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Federal Criminal Discovery Reform: A Legislative Approach

by Bruce A. Green*

Suppose that federal prosecutors have conducted an investigation culminating in an indictment. Although the prosecutors believe that they have enough evidence to secure a conviction and are personally convinced that the defendant is guilty, some of the evidence they have collected is favorable to the defendant, because it tends to show that the defendant is innocent or that prosecution witnesses should not be believed. Must prosecutors disclose the favorable evidence to defense counsel to use in investigating, advising the defendant, plea negotiations, or trial? Under current federal law, the answer is generally “no.” Unless favorable evidence falls within one of several narrow categories, or the evidence might be probative enough to produce an acquittal, federal prosecutors can keep it to themselves.¹

Proponents of broader federal criminal discovery law express two principal concerns about prosecutors’ existing disclosure obligations. The most crucial one is that disclosure is now too limited to ensure fair outcomes and provide a fair process in criminal cases.² The other is that prosecutors do not universally comply even with their existing obligations,³ whether because of the vagueness, inconsistency, or

* Stein Chair and Director, Stein Center for Law and Ethics, Fordham University School of Law. My thanks to Patrick Longan for inviting me to the Mercer Law School Symposium for which this Article was prepared; James Fleissner and Peter Joy for their generous comments on the draft presented at the Symposium; and the Mercer Law Review and Walter F. George School of Law for organizing and hosting the Symposium. Also, my thanks to Ted Sangalis, Fordham Law Class of 2012, for his fine research assistance.

1. See *infra* Part I.A.

2. See *infra* Part II.B.1.

3. *E.g.*, Letter from Thomas M. Susman, Am. Bar Ass’n, to Patrick Leahy, Chairman, Comm. on the Judiciary, U.S. Senate, and Charles Grassley, Ranking Member, Comm. on the Judiciary, U.S. Senate (June 5, 2012) (on file with author) [hereinafter Letter from Thomas M. Susman] (“Unfortunately, the type of conduct at issue in the highly publicized criminal case against former Senator Stevens is not a rare occurrence . . .”); see also *infra*

complexity of the discovery law⁴ or because of the failings of individual prosecutors or their offices.⁵

Federal law governing prosecutors' disclosure obligations comes from various sources, and so additional obligations might be adopted in various ways. The Supreme Court might read the Constitution more demandingly;⁶ the federal judiciary might augment discovery under the Federal Rules of Criminal Procedure⁷ or under local rules;⁸ or federal courts might enforce ethics rules calling on prosecutors to disclose favorable evidence and information.⁹ In general, the Department of

Part II.B.1.

4. See, e.g., Kirsten M. Schimpff, *Rule 3.8, The Jencks Act, and How the ABA Created a Conflict Between Ethics and the Law on Prosecutorial Disclosure*, 61 AM. U. L. REV. 1729, 1734-35 (2012) (remarking on the complex authorities from which prosecutorial disclosure derives); Paul C. Giannelli, *Brady and Jailhouse Snitches*, 57 CASE W. RES. L. REV. 593, 599 (2007) (noting the difficulty in defining "materiality").

5. See, e.g., Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2091-93 (2010) (examining reasons why prosecutors fail to disclose); Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 687-89 (2006) (discussing *Brady* as a failure of discovery doctrine).

6. See, e.g., *United States v. Bagley*, 473 U.S. 667, 698 (1985) (Marshall, J., dissenting):

Once the prosecutor suspects that certain information might have favorable implications for the defense, either because it is potentially exculpatory or relevant to credibility, I see no reason why he should not be required to disclose it. After all, favorable evidence indisputably enhances the truth-seeking process at trial. And it is the job of the defense, not the prosecution, to decide whether and in what way to use arguably favorable evidence. In addition, to require disclosure of all evidence that might reasonably be considered favorable to the defendant would have the precautionary effect of assuring that no information of potential consequence is mistakenly overlooked.

Id.

7. See ROBERT M. CARY ET AL., *FEDERAL CRIMINAL DISCOVERY* 426-27 (2011) (quoting District Judge Sullivan); Am. Coll. of Trial Lawyers, *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 93 (2004) [hereinafter ACTL Report]; FED. JUDICIAL CTR., A SUMMARY OF RESPONSES TO A NATIONAL SURVEY OF RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND DISCLOSURE PRACTICES IN CRIMINAL CASES: FINAL REPORT TO THE ADVISORY COMMITTEE ON CRIMINAL RULES (2011) [hereinafter FJC Report]; see generally *United States v. Jones*, 620 F. Supp. 2d 163, 171-73 (D. Mass. 2009) (discussing proposed amendment of Rule 16 and Department's successful opposition).

8. See, e.g., M.D. ALA. CT. R. 16.1(a)(1)(B), available at <http://www.almd.uscourts.gov/docs/orules.pdf> (requiring disclosure of "[a]ll information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, without regard to materiality, within the scope of *Brady v. Maryland*"); S.D. ALA. CT. R. 16.13(b)(1)(B), available at <http://www.als.uscourts.gov/documents/forms/local-rules.pdf> (same); N.D. FLA. CT. R. 26.3(D)(1), available at http://www.flnd.uscourts.gov/forms/Court%20Rules/local_rules.pdf (same).

9. See *United States v. Acosta*, 357 F. Supp. 2d 1228, 1232 (D. Nev. 2005); *In re Matter of Feland*, 820 N.W.2d 672, 679-80 (N.D. 2012) (holding that Rule 3.8(d) requires the

Justice has opposed the expansion of defendants' discovery rights in any of these directions.¹⁰

Another possible route to reform—federal legislation—is currently being explored. Last year, Senator Lisa Murkowski of Alaska proposed the Fairness in Disclosure of Evidence Act of 2012,¹¹ which would generally require federal prosecutors to disclose favorable evidence to the accused.¹² The proposal came largely in response to the disastrous federal corruption prosecution of U.S. Senator Ted Stevens of Alaska. In that case, the defense team discovered after the jury's guilty verdict that prosecutors had suppressed important exculpatory evidence, which led the court to dismiss the charges with the government's consent and instigate an investigation of the prosecutors.¹³ The proposed congressional response seems to call for only a modest expansion of prosecutors' disclosure obligations, and to be far less demanding than the "open file" discovery required by law in some states and employed by some state and local prosecutors as a matter of discretion.¹⁴ Nonetheless, the

disclosure of favorable evidence without regard to materiality, and that negligent nondisclosures are sanctionable); ABA Comm. on Prof'l Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009); see generally Bruce A. Green, *Prosecutors' Ethical Duty of Disclosure In Memory of Fred Zacharias*, 48 SAN DIEGO L. REV. 57 (2011).

10. See, e.g., Video recording: Ensuring that Federal Prosecutors Meet Discovery Obligations: Hearing on S. 2197 Before the S. Judiciary Comm., 112th Cong. (2012) [hereinafter SJC Hearing] (on file with S. Judiciary Comm.) (noting statement of James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice); Letter from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of J., to Hon. David F. Levi, Chair, Comm. on Rules of Practice and Procedure, E.D. Cal. (June 5, 2007) [hereinafter Letter from Paul J. McNulty].

11. Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. (2d Sess. 2012).

12. *Id.* § 2.

13. Report to Hon. Emmet G. Sullivan of Investigation Conducted Pursuant to the Court's Order, dated Apr. 7, 2009, In re Special Proceedings, No. 1:09-mc-00198-EGS (D.D.C. Mar. 15, 2012), available at http://legaltimes.typepad.com/files/Stevens_report.pdf [hereinafter Schuelke Report].

14. See, e.g., N.C. GEN. STAT. § 15A-903(a)(1) (2012), available at <http://www.NCleg.net> ("Upon motion of the defendant, the court must order: The State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation of the crimes committed or the prosecution of the defendant."); FLA. R. CRIM. P. 3.220(b)(1), available at <http://www.floridabar.org> ("[T]he prosecutor shall . . . disclose to the defendant . . . a list of the names and addresses of all persons known to the prosecutor to have information that may be relevant . . . [and] the statement of any [such] person . . . [plus other information such as that which] has been provided by a confidential informant . . . whether there has been any electronic surveillance . . . reports or statements of experts . . . and any tangible papers or objects that the prosecuting attorney intends to use in the hearing or trial and that were not obtained from or that did not belong to the defendant."); see generally Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical*

Department of Justice dispatched its second highest ranking representative, Deputy Attorney General James Cole, to testify against the bill.¹⁵

This Article discusses the proposed legislation and various arguments that might be made for and against it. It begins by briefly discussing the current scope of federal criminal discovery. It then describes the legislative proposal and the competing testimony of its sponsor and the Deputy Attorney General at the initial hearing concerning it. Finally, in the context of a recent federal criminal case raising disclosure questions, this Article addresses some of the fundamental issues raised by the legislation.

I. BACKGROUND: FEDERAL CRIMINAL DISCOVERY AND PROPOSED LEGISLATIVE REFORM

A. *Federal Criminal Discovery Under Current Law*

As many others have noted, the limited scope of discovery in federal criminal cases cannot easily be reconciled with the liberality of discovery in modern civil litigation.¹⁶ In the nineteenth and early twentieth centuries, civil litigators could play their cards close to the vest by interviewing witnesses who were willing to talk to them, gathering documents and physical evidence, using favorable evidence and information to their advantage at trial, and keeping unfavorable evidence and information to themselves.¹⁷ Contemporary civil proce-

Importance of Full Open-File Discovery, 15 GEO. MASON L. REV. 257, 306-09 (2008) (arguing that open-file discovery is the best remedy to ensure constitutional obligations are met and, more importantly, ensuring fair criminal trials); Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1153-54 (2004) (suggesting that open-file discovery is the most appropriate way to allow defense counsel to effectively fulfill its duty to investigate).

15. SJC Hearing, *supra* note 10 (statement of James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice).

16. See *United States v. Gupta*, 848 F. Supp. 2d 491, 495 (S.D.N.Y. 2012) (noting the differences between civil and criminal discovery obligations); Richard M. Strassberg & Yvonne M. Cristovici, *Criminal Discovery: Reform to Level the Playing Field?*, N.Y. L.J., Sept. 14, 2010, at 1, available at <http://NYLJ.com> ("The difference in the discovery requirements between criminal and civil litigation has long been the subject of heated debate among attorneys, judges and legal scholars. The more limited disclosure in criminal cases, when a defendant's liberty is at risk, stands in marked contrast to the fulsome disclosure afforded parties in a civil litigation, when only money is typically at issue.")

17. 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1002 (3d ed. 2010) (discussing the history of civil procedure prior to the adoption of the Federal Rules of Civil Procedure); see *Sinclair Ref. Co. v. Jenkins Petroleum Process Co.*, 289 U.S. 689, 693-94 (1933) (requiring a collateral proceeding to compel

dures rules, however, afford litigants relatively easy access to relevant evidence and information in the other side's possession as well as opportunities to acquire relevant evidence and information from third parties.¹⁸ Parties can obtain relevant information from opposing parties and witnesses through interrogatories, depositions, document requests, and subpoenas, resulting in parties having relatively liberal access to each other's facts, witnesses, and documents.¹⁹ Lawyers can still keep their strategies and mental processes secret, but not their evidence.²⁰

The liberality of civil discovery grows out of an essential premise of adversarial proceedings, which is that the truth will emerge through a contest in court between parties who present the best evidence for their respective positions.²¹ Parties build their cases "brick by brick" through the presentation of relevant evidence that, taken as a whole, constructs their theories of the case.²² Unlike in inquisitorial systems, where judges take an active role in the fact-finding process,²³ judges and jurors in an adversarial system evaluate evidence that the lawyers gather and present but they cannot look for more on their own.²⁴ Consequently, when parties lack access to favorable evidence, the fairness and reliability of the adjudication is called into question. Liberal discovery is considered essential to enable the parties to present their best cases as well as to enable them to make informed settlement decisions.

discovery of critical documents and testimony).

18. 2-15 JAMES WM. MOORE ET AL., *MOORE'S MANUAL: FEDERAL PRACTICE & PROCEDURE* § 15.03 (2012).

19. *Id.* §§ 15.20-28.

20. *Upjohn Co. v. United States*, 449 U.S. 383, 399-400 (1981); *see also* FED. R. CIV. P. 26(b)(3).

21. *See* JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 80 (1949).

22. *United States v. Kott*, No. 3:07-cr-0056JWS, 2007 WL 2493480, at *2 (D. Alaska Aug. 29, 2007) ("Federal Rule of Evidence 401 requires no more for the admission of the evidence [than that it be relevant]. It may be that under all the facts and circumstances that may emerge at trial such evidence would not be very persuasive, but evidence does not have to be determinative to be relevant. Reasonable doubt, like the government's own case, is built brick by brick.").

23. Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 *CORNELL L. REV.* 1181, 1261-62 (2005); Erik Luna, *A Place for Comparative Criminal Procedure*, 42 *BRANDEIS L.J.* 277, 296-98 (2004).

24. *See Sheppard v. Maxwell*, 384 U.S. 333, 356-58 (1966) (reversing convictions where the jury had outside knowledge of alleged facts due to heavy publicity); *MODEL RULES OF JUDICIAL CONDUCT* § 2.11(A)(1) (2007) (requiring that judges disqualify themselves if they have personal knowledge of facts independent of the proceedings).

In the federal criminal process, in contrast, a "sporting" approach still prevails.²⁵ Before trial, the government has no obligation to tell the defense with whom the prosecution has spoken, who has relevant testimony, or who the prosecution will call as witnesses. The defense cannot depose witnesses to gather relevant information on its own. The defense lacks the investigative tools and, in most cases, the funds to try to replicate the government's investigation. Consequently, the government may acquire substantial evidence, including exculpatory evidence, that the defense cannot see before trial, and even much that the defense will never see. Although state laws vary, many states provide the defense far greater access to evidence. In many states, for example, the defense is entitled to a list of witnesses.²⁶ In some, the defense is entitled to the entire prosecution file²⁷ or to an opportunity to depose witnesses before trial.²⁸

This is not to say that the defense is left empty-handed in federal criminal cases. As a constitutional minimum, the United States Supreme Court held in *Brady v. Maryland*,²⁹ and a line of decisions following it, that the prosecution must disclose certain "material" evidence and information that is favorable to the accused—that is, certain evidence and information that either exculpates the defendant or impeaches prosecution witnesses.³⁰ Insofar as the material evidence

25. See William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L. REV. 279, 279 (1963) (addressing whether the law should "extend to criminal prosecutions the civil pre-trial discovery techniques which force both sides of a civil law suit to put all cards on the table before trial" or whether we shall "continue to regard the criminal trial as 'in the nature of a game or sporting contest' and not 'a serious inquiry aiming to distinguish between guilt and innocence'") (quoting Glanville Williams, *Advance Notice of the Defence*, 1959 CRIM. L. REV. 548, 554 (1959)); see also ELIHU ROOT, PUBLIC SERVICE BY THE BAR 12 (1916) (procedural rules advantaging the more skillful lawyer "make litigation a mere sporting contest between lawyers").

26. See CAL. PENAL CODE § 1054.1(a) (West 2012); FLA. R. CRIM. P. 3.220(b)(1)(A); ILL. COMP. STAT. ANN. 412(a) (West 2010); MICH. COURT R. 6.201(A)(1); N.J. R. GOVERNING CRIM. PRAC. 3:13-3(c); PA. CODE R. 573(B)(1).

27. See *supra* note 14.

28. See, e.g., FLA. R. CRIM. P. 3.220(h); ILL. COMP. STAT. ANN. 412(a); N.J. R. GOVERNING CRIM. PRAC. 3:13-2(a).

29. 373 U.S. 83 (1963).

30. See, e.g., *Banks v. Dretke*, 540 U.S. 668, 691 (2004) (holding that to raise a *Brady* violation a defendant need only show that "the reason for his failure to develop facts in state-court proceedings was the State's suppression of the relevant evidence"); *Strickler v. Greene*, 527 U.S. 263, 280-82 (1999) (noting favorable evidence may either exculpate or impeach); *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (requiring that non-disclosed evidence be considered in its entirety and if its suppression has a "reasonable probability" of changing the result, it is material) (quoting *U.S. v. Bagley*, 472 U.S. 667, 682 (1985)); *United States v. Agurs*, 427 U.S. 97, 112 (1976) (holding that material evidence is anything

is useful only for impeaching prosecution witnesses, and not otherwise for establishing a defense, the prosecution may wait until trial to disclose it.³¹

Brady and subsequent decisions limit prosecutors' constitutional obligation in various ways,³² but the "materiality" element is the most significant limitation on the disclosure duty. The Supreme Court has explained materiality somewhat differently in different opinions, but essentially, at least for purposes of appellate review, the Supreme Court has said that evidence is not material unless it might have tipped the balance between a conviction and an acquittal,³³ or, to put it slightly differently, unless the government's suppression of the evidence

that raises a reasonable doubt as to a defendant's guilt). Evidence useful solely to impeach witnesses is conventionally referred to as "*Giglio* material" after *Giglio v. United States*, 405 U.S. 150 (1972).

31. *United States v. Ruiz*, 536 U.S. 622, 633 (2002). The conventional understanding is that exculpatory evidence must be disclosed prior to trial so that the defense can use it in formulating strategy and investigating the case. *See, e.g., United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir. 1976) (asserting *Brady* material must be produced "at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case"). Belated disclosure, however, will not ordinarily result in the reversal of a conviction unless the court finds that the defense was prejudiced as a result. *Compare, e.g., United States v. Warren*, 454 F.3d 752, 760 (7th Cir. 2006) (deciding defense was not impaired by untimely disclosure), and *United States v. Woodley*, 9 F.3d 774, 777 (9th Cir. 1993) (stating defendant was "not materially prejudiced"), with *Miller v. United States*, 14 A.3d 1094, 1112 (D.C. App. 2011) (deciding defense was prejudiced by prosecution's failure to disclose until the night before opening statements that eyewitness stated the shooter was left-handed, which defense would have used to prove the innocence of the right-handed defendant).

32. *See, e.g., DA's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 85-86 (2009) (restricting the disclosure obligations of *Brady* to a pre-conviction trial right); *California v. Trombetta*, 467 U.S. 479, 488-89 (1984) (limiting disclosure to evidence that the prosecution exclusively possesses); *Weatherford v. Bursey*, 429 U.S. 545, 559-60 (1977) (deciding that *Brady* does not warrant general discovery).

33. *Youngblood v. West Virginia*, 547 U.S. 867, 870 (2006) (holding that evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different") (quoting *Greene*, 527 U.S. at 280); *Kyles*, 514 U.S. at 434 ("A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'") (quoting *Bagley*, 473 U.S. at 678, 682); *Bagley*, 473 U.S. at 682 (noting that a new trial must be granted "if 'there is a reasonable probability that . . . the result of the proceeding would have been different' if the favorable evidence had been produced") (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)); *see also Agurs*, 427 U.S. at 112-13 ("[T]he omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional [evidence] is considered, there is no justification for a new trial."). *But see Greene*, 527 U.S. at 300 (Souter, J., concurring in part and dissenting in part) (arguing the materiality standard should be more than "reasonable probability").

“undermines confidence in the outcome of the trial.”³⁴ One could take the view that, like a “harmless error” standard, materiality is only a standard of post-conviction review—that is to say, that prosecutors must disclose *all* favorable evidence in connection with a trial but that afterwards a conviction will not be overturned unless, in hindsight, the withheld evidence was material.³⁵ Some lower courts read the *Brady* line of cases this way.³⁶ But most lower courts interpret the Supreme Court decisions to permit prosecutors to withhold favorable evidence unless it is material.³⁷ This is how the Department of Justice reads the high court’s opinions as well.³⁸

If materiality is regarded as the pre-trial as well as the appellate standard, then a federal prosecutor who seeks merely to abide by the constitutional minimum must predict *before* trial what a court will say *after* trial about the utility of favorable evidence in the government’s possession. The question will be whether, later viewing the favorable evidence in the context of the trial evidence, a court will conclude that

34. *Kyles*, 514 U.S. at 434 (internal quotation marks omitted) (“A ‘reasonable probability’ of a different result is accordingly shown when the government’s evidentiary suppression ‘undermines confidence in the outcome of the trial.’” (quoting *Bagley*, 473 U.S. at 678)).

35. Some discussions about the import of the materiality requirement are simply confusing. For example, in a letter to the Senate Judiciary Committee regarding Senator Murkowski’s bill, the American Civil Liberties Union has expressed the view that *Brady* “recognized a defendant’s fundamental right to *any and all* favorable information that might prove he or she is innocent of a crime,” but then characterized the case as establishing “a constitutional obligation for the prosecution to disclose any *material* evidence favorable to the accused.” Letter from Laura W. Murphy, Dir., Washington Legis. Office, Am. Civil Liberties Union, and Jesselyn McCurdy, Senior Legis. Counsel, Am. Civil Liberties Union, to Hon. Patrick J. Leahy, Chairman, Comm. on the Judiciary, U.S. Senate, and Hon. Charles E. Grassley, Ranking Member, Comm. on the Judiciary, U.S. Senate (Mar. 27, 2012) [hereinafter ACLU letter] (emphasis added). Defendants’ purported right to “any and all favorable information” cannot logically be reconciled with prosecutors’ purported obligation to disclose only “material evidence favorable to the accused.” *Id.*

36. For decisions holding that prosecutors must disclose all favorable evidence without regard to materiality, see *United States v. Safavian*, 233 F.R.D. 12, 16-17 (D.D.C. 2005); *United States v. Acosta*, 357 F. Supp. 2d 1228, 1233 (D. Nev. 2005); *United States v. Sudikoff*, 36 F. Supp. 2d 1196, 1199 (C.D. Ca. 1999). For commentary criticizing these decisions, see Michael Serota, *Stare Decisis and the Brady Doctrine*, 5 HARV. L. & POLY REV. 415 (2011) (arguing *stare decisis* demands that courts not follow the path of *Sudikoff*).

37. *E.g.*, *United States v. Mathur*, 624 F.3d 498, 506-07 (1st Cir. 2010); *United States v. Coppa*, 267 F.3d 132, 139 (2d Cir. 2001).

38. Brief and Appendices of Amicus Curiae United States of America in Support of Respondent Andrew J. Kline at 10 & n.3, *Matter of Kline*, Bd. Dkt. No. 11-BD-007 (2012) (“The Due Process Clause does not mandate the disclosure of non-material evidence”—namely, evidence that is not reasonably likely to lead to a more favorable result for the defendant).

the prosecution's failure to disclose the evidence "undermine[d] confidence in the outcome of the trial" because the evidence might have led to an acquittal.³⁹ Prosecutors must make that prediction before trial without knowing precisely how its own case will unfold, what evidence the defense will present—perhaps even what the theory of the defense will be—and how the favorable evidence might be used by the defense. As the Supreme Court has recognized, the prosecutor's *ex ante* determination is inherently imprecise, and so "the prudent prosecutor will resolve doubtful [cases] in favor of disclosure."⁴⁰ The Department of Justice internal guidelines on discovery similarly encourage federal prosecutors to err on the side of disclosure.⁴¹ But there are reasons why not all prosecutors do so,⁴² including their natural human tendency to minimize the significance of evidence inconsistent with their belief in the defendant's guilt.⁴³

In federal proceedings, the government's constitutional obligation is supplemented by federal statutes,⁴⁴ criminal procedure rules,⁴⁵ and, in some judicial districts, by local district court rules.⁴⁶ Under Rule 16 of the Federal Rules of Criminal Procedure, in part to prevent unfair surprise, the government must disclose various other items pre-trial: the defendant's statements and prior criminal record; documents and other

39. *Kyles*, 514 U.S. at 434 (quoting *Bagley*, 473 U.S. at 678).

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

41. Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010), available at <http://www.justice.gov/dag/discovery-guidance.html>.

42. For example, in *Connick v. Thompson*, the New Orleans prosecutor's office conceded that its policy was to attempt to comply with its *Brady* obligations without disclosing more than the law requires. 131 S. Ct. 1350, 1377 (2011) (Ginsburg, J., dissenting) ("Connick's *Brady* policy directed prosecutors to turn over what was required by state and federal law, but no more.") (internal quotation marks omitted).

43. For discussions of the potential influence of cognitive biases on prosecutorial disclosure practices, see Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 479 (2006); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464 (2004); Alifair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481 (2009); Nathan A. Frazier, Note, *Amending for Justice's Sake: Codified Disclosure Rule Needed to Provide Guidance to Prosecutor's Duty to Disclose*, 63 FLA. L. REV. 771 (2011). For discussions on how office culture and other external influences shape prosecutors' disclosure decisions, see Ellen Yaroshefsky & Bruce A. Green, *Prosecutors' Ethics in Context: Influences on Prosecutorial Disclosure*, in *LAWYERS IN PRACTICE: ETHICAL DECISION MAKING IN CONTEXT* 269-92 (Leslie C. Levin & Lynn Mather eds., 2012).

44. *E.g.*, 18 U.S.C. § 3500 (2006).

45. *E.g.*, FED. R. CRIM. P. 16.

46. See *supra* note 8; see also FJC Report, *supra* note 7 (summarizing the local rules that govern prosecutorial disclosure of evidence).

tangible items that were taken from the defendant, will be used in evidence by the government, or are material to the defense; and examination and laboratory reports that the government will use or that are material to the defense.⁴⁷ And, under the Jencks Act,⁴⁸ if and when the case goes to trial, the prosecution must disclose some of the prior statements of its witnesses.⁴⁹ None of the federal statutes and rules require prosecutors generally to disclose favorable evidence or information, however. Courts cannot enforce internal Department of Justice guidelines that encourage federal prosecutors to go beyond their legal obligations or provide a remedy when federal prosecutors fail to do so,⁵⁰ and, at least in some jurisdictions, individual federal judges cannot exercise supervisory authority to require federal prosecutors to disclose more than the law requires.⁵¹

Consequently, the law leaves a class of information that the federal government may withhold, even though defense lawyers would regard the information as important in counseling the defendant, preparing for trial, and presenting a defense. At trial, the prosecution will introduce some of the additional information—namely, evidence that tends to establish the defendant's guilt. But the defense may never get its hands on other information—exculpatory information—that might have been introduced by the defense or led to other evidence that the defense could have introduced. If the information is not a potential game-changer, then the prosecution never has to disclose the information.

One might argue that keeping the defense in the dark serves to level the playing field, since the defense is even more limited in what it must provide to the government by way of discovery. But the government would be hard-pressed to defend the discovery regime based primarily on the prosecution's interest in fairness or equal treatment, given not only the dominant interest in preventing wrongful convictions⁵² but also the prosecution's superior investigative resources and, as a consequence, its ordinarily superior access to evidence and informa-

47. FED. R. CRIM. P. 16.

48. 18 U.S.C. § 3500.

49. *Id.*

50. *See, e.g.,* United States v. Wilson, 413 F.3d 382, 389 (3d Cir. 2005); United States v. Fernandez, 231 F.3d 1240, 1246 (9th Cir. 2000); *see also* SJC Hearing, *supra* note 10 (statement of James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice) (discussing the guidelines).

51. *E.g.,* Copp, 267 F.3d at 135; Smith v. Holtz, 210 F.3d 186, 198-99 (3d Cir. 2000).

52. This is reflected in prosecutors' burden to prove guilt "beyond a reasonable doubt." *In re Winship*, 397 U.S. 358, 362 (1970).

tion.⁵³ The government typically relies instead on other arguments against expanding discovery—primarily, the need to protect public safety and prevent obstruction of justice, and secondarily, the need to limit the administrative burden on prosecutors. A key question for those considering the proposed legislation is whether the accused individual's interest in procedural fairness might ever be outweighed by countervailing considerations such as these and, even if so, which way the balance ordinarily should be struck.

B. The Proposed Legislative Expansion of Defense Discovery Rights

1. Discovery Issues. Discussions about federal criminal discovery raise four major issues.⁵⁴ They are: (1) the scope of discovery—namely, what federal prosecutors should have to turn over and what they can withhold; (2) the timing of disclosure—that is, when before or during trial must discoverable information be disclosed; (3) whether the defendant may waive the statutory right to receive evidence and information; and (4) the consequences of the prosecution's violation of the statutory right.⁵⁵ New federal legislation may expressly resolve all of these issues or leave some of them to judicial interpretation.

The scope of discovery is the big issue. One way to frame the question, in general terms, is whether (subject to exception) defendants should receive (1) nothing more than current law provides, (2) all *favorable* evidence in the prosecution's custody and control, or (3) more broadly, all *relevant* evidence in the prosecution's custody and control, regardless of whether it helps or hurts the defense. The position of the Department of Justice is that the present law strikes the optimal balance between competing interests, and therefore no legislative expansion of defendants' discovery rights is warranted.⁵⁶ At the other end of the spectrum, a right to all *relevant* evidence would be most consistent with the approach in civil litigation. It would maximize the defendant's interest in making a well-informed decision whether to plead guilty and, if the defendant went to trial, it would maximize the

53. See Brennan, *supra* note 25, at 292 (questioning the soundness of the premise that the limitation on prosecutorial disclosure is justified by the defendant's "constitutional privilege against self-incrimination [that] prevents discovery being a two-way street").

54. See generally Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 HASTINGS L.J. 1321 (2011) (identifying various key issues).

55. *Id.*

56. SJC Hearing, *supra* note 10 (statement of James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice).

defendant's ability to present an effective defense.⁵⁷ The middle ground is a right to *all* favorable evidence—not just “material” favorable evidence, as constitutional decisions provide. While defendants would not get to see all of the prosecution's proof unless and until they go to trial, they would at least be able to defend themselves more effectively if they go to trial by presenting relevant evidence of which they might otherwise not have known. One might also, of course, take a more nuanced approach—for example, by distinguishing among types of relevant or favorable evidence, as Rule 16 currently does, and providing for disclosure of some categories of information but not others. Most obviously, legislation might expand access to “exculpatory” as distinguished from “impeachment” evidence.

The second question—the question of timing—may be the thorniest issue.⁵⁸ There is broad agreement that, prior to trial, prosecutors should provide the exculpatory evidence to which defendants are entitled. The Department of Justice distinguishes evidence that is useful only to impeach prosecution witnesses. In federal proceedings, there is currently no statutory right to a list of all prosecution witnesses. The Jencks Act requires disclosure of prosecution witnesses' prior statements, but not until the witnesses testify. The prevailing understanding is that “*Giglio* material”—material evidence and information useful for impeaching witnesses—similarly need not be disclosed until trial. The practice in some jurisdictions is to provide Jencks Act statements and *Giglio* material shortly before witnesses testify and, in others, to provide this material shortly before trial. The effect of disclosing impeachment material significantly earlier, such as within a short time after indictment, would be to disclose witnesses' identities far sooner than necessary and, in cases that would have resulted in a pre-trial guilty plea, unnecessarily. The Department of Justice publicly sees early disclosure as a threat to witnesses' safety.⁵⁹ The Department may also perceive this practice as contrary to its strategic interests, insofar as it provides defense lawyers an opportunity to investigate and to prepare the defense more effectively as well as to advise their clients against

57. Cf. Robert M. Cary, *Exculpatory Evidence: A Call for Reform After the Unlawful Prosecution of Senator Ted Stevens*, 36 LITIG. 34 (2010) (advocating open-file discovery).

58. See Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1427 (2011); see also Kevin C. McMunigal, *Guilty Pleas, Brady Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. REV. 651 (2007); Schimpff, *supra* note 4; Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643 (2002).

59. SJC Hearing, *supra* note 10 (statement of James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice).

pleading guilty when impeachment material exposes unexpected weaknesses in the government's proof.

The waiver question grows out of the timing question. Insofar as defendants are entitled to certain information, may they voluntarily relinquish their discovery right, whether explicitly in exchange for a lenient plea agreement or implicitly by pleading guilty before disclosure becomes due? The current understanding is that a guilty plea has the effect implicitly of waiving the right to *Giglio* material.⁶⁰ Further, it is not uncommon for prosecutors to require defendants to waive all disclosure rights, including the right to material exculpatory evidence, as a condition of a favorable plea agreement.⁶¹ A 2009 American Bar Association (ABA) ethics opinion interpreting Model Rules of Professional Conduct (Model Rule) 3.8(d)⁶² concluded that the disclosure obligation under the model rule may not be relinquished by the accused. No state court, however, has yet considered whether to adopt this reading of a state ethics rule based on Model Rule 3.8(d). Prosecutors—and probably many defense lawyers—would regard the right to discovery as something that might legitimately be bargained away.

Finally, there is a question of what, if any, consequences should follow a failure to comply with a discovery obligation. Under current federal law, when a discovery violation under *Brady*, Rule 16, or the Jencks Act is discovered before or during a trial, the trial court generally has discretion to provide an appropriate remedy, such as a delay or adjournment of the trial to enable the defense to respond or, in an extreme case, a mistrial.⁶³ Post-trial, a court may overturn a conviction

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

61. The waivers may be explicit. See, e.g., Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957 (1989); Shane M. Cahill, Note, *United States v. Ruiz: Are Plea Agreements Conditioned on Brady Waivers Unconstitutional?*, 32 GOLDEN GATE U.L. REV. 1 (2002); Erica G. Franklin, Note, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery" Waivers*, 51 STAN. L. REV. 567 (1999). But they may also be implicit. For example, when defendants entirely waive their right to seek appellate or other post-conviction review of their convictions, one result is implicitly to relinquish the right to challenge suppression of discoverable evidence. See, e.g., Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HASTINGS CONST. L.Q. 127, 174-77 (1995); Alexandra W. Reimelt, Note, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. REV. 871, 877-79 (2010).

62. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2012).

63. *United States v. Rodriguez*, 496 F.3d 221, 228 n.6 (2d Cir. 2007) (noting that "failure to disclose [*Brady* material] before trial may . . . require a mid-trial adjournment"); *United States v. Graham*, 484 F.3d 413, 416-17 (6th Cir. 2007) (considering, though not ultimately granting, a mistrial for alleged *Brady* violations).

when a discovery violation may have affected the outcome.⁶⁴ Individual prosecutors who deliberately suppress information in violation of law may be sanctioned personally: Michael Nifong's disbarment, in part for withholding *Brady* material in the prosecution of Duke lacrosse players, was a famous—and unusual—example.⁶⁵ If the discovery standard is established exclusively by internal Department of Justice policy, however, the only recourse is an internal sanction.

2. The Proposed Act. The Fairness in Disclosure of Evidence Act, which Senator Murkowski introduced in March 2012, has its origins in proposals made by representatives of the legal profession, including the American College of Trial Lawyers almost a decade ago, to reform the Federal Rules of Criminal Procedure to generally require prosecutors to disclose all evidence and information favorable to the accused.⁶⁶ The proposal was considered by the Advisory Committee on Criminal Rules several years ago but was not adopted.⁶⁷ In general, the legislation would modestly expand defendants' discovery rights while seeking to protect countervailing public interests in individual cases in which they most clearly are implicated.

Most importantly, the proposed law would expand on federal prosecutors' duty to disclose favorable evidence by eliminating the legal limitation that only material information must be disclosed. Building on the constitutional floor, the Act would require federal prosecutors to disclose information "that may reasonably appear to be favorable to the defendant . . . with respect to: (A) the determination of guilt; (B) any

64. *E.g.*, *Smith v. Cain*, 132 S. Ct. 627, 630 (2012) (vacating a conviction where *Brady* violations were found); *Banks v. Dretke*, 540 U.S. 668, 689 (2004) (same).

65. Duff Wilson, *Prosecutor in Duke Case Disbarred by Ethics Panel*, N.Y. TIMES, June 17, 2007, at A21, available at <http://www.nytimes.com/2007/06/17/us/17duke.html>.

66. ACTL Report, *supra* note 7. More recently, a working group of prosecutors, defense lawyers, and others, which I chaired, reached a similar consensus that defendants should generally receive all favorable evidence possessed by the prosecution. *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Group on Best Practices*, 31 CARDOZO L. REV. 1961, 1966 (2010) [hereinafter *New Perspectives*]; see also Lissa Griffin, *Pretrial Procedures for Innocent People: Reforming Brady*, 56 N.Y.L. SCH. L. REV. 969, 997, 1004 (2012) (advocating legislation to require prosecutors to disclose "reasonably helpful information"). The American Bar Association recently reached a similar conclusion. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454. The most direct antecedent for the Act, however, is a proposal of the National Association of Criminal Defense Lawyers, as Jim Fleissner discussed at the Mercer symposium for which this Article was prepared. Nat'l Ass'n of Crim. Def. Lawyers, Proposed 18 U.S.C. § 3014, Duty to Disclose Favorable Information (2012), available at <http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=21756&libID=21726>.

67. See FJC Report, *supra* note 7.

preliminary matter before the court before which the criminal prosecution is pending; or (C) the sentence to be imposed.⁶⁸ In effect, the Act would bring prosecutors' statutory obligation in line with their ethical obligation as written.⁶⁹ The requirement would apply both to information already in the prosecution's "possession, custody, or control" and to information known to the prosecutors or that would be discovered "by the exercise of due diligence."⁷⁰ This would meaningfully expand prosecutors' disclosure but would still be a far cry from an "open file" system, since it would not afford advance notice of testimony that the prosecution plans to introduce to prove the defendant's guilt.

The Act would also accelerate disclosure of impeachment material. Under the Act, prosecutors would have to disclose favorable information of which they are aware "without delay after arraignment and before the entry of any guilty plea," and favorable information that they later discover "as soon as is reasonably practicable."⁷¹ This is consistent with decisions requiring pretrial disclosure of *Brady* material that is exculpatory but more generous than decisions allowing prosecutors to wait until trial to disclose evidence useful only to impeach prosecution witnesses. To some extent, the law would have the effect of accelerating disclosure of witness statements that, under the Jencks Act, need not be disclosed until prosecution witnesses testify. Insofar as the statement contains favorable evidence, its content would have to be disclosed sooner.

The Act recognizes that in exceptional cases, defendants might threaten or harm prosecution witnesses whose identities are disclosed.⁷² When prosecutors are worried about witnesses' safety, they would be allowed to apply for a protective order to delay turning over material that could be used to impeach a witness of whom the defense is not already aware.⁷³

The proposed legislation also addresses the waiver question. It recognizes that in exceptional cases, the prosecution and defense may have legitimate reasons to bargain over whether the prosecution will disclose favorable evidence. Defendants would be allowed to waive their

68. Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. § 2 (2d Sess. 2012).

69. See MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2007); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454.

70. S. 2197 § 2.

71. *Id.*

72. *Id.*

73. *Id.*

right to disclosure if the court determined that such a waiver was in “the interests of justice.”⁷⁴

Finally, a court would have various remedies available when it found that prosecutors violated their statutory disclosure obligation, including postponement or adjournment of the proceedings, exclusion or limitation of testimony or evidence, ordering a new trial, or dismissing the charges with or without prejudice.⁷⁵ In place of the materiality standard on appeal, the “harmless error” test would apply: a reviewing court could not find a failure to disclose favorable information to be harmless unless the government “demonstrates beyond a reasonable doubt that the error did not contribute to the verdict obtained.”⁷⁶

3. Hearings on the Proposed Act. The Senate Judiciary Committee conducted a brief hearing on Senator Murkowski’s bill in June 2012 at which Senator Murkowski and federal defender Carol Brook testified in favor of the bill and Deputy Attorney General Cole and Professor Stephanos Bibas, a former federal prosecutor, testified against it.⁷⁷ The dominant metaphor was a scale. The question was how to strike the ideal balance between competing interests in procedural fairness, which weighed in favor of disclosing information favorable to the defense, and public safety considerations that were implicated in some cases and weighed against disclosures.⁷⁸

Senator Murkowski set forth the rationale for the proposed legislation: criminal defendants have an interest in a fair trial, which presupposes a right to evidence in the hands of the government that is exculpatory or that would show that government witnesses “might not be forthright and truthful.”⁷⁹ There are countervailing interests, such as in preventing witness intimidation and protecting classified information.⁸⁰ Although some would argue that the proposal “is not sufficiently protective of the interests of defendants,” and that federal prosecutors

74. *Id.*

75. *Id.*

76. *Id.*

77. SJC Hearing, *supra* note 10.

78. *Id.*

79. *Id.* (statement of Hon. Lisa Murkowski, U.S. Senate).

80. *Id.*

should “go to an open file system of discovery,”⁸¹ she believed the bill maintained an appropriate balance.⁸²

Deputy Attorney General Cole argued to the contrary that existing law and internal policy set the optimal balance. He argued that *Brady* reflected “a careful reconciling” of competing interests and that the proposed legislation

would radically alter the . . . balance between ensuring the protection of a defendant’s constitutional rights and . . . safeguarding the equally important public interest in a criminal trial process that reaches timely and just results, safeguard[ing] victims and witnesses from retaliation or intimidation . . . protect[ing] ongoing criminal investigations from undue interference, and recogniz[ing] critical national security interests.⁸³

He alluded to examples of witnesses being “intimidated, assaulted, and even killed after their names were disclosed in pretrial discovery” and warned that if the bill were enacted, “serious public safety risks . . . would result.”⁸⁴ In his view, the Department of Justice adequately promoted compliance with existing law through its internal policies and procedures,⁸⁵ under which prosecutors were encouraged to disclose more than the constitutional minimum as a matter of discretion.⁸⁶ Even prior to recent revisions of the policy, he asserted, instances of federal discovery misconduct were “infinitesimally small.”⁸⁷

81. *Id.*; see also William M. Welch & William W. Taylor III, *The Brady Problem: Time to Face Reality*, NAT’L L.J. (July 16, 2012) http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202562947386&THE_Brady_problem_Time_to_face_reality_&slreturn=201301123183831 (arguing that a requirement that “favorable” evidence be disclosed is too limited, and that prosecutors should generally be required to disclose all relevant information, including “all interview reports and grand jury testimony subject to certain exceptions”); FJC Report, *supra* note 7, at 47 (noting that many defense lawyers surveyed said that “they would like to see an ‘open file’ disclosure policy incorporated in any proposed rule”); *Expanded Discovery in Criminal Cases: A Policy Review*, JUST. PROJECT 2 (2007), http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Death_penalty_reform/Expanded%20discovery%20policy%20brief.pdf (recommending an open file system for all jurisdictions).

82. SJC Hearing, *supra* note 10 (statement of Hon. Lisa Murkowski, U.S. Senate).

83. SJC Hearing, *supra* note 10 (statement of James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Justice).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

II. EVALUATING THE PROPOSED LEGISLATION

A. *An Illustrative Case*

To put the issues raised by proposed federal criminal discovery reform in a concrete context, consider a recent United States Court of Appeals for the Second Circuit decision, *United States v. Mahaffy*.⁸⁸ The court reviewed a securities fraud prosecution originating out of one of the nation's premier federal prosecutors' offices—the Eastern District of New York.⁸⁹ The central issue involved whether the prosecution should have disclosed favorable testimony to the defense.⁹⁰

In the *Mahaffy* prosecution, the government accused traders at top brokerage firms—Merrill Lynch, Smith Barney, and Lehman Brothers—of giving confidential trading information to a day trading firm, A.B. Watley, for its improper use. The trading information in question, which concerned clients' requests to buy or sell blocks of securities, was communicated internally within the brokerage firms by way of a system known as squawk boxes. The defendants transmitted the squawked information to Watley, which used it to engage in "frontrunning"—purchasing the same securities ahead of the other institutions in order to profit in movements in stock prices caused by the transactions.⁹¹ The defense theory, however, was at least three-fold: that the information was not in fact confidential; that if it was, the defendants did not know it; and that the defendants also did not know that Watley would improperly use the information for frontrunning.⁹²

The prosecutors possessed thirty deposition transcripts from witnesses questioned by the Securities Exchange Commission (SEC), which was one among several agencies responsible for the investigation leading up to the indictment. The prosecution trial team knew that the transcripts contained testimony favorable to the defense because the team included an SEC lawyer who had personally deposed many of the witnesses and who was cross-designated as a Special Assistant United States Attorney.⁹³ Before trial, the SEC lawyer asked his colleagues whether the government had to disclose portions of the SEC deposition transcripts to

88. 693 F.3d 113 (2d Cir. 2012).

89. *Id.* at 118-19.

90. *Id.* at 119.

91. *Id.* at 119-20.

92. *Id.* at 120-22.

93. *Id.* at 122.

the defense under *Brady v. Maryland*⁹⁴ and provided a deposition excerpt that he thought might have to be disclosed.⁹⁵

The deposition testimony related to all three of the defenses. Some of the testimony was contrary to the prosecution's theory that the information was confidential and that the defendants knew it. For example, a high-ranking Merrill Lynch executive testified that information transmitted over a squawk box is not confidential and that there was nothing wrong with transmitting that information outside the firm, and a Merrill Lynch branch manager testified that he had never heard of a rule forbidding the broadcast of that information and that in the old days, outsiders used to come to the office to listen in on the transmissions.⁹⁶ A Smith Barney trader testified similarly that the information is not confidential because it is intended to be broadcast on the floor of the stock exchange.⁹⁷ Other transcripts might have helped to refute the prosecution's theory that the defendants knew that Watley was using the information for "frontrunning." For example, a Watley trader testified that neither he nor other Watley traders frontran, and a Lehman partner testified that one of the government cooperators told him that Watley wanted the squawked information in order to take the opposite side of trades, not to engage in frontrunning.⁹⁸

The prosecutors withheld the transcripts from the defense. Evidently, they concluded that none of the favorable testimony was discoverable under *Brady* because, in their view, it was not material and that there was no other legal basis for disclosure.⁹⁹ At the conclusion of a two-month trial, the jury acquitted every defendant but one on every count but one—a conspiracy to commit securities fraud charge—on which the jury hung.¹⁰⁰ After this setback, the prosecutor's office assigned the

94. 373 U.S. 83 (1963).

95. *Mahaffy*, 693 F.3d at 122.

96. *Id.* at 122 n.8, 128-29.

97. *Id.* at 129.

98. *Id.* at 129-30.

99. One may infer that the prosecutors focused exclusively on their *Brady* obligation, which they understood to be limited to the disclosure of favorable evidence that is "material," and did not believe they had an independent ethical obligation to disclose favorable evidence. Under a state ethics rule (then DR 7-103(B)), which applied to New York's federal prosecutors (both under the McDade Amendment and under the district court's local rules), prosecutors must disclose evidence "that tends to negate the guilt of the accused." N.Y. LAWYER'S CODE OF PROF'L RESPONSIBILITY DR 7-103(B) (2007). But federal prosecutors generally take the position that this state ethics rule does not mean what it says and that, as long as the prosecutors comply with their *Brady* obligations, they satisfy the ethics rule. If the *Mahaffy* prosecutors were aware of the ethics rule at all, they evidently shared the prevailing view that it is toothless.

100. *Mahaffy*, 693 F.3d at 121.

case to a wholly new team of experienced prosecutors to retry the defendants on the remaining conspiracy charge. This new team learned of the SEC deposition transcripts and reviewed some of them, but decided to rely on the first team's decision rather than rethink whether any deposition testimony had to be disclosed.¹⁰¹ It did so even though the first team made its decision that there was no material favorable testimony in the context of what it may have regarded as a strong case, whereas the second team was making its decision in the context of a prosecution of a single charge on which a jury had already failed to convict.¹⁰²

This time, the jury did convict on the conspiracy count. But that was not enough for the government. After sentencing, the SEC initiated administrative proceedings against Mahaffy, a Merrill Lynch stockbroker. At that point, the more liberal approach to discovery in civil cases applied. The SEC disclosed to Mahaffy, for use in defending against administrative charges, all thirty deposition transcripts that the prosecution had entirely withheld from Mahaffy in the criminal case. The defense lawyers reviewed the transcripts, identified various passages that would have been favorable to their defense of the criminal case, and moved to set aside the convictions based on the prosecution's failure to disclose *Brady* material.¹⁰³ The trial judge, himself a former federal prosecutor, thought the prosecution's previous failure to disclose the transcripts was inexplicable.¹⁰⁴ He concluded, however, that there

101. *Id.* at 123.

102. *Id.* at 134 n.13.

103. *Id.* at 118-19.

104. *United States v. Mahaffy*, No. 05-CR-613(JG), 2010 WL 2925952, at *6 (E.D.N.Y. July 21, 2010). District Judge Gleeson stated:

I remain mystified by the government's failure to disclose the testimony of these various witnesses. I see no legitimate interest served by an approach that has the parties and the Court sifting through the transcripts of testimony taken by the SEC *after* the trial has already occurred—especially when the testimony was taken as part of the investigation that resulted in this very case. Nor do I see a justification for the decision by the government's trial team (which did not include any members of the team that handled the original trial) not to reconsider the disclosure decisions made by their predecessors. The disclosure obligations imposed by the federal rules, federal statutes[,] and the Constitution are too important, and too easily complied with, to justify such an approach. Even if the prosecutors are not sufficiently motivated, as they should be, by the defendants' interest in a fair trial, one would think the government's selfish interest in the integrity and durability of the convictions it obtains would induce it to consider its disclosure obligations on an ongoing basis, and to err on the side of over-disclosure unless well-grounded concerns about particular witnesses or other investigations counsel otherwise.

Id.

was no reasonable probability that the undisclosed evidence would have changed the result.¹⁰⁵ A Second Circuit panel disagreed and overturned the defendants' convictions, finding that the withheld evidence might indeed have tipped the balance.¹⁰⁶

B. Central Issues Raised by the Proposed Legislation

The *Mahaffy* prosecution provides a useful context in which to discuss the central issues raised by the proposed criminal discovery legislation, which essentially would require prosecutors to make pretrial disclosure of all evidence favorable to the accused, subject to exceptions in individual cases where the prosecution can persuade the court that disclosure would jeopardize public safety or national security interests. The central issues addressed below include: (1) whether to identify the target of the proposed legislation narrowly as prosecutors' noncompliance with *Brady* or, more broadly, as the fairness of the criminal process; (2) whether discovery law aimed at the problem, however defined, ought to reflect a balancing of competing interests; (3) if so, how much weight to ascribe to the public safety and administrative interests that may be jeopardized by disclosure and whether defendants' access to information should be limited in all cases because these countervailing public interests are implicated in some cases; (4) whether disclosure obligations, whatever their scope, should be established by law or self-imposed by the Department of Justice; and (5) if disclosure obligations should be established by law, which institution should determine them and by what process.¹⁰⁷

1. Identifying the Problem: *Brady* Compliance or Fair Process? One threshold question is what problem federal criminal discovery legislation should address. Identifying the problem is essential to defining the terms of the debate between proponents and opponents of the proposal. The Department of Justice perceives Senator Murkowski's bill to be aimed at a relatively narrow problem: federal prosecutors' occasional failures to comply with *Brady*. But the problem could be described much more broadly to include the fundamental fairness of the

105. *Id.* at *6-7.

106. *Mahaffy*, 693 F.3d at 134.

107. As Jim Fleissner discussed at the Mercer Symposium, the Bill also raises a host of drafting questions. The Deputy Attorney General focused on one of these, namely, the vagueness of the definition of "favorable" evidence. As Professor Fleissner noted, one could expect the Department of Justice to raise various other particular concerns if passage of the Bill were to become imminent. This Article, however, focuses on basic conceptual questions which would have to be resolved, at least implicitly, before moving on to the details of drafting.

federal criminal process, including guilty pleas as well as trials, when helpful evidence is inaccessible to the defense.

a. Brady Compliance

The Department of Justice seeks to define the discovery problem narrowly and then to minimize it. In its view, the disclosure established by existing law is sufficient to ensure federal criminal defendants a fair trial while also serving countervailing interests. The only problem is the consistency of prosecutors' compliance with existing law. That is the problem exemplified by the Ted Stevens prosecution, which inspired the legislative proposal. The premise of the legislation, viewed from this perspective, is that prosecutors' disclosure obligations must extend to all favorable evidence in order to guarantee that, in the very least, they disclose favorable evidence that is "material"—namely, highly probative. In effect, the law would codify the Supreme Court's admonition that prudent prosecutions should err on the side of disclosure. From this perspective, the proposal is arguably misdirected and excessive. A little bit more prudence would suffice.

As a cure for the occasional noncompliance with *Brady*, it is not clear that the bill gets at the problem, at least insofar as one is concerned with federal prosecutors who deliberately withhold evidence that they know must be disclosed. Arguably, unethical prosecutors who are now inclined to suppress *material* favorable evidence will, under the proposed law, suppress *all* favorable evidence.¹⁰⁸ Insofar as the law is targeting a few rogue prosecutors, the better response may not be to substitute one standard for another one that might be equally ignored but to toughen up on enforcement of the existing standard.¹⁰⁹ As for the well-intentioned prosecutors who occasionally make mistakes, one might argue the

108. This presupposition may be incorrect because the Act's broader disclosure obligation may be harder or riskier to evade. As the volume of discoverable material increases, the risk increases that violations will be discovered. Unethical prosecutors who currently take the low risk that their *Brady* violations will be discovered may be unwilling to take the higher risk that their statutory violations will be discovered.

109. See Randall Grometstein & Jennifer M. Balboni, *Backing Out of a Constitutional Ditch: Constitutional Remedies for Gross Prosecutorial Misconduct Post Thompson*, 75 ALB. L. REV. 1243, 1268-71 (2012); David Keenan et al., Lerer, *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 (2011), available at <http://www.yalelawjournal.org/images/pdfs/1018.pdf>; Rosalie Berger Levinson, *Who Will Supervise the Supervisors? Establishing Liability for Failure to Train, Supervise, or Discipline Subordinates in a Post-Iqbal/Connick World*, 47 HARV. C.R.-C.L. L. REV. 273, 303-11 (2012); Brian Gregory, Comment, *Brady is the Problem: Wrongful Convictions and the Case for "Open File" Criminal Discovery*, 46 U.S.F. L. REV. 819, 830-33 (2012).

new standard adds little: this problem can adequately be addressed through better training, supervision, and internal systems coupled with internal guidelines that call for generous disclosure to avoid close questions.¹¹⁰ On the other hand, unless there are compelling reasons for prosecutors to withhold favorable evidence, it seems hard to take issue with proposed legislation that might reduce *Brady* violations, given their cost to individual defendants and the public, as both the Ted Stevens prosecution and *Mahaffy* illustrate.

The Department of Justice argues, however, that *Brady* violations occur too infrequently to require a legislative fix, especially given the harms that a broader disclosure obligation might cause. The instances in which federal courts have set aside convictions because prosecutors failed to disclose *Brady* material are, in the Deputy Attorney General's characterization, "infinitesimal." Further, the risk of these failures, already low by the Department's reckoning, is now being further reduced through the revision of internal standards to encourage more generous disclosure, through education, and through other internal measures. To the extent that, in occasional close cases, federal prosecutors fail to disclose *Brady* material, it is unlikely that an innocent person will be convicted as a result—the evidence may at best establish reasonable doubt in the minds of the jurors. For example, in *Mahaffy*, where the district and appellate courts reached different conclusions on whether withheld deposition testimony might have led to an acquittal, no one suggested that the testimony may have established actual innocence. Legislation, the Department argues, is not needed to cure the problem of *Brady* violations in gray areas.

Many defense lawyers would disagree with the Department's characterization of the extent of noncompliance with *Brady*. The frequency with which prosecutors withhold material favorable evidence is an empirical question that is so far unanswered. Contrary to the Department's argument, however, the infrequency of reversed convictions on *Brady* grounds does not necessarily mean that *Brady* violations are rare. There is no reason to think that, if *Brady* material is withheld before trial, it will ordinarily come to light afterward and become the

110. The legislation would not preclude internal measures. The question is whether the legislation would meaningfully augment them, thereby reducing *Brady* violations by well-intentioned prosecutors who are prone to make mistakes. Generally, law-abiding prosecutors might take the legislation more seriously than internal guidelines, since the consequences of non-compliance would be more significant. If prosecutors make a good faith effort to disclose *all* favorable evidence, as the Act would require, they might err by not producing marginally relevant evidence but probably not by withholding material evidence.

subject of a post-conviction claim. Most defendants, being indigent, lack legal or investigative resources after a conviction to look for favorable evidence that may have been withheld. Prosecutors who intentionally withhold material before trial, as in *Mahaffy*, will have no motivation to disclose it afterward to enable the defense to file a *Brady* claim. The bad prosecutor's strong motivation is to keep possible *Brady* material undisclosed in order to avoid further litigation, the possible embarrassment of having a conviction overturned, the risk of personal sanction, and the burden of a retrial. Well-intentioned prosecutors who negligently failed to produce *Brady* material are likely to own up to their mistakes if they realize them, but most prosecutors who overlook *Brady* material before and during trial are unlikely to discover it after trial. In *Mahaffy*, the evidence in question was disclosed by a civil agency in civil proceedings on the same subject, but that was an unusual occurrence.¹¹¹

For these reasons, among others, defense lawyers assume that public cases of successful, post-conviction *Brady* claims are the tip of the iceberg. One might be able to substantiate or refute that assumption by auditing prosecutors' files after convictions are obtained to determine how often *Brady* material contained in the files is withheld. However, the Department has expressed no interest so far in undertaking or allowing such an inquiry, not even for training purposes or quality control.¹¹² In any event, audits would not fully answer the question, since potential *Brady* material may never have been memorialized or may be contained somewhere other than in the prosecutor's files.¹¹³

b. Fair Process

There are indications that proponents of criminal discovery reform are primarily seeking compliance with existing constitutional disclosure obligations. For example, the title of the hearing on Senator Murkowski's bill, "Ensuring that Federal Prosecutors Meet Discovery Obligations," implies that its objective is to promote compliance with existing obligations, not to establish new ones. Her remarks and those of other

111. *Mahaffy*, 693 F.3d at 120.

112. See generally Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn From Their Lawyers' Mistakes?*, 31 CARDOZO L. REV. 2161 (2010) (discussing the unwillingness of the Department of Justice to examine its prior mistakes to correct future ones).

113. See, e.g., *New Perspectives*, supra note 66, at 1981 (revealing that many prosecutors fail to fully investigate misdemeanors, abandoning potential *Brady* material); Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 545-46 (2006) (discussing a "common" scenario when potentially exculpatory information was never memorialized).

Senators reinforced the impression that *Brady* compliance is principally what is at stake.¹¹⁴ Submissions to the Senate Judiciary Committee in support of the bill also focused on the need to ensure prosecutors' compliance with their *Brady* obligation to disclose material favorable evidence.¹¹⁵ Relatedly, commentators point to the Stevens prosecution and other cases in which prosecutors violated their *Brady* obligations as illustrations of the need for discovery reform.¹¹⁶

It is by no means clear, however, that this is the right way to view the problem. The *Brady* cases, with their focus on materiality, have greatly influenced discussions of criminal discovery. But the problem addressed by the proposed legislation is not necessarily confined to prosecutors' noncompliance with existing law. Even if there were perfect compliance with *Brady*, questions could be raised about the fairness of a criminal process in which some defendants plead guilty without a chance to evaluate favorable evidence and others defend themselves at trial without being able to introduce evidence in the prosecution's possession that would be admissible to help establish reasonable doubt.

The first problem, which was highlighted by the American College of Trial Lawyers's proposal to reform the Federal Rules, is that the legitimacy of criminal trials arguably requires broader disclosure than the constitutional minimum.¹¹⁷ What is at stake is both the actual fairness of criminal trials and the extent to which they appear to be fair to both the public and the defendant. The fairness of the trial process depends on the assumption that the evidence favorable to each side will be ascertained and put before the jury.¹¹⁸ As noted previously, this premise underlies the liberality of discovery in civil litigation.¹¹⁹ But this premise runs throughout the law governing adjudications.

114. SJC Hearing, *supra* note 10.

115. *See, e.g.*, Letter from Thomas M. Susman, *supra* note 3 (conveying ABA's conclusion "that federal legislation is needed to implement *Brady* disclosure duties"); ACLU Letter, *supra* note 35 (maintaining that inconsistent application of materiality standard "has created confusion for prosecutors").

116. Welch & Taylor, *supra* note 81 ("What makes the [Schuelke] report more valuable is the force with which the facts prove the need for discovery reform in criminal cases.").

117. ACTL Report, *supra* note 7, at 94-95 ("Nothing is more essential to a fair criminal trial or sentence than the disclosure of information favorable to the defendant in sufficient time for the defendant to receive due process . . . and effective assistance of counsel. . .").

118. *See, e.g.*, *United States v. Agurs*, 427 U.S. 97, 116 (1976) (Marshall, J., dissenting) ("Our overriding concern in cases such as the one before us is the defendant's right to a fair trial. One of the most basic elements of fairness in a criminal trial is that available evidence tending to show innocence, as well as that tending to show guilt, be fully aired before the jury; more particularly, it is that the State in its zeal to convict a defendant not suppress evidence that might exonerate him.").

119. *See supra* notes 16-24 and accompanying text.

Suppressing probative evidence is ordinarily justified only when a significant public policy is strongly implicated. For example, case law on the attorney-client privilege starts with the recognition that the public is generally entitled to all probative evidence.¹²⁰ Likewise, decisions regarding the Fourth Amendment exclusionary rule recognize many situations in which, despite a constitutional violation, probative evidence is admissible to promote a reliable adjudication.¹²¹ At the same time, discussions of defense counsel's ethical and constitutional duty to render competent representation recognize the necessity of investigation as an aspect of competence; in other words, defense counsel has the primary responsibility to locate witnesses and evidence helpful to the defense.¹²²

Often, however, the government is the only possible source of evidence helpful to the defense. A century ago, when parties in both civil and criminal cases were required to conduct their own investigations with minimal assistance from the opposing party, one might have imagined that requiring parties to exchange evidence would lead some lawyers to look exclusively to their adversaries and discourage vigorous investigations, thereby reducing the amount of evidence ultimately acquired and put before the jury.¹²³ But no one would plausibly make that argument now, least of all in criminal cases, where the defense is typically underfunded and, in any event, lacks access to witnesses and to investigative methods comparable to the prosecution.

Indeed, a central premise of the Department's opposition to the legislation is that the defense should be kept ignorant. Its most persistent argument against the disclosure law is that if the defense receives the favorable evidence in question, defendants will harm witnesses or disclose classified information. The Department is banking on the fact that, if the defense cannot get the information from the

120. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 395-96, 399 (1981) (noting the attorney-client privilege is an exception to the general rule that relevant evidence is discoverable).

121. See, e.g., *Carroll v. United States*, 267 U.S. 132, 147 (1925); *Abel v. United States*, 362 U.S. 217, 236-37 (1960).

122. See Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85, 91-99 (2007) (discussing the difficulty defense attorneys face in meeting these obligations); Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2218-19 n.7 (2010) (encouraging defense attorneys to undergo a meaningful reform of internal regulations to avoid neglect and misconduct).

123. See Darryl K. Brown, *Criminal Procedure Entitlements, Professionalism, and Lawyering Norms*, 61 OHIO ST. L.J. 801, 820 & n.86 (2000) (discussing the strategic problems of open file discovery for defense attorneys).

prosecution, it cannot get the information at all. Otherwise, the government's public policy concern would be irrelevant: there would be the same risk to witnesses whether the prosecution produced the favorable evidence or the defense ferreted out the information itself. Further, from a public policy perspective, if the information was otherwise accessible to the defense, it would be irrational for the prosecution to insist that the defense locate the evidence on its own. Since most defendants are indigent, most investigations are publicly funded, and so the result would needlessly add to the public expense. Even if defense counsel were privately retained, as is often true in white-collar criminal cases such as *Mahaffy*, it would be unfair and punitive for the prosecution to put the defense to the unnecessary expense of pounding the pavements to locate evidence that is sitting in the prosecution's file.¹²⁴

Thus, one must start with the understanding that in federal criminal cases there will be a universe of information that is favorable to the defense but to which the defense has no realistic access. The information would be admissible in court or would lead to admissible evidence. The defense would use the evidence, if it could, to build its case "brick by brick." However, the jury will never see that evidence before deciding whether the defendant is guilty beyond a reasonable doubt.

In absolute terms, the simple question is whether, especially when life or liberty is on the line, this trial process can be considered fair and reliable. Does the prosecutor's determination that the favorable evidence is not probative enough to secure an acquittal, which may be followed in some but not all cases by *ex post* judicial review, legitimize a process in which the defense has no opportunity to introduce evidence favorable to the accused and argue its significance? An analogous process would not be considered fair or reliable on the civil side when only money is at stake.¹²⁵ Further, the idea that the adjudicative process can be called

124. Cf. *United States v. Bortnovsky*, 820 F.2d 572, 574-75 (2d Cir. 1987) (requiring a retrial where the prosecution failed to specify which documents it would introduce to prove insurance fraud charges: "The Government did not fulfill its obligation merely by providing mountains of documents to defense counsel who were left unguided as to which documents would be proven falsified or which of some fifteen burglaries would be demonstrated to be staged.").

125. Even the meaning of fairness in this context is open to disagreement. One might focus solely on the reliability of the result: whether the verdict corresponded to the defendant's actual guilt or innocence. Or one can focus on the fairness of the adjudication process: whether the procedures sufficiently promoted a reliable outcome or sufficiently reduced the risk that an innocent person would be convicted. A process of judicial review of favorable evidence withheld by the government, to determine whether the evidence is significant enough to raise concerns about the outcome, might satisfy one that the result

fair when the prosecution withholds evidence that is favorable to the defense but otherwise inaccessible to it, is inconsistent with the premises underlying the right to competent counsel and other bodies of law.

Wholly apart from the fairness and reliability of the trial, there is a second concern that legislation might address: the fairness of the process by which defendants decide whether to plead guilty or stand trial. Among the basic duties of defense lawyers is "to consult with the defendant on important decisions."¹²⁶ No decision is more important than whether to plead guilty. The guilty-plea and plea-bargaining processes are now central to criminal adjudications. The overwhelming majority of cases are resolved by a guilty plea. Effective consultation requires providing information necessary to make a well-informed decision. Among other things, this means that criminal defendants should not only understand the procedural rights that they relinquish by pleading guilty but also receive a fair assessment of the likelihood that they will be convicted or acquitted at trial. For example, the Supreme Court recognized last term that a defendant was denied reasonable defense representation when his attorney misadvised him that he would be acquitted of attempted murder because he had shot below the belt.¹²⁷ A reasonably informed decision requires some knowledge of the evidence no less than the law.

Under the *Brady* cases and other discovery law, prosecutors appear to be authorized to withhold impeachment evidence until trial, with the result that defendants must plead guilty without being able to use this evidence to assess the credibility of government witnesses. Further, prosecutors may offer incentives for defendants to plead guilty at an early stage, before the prosecutor turns over exculpatory material.¹²⁸ The disclosure of favorable evidence before a guilty plea would enable a defendant to make a better-informed decision.¹²⁹ Consequently, one might question the fairness of the criminal process when defendants plead guilty without awareness of favorable evidence, including *Brady* material, which might contribute to an acquittal. Of course, the interest

is fair but not necessarily that the process is fair.

126. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). See also *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) ("Prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings[,] and laws involved and then to offer his informed opinion as to what plea should be entered.").

127. *Lafler v. Cooper*, 132 S. Ct. 1376, 1383 (2012).

128. Jane Campbell Moriarty & Marisa Main, "Waiving" Goodbye to Rights: Plea Bargaining and the Defense Dilemma of Competent Representation, 38 HASTINGS CONST. L.Q. 1029, 1038-40 (2011).

129. See ACTL Report, *supra* note 7, at 116 ("[D]isclosure of favorable information affects a defendant's plea decisions. . .").

in a well-informed plea would argue for even broader disclosure to include relevant evidence, whether helpful or prejudicial to the defense.

2. The Framework for Lawmaking: Balancing? Both Senator Murkowski and Deputy Attorney General Cole assumed that the question of how much disclosure prosecutors must make, in order to serve whatever purposes are meant to be served by disclosure law, should be determined based on a balancing: the defendant's interest in a fair trial goes on one side of the scale, the public interests in witness safety and national security, among others, go on the other side of the scale, and the law should strike a fair balance between the competing interests.¹³⁰ In the Department's view, the existing law already strikes a fair balance and has done so for a half century; indeed, the Department asserts that lawmakers, including the Supreme Court, have explicitly sought to strike the appropriate balance between competing interests. The Department made essentially the same argument at length in its earlier opposition to a proposal to expand discovery under the Federal Rules.¹³¹ In Senator Murkowski's view, in contrast, striking the fair balance requires that more—but not everything in the prosecution's file—generally be disclosed to the defense.

It is not self-evident, however, that balancing is the right way to approach the question of how to construct discovery law. If criminal trials are regarded as unfair when the defense is denied access to favorable evidence in the prosecution's possession, one might conclude that the defense should almost invariably have access to that evidence, as a matter of principle, rather than that the interest in a fair trial should be qualified by countervailing interests. At the very least, one might assume that access to favorable information should be the general rule, subject to exceptions in particular cases in which countervailing public safety interests are implicated to a compelling extent. Consider, for example, the unanimous Supreme Court's rejection of the President's absolute, unqualified executive privilege claim in response to a grand jury subpoena *duces tecum* in *United States v. Nixon*.¹³²

[T]he allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of

130. See SJC Hearing, *supra* note 10 (statements of Hon. Lisa Murkowski, U.S. Senate & James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice).

131. Letter from Paul J. McNulty, *supra* note 10 ("[A]ny broader right—such as the one currently proposed—would fundamentally alter the character and balance of our present systems of criminal justice . . . [and] threatens to disrupt the delicate balance of interests achieved in the [Jencks] Act . . .").

132. 418 U.S. 683 (1974).

due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated.¹³³

If denying a party access to relevant evidence frustrates the fairness of a criminal trial, as that decision suggests, then the defendant's right to favorable evidence in the government's hands would not be analyzed under a balancing test.¹³⁴ It certainly would not be balanced against merely theoretical interests that might not be implicated in most cases. Competing interests, such as the concern for public safety implicated in some cases, would not justify suppression of the evidence in all cases—at least if one could identify cases in which this countervailing interest is minimal or nonexistent. In *Mahaffy*, for example, no one would plausibly argue that the witnesses who testified favorably to the defense in SEC depositions would be significantly at risk if the defense learned of their testimony. If a fair adjudication presupposes that the defendant have a chance to present favorable evidence to the jury, it is hard to see how the defendant's interest in the government's disclosure of favorable evidence can be subject to a balancing of public interests that are not even implicated in many defendants' cases.

Certainly, "balancing" is not the invariable approach to fair process interests. For example, one would not say that jurors' identities should be concealed in all cases because of the risk to their safety in some cases. Rather, anonymous juries are limited to cases where there is a reason for them.¹³⁵ And one would not dispense with juries altogether even in cases where there is a perceived risk to their safety. Rather, that risk would be addressed in other ways that do not deprive the defendant of a fair process.¹³⁶ In other words, fairness is sometimes an absolute, or

133. *Id.* at 712-13.

134. *See id.*

135. *See* Adam Liptak, *Nameless Juries Are on the Rise in Crime Cases*, N.Y. TIMES, Nov. 18, 2002, at A1 (discussing the types of cases in which juries are anonymous); Kory A. Langhofer, Comment, *Unaccountable at the Founding: The Originalist Case for Anonymous Juries*, 115 YALE L.J. 1823, 1823 (2006) (describing a case that used an anonymous jury for defendants who "were 'extraordinarily violent' mobsters, drug lords, and killers") (quoting Liptak, *supra*); Eric Wertheim, Note, *Anonymous Juries*, 54 FORDHAM L. REV. 981, 997-1001 (1986) (discussing the situations in which anonymous juries are used).

136. For example, a judge may order sequestration of jurors if there is a risk to their safety. *E.g.*, *United States v. Ruggiero*, No. 09 CR 135(SJ)(JO), 2012 WL 1427375, at *1-2

virtually absolute, value. Unfairness and unreliability generally are not accepted to serve other public values.

Thus, the choice of an analytic framework for developing criminal discovery law is inextricably bound up with one's characterization of the problem that the law addresses. If the problem is just *Brady* compliance and one imagines that the law is meant simply to establish a prophylactic requirement to ensure that "material" favorable evidence is disclosed, then balancing may make sense. It does not make sense, however, if the defendant's access to favorable evidence is regarded as an essential precondition to a fair trial. Further, if balancing is appropriate, how one characterizes the problem matters to how much weight one places on the defense side. If one thinks that favorable evidence is not absolutely essential but does make the trial substantially more fair and reliable, one will put more weight on the disclosure side than if one thinks that compliance with *Brady* is all that is at stake.

3. The Countervailing Public Interests. The government's opposition to discovery reform has rested on the premise that, when one trots out the scale, the interests underlying broader disclosure will be outweighed by two other sets of interests—public safety (especially the security of witnesses) and prosecutors' administrative interests. Underlying this claim is an unproven empirical assumption that these countervailing interests would be seriously jeopardized by broader disclosure.

a. Public Safety Concerns

The Department of Justice cites various concerns that might be grouped loosely under the category of "public safety." One set of concerns revolves around protecting potential witnesses from physical harm, threats, or harassment. Relatedly, prosecutors sometimes voice concern that disclosures of witnesses' identities, statements, or background will discourage witnesses from assisting law enforcement officials in current or future cases. Another set of law enforcement concerns relates to the risk that disclosures may jeopardize ongoing criminal investigations of other individuals.

The Department does not claim that the disclosure of relevant information, regardless of its materiality, would jeopardize public safety in all or even most federal criminal cases, and, as *Mahaffy* illustrates, such an argument would be implausible for several reasons. First, there is nothing to suggest that witness tampering is a serious risk in all,

most, or even many federal criminal prosecutions. Some defendants pose a danger, but most do not. That may be, in part, because witness tampering is a crime that law enforcement authorities can be expected to treat especially seriously. Evidence that a defendant threatened or harmed a witness could be used to prosecute the underlying charges as well as a new obstruction charge. Presumably, defendants in organized crime and gang prosecutions and their associates may be predisposed to assume the risk by threatening prosecution witnesses, but it is implausible to suggest that white-collar defendants like those in *Mahaffy* are likely to do so.

Second, the category of favorable information that might precipitate concerns about witness safety is limited. It is unlikely that a defendant would threaten a witness who will provide exculpatory testimony. Disclosing impeachment evidence would not increase the risk to witnesses who are already known to the defense. To the extent the proposed statute creates a risk, it is in situations where disclosure would reveal to dangerous defendants the identity of government witnesses who are not already known. The Bill addresses that risk by allowing exceptions to be made when prosecutors have particular reason to be concerned about witness safety.¹³⁷ There is nothing to suggest that all relevant evidence must be withheld because prosecutors and judges cannot identify particular defendants who may threaten witnesses and particular favorable information which poses a risk to witness safety. The Bill assumes that risks can be identified and avoided through requests for protective orders in particular cases. The Department of Justice has not argued cogently why that is not good enough.

At bottom is an empirical question: Would there be significantly greater danger to witnesses under the proposed statutory regime, which generally requires prosecutors to disclose favorable information subject to exception, than under the current legal regime, which requires prosecutors to disclose favorable information only if it is constitutionally material?

This question probably can be answered, because there are many state and local jurisdictions in which prosecutors must generally produce witness lists, all favorable evidence, or, more broadly, all evidence in their files.¹³⁸ In some federal jurisdictions, as a matter of local district

137. See Brennan, *supra* note 25, at 292 ("Where that possibility [of witness tampering] may appear, a trial judge's discretion affords an ample safeguard.")

138. See, e.g., ILL. SUP. CT. R. 412(c) ("Except as is otherwise provided in these rules as to protective orders, the State shall disclose to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce his punishment therefor."); N.C.

court rule¹³⁹ or simply internal practice, federal prosecutors have conventionally disclosed all exculpatory and impeachment evidence without regard to materiality, subject to concerns about witness safety, the protection of ongoing investigations, and the like.¹⁴⁰ To date, no one has shown that in those United States jurisdictions there is a greater incidence of witness tampering.¹⁴¹ Nor has anyone shown that instances of witness tampering, to the extent they occur in jurisdictions with more liberal discovery, are attributable to the marginal increases in disclosure of information that would not be produced in federal criminal cases.¹⁴² Notably, while the Deputy Attorney General pointed to criminal cases in which witnesses had been harmed, he did not pin the blame on disclosures beyond those that *Brady* and other federal law now demand.¹⁴³ Consequently, to the extent that disclosure requirements should be determined by balancing competing interests, one might be skeptical how much weight to assign to the interest in witness safety—not because witness safety is unimportant but because there is no reason to assume that the marginal increase in disclosure of favorable evidence under the proposed law would increase the risk to witnesses.

GEN. STAT. § 15A-903(a)(1)(2012) (“Upon motion of the defendant, the court must order . . . [t]he State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors’ offices involved in the investigation of the crimes committed or the prosecution of the defendant.”); *see also supra* notes 26-28 and accompanying text.

139. *See supra* note 14 and accompanying text.

140. It should be emphasized that the current Department of Justice guidelines do not call for as broad disclosure as the Act. The guidelines require resolving doubts about materiality in favor of disclosure, but do not require prosecutors to disclose evidence and information that are favorable to the defense but that clearly are not “material” in the constitutional sense.

141. One might similarly look to the experience of foreign jurisdictions, such as England and Canada, where more liberal discovery is afforded in criminal cases. *See Brennan, supra* note 25, at 293. Further, as Peter Joy pointed out at the Mercer Symposium, U.S. military lawyers on both sides of a criminal case share access to the evidence.

142. In fact, empirical evidence shows the contrary. Avis E. Buchanan, *Fairer Trials and Better Justice in D.C.*, WASH. POST, Oct. 28, 2011 at A1 (“In studies by some of the states and cities with open-file discovery (Florida, San Diego, Philadelphia, Detroit[,] and Newark), no causal link between the practice and witness intimidation has been found. Notably, none of the jurisdictions with more open discovery practices has switched back to a more restrictive practice. Instead, these jurisdictions rely on allowing prosecutors to seek judicial intervention or protective orders on those rare occasions where discovery disclosures might jeopardize a witness’s safety.”).

143. SJC Hearing, *supra* note 10 (statement of James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Justice).

Similar doubts might be raised about the weight to be accorded to two related public interests invoked by the government. First, the government has alluded to witnesses' interest in privacy. Compared to public safety, this seems less compelling, and certainly less important, than criminal defendants' interest in fair process. Witnesses routinely give up some privacy in civil litigation to promote fair adjudications. Why not in criminal cases? For example, it is hard to see why the SEC witnesses' privacy was more important in Mahaffy's criminal case than in the administrative proceeding against him.

Second, the government refers to national security concerns. These are undoubtedly weighty in cases where they are implicated, but the number of federal criminal cases in which broader discovery would jeopardize national security is almost certainly minuscule. Further, in espionage cases and other federal cases where potentially discoverable evidence is classified, the Classified Information Procedures Act (CIPA)¹⁴⁴ provides a mechanism to limit disclosures.¹⁴⁵ It makes little sense to suggest that all federal defendants should be denied favorable evidence to prevent disclosure in a handful of identifiable national-security cases, given that mechanisms already exist to protect national security interests that arise in criminal prosecutions.

b. Administrative Concerns

Although the government's emphasis is on countervailing public safety concerns, several administrative issues are also raised by the proposed legislation. One question is whether the process of preserving information for review and potential disclosure would be more burdensome under the proposed law than under the current law. The problem concerns information that is not presently recorded or memorialized—for example, information conveyed by witnesses to federal investigators or prosecutors. Under *Brady*, federal prosecutors must ensure that the information is memorialized and conveyed if it is favorable and material;¹⁴⁶ under the proposed law, however, far more information will have to be memorialized.¹⁴⁷ At first, this may sound like an increased burden. In all likelihood, however, there is no legitimate reason for federal investigators, even under current law, to fail to make a contemporaneous record of information favorable to the defendant. At the time the information is conveyed, there is no way to know whether the information is or is not "material"; therefore, there is as much of an

144. 18 U.S.C. App. 3 §§ 1-16 (2006).

145. *See id.*

146. 373 U.S. at 87-88.

147. S. 2197 § 2.

imperative to record favorable information now as there will be if the Act is passed.

Another question is whether the burden of reviewing and producing information under the proposed statutory standard would be significantly more demanding. There are several reasons to doubt that it would. First, the time involved in gathering and reviewing material would be no greater. In *Mahaffy*, for example, prosecutors had the burden to obtain and review the SEC transcripts to ascertain both whether the transcripts contained useful evidence for the prosecution and whether they contained favorable information that was “material.”¹⁴⁸ The statutory obligation to determine whether testimony was favorable would replace the constitutional obligation to determine whether the transcripts were materially favorable and should not be much more of a burden. Likewise, in an electronic age, the task of producing information determined to be favorable would not seem particularly burdensome especially when compared with either the other pretrial tasks performed by criminal prosecutors or when compared with the tasks undertaken by civil litigators in discovery: if the SEC could turn over the transcripts, federal prosecutors could as easily do so.

One might fairly argue that the statutory requirement to disclose favorable information, like the *Brady* obligation to disclose materially favorable information, would be vague and would engender confusion and uncertainty. Sometimes, because prosecutors are inexperienced, not sufficiently appreciative of the defense theory, or not diligent enough, prosecutors will overlook information helpful to the defense. To protect against this, prudent prosecutors may have to err on the side of disclosing *arguably* favorable information, but that may not solve the problem in all cases. While all this may be true, it is not to say that the proposed statutory standard is any harder to implement than the current constitutional standard. Perhaps some other approach, such as an “open file” requirement, would be preferable. But the vagueness of the Act’s “favorable” standard does not argue for preferring the status quo.

A third question is whether federal prosecutors would be significantly burdened by having to seek protective orders in individual cases when witnesses are at risk. The answer depends on the prevalence of such cases and the amount of work needed to obtain a protective order when they arise. At present, prosecutors regularly go to court for search warrants, arrest warrants, wiretap authorizations, and other *ex parte* orders. On occasion, they presently seek protective orders authorizing

148. See *United States v. Mahaffy*, 693 F.3d 113 (2012).

them to withhold potential *Brady* material to protect informants' identities, prevent obstruction, or protect other important interests.¹⁴⁹ Having to seek court orders with somewhat greater frequency hardly seems burdensome.

The fourth, and probably most significant, administrative question is whether the proposed law would lead to significant satellite litigation over whether prosecutors wrongly withheld favorable evidence and to unnecessary reversals of convictions. The incentive for such litigation is the provision that convictions will be set aside when prosecutors withhold favorable evidence, unless the government can show that its failure was harmless beyond a reasonable doubt. On occasion, as in *Mahaffy*, the defense will learn after trial about favorable evidence that might have made a difference to the outcome.¹⁵⁰ Now, the defense has an incentive to challenge the conviction on this ground only if there is a plausible argument that the evidence was material—that is, its absence undermines confidence in the conviction. Presumably, there will be situations where it is not plausible to make this argument but it *is* plausible to argue that the favorable evidence was not harmless beyond a reasonable doubt, which is an easier burden to meet. Whether the difference between these legal standards is great enough to make a difference is hard to say. Additionally, there will be some cases where courts will reverse convictions under the “harmless error” test but would not have reversed under *Brady*. Some (though scarcely all) would regard retrials in such cases as an unnecessary administrative burden, because the retrial is unlikely to result in an acquittal and, even if it does, that does not mean that the defendant is factually innocent.

The government may not argue about the litigation burden too strenuously, since the argument presupposes that in a significant number of cases, prosecutors will fail to disclose favorable evidence that might plausibly lead to an acquittal. But even if one takes this concern seriously, it does not raise a question about a legislative obligation to disclose favorable evidence but raises a question only about the standard of post-conviction review. Any perceived problem could be addressed by preserving the proposed new disclosure obligation but maintaining the constitutional standard for reviewing violations. Where prosecutors withhold favorable evidence that is not material in the constitutional sense, they might be subject to personal sanction for violating the law but a conviction would be upheld. In sum, it seems unlikely that, under

149. See, e.g., *United States v. Williams Companies, Inc.*, 562 F.3d 387, 396 (D.C. Cir. 2009).

150. See *United States v. Mahaffy*, 693 F.3d 113 (2012).

a balancing test, administrative interests will be entitled to substantial weight.

c. *Unspoken Concerns*

There is a last concern that the government is unlikely to articulate publicly but that likely animates many prosecutors' objection to liberal discovery. It is that the defense will make effective use of the favorable information. This might be labeled the problem of "smoke and mirrors." The problem is that prosecutors fear that defense lawyers are able to make convincing use of exculpatory and impeachment material to persuade juries to find reasonable doubt even when the evidence is not very probative as a logical matter.¹⁵¹ Judges look at evidence differently than juries. A judge may ascribe little legal weight to favorable evidence when making the *ex post* determination of whether withheld evidence was material, even though a defense lawyer may in fact have been able to employ the evidence effectively. Judges presuppose rational juries—they "exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like"¹⁵²—whereas many prosecutors assume that juries are often irrational. Consequently, prosecutors may assume that the practical effect of broader disclosure will be more acquittals, even if, by legal definition, the additional disclosed information is not material.

Of course, this is not a concern that deserves legitimate weight. Disclosure law cannot be predicated on the assumption that juries are irrational. Further, if judges are misjudging the weight of evidence and wrongly concluding that evidence would not reasonably have affected the jury's decision, the prosecution has no right to exploit those misjudgments.¹⁵³

Paradoxically, some defense lawyers may also perceive, though probably not articulate, defense interests that weigh against expanding

151. Cf. U.S. Attorneys' Manual 9-5001(c) ("a trial should not involve the consideration of information which is . . . not significantly probative of the issues before the court and should not involve spurious issues or arguments Information that goes only to such matters . . . is not subject to disclosure.").

152. *Strickland*, 466 U.S. at 694-95 (holding that prejudice under the Sixth Amendment right to effective assistance of counsel, which is based on the "materiality" standard under the *Brady* line of cases, must not take account of "the luck of a lawless decisionmaker").

153. Relatedly, prosecutors may be concerned that the defense will use the additional evidence to establish reasonable doubt even when the defense's theory does not accord with what actually occurred—in other words, that the defense will be able to suggest alternative theories that are plausible but not true. Of course, that is precisely the objective of the defense—to put the prosecution to its proof. It cannot be a legitimate ground for limiting discovery that, given additional probative evidence, the defense would argue reasonable doubt more effectively on behalf of defendants who may not be factually innocent.

prosecutors' disclosure. One possible concern is that if prosecutors have to disclose more, they may conduct more work on their cases, and learn their cases better, before making plea offers. This may result in less favorable plea offers, at least in some cases, for either of two reasons. First, prosecutors may learn that their cases are stronger than they initially thought. Second, a guilty plea may become less beneficial to prosecutors in terms of saving time and resources. Moreover, defendants who favor quicker resolutions may have to wait longer to resolve the charges against them.

A further concern may be that the disclosure of more evidence by prosecutors may necessitate more work by defense lawyers for which they may not receive commensurate compensation or that may simply be less psychologically rewarding than other aspects of their work. For example, defense lawyers may prefer the art of cross-examining witnesses with little information to the prospect of slogging through piles of written material to find additional fodder for cross-examination, even if, from the client's perspective, more information facilitates a more effective defense.

These interests, which arise out of the practical realities of the criminal justice process, may not seem particularly compelling as a theoretical matter, since it is hard to argue that the criminal justice system operates most fairly when defendants are able to exploit prosecutors' ignorance of the evidence and limited resources or when defense lawyers prepare less thoroughly. Nonetheless, the practical concerns might explain why some defense lawyers may not become enthusiastic supporters of the proposed legislation.

4. Law vs. Guidelines. The government's position is that internal Department of Justice guidelines calling on federal prosecutors to disclose information more generously than required by the law are preferable to additional statutory disclosure obligations. The implication is that prosecutors are as likely to comply with standards set forth in Department of Justice guidelines as they are to comply with the law, but that since guidelines are not legally enforceable, they will not engender burdensome legal challenges. One problem with the argument, at present, is that the internal guidelines are less demanding than the proposed law; while encouraging prosecutors to err on the side of disclosure when materiality is uncertain, they do not generally require disclosure of favorable evidence subject to exception when witness safety is at stake. But even if internal guidelines were revised to impose a disclosure obligation identical to that of the Act, there would be reasons to doubt their efficacy, even if one assumes, as I do, that federal

prosecutors are generally well-intentioned and take their legal obligations seriously.

First, recent experience calls the adequacy of this approach into question. Guidelines “‘requir[ing] prosecutors to *go beyond* the minimum obligations required by the Constitution and establish[ing] broader standards for the disclosure of exculpatory and impeachment information” have been in effect at least since 2006.¹⁵⁴ Then-Deputy Attorney General McNulty cited the guidelines as justification for opposing reform of the Federal Rules of Criminal Procedure.¹⁵⁵ However, these guidelines were subsequently violated by experienced prosecutors in the Stevens prosecution and *Mahaffy*, among others. There were many instances in recent decades in which federal discovery violations appeared to provide object lessons in the need to do better on both individual and institutional levels.¹⁵⁶

Second, common sense and experience suggest that the possibility of judicial review encourages compliance with discovery obligations. Prosecutors are more likely to take the obligations seriously if noncompliance carries a risk of professional discipline or judicial enforcement. Further, judicial review will allow for the interpretation of disclosure obligations by an objective judiciary rather than by prosecutors who will naturally be inclined to interpret their obligations through an adversarial lens.

5. Institutional Choice. As discussed above, various fundamental issues are implicated by the possibility of federal criminal discovery reform. If one concludes that prosecutors’ disclosure obligations should be expanded, various details also would have to be resolved. Presently, the Department of Justice opposes the proposed legislation in concept. If there came a point where its adoption was imminent, the Department would interpose more fine-grained objections. This raises an institutional choice question: Which institution and institutional process should be employed to resolve relevant issues, great and small?

154. Letter from Paul J. McNulty, *supra* note 10 (quoting Memorandum from the Deputy Attorney General of the U.S. Dep’t of Justice to the Holders of the U.S. ATTORNEYS’ MANUAL Tit. 9 (Oct. 9, 2006)).

155. *Id.*

156. For example, when the Department of Justice under Attorney General Reno began the practice (which later administrations discontinued) of publishing disciplinary decisions of its Office of Professional Responsibility, the first published decision was in a case where a senior prosecutor took insufficient care to comply with discovery obligations. See Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 86-87 (1995) (discussing the Office of Professional Responsibility report arising out of *United States v. Isgro*, 43 F.3d 1480 (9th Cir. 1994)).

Deciding whether to reform federal criminal discovery and in what manner may initially require resolving both empirical and policy questions. Insofar as the focus is on compliance with *Brady*, the empirical questions include how often federal prosecutors violate existing discovery obligations, whether internal Department of Justice efforts are adequately reducing the incidence of such violations, and whether a broader statutory obligation will further reduce discovery failures.¹⁵⁷ If one seeks to determine the scope of discovery based on a weighing of countervailing interests, additional empirical questions include the extent to which broader disclosure leads to violence and other wrongdoing directed at witnesses, and whether it is possible in advance to identify cases or classes of cases in which the risk is significant, so that discovery need not be curtailed in all cases to protect witnesses in particular cases. Ultimately, answers to these questions may not dictate a particular outcome; different lawmakers may have different intuitions about how best to weigh fairness interests against other, countervailing public interests.

Are the relevant empirical inquiries and policy judgments best made by the federal courts, Congress, or internally by the Department of Justice? If by federal courts, is the optimal process that of federal rule making, constitutional adjudication, or the adoption of ethics rules? In general, the Department of Justice has been unenthusiastic about discovery reform by any institution other than itself. In its opposition to the expansion of prosecutors' discovery obligations, it has promoted stalemate by encouraging institutional lawmakers to defer to each other. At different stages, it has urged the judiciary to respect the balance struck by Congress in the Jencks Act,¹⁵⁸ urged Congress to respect the balance struck by the judiciary in Rule 16,¹⁵⁹ urged lawmakers to respect the constitutional balance struck by the Supreme Court in the

157. See Letter from Paul J. McNulty, *supra* note 10 (maintaining that discovery reform could be justified only if there were "a well-documented case that [reform] is necessary to solve a fundamental problem of regular false conviction of the innocent" and that the "empirical case for change" has not been made).

158. *Id.* ("The proposed amendment disregards the statutory requirements of the Jencks Act . . . which . . . represents the congressional balancing of the competing interests of witness security and privacy with the defendant's interest in disclosure The proposed rule, however, utterly disregards that balance and consigns the statute, and the concomitant congressional balancing of interests contained in the Act, to a distant memory.")

159. SJC Hearing, *supra* note 10 (statement of James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice) (asserting that legislation is unnecessary because the judiciary's rules committee recently "considered and rejected changes to Rule 16").

Brady line of cases,¹⁶⁰ urged the Supreme Court to respect the judgments underlying federal legislation and rules,¹⁶¹ and urged drafters, adopters, and interpreters of prosecutorial ethics rules to defer to everyone else.¹⁶²

In Senator Murkowski's remarks on her bill, she acknowledged that the federal rules drafting process might ordinarily be the preferable one. The federal judges, in the context of rule making, are capable of gathering evidence and studying the empirical questions as legislators might. The judges bring to bear their experience presiding over, and reviewing, federal criminal trials, and can be expected to bring objectivity to the task. The Senator perceived, however, that the judiciary, in considering proposals to expand Rule 16, did not reach a studied conclusion that current laws were optimal but caved to pressure from the Department of Justice.¹⁶³ If the federal rule-making process is deemed preferable,¹⁶⁴ Congress might stiffen the judiciary's backbone by directing the federal judiciary to employ that process to study and expand defendants' discovery rights.

160. *Id.* ("For nearly fifty years, a careful reconciliation of [the various criminal litigation] interests has been achieved through the interweaving of constitutional doctrine . . ."). The Department occasionally quotes the Supreme Court's observation that "[a]n interpretation of *Brady* to create a broad, constitutionally required right of discovery 'would entirely alter the character and balance of our present systems of criminal justice.'" *United States v. Bagley*, 473 U.S. 667, 675 n.7 (1985) (quoting *Giles v. Maryland*, 386 U.S. 66, 117 (1967) (Harland, J., dissenting)). It seems unreasonable to infer from this, however, that the Supreme Court's *Brady* line of decisions are meant to strike the optimal balance between fairness interests and countervailing public interests for legislative as opposed to constitutional purposes. Rather, the Court is establishing the bare minimum that due process requires by way of disclosure, just as its ineffective assistance of counsel cases set the minimally acceptable standard of defense representation, as opposed to the normative or optimal standard. See, e.g., *Strickland*, 466 U.S. at 694.

161. Brief for the United States at 26-28, *United States v. Ruiz*, 536 U.S. 622 (2002) (No. 01-595), 2002 WL 316340, at *26-28 (arguing that the Jencks Act and Rule 16 support the conclusion that impeachment material should not be provided before trial).

162. See Brief for the United States as *Amicus Curiae* Supporting of Appellee Jeffrey Auerhahn and Affirming at 14-16, *In re Auerhahn* (No. 11-2206) (1st Cir. July 23, 2012); Brief and Appendices of *Amicus Curiae* United States of America in Support of Respondent Andrew J. Kline at 7-8, *Matter of Kline*, No. 11-BD-007 (2012).

163. SJC Hearing, *supra* note 10 (statement of Hon. Lisa Murkowski, U.S. Senate); see also Letter from Hon. Emmet G. Sullivan, U.S. Dist. Judge, D.D.C., to Hon. Richard C. Tallman, Chair, Judicial Conference Advisory Comm. on the Rules of Criminal Procedure (Apr. 28, 2009) (remarking that changes to the internal guidelines at the Department of Justice failed to produce noticeable results and urging an amended Rule 16 that requires more disclosure).

164. See Brennan, *supra* note 25, at 293-95.

There may be advantages to proceeding legislatively, however.¹⁶⁵ Although Congress is not the only institution that can make law on the subject, its determinations may command the greatest respect, given its advantages in terms of both information gathering and, from the perspective of democratic legitimacy, policy making. Insofar as empirical issues are implicated, Congress is at least as capable as a judicial rules committee of conducting hearings and other fact-gathering inquiries to resolve them. Further, while the judiciary may feel restrained based on separation-of-powers principles to defer to policy judgments implicit in the Jencks Act, Congress would not be similarly encumbered.

An interesting question is whether the Department of Justice deserves as much deference as it seeks when it suggests that internal policing should suffice. There are some areas of conduct where federal prosecutors undoubtedly deserve broad deference, such as in making discretionary decisions about whom to charge and perhaps more broadly in setting enforcement priorities. But when it comes to making rules to govern prosecutors' professional conduct as advocates, it is hard to see why prosecutors should deserve particular deference. They do not have a monopoly on information and expertise relevant to deciding the optimal scope of discovery. Nor are they particularly objective on the question.¹⁶⁶ The Department's reflexive answer to any criminal process question is likely to minimize defendants' rights. The Department cannot claim a history of expanding defendants' procedural rights through the exercise of self-restraint. Often, internal guidelines appear to be adopted less out of conviction than as a strategic measure to discourage lawmakers or courts from adopting enforceable, external legal constraints,¹⁶⁷ as is true here.

III. CONCLUSION

Imagine that federal criminal defendants had discovery rights comparable to those of federal civil litigants. Following a federal criminal indictment, the prosecution would be required to turn over all relevant evidence in its possession except in particular cases where a court found that certain disclosures would put witnesses at risk or

165. See generally Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965).

166. Cf. Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules be Created?*, 64 GEO. WASH. L. REV. 460 (1996) (maintaining that the Department of Justice is not the preferable body to regulate prosecutors' communications with represented defendants, because of its lack of objectivity).

167. E.g., U.S. ATTORNEYS' MANUAL § 9-13.000 (1997).

otherwise jeopardize public safety or welfare. Defense counsel would then be in a position to investigate further and to give the client a well-informed assessment of the likely outcome of a trial. If the defendant elected to go to trial, the defense would be in a position to take advantage of all the available relevant evidence, building its case for reasonable doubt piece by piece. In the ordinary criminal case where full disclosure was made, the process and outcome would accord with the idea of fairness underlying the civil adjudicatory system. Guilty pleas would be well-advised, and jury verdicts would be based on consideration of all the relevant evidence. If this is one's vision of a fair resolution of criminal charges, then the existing disclosure law results in a process that seems woefully inadequate. Even a process in which prosecutors made the somewhat broader disclosures required by the proposed "Fairness in Disclosure of Evidence Act" would seem to fall substantially short.

The *Brady* violations in the prosecution of Senator Stevens which are the impetus for the proposed Act turn out to be a double-edged sword. On one hand, the case has prompted Congress to consider the adequacy of existing federal criminal discovery law and whether it needs to be reformed. That is all to the good. But on the other hand, discussions of the Stevens case lead one to focus on the adequacy of the *Brady* doctrine and, in particular, its materiality requirement, and to suppose that the problem with *Brady* is simply the difficulty of compliance. If one looks at the criminal discovery regime using the liberality of civil discovery as the baseline, in contrast, one might question the fairness of the criminal process even if invariable compliance with *Brady* were assured.

The Department's opposition to the Act, and to expanding prosecutors' disclosure obligations generally, may seem reasonable if one's objective is simply to ensure that federal prosecutors produce exculpatory evidence and impeachment evidence that are constitutionally "material." The Department is taking significant measures to educate federal prosecutors and to develop a national culture in which compliance with current law is taken seriously. One might fairly defer to the Department's judgment that these and future measures will be effective. If one questions the fairness of the existing disclosure law, however, and concludes that a fair process requires greater and earlier disclosures of relevant evidence—and certainly of favorable evidence—the Department's opposition to any expansion of defendants' rights seems far less reasonable. The interest in public safety and other countervailing interests the Department cites, although implicated in a comparatively small number of cases, would not seem to justify curtailing defendants' access to evidence in all cases. There are many states, localities, and federal districts where prosecutors make broader disclosure, subject to exceptions in

individual cases where there are particular countervailing concerns. Unless it finds that, contrary to these states' evident experience, more generous disclosure demonstrably undermines public safety, Congress should not be persuaded by the Department's opposition in principle to discovery reform.