on whether non-disclosure of favorable evidence would undermine confidence in the outcome by undermining the adversarial process.[49]

The *Brady* rule is actualized through the prosecutor.[50] Moreover, the prosecutor's disclosure decisions are often made with little, or more often no, input from the defense.[51] The trial court also plays only a minimal, and sometimes non-existent, role in the prosecutor's disclosure decisions.[52] This often renders disclosure decisions unreviewable[53] and keeps *Brady* violations hidden.[54]

Prosecutors shoulder this duty despite the fact that it is in tension with other forces at play in the adversarial system.[55] That is, *Brady* requires the prosecutor to pursue her case with "earnestness and vigor"[56] while simultaneously evaluating the information the State possesses dispassionately and from the defendant's perspective.[57] Recognizing the tension that arises from placing the

[49] *See Wearry*, 136 S. Ct. at 1006. *But see* United States v. Agurs, 427 U.S. 97, 109-10 ("The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense."). Notably, many judges and commentators have criticized injecting this standard, which relies on a retrospective analysis, into *Brady*'s disclosure regime. *See infra* Section IV.C.

[50] *See Agurs*, 427 U.S. at 107 (characterizing *Brady* as requiring prosecutor to "decide what, if anything, he should voluntarily submit to defense counsel").

[51] *See* Pennsylvania v. Ritchie, 480 U.S. 39, 59 (1987) ("In the typical case . . . it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final." (footnote omitted)).

[52] *See* Ellen Yaroshefsky & Bruce A. Green, *Prosecutors' Ethics in Context: Influences on Prosecutorial Disclosure*, *in* LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT 274 (Leslie C. Levin & Lynn Mather eds., 2012) ("Prosecutors ordinarily make these [disclosure] decisions without the trial court's involvement; prosecutors rarely ask the judge whether evidence must be disclosed.").

[53] *See* United States v. Bagley, 473 U.S. 667, 698 (Marshall, J., dissenting) (characterizing prosecutor's role in identifying what favorable evidence must be disclosed pursuant to *Brady* as "unguided discretion").

[54] *See* Connick v. Thompson, 563 U.S. 51, 106 (2011) (Ginsburg, J., dissenting) ("A *Brady* violation, by its nature, causes suppression of evidence beyond the defendant's capacity to ferret out."); *id.* at 80 ("*Brady* violations, as this case illustrates, are not easily detected. But for a chance discovery made by a defense team investigator weeks before Thompson's scheduled execution, the evidence that led to his exoneration might have remained under wraps.").

[55] *See Bagley*, 473 U.S. at 696 (Marshall, J., dissenting) (recognizing that *Brady* requires prosecutor to "abandon his role as an advocate"); *id.* at 675 n.6 ("[T]he *Brady* rule represents a limited departure from a pure adversary model.").

[56] Berger v. United States, 295 U.S. 78, 88 (1935).

[57] *See* Medwed, *supra* note 29, at 1542 ("The tension between the prosecutor's dual role of zealous advocate and minister of justice peaks in the context of *Brady* decisions . . . ."); *see*

burden on the prosecutor to bring *Brady*'s promise to life, the Supreme Court has repeatedly advised prosecutors to exercise their discovery duties carefully, erring on the side of disclosure.[58]

Courts and commentators have identified two distinct roles that the *Brady* right serves—protecting the liberty interest of innocent defendants and ensuring fair proceedings.[59] In *United States v. Agurs*,[60] the Court emphasized *Brady*'s power to protect innocent defendants.[61] In *Brady*, the Court highlighted the importance of ensuring fair proceedings, concluding that "[s]ociety 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."[62] And in several opinions, the Court has recognized the interplay of the two roles, relying on a famous passage from its opinion in *Berger v. United States*:[63] "it is as much [the prosecutor's] 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."[64]

However, the central role that prosecutors play in realizing *Brady*'s protections demonstrates the extent to which the criminal justice system depends

also Bagley, 473 U.S. at 702 (Marshall, J., dissenting) ("The prosecutor, convinced of the guilt of the defendant and of the truthfulness of his witnesses, may all too easily view as irrelevant or unpersuasive evidence that draws his own judgments into question.").

[58] *See, e.g.*, Cone v. Bell, 556 U.S 449, 470 n.15 (2009) ("As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure."); Kyles v. Whitley, 514 U.S. 419, 439 (1995) ("[A] prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence."); United States v. Agurs, 427 U.S. 97, 108 (1976) ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure.").

[59] *See generally* Jason Kreag, *Letting Innocence Suffer: The Need for Defense Access to the Law Enforcement DNA Database*, 36 CARDOZO L. REV. 805, 831-37 (2015) (tracing foundation for these roles to Due Process Clause).

[60] 427 U.S. 97 (1976).

[61] *See id.* at 107 ("But if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made."); *id.* at 110 ("If evidence highly probative of innocence is in [the prosecutor's] file, [the prosecutor] should be presumed to recognize its significance even if he has actually overlooked it."); Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 428 (2010).

[62] Brady v. Maryland, 373 U.S. 83, 87 (1963); *see also* Connick v. Thompson, 563 U.S. 51, 109 (2011) (Ginsburg, J., dissenting) ("*Brady*, this Court has long recognized, is among the most basic safeguards brigading a criminal defendant's fair trial right."); *Agurs*, 427 U.S. at 104 (concluding that *Brady* violations "involve a corruption of the truth-seeking function of the trial process").

[63] 295 U.S. 78 (1935).

[64] *Id.* at 88; *see, e.g.*, *Connick*, 563 U.S. at 71 (quoting *Berger*, 295 U.S. at 88); Cone v. Bell, 556 U.S 449, 469 (2009) (same); Banks v. Dretke, 540 U.S. 668, 694-96 (2004) (citing and relying on *Berger*, 295 U.S. at 88); *Kyles*, 514 U.S. at 439 (same).

on prosecutors to reach the desired outcomes of maintaining the system's legitimacy and ensuring just results.[65] The *Berger* Court summarized the prosecutor's special role as follows:

> [The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.[66]

The duties that *Brady* places on prosecutors are an attempt to actualize *Berger*'s lofty ideals.[67]

B. *Flouting* Brady

Despite the fact that the *Brady* rule has entered its sixth decade,[68] judging by the number of cases overturned because of *Brady* violations, misconduct continues at an alarming rate.[69] Prosecutors have violated *Brady*'s constitutional protections in the most serious cases,[70] cases where the stakes are lower,[71] cases

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[65] *See, e.g.*, Carol A. Corrigan, *On Prosecutorial Ethics*, 13 HASTINGS CONST. L.Q. 537, 537 (1986) ("The first, best, and most effective shield against injustice for an individual accused, or society in general, must be found not in the persons of defense counsel, trial judge, or appellate jurist, but in the integrity of the prosecutor."). Prosecutorial power in the *Brady* context is consistent with the broader consolidation of power in the prosecutorial function. *See* Kreag, *supra* note 35, at 793-98 (discussing consolidation of power in prosecutor's office).

[66] *Berger*, 295 U.S. at 88.

[67] *See* Strickler v. Greene, 527 U.S. 263, 281 (1999) (concluding that *Brady* line of cases "illustrate[s] the special role played by the American prosecutor in the search for truth in criminal trials").

[68] *See* Brady v. Maryland, 373 U.S. 83, 83 (1963); Kreag, *supra* note 59, at 831-37 (summarizing *Brady*'s doctrinal foundation).

[69] *See* Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 410-12 (2001) (documenting wrongful convictions caused by prosecutorial misconduct); Ellen Yaroshefsky, *New Orleans Prosecutorial Disclosure in Practice After* Connick v. Thompson, 25 GEO. J. LEG. ETHICS 913, 917-20 (2012) (describing scope of violations).

[70] *See, e.g.*, Connick v. Thompson, 563 U.S. 51, 54 (2011) (summarizing how uncovering of *Brady* evidence days before his scheduled execution led to defendant's conviction and death sentence being set aside); D'Ambrosio v. Bagley, 527 F.3d 489, 489-93 (6th Cir. 2008) (reversing defendant's conviction and death sentence because of *Brady* violation); Graves v. Dretke, 442 F.3d 334, 334-36 (5th Cir. 2006) (same).

[71] *See, e.g.*, Giglio v. United States, 405 U.S. 150, 150 (1972) (reversing conviction for "passing forged money" because of prosecutor's failure to disclose impeachment evidence).

of powerful defendants,[72] and cases in which the strength of the evidence makes it puzzling why they would risk a conviction by skirting their obligations.[73]

Ninth Circuit Judge Alex Kozinski characterized prosecutors' failure to comply with *Brady* as an "epidemic."[74] Others are convinced that *Brady* violations do not pose such a sweeping threat to the legitimacy of the criminal justice system,[75] and some attribute the unconstitutional acts to a comparatively small percentage of bad actors.[76] Of course, the actual rate of *Brady* violations and how these violations are spread across prosecutorial offices is likely unknowable because *Brady* violations occur in private. Despite that, what can be gleaned from uncovered *Brady* violations supports the conclusion that the rate of misconduct is significant and deserves attention.

First, as the following examples illustrate, many prosecutors simply do not understand the scope of their constitutional obligations.[77] In New Orleans, John Thompson's death sentence and conviction were overturned on the basis of *Brady* violations.[78] In the resulting civil suit, the elected prosecutor and several assistant prosecutors revealed that they did not understand *Brady*'s reach.[79] For example, District Attorney Harry Connick incorrectly asserted that "there could

[72] *See In re* Special Proceeding, 842 F. Supp. 2d 232, 234-35 (D.D.C. 2012) (discussing fallout from prosecutorial misconduct in prosecution of Senator Ted Stevens).

[73] *See, e.g.*, Jordan Smith, *Anatomy of a Snitch Scandal*, INTERCEPT (May 14, 2016, 9:57 AM), https://theintercept.com/2016/05/14/orange-county-scandal-jailhouse-informants/ [https://perma.cc/2CLK-YZSC] (describing murder prosecution of Scott Dekraai, fact that Dekraai's guilt was never in doubt, fact that he confessed to murders hours after crime, and fact that, despite this overwhelming evidence, prosecution committed misconduct).

[74] United States v. Olsen, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, C.J., dissenting) ("*Brady* violations have reached epidemic proportions in recent years, and the federal and state reporters bear testament to this unsettling trend.").

[75] *See, e.g.*, *Connick*, 563 U.S. at 73 (Scalia, J., concurring) (concluding that "*Brady* mistakes are inevitable"); Thea Johnson, *What You Should Have Known Can Hurt You: Knowledge, Access, and* Brady*, in the Balance*, 28 GEO. J.L. ETHICS 1, 6 n.24 (summarizing dispute between defense attorneys and prosecutors that took place in *New York Law Journal* regarding prevalence of *Brady* violations).

[76] *See, e.g.*, Thomas P. Sullivan & Maurice Possley, *The Chronic Failure to Discipline Prosecutors for Misconduct: Proposals for Reform*, 105 J. CRIM. L. & CRIMINOLOGY 881, 884 (2015) (attributing misconduct to "small, but insidious, group of miscreants").

[77] *But see* H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51, 61 (2013) ("While the precise parameters of *Brady* continue to be refined, its basic premise is well defined and completely clear to criminal attorneys. Ignorance of *Brady* obligations is seldom reason for non-disclosure.").

[78] *Connick*, 563 U.S. at 51 (summarizing Thompson's prosecution and subsequent exoneration).

[79] *See id.* at 79 (Ginsburg, J., dissenting) ("From the top down, the evidence showed, members of the District Attorney's Office, including the District Attorney himself, misperceived *Brady*'s compass and therefore inadequately attended to their disclosure obligations.").

be no *Brady* violation arising out of 'the inadvertent conduct of [an] assistant [prosecutor] under pressure with a lot of case load.'"[80] Another prosecutor in the case "was asked whether '*Brady* material includes documents in the possession of the district attorney that could be used to impeach a witness, to show that he's lying'; he responded simply, and mistakenly, 'No.'"[81]

Like Connick, Kelley Siegler, a veteran prosecutor who spent over two decades in the district attorney's office in Harris County, Texas, and who spun her prosecutorial experience into a television show focusing on solving cold cases,[82] demonstrated that she did not understand her *Brady* obligations. In the prosecution of David Temple for the murder of his wife, Siegler's team withheld several pieces of exculpatory evidence that would have aided Temple's defense that a third party committed the murder.[83] After Temple's defense team uncovered the undisclosed evidence, Siegler incorrectly asserted that *Brady* did not reach exculpatory evidence that she deemed not credible.[84] The highest criminal court in Texas rebuked this assertion, finding that Siegler's "misconception regarding her duty under *Brady* was 'of enormous significance.'"[85]

Second, the sheer number of cases reversed because of *Brady* violations points to a significant problem. A 2016 study focused on prosecutorial misconduct in Arizona, California, New York, Pennsylvania, and Texas from 2004 to 2008.[86] The study "identified 660 criminal cases where courts confirmed prosecutorial misconduct," including thirty-eight convictions reversed based on

[80] *Id.* at 94 (first alteration in original).

[81] *Id.*

[82] Sonia Smith, *A High-Profile District Attorney's Second Act as a Television Personality*, TEX. MONTHLY (Feb. 6, 2014), http://www.texasmonthly.com/articles/a-high-profile-district-attorneys-second-act-as-a-television-personality/ [https://perma.cc/L5RW-AZKD].

[83] *See Ex parte* Temple, No. WR-78,545-02, 2016 WL 6903758, at *8 (Tex. Crim. App. Nov. 23, 2016) (holding State's failure to disclose this information to defendant in timely manner constituted *Brady* violation).

[84] *Id.* at *3 ("The prosecutor believed, as evidenced by her testimony at the writ hearing, that she was not required to turn over favorable evidence if she did not believe it to be relevant, inconsistent, or credible. She testified that she did not have an obligation to turn over evidence that was, based on her assessment, 'ridiculous.'").

[85] *Id.*; *see also* People v. Dekraai, 210 Cal. Rptr. 3d 523, 537 (Cal. Ct. App. 2016) ("Petersen, an experienced OCDA deputy DA . . . admitted there was 'discovery that was not' produced, but he stated it was not intentional. . . . He conceded his understanding of *Brady* was 'evolving' as he reads more cases."); *Ex parte* Carty, No. 877592-B, slip. op. at 19 (177th Crim. Dist. Ct. Harris Cty. Sept. 1, 2016) (finding that separate capital conviction out of Harris County demonstrated that Harris County prosecutors were "operating under a misunderstanding of *Brady* at the time of the Carty trial").

[86] *See generally* THE INNOCENCE PROJECT, PROSECUTORIAL OVERSIGHT: A NATIONAL DIALOGUE IN THE WAKE OF *CONNICK V. THOMPSON* (2016), https://www.innocenceproject.org/wp-content/uploads/2016/04/IP-Prosecutorial-Oversight-Report_09.pdf [https://perma.cc/BGJ7-AUXQ].

Brady violations.[87] A 2010 California study of cases from 1997 to 2009 revealed "707 cases in which courts explicitly found that prosecutors committed misconduct."[88] And in 1999, two reporters at the Chicago Tribune identified "at least 381" homicide convictions reversed because "prosecutors concealed evidence suggesting innocence or presented evidence they knew to be false."[89] These studies almost certainly underestimate the scope of *Brady* violations.[90]

II. VIOLATIONS OF THE DEFENDANT'S *BRADY* RIGHT HARM THE JURY

The anguish experienced by the jurors who voted to convict Michael Morton despite his innocence is a dramatic example of the collateral harms that result from a prosecutor's violation of a defendant's *Brady* right. When those jurors answered the jury summons and were informed that the case involved a murder, they likely understood that the case might leave a lasting impact on their lives. At a minimum, they probably considered how exposure to evidence describing the crime might be difficult to examine and listen to. However, they undoubtedly did not consider that they faced the risk of being deceived by the very people tasked with enforcing the law.[91] This Part identifies the harms individual jurors and the institution of the jury face when prosecutors violate the defendant's *Brady* right. It places these harms in context by first summarizing the potential harms from jury service even in cases not tainted by prosecutorial misconduct.

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[87] *Id.* at 12-13; *see also The Cases*, INNOCENCE PROJECT, http://www.innocenceproject.org/all-cases/#exonerated-by-dna [https://perma.cc/RX3G-URK2] (last visited Feb. 20, 2018) (finding that of 354 DNA exonerations to date, 54 involved government misconduct, which includes *Brady* violations); Univ. of Cal. Irvine Newkirk Ctr. for Sci. & Soc'y, Univ. of Mich. Law Sch. & Mich. State Univ. Coll. of Law, *The National Registry of Exonerations*, U. MICH. L. SCH., https://www.law.umich.edu/special/exoneration/Pages/browse.aspx [https://perma.cc/4NLU-KGH8] (last updated Feb. 20, 2018) [hereinafter *National Registry of Exonerations*] (concluding that 1127 of 2175 exonerations it has catalogued involved official misconduct).

[88] KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997-2009, at 2 (2010). Courts found the misconduct harmful in 159 of these cases. *Id.* at 3.

[89] Ken Armstrong & Maurice Possley, *Trial & Error: How Prosecutors Sacrifice Justice to Win, Part 1: The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at C1.

[90] *See, e.g.*, BRANDON L. GARRETT, CONVICTING THE INNOCENT 168 (2011) ("By its nature, misconduct involving concealed evidence may remain hidden. We typically do not know what prosecutors had in their files, much less what they failed to show to the defense."); Sullivan & Possley, *supra* note 76, at 916 (recognizing that some *Brady* violations will never be uncovered because "prosecutor is not required to advise the defense lawyer what he has deemed not exculpatory and therefore has decided not to produce, nor is he required to seek the advice of the court as to his obligation to produce"). For example, the *Brady* violations in Michael Morton's case only came to light during the lengthy litigation about whether Morton was entitled to DNA testing; had the State consented to the testing without the litigation, the *Brady* violations may have remained uncovered. *See* Kreag, *supra* note 59, at 837.

[91] *See* Berger v. United States, 295 U.S. 78, 88 (1935) (recognizing that "average jury" likely presumes that prosecutor will "faithfully observe[]" Constitution).

A. *Jury Service Risks Harm to Jurors Even Without* Brady *Violations*

The central, indeed constitutionally required, role of the jury in the criminal justice system and the unyielding praise the Supreme Court heaps upon jurors does not mean that jury duty does not impose significant costs on jurors.[92] The burdens that are often initially considered involve the interruption in jurors' daily routines and the time jury duty takes away from life's other tasks.[93] Potential jurors often focus on these burdens to seek excusal from jury duty.[94] This focus overlooks two types of more serious harms that might result from jury service. First, jury duty often involves enduring a comparatively minor, but nonetheless meaningful, series of indignities. Second, jurors face the more serious risk that jury service will leave lasting emotional or psychological scars.

While jury service is often described as a uniquely empowering form of civic duty,[95] in many respects, the practical realities of jury service are less dignified and can leave jurors feeling exposed and as if they have no control over the experience.[96] These dignitary slights begin with the initial contact a juror receives. Jury service is not voluntary. Rather, jurors receive an order to appear on a certain day.[97] Shortly after arriving for jury duty, potential jurors are often forced to answer very personal and probing questions in open court to test whether they can be impartial.[98] Based on their answers, some potential jurors

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[92] *See infra* Section III.B (summarizing laudatory terms Supreme Court uses to describe jury).

[93] *See* ANDREW GUTHRIE FERGUSON, WHY JURY DUTY MATTERS: A CITIZEN'S GUIDE TO CONSTITUTIONAL ACTION 10 (2013) (observing that receiving jury summons likely leads potential jurors to "ponder the conflicts that the jury date poses with your schedule").

[94] *See id.* at 11 (characterizing "skipping of jury service" as "ancient tradition[]").

[95] *See, e.g.*, Powers v. Ohio, 499 U.S. 400, 402 (1991) ("Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to civic life."); FERGUSON, *supra* note 93, at 9 (characterizing jury summons as "invitation to participate in the American experiment of self-government").

[96] *See* NAT'L CTR. FOR STATE COURTS, THROUGH THE EYES OF THE JUROR: A MANUAL FOR ADDRESSING JUROR STRESS 1 (1998) ("Our system of justice prides itself on protecting the rights of litigants and witnesses, but few protections and little attention are afforded the individuals we rely on to make the system work—individuals who walk into the court and who may subsequently find themselves deciding the fate of others.").

[97] *See* FERGUSON, *supra* note 93, at 11 (explaining that "jury summons is not optional" and that disobeying summons may result in contempt proceedings).

[98] *See, e.g.*, NAT'L CTR. FOR STATE COURTS, *supra* note 96, at 16 ("Individuals who have been through [voir dire] have lamented that they felt as if *they* were on trial. Many fear being embarrassed or humiliated."); Caren Myers Morrison, *Investigating Jurors on Social Media*, 35 PACE L. REV. 285, 287 (2014) (exploring extent to which lawyers are using social media presence of potential jurors to shape jury in their client's favor).

are dismissed, often without explanation.[99] The dignitary slights continue for those selected to serve as jurors, as they are asked to relinquish much of their independence to the court.[100]

The indignities jurors face go beyond the lack of control they have in the process. They also reach the very substance of what the jury is asked to do—to determine whether the prosecutor has proven beyond a reasonable doubt that the defendant committed a crime. For example, after listening to the evidence, jurors are given instructions that are often complex, technical, and unnecessarily confusing.[101] And even if jurors successfully discern the meaning of the jury instructions, other hurdles remain. For example, jurors' requests to clarify the testimony of a witness offered days before or to have the testimony read to them from the transcript are often denied by judges who insist that the jurors do their best to recall the evidence as it was offered.[102]

The deliberative process is filled with its own potential perils. Jurors in the minority after the initial vote often face pressure from jurors in the majority.[103] And if the jury tells the court that it is unable to reach a unanimous verdict despite its best effort, the judge is likely to respond, "Keep trying."[104]

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[99] *See* NAT'L CTR. FOR STATE COURTS, *supra* note 96, at 24 ("Being struck from the panel in front of others in the courtroom with no explanation can be confusing, embarrassing, and/or frustrating.").

[100] *See, e.g.*, FERGUSON, *supra* note 93, at 81 ("You are summoned to court. Day after day, you are told when to arrive, when to leave, and even when you can go to the bathroom. You sit in a particular numbered seat. You watch what others produce for you to watch. The rules of court are decided for you, and though you are a central part of the trial process, you have little independent control."); NAT'L CTR. FOR STATE COURTS, *supra* note 96, at 8 ("Juror stress and frustration typically result when jurors are thrust into situations in which they have little control.").

[101] *See, e.g.*, FERGUSON, *supra* note 93, at 94 ("The instructions are the carefully worded result of lawyers, judges, and scholars thinking about the law. For most jurors, untutored in the law, it may take several readings of the jury instructions to understand them."); Kozinski, *supra* note 30, at xx ("Jury instructions are often lengthy and difficult to follow. Jurors are expected to absorb them by listening . . . . Many judges try to ameliorate this problem by sending a copy of the instructions into the jury room . . . but some judges refuse to do so.").

[102] *See* Kozinski, *supra* note 30, at xxi (criticizing judges who "[f]orc[e] jurors to rely on their recollections alone" and advocating for providing jurors transcripts of testimony during deliberations).

[103] *See, e.g.*, FERGUSON, *supra* note 93, at 133 (recounting experience of hold-out juror who reported: "They shouted at me. One of the jurors threatened me. He turned on me in a fury, just a fury, and he said, 'I'm going to spend the rest of my life destroying you.'"); NAT'L CTR. FOR STATE COURTS, *supra* note 96, at 43-44 (summarizing juror reports of deliberations nearly resulting in physical fights and of "bully jurors," and quoting one juror who believed "jurors appeared traumatized by the personal attacks").

[104] *See* Allen v. United States, 164 U.S. 492, 501 (1896) (recognizing judge's authority to instruct jury that is having difficulty reaching unanimous decision to keep deliberating).

In addition to the comparatively minor dignitary slights, jurors face more serious risks.[105] In part, this is unavoidable because the very power jurors hold can be debilitating.[106] In every case that reaches a jury, jurors are asked to make a moral judgment of a stranger based on information presented to them often in a disjointed and non-narrative form.[107] One study found that the process of reaching a verdict is "one of the most stressful aspects of jury duty for most jurors" and added that "the fear of making a mistake . . . ranked among the top sources of stress" for jurors.[108] Notably, this fear often lingers and can "haunt jurors long after the trial is over."[109]

The potential for more serious harm is also associated with the evidence jurors may be exposed to during a criminal trial.[110] Professor Andrew Guthrie Ferguson explains: "Jurors are asked to involve themselves in some of the most personal, sensational, and terrifying events in a community. It is real life, usually real tragedy, played out in court. Jurors confront disturbing facts, bloody images, or heart-wrenching testimony."[111] This exposure takes its toll on jurors both at the time of trial as well as months and years later.[112] A juror in a murder case described jury service as follows: "[The jury] confronted filth and incredible sadness . . . and we could not discuss these things with anyone. We lay awake in

[105] *See generally* Daniel W. Shuman, Jean A. Hamilton & Cynthia E. Daley, *The Health Effects of Jury Service*, 18 LAW & PSYCHOL. REV. 267, 269-72 (1994) (summarizing anecdotal reports and studies of impact of jury service on juror health).

[106] *See* Charles J. Ogletree Jr., *Foreword* to FERGUSON, *supra* note 93, at xiii ("I saw juries struggle with the power being entrusted to them day after day."); FERGUSON, *supra* note 93, at 140 ("Judgment involves an awesome, unfamiliar power. In my criminal cases, jurors would comment that there had been no harder decision than to pass final judgment on another life. It is not unusual to see tears or flushed faces at the end of a case. Jurors write letters weeks or months later still trying to process the weight of final judgment." (footnote omitted)).

[107] *See* NAT'L CTR. FOR STATE COURTS, *supra* note 96, at 1 (recognizing that jurors "walk into the court and . . . may subsequently find themselves deciding the fate of others").

[108] *Id.* at 39.

[109] *Id.* at 52.

[110] *See* Shuman, *supra* note 105, at 298-99 (concluding based on study of actual jurors that jury service involving traumatic trials places jurors at greater risk of depression, but finding no link to greater risk of PTSD).

[111] FERGUSON, *supra* note 93, at 10-11. Indeed, there may be a strategic advantage to exposing jurors to particularly gruesome evidence. *See* Jessica M. Salerno, *Seeing Red: Disgust Reactions to Gruesome Photographs in Color (but Not in Black and White) Increase Convictions*, 23 PSYCHOL. PUB. POL'Y & L. 336, 336 (2017) (summarizing studies finding that exposing jurors to gruesome photographs increased pro-prosecution outcomes).

[112] *See* NAT'L CTR. FOR STATE COURTS, *supra* note 96, at 30 n.57 (finding that twenty-eight percent of jurors exposed to violent and traumatic evidence found exposure "moderately to extremely stressful"); *id.* at 31 (quoting one juror in survey as saying, "It would help if they would tell us in advance—warn us that it's something we're going to remember for the rest of our lives"); *id.* at 53 (quoting another juror reporting, "I still have nightmares about what I heard" and "[i]t was after the trial that I was bothered the most").

the night recalling the horrors. We are marked forever. We will never, ever be the same again."[113]

Some criminal justice insiders have taken note of these harms and have attempted to address them. For example, Texas allows county victim services personnel to provide limited "psychological counseling" for jurors exposed to "graphic evidence or testimony."[114] Several Texas jurisdictions also provide information to jurors post-trial about the potential negative health effects of jury duty and the services available to address them.[115] The risk of these harms is present in all cases; however, the prosecution adds to the harms jurors face when it does not meet its constitutional obligations.

B. *Violating the Defendant's* Brady *Right Harms the Jury*

To date, scholarly and judicial writing about the harms caused by *Brady* violations has focused on the burdens defendants shoulder as a result of the misconduct and the stress prosecutorial misconduct places on the criminal justice system as a whole.[116] This focus is justified and defensible, and it has triggered reforms.[117] However, the focus on individual defendants and the criminal justice system as a whole ignores the harms jurors and juries unknowingly bear when they are asked to render verdicts in cases without having access to important information that would have aided their decisions. This Section brings those harms to the fore. Recognizing these harms is important in its own right, but it may also catalyze reforms that can help curb *Brady* violations going forward.[118]

Before examining the harms, it is necessary to acknowledge the types of cases that end in jury trials. As an initial matter, the vast majority of criminal

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[113] *For Whom Do I Cry? Prose from Juror No. 3*, WHYY, https://whyy.org/articles/for-whom-do-i-cry-prose-from-juror-no-3/ [https://perma.cc/756B-YSAL] (last visited Feb. 20, 2018).

[114] TEX. CODE CRIM. PROC. ANN. art. 56.04(f) (West 2017); *see also* Stacy Miles-Thorpe, *Leaving the Jury Box with a Heavy Burden*, 41 PROSECUTOR (2011), http://www.tdcaa.com/journal/leaving-jury-box-heavy-burden [https://perma.cc/C56F-Q3DJ] (recounting that this change was adopted, in part, because crime victim noted toll jury service took on jurors and lack of resources available to address this harm).

[115] *See, e.g.*, Miles-Thorpe, *supra* note 114 (linking to "Jury Letter" used by Travis County District Attorney).

[116] *See, e.g.*, Johnson, *supra* note 75, at 4 ("At the heart of the *Brady* doctrine is a debate about how to balance the role of the defendant, the prosecutor and the court in an adversarial system.").

[117] *See, e.g.*, Michael Morton Act, 2013 TEX. GEN. LAWS 106 (codified as amendment to TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2017)) (instituting version of "open file" discovery in Texas); Cynthia E. Hujar Orr & Robert G. Rodery, *The Michael Morton Act: Minimizing Prosecutorial Misconduct*, 46 ST. MARY'S L.J. 407, 412-19 (2015) (exploring how Morton's case led to discovery reform in Texas).

[118] *See infra* Section IV.A.

convictions do not involve juries, as they are resolved by guilty pleas.[119] This does not mean that the cases that go to the jury are necessarily the most difficult cases or cases in which the evidence is closely in dispute. For example, even in an undisputed case, a prosecutor may defer to the victim's desire to proceed to trial.[120] Additionally, a defendant may reject a seemingly reasonable plea offer in the face of overwhelming evidence of guilt for idiosyncratic reasons.[121] Nevertheless, cases that go to the jury often involve close questions where both sides believe that the jury could find in their favor.[122] This leaves the jury with the task of sorting out these disputed cases—a task made more difficult in the face of *Brady* violations.

1. Blocking the Jury's Constitutional Role

The most obvious harm jurors face from violations of the defendant's *Brady* right is that the misconduct prevents them from playing their constitutionally mandated role. The jury plays a dual role in our criminal justice system—as a check on the power of the prosecutor[123] and as a vessel through which to promote a transparent process.[124] Jurors serve these roles by holding the prosecution to

[119] *See, e.g.*, Lafler v. Cooper, 566 U.S. 156, 170 (2012) (recognizing that "criminal justice today is for the most part a system of pleas, not a system of trials"); Murat C. Mungan & Jonathan Klick, *Identifying Criminals' Risk Preferences*, 91 IND. L.J. 791, 821 (2016) (reporting that over ninety percent of criminal cases settle).

[120] *See* Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 574 (2005) (noting cases in which "prosecutors have given victims or their representatives the functional equivalent of a veto over plea deals with defendants").

[121] *See generally* Abbe Smith, *"I Ain't Takin' No Plea": The Challenges in Counseling Young People Facing Serious Time*, 60 RUTGERS L. REV. 11 (2007).

[122] *See* FERGUSON, *supra* note 93, at 151 ("Real-world situations are complicated and unclear, and both sides are usually well convinced of their version by the time they get to trial. The few cases that reach trial and are not settled by a plea agreement . . . really do have contested facts."). This conclusion is supported by what we have learned from wrongful convictions of innocent defendants. These exonerated defendants disproportionately exercised their right to trial. *See* GARRETT, *supra* note 90, at 151 ("The small percentage of guilty pleas [in cases involving DNA exonerations] makes these DNA exonerees very different from typical criminal defendants, who overwhelmingly plead guilty. . . . Several exonerees later explained that they could not bring themselves to plead guilty for a crime that they did not commit.").

[123] *See infra* Section III.B.1 (explaining that jury's role as check on State predates Constitution).

[124] *See* Simonson, *supra* note 35, at 2174 (recognizing that right to public jury trials "assure[s] both defendants and communities that every prosecution will take place in full view and with the participation of the public"); *see also* Ballew v. Georgia, 435 U.S. 223, 229 (1978) (recognizing that protecting defendants from "corrupt or overzealous prosecutor . . . is attained by the participation of the community in determinations of guilt and by the application of the common sense of laymen who, as jurors, consider the case").

its burden, carefully analyzing the evidence, and thoughtfully deliberating with their fellow jurors—in other words, upholding the oath they take as part of their jury service.[125] *Brady* violations short-circuit this process, diminishing the jury's power and frustrating transparency.

Transparency suffers when some cases simply do not reach a jury as a result of the prosecutor withholding favorable evidence.[126] That is, in the absence of the undisclosed favorable evidence the defendant elects to plead guilty, rendering the jury unnecessary. For example, Joe Buffey pleaded guilty to a sexual assault, a plea he certainly would not have entered had the prosecutor disclosed to him the favorable DNA testing that excluded Buffey as the source of the male DNA in the single-perpetrator, stranger assault.[127] The prosecutor's decision not to disclose the favorable evidence ensured that the case was resolved with a private negotiation, not a public trial.[128]

This category of cases that never reach a jury because defendants' guilty plea calculations are made without consideration of undisclosed favorable evidence exists, in part, because the Court has refused to extend *Brady*'s full protections to plea bargaining. In *United States v. Ruiz*,[129] the Court concluded that favorable impeachment evidence that would otherwise merit disclosure before a jury trial does not have to be disclosed before a guilty plea.[130] The Court characterized its decision as consistent with *Brady*'s concern for protecting the "*fairness* of a trial," a consideration the Court concluded was separate from the "*voluntariness* of the plea."[131] However, the decision may contribute to the marginalization of the jury because its upshot is that some cases that would otherwise reach a jury

[125] *See* Patton v. Yount, 467 U.S. 1025, 1036 (1984) (recognizing that requiring jurors to take oath helps to ensure that they will be impartial and "decide the case on the evidence").

[126] *See* Apprendi v. New Jersey, 530 U.S. 466, 483 (2000) (recognizing that "Framers[] fear[ed] 'that the jury right could be lost not only by gross denial, but by erosion'" (quoting Jones v. United States, 526 U.S. 227, 247-48 (1999))).

[127] *See* Buffey v. Ballard, 782 S.E.2d 204, 221 (W. Va. 2015) (finding *Brady* violation and reversing defendant's conviction).

[128] *See* Simonson, *supra* note 35, at 2180 ("[T]he modern plea bargaining regime has transferred . . . power to elite actors who make behind-the-scenes decisions about whom to arrest, what to charge, and what plea bargains to strike.").

[129] 536 U.S. 622 (2002).

[130] *Id.* at 633 ("[T]he Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant."). *But see Buffey*, 782 S.E.2d at 216 (reviewing jurisdictions that have extended *Brady*'s principles to plea bargaining and holding that in West Virginia "defendant is constitutionally entitled to exculpatory evidence during the plea negotiation stage").

[131] *Ruiz*, 536 U.S. at 633.

end in guilty pleas.[132] As such, the jury's transparency-promoting role has diminished.[133]

The second manner in which violations of the defendant's *Brady* right impede the jury's constitutional role involves cases that reach the jury. These cases represent the prototypical example of the jury being prevented from performing its role as a result of the misconduct.[134] By definition, *Brady* violations prevent the jury from considering important evidence in rendering its verdict, leaving the prosecution's case artificially stronger than the entire evidence suggests.[135] In these cases, juries render guilty verdicts, and in that sense, they play a role. But these guilty verdicts do not represent what the Court had in mind when it held in *In re Winship*[136] that due process requires the prosecution to prove its case beyond a reasonable doubt.[137] The prosecution is not permitted to meet *Winship*'s due process burden by committing a due process violation in the form of *Brady* misconduct.[138]

What is more, prosecutors who violate the defendant's *Brady* right sometimes compound the harm to the jury in closing arguments that the defense would have easily refuted had the prosecution met its constitutional disclosure obligations. For example, in securing a capital conviction and death sentence against Delma Banks, Jr., the prosecutor argued to the jury in the guilt-phase closing argument that one of the State's key witnesses "brought [the jury] absolute truth."[139] In its sentencing-phase closing argument, the prosecution argued that another of its witnesses, whose testimony the prosecution characterized as "of the utmost significance," was credible because he was "open and honest with [the jury] in every way."[140] But the prosecutor did not disclose to the defense or jury that the testimony of the guilt-phase witness was "closely rehearsed" shortly before trial, and thus susceptible to impeachment.[141] The prosecution also failed to tell the defense and jury that its important penalty-phase witness was a paid

[132] *See id.* at 629 ("Of course, the more information the defendant has, the more aware he is of the likely consequences of a plea, waiver, or decision, and the wiser that decision will likely be.").

[133] *See* Simonson, *supra* note 35, at 2179-80 (characterizing overall decrease in jury trials as "substantial loss for participation in and accountability of the criminal justice system").

[134] *See* United States v. Bagley, 473 U.S. 667, 694 (1985) (Marshall, J., dissenting) ("When favorable evidence is in the hands of the prosecutor but not disclosed, . . . the trier of fact is deprived of the ingredients necessary to a fair decision.").

[135] *See* Kyles v. Whitley, 514 U.S. 419, 429 (1995) ("Because the State withheld evidence, its case was much stronger, and the defense case much weaker, than the full facts would have suggested.").

[136] 397 U.S. 358 (1970).

[137] *Id.* at 363.

[138] *See id.* at 364.

[139] Banks v. Dretke, 540 U.S. 668, 678 (2004).

[140] *Id.* at 681 (alteration in original).

[141] *Id.* at 685.

informant.[142] This pattern of committing a *Brady* violation and then taking advantage of the undisclosed evidence during closing argument has played out in other cases as well.[143]

The fact that *Brady* violations prohibit the jury from being a check on prosecutorial power is exacerbated by the command prosecutors retain in the courtroom.[144] Indeed, the concern that the prosecutor's words and actions carry special weight before the jury is the foundation upon which *Brady* is built.[145] In *Berger*, the Court quoted at length the improper questions and arguments the prosecutor made, concluding the prosecutor's behavior was "undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury."[146] The Court found that this violated due process, in part, because:

> the average jury, in a greater or less degree, has confidence that [the obligation to pursue justice, not convictions], which so plainly rest[s] upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.[147]

The concern that prosecutors' assertions "carry great weight" is a more significant concern in the context of a *Brady* violation than it is in the context of the misconduct in *Berger*. In *Berger*, the misconduct was in the open, allowing the judge to caution the jury not to consider the prosecutor's inappropriate statements and arguments.[148] The secretive nature of *Brady* misconduct precludes this type of corrective action.

Violations of the defendant's *Brady* right amount to more than simply preventing the jury from performing its role. That is, the prosecution does not just block the jury's power, but also usurps that power, replacing the jury's

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[142] *Id.* at 701 ("The jury . . . did not benefit from customary, truth-promoting precautions that generally accompany the testimony of informants.").

[143] *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 444-45 (1995) (recounting how prosecutor's failure to disclose significant impeachment evidence about two of its central witnesses was compounded by prosecutor's closing argument in which he touted reliability of those two witnesses and importance of their testimony to State's case).

[144] *See* United States v. Young, 470 U.S. 1, 18-19 (1985) ("[T]he prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.").

[145] *See* Brady v. Maryland, 373 U.S. 83, 87-88 (1963).

[146] Berger v. United States, 295 U.S. 78, 85 (1935).

[147] *Id.* at 88.

[148] *Id.* at 85 ("The trial judge, it is true, sustained objections to some of the questions, insinuations and misstatements, and instructed the jury to disregard them.").

decision-making role with the prosecutor's private deliberations.[149] In so doing, the prosecutor asserts that her judgment that the evidence establishes guilt beyond a reasonable doubt trumps what a jury might find.

The prosecution's failure to disclose favorable evidence is just the first way in which *Brady* violations usurp the jury's power. The *Brady* standard itself can also be seen as an impediment to the jury playing its power-balancing role against the government. *Brady*'s materiality prong limits appellate courts to reversing convictions only where the undisclosed favorable evidence "undermines confidence in the outcome of the trial."[150] Several studies confirm that appellate courts make such a finding in only a small percentage of cases in which defendants uncover undisclosed favorable evidence.[151] In these cases, the appellate court, not the jury, evaluates the prosecutor's initial materiality calculation as to whether the undisclosed favorable evidence would matter.[152] Of course, predicting how a jury would have evaluated the undisclosed evidence requires guesswork and often leaves even those conducting a careful and reasoned review in disagreement.[153]

2. Undermining the Dignity and Legitimacy of the Jury

When the prosecutor fails to disclose favorable evidence, the failure adds to the routine indignities jurors face. In violating the defendant's *Brady* right, the prosecutor sends the message that the jury cannot be trusted to evaluate the evidence, the jury's role is peripheral to the prosecutorial function, and the jury is just a cog in the process instead of a coequal and necessary constitutional actor.[154]

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[149] *See* Kyles v. Whitley, 514 U.S. 419, 440 (1995) (recognizing that compliance with *Brady* "will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations").

[150] *Id.* at 434 (quoting United States v. Bagley, 473 U.S. 667, 678 (1985)).

[151] *See, e.g.*, RIDOLFI & POSSLEY, *supra* note 88, at 2-3 (noting that misconduct was deemed harmful in only 159 of 707 cases in which courts found prosecutorial misconduct in California from 1997 to 2009).

[152] *See, e.g.*, *In re* Kline, 113 A.3d 202, 212 (D.C. 2015) (recognizing that *Brady*'s materiality requirement as to whether particular item of favorable evidence would have made difference results in "judgment calls that can undermine the public's trust and confidence in the courts because they are not being made by a jury of one's peers but by a court that is sitting and reviewing a cold record").

[153] *See, e.g.*, United States v. Bagley, 473 U.S. 667, 693 (1985) (Marshall, J., dissenting) ("[T]he existence of any small piece of evidence favorable to the defense may, in a particular case, create just the doubt that prevents the jury from returning a verdict of guilty. The private whys and wherefores of jury deliberations pose an impenetrable barrier to our ability to know just which piece of information might make, or might have made, a difference.").

[154] The fact that it might be the police, as opposed to the prosecutor, who are the more direct cause of the harm in some *Brady* violations (e.g., by deliberately hiding evidence from the prosecutor's office) does not alter this analysis. The Court has made clear that the prosecutor bears *Brady*'s disclosure obligation. *See Kyles*, 514 U.S. at 437 ("[T]he individual

Justice Robert Jackson warned of such behavior in his famous remarks about the prosecutor's vast power.[155] He explained that to ensure "protection against the abuse of power" the prosecutor needed to "approach[] his task with humility."[156] Withholding favorable evidence from defendants and preventing juries from reviewing such evidence contravenes that obligation, as such actions co-opt the jury to serve the prosecutor's ends, not justice.

Brady misconduct renders the jury's participation a mere pretense in the prosecutor's quest for a conviction. In similar contexts, the Court has recognized the constitutional harms arising when outside forces render the jury's power a pretense. For example, in *Moore v. Dempsey*,[157] the Court took one of its first steps to applying the Due Process Clause, the foundation upon which *Brady* sits, to state criminal trials.[158] In *Moore*, several black defendants were convicted of murdering a white man in Phillips County, Arkansas.[159] The defendants asserted that they did not commit the murder and that the violence, which left several black people dead, started when a group of black people "assembled in their church were attacked and fired upon by a body of white men."[160] Upon their arrest, the defendants were targeted by a lynch mob, but escaped death when a group of white citizens assured the mob that the defendants would be quickly convicted, sentenced to death, and executed.[161] The capital trial lasted forty-five minutes, and the jury returned its verdict in "less than five minutes"[162] despite the fact that "[s]erious doubt existed—at the time of the trial[], not just in retrospect—as to the guilt of the defendants."[163] The Court explained that under these circumstances, "if . . . the whole proceeding is a mask—that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion,"

prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."); Giglio v. United States, 405 U.S. 150, 154 (1972) ("[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor.").

[155] Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC. 18, 18 (1940) ("The prosecutor has more control over life, liberty, and reputation than any other person in America.").

[156] *Id.* at 20.

[157] 261 U.S. 86 (1923).

[158] *Id.* at 86; MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 120 (2004) ("Prior to *Moore*, a federal constitutional law of state criminal procedure did not exist."); Colin P. Starger, *Expanding Stare Decisis: The Role of Precedent in the Unfolding Dialectic of* Brady v. Maryland, 46 LOY. L.A. L. REV. 77, 108 fig.1 (2012) (finding *Brady*'s roots in *Moore* Court's due process analysis).

[159] *Moore*, 261 U.S. at 87.

[160] *Id.*; *see also* KLARMAN, *supra* note 158, at 98 (discussing *Moore* and 1919 Phillips County race riot).

[161] *Moore*, 261 U.S. at 88-89.

[162] *Id.* at 89; *see also* KLARMAN, *supra* note 158, at 118.

[163] KLARMAN, *supra* note 158, at 117.

the convictions could not stand.[164] Although in the context of a *Brady* violation it is the prosecutor's unlawful actions, not the actions of a lynch mob, that cause the jury's verdict to be a pretense, *Moore*'s holding is relevant because it recognized the constitutional harm of turning jury deliberations into a pretense.

Twelve years after *Moore*, the Court returned to this concern of the jury's role as mere pretense, although this time the concern was raised in a case directly in *Brady*'s lineage.[165] In *Mooney v. Holohan*,[166] the defendant claimed that his murder conviction resulted from the prosecutor's knowing use of perjured testimony.[167] The Court rejected the State's assertion that due process required only notice and the opportunity to be heard, finding that due process is not satisfied "if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury."[168]

In addition, the Court expressed concern with prosecutorial conduct that deceives and devalues the jury in a post-*Brady* case, *Giglio v. United States*.[169] In *Giglio*, the prosecutor violated *Brady* by failing to disclose that it secured the incriminating testimony of the "only witness linking [the defendant] with the crime" by agreeing not to prosecute that witness.[170] The Court concluded that "the jury was *entitled* to know of [the non-prosecution agreement]."[171] The prosecution asked the jury to convict the defendant of a felony while withholding evidence to which the jury was entitled because the evidence was material to a proper determination of guilt or innocence. This misconduct belittled the jury's judgment. From this perspective, *Brady* amounts to more than a right devised to protect defendants; it can also be seen as a declaration of respect for juries and the jury process.

The ease with which some prosecutors substitute their judgment for the jury's is evident by how prosecutors respond to *Brady* violations that come to light. The defense attorney in Scott Dekraai's capital case uncovered systemic misconduct in Orange County, California, including numerous *Brady* violations.[172] The multiyear prosecutorial misconduct resulted in the court

[164] *Moore*, 261 U.S. at 91.

[165] *See* Starger, *supra* note 158, at 108 (recognizing *Brady*'s roots in *Mooney v. Holohan*, 294 U.S. 103 (1935)).

[166] 294 U.S. 103 (1935).

[167] *Id.* at 110.

[168] *Id.* at 112.

[169] 405 U.S. 150 (1971).

[170] *Id.* at 151-53 (finding that prosecution's only witness was assured that he would not be prosecuted at trial if and only if he testified against defendant).

[171] *Id.* at 155 (emphasis added).

[172] *See* People v. Dekraai, 210 Cal. Rptr. 3d 523, 558 (Cal. Ct. App. 2016) (upholding recusal of Orange County District Attorney's Office as result of systemic misconduct); PATRICK DIXON ET AL., ORANGE COUNTY DISTRICT ATTORNEY INFORMANT POLICIES & PRACTICES EVALUATION COMMITTEE REPORT 2 (2015) (outlining proposed reforms

taking the extraordinary step of recusing the entire Orange County District Attorney's Office from prosecuting the penalty phase of the case.[173] Additionally, the court called into question the constitutional firmness of several other felony convictions in Orange County.[174]

Despite this, the elected prosecutor, Tony Rackauckas, initially shrugged off the *Brady* violations, saying they were the result of limited resources and overworked prosecutors.[175] He then attacked outside experts who called on the Department of Justice to investigate the misconduct.[176] And his office retaliated against the judge who held the hearings that uncovered the misconduct, seeking to block him from hearing many criminal cases.[177] Notably, even when he grudgingly admitted that his office violated *Brady*, Rackauckas's comments demonstrated that he did not fully recognize the scope of the harms *Brady* violations cause. He asserted that "no innocent people" were convicted, despite the fact that "some mistakes [were] made."[178] Of course, a focus on protecting innocent defendants is central to *Brady*, and it should be on the prosecutor's mind; however, violations of the defendant's *Brady* right also demean the importance of jury service, a harm Rackauckas ignored.

Other prosecutors have expressed similar disdain for the jury's role. One longtime prosecutor in Cleveland, Ohio, Carmen Marino, retired after thirty years of what appeared to be a distinguished career.[179] His office created an annual award in his honor for prosecutors who demonstrate "integrity and

responding to misconduct); Smith, *supra* note 73 (describing scope of misconduct in *Dekraai*).

[173] *See Dekraai*, 210 Cal. Rptr. 3d at 558 ("Based on the entire record, we conclude the court's ruling there was a genuine conflict of interest that posed a grave danger the OCDA could not fairly prosecute the penalty phase was supported by substantial evidence.").

[174] DIXON, *supra* note 172, at 1 (recognizing that misconduct "resulted in an examination of numerous other past and pending Orange County prosecutions").

[175] *See Dekraai*, 210 Cal. Rptr. 3d at 541 (noting that trial court rejected prosecutor's "justifications [for the misconduct], i.e., misunderstanding of the law, heavy caseloads, uncooperativeness of federal authorities, and failure to anticipate defense strategy"). This came after the prosecutor's office publicly dismissed the initial allegations before even reviewing them. *Id.* at 534; *id.* at 553-54 (recounting how OCDA leadership characterized allegations as "delay tactics" that were "meritless").

[176] *See* Smith, *supra* note 73 ("But in familiar fashion, rather than consider [Dean Erwin] Chemerinsky's concerns, Rackauckas's office lashed out at the respected legal scholar.").

[177] *See id.* ("Between February 2014 and March 2015, [OCDA] sought to disqualify [Judge] Goethals 57 times based on alleged prejudice—a marked contrast to previous years."); *see also* R. Scott Moxley, *DA Tony Rackauckas Bullies Judge Who Slammed Cheating in Death-Penalty Case*, OC WEEKLY (Dec. 16, 2015, 2:50 PM), http://www.ocweekly.com/news/da-tony-rackauckas-bullies-judge-who-slammed-cheating-in-death-penalty-case-6840206 [https://perma.cc/P5GF-ZCWP].

[178] Smith, *supra* note 73.

[179] *See* Sullivan & Possley, *supra* note 76, at 885-88.

professionalism in the pursuit of justice."[180] Despite this, in the years after his retirement, courts reversed several convictions obtained by Marino, citing a series of *Brady* violations.[181] Before the full scope of his misconduct and *Brady* violations were uncovered, Marino credited jurors for his success as a prosecutor, failing to acknowledge that his misconduct usurped the jury's power and demeaned its role.[182]

3. Using Juries to Commit Injustice

Brady violations do more than render the jury's power and deliberative process meaningless; they also risk turning jurors into the very instrument of the prosecutor's unconstitutional behavior. In this manner, jurors become unknowing participants in unjust convictions, giving these convictions legitimacy that they do not deserve.[183] Being transformed into an agent for injustice is a far cry from the feelings of empowerment and civic participation that are supposed to accompany jury service.[184]

The prosecution of Dan Bright in Louisiana is illustrative. In *State v. Bright*,[185] the defendant's murder conviction was overturned because the prosecution failed to disclose significant impeachment evidence in the form of the criminal history of a witness who provided "[t]he only evidence relied on to convict defendant,"[186] a criminal history which gave the witness "motivation to

[180] *Id.* at 885; *see also* Regina Brett, *Prosecutor Bill Mason Did the Right Thing Ending Carmen Marino Award*, PLAIN DEALER (Sept. 23, 2008, 8:27 PM), http://www.cleveland.com/brett/blog/index.ssf/2008/09/prosecutor_bill_mason_did_righ.html [https://perma.cc/VBV9-GE6N].

[181] *See* Sullivan & Possley, *supra* note 76, at 885 (summarizing cases overturned based on *Brady* violations); *see also* D'Ambrosio v. Bagley, 527 F.3d 489, 499-500 (6th Cir. 2008) (overturning defendant's conviction and death sentence on account of *Brady* violations); *In re* Lott, 366 F.3d 431, 433 n.1 (6th Cir. 2004) (noting that "Carmen Marino[] has a shameful track record of breaking rules to win convictions").

[182] *See* WILLIAM L. DAWSON, THE LEGAL MATRIX 68 (2008) ("Marino said it's not difficult to win convictions in Ohio, as jurors are predisposed to find defendants guilty because they trust police and prosecutors.").

[183] *See* Spaziano v. Florida, 468 U.S. 447, 481 (1984) (Stevens, J., dissenting) ("In our jurisprudence, the jury has always played an essential role in legitimating the system of criminal justice."); Taylor v. Louisiana, 419 U.S. 522, 530 (1975) ("Community participation in the administration of the criminal law . . . is also critical to public confidence in the fairness of the criminal justice system.").

[184] *See, e.g.*, Powers v. Ohio, 499 U.S. 400, 406 (1991) ("The opportunity for ordinary citizens to participate in the administration of justice has long been recognized as one of the principal justifications for retaining the jury system.").

[185] 875 So. 2d 37 (La. 2004).

[186] *Id.* at 43. The impeachment material was not the only favorable evidence withheld. Federal law enforcement officials possessed a statement indicating that Bright was innocent and that a third party, Tracey Davis, committed the murder. *See* Bright v. Ashcroft, 259 F. Supp. 2d 502, 502 (E.D. La. 2003) ("[The statement] relates to the possibility of Bright's

cooperate with law-enforcement."[187] The prosecution compounded its misconduct by using "the [same] type of evidence . . . to effectively impeach the defendant's [alibi] witnesses."[188]

While Bright's case made its way through the appellate process, the jury foreperson at Bright's trial, Kathleen Hawk Norman, paid close attention to the case. Though she was initially certain that her vote to convict Bright and send him to death row was the correct decision, she was nonetheless traumatized by her jury service.[189] Her confidence eroded as the undisclosed favorable evidence trickled out, yet she was still reluctant to admit that an injustice had occurred.[190] Eventually, after the prosecutorial misconduct became clear, Norman transformed from a juror who sent Bright to death row into one of his most ardent supporters. She recalled seeing Bright's mother at a post-conviction hearing and feeling "so riddled with guilt . . . so embarrassed that [she'd] been duped."[191] She wrote a biting editorial, chastising the prosecutors for "turn[ing] citizen-jurors into patsies for the state" and "unwitting[] . . . accomplices in the condemnation of an innocent man."[192] She publicly lamented the fact that the system she "trusted didn't trust [her] enough to make sure [she] had all the facts before it asked [her] to render a verdict."[193]

Norman spoke out again after the first court to review the undisclosed favorable evidence concluded that it would not have made a difference to the jury's determination of guilt; only this time she sought to do it through filing an amicus brief in Bright's appeal to the Supreme Court of Louisiana.[194] In her

innocence and should have at the least been disclosed to him prior to his trial under the clear instruction of the Supreme Court in *Brady* . . . .").

[187] *Bright*, 875 So. 2d at 43.

[188] *Id.* at 44.

[189] Kathleen Hawk Norman, Editorial, *A Long Wait for Justice*, TIMES-PICAYUNE, Mar. 3, 2003, at 7 ("I went home [after the verdict] traumatized but absolutely certain that a guilty man was justly sentenced."); *see also* Katy Reckdahl, *Jurors Dismissed*, GAMBIT WEEKLY (Dec. 16, 2003), http://www.bestofneworleans.com/gambit/jurors-dismissed/Content?oid=1242255 [https://perma.cc/4TLU-ZNF7] (detailing Norman's fight to "overturn her jury's verdict").

[190] Norman, *supra* note 189, at 7 ("[A]dmitting that I played a part in an unjust capital murder conviction was the most painful admission I've ever faced. And yet, I held fast to my illusions. Surely our system of justice could not have an interest in the detention of an innocent man.").

[191] Reckdahl, *supra* note 189.

[192] Norman, *supra* note 189, at 7.

[193] *Id.*

[194] *See generally* Brief for Kathleen Hawk Norman as Amicus Curiae Supporting Petitioner, State v. Bright, 875 So. 2d 37 (La. 2004) (Nos. 2002-KP-2793, 2003-KP-2796) [hereinafter Brief for Norman] (draft of amicus brief, which was rejected by Louisiana Supreme Court) (on file with author).

brief, which the court declined to accept,[195] she asserted that, as a juror, she had "an interest in correcting the perversion of the democratic process of which she was a part."[196] She characterized the prosecutor's actions as amounting to "swindl[ing]" the jurors and securing a conviction by "false pretenses."[197] She again asserted that the State turned the jurors into victims by making them "unwitting accomplices to illegitimate state-action."[198] And she concluded forcefully: "If the Government wants to retain Mr. Bright in custody, for whatever reason, it should at the very least not do so under our name, with the suggestion that its own misconduct would not have made a difference to us[, the jury]."[199]

4. Wasting Jury Resources

Although not necessarily true in all cases involving *Brady* violations, in some cases where the exculpatory value of the undisclosed evidence is so strong, it is likely that, had the evidence been disclosed, there never would have been a trial in the first instance.[200] In this set of cases, jurors are unnecessarily called to perform jury service. Had the prosecutor simply complied with *Brady*, the jurors would not have faced the routine harms associated with jury service—giving up their time, being forced to confront gruesome evidence and traumatic testimony, and suffering the stress associated with being forced to make weighty decisions about a person's liberty.[201] Furthermore, even if some cases still would have proceeded to trial had the favorable evidence been disclosed, the jurors might have quickly returned not guilty verdicts, perhaps eliminating some of the stress associated with the deliberative process. These unnecessary trials add to the

[195] *See* Reckdahl, *supra* note 189 (reporting that this left Norman feeling "like a tossed-away Kleenex").

[196] *Id.*; *see also* Brief for Norman, *supra* note 194.

[197] Brief for Norman, *supra* note 194, at 1-2.

[198] *Id.* at 1.

[199] *Id.* at 7. In a case involving a holdout juror who felt pressured to convict, the juror explained, "[t]his has been on my mind and on my heart ever since that jury service. It rises up and troubles me in the night." Tristan Scott, *Montana Innocence Project Appealing Trout Creek Man's Life Sentence*, MISSOULIAN (Sept. 17, 2012), http://missoulian.com/news/local/montana-innocence-project-appealing-trout-creek-man-s-life-sentence/article_c7bc860c-0082-11e2-aac5-001a4bcf887a.html [https://perma.cc/D3EC-BATH]. The conviction was vacated in 2015 based on *Brady* violations. *See* Findings of Fact, Conclusion of Law, and Order, Raugust v. Montana, No. DV 12-108 (Mont. 20th Jud. D. Ct. Nov. 16, 2015) (on file with author).

[200] *See, e.g.*, Pamela Colloff, *Innocence Found*, TEX. MONTHLY (Jan. 2011), http://www.texasmonthly.com/articles/innocence-found/ [https://perma.cc/5MSJ-BMT2] (recounting how in case of Anthony Graves, after court overturned his conviction and death sentence based on *Brady* violations, new prosecutors reviewed case and dismissed all charges based on Graves's innocence).

[201] *See supra* Section II.A.

stress on the jury system, which is already under considerable capacity limitations.

III. THE JURY'S *BRADY* RIGHT

Despite the fact that jury trials are rare, some prosecutions end in trials; approximately 1.5 million people serve as jurors each year.[202] And in some unknowable percentage of these cases, prosecutors commit *Brady* violations. These violations cause real harms to defendants, victims, and jurors.[203] Admittedly, the indirect harms to jurors do not rival the direct harms to defendants and victims. But this should not be an excuse to disregard harms to jurors. Furthermore, the harms to the jury as an institution are far from insignificant.[204] To the extent the criminal justice system creates these harms, it should at least recognize them, even if it cannot completely mitigate them.[205]

The harms that individual jurors and the jury as an institution incur as a result of *Brady* violations demonstrate what is at stake in a new *Brady*-like right for the jury. Individual defendants will continue to challenge convictions when prosecutors violate *Brady*. The Innocence Project and other criminal justice reform groups will highlight these cases in their reform efforts.[206] Some prosecutors will respond to the misconduct as well by replacing staff or changing policies when a new prosecutor is elected, for example.[207] And, of course, these efforts simultaneously benefit all who are harmed by violations of the defendant's *Brady* right, including jurors. Even so, the harms jurors face are significant, distinct, and should be considered in their own right.

This Part outlines what I have dubbed the jury's *Brady* right. Such a right would protect the institution of the jury, helping to ensure that it maintains its

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[202] GREGORY E. MIZE, PAULA HANNAFORD-AGOR & NICOLE L. WATERS, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 8 (2007).

[203] *See* RIDOLFI & POSSLEY, *supra* note 88, at 4 ("Prosecutorial misconduct fundamentally perverts the course of justice and costs taxpayers millions of dollars in protracted litigation. It undermines our trust in the reliability of the justice system and subverts the notion that we are a fair society.").

[204] *See supra* Section II.B.

[205] *See generally* DAVID B. WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (1990); David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 TOURO L. REV. 17, 21 (2008) (describing objective of therapeutic jurisprudence as being "to creatively make the law as therapeutic as possible without offending those other [traditional legal] values," such as due process).

[206] For example, Morton's case attracted widespread attention in Texas and nationally. *See, e.g.*, *60 Minutes: Evidence of Innocence: The Case of Michael Morton* (CBS television broadcast June 23, 2013). This led to sweeping discovery reforms. *See supra* note 117.

[207] *See, e.g.*, Ellen Yaroshefsky, *Why Do* Brady *Violations Happen?: Cognitive Bias and Beyond*, CHAMPION, May 2013, at 12, 15 n.26 (explaining that when Craig Watkins was elected as District Attorney in Dallas he sent *Brady* to all job candidates and instructed them "to be prepared to discuss [it] during the interview").

constitutional role. The *Brady* rule itself offers some protection to the jury, but it does not go far enough. Its focus on avoiding constitutional harms to defendants and more amorphous general harms to the legitimacy of the criminal justice system overlooks specific harms to the jury. For example, some traditional *Brady* claims fail because the court holds that the undisclosed favorable evidence does not undermine confidence in the verdict.[208] However, even in these cases, the prosecution's failure to disclose the favorable evidence: (1) demeans the jury's ability to evaluate the evidence and render a verdict, (2) represents an attempt to tip the evidentiary scales, and (3) amounts to the prosecutor attempting to usurp the jury's constitutional role. Recognizing an explicit right in the jury would help to address the distinct harms to the jury that the defendant's *Brady* right does not address.

This Part describes the scope of the jury's *Brady* right, explores the foundation for such a right in the Sixth Amendment and due process, and summarizes how the right could be implemented. In Part IV, I explore some of the repercussions of recognizing the jury's *Brady* right.

A. *Scope of the Jury's* Brady *Right*

Because the jury's interests and potential harms from the non-disclosure of favorable evidence do not map precisely onto the defendant's harms, the defendant's *Brady* right does not adequately protect the jury's interests. As such, the jury's *Brady* right should be distinct from the defendant's *Brady* right. The jury's right should parallel the defendant's *Brady* right in most respects, but in two important areas it should go beyond the defendant's right to account for the distinct harms the jury faces in these situations.[209] First, the jury's *Brady* right should require that the jury be able to review all evidence favorable to the defendant during its deliberations—i.e., the jury's *Brady* right should not be filtered through *Brady*'s materiality screen.[210] Second, borrowing from the standard the Supreme Court developed in *Napue v. Illinois*[211] for evaluating convictions that rest on the prosecution's use of false testimony, I propose that courts should reverse convictions in which the prosecution failed to disclose all favorable evidence, thus violating the jury's *Brady* right, if the non-disclosure "*may* have had an effect on the outcome of the trial."[212] Discarding *Brady*'s

[208] *See, e.g.*, Cone v. Bell, 556 U.S. 449, 474 (2009) (holding that undisclosed favorable evidence did not meet *Brady*'s materiality prong with respect to defendant's guilt phase *Brady* claim); Strickler v. Greene, 527 U.S. 263, 296 (1999) (holding that undisclosed favorable evidence did not meet *Brady*'s materiality prong); United States v. Agurs, 427 U.S. 97, 114 (1976) (same).

[209] *See supra* Section I.A (summarizing scope of defendant's *Brady* right).

[210] *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).

[211] 360 U.S. 264 (1959).

[212] *Id.* at 272 (emphasis added); *see also* Giglio v. United States, 405 U.S. 150, 154 (1972) (rephrasing *Napue* standard as requiring reversal if prosecutorial misconduct "could . . . in

materiality prong in the context of the jury's *Brady* right and applying the *Napue* standard for appellate review would extend the reach of this right beyond that of the defendant's *Brady* right.[213]

B. *Foundation for the Jury's* Brady *Right*

The criminal jury's prominence in the Constitution—meriting mention in both Article III and the Sixth Amendment—renders recognizing a *Brady*-like right for jurors comparatively easier than other constitutional rights with less direct connections to the text.[214] This Section demonstrates how these constitutional roots offer a compelling and strong foundation for recognizing the jury's *Brady* right. It begins by exploring the historical context of the jury, demonstrating that the institution of the jury was of utmost importance to the Founders. It then examines several cases in which the Court sought to preserve and protect the jury's power. These cases demonstrate that even though the jury's reach has diminished, it maintains significant constitutional power in cases that go to trial. Recognizing a *Brady* right in the jury as outlined in the previous Section is supported by the scope of the jury's constitutional power in these cases.

1. Establishing the Jury's Power

The power of the jury as a check on the power of the State predates the Constitution.[215] The Declaration of Independence listed the denial of the right to

any reasonable likelihood have affected the judgment of the jury" (alteration in original) (emphasis added) (quoting *Napue*, 360 U.S. at 271)).

[213] I propose this extension for several reasons. First, it is consistent with the jury's role as a check on the power of the State. *See infra* Section III.B. The jury's ability to play this constitutional role is undermined when the State is able to hide favorable evidence. Second, in addition to increasing the jury's power versus the prosecution, helping to ensure that the jury has access to all favorable evidence increases the jury's power versus the judiciary. *See In re* Kline, 113 A.3d 202, 212 (D.C. 2015) (criticizing *Brady*'s materiality requirement because it often leaves "judgment calls" about whether particular items of favorable evidence would have made difference not to "a jury of one's peers but [to] a court that is sitting and reviewing a cold record"). Finally, as a practical matter, the inherent flaws in *Brady*'s materiality analysis, *see infra* Section IV.C, weigh in favor of abandoning it in this context.

[214] *See* U.S. CONST. art. III, § 2, cl. 3. ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .").

[215] *See, e.g.*, Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 860 (2017) ("In the era of our Nation's founding, the right to a jury trial already had existed and evolved for centuries, through and alongside the common law."); Apprendi v. New Jersey, 530 U.S. 466, 548 (2000) (O'Connor, J., dissenting) ("Blackstone explained that the right to trial by jury was critically important in criminal cases because of 'the violence and partiality of judges appointed by the crown, . . . who might then . . . imprison, dispatch, or exile any man that was obnoxious to the government, by an instant declaration, that such is their will and pleasure.'" (first alteration in original) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 343 (1769))).

a jury trial as one of the reasons for breaking with Great Britain.[216] Our country's Founders held "the right to trial by jury [was] probably the most valued of all civil rights."[217] The fear of an all-powerful State formed the foundation for the Sixth Amendment right to trial by jury.[218] The glowing terms the Founders used to describe the institution of the jury provide evidence of its central importance to the formation of our system of government.[219] For example, Thomas Jefferson characterized "[t]rial by jury . . . as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."[220]

Historically, the right to trial by jury was based on a desire to protect defendants from abuses of power by the judiciary.[221] Today, consistent with the

[216] THE DECLARATION OF INDEPENDENCE para. 19 (U.S. 1776) ("For depriving us, in many cases, of the benefits of trial by jury . . . ."); *see also* FERGUSON, *supra* note 93, at 142-44 (describing jury's refusal to convict John Peter Zenger in 1734 for seditious libel, despite overwhelming evidence of his guilt); SUJA A. THOMAS, THE MISSING AMERICAN JURY 66 (2016) (noting, for example, that Founders also recognized important role juries played in curbing executive power by refusing to convict Americans critical of British government under sedition laws).

[217] THOMAS, *supra* note 216, at 12 (quoting WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 96 (1975)).

[218] *See* Blakely v. Washington, 542 U.S. 296, 308 (2004) ("[T]he very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury."); *Apprendi*, 530 U.S. at 548 (O'Connor, J., dissenting) ("[T]he Court has recognized that the Sixth Amendment's guarantee was motivated by the English experience of 'competition . . . between judge and jury over the real significance of their respective roles'" (alteration in original) (quoting Jones v. United States, 526 U.S. 227, 245 (1999))). Justice Antonin Scalia characterized the right to a jury trial as "one of the least controversial provisions of the Bill of Rights." *Id.* at 498 (Scalia, J., concurring).

[219] *See* THOMAS, *supra* note 216, at 67 ("James Wilson stated that the jury, 'this beautiful and sublime effect of our judicial system,' promoted the principles of 'an habitual courage, and dignity, and independence of sentiment and of actions in the citizens,' which he thought 'should be the aim of every wise and good government.'" (quoting 2 JAMES WILSON, COLLECTED WORKS OF JAMES WILSON 1009, 1011 (Kermit L. Hall et al. eds., 2007))).

[220] *Id.* (alterations in original) (quoting THOMAS JEFFERSON, ON DEMOCRACY 160 (Saul K. Padover ed., 1939)).

[221] *See, e.g.*, *Blakely*, 542 U.S. at 308 ("[T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury."); *Apprendi*, 530 U.S. at 477 (characterizing purpose of right to trial by jury as "guard[ing] against a spirit of oppression and tyranny on the part of rulers" (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540-41 (4th ed. 1873))); *Jones*, 526 U.S. at 244 ("[S]everal studies demonstrate that on a general level the tension between jury powers and powers exclusively judicial would likely have been very much to the fore in the Framers' conception of the jury right.").

expansion of the power of the prosecutor,[222] the Court understands the right to a jury trial as "an inestimable safeguard against [both] the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[223] Moreover, in *Duncan v. Louisiana*, the Court recognized that the jury trial right "reflect[s] a fundamental decision about the exercise of official power,"[224] and is thus applicable to the states as well as the federal system.[225]

Since recognizing the right to trial by jury as a fundamental right, the Court has continued to echo the laudatory language in *Duncan*. In *Apprendi v. New Jersey*,[226] the Court held that the right to trial by jury requires the jury, as opposed to the judge, to find beyond a reasonable doubt the existence of any fact that increases the maximum sentence a defendant can receive.[227] In so holding, the Court characterized the right to a jury trial as a "tradition that is an indispensable part of our criminal justice system."[228] Similarly, in *Ring v. Arizona*,[229] in which the Court held that the right to trial by jury requires a jury finding of any fact that makes a defendant eligible for the death penalty, the Court relied on the assertion in *Duncan* that the jury trial right "reflect[s] a profound judgment about the way in which law should be enforced and justice administered."[230] In *Blakely v. Washington*,[231] the Court found that the right to a jury trial "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure."[232] And in *Peña-Rodriguez v. Colorado*,[233]

[222] *See* Kreag, *supra* note 35, 794-98 (describing how changes in substantive law and sentencing practices have led to increases in prosecutorial power in absolute and comparative terms).

[223] Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

[224] *Id.*

[225] *See id.* at 149 ("Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee.").

[226] 530 U.S. 466 (2000).

[227] *Id.* at 490.

[228] *Id.* at 497.

[229] 536 U.S. 584 (2002).

[230] *Id.* at 589, 609 (quoting *Duncan*, 391 U.S. at 155-56); *see id.* at 612 (Scalia, J., concurring) ("We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it."); *see also* Hurst v. Florida, 136 S. Ct. 616, 624 (2016) ("The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding.").

[231] 542 U.S. 296 (2004).

[232] *Id.* at 305-06; *id.* at 308 ("[T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power.").

[233] 137 S. Ct. 855 (2017).

the Court characterized the jury as "a central foundation of our justice system and our democracy."[234]

The constitutional power reserved in the jury is designed to ensure that the jury can "prevent oppression by the Government,"[235] balance the legitimate use of State power,[236] "prevent[] miscarriages of justice,"[237] "guard against the exercise of arbitrary power,"[238] and provide an avenue for civic participation in and engagement with our democracy.[239] When the jury is properly respected and can play these roles, it provides important legitimacy to the criminal justice system.[240] As a result, the Court has taken steps in several areas to protect the "reservation of power" in the jury for cases that go to trial.[241]

2. Protecting the Jury's Power

On the front end of the trial proceedings, the Court has sought to protect the jury's power and legitimizing force by requiring the State to provide an impartial jury.[242] This requirement is accomplished by selecting the jury from a fair cross-section of the community and by adequate voir dire to identify potential jurors with biases too great to exercise the jury's power.[243] However, it is not enough

[234] *Id.* at 860.

[235] *Duncan*, 391 U.S. at 145 (discussing constitutional importance of jury trials in federal and state systems).

[236] *See Peña-Rodriguez*, 137 S. Ct. at 860 (recognizing that "jury is a necessary check on governmental power"); *Duncan*, 391 U.S. at 156 (recognizing that jury protects against not just "corrupt" but also "overzealous" prosecutor).

[237] *Duncan*, 391 U.S. at 15 (explaining why jury trials for serious offenses are fundamental rights).

[238] Taylor v. Louisiana, 419 U.S. 522, 530 (1975); *see also* Spaziano v. Florida, 468 U.S. 447, 482 (1984) (Stevens, J., dissenting) ("[T]he jury serves to ensure that the criminal process is not subject to the unchecked assertion of arbitrary governmental power . . . .").

[239] *See* FERGUSON, *supra* note 93, at 9-25.

[240] *Spaziano*, 468 U.S. at 481 (Stevens, J., dissenting) ("In our jurisprudence, the jury has always played an essential role in legitimating the system of criminal justice."); *see also* Powers v. Ohio, 499 U.S. 400, 407 (1991) ("Jury service preserves the democratic element of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people."); *Taylor*, 419 U.S. at 530 ("Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system.").

[241] Of course, the Court blessed the practice of plea bargaining in *Bordenkircher v. Hayes*, 434 U.S. 357, 362-65 (1978), which has severely limited the jury's power. *See* THOMAS, *supra* note 216, at 44-46 (explaining how plea bargaining has shifted power from jury to prosecutor and legislature).

[242] *See* Ristaino v. Ross, 424 U.S. 589, 595 (1976) (recognizing "State's obligation to the defendant to impanel an impartial jury").

[243] *See* J.E.B. v. Alabama *ex. rel* T.B., 511 U.S. 127, 143-44 (1994) ("*Voir dire* provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently."); *Powers*, 499 U.S. at 411 ("[R]acial

to guard against pre-formed biases; the Constitution protects the jury's power by guarding against biases that might form during a trial because these too can undermine the jury's authority.

In *Remmer v. United States*,[244] the Court remanded defendant's case to examine whether outside influences invaded the jury's domain.[245] The defendant alleged that a third party approached a juror and implied the juror "could profit" from finding for the defendant.[246] After the juror reported the interaction to the judge, the court consulted with the prosecutors and asked the FBI to investigate the matter.[247] Based on the information collected by the FBI, the court and the prosecution concluded that the comment to the juror "was made in jest."[248] However, the trial court did not share any of this information with the defense.[249] In support of its remand order, the Court reasoned that "[i]n a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial."[250] It added that the State could rebut this presumption only after notice to the defendant and a hearing, during which the State must demonstrate that the "contact with the juror was harmless to the defendant."[251]

On the back end of the trial proceedings, the Court has sought to protect the jury's power by shielding the deliberative process from external review.[252] In *Tanner v. United States*,[253] the defendants sought to challenge their convictions based on information from two jurors who reported that several members of the jury drank alcohol, smoked marijuana, used cocaine, and generally treated their

discrimination in the selection of jurors 'casts doubt on the integrity of the judicial process,' and places the fairness of a criminal proceeding in doubt." (citation omitted) (quoting Rose v. Mitchell, 443 U.S. 545, 556 (1979))); *Taylor*, 419 U.S. at 528 (reversing conviction based on violation of fair cross-section requirement because jury pool effectively excluded women from jury service).

[244] 347 U.S. 227 (1954).

[245] *Id.* at 230.

[246] *Id.* at 228.

[247] *Id.*

[248] *Id.*

[249] *Id.*

[250] *Id.* at 229.

[251] *Id.* The Court reaffirmed this rule in *Smith v. Phillips*, 455 U.S. 209 (1982), recognizing that impartiality requires "a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Id.* at 217.

[252] *See, e.g.*, FED. R. EVID. 606(b)(1) ("During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.").

[253] 483 U.S. 107 (1987).

jury service as "one big party."[254] The Court upheld the trial court's refusal to hold an evidentiary hearing to explore the jurors' behavior, relying on what it characterized as the "near-universal and firmly established common-law rule in the United States flatly prohibit[ing] the admission of juror testimony to impeach a jury verdict."[255] It explained that the prohibition was necessary to ensure "full and frank discussion in the jury room, jurors' willingness to return an unpopular verdict, and the community's trust in a system that relies on the decisions of laypeople."[256]

Similarly, the Court protected the jury's power, which includes the "unreviewable power . . . to return a verdict of not guilty for impermissible reasons,"[257] by insulating logically inconsistent verdicts from review. In *United States v. Powell*,[258] the Court upheld the defendant's conviction on one count despite the fact that the jury's acquittal of the defendant on related counts rendered the verdicts irreconcilable.[259] In so holding, the Court upheld the rule it announced in *Dunn v. United States*,[260] that "inconsistent verdicts in criminal trials need not be set aside, but may instead be viewed as a demonstration of the jury's leniency."[261] It added that *Dunn*'s rule "ha[d] been explained by both courts and commentators as a recognition of the jury's historic function . . . as a check against arbitrary or oppressive exercises of power by the Executive Branch."[262]

Collectively, these Sixth Amendment cases demonstrate the constitutional importance of the jury and the extent to which the Constitution protects the jury's role as a check on the State and a legitimating force for the system. Recognizing the jury's *Brady* right is consistent with these goals. It would protect the jury from unknowingly becoming biased against the defendant as a result of being shielded from favorable evidence. It would also ensure the "full

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[254] *Id.* at 113-17.

[255] *Id.* at 117. The Court recently announced an exception to the no-impeachment rule in situations "where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant." Peña-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017). In these situations, the Court held that "the Sixth Amendment [right to an impartial jury] requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement." *Id.*

[256] *Tanner*, 483 U.S. at 120-21; *see also* United States v. Thomas, 116 F.3d 606, 618-19 (2d Cir. 1997) (summarizing reasons for maintaining secret deliberations and concluding that "objections to the secrecy of jury deliberations are nothing less than objections to the jury system itself").

[257] Harris v. Rivera, 454 U.S. 339, 346 (1981).

[258] 469 U.S. 57 (1984).

[259] *Id.* at 69 (explaining that jury's "verdicts cannot rationally be reconciled" but refusing to disturb those verdicts).

[260] 284 U.S. 390 (1932).

[261] *Powell*, 469 U.S. at 61 (citing *Dunn*, 284 U.S. at 393).

[262] *Id.* at 65.

and frank discussion in the jury room" the Court sought to protect in *Tanner*.[263] Thus, recognizing the jury's independent right to all favorable evidence would also serve the jury's role in protecting the legitimacy of the system.

In addition to the Sixth Amendment, the Due Process Clause offers support for a constitutional *Brady*-like right for jurors. This can be found in the line of cases giving rise to *Brady* itself, as well as in the Court's conclusion that due process requires proof beyond a reasonable doubt for criminal convictions.[264]

The Supreme Court made explicit in *Winship* that due process prevents a jury from returning a guilty verdict unless the prosecution has established all elements of the crime beyond a reasonable doubt.[265] The rule primarily protects the liberty interest of defendants,[266] but it interacts with the jury's power in at least two ways. First, the standard of proof and the jury trial right each provide legitimacy to the criminal justice system.[267] Similarly, these two rights combine to limit the power of the State.[268]

Although due process demands that jurors apply the beyond a reasonable doubt standard, in application, the rule has proven difficult to describe.[269] The courts' instructions about what level of certainty is required to meet the reasonable doubt standard are often just as confusing and unilluminating as other jury instructions.[270] One common instruction tasks jurors with determining whether the evidence leaves them with a firm belief in the defendant's guilt.[271] That due process demands jurors apply this admittedly confusing and nearly

[263] Tanner v. United States, 483 U.S. 107 (1987).

[264] *In re* Winship, 397 U.S. 358, 368 (1970).

[265] *Id.* at 364.

[266] *See id.* at 363 (stating that beyond reasonable doubt standard "plays a vital role in . . . reducing the risk of convictions resting on factual error").

[267] *See id.* at 364 ("[U]se of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law."); *see also* Spaziano v. Florida, 468 U.S. 447, 481 (1984) (Stevens, J., dissenting) ("In our jurisprudence, the jury has always played an essential role in legitimating the system of criminal justice.").

[268] *See In re Winship*, 397 U.S. at 364 (recognizing that "government cannot adjudge [a defendant] guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty"); *see also supra* notes 235-38 and accompanying text.

[269] *See, e.g.*, *In re Winship*, 397 U.S. at 369 (Harlan, J., concurring) ("Professor Wigmore, in discussing the various attempts by courts to define how convinced one must be to be convinced beyond a reasonable doubt, wryly observed: 'The truth is that no one has yet invented or discovered a mode of measurement for the intensity of human belief. Hence there can be yet no successful method of communicating intelligibly . . . a sound method of self-analysis for one's belief.'" (alteration in original) (quoting 9 J. WIGMORE, EVIDENCE § 2497, at 325 (3d ed. 1940))).

[270] *See* Kozinski, *supra* note 30, at xx ("Jury instructions are often lengthy and difficult to follow.").

[271] *See, e.g.*, *Proof Issues*, 45 GEO. L.J. ANN. REV. CRIM. PROC. 770, 771 n.2087 (2016) (collecting cases discussing various formulations of "beyond a reasonable doubt" jury instructions).

undefinable standard weighs in favor of making sure jurors have as much information as possible to render a verdict. This should include all evidence favorable to the defendant in the prosecutor's possession, not just favorable evidence that meets *Brady*'s materiality prong.

The due process cases that formed the foundation for *Brady* also support a *Brady*-like right for the jury, as these cases explicitly chastise prosecutors for misrepresentations before the jury.[272] Perhaps the most important of these foundational cases is *Berger*, in which the Court concluded that prosecutors have a duty to use "every legitimate means to bring about . . . just [convictions]."[273] In using the term "just," the Court recognized that prosecutors have more than a duty to help ensure that trials accurately sort the guilty from the not guilty.[274] That is, *Berger* reached beyond simply protecting the defendant's constitutional rights; it also emphasized protecting the constitutional role of the jury in the trial proceedings. Specifically, the Court recognized that improper prosecutorial conduct before the jury would "carry much weight" during the jury's deliberative process when it "should properly carry none."[275] In this light, *Berger*'s demand that prosecutors seek only "just" convictions can be read as respecting both the defendant's constitutional rights and the jury's constitutional role in reaching a verdict without interference from the prosecutor.[276]

The Court's due process analysis in *Napue* similarly acknowledges both the defendant's constitutional rights and the jury's constitutional role in determining guilt.[277] In *Napue*, the prosecution relied on the testimony of a co-defendant who testified that he was not promised a benefit in return for his testimony against the defendant.[278] The prosecutor knew the testimony was false, but did nothing to correct it.[279] In finding a due process violation, the Court relied on the fact

[272] *See* Miller v. Pate, 386 U.S. 1, 6 (1967) (finding due process violation because "prosecution deliberately mispresented the truth" before jury); *see also* Kyles v. Whitely, 514 U.S. 419, 432 (1994) ("The prosecution's affirmative duty to disclose evidence favorable to a defendant can trace its origins to early 20th-century strictures against misrepresentation . . . ."); United States v. Bagley, 473 U.S. 667, 680 n.8 (1985) ("In fact, the *Brady* rule has its roots in a series of cases dealing with convictions based on the prosecution's knowing use of perjured testimony.").

[273] Berger v. United States, 295 U.S. 78, 88 (1935).

[274] *See id.* (recognizing that prosecutor had two distinct duties, including "refrain[ing] from improper methods calculated to produce a wrongful conviction" and using "legitimate means to being about a just [conviction]").

[275] *Id.*

[276] The Court's opinion in *Berger* also seeks to protect the integrity of the prosecutorial function. *See id.* (recognizing that prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation [is] to govern impartially . . . [and ensure] that justice shall be done").

[277] *See* Napue v. Illinois, 360 U.S. 264, 272 (1959) (finding due process violation where prosecutor knowingly relied on false testimony).

[278] *Id.* at 265.

[279] *Id.*

that the false testimony undercut the jury's constitutional role.[280] The Court recognized that, had the jury known the facts, it might have concluded that the co-defendant fabricated other parts of his testimony, and thus the "false testimony . . . may have had an effect on the outcome of the trial."[281] In short, one of *Napue*'s goals is to protect the jury's role from being tainted by the prosecutor's misconduct. Recognizing a *Brady-like right for* the jury serves this same goal.

C. *Mechanics of the Jury's* Brady *Right*

Because the jury is not a party in a criminal case, vesting a constitutional right in it to receive evidence favorable to the defendant beyond that required by *Brady* creates real but surmountable hurdles.[282] The Court's equal protection jurisprudence in the jury selection context offers a guide to how a new *Brady*-like right for the jury could be implemented through the defendant based on third-party standing.

In *Batson v. Kentucky*,[283] the Court held that the State's use of peremptory challenges to exclude potential jurors based on race violates the Equal Protection Clause.[284] The Court added that the exclusion of jurors based on race also implicated the constitutional rights of the potential jurors.[285] Specifically, it recognized that "by denying a person participation in jury service on account of . . . race, the State unconstitutionally discriminated against the excluded juror."[286] Moreover, the Court recognized that the harms from race-based jury selection reach the entire community.[287]

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[280] *See id.* at 269 ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.").

[281] *Id.* at 272.

[282] *See, e.g.*, Powers v. Ohio, 499 U.S. 400, 410 (1991) ("In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.").

[283] 476 U.S. 79 (1986).

[284] *Id.* at 89 ("[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.").

[285] *Id.* at 87; *see also* Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 726 (1992) (arguing that proper way to evaluate race-based jury selection practices is from perspective of those who face primary harm (i.e., jurors excluded based on race), not perspective of defendants who face derivative harm of being tried by jury compromised by race-based selection).

[286] *Batson*, 476 U.S. at 87.

[287] *Id.* ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.").

The Court further explored the interrelationship between the equal protection rights of defendants and the potential jurors in *Powers v. Ohio*.[288] In *Powers*, unlike *Batson*, a white defendant raised an equal protection challenge to the prosecution's exclusion of black jurors.[289] The Court concluded that the struck jurors had a constitutional interest in jury service independent from the defendant's constitutional right, and that the defendant had third-party standing to raise the jurors' equal protection claim.[290] The Court conditioned the defendant's third-party standing to raise the constitutional rights of the struck jurors on a three-part test.[291] The Court explained:

> The litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests.[292]

The Court found that the defendant in *Powers* met this three-part test, establishing standing to raise the jurors' constitutional claim.[293]

Similar to the defendant's third-party standing to assert a juror's equal protection rights in jury selection, a defendant should have third-party standing to assert the jury's *Brady* right.[294] With respect to the first prong, the defendant

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[288] 499 U.S. 400, 402 (1991) (holding that "criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race").

[289] *Id.* at 402-03.

[290] *Id.* at 402 ("Jury service is an exercise of responsible citizenship by all members of the community, including those who otherwise might not have the opportunity to contribute to our civic life."); *id.* at 406-07 (summarizing benefits of jury service); *id.* at 409 (holding that Equal Protection Clause prohibits race-based peremptory challenges because potential juror "does possess the right not to be excluded from [a jury] on account of race"); *id.* at 415 ("We conclude that a defendant in a criminal case can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race.").

[291] *Id.* at 410-11 ("We have recognized the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied . . . .").

[292] *Id.* at 411 (citations omitted) (quoting Singleton v. Wulff, 428 U.S. 106, 112-16 (1976)).

[293] *Id.* at 416.

[294] Funneling the jury's *Brady* right through the defendant would undoubtedly render the right underenforced. Even with the disclosure of all favorable evidence, the vast majority of convictions would still result from plea bargains, sidelining the jury. Moreover, a defendant may elect not to present some favorable evidence to the jury if the evidence is inconsistent with the defendant's theory of defense. However, recognizing that the jury's *Brady* right would be underenforced is not a fatal flaw. *See, e.g.*, Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221 (1978) (arguing that "constitutional norms which are underenforced by the federal judiciary should be understood to be legally valid to their full conceptual limits . . . [i.e.,] underenforced

certainly faces harm by the prosecution's failure to disclose all favorable evidence to the jury. As the Court has recognized, it is difficult to predict what shred of evidence tips the jury's verdict one direction or another.[295] In addition, just as race-based jury selection "damages both the fact and the perception" of the jury's role as a "vital check against the wrongful exercise of power by the State and its prosecutors,"[296] so too does the failure to disclose evidence favorable to the defendant, which keeps the jury in the dark during deliberations. Each tactic undercuts the legitimacy jury trials provide to the criminal justice system.[297]

The second prong of the *Powers* test for third-party standing requires the defendant to have a close relationship to the third party.[298] In *Powers*, the Court held that the defendant had a sufficiently close relationship with the third-party rights holder—the juror struck based on race—to permit third-party standing.[299] It reasoned that the relationship started during voir dire, when the defendant attempted to build trust with the potential jurors.[300] This relationship with the jury applies equally in the context of disclosure of evidence favorable to the defendant. The defendant and the jury would each prefer that the jury have access to all information favorable to the defendant. The defendant has an interest in maximizing the chance of avoiding conviction, and the jury has an interest in playing its constitutional role as a check on the prosecutor. Like in *Powers*, "[t]his congruence of interests makes it necessary and appropriate for the defendant to raise the rights of the juror."[301]

Finally, *Powers*'s third prong also supports the defendant's third-party standing to assert the jury's *Brady* right because jurors face sufficient hurdles to

norms should have the full status of positive law which we generally accord to the norms of our Constitution").

[295] *See, e.g.*, United States v. Bagley, 473 U.S. 667, 693 (1985) (Marshall, J., dissenting) ("The private whys and wherefores of jury deliberations pose an impenetrable barrier to our ability to know just which piece of information might make, or might have made, a difference."); United States v. Agurs, 427 U.S. 97, 108 (1976) (recognizing that "significance of an item of evidence can seldom be predicted accurately"); Napue v. Illinois, 360 U.S. 264, 269 (1959) ("[I]t is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.").

[296] *Powers*, 499 U.S. at 411.

[297] *See, e.g.*, *id.* at 413 ("The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset.").

[298] *Id.* at 411.

[299] *Id.* at 413 ("Here, the relation between petitioner and the excluded jurors is as close as, if not closer than, those we have recognized to convey third-party standing in our prior cases.").

[300] *Id.* ("*Voir dire* permits a party to establish a relation, if not a bond of trust, with the jurors.").

[301] *Id.* at 414.

raising this right on their own.[302] In the context of disclosure, there are several reasons why jurors would lack the ability or incentive to vindicate their rights. Most importantly, as is the case with violations of the defendant's *Brady* right, violations of the jury's *Brady* right would often remain secret for years.[303] Moreover, while jurors would face real harm from violations of this new *Brady*-like right, the harm would remain slight compared to the acute harm the defendant faces.[304]

Having outlined the scope, the constitutional foundation, and the mechanics of the jury's *Brady* right, the next Part explores the likely consequences of recognizing this right.

IV. IMPLICATIONS OF RECOGNIZING THE JURY'S *BRADY* RIGHT

Recognizing the jury's *Brady* right offers promise on several fronts. This Part argues that considering the jury's perspective in the prosecutor's disclosure calculus will increase disclosures. Indeed, regardless of whether the Court recognizes a *Brady-like right for* the jury, simply recognizing the harms to the jury from the failure to comply with the defendant's *Brady* right should lead to increased disclosures. In turn, this would lead to fewer errors. Recognizing this right will also render moot one of the most troubling aspects of the defendant's *Brady* right—the materiality prong. More generally, it will reinforce the importance of the jury as a constitutional actor.

A. *Increasing Prosecutorial Disclosures*

While it is important to recognize the harms jurors face from *Brady* violations, this recognition might have the salutary effect of altering behavior and limiting misconduct. Such potential promise is worth exploring as other methods of curbing *Brady* misconduct have been met with mixed results at best.[305] If nothing else, considering the jurors' perspective expands the traditional manner in which we evaluate *Brady* compliance decisions, which focuses on the adversarial nature between prosecution and defense,[306] and it offers the

[302] *See id.* ("The final inquiry in our third-party standing analysis involves the likelihood and ability of the third parties . . . to assert their own rights.").

[303] *See supra* note 54 and accompanying text.

[304] *See Powers*, 499 U.S. at 415 ("The reality is that a juror dismissed because of race probably will leave the courtroom possessing little incentive to set in motion the arduous process needed to vindicate his own rights.").

[305] *See* Johnson, *supra* note 75, at 3-4 (noting that one potential alternative method to *Brady*, the "knew or should have known" rule, is unfair to defendants).

[306] *See* United States v. Bagley, 473 U.S. 667, 675 n.6 (1985) ("[T]he *Brady* rule represents a limited departure from a pure adversary model."); Johnson, *supra* note 75, at 4 ("At the heart of the *Brady* doctrine is a debate about how to balance the role of the defendant, the prosecutor and the court in an adversarial system.").

possibility that new considerations might alter behavior and increase *Brady* compliance.[307]

The existing framework and the remedial measures taken to deter *Brady* violations have fallen short.[308] Professors Ellen Yaroshefsky and Bruce Green conducted an extensive study into what factors contribute to *Brady* compliance.[309] They concluded that discipline from state bar associations and attorney licensing organizations is ineffective,[310] internal procedures to review *Brady* compliance are often unavailing,[311] the risk of civil liability is not a factor in compliance decisions,[312] and the risk of public opinion backlash is negligible.[313] Although these formal channels proved ineffective, informal processes, including peer pressure and the exercise of soft power by local judges,

[307] *See Bagley*, 473 U.S. at 692-93 (Marshall, J., dissenting) ("When evidence favorable to the defendant is known to exist, disclosure only enhances the quest for truth; it takes no direct toll on that inquiry.").

[308] *See* Keenan, *supra* note 29, at 203 ("Our study demonstrates that professional responsibility measures as they are currently composed do a poor job of policing prosecutorial misconduct.").

[309] *See* Yaroshefsky & Green, *supra* note 52, at 272-85 (summarizing interviews with thirty-five prosecutors from seven different offices).

[310] *Id.* at 277 ("We also found little evidence that regulation through formal attorney disciplinary processes had a significant effect on prosecutorial disclosure decisions."); *see also* Lara A. Bazelon, *Hard Lessons: The Role of Law Schools in Addressing Prosecutorial Misconduct*, 16 BERKELEY J. CRIM. L. 391, 428-29 (2011) (stating that it is "empirical fact that very few defense attorneys report prosecutors who commit misconduct to the state bar or any other disciplinary authority"); Caldwell, *supra* note 77, at 69 ("The state bar association model has little impact on prosecutors, partly because of the type of complaint that triggers a bar association inquiry."); Rudin, *supra* note 29, at 539.

[311] Yaroshefsky & Green, *supra* note 52, at 283 ("In practice, supervisory review of disclosure decisions is rare, and there are often inadequate mechanisms to review disclosure and track problems." (citation omitted)); *id.* at 284 ("Discretion may be driven less by carefully considered ethical judgments than by time constraints preventing careful file review."); *see also* Kozinski, *supra* note 30, at xxxii ("In my experience, the U.S. Justice Department's Office of Professional Responsibility (OPR) seems to view its mission as cleaning up the reputation of prosecutors who have gotten themselves into trouble.").

[312] Yaroshefsky & Green, *supra* note 52, at 276 ("Prosecutors are highly unlikely to be influenced by concerns about criminal or civil liability for noncompliance with disclosure obligations.").

[313] *Id.* at 275 ("Public opinion is unlikely to have a major impact on disclosure policies of a prosecutor's office and certainly not on the conduct of junior or line prosecutors."). *But see id.* at 276 (quoting one chief prosecutor as saying, "[i]f an office gets a reputation for cutting corners, it ultimately affects the perception of juries").

proved influential.[314] Yaroshefsky and Green's findings are consistent with decision-making research in other contexts.[315]

This research raises several questions. What would encourage more widespread adoption of informal, local norms supporting disclosure? What causes compliance with *Brady* to be seen as the preferred behavior? Alternatively, what type of prosecutorial culture allows *Brady* violations to flourish? Certainly, many factors combine to determine whether a prosecutor's office develops a culture of respect for *Brady*, including whether the office employs prosecutors with experience as defense attorneys,[316] the overall experience level of the prosecutors,[317] and hiring practices and decisions.[318] But a willingness to consider the implications of *Brady* violations on jurors also has the potential to change the culture of a prosecutor's office in a manner that increases compliance with *Brady*.

First, ponder the potential effect on the judiciary of considering *Brady* violations from the jurors' perspective. As it stands now, with our *Brady* enforcement regime largely ignoring the plight of jurors, the judiciary has faced

[314] *Id.* at 277-78 ("[I]nformal peer pressures in the form of 'local legal culture' may influence prosecutors' conduct. In particular, individual prosecutors or their offices as a whole may respond to how other local actors and agencies regard their behavior, preferring others to regard their behavior as legitimate and consistent with established practices and conventions." (citation omitted)); *id.* at 278 ("Local judges appear to influence prosecutors' disclosure practices, most commonly through informal expressions of concern or disapproval that imply a potential withdrawal of goodwill, on which prosecutors depend for the smooth management of their work."); *see also* Kozinski, *supra* note 30, at xxvi ("While most prosecutors are fair and honest, a legal environment that tolerates sharp prosecutorial practices gives important and undeserved career advantages to prosecutors who are willing to step over the line, tempting others to do the same.").

[315] *See* PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT 540 (2010) ("[P]eople tend to see behavior as appropriate in a given situation to the degree that they see others performing it.").

[316] *See* Barry C. Scheck, Conviction Integrity Units Revisited 34 (Dec. 26, 2016) (unpublished manuscript), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2890341 [https://perma.cc/ML7D-4ACZ] (concluding that "single most important best practice to assure that the [Conviction Integrity Unit] runs well and is perceived as credible by the legal community and the public" is that it is "run by defense attorneys").

[317] *See, e.g.*, A.M. "Marty" Stroud III, *Lead Prosecutor Apologizes for Role in Sending Man to Death Row*, SHREVEPORT TIMES (Mar. 20, 2015), http://www.shreveporttimes.com/story/opinion/readers/2015/03/20/lead-prosecutor-offers-apology-in-the-case-of-exonerated-death-row-inmate-glenn-ford/25049063/ [https://perma.cc/9JSN-MNEX] (quoting prosecutor who committed misconduct that caused Glenn Ford's wrongful conviction and death sentences as follows: "In 1984, I was 33 years old. I was arrogant, judgmental, narcissistic and very full of myself. I was not as interested in justice as I was in winning. . . . 'Winning became everything.'").

[318] *See* Yaroshefsky, *supra* note 207, at 12-15 (describing Dallas District Attorney interview process).

significant criticism for its unwillingness to address *Brady* violations.[319] Judge Kozinski put it succinctly: "Some prosecutors don't care about *Brady* because courts don't *make* them care."[320] Highlighting the harm *Brady* violations cause to jurors may motivate some judges to *make* prosecutors care.

Some judges who would otherwise take a hands-off approach to discovery matters, leaving them largely to the parties to sort out, might be more willing to engage if *Brady* violations are considered not just a violation of the defendant's constitutional rights, but also demeaning and debilitating to jurors. Courts routinely describe part of their role as protecting the interests of jurors. And while this includes mundane tasks like ensuring jurors can hear witness testimony, have adequate breaks to help them stay engaged, and are treated with respect by court staff and officials, it should also include working to ensure that the jury's role is not usurped by prosecutorial misconduct. Judges who take this position, recognizing the harms jurors shoulder from *Brady* violations, may be more comfortable actively policing *Brady* compliance and chastising non-compliance when the engagement is couched not as punishing a prosecutor or even as benefitting a defendant but as protecting citizens required to submit to jury duty.[321] If the engagement results in judges explicitly discussing disclosure obligations with prosecutors on the record, engaging in other informal discussions in the courthouse, sending letters to supervisors in the prosecutor's office regarding instances of near misconduct, or convening discussions among the judiciary about the importance of recognizing the full scope of the harms from *Brady* violations, these actions will have an impact on disclosure practices by altering the culture in which disclosure decisions are made.[322]

Similar forces offer promise to alter prosecutorial behavior even absent interference from the judiciary. In the current *Brady* regime, prosecutors make disclosure decisions largely in private and with little, if any, oversight.[323] No doubt a complex combination of factors affect these decisions. However, at its core, the system relies on prosecutors to pursue fairness. In short, the system asks prosecutors to treat defendants how prosecutors would want to be treated if they were in the defendant's position. But perhaps this idea is too remote and

[319] *See* Sullivan & Possley, *supra* note 76, at 890-95 (summarizing studies documenting that "courts rarely discipline prosecutors for misconduct").

[320] United States v. Olsen, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, J., dissenting); *see also* Kozinski, *supra* note 30, at xxxiii (characterizing judges as "only ones who can force prosecutors and their investigators and experts to comply with due process").

[321] *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (reasoning that objective of reversing conviction based on prosecutorial misconduct "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused").

[322] *See* Yaroshefsky & Green, *supra* note 52, at 278 ("Local judges appear to influence prosecutors' disclosure practices, most commonly through informal expressions of concern or disapproval that imply a potential withdrawal of goodwill, on which prosecutors depend for the smooth management of their work.").

[323] *See supra* Section I.A.

abstract to influence the behavior of some prosecutors. Even prosecutors with ample empathy may find it difficult to imagine themselves in the defendant's position.[324]

Prosecutors may have less difficulty placing themselves in the shoes of the jury. Indeed, successful prosecutors pride themselves on being able to connect with jurors, as this is viewed as a key to effective advocacy and successful outcomes. To help promote *Brady* compliance, we should ask prosecutors to treat jurors with the respect and dignity that prosecutors would demand if they were in the jury box.

Requiring prosecutors to consider the impact of *Brady* disclosure decisions from the perspective of the jury offers promise for other reasons as well. At trial, prosecutors enter into a one-way conversation of sorts with the jury. This is most clear during opening and closing arguments, but even during witness testimony, prosecutors—like defense attorneys—seek to engage with the jury. This engagement and the ultimate connection requires trust.[325] Prosecutors who only see *Brady* from the traditional lens of the adversarial process may only recognize it as causing harm to a defendant, someone who in the prosecutor's eyes deserves punishment. Or, at best, prosecutors might recognize that non-compliance with *Brady* causes less-defined harms to the system as a whole. Yet potential harms to the system as a whole are remote. Jurors are different. They are in court, sitting steps away from the prosecutor. The prosecutor's goal is to engage with the jurors and to convince them by earning their trust. To the extent that prosecutors recognize *Brady* violations as demeaning to jurors in a way that causes lasting harm and as a violation of the trust they seek to build, some prosecutors will be more inclined to meet their disclosure obligations than they would be if they did not consider the plight of jurors subjected to *Brady* violations.

B. *Reducing Errors*

Focusing on juries in the *Brady* context is also essential because it emphasizes the role juries play in ensuring reliable convictions. This does not mean juries always make the correct factual determination; exonerations demonstrate otherwise.[326] However, the jury's deliberative process coupled with due process's requirement of proof beyond a reasonable doubt remain a powerful force to prevent wrongful convictions. Yet when prosecutors violate *Brady* they place their ability to determine the defendant's guilt above the ability of the jury to make that determination. This demeans jurors regardless of whether the jurors would have ultimately agreed with the prosecutor about which defendants

[324] *Cf.* Scheck, *supra* note 316 (explaining why it is essential to have defense attorneys running conviction integrity units in prosecutor's offices).

[325] *See* Powers v. Ohio, 499 U.S. 400, 413 ("*Voir dire* permits a party to establish a relation, if not a bond of trust, with the jurors. This relation continues throughout the entire trial and may in some cases extend to the sentencing as well.").

[326] *See National Registry of Exonerations*, *supra* note 87 (listing all known exonerations); *The Cases*, *supra* note 87.

deserved convictions.[327] More importantly, replacing the deliberative process with the prosecutor's decision-making risks convicting innocent defendants and others for whom the prosecution cannot meet its burden of proof.

A recent study of capital sentencing practices in Alabama supports the need for caution where the jury's deliberative process is replaced by a single decision maker.[328] The study examined cases where judges sentenced defendants to death despite a jury vote for a life sentence, and found that these override decisions "increase[] the risk of wrongful executions."[329] Specifically, "override cases [in Alabama] account for less than a quarter of death sentences but half of death row exonerations."[330] *Brady* violations are a form of overriding the jury's deliberative process and risk similar errors.[331]

The study of jurors in Alabama capital cases is consistent with other studies that find that jury "deliberation creates a better and more accurate result."[332] The jury's comparative advantage is attributed to "better recall of evidence" by the group of jurors, a diminished role for individual biases to influence the decision, and the fact that decisions are the result of "the intuitions of each juror [being] checked and rechecked against those of the others."[333]

C. *Sidestepping the Pitfalls of* Brady*'s Materiality Prong*

Recognizing the jury's *Brady* right, as proposed in Section III.A, would satisfy those who argue that the defendant's *Brady* right is not broad enough because of its materiality prong. The scope of the jury's *Brady* right proposed here would require disclosure of all favorable evidence, not just evidence that is

[327] *See supra* Section II.B (discussing harm suffered by juries and jurors as result of *Brady* violations).

[328] *See* Patrick Mulvaney & Katherine Chamblee, *Innocence and Override*, 126 YALE L.J.F. 118, 118-19 (2016) (summarizing practical and constitutional concerns surrounding use of judicial override in Alabama). The single decision maker in the context of override cases is the judge, not the prosecutor, but the comparison is relevant.

[329] *Id.* at 119.

[330] *Id.* at 120. The study attributes this to residual doubt that causes jurors to vote for a life sentence despite the fact that they voted to convict these defendants. *Id.* at 119.

[331] Moreover, displacing the jury's deliberative process undermines the centrality of the jury in our system of justice. *See* Arizona v. Ring, 536 U.S. 584, 612 (2002) (Scalia, J., concurring) ("We cannot preserve our veneration for the protection of the jury in criminal cases if we render ourselves callous to the need for that protection by regularly imposing the death penalty without it.").

[332] FERGUSON, *supra* note 93, at 111-12.

[333] *Id.* at 112; *see also* Spaziano v. Florida, 468 U.S. 447, 487 (1984) (Stevens, J., dissenting) ("That the jury provides a better link to community values than does a single judge is supported not only by our cases, but also by common sense."); Ballew v. Georgia, 435 U.S. 223, 232-39 (1978) (summarizing several studies demonstrating importance of deliberative process before concluding "purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members").

deemed material.[334] This change would avoid many of the practical problems caused by *Brady*'s materiality prong. In addition to being easier for prosecutors to apply, it would be an easier rule for reviewing courts to apply.

Commentators and members of the judiciary have criticized *Brady*'s materiality filter because it has been used to justify withholding favorable evidence. Justice Thurgood Marshall offered a comprehensive attack on the materiality prong in his dissenting opinion in *United States v. Bagley*,[335] expressing his belief that the defendant's *Brady* right should require the disclosure of all favorable evidence.[336] He explained that the materiality standard weakened *Brady*'s protections because it required the prosecutor to play an "unharmonious" and "dual role" of pursuing a conviction while at the same time objectively gauging the evidentiary worth of information favorable to the defendant.[337] Furthermore, he argued that the rule was not workable because it required the prosecutor to "predict" the value of the favorable evidence in advance.[338] Many scholars agree with Justice Marshall's criticism of *Brady*'s materiality requirement.[339] While I agree with the critique and support abandoning the materiality prong for the defendant's *Brady* right, recognizing the jury's *Brady* right would achieve the same ends.

Abandoning the materiality filter certainly results in a more workable rule. It would relieve prosecutors of the duty to sort in advance of trial the evidence favorable to the defendant that is material from the evidence favorable to the defendant that is not material. It would also make it easier for appellate courts to review claims of prosecutorial misconduct by aligning more closely the prosecutor's constitutional disclosure obligations with the Court's repeated

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[334] *See supra* notes 46-49 and accompanying text (discussing *Brady*'s materiality prong).

[335] 473 U.S. 667 (1985).

[336] *Id.* at 695-96 (Marshall, J., dissenting) ("To my mind, the *Brady* decision, the reasoning that underlay it, and the fundamental interest in a fair trial, combine to give the criminal defendant the right to receive from the prosecutor, and the prosecutor the affirmative duty to turn over to the defendant, *all* information known to the government that might reasonably be considered favorable to the defendant's case.").

[337] *Id.* at 696-97.

[338] *See id.* at 698 ("Evidence that is of doubtful worth in the eyes of the prosecutor could be of inestimable value to the defense, and might make the difference to the trier of fact."); *id.* at 701 ("[T]he standard . . . also asks the prosecutor to predict what effect various pieces of evidence will have on the trial."); *id.* at 702 ("The prosecutor, convinced of the guilt of the defendant and of the truthfulness of his witnesses, may all too easily view as irrelevant or unpersuasive evidence that draws his own judgments into question."); *see also In re* Kline, 113 A.3d 202, 208 (D.C. 2015) ("Retrospective analysis, while it necessarily comports with appellate review, is wholly inapplicable in pretrial prospective determinations.").

[339] *See, e.g.*, Medwed, *supra* note 29, at 1556 n.129 (listing scholars who have called for abandoning *Brady*'s materiality prong); Yaroshefsky, *supra* note 69, at 939 (advocating for open file discovery, which would bypass *Brady*'s materiality filter); Yaroshefsky & Green, *supra* note 52, at 273 ("In many respects, the legal standard for pretrial disclosure is ill defined and imprecise in application.").

advice to err on the side of disclosure.[340] Such a move would make it much less likely that appellate courts would need to issue opinions like Justice Clarence Thomas's dissent in *Smith v. Cain*,[341] in which he engaged in a detailed examination of the record to conclude, contrary to the other eight Justices, that the withheld evidence was not material.[342] Rather, an opinion evaluating alleged violations of the jury's *Brady* right might require comparatively shorter analysis to establish the favorability to the defendant of the undisclosed evidence before concluding something like the following:

> Because the Court recognizes the jury's essential constitutional role;[343] because prosecutors, like the Court, must respect the jury as a constitutional actor;[344] and because the jury's verdict may turn on subtle considerations;[345] the Court cannot conclude that there is no reasonable likelihood that the undisclosed favorable evidence would not have affected the judgment of the jury.

D. *Reinforcing the Jury's Importance*

Recognizing the jury's *Brady* right has the potential to tap the brakes on the jury's diminishing role in the criminal justice system. Such a right would not return the jury to the power it held in a time of more frequent trials. But it could help reinvigorate the jury as a constitutional actor.

Several scholars have lamented the diminished role of the jury in the modern criminal justice system.[346] For the most part, these scholars focus on reforms that would increase the number of jury trials, arguing that such a move would be a powerful force for reforming the criminal justice system. For example, Professor William Stuntz offered a stinging critique of the modern criminal justice system in which "[i]nstead of juries and trial judges deciding whether this or that defendant merits punishing, prosecutors decide who deserves a trip to the nearest penitentiary."[347] To remedy this imbalance, Professor Stuntz proposed "mak[ing] guilty pleas more costly" to the State, thus increasing the number of

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[340] *See, e.g.*, United States v. Agurs, 427 U.S. 97, 108 (1976).

[341] 565 U.S. 73 (2012).

[342] *See id.* at 77-94 (Thomas, J., dissenting).

[343] *See supra* Section II.B.1, III.B.1.

[344] *See supra* Section II.B (discussing how prosecutors' failure to disclose evidence in violation of *Brady* undermines jury's constitutional role and dignitary interests).

[345] *See* Napue v. Illinois, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.").

[346] *See, e.g.*, THOMAS, *supra* note 216, at 5 (arguing that despite jury's constitutional foundation "the traditional actors [i.e., the executive, the legislature, the judiciary, and the states] led by the Supreme Court have seized the domain of the jury").

[347] WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 286 (2011).

jury trials.[348] Others have proposed alternatives for returning power to the jury by, for example, convening special juries to assist in plea bargaining, suppression hearings, and sentencing.[349]

Recognizing the jury's *Brady* right is in many ways a less ambitious step than many of these reform proposals. Furthermore, it is difficult to predict whether such a right would result in more jury trials in the aggregate. However, on an individual case level, it is likely that at least some defendants who would have otherwise pleaded guilty in the absence of the favorable evidence will elect to go to trial.[350] More importantly, even if recognizing the jury's *Brady* right does not result in more jury trials, it would certainly serve as a reminder of the jury's status as a constitutional actor with its own power.[351]

CONCLUSION

The jury as a constitutional actor is often forgotten in the modern criminal justice system. Of course, much of this is driven by the system's dependence on plea bargaining. Despite this dependence, or perhaps in response to it, courts must look elsewhere to protect the jury's constitutional role as a check on the State. Recognizing the jury's *Brady* right is a step in the right direction. At a minimum, explicit consideration of the jury's interests should be considered in comprehensive reform efforts designed to curb *Brady* violations. The criminal justice system overlooks significant harms to individual jurors and the institution of the jury when it focuses solely on the harms to defendants and the system as a whole as a result of *Brady* violations.

[348] *Id.* at 283.

[349] *See* Simonson, *supra* note 35, at 2180-81 (summarizing proposals for specialty juries to "review discretionary decisions that currently lack civilian input"); *see also* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 148 (2012) (summarizing similar proposal that would "involve the local community more thoroughly even in cases that are plea bargained"); THOMAS, *supra* note 216, at 158-63 (advocating for increased use of grand jury proceedings in state courts to replace current system in which prosecutors' charging decisions drive outcomes).

[350] *See supra* Section II.B.1.

[351] *See* Blakely v. Washington, 542 U.S. 296, 308 (2004) ("[T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power.").