

PROSECUTORIAL MISCONDUCT AND CONSTITUTIONAL REMEDIES

PETER J. HENNING*

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INTRODUCTION

Modern prosecutors have enormous authority in every phase of a criminal case, from the start of an investigation through the sentencing of a defendant after conviction. The source of that authority is the discretion the criminal justice system vests in prosecutors to decide whether to initiate an investigation, which charges to file, when to file such charges, and whether to offer a plea bargain or request leniency.¹ Under the current sentencing regime for federal cases, the prosecutor, not the trial judge exercises primary control over the sentence a particular defendant will receive.² Not surprisingly, some prosecutors have abused this authority, or at least exercised it in a fashion that calls into question the fairness of their conduct. When prosecutors abuse their broad authority, the vexing questions are whether such prosecutorial misconduct violated a defendant’s constitutional rights, and, if so, what remedy to afford.³

1. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”); Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 718 (1996) (“In the past thirty years . . . power has increasingly come to rest in the office of the prosecutor. Developments in the areas of charging, plea bargaining, and sentencing have made the prosecutor the preeminent actor in the system.”); Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 862 (1995) (“The prosecutor’s charging discretion is, for the most part, unreviewable.”); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1522 (1981) (“There is a broad and rather casual acceptance of the fact that prosecutors often exercise greater control over the administration of criminal justice than do other officials.”).

2. In enacting the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-3586 (1994)), Congress adopted a system of uniform Sentencing Guidelines to eliminate disparity in punishment for violations of federal criminal statutes. The Sentencing Guidelines provide a determinate range of incarceration depending on the type of offense and degree of harm caused. See UNITED STATES SENTENCING GUIDELINES MANUAL § 1A3, comment. (backg’d) (1997). Under the Sentencing Guidelines, judicial discretion to affix a sentence has been substantially curtailed and federal prosecutors determine the range of punishment through the selection of the charge that will be filed against the defendant. See *United States v. La Guardia*, 902 F.2d 1010, 1013 (1st Cir. 1990) (“It is by now apodictic that the sentencing guidelines effectively stunt the wide discretion which district judges formerly enjoyed in criminal sentencing.”).

3. See, e.g., *United States v. Lopez*, 4 F.3d 1455, 1464 (9th Cir. 1993) (“[E]ven assuming that [the prosecutor] did act unethically, we question the prudence of remedying that misconduct through dismissal of a valid indictment.”); *United States v. Jannotti*, 673 F.2d 578, 613-14 (3d Cir. 1982) (Aldisert, J., dissenting). In dissenting from the *en banc* court upholding a conviction as part of the ABCAM investigation, Circuit Judge Aldisert stated:

To the Department of Justice, its operation was a taste of honey; to me, it emanates a fetid odor whose putrescence threatens to spoil basic concepts of fairness and justice that I hold dear. That the FBI has

The relief granted for prosecutorial misconduct should redress the harm suffered by the defendant rather than merely send the government a message about the impropriety of its conduct.

Contact between individuals and the police, such as an arrest, search, or interrogation, are discrete events; therefore, any violation of the defendant's rights under the Fourth or Fifth Amendments will usually arise directly from that contact. A prosecutor, on the other hand, deals with a defendant, and more importantly, the defendant's attorney, on a routine basis throughout a criminal proceeding. There are, at least quantitatively, a greater number of constitutional rights associated with the adjudicative phase of a criminal proceeding than with the investigative phase, and the parameters within which a violation can take place are much broader. Moreover, a constitutional violation by the prosecutor can occur without any direct contact with the defendant or his counsel, and it may be the culmination of a series of events rather than the product of a discrete act.

The motives and intent of police officers are irrelevant to the Fourth Amendment issue of whether probable cause supported a search or seizure.⁴ The Supreme Court, however, refers with some regularity to the prosecutor's intent as one factor in determining whether prosecutorial misconduct violated a defendant's rights. Unlike other areas of criminal procedure, in which the Court focuses on the defendant's knowledge of a right and expectation of privacy, the intent of the government's lawyer—the prosecutor—is often considered in determining whether there was a constitutional violation arising from prosecutorial misconduct.

One reason an assessment of intent may be attractive as a standard for reviewing the conduct of prosecutors, as opposed to the conduct of police, is the apparent ease with which a court can gather evidence of a prosecutor's motives. Because the prosecutor appears routinely before the court, a judge may believe that she need do little more than question the prosecutor to determine intent. In addition, the vast majority of crimes require proof of the defendant's state of mind, so courts generally are comfortable assessing a person's mental state.⁵

earned high praise for its performance in the traditional discharge of its duties should not immunize the secret police tactics employed in its ABSCAM operation from appropriate and vigorous condemnation.

Id.

4. See *United States v. Whren*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.")

5. See, e.g., *Oregon v. Kennedy*, 456 U.S. 667, 675 (1982). The *Kennedy* court stated: [A] standard that examines the intent of the prosecutor, though certainly not free from practical difficulties, is a manageable standard to apply. It merely calls for the court to make a finding of fact.

Yet the Fifth and Sixth Amendments, which largely govern the manner in which the prosecutor conducts a criminal proceeding, do not require an assessment of the reasonableness of the government's actions, as does the Fourth Amendment's proscription on "*unreasonable* searches and seizures."⁶ It therefore seems incongruous to remove subjective intent from the Fourth Amendment's protection but incorporate it into the determination of whether conduct violated the unqualified constitutional protections of the Fifth and Sixth Amendment. Moreover, while the exclusionary rule provides an exclusive remedy for Fourth and Fifth Amendment violations that occur during a police investigation, there is no singular remedy available to redress the harm caused by prosecutorial violations of a defendant's constitutional rights. The Supreme Court has noted that "[t]he remedy in the criminal proceeding is limited to denying the prosecution the fruits of its transgression."⁷ Unfortunately, it is more difficult to identify the fruits of prosecutorial misconduct than illegally seized evidence or a statement derived from an improper interrogation.

Even ascertaining a prosecutor's actual intent would not fully resolve the issue of whether prosecutorial misconduct violated a defendant's constitutional rights. When a court applies the label of "prosecutorial misconduct" to describe what has occurred, it raises the question of what remedy the court should grant to redress the harm to the defendant. But even if the misconduct did not cause harm, the court's assessment of prosecutorial intent remains. If prosecutorial intent is relevant to the analysis of whether a constitutional violation occurred, then to the extent a prosecutor acts with the requisite improper purpose, the natural impulse is to punish the perpetrator for acting on that bad intent, much like in an ordinary criminal case.⁸ Focusing on the prosecutor's intent, however,

Inferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system.

Id.

6. The Fourth Amendment provides that a person's house, papers, and effects be held secure "against unreasonable searches and seizures," U.S. CONST. amend. IV, while the Fifth and Sixth Amendment protections are stated in absolute terms, such as "[n]o person shall" and "[i]n all criminal prosecutions." U.S. CONST. amends. V, VI. For example, a search with an invalid warrant that violates the Fourth Amendment will not result in the exclusion of evidence if the government agents acted in objective good faith. *See United States v. Leon*, 468 U.S. 897, 913 (1984). However, there is no analogous exception for violations of the Fifth and Sixth Amendments.

7. *United States v. Morrison*, 449 U.S. 361, 366 (1981); *see also United States v. Lin Lyn Trading, Ltd.*, 149 F.3d 1112, 1118 (10th Cir. 1998) ("[T]he district court did not adequately explain why less extreme sanctions [than dismissal of the indictment] would not suffice to protect the defendants' rights. Under these circumstances, suppression of all evidence . . . would appear to be an adequate remedy.").

8. *See Morrisette v. United States*, 342 U.S. 246, 250-51 (1952) ("A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar

means that a court may feel compelled to grant a remedy even if the misconduct did not cause an identifiable harm to the defendant by undermining the fairness of the proceeding or sufficiency of the evidence.

The constitutional intent analysis may include the issue of whether the prosecutor's improper purpose or motive should trigger some remedy to discourage such misconduct in the future. Unlike a criminal prosecution, which imposes society's moral condemnation on a person,⁹ punishing a prosecutor by granting the defendant relief, such as excluding evidence or dismissing charges, does not necessarily vindicate the interests of the community. Instead, it may produce a windfall for the defendant.¹⁰ A remedy granted solely to deter future prosecutorial misconduct can lead to incongruous results, such as the dismissal of charges when it is likely that the defendant is guilty of the crime, or reversal of a conviction when the proceeding was otherwise fair. Nevertheless, finding improper intent without meting out punishment gives the impression that the courts are powerless in the face of prosecutorial misuse of authority.

This Article analyzes the Supreme Court's determination of whether prosecutorial misconduct violated a defendant's rights, as well as the related issue of what constitutional remedies are available to redress the prosecutor's violation. The issues are connected because the Court frequently refers to

exculpatory, 'But I didn't mean to.'").

9. See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958) ("[A crime] is not simply any conduct to which a legislature chooses to attach a 'criminal' penalty. It is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community."); Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. CHI. L. REV. 733, 741 (1998) ("In a word, punishment, unlike civil sanctions, condemns.").

10. In *United States v. Acosta*, 526 F.2d 670 (5th Cir. 1976), the Fifth Circuit reviewed a district court's dismissal of an indictment because of prosecutorial misconduct. The court stated:

Taking them as they are recited in the opinion of the District Court, the tactics of government agents and prosecutors invited a swift and stern response. The question, however, is whether the response was correct. Carefully weighing the trial record, did the conduct require that the convictions be nullified? Should the action have been directed toward the prosecutors and government agents rather than taking the form of a fortuitous escape for the convicted felons? Defendants are entitled to take advantage of any error which prejudices their case but they are not entitled to a reward for such conduct unless it could have had at least some impact on the verdict and thus redounded to their prejudice.

Id. at 674. See also *United States v. Isgro*, 974 F.2d 1091, 1098-99 (9th Cir. 1992) ("Even if all the misconduct could be considered, it is difficult to identify the prejudice to the defendants. . . . [D]ismissing the indictment is simply an unwarranted 'windfall' to the defendants."); Walter W. Steele, Jr., *Unethical Prosecutors and Inadequate Discipline*, 38 SW. L.J. 965, 977-78 (1984) ("Since reversing cases is such a dysfunctional way to impose sanctions for unethical conduct, one cannot help but wonder why appellate courts, with their inherent power over discipline, have not structured more formidable and sanction-specific remedies."). Professor Kades defines a windfall as "economic gains independent of work, planning, or other productive activities that society wishes to reward," a broad definition that incorporates benefits conferred on criminal defendants and not just private actors. Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1490 (1999).

prosecutorial intent as a facet of its misconduct analysis. Consideration of intent raises the question of whether a court should grant a remedy to deter future instances of misconduct even if the defendant did not suffer any specific harm. Once a court finds that a prosecutor acted with improper intent, the temptation is to punish the wrongdoer, even if that means granting relief to a defendant not directly harmed by the misconduct.

Subjective intent is irrelevant in a search and seizure case to determining whether governmental conduct violated a defendant's Fourth Amendment rights and, therefore, has no bearing on the remedy granted in such a case.¹¹ Similarly, violations of a defendant's constitutional rights that do not involve a structural error in the proceedings require a harmless error analysis. If the government can show beyond a reasonable doubt that the violation did not contribute to the conviction, then the court may not grant a remedy despite the violation.¹² Therefore, the Constitution does not provide a remedy to deter future prosecutorial misconduct, absent a finding of harm to the defendant.

By referring to intent as a facet of the constitutional analysis, however, the Supreme Court puts the judiciary in a quandary. Intentional misconduct that did not violate a specific constitutional right, or was not sufficiently harmful to warrant granting relief, means that the court is powerless to counteract the wrongdoing of the prosecutor or perhaps to deter future impropriety. The temptation of judges is to invoke a constitutional remedy to punish the government, regardless of whether the defendant is entitled to such relief. The intent standard distracts from the analysis of whether the prosecutor violated the defendant's constitutional rights. This Article posits that the Supreme Court's references to intent are misleading because, with one exception, the prosecutor's subjective intent was effectively irrelevant to the constitutional analysis. Yet, by retaining intent as an element, lower courts are improperly led to focus more on deterring prosecutorial misconduct than on determining whether the defendant's rights were violated and whether the violation resulted in any harm. Having made the effort to ascertain prosecutorial intent, courts may seek to express their authority by rebuking the government for acting improperly.

Actual intent should be—and largely is—irrelevant to the constitutional analysis of whether a prosecutor's conduct violated a defendant's rights. This

11. See *Whren v. United States*, 517 U.S. 806, 812 (1996); *Scott v. United States*, 436 U.S. 128, 138 (1978) (stating that searches are evaluated "under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved").

12. See *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991); *Chapman v. California*, 386 U.S. 18 (1967).

Article analyzes prosecutorial acts that violate a defendant's constitutional rights and how the Supreme Court has almost entirely eliminated inquiry into subjective intent, with one significant exception in the area of peremptory challenges. The Article maintains that reliance on actual intent is misguided because it can elevate punishing a prosecutor to deter future misconduct above granting a constitutional remedy to correct harm to a defendant. Moreover, in the one instance in which the Court sanctions judicial inquiry into prosecutorial motives, the exercise of peremptory challenges, the result has been to create an impression of injustice. The Article concludes that, rather than misinterpreting constitutional protections to permit relief as a deterrent to future prosecutorial misconduct, courts should employ non-constitutional means to police the conduct of prosecutors.

Part I of this Article considers generally the problem of ascertaining the intent of a prosecutor and discusses specifically the ethical precepts of the legal profession that impose on a prosecutor the apparently irreconcilable duties to act both as an advocate and as a "minister of justice." Part II begins the detailed analysis of prosecutorial misconduct that can violate a defendant's constitutional rights by examining the decision to prosecute a case. This Part starts with an examination of the prosecutor's authority to negotiate a plea bargain and then considers the standards governing a prosecutor's permissible motivations to pursue charges. Those areas raise questions regarding the role of subjective intent, whether the prosecutor was improperly vindictive or used improper criteria for selection of the defendant, to determine if filing criminal charges violated a defendant's constitutional rights. The Court's references to the prosecutor's intent as an element of the analysis does not reflect the reality of the tests it adopts that make judicial inquiry into actual motives irrelevant.

Part III of the Article reviews the prosecution's treatment of evidence that will or should be available to the defendant at trial. Part III begins with an examination of the Supreme Court's expansion of due process to require the government to disclose exculpatory evidence and contemplates the instances in which the government must preserve evidence or pursue a prosecution with sufficient dispatch to avoid the loss of such evidence. The Article focuses here on the relevance of the prosecutor's knowledge to determine whether the conduct violated a defendant's due process rights.

Part IV focuses on peremptory challenges, the one area in which the Court sanctions judicial inquiry into a prosecutor's actual motive. In *Batson v.*

Kentucky,¹³ the Court required judges to ask advocates why they exercised a peremptory challenge when it appeared to be based on the race of the juror. While *Batson*'s goal of eliminating the effect of discriminatory conduct in the selection of juries is laudable, this Article argues that the *Batson* court's approach does more harm than good because it permits attorneys to be less than honest in explaining their reasons in challenging a particular juror. The *Batson* inquiry results in a denigration of the judicial process when courts accept responses that "strain credulity."¹⁴

Part V of this Article considers the relationship between prosecutorial misconduct at trial and the constitutional protection against double jeopardy, focusing on a test for double jeopardy that appears to make prosecutorial intent the primary element. Part V argues that this test makes the prosecutor's actual motives irrelevant.

Part VI of this Article addresses generally the topic of remedy, and argues that extending the Double Jeopardy Clause as a means of deterring prosecutorial misconduct is not only improper, but harms the judicial system by encouraging judges to demand, without any clear constitutional basis for doing so, that prosecutors describe their motives.

I. PROSECUTORIAL INTENT AND "DO JUSTICE"

In *Berger v. United States*,¹⁵ the Supreme Court asserted that the government's interest in a criminal prosecution "is not that it shall win a case, but that justice shall be done," and that it is therefore a prosecutor's duty "to refrain from improper methods calculated to produce a wrongful conviction [even] as it is to use every legitimate means to bring about a just one."¹⁶ This duty of prosecutors described in *Berger* furnishes the basis for courts to assert that when the government crosses the line between proper and improper methods, what has taken place is "prosecutorial misconduct." That label can be attached to as broad an array of acts as the prosecutor has authority to perform because the admonition to ensure "justice" shadows every endeavor of the

13. 476 U.S. 79 (1986).

14. *United States v. Clemmons*, 892 F.2d 1153, 1162 (3d Cir. 1989) (Higginbotham, J., concurring). Judge Higginbotham went on to note that in "any individual case on appeal, even a flimsy explanation may appear marginally adequate and be sustained. However, this cumulative record causes me to pause and wonder whether the principles enunciated in *Batson* are being undermined by excuses that have all form and no substance." *Id.*

15. 295 U.S. 78 (1935).

16. *Id.* at 88.

prosecutor. Since *Berger*, courts have applied the prosecutorial misconduct designation almost reflexively, as a shorthand method of describing whether the government attorney acted outside the bounds of acceptable advocacy.

When a court labels acts as prosecutorial misconduct, it occasionally does so in a blistering opinion that calls prosecutors to task for their failings. For example, in *United States v. Kojayan*,¹⁷ the Ninth Circuit berated a prosecutor who failed to disclose to defense counsel the truth about the availability of a key witness, and who then compounded the error by asserting on appeal that the government had not misled either opposing counsel or the trial court.¹⁸ In *Demjanjuk v. Petrovsky*,¹⁹ the Sixth Circuit found prosecutorial misconduct when government attorneys recklessly disregarded their duty to disclose exculpatory evidence to a defendant facing loss of citizenship and deportation for allegedly participating in the murder of Jews during World War II.²⁰ In *Wang v. Reno*,²¹ the Ninth Circuit affirmed the lower court's issuance of an injunction against the deportation of a foreign witness who testified in an American judicial proceeding at the government's behest and faced likely execution if forced to return to his native country.²² The appellate court castigated the deportation effort as "a course of governmental misconduct in which United States officials and prosecutors callously violated Wang's Fifth Amendment due process rights."²³

Given the assortment of interactions between prosecutors, defendants, and defense counsel, it should not be surprising that the term "prosecutorial misconduct" does not describe any particular type of act or category of violation. Courts review most prosecutorial misconduct claims under a harmless

17. 8 F.3d 1315 (9th Cir. 1993).

18. *Id.* at 1322-23 ("Most disappointing of all, perhaps, is the government's failure to acknowledge that the prosecutor's misconduct was far more than a single slip of the tongue, more than a temporary misstep. . . . [The government] shows no appreciation of the seriousness of the misconduct, no hint of contrition.").

19. 10 F.3d 338 (6th Cir. 1993).

20. *Id.* at 339. The court found prosecutorial misconduct because the "attitude of the [government] attorneys toward disclosing information to Demjanjuk's counsel was not consistent with the government's obligation to work for justice rather than for a result that favors its attorneys' preconceived ideas of what the outcome of legal proceedings should be." *Id.* at 349-50. *Demjanjuk* was a civil immigration proceeding, but the court analyzed the government's actions as if they had occurred in the context of a criminal proceeding. The Sixth Circuit may have taken this approach to a civil proceeding because of the strong likelihood, eventually borne out, that Demjanjuk would be subject to criminal prosecution in a foreign jurisdiction.

21. 81 F.3d 808 (9th Cir. 1996).

22. *See id.* at 821.

23. *Id.* at 813. In finding a Fifth Amendment violation, the Ninth Circuit emphasized the district court's conclusion that the government's actions "shock the conscience of the Court." *Id.*

error standard, which requires that a defendant identify prejudice traceable to the violation.²⁴ In considering such a claim, therefore, a court need not precisely define prosecutorial misconduct because a finding of misconduct usually does not trigger relief unless the prosecutor's acts undermined the fairness of the proceeding or confidence in the jury's verdict. Courts can affix a prosecutorial misconduct label on the government's actions without concern that their determination will result in overturning a conviction or requiring the dismissal of charges.²⁵ Branding behavior as misconduct is, therefore, almost cost-free. The label itself has no content, however, in much the same way that *Berger's* paean does not provide any assistance in determining whether a defendant's rights have been violated. A court must therefore determine when a prosecutor's misconduct should result in granting a defendant some remedy when the defendant's constitutional rights have not been violated.

A. *Ascertaining Prosecutorial Intent*

When the Supreme Court refers to intent as a standard by which to assess the propriety of the prosecutor's conduct, the question of whether courts are to consider the actual, subjective motives or knowledge of the prosecutor still remains. Unfortunately, as Professor Reiss noted, consideration of prosecutorial intent "is not the result of any overarching theory concerning the role of intent in the constitutional regulation of prosecutorial conduct—at least not one that has been articulated by the courts."²⁶

The Supreme Court could empower judges to ask prosecutors why they chose a particular course of action, but such an inquiry is unlikely to yield reliable information concerning possible violation of a defendant's rights. If a constitutional determination of prosecutorial misconduct required the offending

24. See *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255-56 (1988) ("[W]here the error is harmless, concerns about the 'integrity of the [judicial] process' will carry less weight, and that a court may not disregard the doctrine of harmless error simply 'in order to chastize what the court view[s] as prosecutorial overreaching.'" (quoting *United States v. Hasting*, 461 U.S. 499, 507 (1983)). In federal prosecutions, any errors in the proceeding that do not affect "substantial rights" are disregarded. FED. R. CRIM. P. 52(a). Most constitutional errors are also reviewed to determine whether the defendant has been prejudiced under the standard set forth by the Supreme Court in *Chapman v. California*, 386 U.S. 18 (1967). See WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 27.6 (2d ed. 1992) (summarizing various harmless error standards).

25. The Eleventh Circuit echoed a lament of appellate courts, stating that "[w]e . . . find ourselves in a situation with which we are all too familiar: a prosecutor has engaged in misconduct at trial, but no reversible error has been shown." *United States v. Wilson*, 149 F.3d 1298, 1303 (11th Cir. 1998).

26. Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1366 (1987).

party to admit to the violation, or at least to disclose an improper motive for acting, then few if any such violations would be found.

References to a prosecutor's intent are misleading because the Court largely avoids giving lower courts the authority to inquire into a prosecutor's actual motives, while at the same time asserting that an evaluation of intent is an important facet of the constitutional equation. Rather than relying on an assessment of the prosecutor's subjective intent, the Court has approached the issue of intent as an element of prosecutorial misconduct in two different ways.

The Court's first approach employs a completely objective standard, by which courts are to infer the improper intent from the conduct and statements of prosecutors, but are not to compel prosecutors to respond to any judicial inquiry into their subjective motives. The Court's second approach imposes a high standard for finding a constitutional violation, one that will subject the prosecutor to questioning regarding his motives only in cases of the most blatant misconduct. Such an inquiry will be largely duplicative of the available evidence because the violation will be so clear. The exception to this approach is *Batson v. Kentucky*,²⁷ which empowers judges to require prosecutors, and defense counsel for that matter, to explain the reasons for removing a juror from the panel through the use of a peremptory challenge.

Apart from *Batson*, the Supreme Court precludes real scrutiny of a prosecutor's subjective intent because permitting such an inquiry as a proxy for determining whether a defendant's constitutional rights were violated engenders an even greater harm in the criminal justice system. Although one reason the Court fails to inquire into prosecutorial motive is possibly the result of the haphazard nature of the constitutional analysis,²⁸ it is more likely that it is simply unrealistic to expect an advocate to reveal completely the reasoning for a particular decision made during an adversarial proceeding, assuming one is even articulable. This premise is paralleled by the fact that the law recognizes a protection for an attorney's work product in civil litigation to preserve the confidentiality of a lawyer's thoughts from discovery, even if the information is not otherwise privileged. This is the case because attorneys need a "certain degree of privacy" to fairly represent their clients.²⁹

27. 476 U.S. 79 (1986).

28. See Reiss, *supra* note 26, at 1367 ("Reliance upon prosecutorial intent has been not only unsystematic, but largely unreflective.")

29. *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). The Supreme Court first recognized the work product doctrine in *Hickman*, and the protection has been incorporated into the Federal Rules of Civil Procedure. Fed. R. Civ. P. 26(b)(3). Of course, the doctrine is not an absolute bar to discovery, and a party can compel production of an opposing attorney's work product on a showing of a particularized

Once called upon to provide a justification for conduct in a criminal case, the government's response in most cases will probably be that its attorneys and investigators acted properly.³⁰ Further, if the Court asked the government to document decisions or to maintain records showing how it reached a particular position, those records would probably reveal little suggesting an unreasonable or impermissible rationale for the prosecutor's conduct, even assuming there was such an improper motivation. If the Supreme Court permits questioning of prosecutors about subjective intent, it will be difficult for lower courts to reject responses as untrue, regardless of whether they appear contrived or as a *post hoc* rationalization. Indeed, the exception to this analysis, *Batson*, proves the folly of permitting judicial inquiry into the prosecutor's reasons for acting. In evaluating the proffered justification for a peremptory challenge, the Court stated that assessing the constitutionality of the attorney's conduct "does not demand an explanation that is persuasive, or even plausible."³¹ Arguably, then, there is no real reason to ask a prosecutor about prosecutorial motive when it is unlikely the prosecutor will produce anything worth the court's consideration.

Ascertaining a prosecutor's actual state of mind is qualitatively different from determining a defendant's intent in committing a crime. In a criminal prosecution, the government tries to prove intent through the perpetrator's actions and words, asking the trier of fact to infer the defendant's state of mind from this objective evidence. Judicial inquiry into prosecutorial intent is dissimilar because the court compels an advocate, in the midst of a contentious proceeding, to describe the reasoning for pursuing a course of action. Further, proof of prosecutorial misconduct often relies on the prosecutor's own statements, which is subjective evidence, rather than objective conduct. Unlike the prosecution of a criminal case, which has a retrospective focus and the need for objective facts on which to draw inferences, a judicial assessment of

need and that substantially equivalent evidence is unavailable. *See id.*

30. I do not mean to imply that government attorneys never admit mistakes to the detriment of their case. For example, in *Black v. United States*, 385 U.S. 26 (1966), then-Solicitor General Thurgood Marshall requested that the Supreme Court order a new trial when federal investigators improperly monitored conferences between defendants and their lawyers. *See id.* at 27. During the pretrial and trial phase of a case, however, when the attorney who pursued a course of conduct is called upon to explain the intent behind the decision, it seems much more likely that the person will explain a position in the most benign way possible.

31. *Purkett v. Elem*, 514 U.S. 765, 768 (1995); *see also* José Felipé Anderson, *Catch Me If You Can! Resolving the Ethical Tragedies in the Brave New World of Jury Selection*, 32 *NEW ENG. L. REV.* 343, 376 (1998) ("[A] reluctance on the part of judges to find a *Batson* violation fuels the practice of offering fabricated reasons that relieves the judge of the need to implicitly call an officer of the court a liar by ruling to reject his reason.").

prosecutorial intent with respect to possible misconduct would be almost contemporaneous with the questioned conduct, and the court does not necessarily have any observable objective conduct on which to base such an assessment.

Courts compelling disclosure of motives or knowledge essentially would be asking prosecutors to justify their actions in order to avoid a finding in favor of their opponent, a person whom the prosecutor believes committed a criminal offense. The hope would be that a prosecutor would always respond with complete candor, regardless of the effect on a pending or completed case. A realistic view should acknowledge, however, that putting such a question to an advocate seeking the conviction of an alleged criminal raises a serious concern regarding the expected veracity, or at least the completeness, of the response.³² In other words, courts trying to discern the government's actual intent may be extending to some prosecutors a tempting opportunity to lie to protect the criminal prosecution. By using the word "lie," I do not mean to imply that prosecutors will brazenly misstate the truth, although that can happen on occasion. Instead, I employ the term as the starkest result of the calculus that individuals, asked to justify their actions, may undertake to put their position in the best light possible, especially when they understand the potential adverse consequence of a finding of improper conduct or motivation.³³ As one practicing attorney put it, "[w]hat prosecutor in his senses would admit to being motivated by personal pique? What action could not be rationalized as a good faith effort to discern community needs?"³⁴

32. See Reiss, *supra* note 26, at 1434 ("When a prosecutor is questioned about her intent, and that intent is dispositive of a claim that the prosecutor opposes, the prosecutor faces enormous pressure to rationalize her actions as permissibly motivated.")

33. A lawyer must disclose facts to a tribunal when "necessary to avoid assisting a criminal or fraudulent act by the client." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(2) [hereinafter MODEL RULES]. There is no prohibition against trying to advance a client's interests by putting forward the most favorable interpretation of those facts. The troublesome question for the legal system concerns how far a lawyer may go in creating impressions that the lawyer knows do not reflect the truth. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 12.3.4 (1986) ("Beyond the prohibition against presenting blatantly false evidence, what restraints are placed on lawyers to prevent their taking steps in litigation to create impressions in the mind of the fact finder that a lawyer knows to be false?"). Wolfram concludes that "it is certainly not a standard requirement that an American advocate always avoid distorting facts." See *id.* In a well-known article on prosecutorial ethics, Professor Uviller noted that the ethical codes provide little concrete guidance to prosecutors in exercising their discretion, and argued that prosecutorial discretion should be guided "by an honest effort to discern public needs and community concerns [rather] than by personal pique or moralistic impertinence." H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 MICH. L. REV. 1145, 1153 (1973).

34. *Id.*

A prosecutor may act after weighing conflicting reasons in response to unconscious motives, or based only on instinct when deciding whether to pursue a particular course of action. When called upon to explain the reason for that conduct, a prosecutor, serving as the government's advocate, may, and perhaps should, try to put his conduct in the best light to protect the government's case. When the impulse to present the government's case in the best light possible is combined with the dictates of the adversarial system, which compel attorneys for each side to vigorously assert the position of their client,³⁵ a court's inquiry into intent might tempt a prosecutor to explain his actions in a way that may not necessarily reflect all of his private thoughts or motivations. A judicial assertion that the government attorney owes a special duty to uphold justice serves as powerful rhetoric that highlights the danger to society when a prosecutor engages in misconduct.³⁶ The admonitions to prosecutors in ethical codes and judicial opinions to "do justice" in prosecuting a case has little meaningful effect, however, when the public judges prosecutors by the results of cases. Government attorneys are also aware that they operate within an adversarial system in which that same duty is not imposed on the other side. This could, in some circumstances, allow defense counsel to employ tactics that may obfuscate the truth without fear of admonition or reprisal.³⁷

35. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1983) [hereinafter MODEL CODE] ("A lawyer should represent a client zealously within the bounds of the law.")

36. The oft-cited statement of a prosecutor's special duty to ensure justice came from *Berger v. United States*, 295 U.S. 78 (1935), in which Justice Sutherland stated:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id. at 88. As discussed below, the demarcation between hard and foul blows is as indistinguishable as any in the law, subject to much judicial hand-wringing amid strongly-worded admonishments to prosecutors to avoid the line.

37. See Kenneth Bresler, *Pretty Phrases: The Prosecutor as Minister of Justice and Administrator of Justice*, 9 GEO. J. LEGAL ETHICS 1301, 1301 (1996) ("Unfortunately, the 'minister of justice' language, so lofty-sounding at first, degenerates into malarkey upon closer examination."); Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 957 (1991) ("[The] double standard [imposing on government attorneys a heightened duty to seek justice] furnishes much of the ethical tension inherent in the role of the government lawyer."); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutor's Do Justice?*, 44 VAND. L. REV. 45, 48 (1991) ("The 'do justice' standard, however, establishes no identifiable norm. Its vagueness leaves prosecutors with only their individual sense of morality to determine just conduct."). In a criminal prosecution, a defense lawyer is generally

B. Ethical Rules

The adversarial structure of the American justice system makes the lawyer's zealous advocacy on behalf of the client the linchpin of the process.³⁸ Yet, the ethical rules that govern the legal profession single out prosecutors as the only participants who must adhere to a special duty beyond that of representing zealously their "client." This higher duty has been variously phrased to require the prosecutor "to seek justice, not merely to convict,"³⁹ and "to serve as a minister of justice and not simply [as] an advocate."⁴⁰ The recurrent theme is justice, although the codes do not furnish any guidance about what that means

acknowledged to have the duty to raise doubts about the government's case, even if the attorney believes that the prosecution's witnesses are testifying truthfully. See MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 214 (1990) ("[A] defense lawyer can ethically cross-examine a prosecution witness to make the witness appear to be inaccurate or untruthful, even though the lawyer knows that the witness is testifying accurately and truthfully."); WOLFRAM, *supra* note 33, § 12.4.5 ("General agreement exists among commentators that defense counsel in a criminal case may permissibly cross-examine a witness known to be telling the truth in an effort to persuade the jury not to believe the witness."); Stanley Z. Fisher, *In Search of the Virtuous Prosecutor: A Conceptual Framework*, 15 AM. J. CRIM. L. 197, 210-11 (1988) ("[W]e give defense lawyers a special license to use truth-defeating trial tactics. . . . But the prosecutor, enjoined to 'fight fairly,' is barred from using the same tactics. . . . [S]he is sent into battle with a blunted sword, while her opponent's is sharpened to a razor's edge."); Harry I. Subin, *Is This Lie Necessary? Further Reflections on the Right to Present a False Defense*, 1 GEO. J. LEGAL ETHICS 689, 689 (1988) ("[P]recluding the defense attorney from attacking a truthful case against the defendant may be incompatible with the defense attorney's responsibility to assure that the prosecution meets its high burden of proof at trial."). Professor Freedman noted the asymmetry between the roles of the prosecutor and defense counsel, but asserted that there is no ethical basis to "justify a prosecutor in making a defense witness appear to be testifying inaccurately or untruthfully when the prosecutor knows that the witness is testifying accurately and truthfully." FREEDMAN, *supra*, at 214. But see Joseph D. Grano, *Criminal Procedure: Moving from the Accused as Victim to the Accused as Responsible Party*, 19 HARV. J.L. & PUB. POL'Y 711, 716 (1996) ("[P]erhaps defense counsel should be ethically precluded not just from presenting perjurious testimony but also from offering defenses that counsel knows to be false, even when this can be done without perjured testimony."); Stephen A. Saltzburg, *Lawyers, Clients, and the Adversary System*, 37 MERCER L. REV. 647, 676 (1986) ("The lawyer should not use her courtroom experience and the nervousness of the witness, however, to make an honest witness appear less than honest. She may not do so because this action no longer is good faith testing of the witness.").

38. See FREEDMAN, *supra* note 37, at 65 ("The ethic of zeal is . . . pervasive in lawyers' professional responsibilities, because it inspires all of the lawyer's other ethical obligations with 'entire devotion to the interest of the client.'") (quoting 2 TRIAL OF QUEEN CAROLINE 8 (1821)); WOLFRAM, *supra* note 33, § 10.3.2 ("In the dominant legal culture in the United States, to ask why it is that a lawyer should be zealous in pursuit of a client's interests is to raise a question the answer to which most lawyers probably feel is intuitively obvious."). I do not question the efficacy of the adversary system in ascertaining truth, as many others have done. See *id.* Rather, I accept it as a given of the current criminal justice system that is unlikely to be changed significantly in the near future.

39. MODEL CODE, *supra* note 35, EC 7-13; see also STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE Standard 3-1.2(c) (1992) ("The duty of the prosecutor is to seek justice, not merely to convict.").

40. MODEL RULES, *supra* note 33, Rule 3.8 cmt. 1 (1992).

or even whose perspective determines whether a particular result was just.⁴¹

The prosecutor labors under the pull of two divergent forces created by the ethical precepts. One of these forces requires an attorney to advocate passionately the government's position, while the other pushes the prosecutor to seek a result that may not be exactly what the client and the attorney desire: a conclusion short of a criminal conviction. Therefore, at the core of a prosecutor's function lies a potentially irreconcilable conflict between doing justice—which the ethical codes do not define—and the prosecutor's role as the government's primary advocate in the criminal justice system.⁴² The special place prosecutors occupy seemingly entails a duty to refrain from acting in an independently unethical way, but prosecutors have no guidance for discerning whether their conduct can constitute acceptable zealous advocacy under the rules but at the same time not advance justice.⁴³

It is clear that no lawyer in a civil or criminal case may use either false or inadmissible evidence.⁴⁴ If the admonition that prosecutors "do justice" only

41. The Model Rules impose a duty on every attorney to deal with the court and opposing counsel honestly and fairly. MODEL RULES, *supra* note 33, Rule 3.3 ("Candor Toward the Tribunal") & 3.4 ("Fairness to Opposing Party and Counsel"). The prosecutor's special duty appears to be owed to the entire justice system rather than just to the other participants in a particular proceeding.

42. See Zacharias, *supra* note 37, at 52 ("[T]he noncompetitive approach to prosecutorial ethics is inconsistent with the professional codes' underlying theory.")

43. See Lanctot, *supra* note 37, at 967. Professor Lanctot notes that

[A] review of both modern codes shows that neither the *Model Code* nor the *Model Rules* reflects much detailed consideration of the government lawyer's role in the advocacy system. To the extent that they address government lawyers at all, the ethical codes suggest that government lawyers are subject to different ethical considerations than other lawyers, but the nature of these considerations remains ambiguous.

Id. See also Uviller, *supra* note 33, at 1153 ("Let us frankly acknowledge that justice in the criminal process and the rectitude of its administrators are both largely a matter of myth. (I use myth in the anthropological sense, as a community belief which . . . is necessary for the functioning of some institution of that community)."); Vorenberg, *supra* note 1, at 1557 ("It is simply unrealistic to expect the adversary counsel to ensure the fairest possible exercise of this enormous power. The ambiguous role of the prosecutor subverts 'the appearance of evenhanded justice which is at the core of due process.'" (quoting *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring))).

44. The Model Code of Professional Responsibility contains a detailed list of prohibitions:

(A) In his representation of a client, a lawyer shall not:

...

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

MODEL CODE, *supra* note 35, at DR 7-102. The Model Rules similarly prohibit the submission of false

prohibits the use of such evidence or similar illegal tactics, then a prosecutor's special duty is redundant. If it requires something more of a prosecutor, so that the standard has some independent meaning that instructs prosecutors to act differently from other lawyers, then that broader obligation would hinder the furtherance of the state's interest. Thus, only by tempering the zealous advocacy that could otherwise be acceptable can the caveat that prosecutors must also further justice make sense. The result is that imposing a separate duty on prosecutors may contradict their obligation as lawyers representing the government in a criminal prosecution.

In addition to ethical rules, constitutional and statutory provisions also constrain the authority of the government and protect the criminal defendant at every stage of the proceeding. The Fourth, Fifth, and Sixth Amendments impose important limits on the government's ability to gather evidence and mandate specific procedures for initiating and conducting a criminal trial.⁴⁵ Similarly, statutes at both the state and federal level govern discovery and the timing of prosecution, among other things.

The ethical admonition to "do justice" cannot mean just that a government attorney may not violate any of the myriad constitutional and statutory rights afforded a defendant because then the admonition would only reiterate the underlying axiom that a lawyer represent a client within the bounds of the law. If advancing justice only means refraining from breaking the law, then every attorney labors under the same standard, and the prosecutor has no more of a special duty than other members of the bar. The innumerable constitutional and statutory constraints on prosecutorial behavior concededly give prosecutors a greater number of opportunities to violate the law. But this does not illuminate why the ethical precept that attorneys must operate within the confines of the law should apply more stringently to prosecutors.

C. *Due Process*

Courts embrace the perceived special ethical duty of prosecutors, referring frequently to the distinct obligation of prosecutors to be more than advocates seeking a conviction. *Berger's* oft-repeated phrase, that a prosecutor's interest

evidence, and require that even if the information is subject to the confidentiality provisions of the Rules, the information about falsity must still be disclosed. See MODEL RULES, *supra* note 33, Rule 3.3(a)(4),(b).

45. See Saltzburg, *supra* note 37, at 666 (noting that constitutional rules "recognize, implicitly more than explicitly, that the legal system must control the desire to win in criminal investigations and prosecutions and the desire to convict and punish all persons believed by prosecutors to be guilty.").

“in a criminal prosecution is not that it shall win a case, but that justice shall be done,”⁴⁶ showed that the Supreme Court recognizes a prosecutor’s special duty beyond simple compliance with the law; that is, a line exists between acceptable and unacceptable prosecutorial conduct beyond just respecting a defendant’s statutory and constitutional rights. In almost the same breath, however, the Court noted the prosecutor’s duty to strike “hard blows,” while avoiding “foul ones,” and stated that the government’s attorney may “use every legitimate means” to secure a conviction.⁴⁷ The tension in *Berger* is the same as under the ethical codes: the point at which a hard blow becomes a foul one is impossible to identify, so prosecutors must be forceful advocates, but not so forceful that a court can later conclude that the government engaged in prosecutorial misconduct.⁴⁸

The *Berger* Court, explaining neither the source nor the scope of this special duty imposed on prosecutors, reversed the defendant’s conviction because the government’s evidence was weak and “the prosecuting attorney’s argument to the jury was undignified and intemperate, containing improper insinuations and assertions calculated to mislead the jury.”⁴⁹ Although the Court never identified which of the defendant’s rights the government violated, its references to the “fairness” of the proceeding, resulting from the prosecutor’s prejudicial statements, appeared to invoke the due process protection of the Fifth Amendment.⁵⁰ Asserting that the special duty of prosecutors derives from the Due Process Clause, however, does not illuminate what that duty entails. *Berger* made clear that the prosecutor must pursue the case “with earnestness and vigor”⁵¹ There can only be a constitutional violation, therefore, when the prosecutor has not sought justice, but prosecuting vigorously is part of doing justice. If prosecutors “do justice” in order to ensure due process, they must still prosecute a case vigorously or they will not ensure that justice is done. If due process only means that the prosecutor may not violate a defendant’s other rights, then it does nothing more than reiterate the ethical duty of every attorney. Thus, raising the prosecutorial standard to a constitutional level does not resolve

46. *Berger*, 295 U.S. at 88.

47. *Id.*

48. Cf. Kenneth Bresler, “*I Never Lost a Trial*”: When Prosecutors Keep Score of Criminal Convictions, 9 GEO. J. LEGAL ETHICS 537, 544 n.27 (1996) (“Translated into district attorney lingo, the Supreme Court [in *Berger*] has told prosecutors, “Kick butt, but don’t kick groin.”).

49. *Berger*, 295 U.S. at 85, 89.

50. U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law.”).

51. *Berger*, 295 U.S. at 88.

the conflict between the prosecutor's duty to vigorously represent the government and the admonition to "do justice."

Much like both the ethical mandate to "do justice" and the *Berger* court's analysis of due process, consideration of whether an act constitutes "prosecutorial misconduct" does not help define the scope of the prosecutor's duty beyond the requirement that the government not violate any of the defendant's constitutional or statutory rights. Claiming that the government engaged in misconduct is easy because due process and the prosecutor's special duty apply at every stage in the criminal process.

Kojayan,⁵² *Demjanjuk*,⁵³ and *Wang*⁵⁴ each involved an appellate court's determination that prosecutors violated the rights of a participant in the criminal justice system. These cases are disturbing because of the broad discretion prosecutors have to decide both whether to bring a case and how to conduct the proceeding. Courts do not inquire into the government's reasons for deciding not to bring a case, and challenges to a decision to file charges generally are doomed to failure absent a clear showing of an impermissible motivation.⁵⁵ Control over the investigative process often provides the government with a substantial advantage in deciding what information to release to a defendant. For example, courts acknowledge that it is the prosecutor, not the judge, who makes the initial decision as to whether evidence in its possession is exculpatory such that it must be disclosed to the defendant.⁵⁶

The absence of a workable definition of the special duty of a prosecutor means that courts cannot engage in serious review of prosecutorial conduct without referring to the specific rights of a criminal defendant. Only in the context of determining the effect of the government's conduct on the defendant is a court able to determine whether the prosecutor's actions rose to a level of misconduct that constituted a failure to "do justice." The analysis of the defendant's rights necessarily involves examining the prosecutor's actions. The

52. 8 F.3d 1315 (9th Cir. 1993).

53. 10 F.3d 338 (6th Cir. 1993).

54. 81 F.3d 808 (9th Cir. 1996).

55. See *infra* text accompanying notes 57-146 (reviewing vindictive and selective prosecution analysis).

56. See *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (determination of what constitutes material exculpatory evidence "must accordingly be seen as leaving the government with a degree of discretion"); *United States v. Bagley*, 473 U.S. 667, 675 (1985) ("[T]he prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial"); cf. *id.* at 696-97 (Marshall, J., dissenting) ("Thus, for purposes of *Brady*, the prosecutor must abandon his role as an advocate and pore through his files, as objectively as possible, to identify the material that could undermine his case.").

important question is how the court's analysis should incorporate the motivations and knowledge of the prosecutor. If a court considers the prosecutor's state of mind in deciding whether he violated a defendant's rights, and concomitantly determines whether the prosecutor violated the special duty to "do justice," then the prosecutor will possibly be less than candid in responding to judicial inquiry regarding his intent. In deciding whether prosecutors have done justice, it makes little sense to ask those charged with this special duty whether they think they have acted justly, because prosecutors operate under conflicting ethical duties. By asking "Why?," a court may only frustrate the inquiry and thereby make justice less obtainable by creating an incentive for prosecutors to be less than completely honest.

II. PROSECUTORIAL INTENT AND THE DECISION ABOUT WHO AND WHAT TO PROSECUTE

The prosecutor's discretion begins, in a sense, with the formation of a miscreant's criminal intent. Once a person decides to commit a crime, a prosecutor could, if informed of the plan, initiate an investigation that could culminate in filing formal charges. Alternatively, the prosecutor could decline to prosecute, even if credible evidence existed that an individual engaged in criminal conduct. This first step defines the breadth of prosecutorial discretion because all else flows from the initial decision about whether to set the criminal process in motion.⁵⁷ The prosecutor's authority is increased by the expansiveness of criminal codes, which often permit the government to file charges under multiple provisions based on a single course of conduct.⁵⁸ As Professor Richman noted, "[p]rosecutors . . . emerge as mediators between

57. See Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 246-47 (1980) (describing criticisms of prosecutorial decisions to accept a lenient disposition in a criminal case, but noting that "[i]t has long been recognized . . . that police and prosecutors exercise even broader discretion in the arrest and screening stages."). The issue at the charging stage concerns the exercise of the prosecutor's judgment, not whether there is sufficient evidence to support bringing a criminal charge and securing a conviction. See Michael Kades, *Exercising Discretion: A Case Study of Prosecutorial Discretion in the Wisconsin Department of Justice*, 25 AM. J. CRIM. L. 115, 120 (1997) ("Discretion has two components: accuracy and judgment. Accuracy is the ability to process information, decide what actually happened, and determine what can be proved in court Judgment is the ability to prosecute the most important cases.").

58. See *United States v. Batchelder*, 442 U.S. 114, 123-24 (1979). The opinion stated that [t]his Court has long recognized that when an act violates more than one criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants. Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion.

Id.

phenomenally broad legislative pronouncements and the equities of individual cases, and as technical judges of when evidence is sufficient to proceed.”⁵⁹

Allowing prosecutors such broad discretion, especially at the charging stage, raises the issue of monitoring the fairness of their decisions. Justice Jackson, in a famous address given in 1940 when he was the Attorney General, noted that “[w]hile the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.”⁶⁰ The problem with prosecutorial discretion is obvious: insulating a prosecutor’s actions from judicial review can lead to violations of citizens’ rights through the arbitrary or, worse, malevolent exercise of authority.⁶¹

Imposing greater accountability on prosecutors, however, raises a different set of concerns. The greater a defendant’s opportunity to challenge a prosecutor’s decision, the more courts will have to immerse themselves in the operations of prosecutorial offices. Judicial review of charging decisions would inevitably result in the formulation of specific criteria for making such decisions because courts ordinarily do not limit their pronouncements to the particular case at bar. This undermines a major advantage of the current system by limiting the prosecutor’s ability to apply limited resources flexibly to respond to new challenges and to achieve the greatest measure of deterrence and punishment through the criminal justice system.⁶² As then-Circuit Judge Burger stated in *Newman v. United States*,⁶³ “[f]ew subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought.”⁶⁴

59. Daniel C. Richman, *Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 958 (1997).

60. Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC’Y 18 (June 1940).

61. See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 189 (1969) (“Even if we assume that a prosecutor has to have a power of selective enforcement, why do we not require him to state publicly his general policies and require him to follow those policies in individual cases in order to protect evenhanded justice?”).

62. See Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 2 (1971) (“The major advantage of such discretion is that it provides early in the decision-making process a flexibility and sensitivity not available in a system where prosecutorial decisions must be made according to predetermined rules.”).

63. 382 F.2d 479 (D.C. Cir. 1967).

64. *Id.* at 480. *Newman* based its rejection of judicial overview of prosecutorial charging decisions on separation of powers grounds, stating that “it is not the function of the judiciary to review the exercise of executive discretion whether it be that of the President himself of those to whom he has delegated certain of his powers.” *Id.* at 482. See also Sarah J. Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383, 391 (1976) (“Review by some outside authority cannot guarantee protection from the hazards of discretion; the question of review is not that simple. A trial is essentially a review of a

The tension between countenancing unfettered exercise of the prosecutor's powers and acquiescing to judicial review of charging decisions reflects the ethical conflict underlying the role of the prosecutor both as a zealous advocate and an official charged with a broader duty to ensure justice. Courts cannot simply abjure all authority to oversee the fairness of such an important process, yet the impetus to engage in judicial review conflicts with an important precept of the criminal justice system: the executive branch decides the proper means of enforcing the criminal law to the exclusion of the judiciary.

The Supreme Court has affirmatively recognized judicial authority to review prosecutorial charging decisions in two situations: when the decision to increase charges was vindictive, and when the government improperly selected the defendant based on an impermissible classification. Whether the prosecutor acted vindictively or selected the defendant based on an unacceptable criterion focuses judicial review of prosecutorial conduct squarely on the motivations of the particular attorneys who made the decision. The Court's approach, however, avoided the hard issue of how to ascertain actual intent by adopting tests that made meaningful inquiry into the prosecutor's state of mind irrelevant for a vindictive prosecution claim, and almost impossible for a selective prosecution claim. Any judicial review of the decisions of whether to charge a particular person and which crime should be charged seems to be an area in which the prosecutor's thought process would be of paramount importance. The Court, however, has made intent essentially irrelevant, most likely because it recognized that asking prosecutors why they acted would be fruitless and perhaps even counter-productive.

A. Vindictive Prosecutions: Isn't That What You're Paid For?

The dictionary defines "vindictive" as "having a bitterly vengeful character" or "characterized by an intent to cause unpleasantness, damage, or pain."⁶⁵ One of the definitions for "vindication" is "to take vengeance for; avenge."⁶⁶ Describing the prosecutor's role as vindicating society's interest is an acceptable characterization, while attributing to that person a measure of vindictiveness is unsettling because of the negative connotation the word carries. "Causing unpleasantness" and being "bitterly vengeful" do not sound like qualities society seeks in an official invested with substantial discretion. Yet vindictive and

prosecutor's decision to prosecute; all tried cases offer review of his decisions in the case at bar.").

65. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged 1966).

66. *Id.*

vindication are closely related, each involving a measure of retribution that maintains society's interest in punishing criminal conduct.⁶⁷ The distinction is as fine as that discussed in *Berger* between the hard and foul blows struck by the prosecutor.⁶⁸

The Supreme Court prohibits prosecutorial decisions that are vindictive, but it has opted to prevent inquiry into actual motives, even though the attorney's state of mind seems to be at the heart of the question. While the judicial system encourages vindication of society's interest in punishing criminals, so that a retributive motive is acceptable for prosecutors, it abhors personal vindictiveness on the prosecutor's part. Unfortunately, the Supreme Court has sidestepped describing how to discern between these two positions in any meaningful way.

1. *The Presumption of Vindictiveness*

The proscription against vindictive prosecutorial charging decisions originated not in the setting of the prosecutor's decision to pursue a case, but in the context of judicial sentencing. A prosecutor's reasons for pursuing a case are generally private. A judge, on the other hand, announces a sentencing decision in open court after conviction, often describing on the record the reasons for imposing a particular sentence. In *North Carolina v. Pearce*,⁶⁹ the Supreme Court reviewed two defendants' increased sentences imposed on remand after they had successfully challenged their convictions on appeal.⁷⁰ The

67. One rationale for imposing criminal sanctions is the "just desserts" or retributive theory of criminal sanctions, that "liability and punishment should be imposed because the offender deserves it, whether or not such liability and punishment would help avoid future offenses." PAUL H. ROBINSON, CRIMINAL LAW § 1.2 (1997); see generally Joshua Dressler, *Hating Criminals: How Can Something That Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448 (1990) (discussing retributive principle of criminal punishment). To the extent that the criminal law rests on seeking retribution from criminals for their wrongdoing, the prosecutorial function is to seek convictions to the fullest extent possible within the confines of acceptable constitutional and statutory guidelines. That would appear to give prosecutors a broad mandate to "vindicate" society's interests and make the category of prosecutorial conduct that might be impermissibly "vindictive" quite narrow.

68. See *United States v. Andrews*, 633 F.2d 449, 459 (6th Cir. 1980) (en banc) (Merritt, J., dissenting) ("[T]he prosecutor's attitude toward the defendant in a hard-fought criminal case is seldom benign or neutral.").

69. 395 U.S. 711 (1969).

70. In the first case, *North Carolina v. Pearce*, the defendant challenged his conviction after trial on Fourth Amendment grounds and was convicted after the retrial. See *id.* at 713. The defendant in the second case, *Simpson v. Rice*, pleaded guilty and then successfully challenged the guilty plea because he was denied the right to counsel. See *id.* at 714. Although the court in *Pearce* applied the presumption of vindictiveness to both cases. See *id.* at 726, the Court later overturned the decision in *Alabama v. Smith*, 490 U.S. 794, 803 (1989), holding that the presumption of vindictiveness does not apply when a court

Court stated that “vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial,” and that due process “requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.”⁷¹ The Court limited a judge’s authority to impose a higher sentence after appeal because “the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be no less a violation of due process of law.”⁷² *Pearce* did not outlaw all increased sentences after a successful appeal; rather, the sentencing judge must state on the record the reasons for the increase, which must be based on the defendant’s conduct “occurring after the time of the original sentencing.”⁷³

Pearce adopted a seemingly clear rule that prohibits an increased sentence after a successful appeal unless the sentencing judge discloses reasons that demonstrate a valid basis for the new punishment. The presumption that the judge acted vindictively arose from the defendant’s point of view. The possibility of an increased sentence created an apprehension that, unless affirmatively dispelled, would lead the defendant to forego an appeal lest he be punished for exercising a valuable right.⁷⁴

vacate a guilty plea and then imposes a higher sentence upon conviction after a trial.

71. *Pearce*, 395 U.S. at 725.

72. *Id.* at 724. The Court, however, rejected the defendants’ equal protection argument. *See id.* at 722-23.

73. *Id.* at 726. Justice Black dissented from the majority’s due process analysis, arguing that “the Court does not explain why the particular detailed procedure spelled out in this case is constitutionally required, while other remedial devices are not. This is pure legislation if there ever was legislation.” *Id.* at 741 (Black, J., dissenting). Later, the Court expanded the permissible reasons a judge may give for enhancing a sentence to include information concerning events that took place prior to the original sentencing but discovered later. *See Texas v. McCullough*, 475 U.S. 134 (1986).

74. The Court limited its reliance on the defendant’s personal apprehension of a vindictive motive as the basis for a due process violation in two later cases, *Colten v. Kentucky*, 407 U.S. 104 (1972), and *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973). In *Colten*, the Court held that an increased sentence by a judge who had no role in the initial trial and sentencing was not presumptively vindictive. *See Colten*, 407 U.S. at 116-17. *Chaffin* held that the presumption of vindictiveness does not apply to an increased sentence imposed by a jury so long as the jury does not know about the original sentence. *See Chaffin*, 412 U.S. at 35. In both cases, the defendants exercised a right to seek review of their convictions before receiving the increased sentences, yet the Court rejected the argument that any increase impermissibly deterred a defendant from exercising the right to appeal. *See Colten*, 407 U.S. at 116 (stating that the problem addressed in *Pearce* was not an increased sentence per se, but the possibility that the increased sentence constituted “purposeful punishment” of the defendant); *Chaffin*, 412 U.S. at 33-35 (indicating that requiring the defendant to make some choice of rights does not violate due process if the choice was attenuated from any punitive result). *Pearce*’s prophylactic rule, therefore, does not always protect the defendant from every apprehension of vindictiveness, but only when the same judge imposed the sentence. Even then, a judge could avoid the strictures of the rule by stating permissible reasons for the increased sentence.

The Court expanded the *Pearce* rule in *Blackledge v. Perry*⁷⁵ to cover a claim of *prosecutorial* vindictiveness when the prosecutor increased charges against the defendant after he appealed to a higher court for a trial *de novo*. The Court held that, although there was no evidence of actual prosecutorial bad faith, “the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analogous to that of the *Pearce* case.”⁷⁶ What constitutes impermissible vindictiveness was not considered solely from the point of view of the defendant, however, because the possibility of increased punishment only violates the Due Process Clause if the circumstances “pose a realistic likelihood of ‘vindictiveness.’”⁷⁷

The *Pearce* rule can be explained by the fact that judges act in open court when they impose sentence and therefore should not render judgments with any hint of malice. Calling upon judges to dispel any notion of vindictiveness by supplementing the record with their reasoning before imposing a higher sentence adds only a very small burden to a process. On the other hand, prosecutors, unlike judges, operate mainly behind closed doors in deciding who and what to charge, with no required disclosure of their reasoning beyond the fact of the criminal charge. Moreover, prosecutors inevitably act with a degree of vindictiveness, in the sense that they are charged with avenging the wrong inflicted on society and the victim of the crime, by selecting who to bring into the criminal justice system and what punishment to seek. The Court in *Blackledge* did not explain why it transferred the *Pearce* rule, with its presumption of vindictiveness, to an arena in which the government acts properly when its decisions incorporate at least some measure of vindictiveness.⁷⁸

75. 417 U.S. 21 (1974).

76. *See id.* at 27-28.

77. *Id.* at 27. *Pearce* had referred to freeing the defendant from the “apprehension of . . . a retaliatory motivation on the part of the sentencing judge,” *Pearce*, 395 U.S. at 725, but that subjective fear no longer serves as the guiding principle of the vindictiveness analysis after *Colten and Chaffin*. *See supra* note 74 (discussing limitation of apprehension aspect of vindictiveness analysis).

78. The Court’s use of the term “presumption” in this context is a misnomer because a presumption can be rebutted, while *Blackledge* and subsequent decisions appear to adopt a categorical rule that requires courts to disregard evidence of the prosecutor’s actual intent if the so-called presumption applies. *See United States v. Krezdom*, 718 F.2d 1360, 1371 (5th Cir. 1983) (en banc) (Goldberg, J., dissenting) (“[E]ven in the face of a factual finding, supported by the record, of no actual vindictiveness, a ‘presumption of vindictiveness’ would still establish a due process violation. No mere evidentiary presumption concerned with the presence or absence of actual vindictiveness would function in that manner.”). The different approaches to judges and prosecutors may be explained by the broader discretion prosecutors have, which requires imposition of a categorical rule rather than a true presumption. *See Note, Prosecutorial Vindictiveness in the Criminal Appellate Process: Due Process Protection After United States v. Goodwin*, 81 MICH. L. REV. 194, 215 n.100 (1982) (“One could argue that if the *Pearce* rule is

2. *The Irrelevance of Actual Intent*

After applying the *Pearce* presumption to prosecutors, the Supreme Court resisted any inquiry into actual prosecutorial motives by noting that genuine good faith would not justify the increased charges because the “potential for vindictiveness” in response to the defendant’s assertion of his right to appeal triggered the due process violation.⁷⁹ Why did the Court render the prosecutor’s motives irrelevant for determining the existence of a constitutional violation premised on the prosecutor acting with an improper motive? The Court’s subsequent decisions continued to reject any probing of prosecutorial motives, probably because the Court recognized the futility of asking prosecutors to explain themselves. Asking “Why?” would be a meaningless exercise, unlike having a judge explain the reasons for a sentence on the record, because the criminal justice system operates by having prosecutors act with some degree of vindictiveness. If the Court sanctioned judicial review of prosecutorial decisions, then an explanation that reflected *any* vindictiveness would be open to a challenge on constitutional grounds. The line between acceptable and unacceptable vindictiveness would be impossible to delineate coherently, so the

adequate to control judges, it should also be adequate to control prosecutors. The distinction between the position of the judge and the prosecutor is, however, substantial: prosecutors have more discretion than judges, are more likely to act vindictively because of their role as an adversary, and operate less openly than the courts.”).

79. See *Pearce*, 417 U.S. at 28-29. The potential breadth of the prophylactic rule applied to prosecutors was shown in two circuit court cases decided shortly after *Blackledge*. In *United States v. Jamison*, 505 F.2d 407 (D.C. Cir. 1974), the court of appeals held that *Blackledge* barred increased charges after a mistrial because “[i]mposing a ceiling on subsequent indictments after reversals but not after mistrials would discourage defendants from seeking mistrials when error prejudicial to them has occurred, whereas mistrials in such cases may represent a significant saving of judicial resources.” *Id.* at 416. The D.C. Circuit focused on the language in *Blackledge* and *Pearce* regarding the defendant’s apprehension of vindictiveness, and not whether increasing charges after the grant of a mistrial was in fact based on an improper motive to punish the defendant. See *id.* at 413. In *United States v. Ruesga-Martinez*, 534 F.2d 1367 (9th Cir. 1976), the government had indicted the defendant on higher charges after he refused to waive his right to a jury trial and agree to trial before a magistrate on misdemeanor charges. See *id.* at 1368. The Ninth Circuit read *Pearce* and *Blackledge* as establishing a blanket rule “beyond doubt, that when the prosecution has occasion to reindict the accused because the accused has exercised some procedural right, the prosecution bears a heavy burden of proving that any increase in the severity of the alleged charges was not motivated by a vindictive motive.” *Id.* at 1369. The Ninth Circuit’s reading essentially gave a defendant immunity from increased charges once that person had exercised some right in the criminal proceeding, unless the government could justify the increase. See also *United States v. Motley*, 655 F.2d 186, 188 (9th Cir. 1981) (“A re-indictment increasing the severity of the charges following the exercise of a procedural right creates an appearance of vindictiveness which, if not dispelled by the government, constitutes a due process violation.”). Under the guise of prohibiting vindictive prosecutions, *Ruesga-Martinez* transformed *Blackledge* into a substantive prohibition on the exercise of prosecutorial discretion by requiring the prosecutor to explain to the court the reasons for increasing charges.

Court in *Blackledge* adopted instead a bright line rule to determine when prosecutors act with the proper vindictiveness. The Court rendered moot the issue of intent by applying a prophylactic rule that substituted judicial assessment of the likelihood of an improper motivation for any inquiry into the prosecutor's actual state of mind.

The Court's prophylactic approach to prosecutorial vindictiveness became clear in *Bordenkircher v. Hayes*,⁸⁰ a case in which the prosecutor threatened the defendant with reindictment on more serious charges if he did not plead guilty to the pending indictment.⁸¹ The prosecutor's stated reason for seeking the plea bargain was to "save the court the inconvenience and necessity of a trial."⁸² The defendant refused the offer and was convicted and sentenced to life imprisonment.⁸³ It was obvious that the prosecutor sought to dissuade the defendant from exercising his Sixth Amendment jury trial right, and that the superseding charge came in retaliation for forcing the government to prove its case at trial.

The prosecutor clearly violated the defendant's due process right if one understands the language of *Pearce* and *Blackledge* as prohibiting any *appearance* of vindictiveness in response to the exercise of a constitutional or statutory right.⁸⁴ Yet, the Court in *Bordenkircher* rejected the due process claim, holding that "in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer."⁸⁵ The prosecutor's acknowledged retaliatory

80. 434 U.S. 357 (1978).

81. *See id.* at 358-59. The government charged Hayes with forging a check for \$88.30, a felony punishable by 2 to 10 year imprisonment. *See id.* at 358. Under the Kentucky Habitual Criminal Act, KY. REV. STAT. § 431.190 (1973) (repealed 1975), Hayes faced a mandatory term of life imprisonment because he had two prior felony convictions. *See id.* at 358-59.

82. *See id.* at 358.

83. *See id.* at 359.

84. *See Blackledge*, 417 U.S. at 28 ("A person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration."); *Pearce*, 395 U.S. at 724 ("[T]he imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be . . . a violation of due process of law."); Barbara A. Schwartz, *The Limits of Prosecutorial Vindictiveness*, 69 IOWA L. REV. 127, 166 (1983) ("[I]n *Bordenkircher* there was no dispute that the prosecutor's enhancement of the charges against Hayes was in response to Hayes' exercise of his right to trial. This difference seems to make the due process violation in *Bordenkircher* even clearer than in *Blackledge*."); Reiss, *supra* note 26, at 1378 (deeming *Bordenkircher* "a crystal clear case" of actual vindictiveness).

85. *Bordenkircher*, 434 U.S. at 363. The Court found that plea bargaining could not exist unless the government could employ coercive tactics "to persuade the defendant to forgo his right to plead not guilty." *Id.* at 364. The Court took the same position in considering a challenge to the voluntariness of a plea in *Brady v. United States*, 397 U.S. 742 (1970), when it stated that "pleas are no more improperly

intent in increasing the charges did not violate due process, so certainly the defendant's mere apprehension of vindictiveness during plea bargaining could not suffice for a constitutional violation.

The Court sought to temper the effect of its analysis by emphasizing the forthrightness of the prosecutor, that his intent to increase the charges "was clearly expressed at the outset of the plea negotiations. Hayes was thus fully informed of the true terms of the offer when he made his decision to plead not guilty."⁸⁶ *Bordenkircher's* emphasis on disclosure to the defendant as an aspect of the constitutional analysis contradicted the Court's aim to limit inquiry into the prosecutor's actual intentions. Complimenting a prosecutor for being forthright was comforting, but permitting a defendant to assert a due process claim based on the government's failure to disclose its intentions during plea bargaining would have put the Court in the very position it avoided in adopting a prophylactic rule. Asking the prosecutor why he chose a course of action would only invite the government to furnish the answer that protected its higher charges. That is, the government might simply assert its good faith by stating, for example, that the prosecutor's office was unaware of prior offenses or had not decided whether to pursue the higher charge until after the defendant rejected the plea offer. A court must either accept the government's proffered explanation and find no retaliation violative of due process, or reject it as a falsehood. While superficially reassuring, *Bordenkircher's* reference to the forthrightness of the prosecutor was irrelevant to the Court's holding.⁸⁷ Plea bargaining simply falls outside the *Blackledge* presumption because the

compelled than is the decision by a defendant at the close of the State's evidence at trial that he must take the stand or face certain conviction." *Id.* at 750.

86. *Bordenkircher*, 434 U.S. at 360.

87. If the prosecutor had *not* informed the defendant of the possible increase in charges, would that failure render the conduct impermissibly vindictive? The analysis adopted in *Bordenkircher* suggests that it would not because the Court essentially defined the prophylactic rule in such a way that it did not apply to vindictive prosecutorial acts during plea bargaining. *See id.* at 363-64. The government's failure to inform the defendant of a potentially higher charge that it may file would not make the additional charge any more retaliatory than if the defendant did not know the effect of rejecting the plea offer. *See Schwartz, supra* note 84, at 170 ("The fact that the prosecutor announced his intention to up the ante if Hayes declined to waive trial did not render retaliatory conduct nonretaliatory. Rather, the prosecutor's announcement manifested his retaliatory intention and served to eliminate the need for a prophylactic device."). If the government does a bad job of bargaining by not employing its strongest lever, the increased charge, to persuade the defendant to forgo his constitutional right to trial, it is unclear why that ineptitude would demonstrate impermissible vindictiveness. Moreover, failing to warn the defendant of the possible consequences of not accepting the plea offer creates no apprehension that the government will punish the exercise of a right because the defendant believes he will be tried on the existing charges. Increasing them without warning, therefore, could not create any additional apprehension or make the prosecutor's motive more retaliatory so as to justify finding a due process violation.

negotiation process works best when prosecutors can act vindictively by seeking greater punishment if a defendant does not waive important constitutional and statutory rights.

The Court took the same approach in *United States v. Goodwin*,⁸⁸ a case arising from the pre-trial stage, by rejecting explicitly any inquiry into prosecutorial motives in deciding before trial to increase charges after a defendant exercised a constitutional right.⁸⁹ The government in *Goodwin* had charged the defendant with misdemeanor assault, and after unsuccessful plea negotiations the defendant asserted the right to a jury trial.⁹⁰ The government attorney assigned to the matter did not have the authority to conduct jury trials, so another attorney reviewed the matter and decided to seek an indictment charging four felonies with higher sentences than the original misdemeanor charge.⁹¹ The defendant challenged the higher charges on the ground of prosecutorial vindictiveness, arguing that the government retaliated against him for exercising his right to a jury trial.⁹²

To determine whether the higher charges violated the *Blackledge* presumption of vindictiveness,⁹³ the Court looked at the type of right invoked and the timing of the government's response. First, the Court labeled "unrealistic" the assumption that the prosecutor would retaliate against invocation of what it called a "procedural" right, such as a jury trial in lieu of a bench trial, because those rights are such an integral part of the system that defendants assert them routinely.⁹⁴ Second, the Court stated that the presumption of vindictiveness did not apply when the government acted before trial, as opposed to after a conviction that has been successfully challenged, as in *Blackledge*.⁹⁵

The Court's holding was not surprising in light of its finding that the right asserted was only procedural and that the prophylactic rule curbing any

88. 457 U.S. 368 (1982).

89. *See id.* at 372-73.

90. *See id.* at 370-71.

91. *See id.* at 371.

92. *See id.*

93. The Court noted that there was no proof of actual vindictiveness, and therefore that "[t]he conviction in this case may be reversed only if a presumption of vindictiveness—applicable in all cases—is warranted." *Id.* at 380-81.

94. *Id.* at 381. The Court stated that "[t]he distinction between a bench trial and a jury trial does not compel a special presumption of prosecutorial vindictiveness whenever additional charges are brought after a jury is demanded." *See id.* at 383.

95. *See id.* at 381 ("Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.").

perception of improper vindictiveness would not work well in the pretrial setting. More telling than the Court's holding was its rejection of actual good faith as a ground for upholding the conviction.⁹⁶ In response to the defendant's motion in the trial court, the second prosecutor submitted an affidavit outlining his reasons for increasing the charges, making the assertion that his "decision to seek a felony indictment was not motivated in any way by Goodwin's request for a jury trial in the District Court."⁹⁷ The trial court found the affidavit had eliminated the appearance of vindictiveness but the court of appeals applied the prophylactic rule of *Blackledge* and reversed the conviction.⁹⁸ Rather than adopt the district court's factual findings, the Supreme Court rejected expressly any attempt to ascertain the prosecutor's motives for bringing charges. The Court stated:

The imposition of punishment is the very purpose of virtually all criminal proceedings. The presence of a punitive motivation, therefore, does not provide an adequate basis for distinguishing governmental action that is fully justified as a legitimate response to perceived criminal conduct from governmental action that is impermissible response to noncriminal, protected activity. *Motives are complex and difficult to prove.*⁹⁹

Goodwin supports the proposition that some measure of vindictiveness on the prosecutor's part is acceptable in a criminal proceeding.¹⁰⁰ Asking whether a

96. As Professor Schwartz notes:

Essentially the same facts that the majority interpreted as removing a reasonable likelihood of vindictiveness could have been viewed as providing sufficient objective evidence to dispel any initial likelihood of vindictiveness. Given the nature of the evidence available to the prosecutor and his reasons for enhancing the charges, the Court could have reversed the Fourth Circuit without significantly undermining the *Pearce-Blackledge* doctrine and its underlying premises.

See Schwartz, *supra* note 84, at 183.

97. *Goodwin*, 457 U.S. at 371 n.2. I think it would have been surprising had the prosecutor said something different.

98. *See id.* at 371-72.

99. *Id.* at 372-73 (emphasis added). While *Goodwin* rejected the circuit court's conclusion that the government acted with improper vindictiveness, it did agree with the lower court's statement that the prophylactic rule of *Blackledge* was "designed to spare courts the unseemly task of probing the actual motives of the prosecutor in cases where objective circumstances suggest a realistic possibility of vindictiveness." *Goodwin*, 475 U.S. at 372 (quoting *United States v. Goodwin*, 637 F.2d 250, 255 (1981)). *See also* *United States v. Andrews*, 633 F.2d 449 (6th Cir. 1980) (en banc). The Sixth Circuit indicated that when a court finds a presumption of vindictiveness, the government can respond with objective evidence, but stated that "we do not think that judges should pass on subjective good faith assertions by prosecutors . . . we think that only objective, on-the-record explanations can suffice to rebut a finding of realistic likelihood of vindictiveness." *See id.* at 456.

100. *See also* *United States v. Doran*, 882 F.2d 1511, 1518 (10th Cir. 1989) ("A certain amount of punitive intent . . . is inherent in any prosecution. This case presents us with the delicate task of

prosecutor's motive was improper therefore invites a response likely to be less than complete, a point the Supreme Court recognized by adopting a bright line rule in *Blackledge*, *Bordenkircher*, and *Goodwin*.¹⁰¹ The Court's decisions protected prosecutorial discretion by adopting a prophylactic rule defining, *ex ante*, what was improperly vindictive. The effect of this approach should prevent lower courts from compelling explicit statements of prosecutorial motivation, which provide fodder for the dismissal of charges or reversal of a conviction on due process grounds.

Can prosecutors *ever* be subject to a claim of acting with impermissible vindictiveness when they increase charges after unsuccessful plea negotiations or at other times before trial? The Court in *Goodwin* made it clear that the judiciary would not abdicate all authority to police the conduct of prosecutors, despite its assertion that prosecutorial motives are irrelevant. At the end of the opinion, the Court noted that "we of course do not foreclose the possibility that a defendant in an appropriate case might prove objectively that the prosecutor's

distinguishing between the acceptable "vindictive" desire to punish Doran for any criminal acts, and "vindictiveness" which violates due process."); C. Peter Erlinder & David C. Thomas, *Prohibiting Prosecutorial Vindictiveness While Protecting Prosecutorial Discretion: Toward a Principled Resolution of a Due Process Dilemma*, 76 J. CRIM. L. & CRIMINOLOGY 341, 387-88 (1985) ("The issue in the prosecutorial vindictiveness doctrine is differentiating between punitive motives that are improper under the law and those that are not.").

101. See Schwartz, *supra* note 84, at 195-96 ("Following the Court's decisions in *Bordenkircher* and *Goodwin*, words like 'vindictiveness' and 'penalty' . . . are terms of art that denote forbidden practices. If the practice is not forbidden, it cannot be considered vindictive or a penalty, even if it is retaliatory or imposes cost on the assertion of a right."). In two later decisions, *Thigpen v. Roberts*, 468 U.S. 27 (1984), and *Wasman v. United States*, 468 U.S. 559 (1984), the Court stated that if the presumption of vindictiveness applies, the sentencing judge or the prosecutor can rebut it with objective evidence. See *Thigpen*, 468 U.S. at 32 n.6 ("[W]e note that the *Blackledge* presumption is rebuttable."); *Wasman*, 468 U.S. at 569 ("[W]here the presumption applies, the sentencing authority or the prosecutor must rebut the presumption that an increased sentence or charge resulted from vindictiveness."). In much the same sense that courts will not renounce authority to review a prosecutorial decision based on an improper motive, courts also wanted to avoid a hard-and-fast rule prohibiting any increased charges after a successful appeal. But courts do not explain what objective evidence could rebut the *Blackledge* presumption, nor how the government can provide "objective" evidence that does not involve the prosecutor rationalizing a decision and asserting good faith.

The courts allow prosecutors to rebut the presumption of vindictiveness because courts do not want to close the door to a prosecutor furnishing proof that justifies a new charge, such as the unexpected discovery of previously unknown physical evidence or the appearance of a new witness. It is highly unlikely, however, that a defendant faced with *new* evidence that results in more serious charges brought after a successful appeal has the slightest apprehension that the government acted with improper vindictiveness. In that instance, a court would likely find that the presumption should not apply because of the lack of apprehension, not that the government has rebutted the presumption. When the prosecutor files higher charges after a successful appeal without any new evidence, the classic *Blackledge* situation, there is no objective evidence the government can provide that would justify the increased exposure in the second proceeding. Therefore, it would seem difficult to imagine a situation in which a prosecutor could rebut the presumption of vindictiveness.

charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do."¹⁰² For the Court to state otherwise would give prosecutors free reign to retaliate against a defendant's assertion of rights without fear of reprisal.¹⁰³ The Court, however, did not describe what "objective" evidence might establish a case of actual vindictiveness.¹⁰⁴ *Bordenkircher* permitted retaliation against a defendant for rejection of a plea offer, while *Goodwin* held that an increase in charges after the pre-trial assertion of a constitutional right did not invoke a presumption of improper vindictiveness.¹⁰⁵ Therefore, courts cannot compel the government to explain its

102. *Goodwin*, 457 U.W. at 384.

103. The Court's recognition that objective evidence might support a claim that the prosecutor harbored an improper motive leaves open the question of whether a defendant can obtain discovery to determine the prosecution's intent. Permitting defendants to rummage through the government's files or call prosecutors assigned to their cases for cross-examination raises troublesome issues. Any real inquiry into vindictiveness, however, would require discovery. See Erlinder & Thomas, *supra* note 100, at 395 (stating that courts must allow thorough discovery in vindictive prosecution cases). In *United States v. Adams*, 870 F.2d 1140 (6th Cir. 1989), the Sixth Circuit ordered discovery of the government's motives because "there is enough smoke here, in our view, to warrant the unusual step of letting the defendants find out how this unusual prosecution came about." *Id.* at 1146. The "smoke" in *Adams* was the possible retaliation by the Equal Employment Opportunity Commission in referring a case to the United States Attorney that involved a defendant who had previously worked for the Commission and had filed a sex discrimination lawsuit against the agency. See *id.* at 1144-46. The Sixth Circuit did not find that a presumption of vindictiveness applied, but found enough evidence of possible actual vindictiveness to order discovery. See *id.* at 1146. The problem with ordering discovery is that it draws the court into the very assessment of motives that *Goodwin* and *Bordenkircher* sought to avoid. Absent clear evidence of prosecutorial animus based on the defendant's exercise of a right, discovery should not be permitted. See *United States v. Heidecke*, 900 F.2d 1155, 1159 (7th Cir. 1990) ("[W]e must guard against allowing claims of vindictive prosecution to mask abusive discovery tactics by defendants.") The existence of such objective evidence of improper vindictiveness makes the need for discovery less important to the ultimate resolution of the due process claim. The Supreme Court has recognized the problem of permitting wide ranging discovery in the context of selective prosecution claims by establishing a very high threshold for permitting discovery to avoid allowing defendants to probe into prosecutorial motives. See *infra* Part II.B.

104. Courts have found evidence of negligence or evidence that a prosecutor failed to fully prepare a case sufficient to rebut the presumption. For example, in *Paradise v. CCI Warden*, 136 F.3d 331 (2d Cir. 1998), the Second Circuit found the presumption of vindictiveness rebutted when the government's failure to charge the defendant with a greater offense until after the state supreme court barred charges for less serious offenses resulted from its failure to fully analyze the law, noting that "[w]e should not allow the doctrine of prosecutorial vindictiveness to be invoked . . . to require application of some hypothetical presumption of prosecutorial infallibility, and to require the release of a guilty defendant every time a prosecutor stumbles into an inadvertent pleading error." *Id.* at 336 n.7. In *Gardner v. State*, 963 S.W.2d 590 (Ark. 1998), the Arkansas Supreme Court found that the government's explanation that it did not seek evidence of a defendant's prior convictions until the week before trial rebutted a prima facie case of prosecutorial vindictiveness when it sought to use a sentencing enhancement provision after the defendant successfully had his guilty plea vacated on collateral attack. The court held that the prosecutor's conduct constituted prima facie vindictiveness, see *id.* at 596, but held that the prosecutor's statement that "a lot of times" he did not completely review a case "until just before trial" satisfactorily disproved vindictiveness. *Id.* at 597.

105. Similarly, in *Corbett v. New Jersey*, 439 U.S. 212 (1978), the Court upheld a statutory scheme under which a defendant could only receive a reduced sentence by pleading guilty to the charge. See *id.* at

motive for increasing charges in the absence of a presumption of vindictiveness, which appears to apply only in a second proceeding *after* either a conviction or a mistrial.¹⁰⁶ Without the ability to seek discovery of the government's motives in the pre-trial phase, the defendant's objective evidence would probably have to consist of a prosecutor's explicit admission that the government retaliated against the defendant solely because of the assertion of a constitutional or statutory right to which the government had no principled basis to object.¹⁰⁷ The temporal sequence of the defendant's assertion of a right followed by the filing of additional charges would not demonstrate objectively that the prosecutor had an improper purpose. Rather, the evidence must show the government's unreasonable motivation by establishing a direct link between the retaliatory response and the defendant's exercise of a right.¹⁰⁸ Outside of the post-trial

226. The Court asserted that precedent "unequivocally recognize[s] the constitutional propriety of extending leniency in exchange for a plea of guilty and of not extending leniency to those who have not demonstrated those attributes on which leniency is based." *Id.* at 224.

106. Increased charges after a mistrial do not appear to be as questionable as increases after an appellate court reverses a conviction or sentence. *See* Lane v. Lord, 815 F.2d 876, 879 (2d Cir. 1987). In *United States v. King*, 126 F.3d 394 (2d Cir. 1997), after a mistrial, the grand jury issued a superseding indictment adding the lone defendant's corporation as a co-defendant as a response to his defense at the first trial that the corporation was responsible for the violation and he did not have direct knowledge of the allegedly illegal activity. *Id.* at 397-98. The Second Circuit applied a presumption of vindictiveness to the government's actions without noting that the entire vindictiveness issue was irrelevant because neither defendant was the target of any vindictive intent, at least as the Supreme Court had defined the analysis. If the individual defendant claimed adding a defendant violated his due process right, that would not amount to the vindictiveness which the Supreme Court recognized as impermissible because there was no increase in charges against the individual. Similarly, if the claim was that the superseding indictment violated the corporation's rights, there was no *increase* in the charges, only the institution of charges against the corporate defendant. There was no prior assertion of a right by the corporation that could trigger a vindictive response, so indicting the corporate entity could not be vindictive. While the government in *King* certainly sought to gain an advantage from the earlier, aborted trial, its actions did not meet the prerequisites for a vindictive prosecution claim by either defendant.

107. *See* Erlinder & Thomas, *supra* note 100. The authors note:

[I]f the prima facie case required in a challenge to vindictive prosecutorial acts is more than a recitation of the objective factual predicates . . . together with a general assertion of improper motive, only a defendant who can allege the existence of an admission in a 'smoking gun' memo will be able to survive a motion to dismiss. Under this construction, courts would be prevented from reviewing *any* prosecutorial impropriety that was not open and notorious. Thus, prosecutors would be quite free to take actions that were vindictive in fact without the possibility of judicial oversight unless they openly admitted their improper motive.

See id. at 394-95 (emphasis in original). *See also* Murray R. Garnick, Note, *Two Models of Prosecutorial Vindictiveness*, 17 GA. L. REV. 467, 471 (1983) ("A successful [vindictive prosecution] defense often depends upon the prosecutor's willingness to admit his illegitimate motives in court.").

108. *See* *United States v. Bullis*, 77 F.3d 1553, 1559 (7th Cir. 1996) ("[T]here is no evidence to suggest that the relatively quick entry of the superseding indictment following the successful motion to transfer was anything more than a temporal coincidence."); *United States v. Miller*, 948 F.2d 631, 634 (10th Cir. 1991) ("[A]s a policy matter, we find a presumption of vindictiveness based on timing alone unsound as it could easily be abused."). An example of the type of evidence that might establish actual

setting, the prophylactic rule does not prohibit the prosecutor from increasing charges, regardless of how questionable the timing of the government's decision might seem.¹⁰⁹

One can ask quite fairly whether a prosecutor would ever admit vindictiveness, but this problem did not concern the Court in *Goodwin*.¹¹⁰ The possibility always exists that a government official will announce that the prosecutor's office acted to retaliate against the defendant's assertion of a constitutional right,¹¹¹ at which point the Court does not want to leave the

vindictiveness in the pre-trial context can be found in *State v. Halling*, 672 P.2d 1386 (Or. Ct. App. 1983). In *Halling*, the Oregon Court of Appeals found a prosecutor's statement to defense counsel, after the collapse of plea negotiations, that "I have a brilliant idea. I have just thought of a way to cause further evil to poor Mr. Halling" constituted objective evidence of actual prosecutorial vindictiveness. *See id.* at 1388. Absent the prosecutor's obnoxious threat to defense counsel, the court would have had no basis under *Bordenkircher* and *Goodwin* to conclude that the prosecutor's subsequent filing or additional charges violated the defendant's due process rights.

109. Lower court decisions have permitted the government to increase or add charges in a variety of situations in which the prosecutor's intent was clearly punitive. For example, indicting a defendant on new charges after an acquittal on charges involving the same underlying conduct would seem to be a vindictive response, in that the government seeks to punish the defendant even though it failed to prove his guilt beyond a reasonable doubt in a prior proceeding. Unless the second prosecution violates the constitutional double jeopardy prohibition, however, a second indictment following an acquittal does not invoke the presumption of vindictiveness. *See United States v. Wall*, 37 F.3d 1443, 1449 (10th Cir. 1994) ("[T]he acquittal itself cannot form the basis for a charge of prosecutorial vindictiveness."); *United States v. Esposito*, 968 F.2d 300, 303-04 (3d Cir. 1992) ("Where . . . the prosecutor has done nothing to deter the exercise of one's right during the [prior] case or proceeding, and the prosecution has come to a natural end, no presumption of vindictiveness applies."); *United States v. Martinez*, 785 F.2d 663, 670 (9th Cir. 1986) ("Assuming, arguendo, that the sole motive for bringing the Arizona indictment was the Colorado acquittal . . . such a motive should not raise the presumption of vindictiveness. It is a legitimate prosecutorial consideration."). Courts have also found that the presumption of vindictiveness does not apply when, after a mistrial, the government adds an additional charge that does not increase the potential penalty, in order to provide a basis for the admission of evidence excluded at the first trial. *See Lane v. Lord*, 815 F.2d 876, 879 (2d Cir. 1987) ("The choice facing the defendant when a jury reports a deadlock involves too much speculation for us to conclude that the prospect of an increased chance of conviction at retrial . . . would impair the defendant's opportunity to seek a mistrial. A presumption of vindictiveness did not arise in this case."). *But see United States v. D'Alo*, 486 F.Supp. 954, 960 (D.R.I. 1980) (granting motion to dismiss charges added after mistrial because the new charges, which increased the probability of conviction, constituted a penalty for the defendant's exercise of his constitutional right to a fair trial. Even the government's negligence in failing to file charges for which it had sufficient information before the first trial that resulted in an acquittal is insufficient to raise the presumption of vindictiveness). *See United States v. Rodgers*, 18 F.3d 1425, 1431 (8th Cir. 1994) (holding that there was no reasonable likelihood of vindictiveness when, although the evidence necessary to indict on the added charge was available to agents before first indictment, and "[w]hile this might indicate a lack of preparation on the part of the prosecution, it does not indicate a reasonable likelihood of a vindictive motive").

110. *See Erlinder & Thomas, supra* note 100, at 429 ("[R]ather than setting out standards that would aid prosecutors in effectively fulfilling their obligations, *Goodwin* is an indication that the Court may be willing to 'solve' the problem by reducing judicial oversight of the prosecutorial function.")

111. *See, e.g., United States v. Cady*, 955 F.Supp. 164, 167 (N.D.N.Y. 1997) (suggesting that the prosecutor's letter to defense counsel threatening to indict defendant on additional charges "as a result of your client's most recent tactic" of collaterally attacking his prior guilty plea constituted evidence of

judiciary powerless to provide redress. Short of a clear admission of an improper motive linked directly to the defendant's assertion of a right, however, *Blackledge*, *Bordenkircher*, and *Goodwin* render the actual intent of the prosecutor irrelevant to deciding whether the prosecutor's actions raise a realistic probability of improper vindictiveness.¹¹²

B. Selective Prosecution: You Can't Get There From Here

A vindictive prosecution claim puts a court in an uncomfortable position because it pits the prosecutor's broad discretion against the judicial function of ensuring justice rather than simply serving as a rubber stamp for the executive branch. A claim of selective prosecution, on the other hand, permits judges to wax eloquent about the need for fair administration of justice under the Equal Protection Clause's clear limit on a prosecutor's discretion. The Supreme Court has noted on more than one occasion that "a prosecutor's discretion is 'subject to constitutional constraints,'"¹¹³ and a prosecution "based upon 'an unjustifiable standard such as race, religion or other arbitrary classification'" cannot be permitted.¹¹⁴ The constitutional pedigree of the Equal Protection Clause's prohibition on selective prosecutions is impeccable, reaching back to the Court's 1886 decision in *Yick Wo v. Hopkins*.¹¹⁵ That case overturned the denial of a writ of habeas corpus for a defendant who suffered from the sheriff's enforcement of a municipal ordinance only against laundries owned by Chinese-Americans and not others. *Yick Wo*'s language has become the standard for measuring unequal application of a law:

Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the

actual vindictiveness); *State v. Halling*, 672 P.2d 1386, 1388 (Or. Ct. App. 1983) (indicating that prosecutor's statement linking new charges to defendant's refusal to plead guilty effectively admitted vindictive motive).

112. Professor Reiss notes that, after *Bordenkircher* and *Goodwin*, "it is simply unclear what actual prosecutorial vindictiveness is . . . Thus, many entirely legitimate prosecutorial actions could be said to be punitively or retaliatorily motivated." Reiss, *supra* note 26, at 1387.

113. *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *United States v. Batchelder*, 442 U.S. 114, 125 (1979)).

114. *Id.* (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

115. 118 U.S. 356 (1886).

constitution.¹¹⁶

In the late 1960s, the selective prosecution door opened briefly, when four lower court decisions found that the government had based its decision to prosecute on improper criteria. The cases are interesting mainly for their historical character, revealing that judges were caught up in the political tenor of the era; three of these cases involved acts of civil disobedience and one reflected the growing perception that law enforcement agents used overwrought investigatory tactics against fringe groups.¹¹⁷

In *United States v. Falk*,¹¹⁸ the Seventh Circuit reversed the conviction of a draft resistance leader for selective service violations.¹¹⁹ The court was troubled by the apparent selection of the defendant for his protest activities, finding the circumstances suspect because a number of high-ranking Department of Justice officials reviewed and approved the decision to bring charges.¹²⁰

Similarly, in *United States v. Crowthers*,¹²¹ the Fourth Circuit overturned convictions for creating a disturbance at the Pentagon during a prayer service protesting the Vietnam war.¹²² The court found an Equal Protection violation because the government had not prosecuted participants in sixteen other events that had been sanctioned by the government but had the same disruptive effect as the defendants' conduct.¹²³

In *United States v. Steele*,¹²⁴ the Ninth Circuit overturned the conviction of an anti-government activist for refusing to fill out a census form when the government could not show any other defendants who had been charged with the same crime, asserting that “[a]n enforcement procedure that focuses upon

116. *Id.* at 373-74.

117. Involvement in anti-war activities, however, did not insulate one from criminal prosecution, as shown by the successful prosecutions of Philip Berrigan and Elizabeth McAlister, two prominent activists. *See United States v. Berrigan*, 482 F.2d 171 (3d Cir. 1973) (upholding conviction for smuggling items into federal prison after trial in which district court refused to permit defendants to call prosecutors as witnesses to establish selective prosecution defense).

118. 479 F.2d 616 (7th Cir. 1973) (en banc).

119. *See id.* at 624.

120. *See id.* at 622 (“It is difficult to believe that the usual course of proceedings in a draft case requires such careful consideration by such a distinguished succession of officials prior to a formal decision to prosecute.”). It is equally difficult to comprehend how careful review of a case demonstrates improper selectivity in the exercise of prosecutorial discretion. Such a process should *diminish* the possibility of unfair use of authority, not increase it.

121. 456 F.2d 1074 (4th Cir. 1972).

122. *See id.* at 1081.

123. The court stated, “In choosing whom to prosecute, it is plain that the selection is made not by measuring the amount of obstruction or noise but because of governmental disagreement with ideas expressed by the accused.” *Id.* at 1079.

124. 461 F.2d 1148 (9th Cir. 1972).

the vocal offender is inherently suspect.”¹²⁵

Finally, in *United States v. Robinson*,¹²⁶ a district court overturned the conviction of a private detective for using an illegal wiretap because government agents had systematically violated the same statute in investigations of left-wing organizations without ever being prosecuted. The district court cited to a number of articles and books detailing governmental abuses of civil liberties through electronic surveillance, leading to the conclusion “that there has been systematic discrimination in the enforcement of the act against the defendant in this case”¹²⁷

These four cases, decided during a relatively brief period of significant political turmoil, represent the sum total of reported selective prosecution cases decided in a defendant’s favor. The virtual impossibility of proving a selective prosecution claim can be traced to the sentiment expressed in *Oyler v. Boles*,¹²⁸ in which the Supreme Court recognized that “the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation.”¹²⁹ While recent decisions reaffirm the constitutional prohibition on unequal application of the law in deciding who to prosecute, the Court also has eliminated any meaningful judicial inquiry into the prosecutor’s actual motivations. Although grounded on different constitutional provisions, the conclusions reached in selective and vindictive prosecution cases are strikingly similar: the Court will not compel prosecutors to justify their decisions by forcing them to disclose the reasons for charging a defendant because those statements are unlikely to furnish any useful information and may in fact be less than forthright.

In *Wayte v. United States*,¹³⁰ the Court showed a decided lack of sympathy toward equal protection claims involving the exercise of prosecutorial discretion, adopting an approach that diminished significantly a defendant’s chance of success in raising a claim that the prosecutor singled him out for criminal charges based on an impermissible criterion. The Court in *Wayte*, revealing how attitudes had changed since the Vietnam war era, reinstated the indictment of a defendant who refused to register for the draft despite evidence that the government selected him for prosecution under a policy that made vocal

125. *Id.* at 1152.

126. 311 F.Supp. 1063 (W.D. Mo. 1969).

127. *Id.* at 1065.

128. 368 U.S. 448 (1962).

129. *Id.* at 456.

130. 470 U.S. 598 (1985).

proponents of non-registration more likely to be charged.¹³¹ The Court held that, to demonstrate selective prosecution, a defendant must show that the government's decision "had a discriminatory effect and that it was motivated by a discriminatory purpose."¹³² Proof of discriminatory intent required a defendant to demonstrate "that the government prosecuted him because of his protected activities," not just that his involvement in protected speech was one reason for the decision to prosecute.¹³³ In imposing a high threshold for proof of a selective prosecution claim, the Court emphasized the problem with judicial scrutiny of the government's reasons for choosing to pursue a particular defendant. The Court stated that "[e]xamining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy."¹³⁴

The burden established by *Wayte* for a selective prosecution claim was heavy but certainly not insurmountable if defendants had some means of ascertaining the prosecutor's motives. The Court, however, made ascertaining prosecutors' motives nearly impossible in *United States v. Armstrong*.¹³⁵ The *Armstrong* Court virtually ruled out the availability of discovery to determine whether an impermissible criterion supplied the primary reason for selecting the defendant. The district court dismissed an indictment for selling crack cocaine after the United States Attorney's Office refused to comply with an order requiring it to provide information regarding prosecutions for similar offenses and "to explain its criteria for deciding to prosecute the[] defendants for federal cocaine offenses."¹³⁶

131. *See id.* at 603. Moreover, the defendant was among a rather exclusive group of young men numbering less than 20 out of a total of approximately 674,000 non-registrants picked for prosecution. *See id.* at 604 & n.4.

132. *Id.* at 608.

133. *Id.* at 610 (citing *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979)). *See also* Barry Lynn Creech, Note, *And Justice for All: Wayte v. United States and the Defense of Selective Prosecution*, 64 N.C. L. REV. 385, 408 (1986) ("From the majority's equal protection analysis, it appears that a defendant must introduce a virtually direct showing of discriminatory motive to establish a prima facie case of selective prosecution.").

134. *Wayte*, 470 U.S. at 607.

135. 517 U.S. 456 (1996).

136. *Id.* at 459. The defendants had moved to dismiss the indictment because they claimed that federal prosecutors selected them because of their race. According to the defendants, the federal government prosecuted only African-Americans for crack offenses. According to information from the federal defender's office, all of the 24 crack cocaine cases defended by that office in 1991 involved a black defendant. *See id.* The government refused to comply with the discovery order, leading the district court to dismiss the indictment. *See id.* at 461.

Without considering the merits of the selective prosecution claim, the Supreme Court focused on whether the defendants had made the requisite showing to obtain discovery of the prosecution's motives. It began by noting the "background presumption" for a selective prosecution claim "that the showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims."¹³⁷ The standard adopted indeed created a significant barrier. "In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present 'clear evidence to the contrary.'"¹³⁸ *Armstrong* effectively required proof of an equal protection violation before a court could allow the defendant to engage in discovery of the prosecution's motive. Such discovery would then be used to establish the equal protection violation.

The circularity of the *Armstrong* standard could not have been lost on the Court, despite its assertion that the high threshold for establishing invidious discrimination "does not make a selective-prosecution claim impossible to prove."¹³⁹ Perhaps not impossible, but *Armstrong* makes the standard of proof necessary just to obtain discovery so rigorous that it is difficult to see how raising such a claim can be anything but an exercise in futility.¹⁴⁰ Without explicitly saying so, the Court made protection of prosecutor motives paramount to the defendant's ability to assert a selective prosecution claim.¹⁴¹

137. *See id.* at 463-64.

138. *Id.* at 465 (quoting *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926)).

139. *Id.* at 466.

140. *See* Andrew D. Leipold, *Objective Tests and Subjective Bias: Some Problems of Discriminatory Intent in the Criminal Law*, 73 CHI.-KENT L. REV. 559, 574-75 (1998) ("[T]here is no doubt that *Armstrong* cripples a defendant's ability to attack race-based decisionmaking when it occurs."); Richard H. McAdams, *Race and Selective Prosecution: Discovering the Pitfalls of Armstrong*, 73 CHI.-KENT L. REV. 605, 640 (1998) ("The *Armstrong* holding and the implications of its reasoning create a barrier to discovery that, for the great majority of criminal cases, is insuperable.") (emphasis in original); Anne Bowen Poulin, *Prosecutorial Discretion and Selective Prosecution: Enforcing Protection After United States v. Armstrong*, 34 AM. CRIM. L. REV. 1071, 1079 (1997) ("[D]espite the Court's reassuring language to the contrary, the 'control group' and 'similarly situated' requirement poses an insurmountable barrier for many defendants."); Stephen D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 683 (1997) ("Although theoretically stringent, the prohibition on discriminatory selective prosecution is largely meaningless in practice because courts require that a defendant raising such a claim prove both discriminatory effect and discriminatory intent, burdens that are all but impossible to satisfy."); Reiss, *supra* note 26, at 1373-74 ("A defendant seeking to raise a selective prosecution claim is thus placed in a Catch-22 type bind. She cannot obtain discovery unless she first makes a threshold showing . . . of selective prosecution. . . . Yet making a sufficient preliminary showing of discriminatory intent may be impossible without some discovery.")

141. *Cf.* McAdams, *supra* note 140, at 641 n.109 ("I do not think it is plausible to defend *Armstrong* by claiming that the harm of unnecessary discovery greatly exceeds the harm of undetected racially selective prosecution, unless one raises the objection to dismissal [as the remedy for a violation].")

Why is *Armstrong* so protective of the government? The answer becomes evident after one considers the effects that a lower threshold for discovery would likely produce.¹⁴² If a prosecutor were asked to state her reason for selecting a particular defendant, the answer would be unlikely to reflect a motivation based on a protected status, such as race or sex, even if such a criterion were in fact the reason for singling out the defendant for prosecution. Requiring the government to produce internal memoranda would probably be equally fruitless because it is hard to imagine an attorney committing to paper an expression of racial or sexual bias as a motivating factor in deciding to file charges.¹⁴³ The

142. Commentators have argued for a more liberal discovery standard to permit judicial review of the prosecution's intent. See Poulin, *supra* note 140, at 1107 ("A better approach than *Armstrong* would give a trial court confronted with a discovery request latitude to balance the strength of the defendant's claim against the government's need to shield its internal deliberative processes."); Robert Heller, Comment, *Selective Prosecution and the Federalization of Criminal Law: The Need for Meaningful Judicial Review of Prosecutorial Discretion*, 145 U. PA. L. REV. 1309, 1315 (1997) ("[A] prosecutor, as a fiduciary of the people, has a judicially enforceable duty in certain situations to answer a defendant's accusations of unconstitutional selective prosecution through discovery mechanisms."); Tobin Romero, Note, *Liberal Discovery on Selective Prosecution Claims: Fulfilling the Promise of Equal Justice*, 84 GEO. L.J. 2043, 2044 (1996) ("This note argues for mandatory disclosure of government documents material to a claim of selective prosecution."). Professor Clymer proposes a different approach to ensuring review of prosecutorial motives, arguing that the rational relation standard applicable to equal protection claims should apply to a federal prosecutor's decision to charge a defendant with a crime that could also be charged under state law. Clymer, *supra* note 140, at 685-86. Under this approach, a defendant charged by the United States Attorney could challenge the rationality of the federal charges, and the burden would be on the prosecutor to "disclose the classification scheme that resulted in the defendant's selection." *Id.* at 732.

Proposals to lower the threshold for discovery misunderstand the thrust of the Court's approach to selective (and vindictive) prosecution claims. If the court's goal was to allow defendants to *ferret out* any possible bias or retaliatory motive, then a more generous discovery standard would be warranted. That was not, however, the Court's design. Rather, in requiring proof of improper selection before permitting discovery, the Court sought to *eliminate* inquiry into the motives of the prosecutor much as it had sought to do in adopting a prophylactic rule that makes actual intent irrelevant in vindictive prosecution claims. The Court sought to eliminate inquiry into prosecutorial motives because of the problems attendant in giving one party in an adversary proceeding access to the other side's decision making process. Thus, the Court rejected a liberal discovery rule in *Armstrong*, even though in so doing it effectively made proving a selective prosecution claim impossible absent an explicit admission of an improper motive. Criticism of *Armstrong* on the ground that it undermines effective judicial control of prosecutorial misconduct ignores the Supreme Court's broader policy against permitting courts to compel prosecutors to justify their decisions. One can argue with that policy, but the high threshold of proof established in *Armstrong* was the product of a deliberate choice to foreclose inquiry into prosecutors' motives, and not of a misunderstanding of what the selective prosecution standard entails.

143. See Clymer, *supra* note 140, at 730 ("[E]ven if the prosecutor has consciously selected the defendant for an impermissible reason, she almost certainly will have avoided generating any tangible evidence of that intent."). Allowing discovery of internal government documents would also raise questions regarding the availability of the attorney-client privilege and work product doctrine, and whether grand jury secrecy rules permit disclosure of protected records. See Philip J. Cardinale & Steven Feldman, *The Federal Courts and the Right to Nondiscriminatory Administration of the Criminal Law*, 29 SYRACUSE L. REV. 659, 679 (1978) ("[D]iscovery [of prosecutorial records] is limited further by the work product rule, grand jury secrecy, executive privilege, and the separation of powers doctrine.").

search for motives is unlikely to produce proof of a discriminatory purpose even if one exists.

If the concern is with unconscious bias causing the improper selection of a class of defendants for prosecution, discovery will not yield any hard evidence of intent. Almost by definition, documentary evidence would not reflect the effect of unconscious discrimination in individual cases. Allowing discovery of statistics relating to prosecutorial decisions as a means to establish the discriminatory effect prong of the claim would be marginally more revealing, especially for a claim of unconscious bias. But if the bias is unconscious, it is difficult to see how the defendant could establish the actual intent necessary to show an equal protection violation using only a statistical analysis. Moreover, even if the office keeps records of the rates of prosecution of various protected groups, such records may not reflect fairly the processing of the caseload.¹⁴⁴ Recalling the adage regarding damned lies and statistics,¹⁴⁵ reporting how many potential defendants the government considered for criminal prosecution and how many cases it brought or declined can be subject to a number of differing interpretations. It would be difficult for courts to fashion a standard that permitted discovery of statistical evidence without also allowing inquiry into the prosecutor's subjective intent—the type of inquiry disapproved of by the Supreme Court in *Wayte* and *Armstrong*. The likelihood of fruitful discovery growing out of a less restrictive standard may not be sufficient to warrant relaxing the *Armstrong* rule, given the incentive such a standard would give to prosecutors to create documents that serve only to justify their decisions in the event a judge starts questioning their motives.

Does *Armstrong* mean that a successful selective prosecution case will never be brought? None have succeeded since the early 1970s, although there may have been instances in which the government agreed to dismiss a case because

144. There is no uniform requirement that prosecutors' offices keep statistics on the disposition of cases, and it may be hard to define when a person is considered a suspect in a case for record keeping purposes. Proposals to grant defendants greater access to government information regarding the decision to prosecute rely on imposing such a refinement. See Leipold, *supra* note 140, at 560 (“[O]ne of the easiest steps to take would be to have the government gather precise data on the size and scope of the correlation between race and crime.”); Poulin, *supra* note 140, at 1120 (“The government should be required to maintain and publish additional information.”); Romero, *supra* note 142, at 2069 n.164 (“In many cases, there will be little evidence to disclose because few prosecutors' offices . . . keep statistics regarding nonprosecuted offenders. For [the] rule [allowing greater discovery in selective prosecution cases] to be most effective, the legislature should require prosecutors' offices to maintain guidelines, written reasons, and statistics regarding nonprosecuted offenders.”).

145. “There are three kinds of lies: lies, damned lies and statistics.” Benjamin Disraeli (as attributed to him by Mark Twain in his autobiography) (quoted in OXFORD DICTIONARY OF QUOTATIONS 249 (4th ed. 1992)).

of the appearance of an illegal bias in the decision to prosecute. As with vindictive prosecutions, a successful selective prosecution case will require the defendant to produce an admission by the prosecutor that an impermissible criterion played a significant role in the decision to prosecute and that it was the type of “but for” reason referenced in *Wayte*.¹⁴⁶ In that event, however, additional discovery of the prosecutor’s motives is of minimal importance because the key piece of information is already available to show both discriminatory effect and discriminatory purpose. Absent such proof, the Court has made discovery of the reason for the selection virtually impossible.

III. PROSECUTORIAL MISCONDUCT AND EVIDENCE OF GUILT

Once the prosecutor files charges or the grand jury indicts a person, a host of constitutional rights govern the conduct of the proceedings and the assistance the government must provide to the defense. Under the Sixth Amendment, the government must inform the defendant “of the nature and cause of the accusation,” provide counsel for the accused, try the case before “an impartial jury of the State and district wherein the crime shall have been committed,” and furnish to the defendant “compulsory process for obtaining witnesses in his favor.”¹⁴⁷ Moreover, the Fifth Amendment affords two of the most prominent protections for criminal defendants during trial. The defendant cannot “be compelled . . . to be a witness against himself,” and under the Due Process Clause, the government bears the burden of proving all elements of the offense beyond a reasonable doubt.¹⁴⁸

While the Constitution grants a plethora of rights to defendants as the prosecutor pursues a conviction, there is a significant gap in the constitutional protection. Although the Constitution gives defendants the right to compel witnesses to appear at trial and to confront those who testify for the government, there is no affirmative constitutional right to discovery of the prosecution’s

146. Even an admission by the investigating agent regarding a discriminatory reason for referring or recommending a matter for criminal prosecution is not enough to justify dismissal of an indictment. *See United States v. Hastings*, 126 F.3d 310, 314 (4th Cir. 1997) (“We will not impute the unlawful biases of the investigating agents to the persons ultimately responsible for the prosecution.”); *United States v. Monsoor*, 77 F.3d 1031, 1035 (7th Cir. 1996) (“[A]nimus of a referring agency is not, without more, imputed to federal prosecutors.”).

147. U.S. CONST. amend. VI.

148. U.S. CONST. amend. V. In *In re Winship*, 397 U.S. 358 (1970), the Court stated, “Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” *Id.* at 364.

evidence *before* trial to prepare one's defense.¹⁴⁹ In *Moore v. Illinois*,¹⁵⁰ the Court stated that there was "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case."¹⁵¹ While state and federal rules grant defendants varying degrees of discovery of the government's case, the lack of any explicit constitutional guarantee to a minimum level of access to the government's evidence subjects defendants to the vagaries of the legislative process. Deference to the legislature's prerogative to define the appropriate rules for discovery reflects the common law rule that the judiciary's inherent authority does not encompass ordering pretrial discovery in a criminal proceeding.¹⁵²

Discovery is just one aspect of the relationship of the prosecutor to the evidence that will convict or acquit the accused. Prosecutorial inaction can result in the loss of evidence that a defendant may consider critical to mounting a defense to the charges. Over time, the Supreme Court has fashioned rules to govern the prosecutor's duty to preserve and disclose evidence, despite never recognizing an explicit constitutional right to discovery in a criminal case.

The genesis of the Court's treatment of the prosecutor's disclosure duty came through a series of cases dealing with the seemingly unrelated issue of governmental use of fabricated evidence. In *Mooney v. Holohan*,¹⁵³ the Court first confronted prosecutorial misconduct relating to the use of false evidence by considering whether the introduction of false evidence violated the defendant's due process rights even in the absence of an affirmative right to discovery. The *Mooney* Court easily concluded that the use of false evidence was unfair,¹⁵⁴ but had no occasion to address the harder question of whether a prosecutor would violate due process by hiding evidence rather than fabricating it. The due process right that prevents the use of false evidence ultimately led to the seminal decision in *Brady v. Maryland*,¹⁵⁵ in which the Court recognized a broader due process right to disclosure in every criminal case to prevent prosecutorial misconduct in suppressing evidence favorable to the defense.¹⁵⁶

Thus, while a defendant technically still has no constitutional right to

149. See *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case.").

150. 408 U.S. 786 (1972).

151. *Id.* at 795. See also *United States v. Bagley*, 473 U.S. 667, 675 (1985) ("[T]he prosecutor is not required to deliver his entire file to defense counsel.").

152. See LAFAVE & ISRAEL, *supra* note 24, § 20.1(a).

153. 294 U.S. 103 (1935).

154. See *id.* at 112-13.

155. 373 U.S. 83 (1963).

156. See *id.* at 86-87.

discovery, *Brady* held that due process requires a prosecutor to disclose exculpatory evidence in its possession that is both material and favorable to the accused regarding either guilt or punishment.¹⁵⁷ The Court's reliance on the Due Process Clause provided a powerful vehicle for defendants seeking to impose constraints on prosecutors' allegedly improper uses and abuses of evidence. Not surprisingly, since *Brady*, the Court has groped to establish the contours of this aspect of due process, much as it did in the context of vindictive prosecutions claims. The question of prosecutorial intent played a significant role in the Court's consideration of the limits imposed by due process on governmental actions that affect the defendant's right both to learn what the government knows and to impose on prosecutors a duty to preserve evidence that might be useful to the defense.

A. *The Knowing Use of Perjured Testimony*

The application of the due process protection to discovery of the prosecution's evidence traces its roots to *Mooney v. Holohan*,¹⁵⁸ a case in which the defendant, a labor agitator, filed a petition for a writ of habeas corpus alleging that the government violated his constitutional rights by introducing false evidence that he detonated a bomb in a crowd in San Francisco.¹⁵⁹ Although the Court rejected the petition on procedural grounds, it paused to note that due process could never be satisfied "through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured."¹⁶⁰ Because the Court did not grant the defendant any relief, it did not need to consider what test should apply to determine whether the government violated due process in presenting false testimony.

Similarly, in *Pyle v. Kansas*,¹⁶¹ the Court implied that using false testimony violated due process, in reviewing an allegation that the government used perjured testimony to convict the defendant. As in *Mooney*, the defendant sought a writ of habeas corpus based on the prosecutor's intentional use of perjury to

157. *See id.* at 87.

158. 294 U.S. 103.

159. For a discussion of the facts underlying *Mooney*, see Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136, 136 (1964). A later investigation of the *Mooney* prosecution found that the government's witnesses had lied at the instigation of the San Francisco District Attorney. *Id.*

160. 294 U.S. at 112.

161. 317 U.S. 213 (1942).

obtain a conviction.¹⁶² The Court, however, only found that the defendant's allegations, if true, would support granting the writ, and did not discuss due process beyond a perfunctory acknowledgment of the protection.¹⁶³ The Court's references in *Mooney* and *Pyle* to testimony "known to be perjured" and false evidence "knowingly used" indicated that the prosecutor's knowledge, and not just that of the lying witness, was important to determining whether the defendant's due process right had been violated.¹⁶⁴

Mooney and *Pyle* involved allegations that the government manufactured evidence by having its witnesses testify falsely to convict innocent men. *Alcorta v. Texas* stated that false testimony includes not only affirmative misstatements, but also the failure of a witness to be entirely truthful.¹⁶⁵ The defendant in *Alcorta* offered a "heat of passion" defense to a charge of murdering his wife, contending that he became enraged when he saw her kissing one Castilleja in a parked car.¹⁶⁶ At trial, Castilleja testified that he was just a friend of the defendant's wife and was dropping her off at home after work.¹⁶⁷ After trial, Castilleja admitted to having had a sexual relationship with the wife, and that the prosecutor "told him he should not volunteer any information about such intercourse but if specifically asked about it to answer truthfully."¹⁶⁸ The Court reversed *Alcorta*'s conviction because the testimony created a "false impression," and because the prosecutor allowed the witness to testify knowing the actual relationship of the parties but never disclosing it to the defendant or eliciting the truth at trial.¹⁶⁹ Similarly, in *Napue v. Illinois*,¹⁷⁰ the Court reviewed the prosecutor's knowing use of perjured testimony that created a misleading impression of the witness' potential bias. The government's principal

162. *See id.* at 215-16.

163. The defendant in *Pyle* also alleged that the government had suppressed favorable evidence, *see id.* at 214, and the Court did not distinguish between knowing use of perjured testimony and governmental suppression of favorable evidence. It is unclear whether *Pyle* held that these claims in combination established a constitutional violation, or whether either one would be sufficient to establish a constitutional violation.

164. In *Mesarosh v. United States*, 352 U.S. 1 (1956), the Court relied on its supervisory power to reverse a conviction and grant a new trial based on the perjured testimony given by a government witness even though there was no suggestion that the prosecutor knew the witness testified falsely during the trial. *See id.* at 9 ("The dignity of the United States government will not permit the conviction of any person on tainted testimony.").

165. 355 U.S. 28 (1957).

166. *See id.* at 28-29.

167. *See id.* at 29.

168. *See id.* at 30-31. The Court noted that the prosecutor admitted to making this statement to the witness. *See id.* at 31.

169. *Id.* at 31-32.

170. 360 U.S. 264 (1959).

witness denied on both direct and cross-examination that he testified against the defendant in exchange for a recommendation of leniency at sentencing, when the prosecutor in fact had promised leniency.¹⁷¹ Emphasizing that the prosecutor knew the witness perjured himself, the Court held that due process “does not cease to apply merely because the false testimony goes only to the credibility of the witness.”¹⁷²

The prosecutor’s knowledge of the perjury was not at issue in any of these cases. *Mooney* and *Pyle* accepted the allegations of the defendants as true, while the prosecutors in *Alcorta* and *Napue* essentially admitted their knowledge of the untruthful testimony after the convictions. It is not surprising that the Court found prosecutorial misconduct when the procedural posture of the case or the government’s admissions established at the outset that the prosecutor knew of the testimony’s falsity. The more important question raised by these cases concerns why the prosecutor’s knowledge was an element of the due process analysis. Answering this question requires an understanding of the limits on the judiciary’s authority to overturn a conviction on the ground of newly discovered evidence. The perjurious nature of testimony generally does not come to light until after conviction.¹⁷³ Once discovered, the defendant may seek a new trial free from the tainted evidence if he can show that a new trial would likely produce a different result.¹⁷⁴ In *Mesarosh v. United States*,¹⁷⁵ however, the

171. *See id.* at 265.

172. *Id.* at 269. In his subsequent petition to reduce the witness’ sentence, the prosecutor stated that he had “promised” to recommend reduction in exchange for the trial testimony. *See id.* at 266. When called to testify at the hearing on Napue’s habeas corpus petition, however, the prosecutor denied that such a firm agreement had been reached, stating that his earlier statements regarding a “promise” had “probably used some language that he should not have used” *Id.* at 267.

173. The vast majority of cases in which the prosecutor uses false evidence at trial involve false testimony. Most commonly, witnesses testify falsely about their recollection of the events or fail to disclose information that would undermine their credibility. Even cases in which a prosecutor submits adulterated or counterfeited physical evidence usually involve false testimony about the nature of the item, the circumstances regarding its discovery, and its relation to the defendant’s guilt (*i.e.*, relevance). Under the Federal Rules of Evidence, the proponent of evidence must authenticate it “by evidence sufficient to support a finding that the matter in question is what its proponent claims.” FED. R. EVID. 901(a). Physical evidence is commonly authenticated through testimony. Similarly, records of a business come within an exception to the hearsay rule when a “custodian or other qualified witness” testified regarding the preparation and maintenance of the records. FED. R. EVID. 803(6). Furthermore, the government may call expert witnesses to testify about physical evidence in order to explain tests performed on the item. *See* FED. R. EVID. 702. Whether the problem is false testimony regard the witness’ recollection, failure to respond truthfully to a question, or the creation or adulteration of physical evidence, all entail perjury by a witness.

174. *See* *United States v. Young*, 17 F.3d 1201, 1203 (9th Cir. 1994) (ordering a new trial because the prosecutor used an officer’s false testimony and outcome probably would have been different absent the testimony); *United States v. Caro*, 965 F.2d 1548, 1558 (10th Cir. 1992) (denying motion for new trial because newly available testimony of co-conspirator was unlikely to change result when co-

Court noted that newly discovered evidence “which is merely cumulative or impeaching is not . . . an adequate basis for the grant of a new trial.”¹⁷⁶ Moreover, even with the revelation of perjury, a motion for a new trial based on newly discovered evidence must be made within a limited period after the entry of the final judgment of conviction.¹⁷⁷

If a defendant learns of perjury only after the period in which he may file a new trial motion, the only procedural avenue available is a collateral attack on the conviction alleging that the use of perjured testimony rose to the level of a constitutional violation. To decide the constitutional issue, a court cannot simply transform the newly discovered evidence standard for a new trial into the due process analysis. That approach would circumvent the time limits by allowing a defendant to rely on the newly discovered evidence as proof of the constitutional violation without complying with the statutory requirements. Due process must entail something greater than the standard for a new trial, *i.e.*, more than just the existence of perjured testimony. Reliance on the prosecutor’s *knowledge* of the perjury provides the additional element that raises questions regarding the fundamental fairness of the proceeding beyond just the probative value of the newly discovered evidence.¹⁷⁸ Given the lack of any real controversy regarding the prosecutors’ knowledge in the *Mooney* line of perjured testimony cases, the Court did not have to consider how much inquiry into the government’s intentions it should permit to prove a due process violation.

The knowing use of perjured testimony is probably quite rare because it

conspirator had earlier made statements inculcating the defendant). In addition to showing that a new trial would likely produce a different outcome, a defendant must show that “(1) the evidence was discovered after trial; (2) the failure to learn of the evidence at the time of trial was not due to the defendant’s lack of diligence; (3) the evidence is material to the issues involved; [and] (4) the evidence is authentic” Andrew Moriarty et al., Project, *Twenty-Sixth Annual Review of Criminal Procedure*, 85 GEO. L.J. 1463, 1464-65 (1997).

175. 352 U.S. 1 (1956).

176. *Id.* at 9 (internal quotation marks omitted).

177. *See, e.g.*, FED. R. CRIM. P. 33 (motion must be made within three years after the verdict or finding of guilt). Some states require a defendant to move for a new trial within a fairly brief period. *See, e.g.*, MICH. COMP. LAWS § 770.2 Sec. 2(1) (1982) (“[A] motion for a new trial shall be made within 60 days after entry of the judgment”). Also, the Supreme Court has held that a Texas statute providing only 30 days to file the motion based on newly discovered evidence does not violate fundamental fairness. *Herrera v. Collins*, 506 U.S. 390, 411 (1993).

178. In elaborating on the Court’s due process analysis in *Napue v. Illinois*, one student commentator notes:

[T]he [*Napue*] Court did not explain how this particular lie prejudiced the defendant. Nonetheless it held that there had been a denial of due process. The only explanation is that the Court concerned itself with the prosecutor’s conduct more than with the defendant’s harm, with a protection of the criminal process rather than with the possibility that the lie influenced the defendant’s conviction.

Note, *supra* note 159, at 138-39.

involves multiple participants who must keep their shared secret forever; ultimately, someone may reveal the truth. Absent the type of clear evidence available in *Alcorta* and *Napue*, the defendant would have a difficult time showing the prosecutor's actual intent. If the extent of the due process right concerning prosecutorial use of evidence were limited to just those clear cases that involved a knowing introduction of false testimony, then the Constitution provided only a very narrow protection. The lack of any constitutional right to discovery means that a prosecutor's intentional withholding of evidence from the defendant, which is different from perjury, would not be a constitutional violation. If a prosecutor need not provide any evidence to a defendant, then how can a knowing refusal to reveal it be improper and violate due process? The problem with limiting due process to only those cases involving false testimony was that withholding evidence can work as great an injury on the truth-seeking function of a criminal trial as perjury. The due process analysis that addressed newly discovered evidence of perjury reached only an egregious, but comparatively rare, instance of prosecutorial misconduct in the use of evidence.

B. Extending Due Process to Undisclosed Evidence

The problems in *Alcorta* and *Napue* would have been avoided had the government been required to turn over evidence of its witnesses' conflicts, *i.e.*, the personal relationship with the victim and the promise of leniency in return for testimony. Moreover, if the witnesses had never been asked the questions to which they responded falsely, there would have been no perjury to form the basis of a due process violation. The Court began to address the matter of prosecutorial suppression of relevant evidence in *Jencks v. United States*,¹⁷⁹ holding that the government had to produce written reports prepared by two informants regarding conduct involving the defendant.¹⁸⁰ The Court relied on its supervisory power, stating that justice "requires no less" than providing the defense access to the reports to decide whether they would assist in discrediting the government's witnesses.¹⁸¹ *Jencks* had a limited reach, however, because the

179. 353 U.S. 657 (1957).

180. *See id.* at 668-69.

181. *Id.* The defendant in *Jencks* had been convicted of filing a false affidavit regarding his participation in the Communist Party, and the principal witnesses were two Party members who were covert informants. *Id.* at 659. Congress overturned the Court's broad disclosure requirement shortly after the decision by adopting the Jencks Act, 18 U.S.C. § 3500 (1994), which limits disclosure of reports to only those prepared or adopted by witnesses, and then only after the witness has testified. *See* 18 U.S.C.

federal courts could not rely on their supervisory power to review instances of suppressed evidence by prosecutors in state courts.

In *Brady v. Maryland*,¹⁸² the Court expanded due process to prohibit “the suppression by the prosecution of evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment, *irrespective of the good faith or bad faith of the prosecution.*”¹⁸³ The Court relied on the *Mooney* line of cases for the proposition that applying due process to the prosecutor’s suppression of evidence “is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused.”¹⁸⁴ The opinion did not discuss why prosecutorial intent was irrelevant, even though it had been the key element in the due process analysis of perjured testimony since *Mooney*. Although unstated, the Court’s reason is clear: reliance on prosecutorial intent would create an unduly narrow rule that could make judicial ascertainment of the government’s motives paramount to an assessment of the fairness of the trial. *Brady* cited *Mooney* and its progeny to reach a result that fundamentally changed the due process analysis of prosecutorial misconduct, eschewing an assessment of prosecutorial intent for a broader review of the overall fairness of the proceeding.¹⁸⁵ By avoiding the distraction of questioning *why* the prosecutor did not reveal evidence, *Brady* signaled a substantial departure from the false testimony cases by measuring the effect of prosecutorial misconduct on the outcome of the trial without regard to either the prosecutor’s stated or actual underlying motive. Prosecutorial intent was simply irrelevant when the government’s failure to disclose exculpatory evidence made the proceeding unfair.¹⁸⁶

By eliminating prosecutorial intent as an element of the due process analysis,

§ 3500(a).

182. 373 U.S. 83 (1963).

183. *Id.* at 87 (emphasis added).

184. *Id.*

185. See Note, *supra* note 159, at 142-44. As the student commentator notes:

When courts do not concern themselves with the prosecutor’s misconduct the constitutional rationale based on fraud has no application. Instead *Brady* focuses upon prejudice to the defendant The factor which differentiates the suppression cases and gives them constitutional dimension is that they grow out of a situation which makes a fair trial for many defendants nearly impossible.

Id.

186. One student commentator has pointed out the difficulty with giving prosecutors the responsibility of determining which evidence fits the definition of materiality. See Stephen P. Jones, Note, *The Prosecutor’s Constitutional Duty to Disclose Exculpatory Evidence*, 25 U. MEM. L. REV. 735, 765 (1995) (“The tension is apparent—a prosecutor cannot decide that the failure to disclose evidence in his possession would violate due process and undermine the correctness of a guilty verdict *and* retain the good faith belief that the defendant is guilty.”) (emphasis in original).

the Court also sidestepped the problem posed by the traditional rule that defendants have no constitutional right to discovery in a criminal case. Knowledge was irrelevant to the *Brady* analysis, so the probative value of the suppressed evidence determined whether it should have been disclosed, even if a prosecutor was unaware of its existence at the time of trial.¹⁸⁷ Without so stating, *Brady* implicitly recognized a due process right to discovery, limited as it may be to only favorable evidence. The difference between *Brady* and *Mooney* is that the former required a determination of materiality that focused solely on the effect of the suppressed evidence on the fairness of the proceeding, while the latter relied on the prosecutor's intent to remove the misconduct from the newly discovered evidence rule and elevate it to a constitutional due process violation.¹⁸⁸

Did *Brady*'s materiality analysis subsume the *Mooney* line of cases, that found a due process violation based on the prosecutor's knowing use of perjured testimony? The government's failure to disclose that it knew testimony was false would be exculpatory because a prosecutor is unlikely to introduce fabricated evidence if it is not helpful to the case, or to jeopardize a prosecution when other evidence strongly favors a guilty verdict without the false testimony. The knowing use of perjured testimony would certainly meet *Brady*'s materiality requirement for a due process violation because disclosure of the fact of the perjury would have a strong negative effect on the government's case and undermine confidence in the jury's verdict.¹⁸⁹ The *Mooney* analysis therefore remains viable as a separate means of showing a due process violation.¹⁹⁰

187. See *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) (rejecting government's argument that *Brady* was not violated because only the police investigators knew about existence of exculpatory evidence).

188. But see *Reiss*, *supra* note 26, at 1413 ("Prosecutorial intent is clearly an important factor in claims that the prosecutor violated her constitutional disclosure obligations, notwithstanding the Court's seeming insistence that, as a matter of doctrine, it should be irrelevant.")

189. In *United States v. Bagley*, 473 U.S. 667 (1985), the Court gave content to the *Brady* materiality standard in holding that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* at 682. This standard essentially incorporated the harmless error analysis into the determination of whether the failure to disclose evidence rose to the level of a due process violation. Under this standard, even if the suppressed evidence were exculpatory, the proceeding was not unfair if the result would most likely have been the same had the evidence been available to the defendant. *Bagley* created a balancing test that requires courts to weigh the effect of the undisclosed evidence against the strength of the government's case to determine whether the failure to disclose rose to the level of a due process violation.

190. See *United States v. Boyd*, 55 F.3d 239, 242 (7th Cir. 1995) ("If the prosecutors did not think their cases airtight (and so they tried to bolster it improperly), this is some indication that it was indeed not airtight."). In *Brown v. Borg*, 951 F.2d 1011 (9th Cir. 1991), the prosecutor repeatedly referred to robbery as the defendant's motive for killing the victim, pointing out that the victim's wallet and jewelry were missing. See *id.* at 1012-13. As the prosecutor knew, however, the items had been given to the

Unlike *Brady*'s balancing of suppressed evidence with the strength of the government's case, knowing use of perjured testimony reaches a particularly egregious level of prosecutorial misconduct and should therefore trigger an automatic reversal of a conviction upon a finding of actual prosecutorial knowledge.¹⁹¹

*Giglio v. United States*¹⁹² highlighted the difference between the *Brady* and *Mooney* approaches. In *Giglio*, a prosecutor promised the only witness linking the defendant to the crime that the government would not prosecute him if he testified before the grand jury and at trial.¹⁹³ The witness testified on cross-examination that no promises had been made. A second prosecutor assigned to try the case, unaware of the earlier promise, asserted in closing argument that the witness received no promises in exchange for his testimony.¹⁹⁴ Because there was no evidence that the second prosecutor knew the witness had not testified

victim's family at the hospital after her death. *See id.* at 1014. Deeming the prosecutor's statements "intolerable," the Ninth Circuit upheld reversal of the conviction despite eyewitness testimony identifying the defendant as the assailant. *See id.* at 1015-16. The court reasoned that without the prosecutor's statements regarding a robbery motive "testimony identifying Brown as the murderer would at least be puzzling, and the jury might well have scrutinized such testimony more carefully." *Id.* at 1016. This was pure judicial second-guessing of the jury with nothing to support the appellate court's conclusion beyond what it surmised the jury "might well" have thought without any statement of motive. While the suppressed information did not rise to the level of materiality under *Brady*, knowing use of false evidence by the prosecutor permitted the court to find that the conviction must be reversed with no more than a minimal showing of prejudice. *Brown* illustrates the point that a prosecutor's knowing use of false evidence calls into question the government's entire case, leading courts to conclude virtually automatically that the improper evidence prejudiced the defense. As the *Boyd* court pointed out, why would a prosecutor lie so brazenly if the government's case was airtight?

191. The Court's decision in *Miller v. Pate*, 386 U.S. 1 (1967), illustrates the continuing vitality of the *Mooney* analysis after *Brady*. In *Miller*, the prosecutor exhibited "blood-stained" underwear as proof of the defendant's involvement in a murder, knowing full well that the garment had only paint stains. The Court never cited *Brady*, only the *Mooney* line of cases, for the proposition that "[t]here can be no retreat from [the] principle" that the knowing use of false evidence violates due process. *Id.* at 7. *See also* *United States v. Bagley*, 473 U.S. 667, 704-05 n.6 (Marshall, J., dissenting) ("In a case of deliberate prosecutorial misconduct, automatic reversal might well be proper. . . . A deliberate effort of the prosecutor to undermine the search for truth clearly is in the category of offenses antithetical to our most basic vision of the role of the state in the criminal process."); Barbara Allen Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1151-52 (1982) ("[T]here is frequently no real difference between the jury's hearing perjury and its failing to hear significant favorable evidence. But there is a distinction if we consider whether the prosecutor's actions constitute fair play. Acceding to perjury is like stepping over a side line . . . in violation of the rules."). In *United States v. Vozzella*, 124 F.3d 389 (2d Cir. 1997), the Second Circuit found that the prosecutor's knowing use of false evidence was "a far more serious act than a failure to disclose generally exculpatory material." *Id.* at 392.

192. 405 U.S. 150 (1972).

193. *Id.* at 150-51.

194. *Id.* at 152-53. Like *Alcorta* and *Napue*, the prosecutor who made the promise admitted that fact publicly, so the Court did not have to make any assessment of whether there was actual knowledge on the government's part.

truthfully, the Court did not apply the *Mooney* analysis. The Court found that the information was material under *Brady*, stating that with a primary government witness “evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility”¹⁹⁵ Had the second prosecutor been aware of the promise, *Mooney* would have governed the due process analysis. Under *Mooney*, proof of the requisite prosecutorial knowledge would have established on its own that the falsified evidence was material, thereby requiring reversal of the conviction without further inquiry into the effect of the perjury on the outcome or the strength of the government’s other evidence.¹⁹⁶ But since there was no proof of actual knowledge, the case came under the *Brady* materiality analysis, and prosecutorial intent was irrelevant to whether the government had a duty to disclose the information.¹⁹⁷

195. *Id.* at 154-55.

196. The Court’s analysis of *Giglio* in *United States v. Agurs*, 427 U.S. 97 (1976), supports the view that the knowing use of perjured testimony should result in an automatic reversal of the conviction. In *Agurs*, the Court found that *Giglio* and the *Mooney* line of cases had “applied a strict standard of materiality, not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process.” *Id.* at 102-03. The *Mooney* test of materiality was phrased in the language of harmless error, i.e., whether the perjured testimony “could have affected the judgment of the jury.” *Id.* at 103. The prosecutor’s knowing use of false testimony should always meet this test because it would be highly unlikely that the government, after fabricating evidence, could turn around and argue that the false evidence could not have affected the outcome. Why would an attorney risk his entire career and expose himself to a possible criminal charge to introduce false evidence that was incidental to guilt or innocence? While theoretically possible, it is highly improbable that the knowing use of perjured testimony would be harmless error. *See* *United States v. Wallach*, 935 F.2d 445, 456 (2d Cir. 1991) (“if it is established that the government knowingly permitted the introduction of false testimony reversal is ‘virtually automatic’”) (quoting *United States v. Stofsky*, 527 F.2d 237, 243 (2d Cir. 1975)).

In *United States v. Boyd*, 55 F.3d 239 (7th Cir. 1995), the Seventh Circuit stated that “[t]he knowing use of perjured testimony is not an automatic ground for a new trial. There must be some likelihood that it made a difference.” *Id.* at 243. How much likelihood is not clear, but I think the required amount is quite small. Once the prosecutorial misconduct becomes known, it taints the government’s entire case by calling into question the veracity of other witnesses. Moreover, in the cases involving the knowing use of perjured testimony, the witness giving false testimony is often the key declarant linking the defendant to the crime. It is hard to imagine a case where the prosecutor knowingly introduced false evidence or coached a witness to cover up impeachment information without raising a substantial doubt about the validity of the guilty verdict. Such a corrupt process should trigger a new trial for the defendant free from the taint of prosecutorial misconduct. As the New York Court of Appeals found in *People v. Savvides*, 1 N.Y. 2d 554 (1956) (a case relied on by the Supreme Court in *Napue*):

A lie is a lie no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. . . . We may not close our eyes to what occurred; *regardless of the quantum of guilt or asserted persuasiveness of the evidence*, the episode may not be overlooked.

Id. at 557 (emphasis added).

197. In *Kyles v. Whitley*, 514 U.S. 419 (1995), the Court reiterated the point regarding the irrelevance of actual prosecutorial knowledge of the existence of exculpatory information:

[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on

A recent case applying the *Brady* analysis shows that suppression of evidence encompasses a broader range of prosecutorial misconduct than knowing use of perjured testimony, which is limited to the use of evidence at trial. In *Wood v. Bartholomew*,¹⁹⁸ the Court held that the government's failure to disclose the results of a failed polygraph examination of two prosecution witnesses that could not have been admitted at trial for impeachment purposes did not constitute a *Brady* violation. The Court noted that "[i]f the prosecution's initial denial that polygraph examinations of the two witnesses existed were an *intentional misstatement*, we would not hesitate to condemn that misrepresentation in the strongest terms."¹⁹⁹ Although subject to condemnation, false statements by prosecutors regarding the existence of evidence made outside of a trial still fall under the *Brady* materiality analysis and not the more stringent *Mooney* approach, which only governs the use of false testimony at trial.

This special form of prosecutorial misconduct requires a court to find the prosecutor had *actual* knowledge of the falsity of the evidence submitted to the jury, not just that the trier of fact has been misled by the false evidence.²⁰⁰ In

the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see *Brady*) the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable.

Id. at 437-38 (citation omitted). In *Smith v. New Mexico Department of Corrections*, 50 F.3d 801 (10th Cir. 1995), the Tenth Circuit found that a factual dispute as to whether the prosecutor actually knew about a witness' concealment of information removed the case from the *Mooney* analysis, but that the possession of the information by a police officer brought it within the knowledge of the government for the purposes of the *Brady* analysis. *Id.* at 830-31. See also *United States v. Osorio*, 929 F.2d 753 (1st Cir. 1991). The Court in *Osorio* stated that:

It is apparent that [the information] was well known to others in 'the government,' including both the United States Attorney's Office and the FBI, which was using him as a cooperating individual. 'The government' is not a congeries of independent hermetically sealed compartments; and the prosecutor in the courtroom, the United States Attorney's Office in which he works, and the FBI are not separate sovereignties.

Id. at 760. Similarly, in *United States v. Kattar*, 840 F.2d 118 (1st Cir. 1988), the First Circuit held that the government's contradictory characterizations of evidence in different prosecutions did not constitute perjury or submission of false evidence because the characterization as such was "technically not untruthful." *Id.* at 128. Though the court castigated the prosecutors for asserting contradictory positions, the court held that "the government's inconsistent positions did not rise to the level of constitutional error" under *Brady* because a characterization of facts was not material when the defendant had the opportunity to cross-examine a witness about the inconsistency. *Id.*

198. 516 U.S. 1 (1995) (per curiam).

199. *Id.* at 5 (emphasis added).

200. It is the specific knowledge of the prosecutor who elicits the false testimony that determines whether there has been a knowing use of perjured testimony. The knowledge of other government agents is not attributable to the prosecutor, unlike within the *Brady* analysis that considers the knowledge of every member of the investigatory and prosecution team to be that of the government. See *United States v.*

United States v. Wallach,²⁰¹ however, the Second Circuit adopted a lower threshold for prosecutorial knowledge, holding that the government violated due process by using false testimony when “the government should have been on notice that [the witness] was perjuring himself.”²⁰² The court acknowledged that the government did not have actual knowledge that the witness had testified falsely, and “the record demonstrates that the prosecution did not ‘sit on its hands’ after becoming aware that [the witness] may have perjured himself”²⁰³ Nevertheless, the Second Circuit found a *Mooney* violation because it appeared that “the prosecutors may have consciously avoided recognizing the obvious,” *i.e.*, that the witness lied.²⁰⁴ *Wallach* overlooked the key to the due process analysis involving the knowing use of perjured testimony, that the prosecutor’s actual knowledge distinguished the case from *Brady*, which covers a broader range of conduct by considering only the effect of undisclosed evidence on the trier of fact. The fact that the government did not affirmatively know that its witness testified falsely, even if the prosecutor had reason to suspect it, should not permit reversal without determining the materiality of the false testimony under *Brady*.²⁰⁵

Injecting a negligence standard, even gross negligence as the Second Circuit adopted in *Wallach*, raises the specter of judicial inquiry into prosecutorial motives as an element of the due process analysis. That is exactly what *Brady* and *Mooney* avoided in reviewing prosecutorial misconduct in relation to the evidence of guilt. *Brady* made prosecutorial intent irrelevant, while the *Mooney* line of cases required clear proof of the prosecutor’s actual knowledge of the

Noriega, 117 F.3d 1206, 1220 (11th Cir. 1997) (“Noriega points to no evidence that the government had actual knowledge of the alleged payment by the Cali Cartel”); *United States v. Steinberg*, 99 F.3d 1486, 1490-91 (9th Cir. 1996) (holding that government’s failure to disclose exculpatory information known to investigative agents but not to the prosecutor did not constitute knowing use of perjured testimony, but instead the failure to disclose constituted a *Brady* violation).

201. 935 F.2d 445 (2d Cir. 1991).

202. *Id.* at 457.

203. *Id.*

204. *Id.* Cf. *Noriega*, 117 F.3d at 1221 (11th Cir. 1997) (“Although the government appears to have treaded close to the line of willful blindness, the crossing of which might establish constructive knowledge, we decline to charge the government with prior cognizance of the alleged payment.”).

205. By using the automatic reversal rule for the knowing use of perjured testimony, the court in *Wallach* avoided the tougher question of whether the perjury, which only related to the credibility of the witness and not the testimony regarding the underlying conduct charged in the indictment, was material under *Brady*. As an alternative ground for its decision, the *Wallach* court applied the newly discovered evidence standard for a new trial and concluded that the jury would likely have found the defendant not guilty had the witness testified truthfully. *Wallach*, 935 F.2d at 458. Given that conclusion, the court did not need to reach the constitutional issue of whether the government had knowingly used false testimony in violation of due process, or, if the court found it necessary to consider due process, whether in finding that the jury would likely have acquitted could have met the materiality standard for a *Brady* violation.

falsity of the testimony or evidence, not just an estimation of whether the prosecutor should have inquired further into the veracity of the witness' statement or why the government failed to detect the perjury. *Wallach* improperly added an element of judicial inquiry into prosecutorial intent for not pursuing further investigation, thereby requiring a reviewing court to ascertain whether the government should have acted on any possible suspicions regarding the veracity of its witness or evidence. Determining whether prosecutors acted reasonably, negligently, or perhaps even recklessly, as part of the due process analysis, would compel a close examination of both the prosecutor's knowledge of the falsity of the testimony or evidence and the motives for not investigating further. The approach adopted in *Wallach* conflicts with the Supreme Court's carefully crafted due process analysis, that avoided making such an inquiry relevant by either requiring clear proof of actual prosecutorial knowledge or dispensing with prosecutorial intent all together.

C. *The Destruction of Evidence*

The *Mooney* line of cases addressed the government's fabrication of evidence, either by direct testimony or a witness' failure to respond truthfully, while *Brady* adopted a broader rule that the government's failure to furnish exculpatory evidence to the defendant violates due process, regardless of the prosecutor's intent. A third means by which the government can alter the proof available at trial is the destruction of evidence that a defendant could use to support a defense. Unlike the circumstances that triggered a due process violation in *Mooney* and *Brady*, this type of prosecutorial misconduct ensures that exculpatory evidence will never be available to the defendant or the court, thus hampering judicial review of both its probative value and its likely effect on the outcome of the trial.

The Supreme Court first dealt with the problem of evidence made unavailable by the government in *United States v. Valenzuela-Bernal*,²⁰⁶ in which the Immigration and Naturalization Service deported a group of aliens that the grand jury charged the defendant illegally transported into the United States.²⁰⁷ After the indictment, the prosecutor determined that none of the aliens had any evidence material to the illegal transportation charge, but the defendant never had an opportunity to interview them to determine whether they could aid

206. 458 U.S. 858 (1982).

207. *Id.* at 860.

in his defense.²⁰⁸ The Ninth Circuit reversed the conviction on due process and Sixth Amendment compulsory process grounds, finding that testimony from the now-unavailable aliens “could conceivably [have] benefit[ed] the defendant.”²⁰⁹ The Supreme Court reversed, holding that the defendant “must at least make some plausible showing of how their testimony would have been both material and favorable to his defense.”²¹⁰

Requiring proof of the materiality of the evidence poses a significant hurdle for a defendant challenging the government’s actions. As *Valenzuela-Bernal* acknowledged, obligating a defendant to demonstrate that the missing witnesses would have provided favorable evidence of sufficient magnitude to affect the outcome makes proving materiality virtually impossible—how can one show the probative value of evidence to which one never had access? The Court addressed this problem by reducing *Brady*’s materiality standard in cases alleging the improper destruction of evidence. A defendant need only make a “plausible showing” of materiality, indicating that “the testimony was not merely cumulative to the testimony of available witnesses.”²¹¹

After relaxing the materiality threshold for evidence destruction claims in *Valenzuela-Bernal*, the Court had to establish a standard for determining whether the evidence was favorable to the accused so as to trigger a duty to preserve it for the defendant’s use at trial. In *California v. Trombetta*,²¹² the Court required a defendant to show that the exculpatory value of the destroyed item was “apparent before the evidence was destroyed, and . . . of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.”²¹³ *Trombetta* found that the destruction of breath samples taken from drivers was not a “calculated effort to circumvent the disclosure requirements established by *Brady*” because the officers who destroyed the samples acted “in good faith and in accord with their normal

208. *Id.* at 861.

209. *Id.* at 862.

210. *Id.* at 867. The Court noted that its standard was reflected in the *Brady* materiality test applicable to the suppression of evidence in the government’s possession. *Id.* at 867-68.

211. *Id.* at 873. The Court further noted that “courts should afford some leeway for the fact that the defendant necessarily proffers a description of the material evidence rather than the evidence itself.” *Id.* at 874.

212. 467 U.S. 479 (1984).

213. *Id.* at 489. The defendant, charged with drunk driving, alleged that the state’s practice of not preserving breath samples tested to determine whether a person was intoxicated violated due process because it prevented any independent analysis of the evidence. The Court found that the destruction of evidence did not violate due process because “the chances are extremely low that preserved samples would have been exculpatory.” *Id.*

practice.”²¹⁴

The Court’s reference to good faith was not directly relevant to the analysis of the exculpatory nature of the evidence. Nor did *Trombetta* explain how it discerned the government’s intentions in destroying the breath samples. The Court appeared to view cases involving the government’s destruction of evidence as falling under the *Brady* analysis, which makes the prosecutor’s intent in suppressing evidence irrelevant to the due process question. *Trombetta* focused on the notice to the government, from the nature of the item, that the evidence was so clearly exculpatory that its destruction was unreasonable. Good faith may have been a proxy for finding that the exculpatory nature of the item was not so obvious as to constitute a due process violation. Yet, *Trombetta*’s language implied a gross negligence standard, that an item which is so obviously exculpatory should put the government on notice to preserve it for future use by the defendant, which would negate any assessment of actual bad faith. The Court’s reference to good faith appeared to signal a shift toward a more subjective approach that considers what the government actually knew, and away from *Brady*’s objective analysis, which weighs the effect of the government’s actions on the fairness of the proceeding.²¹⁵

The Court’s analysis in *Arizona v. Youngblood*²¹⁶ made it clear that governmental good faith, and not *Brady*’s materiality standard, was the true focal point of the due process analysis of prosecutorial misconduct. Moving away from *Trombetta*’s flirtation with a gross negligence standard, the Court held that “unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.”²¹⁷ In *Youngblood*, the police failed to preserve the clothing of a sexual abuse victim that contained semen, thereby preventing Youngblood from testing the semen to determine whether it supported his defense that the victim wrongly identified him as the assailant.²¹⁸ The Court acknowledged that “the likelihood that the preserved materials would have

214. *Id.* at 488 (quoting *Killian v. United States*, 368 U.S. 231, 242 (1961)).

215. The *Trombetta* opinion raises the question of what remedies are available for a due process violation based on the bad-faith destruction of exculpatory evidence. If the evidence would have affected the outcome, but is no longer available, then according to *Trombetta* the only plausible remedies are to bar prosecution or to suppress evidence related to the destroyed item, which could make it virtually impossible to secure a conviction. *Id.* at 486-87. Relying on the government’s good faith seems to accomplish little, other than serving as a comfort in a close case when a court denies the defendant any relief.

216. 488 U.S. 51 (1988).

217. *Id.* at 58.

218. *Id.* at 53, 54.

enabled the defendant to exonerate himself appears to be greater than it was in *Trombetta*,” but found that the absence of proof that the government acted in bad faith meant that there was no due process violation.²¹⁹ Although the police came perilously close to being grossly negligent in *Youngblood*, the Court supplanted *Trombetta* by raising the defendant’s burden of proof for a due process violation to a showing that the government acted with actual bad faith in destroying evidence.²²⁰ No longer a gross negligence standard, due process requires that, absent proof of actual knowledge, the exculpatory nature of the evidence had to be so apparent that a court could infer the government knew that this particular evidence was required to mount a defense. In other words, unless a piece of evidence screams “Save me!”, destruction of the evidence by the government does not violate a defendant’s due process rights under *Youngblood*.²²¹

219. *Id.* at 58.

220. *See* *United States v. Cooper*, 983 F.2d 928, 931 (9th Cir. 1993) (“*Youngblood*’s bad faith requirement dovetails with the first part of the *Trombetta* test: that the exculpatory value of the evidence be apparent before its destruction.”).

221. *See* H. Lee Sarokin & William E. Zuckerman, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie this Presumption*, 43 RUTGERS L. REV. 1089, 1106 (1991) (“[T]he Court’s ‘bad faith’ holding [in *Youngblood*] represented a major theoretical shift away from the objective analysis of the evidence and how its unavailability affected the defendant’s ability to receive a fair trial.”).

Another type of misconduct involving governmental actions affecting the defendant’s evidence occurs when the prosecutor puts excessive pressure on a witness to not testify on the defendant’s behalf at trial. In this context, “[a] defendant’s constitutional rights are implicated only where the prosecutor or trial judge employs coercive or intimidating language or tactics that substantially interfere with a defense witness’ decision whether to testify.” *United States v. Vavages*, 151 F.3d 1185, 1189 (9th Cir. 1998). Courts recognize that prosecutorial misconduct that causes a witness to absent himself or assert the Fifth Amendment privilege and refuse to testify can constitute a violation of the defendant’s due process right. *See* *United States v. Foster*, 128 F.3d 949, 953-54 (6th Cir. 1997); *United States v. Schlei*, 122 F.3d 944, 991 (11th Cir. 1997); *United States v. Moore*, 11 F.3d 475, 479 (4th Cir. 1993); *United States v. Hoffman*, 832 F. 2d 1299 (1st Cir. 1987); *United States v. Lord*, 711 F.2d 887, 891 (9th Cir. 1983); *United States v. Morrison*, 535 F.2d 223, 227-28 (3d Cir. 1976); *see generally* JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 22 at 22-10 *et seq.* (3d ed. 1996). The *Youngblood* standard applies in this context as well, requiring proof that the testimony would be material and exculpatory, and that the government acted in bad faith. *See, e.g., Hoffman*, 832 F.2d at 1303 (“There can be no violation of the defense’s right to present evidence, we think, unless some contested act or omission (1) can be attributed to the sovereign and (2) causes the loss or erosion of testimony which is both (3) material to the case and (4) favorable to the accused.”).

Some courts have found that there is an inherent judicial authority to order the government to immunize a defense witness when the government has immunized or reached a plea agreement with one of its own witnesses and when the failure to immunize the defense witness would deprive the defendant of material, exculpatory evidence. *See* *United States v. Young*, 86 F.3d 944, 948 (9th Cir. 1996) (“[T]here is a serious danger that the government’s denial of immunity to Delfs—the only witness who could have impeached Drake as the government’s critical witness—distorted the fact-finding process.”); *United States v. Westerdahl*, 945 F.2d 1083, 1087 (9th Cir. 1991) (“For the government to grant immunity to a witness in order to obtain his testimony, while denying immunity to a defense witness whose testimony would directly contradict that of the government witness, is the type of fact-finding distortion we intended to

A footnote in *Youngblood* stated that “the presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police’s knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.”²²² While *Youngblood* appeared to sanction judicial inquiry into governmental intent to determine the due process violation, lower court cases demonstrate that it is the defendant’s notice to the government of the need to preserve evidence that is the key to demonstrating bad faith.²²³

How had the intent of the government become an element of the due process analysis after *Brady* appeared to render it superfluous? *Youngblood* took an approach similar to the *Mooney* line of cases in holding that notice to the government of the importance of the evidence to the defendant raised a *knowing*

prevent in *Lord*”).

222. 488 U.S. at 57.

223. In *United States v. Cooper*, 983 F.2d 928 (9th Cir. 1993), the Ninth Circuit affirmed the dismissal of an indictment because the government destroyed laboratory equipment seized from the defendants in a prosecution for manufacturing methamphetamine. *Id.* at 933. Notwithstanding the defendants’ repeated requests after their indictment to maintain the equipment so that they could show it was incapable of producing the illegal drug, and despite the investigatory agent’s assurances as to its availability, the government disposed of it in a toxic waste dump. *Id.* at 929-30. Exacerbating the problem was the fact that a government agent assured defense counsel that the evidence would be preserved while knowing that it would be held for only a short period before its disposition as toxic waste. *Id.* at 930. Likewise, in *United States v. Bohl*, 25 F.3d 904 (10th Cir. 1994), the Tenth Circuit reversed a conviction and ordered dismissal of an indictment after the government ignored the defendant’s repeated requests to preserve evidence. *Id.* at 914. The circuit court found that the destruction of the evidence in the face of recurrent entreaties to prosecutors to preserve it, “in the absence of any innocent explanation offered by the government, gives rise to a logical conclusion of bad faith.” *Id.* at 913. It is not clear what “innocent explanation” the government could give that would somehow extricate it from the finding of bad faith. If it had an acceptable reason for the destruction, or had the defendants not communicated their need for the goods, then there would be no evidence to support a due process violation under the *Youngblood* standard unless the item was so clearly exculpatory that the government could only act in bad faith by disposing of it. It is unlikely that the defendants could have shown that the items were obviously exculpatory without giving notice of their defense. Under *Youngblood*, once a defendant shows that the government disregarded the defendant’s notice and destroyed the evidence, a court can conclude that the government acted in bad faith. The court should not ask the government to try to explain the way it acted after the fact because that amounts to asking the prosecutors to manufacture an excuse to salvage the case, *i.e.*, a clear opportunity to lie. Absent notice from the defendant of the need to preserve evidence, which establishes actual knowledge of its potential exculpatory value, the most a defendant can usually show is that the government acted negligently. After *Youngblood*, even gross negligence does not trigger a due process violation unless the evidence is so plainly exculpatory that its destruction can only be explained by actual governmental bad faith. *Youngblood*, 488 U.S. at 57-58. See also *United States v. Femia*, 9 F.3d 990, 995 (1st Cir. 1993) (holding that even if government’s destruction of tapes was grossly negligent, that did not constitute bad faith so as to warrant suppression of evidence related to transcripts of tapes); *United States v. Barton*, 995 F.2d 931, 936 (9th Cir. 1993) (stating that the government’s mishandling of bags of marijuana that eventually disintegrated was only negligent and therefore did not amount to a bad faith destruction of exculpatory evidence); *United States v. Richard*, 969 F.2d 849, 853 (10th Cir. 1992) (noting that defendants’ failed to offer evidence that government had notice of need to preserve marijuana to establish due process violation).

destruction of exculpatory evidence to the same level as the knowing use of perjured testimony. In both cases, the proof of governmental knowledge triggered a due process violation because the prosecutorial misconduct rendered a trial fundamentally unfair, not just that the trier of fact would not have all relevant information to judge the defendant's guilt beyond a reasonable doubt. Therefore, to activate this aspect of the due process protection, a defendant must give notice of an item's importance to establish the government's knowledge. Absent such affirmative proof, the only means to demonstrate the requisite governmental knowledge would be to show that the exculpatory nature of the evidence was so obvious that the government must have known of its materiality to the defense, allowing an inference of bad faith.

D. Loss of Evidence Through Governmental Delay

In addition to deliberate acts that destroy evidence, governmental *inaction* can cause the loss of evidence. While the government has no obligation to investigate leads for a defendant, its failure to file charges in a timely fashion after gathering sufficient evidence of a person's wrongdoing can result in the destruction or dissipation of evidence crucial to establish a defense. Does a defendant have a right to have the government act expeditiously to preserve evidence for his defense? The Sixth Amendment imposes one timeliness requirement on the government in a criminal case, that "the accused shall enjoy the right to a speedy . . . trial."²²⁴ The trigger for the speedy trial right is the formal conclusion of the investigatory stage of a case: "these guarantees are applicable only after a person has been accused of a crime."²²⁵

1. The Sixth Amendment Speedy Trial Right

Governmental delay after the initiation of a criminal proceeding can impair a viable defense, although it is often difficult to allocate to either side in a case the harmful effect of delay. The Supreme Court noted that prejudice from a delay in the proceedings can cut both ways, that "[d]elay is not an uncommon defense tactic" to make the government's case harder to establish through the loss of evidence over time.²²⁶ Moreover, the Sixth Amendment right "is a more vague concept than other procedural rights . . . [and it is] impossible to determine with

224. U.S. CONST. amend. VI.

225. *United States v. Marion*, 404 U.S. 307, 316-17 (1971).

226. *Barker v. Wingo*, 407 U.S. 514, 521 (1972).

precision when the right has been denied.”²²⁷

Measuring whether the government proceeded with the requisite dispatch in trying a defendant depends on the four-part analysis adopted by the Court in *Barker v. Wingo*. The balancing test weighs four factors: “Length of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.”²²⁸ The first factor is a “triggering mechanism” requiring the defendant to show that the delay was sufficient to permit a presumption of prejudice.²²⁹ The second factor, the government’s reason for the delay, requires that the prosecutor explain the reason for the delay between the initiation of the proceedings and trial, and that any “deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government.”²³⁰ The Court’s analysis does not appear to involve any inquiry into the veracity of the government’s reason for the delay, instead taking it at face value. It is then up to the defendant to demonstrate that the prejudice resulting from the delay outweighs the government’s explanation for it.

The speedy trial right addresses two different issues arising from pretrial delay: the defendant’s liberty interest and the problem of lost evidence. By requiring the prosecution and the judiciary to act expeditiously once the government formally charges a person, the Sixth Amendment limits the time a defendant might be incarcerated before an adjudication of guilt, and makes less likely any impairment to either side from evidence lost through the passage of time.²³¹ *Barker v. Wingo* recognized that avoiding prejudice to the defense was the more important protection provided by the speedy trial right. Sixth Amendment lost evidence cases are similar to destruction of evidence cases, in that the defendant must show that the unavailable evidence could have affected the outcome of the case.

While the prejudice requirement is reminiscent of *Trombetta* and *Youngblood*, the Court took a different approach in *Doggett v. United States*.²³² Doggett left the country for two years shortly after his indictment on drug trafficking charges, and, unbeknownst to investigators, returned to live in the

227. *Id.* at 521.

228. *Id.* at 530.

229. *Id.*

230. *Id.* at 531. A reason such as governmental negligence or a crowded docket “should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.” *Id.*

231. *Id.* at 532. Another prejudicial factor noted by the Court was minimizing the “anxiety and concern of the accused.” *Id.* I consider this liberty interest of the defendant in a prompt adjudication of the charges similar to the interest in not being held involuntarily prior to the trial.

232. 505 U.S. 647 (1992).

United States for six years while the government made no effort to locate him.²³³ The prosecution had no explanation beyond inertia for its failure to locate Doggett, who lived under his own name after his return and was not aware of the indictment.²³⁴ The Court held that the government's negligence, combined with the eight and one-half year delay after the indictment, constituted a violation of the Sixth Amendment, requiring dismissal of the indictment.²³⁵ The Court found un rebutted the presumption of prejudice generated by the extended delay, concluding that the government's unreasonable procrastination in locating the defendant had not overcome the initial trigger of the *Barker* test, which established a minimum threshold to presume prejudice against the defendant.²³⁶

Unlike *Trombetta* and *Youngblood*, *Doggett* found a constitutional violation without any proof from the defendant regarding either what evidence was lost through the delay or how its loss would have affected the outcome of the case. The Court accepted at face value the government's reason for the delay and did not require the defendant to demonstrate any bad faith on the part of the prosecutor. While *Doggett* and the other destruction of evidence cases involved the same basic issue—prejudice from the loss of probative evidence—the Sixth Amendment contains an explicit directive to the government to bring a defendant to trial expeditiously, while the Fifth Amendment provides only a generalized requirement that a defendant receive a fair trial. *Doggett* adopted a very different tone in its approach to the prejudice issue, putting the burden on the government to show that its reason for the delay was sufficient before requiring the defendant to prove actual prejudice. The prosecutor's plea of incompetence could not overcome the timing requirement embedded in the Speedy Trial Clause, a line the government cannot traverse regardless of the lack of any demonstrable harm from the delay.²³⁷

233. *Id.* at 248-50.

234. *Id.* at 649-50. Although two police officers told the defendant's mother about the indictment, the government conceded to the trial court that Doggett had no actual notice of the indictment. *Id.* at 653. On appeal, the government's appellate counsel "expressed amazement" at this concession, which became the factual predicate for the decision. *Id.*

235. *Id.* at 657-58. The Court stated that while "negligence is obviously to be weighted more lightly than a deliberate intent to harm the accused's defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution once it has begun." *Id.* at 657. The government had made no serious effort to locate the defendant for over six years to determine if he still resided abroad, which the Court noted was a "progressively more questionable assumption . . . [and] they could have found him within minutes." *Id.* at 652-53.

236. The Court stated that "such is the nature of the prejudice presumed that the weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness." *Id.* at 657.

237. Professor Amar has criticized the remedy of dismissal of the indictment with prejudice for

Requiring proof of actual harm in every Speedy Trial Clause case would reduce the Sixth Amendment to little more than a reiteration of the Due Process Clause, that the government does not violate the defendant's rights unless he can prove actual harm. By granting a remedy despite the absence of bad faith or affirmative proof of prejudice, the Supreme Court established that the Sixth Amendment protection represents an independent requirement beyond just providing a fair trial.²³⁸ *Doggett* reaffirmed that *Barker v. Wingo*'s balancing test simply takes the prosecutor's explanation for the delay at face value to see if it overcomes the presumption of prejudice; if it does not, then the indictment must be dismissed even if there is no proof of actual harm traceable to the delay.

2. *Due Process and the Initiation of Criminal Prosecutions*

Unlike the timing of a criminal trial, which is partially subject to the control of the judiciary, the prosecutor retains sole discretion regarding when to officially charge an accused with a crime. Even if the government gathers sufficient evidence to establish probable cause to charge a defendant, the prosecutor need not immediately seek an indictment or file charges. There are a number of reasons to delay the start of formal proceedings; some important, such as persuading a perpetrator to cooperate with the government, others more trivial, such as coordinating the vacation schedules of the various government agents and attorneys. Most prosecutions must be initiated within a certain period after the completion of the offense, or be barred by the statute of limitations.²³⁹ Because the speedy trial right does not attach until an arrest or the

violations of the speedy trial right, arguing for a damages remedy for a violation. See Akhil Reed Amar, *Foreword: Sixth Amendment First Principles*, 84 GEO. L.J. 641, 674-77 (1996).

238. Justice Thomas' dissent in *Doggett* argued that the Speedy Trial Clause is not directed against prejudicial delay, but only to protect a defendant's liberty interests in being free from protracted pretrial incarceration and the burden of living while under the suspicion generated by the formal charges filed by the government. 505 U.S. at 659-60 (Thomas, J., dissenting). According to Justice Thomas, "The touchstone of the speed trial right . . . is the substantial deprivation of liberty that typically accompanies an 'accusation,' not the accusation itself." *Id.* at 663 (Thomas, J., dissenting). Under this analysis, the defendant in *Doggett* would not have a Sixth Amendment claim because he was never incarcerated before trial and, because he did not know about the pending indictment, was not subjected to the continuing anxiety and suspicion created by a criminal charge.

239. In *Toussie v. United States*, 397 U.S. 112 (1970), the Supreme Court described the protection afforded by a statute of limitations:

The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature had decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal

filing of formal charges, if the government brings the case within the relevant limitations period, then the defendant would appear to have no claim that the timing of the prosecutor's decision was constitutionally impermissible.²⁴⁰

The Court recognized in *United States v. Marion*,²⁴¹ decided the same term as *Barker v. Wingo*, that due process, not the Sixth Amendment, governs the propriety of the government's conduct during the pre-indictment phase of a criminal case. While rejecting the defendant's argument that the Sixth Amendment applied before an arrest or the filing of charges, the Court noted in dictum that due process "would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellees' rights to a fair trial and that the delay was an *intentional* device to gain tactical advantage over the accused."²⁴² In its subsequent decision in *United States v. Lovasco*,²⁴³ the Court held that the prosecution of "a defendant following investigative delay does not deprive him of due process, even if his defense might have been *somewhat prejudiced* by the lapse of time."²⁴⁴ In addition to actual prejudice, *Lovasco* required proof of prosecutorial intent to gain a "tactical advantage" over the defendant through the delay in filing the charges.²⁴⁵ Unlike the speedy trial balancing test, *Lovasco*'s due process analysis of pre-indictment delay focused specifically on the prejudice to the defendant from the loss of evidence caused directly by the government's intentional choice to postpone initiating formal criminal proceedings. *Lovasco* rejected the defendant's argument that there was an independent constitutional requirement similar to the Speedy Trial Clause compelling the government to

activity.

Id. at 114-15. Although certain serious crimes, such as murder, may have no limitations period in some states, most felonies must be prosecuted between three and six years after the criminal act, and misdemeanors between one and three years. See LAFAVE & ISRAEL, *supra* note 24, at § 18.5(a). Under federal law, "any offense punishable by death may be found at any time without limitation," 18 U.S.C. § 3281 (1994), while other offenses, with certain exceptions, must be brought within five years after commission of the crime. 18 U.S.C. § 3282 (1994).

240. The filing of the indictment or criminal charges tolls the statute of limitations, even if the defendant is not aware of the formal initiation of the criminal proceeding. For example, under the Federal Rules of Criminal Procedure, the court can seal the indictment pending the arrest of the defendant. FED. R. CRIM. P. 6(e)(4). In *United States v. Hayes*, 40 F.3d 362 (11th Cir. 1994), the circuit court rejected a speedy trial claim when the grand jury returned an indictment shortly before the expiration of the statute of limitations, and the indictment remained under seal for almost five years after its return while the government sought the arrest and extradition of one of the defendants who resided abroad. *Id.* at 367.

241. 404 U.S. 307 (1971).

242. *Id.* at 324 (emphasis added).

243. 431 U.S. 783 (1977).

244. *Id.* at 796 (emphasis added).

245. *Id.* at 795.

act with any particular dispatch in filing charges.

The effect of governmental inaction on the defendant's evidence in the pre-indictment phase is analogous to the destruction of evidence issue. In fact, the Court in *Youngblood* relied on *Lovasco's* incorporation of an actual intent standard as the key element of the due process analysis as precedent for adopting the bad faith test for determining whether the government's destruction of evidence violated due process. *Lovasco* and *Youngblood* are two sides of the due process coin, one holding the government liable only for bad faith conduct that delayed charges in order to destroy evidence not within the government's possession, the other finding a constitutional violation only upon proof that the government destroyed evidence in its possession in order to put it out of the defendant's reach. *Lovasco* went further than *Youngblood*, however, by holding that the government may be held responsible for the loss of evidence over which it had neither control nor perhaps even knowledge of its existence.

The Speedy Trial Clause and the due process analysis both rely on temporal delay as a trigger for protection. It is easy to view them as interchangeable, and the Court's consideration of the government's reasons for the delay for a speedy trial violation was reminiscent of the bad faith element of the due process analysis.²⁴⁶ A closer look, however, shows that the two rights are fundamentally different. The *Barker v. Wingo* test balanced the government's reason for a delay against the other factors, including the presumption of prejudice, to determine a constitutional violation. *Lovasco* and *Marion* did not adopt a balancing test, any more than the due process analysis in *Youngblood* or *Mooney* balanced the government's intent with possible prejudice to the defendant. Unlike the speedy trial right, which arises from a specific constitutional protection requiring the government to act within some general time constraint, due process protects against prosecutorial misconduct related to the use or destruction of evidence. Delay alone is not a due process violation, even if the government's reasons for not acting expeditiously were ill-considered or reflected a slovenly approach to the investigation.²⁴⁷

246. Compare *United States v. Bishel*, 61 F.3d 1429, 1436 (9th Cir. 1995) ([R]eliance on *Doggett's* presumptive prejudice analysis in asserting a due process delay claim is "unavailing . . . *Doggett* was a case of postindictment delay. A Sixth Amendment case, *Doggett* by its own terms is inapplicable."), with *United States v. Benjamin*, 816 F.Supp. 373, 381 (D.V.I. 1993) ("Applying the analysis of the Supreme Court in *Doggett*, this Court concludes that, where as here actual prejudice is sufficiently proved and negligence has resulted in unreasonable [preindictment] delay not persuasively rebutted, Benjamin is entitled to relief.").

247. In *United States v. Crouch*, 84 F.3d 1497 (5th Cir. 1996), the Fifth Circuit, sitting *en banc*, held that the government's extended pre-indictment delay in filing charges due to insufficient resources to investigate the case did not rise to the level of a due process violation absent proof of bad faith. *Id.* at

Some lower courts have ignored the requirement of actual bad faith adopted in *Lovasco* and *Marion*, instead substituting a broader examination of the government's reasons for the delay that is more akin to the balancing test of *Barker v. Wingo*. In *United States v. Foxman*,²⁴⁸ the Eleventh Circuit held that once the defendant showed prejudice from pre-indictment delay, the court must determine whether it was the result of an *intentional* decision by the government to gain some tactical advantage that resulted in harm to the defendant.²⁴⁹ The *Foxman* court asserted that the tactical advantage sought by the government through the delay need not be designed to cause harm to the defendant, so that a due process violation may occur when the government acts to gain any benefit from a delay in filing charges.²⁵⁰ Similarly, in *United States v. Sowa*,²⁵¹ the Seventh Circuit held that under *Lovasco* "once the defendant has proven actual and substantial prejudice, the government must come forward and provide its reasons for the delay. The reasons are then balanced against the defendant's prejudice to determine whether the defendant has been denied due process."²⁵²

Foxman and *Sowa* weighed the government's reason for a delay against any prejudice that resulted from its decision. That approach ignores what the Supreme Court intended in requiring proof of bad faith, that there must be a direct connection between the government's reason for the delay and the prejudice. In other words, prejudice that is an *incidental* effect of delay is insufficient for a due process violation. Unlike *Doggett*, which found a Sixth Amendment violation based on governmental negligence, a defendant asserting a due process claim arising from pre-indictment delay must show that the government's intent was to harm the defendant *by means of the delay*. The balancing approach of *Foxman* and *Sowa* suggested that the government may have to initiate formal proceedings as soon as it has probable cause, or be

1510. The court rejected a balancing test that would weigh prejudice to the defendant against a determination whether the government's reasons for the delay were "appropriate" because "[t]he items to be placed on either side of the balance (imprecise in themselves) are wholly different from each other and have no possible common denominator that would allow determination of which 'weighs' the most." *Id.* at 1512.

248. 87 F.3d 1220 (11th Cir. 1996).

249. *Id.* at 1224.

250. *Id.* at 1223 n.2. The court stated:

We think intentional government acts designed to obtain a tactical advantage which only incidentally cause delay have never been ruled out as a potential basis for due process violations. The main point is showing acts done intentionally in pursuit of a particular tactical advantage: delay (and the prejudice directly caused by the delay) need not necessarily be the tactical advantage sought.

Id.

251. 34 F.3d 447 (7th Cir. 1994).

252. *Id.* at 451.

prepared to explain why it did not if the delay has an adverse effect of the defendant's evidence. Of course, because the lost evidence is not in the government's possession, that risk will always be present. The due process analysis of *Foxman* and *Sowa* therefore counsels in favor of charging the defendant as soon as the prosecution possesses sufficient evidence to go to trial. However, that was the very rule the Court rejected in *Lovasco* when it stated that "[p]enalizing prosecutors who defer action for these reasons would subordinate the goal of 'orderly expedition' to that of 'mere speed.' This the Due Process Clause does not require."²⁵³

When the *Lovasco* and *Marion* courts spoke of gaining a tactical advantage, they did not mean to rule out the wide range of strategic reasons for delaying an indictment. For example, the government frequently delays charging defendants involved in group criminal activity while it tries to get one or more to cooperate and testify against their coconspirators. That delay is certainly tactical, because the government's design is to generate a stronger case against the other conspirators. Moreover, a defendant would be prejudiced by that delay, not only because the prosecution's case is stronger but also possibly through the loss of other evidence helpful to the defendant during the period in which the government sought the cooperation of others. Is this the type of bad faith delay *Lovasco* and *Marion* were directed against? Prosecutorial conduct of this type is probably the height of good faith because the government is using legitimate means to put together the strongest case possible.²⁵⁴ Any test that simply compares prejudice to the defendant with the prosecutor's reason for a delay runs the risk of holding the government responsible for the loss of testimony or items about which it had no knowledge, and, more importantly, no intention of removing from the body of evidence available at trial. If a defendant could show some harm from the government's decision to postpone initiating a prosecution, then the balancing test would give courts the authority to assess the government's reasons for delay and to decide whether they met some unspecified criterion of acceptability.²⁵⁵

253. *United States v. Louasco*, 431 U.S. 783, 795-96 (1997) (citation omitted).

254. *See United States v. Crouch*, 84 F.3d 1497 (5th Cir. 1996). The court stated:

Intentional delay for the purpose of gaining tactical advantage would include delay for the purpose of rendering unavailable evidence favorable to the defense or which would tend to undercut the government's case. But, it would not include delay to affirmatively strengthen the government's case—such as delay until a potential witness for the government becomes available by reason of a plea bargain or the like.

Id. at 1514 n.23.

255. *See id.* at 1512 (rejecting a balancing test for due process violation based on pre-indictment

The decisions making prosecutorial bad faith the linchpin of a due process violation do not rely on a comparison between the government's culpability and the effect on the trial. A defendant must first show that the prosecutorial misconduct had a prejudicial effect on the outcome of the proceeding, unlike the Sixth Amendment analysis that permits a presumption of prejudice that the government must rebut. A defendant must then demonstrate that the prosecutor intended, through the misuse or destruction of evidence, to undermine the ability of the defense to establish its case. There is no room for negligence in a due process analysis that relies on governmental bad faith. The Supreme Court has been consistent throughout its decisions reviewing knowing use of perjured testimony, destruction of exculpatory evidence, and investigatory delay, in holding that a defendant must furnish proof of *actual* prosecutorial intent to harm, not just that government negligence resulted in prejudice.

Does proof of actual intent require judicial inquiry into the prosecutor's motives? The answer is yes, but that inquiry is the second step in the analysis, and the defendant must overcome a substantial hurdle to reach that point. First, a defendant must demonstrate the government's *knowledge* of the loss or destruction of the evidence, without any direct examination of the prosecutor. Absent proof from the defendant of the government's knowledge, there is no basis to inquire into the prosecutor's motive for not acting with greater dispatch. While it appears that prosecutorial intent is the focal point of this due process inquiry, the analysis actually requires the defendant to provide clear proof of the government's knowledge of the loss of evidence outside its control, not just that the evidence was material as required under *Brady*. Whether the government acted reasonably in not pursuing its case, *i.e.* the prosecutor's intent, is not at issue without proof of knowledge regarding the loss of material evidence. As Justice Marshall noted in *Lovasco*, the fact that a defendant has been "somewhat prejudiced" is not sufficient by itself to establish a due process violation.

IV. *BATSON* LIES

The concept of vigorous representation is, for better or worse, the central premise of the judicial system in this country. We expect attorneys to represent their clients' interests forcefully, and would be surprised to see a lawyer taking a

delay because "[i]nvariably, then, a 'length of the Chancellor's foot' sort of resolution will ensue and judges will necessarily define due process in each such weighing by their own 'personal and private notions of fairness,' contrary to the admonition of *Lovasco*").

position antithetical to the client. In a criminal proceeding, the Constitution grants defendants a right to a jury trial for all offenses punishable by a term of imprisonment of more than six months.²⁵⁶ Because the jury plays the key role in deciding guilt, the selection of the panel is an integral step in defending the client. Jury selection is the initial opportunity for attorneys to convey their message and assess the group that will decide the outcome of the case. Attorneys responding to judicial inquiry into why they chose a particular course of action in selecting the jury will do so in light of their client's best interests. It would be naive to expect an attorney questioned about the motives for pursuing a line of voir dire or seeking to remove a juror to respond with an answer that might cause appreciable harm to the client's case.²⁵⁷

The final composition of the petit jury depends, at least in part, on who the attorneys exclude from the panel through the use of the peremptory challenges apportioned to each side. Peremptory challenges give each attorney the chance to shape the jury by eliminating potential jurors who, for whatever reason, the attorney determines should not serve.²⁵⁸ Every state and federal court permits litigants in criminal cases to exercise a limited number of peremptory challenges to excuse members of the jury pool from serving on the petit jury in the case. The constitutional status of the peremptory challenge is uncertain; on one hand, it is recognized by the Supreme Court as a critical means of protecting each party's interests in a fair decision, yet it is a creature of legislative fiat, available

256. There are two jury trial provisions in the Constitution: one in Article III, Section 2, which provides that the "trial of all Crimes . . . shall be by Jury," and another in the Sixth Amendment, which provides that "[i]n all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." The Supreme Court held in *Duncan v. Louisiana*, 391 U.S. 1451 (1968), however, that the right to a jury trial only applies to "serious" offenses, which incorporates all crimes with an authorized punishment of more than six months. See *Baldwin v. New York*, 399 U.S. 66, 73-74 (1970). Defendants do not have the right to demand a jury trial for petty offenses, which the Court considers to be those with a term of imprisonment of six months or less unless a defendant can show that an additional statutory penalty demonstrates a legislative intent that the offense be considered serious rather than petty. See *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543 (1989).

257. See Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 209 (1989) ("The danger of unconstitutional abuse posed by the exercise of peremptory challenges by partisan advocates is probably greater than that posed by the discretion of officials to make random license checks or to grant parade permits without standards."); George P. Fletcher, *Political Correctness in Jury Selection*, 29 SUFFOLK U. L. REV. 1, 12 (1995) ("Advocates use their wits in their clients' best interests. . . . It might be nice for everyone to stop making generalizations. . . . Trials, however, are about convicting the guilty and preserving the freedom of the innocent. They are not about the pursuit of egalitarian ideals.")

258. See Brian J. Serr & Mark Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 8 (1988) ("Another factor prevalent in jury selection is the simple gut reaction of an attorney to a particular venireperson. An attorney who for any reason feels uncomfortable with a particular juror, or feels more comfortable with another, is likely to strike the venireperson who causes the discomfort.")

only to the extent authorized by the legislature.²⁵⁹ Because peremptory challenges may be used arbitrarily, the Court has long been aware that they might be abused when attorneys strike jurors for patently unacceptable reasons, such as race or sex. Yet, in *Swain v. Alabama*,²⁶⁰ the Supreme Court stated that the “essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court’s control.”²⁶¹

A. Equal Protection and Peremptory Challenges

As far back as 1879, the Supreme Court held, in *Strauder v. West Virginia*,²⁶² that purposeful exclusion by the legislature of citizens from the jury pool on the basis of race violated the Constitution’s Equal Protection Clause.²⁶³ But as recently as 1965, in *Swain*, the Court also stated that “we cannot hold that the striking of Negroes in a particular case [by a peremptory challenge] is a denial of equal protection of the laws.”²⁶⁴ How could the Court reject racial discrimination in jury selection in one form while accepting it in another? The answer seemed to be that peremptory challenges were somehow different, a special province of the parties to the action that fell beyond the purview of the trial court. In *Swain*, the Court rejected particularized review of a prosecutor’s peremptory challenges that removed all African-Americans from the petit jury. While acknowledging the apparently discriminatory use of the government’s peremptory challenges, the Court held that “it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged.”²⁶⁵ *Swain*

259. Compare *Lewis v. United States*, 146 U.S. 370, 376 (1892) (holding that making peremptory challenges was an essential part of the trial), and *Pointer v. United States*, 151 U.S. 396, 408 (1894) (peremptory challenge is “one of the most important” of the rights of the accused), with *Stilson v. United States*, 250 U.S. 583, 586 (1919) (“There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges to defendants in criminal cases; trial by an impartial jury is all that is secured. The number of challenges is . . . regulated by the common law or the enactments of Congress.”), and *Frazier v. United States*, 335 U.S. 497, 505 n.11 (1948) (“The [peremptory challenge] is in the nature of a statutory privilege, variable in the number of challenges allowed, which may be withheld altogether without impairing the constitutional guarantees of ‘an impartial jury’ and a fair trial.”).

260. 380 U.S. 202 (1965).

261. *Id.* at 220.

262. 100 U.S. 303 (1879).

263. *Id.* at 310.

264. 380 U.S. at 221.

265. *Id.* at 223.

indulged the fiction of prosecutorial goodwill in exercising peremptory challenges because otherwise judicial review “would entail a radical change in the nature and operation of the challenge.”²⁶⁶ The problem with permitting such an inquiry was that the “prosecutor’s judgment underlying each challenge would be subject to scrutiny for reasonableness and sincerity.”²⁶⁷

Swain accepted the potential for discriminatory exercise of the peremptory challenge because close scrutiny of the prosecutor’s motives would do more than change the nature of the challenge. The Court did not want to open the prosecutorial decision-making process to judicial review or compel prosecutors to justify their decisions on the exercise of a peremptory challenge. Therefore, in *Swain*, the Court required defendants raising an equal protection claim regarding peremptory challenges to prove that the prosecutor removed jurors of a particular race in a series of cases, showing a pattern of racial discrimination comprehending more than just the individual case at bar.²⁶⁸ In order to insulate prosecutors from any inquiry into their actual motives, *Swain*’s test for an equal protection violation required proof of discriminatory design in striking jurors based on race that would provide objective evidence of the prosecutor’s improper intent. *Swain*’s hurdle was much like *Armstrong*’s for selective prosecution in violation of the Equal Protection Clause, and is one that few defendants could ever hope to surmount.

Swain’s burden was intolerably high, however, and permitted prosecutors to exercise peremptory challenges to remove racial minorities from serving on a particular petit jury without fear of reversal. The cost to the system from permitting the government to act in a manner that could be perceived so readily as discriminatory was such that the Court reconfigured the exercise of the peremptory challenge in *Batson v. Kentucky*.²⁶⁹ The Court asserted that it was only tinkering with *Swain*’s “evidentiary formulation,”²⁷⁰ disclaiming what was obviously a decision to overturn *Swain* and to impose a radically different test

266. *Id.* at 221-22.

267. *Id.* at 222.

268. *Id.* at 223-24 (“But when the prosecutor . . . , in case after case . . . is responsible for the removal of Negroes . . . Such proof might support a reasonable inference that . . . the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population.”).

269. 476 U.S. 79 (1986). The Court found that, following *Swain*, many lower courts had “reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause. Since this interpretation of *Swain* has placed on defendants a crippling burden of proof, prosecutors’ peremptory challenges are now largely immune from constitutional scrutiny.” *Id.* at 92-93.

270. *Id.* at 93.

for judging whether the exercise of a peremptory challenge violated the Equal Protection Clause.²⁷¹

Batson lowered the evidentiary standard of proof for an equal protection violation by requiring that the defendant first establish a prima facie case of purposeful discrimination in the exercise of the peremptory challenge in the instant case, not in a series of unrelated criminal trials.²⁷² The defendant could establish the prima facie case by showing either a pattern of strikes against members of a particular race or improper questions asked by the prosecutor. In addition, the defendant could point out any other evidence that would support an inference of purposeful discrimination by the prosecutor through the exercise of peremptory challenges “to exclude the veniremen from the petit jury on account of their race.”²⁷³ Once the defendant established a prima facie case, *Batson* shifted the burden to the prosecutor to furnish a neutral explanation for the peremptory strike. For this step in the process, the Court made clear what would *not* suffice:

[T]he prosecutor may not rebut the defendant’s prima facie case of discrimination by stating merely that he challenged jurors of the defendant’s race on the assumption—or his intuitive judgment—that they would be partial to the defendant because of their shared race Nor may the prosecutor rebut the defendant’s case merely by

271. See Kenneth J. Melilli, *Batson in Practice: What We Have Learned About Batson and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 451 (1996) (“[W]hile the *Batson* Court characterized its decision as merely overruling *Swain* as to the ‘evidentiary formulation’ necessary to establish racially motivated discrimination, the truth is that *Batson* radically recharacterized a form of discrimination, previously endorsed in *Swain*, as a violation of equal protection.”).

272. *Batson* originally required a defendant to show that both he and the struck juror were members of the same cognizable racial group. 476 U.S. at 96. The Court dropped that requirement for an equal protection challenge in *Powers v. Ohio*, 499 U.S. 400, 416 (1991).

273. 476 U.S. at 96-97. See also *Turner v. Marshall*, 121 F.3d 1248, 1251-52 (9th Cir. 1997) (“A comparative analysis of jurors struck and those remaining is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination.”).

denying that he had a discriminatory motive or affirming his good faith in making individual selections.²⁷⁴

Unlike *Swain*, which wrongly assumed prosecutorial good faith in all peremptory challenges, *Batson* required courts that found a prima facie case of purposeful discrimination to ask the prosecutor to explain in some detail, and beyond an assertion of simple good faith, the exercise of the strike. Once the prosecutor provides a race-neutral explanation, the third step of *Batson* requires the trial court to decide whether there has been purposeful discrimination.

The Court has since expanded the scope of the equal protection right in jury selection far beyond *Batson*'s original parameters, which appeared to permit only those defendants who suffered from peremptory challenges against members of their own racial or ethnic group to claim a violation. The enlargement of the equal protection limitation on the exercise of peremptory challenges involved two related issues: first, whose constitutional right was at stake when a party employed a peremptory challenge in a discriminatory manner; and, second, in what type of case could a party raise the *Batson* claim. In *Powers v. Ohio*,²⁷⁵ the Court held that a defendant raising a *Batson* claim need not share the same race as those jurors removed due to purposeful discrimination by the prosecutor.²⁷⁶ To overcome the lack of racial congruity in the discrimination claim, the Court adopted a new rationale for the constitutional analysis, holding that the Equal Protection Clause bars prosecutors from exercising peremptory challenges because individual jurors "possess the right not to be excluded from [a jury] on account of race."²⁷⁷ *Powers* broadened the scope of the equal protection right by shifting the focus from harm to the defendant to harm to potential jurors removed from the jury for an impermissible reason.

Based on the approach adopted in *Powers*, the Court quickly, although over strenuous dissent, applied *Batson*'s principle to private civil actions in *Edmonson v. Leesville Concrete Co.*²⁷⁸ and to criminal defendants who struck jurors on racially discriminatory grounds in *Georgia v. McCollum*.²⁷⁹ Both cases relied on the constitutional protection afforded the excluded jurors, not the defendant, to support the conclusion that the Equal Protection Clause

274. *Id.* at 97-98 (internal quotation marks omitted).

275. 499 U.S. 400 (1991).

276. *Id.* at 416.

277. *Id.* at 409.

278. 500 U.S. 614, 631 (1991).

279. 505 U.S. 42, 59 (1992).

constrained any party appearing before a court who exercised a peremptory challenge.²⁸⁰ The Court could not extend *Batson* to racially discriminatory peremptory challenges by defendants unless every party to the judicial process could raise the equal protection claim of the removed jurors, including the prosecution—otherwise, the defendant would be arguing that his own discriminatory peremptory challenge violated his constitutional right.²⁸¹ Finally, in *J.E.B. v. Alabama*,²⁸² the Court broadened *Batson* to peremptory challenges removing jurors on the basis of sex.²⁸³ Notably, however, the Court refused during the same term to review a case permitting the exercise of a peremptory challenge based on a juror's religious affiliation.²⁸⁴

In his *Batson* concurrence, Justice Marshall questioned the majority's decision permitting judicial inquiry into the prosecutor's motives for exercising a peremptory challenge, noting that any protection afforded by the new approach may be "illusory" because "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill equipped to second-guess those reasons."²⁸⁵ His concern was not just with straightforward misrepresentations by prosecutors, but also the harm of unconscious racism that can lead an attorney to react negatively to racial minorities, causing the exercise of peremptory challenges that were not based on any overt bias. Justice Marshall proposed banning all peremptory challenges by prosecutors, at least in criminal cases, rather than accommodating them under the majority's *prima facie* test that calls on attorneys to explain their actions before the court decides

280. See *Edmonson*, 500 U.S. at 618 ("[W]e [have] made clear that a prosecutor's race-based peremptory challenge violates the equal protection rights of those excluded from jury service."); *McCullum*, 505 U.S. at 57 ("It is an affront to justice to argue that a fair trial includes the right to discriminate against a group of citizens based upon their race.").

281. Justice Scalia noted the incongruity of extending *Batson* to criminal defendants: "A criminal defendant, in the process of defending himself against the state, is held to be acting on behalf of the state. Justice O'Connor demonstrates the sheer inanity of this proposition (in case the mere statement of it does not suffice)." *McCullum*, 505 U.S. at 70 (Scalia, J., dissenting). See also Melilli, *supra* note 271, at 453 ("*Batson* is only able to depart so dramatically from *Swain* because it stands for the proposition that . . . the rights of citizens to participate in their government, and in particular the right to participate by service on juries, outweighs the rights of litigants to remove jurors without cause.").

282. 511 U.S. 127 (1994).

283. *Id.* at 146.

284. See *Davis v. Minnesota*, 511 U.S. 1115, 1117 (1994) (Thomas, J., dissenting from denial of certiorari) ("Indeed, given the Court's rationale in *J.E.B.*, no principled reason immediately appears for declining to apply *Batson* to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause."); Amy B. Gendleman, Comment, *The Equal Protection Clause, the Free Exercise Clause and Religion-Based Peremptory Challenges*, 63 U. CHI. L. REV. 1639, 1666 (1996) (arguing for a prohibition on peremptory challenges based on religious affiliation, but permitting them based on the individual jurors' religious beliefs).

285. 476 U.S. at 106 (Marshall, J., concurring).

whether to allow the removal.

Justice Marshall's concern with the problem of examining the motivations of attorneys, and the incentive *Batson* created for lawyers to advance "neutral" explanations that might hide rather than reveal bias, was prophetic. In *Purkett v. Elem*,²⁸⁶ the Court explained that the "second step of this [*Batson*] process does not demand an explanation that is persuasive, or even plausible."²⁸⁷ While a trial judge could find an implausible explanation unpersuasive, therefore not overcoming the opponent's prima facie case, "a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection."²⁸⁸ After *Elem*, the prosecution must make sure that its reason does not reference a prohibited classification, *i.e.*, race or sex, to meet the minimal requirement of *Batson*'s second step of furnishing a race-neutral explanation. *Elem* probably did not change the *Batson* analysis, but did make it plain that lawyers are not necessarily expected to propound good reasons to counter an objection to a peremptory challenge on equal protection grounds.²⁸⁹ As long as the statement did not explicitly rely on race or sex, then it may be sufficient to permit the peremptory removal of a juror from the panel.

B. The Effect of Implausible Responses

Since *Batson*, trial judges generally have been willing to countenance most explanations for the exercise of peremptory challenges.²⁹⁰ In *Elem*, for example,

286. 514 U.S. 765 (1995).

287. *Id.* at 768.

288. *Id.* at 769.

289. Compare Michelle Mahony, Note, *The Future Viability of Batson v. Kentucky and the Practical Implications of Purkett v. Elem*, 16 REV. LITIG. 137, 168-69 (1997) ("Thus, in practice, *Purkett* reduces *Batson* to a mere formality and places on the complaining party a significantly heavier burden both in the courtroom and on appeal.") with D. John Neese, Jr., Note, *Purkett v. Elem: Resuscitating the Nondiscriminatory Hunch*, 33 HOUS. L. REV. 1267, 1281 (1996) ("*Purkett* restores integrity to the peremptory challenge by requiring that the proponent only provide an explanation 'that does not deny equal protection.'").

290. See Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters*, 1994 WISC. L. REV. 511, 592 ("Highly subjective, vague and unsubstantiated prosecutorial claims are routinely accepted. In fact, generous acceptance of such reasons, more than any other fact, explains the paucity of findings of discrimination post-*Batson*"); Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations under Batson v. Kentucky*, 27 U. MICH. J.L. REFORM 229, 235 (1993) ("A prosecutor who wishes to rebut the prima facie case does not face a significant challenge."). Serr & Maney, *supra* note 258, at 43 ("In practice, [rebutting or defendant's prima facie case] is not a difficult burden, as trial judges accept virtually any explanation proffered."). Surveys of reported cases that review *Batson* challenges may not be fully reflective of the number of successful challenges to peremptory strikes that stop the removal of a juror. If a party persuades a judge that the exercise of the peremptory challenge would violate *Batson*, the judge can seat the juror. Similarly,

the judge accepted the prosecutor's statement, in response to the defendant's objection to striking two black men from the jury, that they were the only two with facial hair and "I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me."²⁹¹ Trial courts have acquiesced to justifications based on age, occupation, residence, and demeanor even though, at least on paper, the explanations appear to be implausible when the effect was to strike only members of racial minorities or one sex from the jury.²⁹² The problem with accepting such explanations at face value was the one described by Justice Marshall in his *Batson* concurrence: trial courts have a hard time finding the prosecutor's proffered explanation a subterfuge for purposeful discrimination.²⁹³ When a defendant in a criminal case makes a *Batson* claim, barring a peremptory challenge requires the trial court to find an intentional violation of the equal protection clause by the prosecutor. That is a very significant result, and one that no judge wants to reach lightly.

While *Batson*'s equal protection rationale is clear, and the Court's rhetoric on the harms of discrimination unassailable, the extension of its principle throughout the judicial system has had problematic effects. By shifting the constitutional analysis away from the harm to a defendant and focusing instead on the discriminatory impact on the excluded jurors, the remedy for an equal protection violation becomes incongruous. Since *Batson*, when an appellate court determines that the trial court should not have permitted the exercise of the

if the jury acquits the defendant, or the jury never reaches a verdict (*e.g.*, a hung jury or the defendant agrees to a plea bargain during trial), then there will be no reported decision regarding *Batson*. Relying solely on reported decisions can give a skewed view of the acceptability of certain types of explanations, although published opinions provide a number of examples of explanations offered for peremptory challenges that strain credulity.

291. 514 U.S. at 766.

292. For reviews of the types of explanations lower courts have accepted in response to *Batson* claims, see Melilli, *supra* note 271, at 460 (presenting detailed review of different types of *Batson* claims); Brand, *supra* note 290, 592-93; Serr & Maney, *supra* note 258, at 44-48. One student commentator noted a possible explanation for judicial acceptance of questionable explanations for the peremptory challenge, that "judges demand explanations when the evidence of discrimination is slight, then find that a weak explanation is sufficient to rebut the weak inference of discrimination. . . . By asking for explanations, judges signal the possibility of purposeful discrimination; then, by accepting weak explanations, they appear unwilling to correct it." Stephen R. DiPrima, Note, *Selecting a Jury in Federal Criminal Trials After Batson and McCollum*, 95 COLUM. L. REV. 888, 889 (1995).

293. See Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099 (1994). As Professor Ogletree notes:

[O]nce the Court bans discriminatory challenges in an area, those who want to discriminate will know enough to conceal their intent, and the Court has failed to explain how that intent is to be divined, leaving trial judges by and large to hew to the tradition of arbitrary strikes and allow peremptory challenges in doubtful cases. *Batson* has therefore become impotent in preventing discrimination.

Id. at 1104-05.

peremptory challenge, the defendant receives a new trial automatically.²⁹⁴ This remedy is unlike those granted for most constitutional violations, which incorporate a harmless error analysis to one degree or another, or even those violations resulting in automatic reversal of the conviction because of doubt about the integrity of the proceeding due to a structural defect. A *Batson* violation is by its nature completely harmless to the defendant because the equal protection violation only harms the jurors.²⁹⁵

Under the Supreme Court's analysis in *Holland v. Illinois*,²⁹⁶ the constitutional jury trial right does not prevent the government from exercising its peremptory challenges to exclude distinctive groups from a jury. According to the Court, while the pool of citizens from which a petit or grand jury was drawn must include a fair cross-section of the community, the actual jury need not reflect any particular racial or sexual composition.²⁹⁷ Under *Holland*, a defendant's jury trial right is preserved so long as the jury was impartial, even if the government removed some members from the panel in violation of *Batson*. Therefore, while *Batson* prevented the use of peremptory challenges based on race or sex, the jury trial right does not provide the defendant with any right to have particular jurors seated on the panel based on their race or sex.²⁹⁸ The

294. When a party raises a successful *Batson* claim in the trial court, the judge can prohibit the exercise of the peremptory challenge or even require that the parties begin jury selection anew. Because there has not been a trial, the judge can take steps to alleviate the harm immediately before the jury is sworn in, while after trial the only possible remedy is to reverse the conviction and retry the defendant. Even that remedy does not prevent a party trying to use a peremptory challenge in a more subtle way to discriminate against a protected class. See Edward S. Adams & Christian J. Lane, *Constructing a Jury that is Both Impartial and Representative: Utilizing Cumulative Voting in Jury Selection*, 73 N.Y.U. L. REV. 703, 725 (1998) (arguing that inclusion of venireperson on the jury or granting a new trial do not adequately deter discriminatory peremptory challenges). My focus is on the remedy available to appellate courts finding that the exercise of the peremptory challenge violated equal protection. The same remedy, reversal of the conviction and a new trial, applies when the trial court improperly found the defendant's explanation for a peremptory strike violated *Batson* and refused to remove the juror. See *United States v. Blotcher*, 142 F.3d 728, 732 (4th Cir. 1998). In either case, a *Batson* error results in a new trial for the defendant.

295. See Eric L. Muller, *Solving the Batson Paradox: Harmless Error, Jury Representation, and the Sixth Amendment*, 106 YALE L.J. 93, 118 (1996). Professor Muller notes that:

Batson's proponents have defined the *Batson* norm in such a way that a *Batson* violation is absolutely harmless in every case. . . . Thus the Court, presented with the question of whether to apply harmless error analysis to a *Batson* violation, would be driven to the odd position that *Batson* error should trigger not automatic reversal, but automatic affirmance.

296. 493 U.S. 474 (1990).

297. *Id.* at 480-81.

298. *Id.* at 486-87. The Court stated:

We do not hold that the systematic exclusion of blacks from the jury system through peremptory challenges is lawful; it obviously is not. . . . We do not even hold that the exclusion of blacks from this particular trial was lawful. . . . All we hold is that [defendant] does not have a valid constitutional

harm from the equal protection violation would have no direct effect on the defendant, so it must be harmless except in the broader sense that it undermined the integrity of the judicial process.²⁹⁹

If the jury is fair, regardless of whether it reflects the community's composition, then branding a prosecutor as a person acting on racial or sexual bias in exercising a peremptory challenge becomes even harder for a court. Moreover, the incentive for the prosecutor to advance a superficially plausible, if not necessarily truthful, explanation for the peremptory challenge is heightened because the actual jury will still be a fair one constitutionally, even if the motive for removing the juror would violate *Batson*. From the prosecutor's point of view, defendants who successfully assert *Batson* claims receive a windfall because the jury may be slightly biased in their favor. Successfully striking that juror by proffering a facially neutral explanation, however, does not cause any direct harm to the defendant while possibly increasing the chance of a conviction. Acknowledging a *Batson* violation gives the defendant a benefit, while advancing a plausible reason for a peremptory challenge does not undermine the constitutional protection provided by the jury trial. The prosecutor, who is an advocate for the government in seeking a conviction, may perceive *Batson* as not just a procedural roadblock, but an impediment that can give defendants an unwarranted benefit.³⁰⁰

The nature of a *Batson* violation as potentially providing a defendant with a windfall was amply demonstrated in *United States v. Huey*.³⁰¹ Huey's attorney used his five peremptory challenges to remove African-Americans from the jury on the ground that tape recordings which the government intended to introduce contained racial slurs by the defendant.³⁰² Both the government and Huey's co-

challenge based on the Sixth Amendment – which no more forbids the prosecutor to strike jurors on the basis of race than it forbids him to strike them on the basis of innumerable other generalized characteristics.

Id.

299. See Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 MICH. L. REV. 2001, 2004 (1998) (“[O]ur experience over the last decade with *Batson* claims—where reversal and retrial has been the standard remedy—suggests that here, too, traditional criminal procedure remedies do not translate easily into the equal protection context.”).

300. Prosecutors may be suspicious of some *Batson* challenges, believing that defense counsel raise the claim to preserve a favorable juror and not because of any possible bias on the part of the prosecutor. See Jean Montoya, *The Future of the Post-Batson Peremptory Challenge: Voir Dire by Questionnaire and the Blind Peremptory*, 29 U. MICH. J.L. REFORM 981, 1008 (1996) (“Some prosecutors also commented that defense counsel sometimes use the motions strategically, to embarrass the prosecutor or to prevent the loss of a juror biased in the defendant's favor.”).

301. 76 F.3d 638 (1996).

302. *Id.* at 639-40.

defendant objected to the strikes on *Batson* grounds, which the trial court denied without explanation.³⁰³ On appeal of their convictions, the Fifth Circuit found that Huey's counsel's peremptory challenges violated *Batson* and ordered a new trial for *both* defendants.³⁰⁴ The circuit court justified granting the transgressor a remedy by asserting that "only by repudiating all results from such a trial can public confidence in the integrity of this system be preserved, even when it means reversing the conviction of the very defendant who exercised the discriminatory challenges."³⁰⁵

The Fifth Circuit was well aware of the irony of its decision, but relied on the vigilance of trial judges to prevent other defendants from using *Huey* as a means to generate grounds for a successful appeal.³⁰⁶ The trial judge had acquiesced in an obvious equal protection violation, so ordering a new trial was traceable primarily to a judicial failure to vindicate the equal protection right of the removed jurors. The Seventh Circuit ridiculed *Huey*'s result, stating that "[g]iving a defendant a new trial because of his own violation of the Constitution would make a laughingstock of the judicial process."³⁰⁷ But was the Fifth Circuit wrong in *Huey*? While the result certainly appears anomalous, it reflected the Supreme Court's focus on the harm to the judicial system from an equal protection violation, divorced from the actual proceeding in which a defendant's right to an unbiased jury may have been fully protected and the conviction a product of a fair proceeding. Once the Supreme Court identified the prospective jurors as the aggrieved party and permitted defendants to attack their convictions not because the particular verdict was tainted but on the ground that the entire system was tarnished by discrimination, then granting every defendant a new trial should be the result. *Huey* was right in not discriminating among the defendants, based on their culpability for the equal protection violation, if a defendant need not show any direct harm from the improper peremptory challenges to sustain a *Batson* claim.³⁰⁸

303. *Id.*

304. *Id.* at 641.

305. *Id.* at 641-42.

306. *Id.* at 641-42.

307. *United States v. Boyd*, 86 F.3d 719, 725 (7th Cir. 1996).

308. In *Mata v. Johnson*, 99 F.3d 1261 (5th Cir. 1996), the Fifth Circuit refused to apply *Huey* to a case in which the prosecutor, defendant and trial judge agreed to remove all eight African-Americans from the jury on the ground that the defendant had not objected to the removal and that such agreements were unlikely to ever take place again. *Id.* at 1271 ("We are . . . convinced that such jury selection collusion among litigants and judges is virtually certain never to be repeated."). The defendant's acquiescence to the obvious *Batson* violation in *Mata* should not have removed the case from the *Huey* analysis that rested the reversal on the effect of the violation on the integrity of the judicial proceeding. Regardless of how

By removing *Batson* violations from the category of cases subject to harmless error, the perception of windfall is heightened when the defendant successfully challenges a conviction on appeal.³⁰⁹ In *United States v. Annigoni*,³¹⁰ the Ninth Circuit, sitting *en banc*, adopted the approach of every other circuit that had addressed the issue by rejecting a harmless error review of a *Batson* violation and holding that a conviction must be reversed automatically upon finding the equal protection violation.³¹¹ Judge Kozinski's dissent noted the conundrum created by a focus on the removed juror, rather than the defendant, as the party harmed by a discriminatory peremptory challenge, that "we are

distasteful it is to permit a defendant to reap the benefit of a violation, *Batson* should apply whenever there is sufficient evidence of purposeful discrimination.

A student author criticized the Fifth Circuit's position in *Huey* and supported the Seventh Circuit's position in *Boyd*, with the important caveat that the bar to granting a new trial to the transgressor "should be supplemented by an obligation on the part of judges to actively protect the interests of jurors by initiating *Batson* hearings sua sponte whenever the circumstances would permit a prosecutor to do so." Audrey M. Fried, Comment, *Fulfilling the Promise of Batson: Protecting Jurors from the Use of Race-Based Peremptory Challenges by Defense Counsel*, 64 U. CHI. L. REV. 1311, 1313 (1997). The problem is not the trial judge who sees a *Batson* violation and fails to correct it, but a court's failure to see the violation that only becomes apparent (or noticed) at the appellate level. The question is really one of post-conviction remedy. If the harm is to the struck juror and not the defendant, then the source of the equal protection violation and its consequent harm to the judicial system seems irrelevant.

That point was illustrated in *United States v. Blotcher*, 142 F.3d 728 (4th Cir. 1998), in which the Fourth Circuit reversed a defendant's conviction because the judge erroneously found the defendant's exercise of a peremptory challenge violated *Batson*. *Id.* at 732. The harm in *Blotcher* from *not* permitting the defendant to remove a juror peremptorily, which is solely a statutory right, was a finding that the peremptory challenge was permissible under the Fourteenth Amendment. A non-violation of *Batson* is treated the same as a violation if the judge erroneously prohibits the removal of the juror. In this case, the harm must be to the defendant, but not such that an unfair trial took place because the jury was not alleged to have been biased in any way. Protecting the integrity of the system by permitting the proper removal of jurors for reasons unrelated to race or sex apparently is just as important as protecting it from improperly motivated peremptory challenges. In either case, the systemic harm, and not a finding of prejudice from the use or denial of the peremptory challenge, permits a court to reverse a conviction without regard to whether the proceeding was fair or the jury otherwise unbiased in reaching its finding of guilt beyond a reasonable doubt.

309. See Muller, *supra* note 295, at 121. Professor Muller states that:

Convictions are not reversed to deter violations of the Equal Protection Clause. . . . [A] prosecutor's illegal courtroom decision to dismiss a juror on account of race or gender should have the same consequences for the defendant as that prosecutor's illegal office decision to fire a secretary on account of race or gender.

Id. Professor Muller cogently argues that the way around the harmless error problem is to "relocate the fair trial harm from the Fourteenth Amendment's Equal Protection Clause to the Sixth Amendment's jury trial guarantee." *Id.* at 132-33. The problem with incorporating the *Batson* analysis in the jury trial right is the Court's decision in *Holland v. Illinois*, which Professor Muller argues should be overturned. Although the jury trial right is sufficient to protect the defendant's interest, the Court must still rely on the Equal Protection Clause to justify extending the protections of *Batson* to civil cases and prosecutors, which would create an odd amalgam of conflicting interests under the jury trial right.

310. 96 F.3d 1132 (9th Cir. 1996) (*en banc*).

311. *Id.* at 1141.

forced to choose from two all-or-nothing rules: the error is always harmless or it is never harmless. There is no practical middle ground.”³¹² Given the problem with labeling a prosecutor as having engaged in intentional discrimination under *Batson*, and the effect of giving the prosecutor’s explanation too close a review to create a record that might invite appellate reversal regardless of the fairness of the trial, a judge may well accept any modestly plausible explanation for the strike without pause. If a judge has an incentive to accept almost any explanation, however, prosecutors will be tempted to use their peremptory challenges aggressively if they know the trial court is unlikely to subject their explanations to any real scrutiny.³¹³

Asking prosecutors and defense counsel to explain the reason for exercising a peremptory challenge, in a structure designed to avoid labeling that explanation as disingenuous or discriminatory, simply invites attorneys to respond in a way that meets the minimal requirements for avoiding a *Batson* violation. The prosecutor’s role is to be an advocate on behalf of the government, and jury selection is an integral part of the process of securing a conviction. It is naive to expect attorneys trying to win their case to respond with full candor to a demand to explain their motivation for striking a juror.³¹⁴ *Batson*’s goal to protect the integrity of the judicial system by eliminating bias is laudable, but the means the Court chose to reach it was deeply flawed.³¹⁵ Judicial inquiry into prosecutorial motives invites responses that may not always be candid, and indeed sometimes will be an outright lie.³¹⁶ Not all prosecutors

312. *Id.* at 1150 (Kozinski, J., dissenting).

313. See Montoya, *supra* note 300, at 1024 (“Because judges are apparently ill-equipped to discern lawyer’s intentions and reluctant to identify purposeful discrimination, the scrutiny of suspect peremptory challenges in a *Batson* hearing provides no answer.”).

314. See Reiss, *supra* note 26, at 1419 (“[*Batson*] requires that a prosecutor reveal and explain his motivations in court, on the record, and in the presence of defense counsel, immediately after the prosecutor has engaged in the challenged behavior. The stark focus on the prosecutor’s subjective intent is bound to make *Batson* difficult to administer.”).

315. Professor Karlan summarized the point quite aptly in asserting that “[w]hat *Batson* shows is that when courts cannot calibrate the remedy, they fudge on the right instead.” Karlan, *supra* note 299, at 2015.

316. See Anderson, *supra* note 31, at 377 (“[T]he ethics of both lawyers and judges are called into question because the law makes it easier for lawyers to lie [about peremptory strikes] and makes it easier for judges to ignore it when they do.”); Robin Charlow, *Tolerating Deception and Discrimination After Batson*, 50 STAN. L. REV. 9, 37 (1997) (“[O]ne possible reason not to state honestly a nondiscriminatory reason is the fear that what one believes to be a neutral, nondiscriminatory reason will be ruled discriminatory nonetheless.”) Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 1006 (1998). Professor Leipold states that:

Since the prosecution’s reasons [for a peremptory strike] by definition would not satisfy a challenge for cause, the judge is then asked to decide whether the prosecutor’s vague, often idiosyncratic reasons are sufficient to refute the allegation of lying. Such a process can hardly inspire confidence in defendants or

are racist or sexist and certainly *Batson* has limited the discriminatory use of peremptory challenges, although clearly it has not eliminated it.³¹⁷ But asking prosecutors to defend their actions, and permitting judges to accept explanations that on occasion are, at best, barely plausible, does nearly as much harm to the integrity of the judicial system as a peremptory challenge based on racial or sexual stereotypes. If almost any reason can be accepted, no matter how apparently implausible, then the harm from discrimination may only be heightened because the courts appear to turn a blind eye to it.³¹⁸

Batson sticks out like the proverbial sore thumb in the area of prosecutorial misconduct. In other contexts, the Supreme Court has adopted tests that largely make judicial inquiry into prosecutorial motives irrelevant. For a *Batson* claim, however, the Court made inquiry into intent the cornerstone of the equal protection edifice while empowering trial judges to accept almost any explanation as sufficient to fulfill the requirements of judicial review.³¹⁹ The inquiry in the name of protecting the integrity of the justice system reveals the central flaw of *Batson* when courts can ignore reality and permit the peremptory

the public, and as a society we might be understandably reluctant to increase the opportunities for this public spectacle of charges and denials to occur.

Id.

317. See Alschuler, *supra* note 257, at 172 (“Because most prosecutors will probably comply with the Supreme Court’s decision in good faith, *Batson* may work a significant change in American trial practice. . . . Nevertheless, some prosecutors may seek to evade the requirements of the *Batson* decision.”).

318. See *United States v. Clemmons*, 892 F.2d 1153, 1162 (1990) (Higginbotham, J., concurring) (“On any individual case on appeal, even a flimsy explanation may appear marginally adequate and be sustained. However, this cumulative record causes me to pause and wonder whether the principles enunciated in *Batson* are being undermined by excuses that have all form and no substance.”); Sheri Lynn Johnson, *The Language and Culture (Not to Say Race) of Peremptory Challenges*, 35 WM. & MARY L. REV. 21, 59 (1993). Professor Johnson asserts that:

If prosecutors exist who . . . cannot create a ‘racially neutral’ reason for discriminating on the basis of race, bar examinations are too easy. If judges exist who wish to believe proffered ‘racially neutral’ reasons and cannot rationalize that desire, impeachment for incompetence ought to be more frequent. Whatever you do, just don’t say race. Don’t even think about it.

Id.

Professor Charlow discussed the possibility of using the professional disciplinary system as a means to police attorneys who violate *Batson*, but she noted that “[i]t may be difficult, however, for courts to separate the egregious cases from all the others. And at least with regard to run-of-the-mill *Batson* findings, it will surely be difficult for courts to assess which of the many possible permutations of culpability exists.” Charlow, *supra* note 316, at 62. See also Sheri Lynn Johnson, *Batson Ethics for Prosecutors and Trial Judges*, 73 CHI.-KENT L. REV. 475, 500 (1998) (“By now it is clear that policing will neither curb the defiant prosecutor nor spur the inert trial judge. The Supreme Court’s extreme deference to trial court determinations of racial motivation compels a focus on ethical trial court actors; perhaps this is the tack that should have been taken.”).

319. See Reiss, *supra* note 26, at 1419 (“[T]he procedure for challenging a prosecutor’s use of peremptories places a spotlight on the prosecutor’s motives in the most immediate, dramatic, and intrusive fashion.”).

strike based on a clearly questionable explanation.

The Court recognized in *Swain* that asking prosecutors to explain their reasons for peremptory challenges was not a proper subject of judicial inquiry. By the time *Batson* overturned *Swain*, the propriety of judicial inquiry into prosecutorial motive had not changed. Yet, the Court ignored an important aspect of its earlier decision that remained viable even though *Swain*'s protection for racial discrimination had to fall. The Court in *Batson* should have at least considered *Swain*'s position that judicial inquiry into prosecutorial motives was improper and will yield just as much harm, although of a different type, as the problem the inquiry seeks to eradicate. Accepting the prosecutor's good faith was the downfall of *Swain*, but the approach adopted by *Batson* has proved to be just as problematic.³²⁰

Simply eliminating the *Batson* inquiry would not solve the problem of discriminatory exercises of peremptory challenges. One possibility might be to keep the prima facie standard, but require that the party challenging the peremptory challenge do more than assert that the strike was based on an impermissible motive. The problem with requiring a higher degree of proof is that it gives the other side a "free shot" at striking at least one juror before there is any evidence that the party used the peremptory challenges in a discriminatory manner.³²¹ It would be an odd rule that an attorney can strike one juror based on race or sex, but that every one after that might be subject to an equal protection challenge. Moreover, permitting a government attorney to violate the Equal Protection Clause, even once, would resuscitate *Swain*'s discredited approach to peremptory challenges.

Another possibility would be to lower the standard by which the trial court can remove a juror for cause. A party may challenge any juror if there is a sufficient basis to show that the person will not decide the case impartially, but

320. See Alschuler, *supra* note 257, at 176 ("Even when prosecutors are forthcoming, determining the adequacy of their explanations is a difficult and burdensome task, and prosecutors may not always be forthcoming. For some prosecutors, *Batson*'s message may appear to be: When your quota of free shots is exhausted, you must make up some plausible reasons."); Montoya, *supra* note 300, at 1007 ("*Batson* . . . motions are difficult to win because lawyers rebutting a prima facie case of discrimination may not tell the truth, and the rebutting lawyer can too easily come up with a race-neutral reason for the challenge."); but see Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 761 (1992) ("By preserving the peremptory challenge, and superimposing an antidiscrimination rule, the Court has struck a sensible and workable balance. . . . Because such a modified peremptory challenge serves important functions, it is worth preserving.")

321. See Alschuler, *supra* note 257, at 173 ("*Batson* may afford [the] prosecutor one or two 'free shots'—opportunities to discriminate against blacks without accounting for his or her actions. . . . Moreover, whenever the prosecutor . . . allows one or two blacks to serve on the jury, he or she may gain additional opportunities to discriminate.")

under the current standards it is difficult to demonstrate either actual prejudice or an inability to decide a case fairly.³²² Courts could combine the prima facie requirement of *Batson* with the challenge for cause, requiring the attorney who appears to be striking jurors in a discriminatory manner to justify the peremptory challenges by something more than just a neutral explanation.³²³ While this approach would cut down on the number of discriminatory strikes, it would not address completely the broader problem of attorneys, especially prosecutors, furnishing explanations that mask a discriminatory intent. This change would really only overturn *Purkett v. Elem* by requiring a good, or at least much more plausible, explanation before the court permitted the peremptory challenge.

There is also Justice Marshall's proposal in his concurrence in *Batson*, that the peremptory challenge be eliminated from criminal trials. He stated, "The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system."³²⁴ Such a prohibition on peremptory challenges would bring the Court full circle from *Swain*. While the Court had once accepted all peremptory challenges, relying on the presumed good faith of the prosecutors, it would reject all such challenges because of the potential for impermissible discrimination.³²⁵ Under either

322. See Pam Frasher, Note, *Fulfilling Batson and Its Progeny: A Proposed Amendment to Rule 24 of the Federal Rules of Criminal Procedure to Attain a More Race- and Gender-Neutral Jury Selection Process*, 80 IOWA L. REV. 1327, 1331-32 (1995) (reviewing requirements to remove jurors for cause). The peremptory challenge can serve as an alternative means to for cause removal of jurors when there are serious questions regarding their impartiality. See Alschuler, *supra* note 257, at 206. Professor Alschuler writes that:

On occasion, unexplained challenges have provided a gentle way of excluding prospective jurors who probably should not have been permitted to serve . . . the peremptory challenge has permitted both judges and prospective jurors to save face. Judges have resolved their doubts against exclusion, relying on the peremptory challenge to correct their errors and to do so without explicitly rejecting the jurors' protestations of impartiality.

Id.

323. See Ogletree, *supra* note 293, at 1133 (proposing a lowered "for cause" standard for all strikes).

324. *Batson v. Kentucky*, 476 U.S. 79, 107 (1986) (Marshall, J., concurring). Justice Marshall rejected a ban on just prosecutorial peremptory challenges, arguing that "[i]f the prosecutor's peremptory challenge could be eliminated only at the cost of eliminating the defendant's challenge as well, I do not think that would be too great a price to pay." *Id.* at 108.

325. See Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 810 (1997) (trial judge author deems himself a "late" and "reluctant convert" to the position that peremptory challenges should be abolished); Melilli, *supra* note 271, at 502 ("The peremptory challenge has outlived its usefulness."); Alschuler, *supra* note 257, at 157 ("The Equal Protection Clause and the peremptory challenge are incompatible."). It is important to note, however, that practitioners support the peremptory challenge, and oppose proposals to ban them completely. See Montoya, *supra* note 300, at 1000 (stating that a survey of prosecutors and defense

regime, the attorneys would not be called upon to justify their actions.

Implementing such a ban is easier said than done, at least in a constitutional sense. While *Batson* and its progeny rely on the Equal Protection Clause as the basis for prohibiting particular acts that show purposeful discrimination, it would be much harder to justify a complete ban on a well-established trial practice because it has, in some instances, been used in a discriminatory manner. Moreover, given the extensions of *Batson* in *McCullum* and *Edmonson*, the constitutional prohibition would apply to every judicial proceeding, civil or criminal, and to every litigant. That is a substantial, and probably unwarranted, extension of the Equal Protection Clause. Such a ban would, however, eliminate the problem caused by *Batson*'s sanction of judicial inquiry into the motives of attorneys exercising peremptory challenges. It may be that the problems created by *Batson* challenges are best addressed through a more radical change that ensures the integrity of the judicial system rather than permitting attorneys, and most prominently prosecutors, to carry vigorous representation of their client to such an extreme that they act in ways that denigrate the system.³²⁶

attorneys should that practitioners overwhelmingly deemed peremptory challenges valuable); Herald Price Fahringer, *The Peremptory Challenge: An Endangered Species?*, 31 CRIM. L. BULL. 400, 401 (1995) ("To effectively confront the forces of prejudice and bias that afflict so many jurors called into service today, it is imperative that the parties have a full complement of peremptory challenges."); William F. Fahey, *Peremptory Challenges: A Crucial Tool for Trial Lawyers*, 12 CRIM. JUST., Spring 1997, at 29 ("Trial attorneys can only hope that there is some residual rationality left in the courts—and that some form of peremptory challenge is allowed to remain.")

326. A detailed constitutional analysis of *Batson* and its progeny under the Sixth and Fourteenth Amendments, and various proposals for changing the equal protection test short of eliminating the peremptory challenge, is beyond the scope of this article. There are a number of recent articles that thoroughly dissect this area, some offering modifications that accommodate both the peremptory challenge and the equal protection principle of *Batson*. See, e.g., Roberta K. Flowers, *Does It Cost Too Much? A 'Difference' Look at J.E.B. v. Alabama*, 64 FORDHAM L. REV. 491 (1995); George C. Harris, *The Communitarian Function of the Criminal Jury Trial and the Rights of the Accused*, 74 NEB. L. REV. 804 (1995); Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041 (1995); Joel H. Swift, *The Unconventional Equal Protection Jurisprudence of Jury Selection*, 16 N. ILL. U. L. REV. 295 (1996); Tracy M.Y. Choy, Note, *Branding Neutral Explanations Pretextual under Batson v. Kentucky: An Examination of the Role of the Trial Judge in Jury Selection*, 48 HASTINGS L.J. 577 (1997); Brian A. Howie, Note, *A Remedy Without a Wrong: J.E.B. and the Extension of Batson to Sex-Based Peremptory Challenges*, 52 WASH. & LEE L. REV. 1725 (1995). My point is that, when considered from the point of view of judicial review of prosecutorial misconduct, *Batson* is misguided because it relies on attorneys who must vigorously represent their client's interest to respond in complete candor regarding their motivations for exercising a peremptory challenge. Reliance on a prosecutor's candor seems particularly misplaced in a criminal prosecution when the defendant would not suffer any direct harm from a violation. It is difficult to envision a test precluding judicial inquiry into the attorney's intent that would not result in the almost complete demise of the peremptory challenge. See Melilli, *supra* note 271, at 503 ("*Batson* as applied in the lower courts has demonstrated the futility of simultaneously attempting to preserve the essential character of the peremptory challenge and to redefine

V. MISCONDUCT DURING TRIAL: CAN DOUBLE JEOPARDY CONTROL PROSECUTORIAL MISCONDUCT?

Once a trial begins, the prosecutor's conduct shifts to a public stage on which all can see the choices made in calling witnesses, introducing evidence, and arguing the case to the trier of fact. The case has reached the point at which the decision whether the defendant is guilty of the crime beyond a reasonable doubt depends, at least in part, on the government attorney's skill in marshaling evidence and explaining how it proves the defendant's culpability. It is in this forum that the prosecutor's role as advocate for the government reaches its apogee. The prosecutor, no doubt convinced of the defendant's guilt, must translate that belief into proof beyond a reasonable doubt that will satisfy a jury (or judge) that the defendant engaged in a criminal act with the requisite mental state.

As the government's advocate, and society's representative, the prosecutor seeks a verdict of guilty, within the confines of the ethical rules that govern the legal profession. The temptation to overstep, however, by imparting to the trier of fact one's firmly held belief in the defendant's guilt, even at the risk of allowing advocacy to degenerate into prejudicial argumentation or unfair commentary on the evidence and credibility of the witnesses is omnipresent. Although the presence of the judge is a moderating influence on both sides, there are numerous instances of overreaching by lawyers during trial. Every objection sustained by the judge or sanction for improper conduct is, in a sense, a result of one attorney's transgression, whether it be characterized as an innocent mistake, aggressive advocacy, or willful misconduct.

If the prosecutor engages in improper conduct during trial, such as making inflammatory arguments or asking witnesses inappropriate questions, then "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'"³²⁷ A claim of prosecutorial misconduct during trial requires a court to resolve two questions: whether the prosecutor's comments were in fact improper, and, if so, whether the remarks prejudiced the defendant's right to a fair trial.³²⁸ The usual remedy granted to overcome prosecutorial misconduct

'discrimination' in such a way as to prohibit the exercise of peremptory challenges on the basis of certain group stereotypes.')

327. *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

328. *United States v. Warfield*, 97 F.3d 1014, 1028 (8th Cir. 1996); *see also* *United States v. Hall*, 47 F.3d 1091, 1098 (11th Cir. 1995) ("A defendant's substantial rights are prejudicially affected when a

that prejudiced the fairness of a proceeding is a new trial.

Whether the trial conduct of the prosecutor, as opposed to defense counsel or civil attorneys, should trigger a remedy beyond a new trial raises a different question. Unlike other attorneys, the prosecutor operates within a system that, for the most part, gives the government only one chance at proving its case. The Fifth Amendment's Double Jeopardy Clause provides that no defendant "shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."³²⁹ The Supreme Court's classic description of the scope of the double jeopardy protection came in *North Carolina v. Pearce*: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense."³³⁰ The Double Jeopardy Clause safeguards a defendant from governmental overreaching because "permitting the sovereign freely to subject the citizen to a second trial for the same offense would arm Government with a potent instrument of oppression."³³¹ Once a jury has reached a verdict, be it guilty or not guilty, the Fifth Amendment provides that a defendant may not be subjected to another trial for the same crime.³³²

The double jeopardy protection is not limited to successive prosecutions after the verdict. The language of the Double Jeopardy Clause restricts placing a defendant "twice in jeopardy" for the same crime, which appears to comprehend both retrials after a proceeding aborted short of a verdict, *i.e.*, a mistrial, and after appellate reversal of a conviction. If the first trial ended because of prosecutorial misconduct prior to a decision by the trier of fact, or if a reviewing court reverses a conviction due to prosecutorial misconduct, could that trigger the double jeopardy protection? If it could, then the Double Jeopardy Clause might prohibit a retrial because of prosecutorial misconduct that did not violate any of the specific protections a defendant receives in a criminal proceeding, except the requirement of a fair trial. Unlike a due process violation, which generally results in the court granting a new trial, the sole remedy for a double jeopardy violation is a complete bar on a second criminal prosecution. As the Supreme Court emphasized, "[W]here the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced, for the

reasonable probability arises that, but for the remarks, the outcome would be different.").

329. U.S. CONST. amend. V.

330. 395 U.S. at 717 (footnotes omitted).

331. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977).

332. See *Jeffers v. United States*, 432 U.S. 137, 150 (1977) (plurality opinion); George C. Thomas III, *An Elegant Theory of Double Jeopardy*, 1988 U. ILL. L. REV. 827, 839 (arguing that verdict finality is the only value protected by Double Jeopardy Clause).

Clause has declared a constitutional policy, based on grounds which are not open to judicial examination.”³³³ The Double Jeopardy Clause provides the holy grail of remedies, an absolute prohibition on further criminal proceedings against the defendant for the charged offense. That remedy creates a powerful incentive for defendants to seek an expansive reading of the double jeopardy protection to encompass prosecutorial misconduct.

A. *Manifest Necessity for a Mistrial*

The Double Jeopardy Clause’s prohibition on putting a defendant “twice in jeopardy” is far more complicated than it first appears. Leaving aside the thorny issues of when a second set of charges incorporates the same underlying conduct as that considered in an earlier proceeding or whether a civil punishment can bar a subsequent criminal action, the impact of prosecutorial or judicial errors on a defendant’s double jeopardy right has presented a continuing challenge to the Supreme Court. Early on, the Court confronted the question of whether a defendant, whose first trial the judge ended short of a verdict due to a mistrial, could be retried on the same charges. In *United States v. Perez*,³³⁴ Justice Story’s opinion stated that a court could retry a defendant when there was a “manifest necessity” for ordering a mistrial, “or the end of public justice would otherwise be defeated.”³³⁵ In *United States v. Ball*,³³⁶ the Court held that the Double Jeopardy Clause did not bar retrial after the defendant’s conviction had been reversed on appeal.³³⁷ The only exception to the *Ball* rule is when the reviewing court reverses a conviction because there was insufficient evidence introduced at trial to prove the defendant’s guilt beyond a reasonable doubt.³³⁸

The most common reason for granting a mistrial is when the jury deadlocks and cannot render a verdict, which the Supreme Court has held constitutes manifest necessity automatically.³³⁹ Aside from hung jury cases, when a trial

333. *Burks v. United States*, 437 U.S. 1, 11 n.6 (1978).

334. 22 U.S. (9 Wheat.) 579 (1824).

335. *Id.* at 580.

336. 163 U.S. 662 (1896).

337. *Id.* at 672.

338. *Burks v. United States*, 437 U.S. 1, 11 (1978) (stating that the “Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding).

339. *See Arizona v. Washington*, 434 U.S. 497, 509 (1978) (“[W]ithout exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial.”). The Court has identified two similar situations in which double jeopardy does not prohibit a second prosecution: (1) double jeopardy does not bar the government’s appeal after dismissal of an indictment without an adjudication of the defendant’s factual guilt, *see United States v. Scott*, 437 U.S.

court orders a mistrial, the initial question in determining whether double jeopardy bars retrial is whether the defendant consented to the premature termination of the proceeding. In *United States v. Dinitz*,³⁴⁰ the Court held that “a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to re prosecution, even if the defendant’s motion is necessitated by prosecutorial or judicial error.”³⁴¹ In that event, there is no question of manifest necessity because the defendant chose to start again in order to dissipate the taint of any impropriety or misconduct in the earlier proceeding. If the defendant objects to the prosecutor’s motion for a mistrial, or to a court’s *sua sponte* suggestion that it declare a mistrial, then the question of manifest necessity arises. For example, if the government’s opening argument seeks to inflame the jury’s passions and the judge orders a mistrial over the defendant’s objection, would double jeopardy bar a second proceeding?

When a defendant objects to the termination of the proceeding, the court’s reason for granting the mistrial must be sufficient to show that there was a manifest necessity under *Perez*. The Supreme Court has taken two different approaches to the manifest necessity analysis, depending on whether the reason for the mistrial can be ascribed to an error by the court or by the prosecutor. If the court negligently granted a mistrial when it should have taken some other means to mitigate the harm short of aborting the trial, then double jeopardy bars a second prosecution. In *United States v. Jorn*,³⁴² the trial court declared a mistrial, without consulting attorneys for either side, to avoid what the judge felt were self-incrimination problems for the government’s witnesses.³⁴³ A plurality of the Court found that the judge’s improvident mistrial order violated double jeopardy, stating that “[r]eprosecution after a mistrial has *unnecessarily* been declared by the trial court obviously subjects the defendant to the same personal strain and insecurity regardless of the motivation underlying the trial judge’s action.”³⁴⁴ *Jorn* is what I call the “loose cannon” rule, preventing a retrial when a trial judge rashly stops the proceeding for reasons unrelated to the defendant’s

82, 101 (1982); and, (2) double jeopardy permits retrial after the defendant’s successful appeal results in reversal of the conviction, *see* *United States v. Ball*, 163 U.S. 662, 672 (1896).

340. 424 U.S. 600 (1976).

341. *Id.* at 607 (quoting *United States v. Jorn*, 400 U.S. 470, 481 (1971)). The Court found that “[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retains primary control over the course to be followed in the event of such error.” *Id.* at 609.

342. 400 U.S. 470 (1971).

343. The defendant had prepared allegedly fraudulent tax returns for the witnesses, and the judge did not believe assertions by the government agents that the witnesses were aware of their Fifth Amendment right, so the judge refused to permit them to testify until they had consulted with counsel. *Id.* at 473.

344. *Id.* at 483 (emphasis added).

factual guilt or innocence.³⁴⁵ In *Arizona v. Washington*,³⁴⁶ the Court held that when the record shows “that the trial judge acted responsibly and deliberately, and accorded careful consideration to [defendant]’s interest in having the trial concluded in a single proceeding,” then double jeopardy would not prohibit a retrial.³⁴⁷ When the trial judge acts “irrationally or irresponsibly,”³⁴⁸ however, double jeopardy provides the defendant with a windfall from the judge’s precipitous act.³⁴⁹

Prosecutorial negligence that causes a mistrial, on the other hand, is not treated as harshly by the Court. In *Illinois v. Somerville*,³⁵⁰ shortly after trial started, the prosecutor noticed that the indictment was fatally deficient because it did not allege an element of the charged offense.³⁵¹ The government was entirely blameworthy for the error, and the defendant objected to the government’s mistrial motion. The Court held that terminating the first trial

345. Reviewing courts do occasionally apply the double jeopardy clause to bar a second trial when the judge acted hastily, showing that trial judges’ unreflective actions can produce serious consequences. *See, e.g.*, *United States v. Gaytan*, 115 F.3d 737, 743 (9th Cir. 1997) (barring retrial after trial court granted mistrial when “[t]he judge admonished the prosecutor [for *Brady* violations] and ordered the case dismissed without pausing for any discussion of the possibility of other remedies, all in a matter of seconds. It is quite apparent from the district court’s subsequent candid remarks that it acted in a burst of anger.”); *United States v. White*, 914 F.2d 747, 754 (6th Cir. 1990) (holding that double jeopardy barred retrial after district court granted mistrial as to both defendants because prosecutor’s questions prejudiced one defendant, without determining whether trial as to unprejudiced defendant could have proceeded.”); *United States v. Means*, 513 F.2d 1329, 1335 (8th Cir. 1975) (holding that dismissal of indictment during trial based on prosecutorial misconduct could not be appealed and double jeopardy barred retrial “[w]hether or not Judge Nichol’s dismissal of the indictments was correct”); *United States v. Glover*, 506 F.2d 291, 297-98 (2nd Cir. 1974) (prohibiting retrial on conspiracy count when defendant objected to mistrial and district court’s reasons for mistrial “was not . . . for the benefit of Glover but for the benefit of his co-defendants.”).

346. 434 U.S. 497 (1978).

347. *Id.* at 516. The issue in *Washington* was the trial judge’s failure to articulate on the record the reason for finding manifest necessity in granting the mistrial, although it was apparent that defense counsel’s improper opening argument was the reason. The Court held that the Fifth Amendment did not require a trial court to make findings of fact or explain its reasons for declaring a mistrial. *Id.* at 517.

348. *Id.* at 514.

349. *See, e.g.*, *Harpster v. Ohio*, 128 F.3d 322 (6th Cir. 1997). The court in *Harpster* upheld an order prohibiting the state from retrying the defendant after a mistrial that the trial judge granted because he incorrectly believed that defense counsel had violated a pre-trial order. *See id.* at 330. The court stated that “a simple corrective instruction would have sufficiently protected against juror bias. Because this case lacks the urgent circumstances or high degree of necessity required to justify a mistrial, double jeopardy bars the retrial of petitioner.” *Id.* *See also* *Illinois v. Somerville*, 410 U.S. 458, 469 (1973) (noting that in *Jorn* the “opinion dealt with action by a trial judge that can fairly be described as erratic.”).

350. 410 U.S. 458 (1973).

351. *Id.* at 459. The grand jury charged the defendant with theft, which requires proof of an intent to permanently deprive the owner of the property. The grand jury’s indictment must charge every element of the offense, and only the grand jury could amend it to include the missing element. Under Illinois law, the defendant could raise an objection to the indictment at any time, including on appeal, and the conviction would have to be overturned automatically. *See id.* at 459-60.

satisfied the manifest necessity requirement because the problem was an “obvious procedural error” that would cause a lengthy delay pending appeal, and would result in an automatic reversal of the conviction and a second trial.³⁵²

Unlike the judicial negligence in *Jorn*, a mistrial caused by prosecutorial error did not result in a double jeopardy bar to a second prosecution. The reason for the different treatment of negligent conduct, depending on who was responsible, relates to the truth-telling incentive created by the *Somerville* Court’s finding of manifest necessity. If the Court had held that double jeopardy applied to mistrials triggered by prosecutorial negligence, then prosecutors would have a powerful inducement not to bring errors to the trial court’s attention because declaration of a mistrial would end any chance of convicting the defendant on the pending charge.³⁵³ The government would be much better served by sandbagging the trial court until after a conviction, at which point all the defendant could gain under the *Ball* rule would be reversal of the conviction and a new trial. If the government need not fear revealing errors that might result in granting a mistrial, then there was a positive gain for the criminal justice system in encouraging prosecutorial forthrightness.

B. Goading Defendants to Seek a Mistrial

After *Somerville*, the Supreme Court’s double jeopardy rule permitted retrials after declaration of a mistrial in three situations: (1) When the defendant requested or consented to a mistrial; (2) When the prosecutor acted negligently and the trial court ordered a mistrial over the defendant’s objection; and, (3) When the trial court acted with apparent deliberateness in ordering a mistrial over the defendant’s objection, or at least did not appear to be a “loose cannon” in reaching its decision. But what if the prosecutor acted improperly so as to

352. *Id.* at 464.

353. In *Downum v. United States*, 372 U.S. 734 (1963), the Court found a double jeopardy violation after the trial court granted a mistrial at the government’s request. The prosecutor informed the judge after the trial commenced that witnesses for two of the six counts of the indictment were unavailable, and the judge granted a mistrial to allow the government to secure their presence. *Id.* at 735. After defendant’s conviction on all counts on retrial, the Supreme Court reversed the convictions on double jeopardy grounds. *Id.* at 738. The Court held that “[t]he situation presented is simply one where the district attorney entered upon trial of the case without sufficient evidence to convict.” *Id.* at 737 (quoting *Cornero v. United States*, 48 F.2d 69, 71 (1931)). The problem in *Downum* was not just the prosecutor’s inadequate preparation, but the trial court’s improper handling of the situation that triggered the double jeopardy violation. Had the judge granted a continuance or taken other action short of a mistrial, there would not have been a double jeopardy issue. As it was, the trial judge’s negligence compounded the prosecutor’s failure and created a situation in which the *entire* case, and not just those counts involving the missing witnesses, was barred by double jeopardy.

provoke a defendant to request a mistrial? Under *Dinitz*, the defendant's request for a mistrial insulated the government from a double jeopardy claim to bar the retrial. Yet the Court, much as it has done in other areas, acknowledged the possibility that deliberate prosecutorial misconduct causing a defendant to request a mistrial might be treated differently than the usual case under *Dinitz*. In *Jorn*, the Court stated in a footnote that "where a defendant's mistrial motion is necessitated by judicial or prosecutorial impropriety designed to avoid an acquittal, re prosecution might well be barred."³⁵⁴ In *Somerville*, it asserted that "the declaration of a mistrial on the basis of a rule or a defective procedure that would lend itself to prosecutorial manipulation would involve an entirely different question."³⁵⁵ Even *Dinitz* noted a possible exception to the rule that a defendant requesting a mistrial could not raise double jeopardy because such a rule would be problematic if a prosecutor acted "in order to goad the [defendant] into requesting a mistrial."³⁵⁶

These statements were only dicta, so the Court did not provide guidance on what might trigger a double jeopardy violation until its decision in *Oregon v. Kennedy*.³⁵⁷ The prosecutor in *Kennedy*, frustrated when the trial judge sustained objections to apparently proper questions,³⁵⁸ finally asked a witness if he had not done business with the defendant "because he is a crook[.]"³⁵⁹ There was no dispute that the question was highly prejudicial, and that the misconduct caused the defendant to request the mistrial granted by the trial judge. The state court held that the Double Jeopardy Clause prohibited a retrial when the mistrial was the result of prosecutorial "overreaching." The Supreme Court rejected such a broad application of double jeopardy that could bar retrial in a wide range of cases in which the prosecutor's conduct, intended to enhance the likelihood of a conviction, resulted in a mistrial. The Court held that such an approach would "offer virtually no standards for their application" because "[e]very act on the part of a rational prosecutor during a trial is designed to 'prejudice' the defendant."³⁶⁰ The "overreaching" test rejected in *Kennedy* was really an enhanced harmless error test, weighing the reason the prosecutor engaged in the act against the harm it caused the defendant. The Court adopted

354. *Jorn*, 400 U.S. 470, 485 n.12 (1971).

355. *Somerville*, 410 U.S. at 464.

356. 424 U.S. 600, 611 (1976).

357. 456 U.S. 667 (1982).

358. The Court noted that the Oregon Court of Appeals had found that "the judge's rulings were probably wrong." *Id.* at 669 n.1 (quoting *People v. Kennedy*, 619 P.2d 948, 949 (Or. Ct. App. 1980)).

359. *Id.* at 669.

360. *Id.* at 674.

a narrower rule for determining whether prosecutorial misconduct violated double jeopardy, holding that a defendant could be retried “absent *intent* on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause.”³⁶¹ According to the Court, that determination called for “[i]nfering the existence or nonexistence of intent from *objective* facts and circumstances.”³⁶²

The *Kennedy* standard was quite narrow, requiring a court to find that the prosecutor specifically sought to “goad” a defendant into requesting a mistrial in order to get a second chance at securing a conviction. While the Court seemed to adopt a rule that relied on an assessment of prosecutorial intent to determine the double jeopardy issue, the analysis did not in fact call for an evaluation of the prosecutor’s actual state of mind or permit judicial inquiry into prosecutorial motives.³⁶³ As the Court stressed, the double jeopardy issue involved an objective test, assessing in hindsight the prosecutor’s actions to determine whether the improper act that caused the defendant’s mistrial motion could only be ascribed to a decision to abort the first trial so that a second proceeding could take place.³⁶⁴

When a prosecutor pushes the limits of the rules, is she trying to provoke a mistrial or just win a conviction? As the Court in *Kennedy* observed, all prosecutorial acts at trial are designed to prejudice the defendant, in the sense of making a conviction more likely. Therefore, a prosecutor can always argue that improper acts were designed to convict the defendant rather than to provoke a mistrial, even if the prosecutor acknowledges that pursuing a course of action increased the risk of a mistrial.³⁶⁵ A double jeopardy claim under *Kennedy* usually will involve an underlying violation of proper trial or evidentiary

361. *Id.* at 675-76 (emphasis added).

362. *Id.* at 675.

363. See Reiss, *supra* note 26, at 1426 (“Despite the Court’s palliative statement that discerning whether a misbehaving prosecutor has acted with the prohibited intent simply implicates the ‘familiar’ process of ‘[i]nfering the existence or nonexistence of intent from objective facts and circumstances,’ the nature and specificity of the prohibited intent make it almost impossible to prove.”).

364. Presumably, the prosecutor’s reason for provoking a defendant into requesting a mistrial that would violate *Kennedy* would have to be to correct errors in the first proceeding that likely would result in an acquittal, a verdict that would bar any further prosecution on the charges. If the prosecutor’s concern was that the jury would deadlock, there would be no reason to provoke a mistrial because one would be declared eventually, after which the *Perez* manifest necessity standard would automatically permit a retrial. See *Arizona v. Washington*, 434 U.S. 497, 510 (1978) (“The trial judge’s decision to declare a mistrial when he considers the jury deadlocked is . . . accorded great deference by a reviewing court.”).

365. See *Robinson v. Wade*, 686 F.2d 298, 309 (5th Cir. 1982) (“[The Prosecutor’s] conduct . . . reached the limits of the trial court’s rulings, and stretched the limits of propriety. It cannot be condoned. Nonetheless, the prosecutor’s arguments for pursuing the several lines of inquiry in question, while weak, are not so wholly lacking in merit as to be termed frivolous.”).

procedures that caused a court to order a mistrial on the defendant's motion, such as a prosecutor's attempt to use otherwise inadmissible evidence or to advance an unjustified argument. Yet those acts, standing alone, do not show any specific intent to goad the defendant into requesting a mistrial because they are means, albeit impermissible ones, to secure a conviction.

It would be easy to misinterpret *Kennedy* to find that it applies to any *intentional* prosecutorial misconduct that triggers a successful mistrial motion by the defendant. Focusing solely on the prosecutor's knowledge or purposefulness in pursuing a course of action ignores the second part of the Court's analysis, that the goading must have been intended to cause a mistrial and not just that the *effect* of the prosecutorial misconduct was termination of the first proceeding. The United States District Court for the Middle District of Florida made this very error in *United States v. Sterba*³⁶⁶ when it held that double jeopardy barred a retrial after the court granted a mistrial due to prosecutorial misconduct. The prosecutor had intentionally misled the judge and defense counsel regarding the identity of a crucial government witness by allowing the witness to testify under a false name, thereby hiding the witness' background and criminal record until the end of trial.³⁶⁷ The prosecutor's conduct was clearly reprehensible, and cast grave doubt on the strength of the government's case. The district court found that the prosecutor violated the double jeopardy protection under *Kennedy* because "intentional misconduct that, if known, is obviously sufficient to provoke a motion for a mistrial by the defense constitutes 'goadings,' especially if it intrudes into the unfettered exercise of a constitutional guarantee as essential as the right of confrontation."³⁶⁸ The problem with *Sterba's* analysis is that the magnitude or noxiousness of a prosecutor's misconduct is not an element of the double jeopardy analysis adopted in *Kennedy*. The Supreme Court required evidence of a specific purpose in the prosecutor's conduct, to goad the defendant into seeking a mistrial and not just that, upon discovery, a defendant would react by moving for a mistrial. *Kennedy* permitted the application of the double jeopardy prohibition only to a narrow category of prosecutorial misconduct during trial

366. 22 F.Supp.2d 1333 (M.D. Fla. 1998).

367. The witness initiated the contact with the defendant and agreed to meet him at the site at which he was arrested. *Id.* at 1340. Because the prosecutor concealed the witness's true identity, the defense did not learn that, among other things, the witness had been paid \$2,000 for her participation in the prosecution, had a conviction for making a false statement and filing a false police report, and had a reputation as "an accomplished liar." *Id.* at 1339.

368. *Id.* at 1342. The court found that "the trial was not conducted on equal footing, because the prosecutor had the force of a lie at her disposal." *Id.*

by linking the impropriety to the prosecutor's intent to the defendant's decision to abort the proceeding short of a verdict.³⁶⁹

A prosecutor could demonstrate the requisite intent under *Kennedy* by admitting he engaged in the conduct with the intent to provoke a mistrial motion, but this is unlikely to occur. If the egregiousness of the prosecutorial malfeasance does not trigger a double jeopardy violation, then the only realistic situation that the *Kennedy* test addressed is a case in which the prosecution fared poorly in presenting its case because there was some evidence that could not be introduced in the first proceeding but could be used in a second trial. For example, if a witness were temporarily unavailable during the first proceeding, then that person's availability at a later date might explain the government's actions prompting a mistrial. On the other hand, if a witness testified ineffectively at the first trial, or a vigorous cross-examination undermined the witness' credibility, it would be hard to connect that failing with the prosecutor's later action that provoked the mistrial. Even if the prosecutor believed that better preparation before the retrial would strengthen the government's case, the act that provoked the defendant's mistrial motion is unlikely to be so clearly connected to the particular problem in the government's case that a reviewing court would have *objective* evidence of improper prosecutorial intent. It is difficult to see how a defendant could prove the prosecutor's intent based on improper conduct arguably designed to secure a conviction. If the witness' testimony was weak or his credibility destroyed, the government may be more aggressive in presenting its case, thereby accepting the risk of a mistrial. A mistrial would permit the government to better prepare for a retrial, even though the government is not necessarily acting with the intent of provoking the defendant into seeking a mistrial.³⁷⁰

369. The district court noted that "[t]he typical case [under *Kennedy*] includes no attempt by the prosecutor to achieve an ill-gotten verdict by furtive means," but that goading had a broader meaning that included "intentional misconduct" that, upon revelation to the defendant, would clearly provoke a mistrial motion. *Id.* The prosecutor's conduct clearly violated the defendant's confrontation right under *Smith v. Illinois*, 390 U.S. 129 (1968), in which the Supreme Court held that "[t]he witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." *Id.* at 131. The Confrontation Clause violation, standing alone, would require only a new trial as the remedy, not dismissal of the indictment. Given that the government violated one constitutional protection, it is difficult to see how the presence of the prosecutor's reprehensible intent transformed it into a violation of the Double Jeopardy Clause solely on the basis of the clear evidence of intent.

370. The *Kennedy* test poses a substantial timing problem for the defendant asserting a double jeopardy claim based on prosecutorial misconduct that triggered a mistrial because the Court essentially excluded any inquiry into the prosecutor's subjective motives. How can a court assess whether the prosecutor acted with the requisite intent to violate the Double Jeopardy Clause by goading the defendant

The *Kennedy* test provided a very limited protection for a defendant's double jeopardy right once the Supreme Court confined the analysis to an after-the-fact assessment of the proper inference to be drawn from the prosecutor's conduct, a purely objective test of intent. Unless evidence of the prosecutor's subjective intent, such as an admission of the prosecutor's reason for pursuing an improper strategy, is available, it is unlikely a court will have sufficient objective evidence to show the government goaded a defendant into seeking a mistrial just to better prepare its case. Simply appraising the strength of the government's case in the first proceeding is not enough to satisfy *Kennedy*'s strict requirement that the defendant show by objective evidence the prosecutor's intent to provoke a mistrial.³⁷¹

The *Kennedy* court's analysis was much like the *Armstrong* court's test for discovery in selective prosecution cases, in that it held out the promise of constitutional protection but made the hurdle for invoking the right almost impossible to clear unless the government admits its improper motive. While *Kennedy* used the language of prosecutorial intent, the Court did not adopt a test that permits lower courts to inquire as to the prosecutor's mindset before the action that caused the mistrial, nor even to seek a response from the government

into seeking a mistrial until the second trial takes place? If the first trial were going well for the government before the mistrial, it is unlikely that a prosecutor would ever want to terminate the proceeding, so *Kennedy* apparently would not apply. If the government's case proceeded poorly, it would not be until the retrial that any change in strategy or presentation of evidence might shed light on the prosecutor's motive for acting impermissibly to provoke a mistrial motion from the defendant. That is too late, however, because the Double Jeopardy Clause protects against a defendant from having to submit to a second proceeding, not just running the risk of a conviction. See *Flanagan v. United States*, 465 U.S. 259, 266 (1984) ("The right guaranteed by the Double Jeopardy Clause is more than the right not to be convicted in a second prosecution for an offense; it is the right not to be 'placed in jeopardy'—that is, not to be tried for the offense."); *United States v. Wentz*, 800 F.2d 1325, 1328 (4th Cir. 1986) ("If a defendant has a valid double jeopardy claim, he should not have to endure the ordeal of a second trial, as the Double Jeopardy Clause is meant to protect the defendant from exactly that."). Absent an admission showing the requisite intent, ferreting out the prosecutor's motive would require that the second proceeding show objectively the prosecutor's intent to violate the defendant's double jeopardy right.

371. Professor Thomas has proposed a test for double jeopardy after a mistrial dependent on the strength of the government's case at the point when the court terminated the proceeding. He would have a court frame the issue in the following way: "Can this defendant show a likelihood of acquittal had the judge denied a mistrial?" George C. Thomas III, *Solving the Double Jeopardy Mistrial Riddle*, 69 S. CAL. L. REV. 1551, 1578 (1996). His analysis is close to my position that the only realistic situation in which *Kennedy* can apply is when the government has insufficient evidence at the first trial, and additional admissible evidence currently known by the prosecutor would be available at the retrial but not at the first trial. The subsequent availability of the evidence is the key because it is objective proof that the prosecutor aborted the first trial in order to get a second chance, when the additional evidence to convict would be introduced. Professor Thomas' approach is broader because it would make every mistrial motion subject to this type of balancing test, not just those made by the defendant. This analysis conflicts with the Court's rule in *Dinitz* that permits retrials almost automatically when the defendant moves for the mistrial.

after the fact to explain its action. As Justice Powell noted in his concurring opinion in *Kennedy*, “‘subjective’ intent often may be unknowable . . . a court—in considering a double jeopardy motion—should rely primarily upon the objective facts and circumstances of the particular case.”³⁷² The issue of prosecutorial intent under *Kennedy* is a purely retrospective review of the circumstances of the prior proceeding to determine whether a court can infer the requisite intent on the part of a prosecutor to goad the defendant into moving for a mistrial. After-the-fact rationalizations from the government would be unnecessary because they provide no help to a court in assessing a defendant’s claim of a double jeopardy violation. In order to eliminate judicial inquiry into prosecutorial motive, *Kennedy* adopted the narrowest approach to prosecutorial misconduct under double jeopardy, looking only to the historical fact of what occurred during the first proceeding, not to the prosecutor’s actual intent to trigger a mistrial motion.

C. Prosecutorial Misconduct as a Separate Basis for a Double Jeopardy Violation

Whether pure prosecutorial misconduct during trial, unaccompanied by any specific intent, can constitute a double jeopardy violation seemed to have been settled by the Court’s statement in *Kennedy* that a double jeopardy violation was “limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.”³⁷³ *Kennedy* recognized an exception to the *Dinitz* rule that appeared to condition the double jeopardy protection on the defendant’s successful motion for a mistrial due to prosecutorial misconduct.³⁷⁴ The Court’s approach to this trial-type prosecutorial misconduct was similar to its analysis in *Somerville* of the effect of prosecutorial negligence on a defendant’s double jeopardy right. *Somerville* encouraged prosecutors to admit their errors up front by removing

372. *Kennedy*, 456 U.S. 667, 679-80 (1982) (Powell, J., concurring).

373. *Id.* at 679.

374. See *Beringer v. Sheahan*, 934 F.2d 110, 113 (7th Cir. 1991) (“Only when the government intentionally and successfully forces the defendant to move for a mistrial does it deprive the defendant of the right to go forward.”); *United States v. Singletery*, 683 F.2d 122 (5th Cir. 1982).

It seems anomalous to say that identical prosecutorial misconduct will create a constitutional bar to retrial when the district court correctly grants a mistrial, but not when the district court erroneously denies the mistrial request. . . . On the other hand, under *Kennedy* the double jeopardy clause is concerned only with prosecutorial misconduct intended to provoke a mistrial. When a mistrial is not declared, then the prosecutor’s efforts have been unsuccessful.

Id. at 124.

the possibility that double jeopardy would bar a retrial caused by governmental negligence brought to the trial court's attention by the prosecutor. The *Kennedy* rule should spur defense counsel to object to governmental misconduct by requesting a mistrial as an immediate remedy for serious transgressions.³⁷⁵

If a defendant does not request a mistrial, but instead waits until the post-conviction stage to raise the issue of prosecutorial misconduct, then under *Kennedy* there is no double jeopardy claim because the government did not goad the defendant into seeking a mistrial. Without a successful mistrial motion, the only relief an appellate court may grant is a new trial, which would not be barred by *Ball* because the defendant sought the reversal of the conviction.³⁷⁶ The prerequisite for invoking *Kennedy*, therefore, is a successful mistrial motion, because the rule encourages defendants not to withhold a motion that, if granted, could cure the problem, much like *Somerville* encourages prosecutors to seek a mistrial to repair errors that they notice during trial. The *Kennedy* rule ensures that the trial judge will deal with the prosecutorial misconduct allegations in the first instance, not an appellate court that must decide the case based only on a paper record.

Despite *Kennedy*'s apparent clarity, the Court's later decision in *Lockhart v. Nelson*³⁷⁷ raised at least the possibility that prosecutorial misconduct that did not goad the defendant into moving for a mistrial might serve as the basis for finding a double jeopardy violation. In *Nelson*, the government sought to have the defendant sentenced as an habitual offender by introducing evidence of three prior convictions, unaware that the Governor had pardoned one of them.³⁷⁸ This meant that the government had not met the statutory proof requirement for the enhanced sentence. After the mistake came to light, the defendant argued that

375. In *Beringer v. Sheahan*, 934 F.2d 110 (7th Cir. 1991), the Seventh Circuit discussed the rationale for requiring defendants to move for a mistrial to come within the ambit of the Double Jeopardy Clause:

We see little reason . . . to encourage defendants to engage in manipulative schemes calculated to sucker unscrupulous prosecutors into committing increasingly flagrant misconduct. We do not generally permit defendants to sit on their rights during trial, and it does not seem unreasonable to require defendants to move for a mistrial when faced with prosecutorial misconduct they believe completely prejudices their right to a fair trial. . . . To hold otherwise would require a post hoc inquiry into the prosecutor's intent every time a defendant successfully claims prosecutorial misconduct on appeal.

Id. at 113.

376. If the defendant requests a mistrial and the judge denies the motion, *ipso facto* the government has not received the benefit of a mistrial even if the goal was to provoke the defendant to make the motion. When the judge denies the mistrial motion, then there can only be an "attempted" goad, which means the defendant's double jeopardy right is not implicated because the jury convicted and the defendant now seeks a reversal of the conviction and a new trial free of any taint of governmental misconduct.

377. 488 U.S. 33 (1988).

378. *Id.* at 36.

there had been insufficient evidence at the first proceeding to prove that he was an habitual offender, and that therefore double jeopardy prohibited re-sentencing, at which time the government could offer evidence of another conviction to permit the court to convict him as a habitual offender.³⁷⁹ Under the rule of *United States v. Burks*, if the government introduced insufficient evidence to convict in the first trial, then a defendant cannot be retried under the Double Jeopardy Clause.³⁸⁰

The *Nelson* court rejected the argument that *Burks* controlled the case, holding that double jeopardy required a court to consider all the evidence available at the first proceeding, including that which should have been excluded, to determine whether there was enough evidence to convict the defendant.³⁸¹ However, the Court also noted, for no apparent reason, that “[t]here is no indication that the prosecutor knew of the pardon and was attempting to deceive the court. We therefore have no occasion to consider what the result would be if the case were otherwise.”³⁸² The first paragraph of the opinion makes a similarly vague reference to the lack of prosecutorial misconduct, that “[n]othing in the record suggests any misconduct in the prosecutor’s submission of the evidence.”³⁸³ The Court then referenced *Kennedy* with a “*cf.*” citation, perhaps to indicate that prosecutorial misconduct involving deliberate misrepresentation might also violate double jeopardy under the objective intent test, although it did not state that explicitly.³⁸⁴

379. *Id.* at 37.

380. *United States v. Burks*, 437 U.S. 1 (1978).

381. 488 U.S. at 40-41 (“It is quite clear from our opinion in *Burks* that a reviewing court must consider all of the evidence admitted by the trial court in deciding whether retrial is permissible under the Double Jeopardy Clause.”).

382. *Id.* at 36 n.2.

383. *Id.* at 34.

384. See *Jacob v. Clarke*, 52 F.3d 178, 181 (8th Cir. 1995) (“[T]he Court’s latest signal is decidedly more ambiguous. In *Lockhart*, an appellate reversal case decided in the prosecution’s favor, the Court introduced its double jeopardy analysis by stating that the record revealed no prosecutorial misconduct. Such a pointed caveat suggests that this remains an open issue.”). *Nelson*’s reference to prosecutorial misconduct appears to be misplaced. Perhaps the specter of some hypothetical state of affairs compelled the Court to note a potential limitation under the Double Jeopardy Clause, but *Nelson*’s statement is irreconcilable with the Court’s analysis of the double jeopardy protection. The misconduct referenced in *Nelson* would amount to the knowing use of falsified evidence, which the Court has already found constituted a due process violation in the *Mooney* line of cases. If the knowing submission of false evidence constituted a double jeopardy violation, then the due process analysis would be superfluous. While double jeopardy bars a second proceeding, under the *Mooney* analysis a due process violation results in a new trial. Would a court choose one remedy over the other based on how egregious it perceived the violation? That hardly seems in keeping with *Kennedy*’s ostensibly clear statement that prosecutorial misconduct violates double jeopardy only when there is objective evidence of intent to provoke the defendant’s mistrial motion. Moreover, double jeopardy does not involve a choice of

Can prosecutorial misconduct that does not meet *Kennedy's* objective intent test trigger the double jeopardy protection and bar a retrial? Recent state supreme court decisions have held that prosecutorial misconduct during trial constitutes a double jeopardy violation under the state constitutions even when there was no objective proof of the prosecutor's intent to goad the defendant to seek a mistrial to undermine the double jeopardy right. In *Bauder v. State*,³⁸⁵ the Texas Court of Criminal Appeals held that "a successive prosecution is jeopardy barred after declaration of a mistrial at the defendant's request . . . when the prosecutor was aware but consciously disregarded the risk that an objectionable event for which he was responsible would require a mistrial at the defendant's request."³⁸⁶ In *Commonwealth v. Smith*,³⁸⁷ the Pennsylvania Supreme Court went a step further when it held that "intentional prosecutorial misconduct designed to secure a conviction through the concealment of exculpatory evidence" violated the defendant's double jeopardy right.³⁸⁸ *Smith* did not condition the double jeopardy protection on the grant of a mistrial on the defendant's motion, focusing only on the prosecutor's intent in engaging in the misconduct that resulted in the reversal of the conviction.³⁸⁹

remedies. Either the defendant's Fifth Amendment right was violated, in which case no further proceedings are permitted, or they were not and the government can proceed with its prosecution. While *Nelson* hints at a double jeopardy protection tied to prosecutorial misconduct, it does not appear that one could be recognized without distorting the *Kennedy* analysis and grafting the double jeopardy remedy onto what is essentially a due process violation.

385. 921 S.W.2d 696 (Tex. Crim. App. 1996) (en banc).

386. *Id.* at 699. A student commentator has criticized *Bauder* on the ground that this broader standard "needlessly places too much importance on the rights of the criminal defendant at the expense of the public's interest in the fair administration of justice." Michael V. Young, Note, *Double Jeopardy and Defendant's Request for Mistrial: Texas Court of Criminal Appeals Finds Prosecutor's Intent No Longer Critical: Prosecutor Should Have Known*, 27 TEX. TECH L. REV. 1631, 1631-32 (1996).

387. 615 A.2d 321 (Pa. 1992).

388. *Id.* at 322. In addition to Pennsylvania and Texas, the state supreme courts in Oregon and Arizona have adopted a prosecutorial misconduct standard for a double jeopardy violation under their state constitutions. The Oregon Supreme Court's decision came in response to the remand of *Kennedy*. On remand from the United States Supreme Court, the Oregon court of appeals in *State v. Kennedy*, 657 P.2d 717 (1982), affirmed the defendant's conviction. The Oregon Supreme Court reversed, finding that the state constitution's Double Jeopardy Clause barred retrial "when improper official conduct is so prejudicial to the defendant that it cannot be cured by means short of a mistrial, and if the official knows that the conduct is improper and prejudicial and either intends or is indifferent to the resulting mistrial or reversal." *State v. Kennedy*, 666 P.2d 1316, 1326 (Or. 1983). The Arizona Supreme Court adopted a similar test under the Arizona Constitution's double jeopardy provision in *Pool v. Superior Court*, 677 P.2d 261, 271-72 (Ariz. 1984). See Cynthia C. Person, Note, *Prosecutorial Misconduct and Double Jeopardy: Should States Broaden Double Jeopardy Protection in Light of Oregon v. Kennedy?*, 37 WAYNE L. REV. 1699, 1709-14 (1991) (reviewing Oregon and Arizona standards for double jeopardy violation based on prosecutorial misconduct that caused a defendant to request a mistrial).

389. The Connecticut Supreme Court and the North Carolina Court of Appeals have recognized a defendant's right to raise double jeopardy as a bar to retrial in the *absence* of a successful mistrial motion.

The New Mexico Supreme Court adopted a far-reaching extension of the double jeopardy right to prevent a retrial after prosecutorial misconduct affected the first proceeding in *State v. Breit*.³⁹⁰ Interpreting the state constitution's double jeopardy protection, the court held that a second trial was prohibited

when improper official conduct is so unfairly prejudicial to the defendant that it cannot be cured by means short of a mistrial or a motion for a new trial, and if the official knows that the conduct is improper and prejudicial, and if the official either intends to provoke a mistrial or acts in willful disregard of the resulting mistrial, retrial, or reversal.³⁹¹

The rationale for extending the double jeopardy protection to all instances of serious prosecutorial misconduct during trial was that “[i]f the prosecutor’s conduct demonstrates willful disregard of the defendant’s right to a fair trial,

See State v. Colton, 663 A.2d 339, 346 (Conn. 1995).

Kennedy logically should be extended to bar a new trial, even in the absences of a mistrial or reversal because of prosecutorial misconduct, if the prosecutor in the first trial engaged in misconduct with the intent ‘to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct.

Id. at 346 (quoting *United States v. Wallach*, 979 F.2d 912, 916 (2d Cir. 1992)); *State v. White*, 354 S.E.2d 324, 329 (N.C. Ct. App. 1987) (“In our view, the better reasoned arguments support the broader test that includes bad faith prosecutorial overreaching or harassment aimed at prejudicing the defendant’s chances for acquittal, whether in the current trial or a retrial.”). The Texas Court of Criminal Appeals, on the other hand, refused to extend *Bauder* to cases in which the defendant did not successfully move for a mistrial, holding that its prior decision “applies only where a mistrial has been granted due to reckless or intentional prosecutorial misconduct.” *Ex parte Davis*, 957 S.W.2d 9, 14 (Tex. Crim. App. 1997) (en banc).

As for the federal courts, in *United States v. Wallach*, 979 F.2d 912 (2d Cir. 1992), the Second Circuit noted in dictum that:

if any extension of *Kennedy* beyond the mistrial context is warranted, it would be a bar to retrial only where the misconduct of the prosecutor is undertaken, not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct.

Id. at 916. In *United States v. Pavloianis*, 996 F.2d 1467 (2d Cir. 1993), the Second Circuit applied its *Wallach* analysis but found that the prosecutor had not engaged in misconduct deliberately to vitiate the possibility of a perceived likely acquittal. *Id.* at 1475. The Seventh Circuit appeared to reject *Wallach* in *United States v. Doyle*, 121 F.3d 1078 (7th Cir. 1997), noting that the only prosecutorial intent that can trigger the double jeopardy protection is “the prosecution’s intent to abort the trial.” *Id.* at 1086. Yet, in *United States v. Catton*, 130 F.3d 805 (7th Cir. 1997), Chief Judge Posner, writing for a different panel, noted that “[t]he need for such a rule [like *Wallach*’s] is easily seen,” but stated that “[w]e need not bite the bullet in this case” because there was not a sufficient factual basis to find a double jeopardy violation even under *Wallach*’s analysis. *Id.* at 806-07. *See also* *United States v. McAleer*, 138 F.3d 852, 856 (10th Cir. 1998) (holding that post-trial order setting aside conviction and ordering a new trial was not the “functional equivalent” of a mistrial, and therefore “the mistrial exception for prosecutorial misconduct set forth in *Kennedy* simply does not apply”).

390. 930 P.2d 792 (N.M. 1996).

391. *Id.* at 803.

then a second trial is barred.”³⁹² The trial court found the prosecutor’s actions at trial to be “out of control” and highly prejudicial to the defendant, and the New Mexico Supreme Court noted that his misconduct was “pervasive and outrageous.”³⁹³

The prosecutor’s conduct in *Breit* was certainly reprehensible,³⁹⁴ worthy of not only the extensive criticism it drew from the New Mexico Supreme Court, but also a disciplinary proceeding by the state bar. The court’s double jeopardy analysis, however, is questionable. As an initial matter, the unfairness of the first trial should not trigger the double jeopardy protection, which prohibits a second proceeding regardless of the conduct of the original proceeding. Most successful appeals arising from problems during trial in one way or another involve a finding that the trial was unfair, *i.e.* the defendant was prejudiced, whether through the improper admission or exclusion of evidence, faulty legal rulings that affected the outcome, or violation of a constitutional protection. Indeed, the harmless error rule involves an assessment of the fairness of the trial to determine the reliability of the jury’s verdict. If the error was not harmless, then the remedy for an unfair trial is a new one, free from the legal errors that undermined the reliability of the conviction in the first proceeding. The court in *Breit* responded to the superficial allure of the double jeopardy remedy which automatically prohibits a retrial, because the severity of the sanction appeared to punish the prosecutor for his misconduct in a way that a new trial did not. Yet, double jeopardy is neither another form of the due process protection ensuring the propriety of the criminal trial nor a means to protect against outrageous government conduct.³⁹⁵

392. *Id.* at 804-05.

393. *Id.* at 795, 805.

394. The trial court’s findings, which the New Mexico Supreme Court attached as an appendix to its opinion, summarized continuing misconduct by the prosecutor from the opening moments of the trial through the closing argument, including “numerous statements expressing or implying his personal belief in the guilt of the defendant, the veracity of the witnesses, and the competency and honesty of opposing counsel.” *Id.*

395. The New Mexico Supreme Court found that “[t]he unavoidable conclusion from such egregious misconduct, is that the prosecutor was fully aware that his actions would deprive Breit of his right to a fair trial.” *Id.* at 806. In support of its analysis, the court cited only to a dissenting opinion by Justice Douglas in *Gori v. United States*, 367 U.S. 364, 372-73 (1961). The Supreme Court has never held that double jeopardy is a means of deterring prosecutorial misconduct, or that the policies supporting the protection are a supplement to the due process clause for particularly nettlesome cases. The Supreme Court of Hawaii followed *Breit’s* analysis in *State v. Rogan*, 984 P.2d 405 (Haw. 1999), to prohibit on double jeopardy grounds a retrial after the prosecutor improperly referred to the defendants race in the closing argument. *Id.* at 1237. The court held that under the Hawaii constitution “reprosecution of a defendant after mistrial or reversal on appeal as a result of prosecutorial misconduct is barred where the misconduct is so egregious that . . . it clearly denied a defendant of his or her right to a fair trial.” *Id.* at 1249.

Another troublesome aspect of *Breit* is that the defendant purposely refrained from moving for a mistrial because, according to his counsel, he did not want to undergo a second trial if the court granted the motion. According to the trial judge and the New Mexico Supreme Court, if the defendant had chosen to move for a mistrial, his motion should have been granted. The rationale for the *Kennedy* rule is that defendants should not be allowed to sandbag the trial court by awaiting the outcome of the first proceeding, hoping for a not guilty verdict, and then seek to bar a second proceeding under double jeopardy on the ground that the prosecutorial misconduct tainted the conviction. *Breit* thus makes double jeopardy a facet of every appeal in which a defendant can allege that the prosecutor engaged in misconduct. Moreover, the New Mexico Supreme Court should have considered the negligence of the trial judge in failing to control the prosecutor or declare a mistrial; all of the misconduct occurred in open court. Indeed, the trial judge lamented her own failure to control the proceeding and noted that she did not grant a mistrial because it “would have wreaked havoc on the court’s calendar and budget.”³⁹⁶

In *Jorn*, the Supreme Court endorsed the concept that judicial negligence in *granting* a mistrial could result in a double jeopardy violation because that decision took away the defendant’s right to have the jury he picked decide his guilt. *Breit* overlooked both the defendant’s decision not to move for a mistrial and the trial judge’s failure to declare a mistrial, which protected, perhaps erroneously, the defendant’s interest in having the first jury decide his guilt.³⁹⁷ The detestable nature of the government’s conduct in *Breit* was similar to that in *Sterba*. The outrage of the courts, however, should not affect the application of the Double Jeopardy Clause. The fact that a prosecutor’s conduct may be particularly appalling does not elevate the misconduct to a double jeopardy violation unless a court is willing to find that the government did not have sufficient evidence to convict the defendant, and that therefore it must enter a

396. *Breit*, 930 P.2d at 811.

397. The New Mexico Supreme Court may have relied on the state constitution’s double jeopardy protection to avoid having to determine whether there was sufficient evidence to support the guilty verdict. Under *Lockhart v. Nelson*, a court must consider improperly admitted evidence in determining the validity of the first jury’s decision, but that would not appear to include prejudicial arguments and other forms of prosecutorial misconduct that are not evidence, even though they may affect the jury’s verdict. The *Breit* court avoided confronting the harder issue of whether there was sufficient evidence from which a reasonable juror could have found the defendant guilty by making prosecutorial misconduct the focal point of its analysis. If the court had to decide the case on the sufficiency of the evidence, the burden of overturning the conviction would have fallen on the court and it could not shift blame for dismissing a murder charge to the prosecutor. If the New Mexico Supreme Court was concerned that the defendant might not be guilty, but was unable to conclude that no reasonable juror could find the defendant guilty, then a retrial, not invocation of double jeopardy, was the proper remedy for prosecutorial misconduct.

verdict of acquittal. That finding, not the court's judgment that a prosecutor engaged in deplorable conduct, triggers the protections of the double jeopardy clause. The prosecutor's intent or negligence should be irrelevant to the application of the double jeopardy protection outside the limited scope described in *Kennedy*.

VI. PROSECUTORIAL MISCONDUCT AND THE PROBLEM OF REMEDY

Double jeopardy can be an attractive basis for policing prosecutors because the resulting drastic remedy of dismissal is not, according to the Supreme Court, open to any modification, so a court does not have to make any hard decisions in crafting an appropriate remedy. In effect, a court can blame the prosecutor and not have to defend the severity of the remedy, which may let a guilty person go free, because its hands are tied by the prosecutor's misconduct.³⁹⁸ If courts expand the double jeopardy protection to encompass all types of prosecutorial misconduct, however, judicial inquiry into the intent of the prosecutor may occur in any case in which a defendant raises a plausible claim of prosecutorial misconduct. The state court decisions extending double jeopardy beyond cases in which the defendant successfully moved for a mistrial open a wide range of conduct to an inquiry into prosecutorial intent. Unlike the extension of double jeopardy to police prosecutorial conduct at trial, the *Kennedy* rule makes it impossible to sanction prosecutorial misconduct under the Double Jeopardy Clause unless that action both causes a defendant to move for a mistrial and results in the trial court granting the motion. If the prosecutorial misconduct does not come to light until after trial, or if the trial judge erroneously denies the mistrial motion, the only remedy under the *Kennedy* rule is to grant a new trial,

398. In *State v. Lettice*, 585 N.W.2d 171 (Wisc. Ct. App. 1998), the Wisconsin Court of Appeals upheld the dismissal of charges on double jeopardy grounds because prosecutorial misconduct in filing an unfounded criminal charge against the defense lawyer undermined the defense lawyer's ability to defend the case. The court found a double jeopardy violation despite the defendant's failure to move for a mistrial because the defendant was unaware of the effect of the prosecutor's misconduct until after trial. *See id.* at 181. The court asserted that no reason existed for "differentiating prosecutorial conduct motivated by a fear of an acquittal once the trial has started from a prosecutor's fear of the same thing on the virtual eve of trial, who then undertakes a plan to undermine the scheduled trial process." *Id.* at 179. The court overlooked one significant difference. Jeopardy had *not* attached at the time of the prosecutor's misconduct, so the double jeopardy clause was not applicable to address the claim. Taken to its logical extreme, the Wisconsin Court of Appeals' position would mean that any prosecutorial misconduct prior to trial could, if sufficiently egregious, trigger the double jeopardy protection so long as the defendant was not aware of the misconduct until after conviction. That approach would turn the Double Jeopardy Clause into a type of extended due process protection resulting in automatic dismissal of the charges rather than some more limited relief tailored to address the harm from the violation.

which is consistent with how the Court remedies other types of prosecutorial misconduct.

Given the severity of the remedy when a court both finds and sanctions prosecutorial misconduct, one should expect that defendants will push hard to raise prosecutorial misconduct claims only on appeal if courts do not require a successful mistrial motion as the procedural trigger for the double jeopardy analysis. The result will be to expand judicial inquiry into why prosecutors acted as they did, and their responses will determine whether a court grants a new trial or prohibits a retrial and frees the defendant.³⁹⁹ Expansion of the double jeopardy protection to serve as a means to police a broad range of prosecutorial misconduct increases the incentive for the government to respond to judicial inquiry into prosecutorial motives in a manner that will justify its conduct in the prior proceeding because the dismissal remedy is so severe, at least compared to the grant of a new trial. The *Kennedy* rule reflects the Supreme Court's reluctance to permit judicial inquiry into prosecutorial intent except in very limited circumstances.

Even determining what constitutes prosecutorial misconduct is difficult. As the Court noted in *Mabry v. Johnson*,⁴⁰⁰ “[t]he Due Process Clause is not a code of ethics for prosecutors; its concern is with the manner in which persons are deprived of their liberty.”⁴⁰¹ The struggle to find some demarcation between what is and is not permissible prosecutorial conduct sometimes degenerates into judicial second-guessing.⁴⁰² The Supreme Court stated in *Smith v. Phillips*⁴⁰³

399. See *United States v. Catton*, 130 F.3d 805, 807 (7th Cir. 1997) (“[I]t would be a great burden on the courts if every reversal traceable to a prosecution-induced error at trial gave rise to a *Kennedy*-style inquest on the prosecutor’s motives.”).

400. 467 U.S. 504 (1984).

401. *Id.* at 511.

402. The characterization of the government’s actions may be important if prosecutorial misconduct can rise to the level of a double jeopardy violation, which bars any further proceedings against the defendant. In *United States v. Young*, 470 U.S. 1 (1985), the Court held that “if the prosecutor’s remarks were ‘invited,’ and did no more than respond substantially in order to ‘right the scale,’ such comments would not warrant reversing a conviction.” *Id.* at 12-13. If statements that “right the scale,” while improper standing alone, did not violate the defendant’s due process rights, then they could not be labeled as prosecutorial misconduct but just an excess of the adversary system all must live with. In *Darden v. Wainwright*, 477 U.S. 168 (1986), the prosecutor’s closing argument, which the Court said “deserves the condemnation it has received from every court to review it,” included, among other things, calling the perpetrator an “animal,” and indicating that only the death penalty would keep the defendant from committing similar acts in the future. *Id.* at 180 & nn. 9-12. While deploring the prosecutor’s statements, the Court agreed with the lower courts that “the prosecutorial argument, in the context of the facts and circumstances of this case, did not render petitioner’s trial unfair—i.e., that it was not constitutional error.” *Id.* at 183 n.15. The *Darden* Court did not find the prosecutor’s comments harmless; indeed, the prosecutor intended the inflammatory comments to be harmful, and they probably contributed to the guilty verdict. Rather, the Court emphasized the fact that “[m]uch of the objectionable content was invited by or

that “the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.”⁴⁰⁴ Courts seeking to extend the Double Jeopardy Clause really are responding to the broader problem of finding an effective means to punish prosecutorial misconduct. There is no direct constitutional remedy to eliminate the effect of prosecutorial misconduct if it did not affect the fairness of a defendant’s trial, and courts have not formulated an adequate deterrent similar to the exclusionary rule, which at least purports to rectify investigatory violations. If the sole, or even primary, purpose of granting relief is to send a message to the government, then in some cases the court gives a benefit to the defendant although he is guilty of the underlying offense. Yet, focusing only on the harmfulness of the conduct can mean that improper actions will be noticed but not otherwise dealt with by

was responsive to the opening summation of the defense.” *Id.* at 182. In *United States v. Robinson*, 485 U.S. 25 (1988) the Court adapted its “invited response” doctrine to analyze a Fifth Amendment privilege claim based on the prosecutor’s improper comment on the defendant’s failure to testify. In his closing argument, defense counsel contended that the government had not given the defendant an opportunity to explain his actions. *See id.* at 27. In rebuttal, the prosecutor argued that the defendant “could have taken the stand and explained it to you, anything he wants to.” *Id.* at 28. Although it was a direct comment on the defendant’s failure to testify, the Court held that the prosecutor’s statement “did not in the light of the comments by defense counsel infringe upon respondent’s Fifth Amendment rights.” *Id.* at 31. The Court was not determining whether the comment was harmless, but rather the threshold issue of whether the prosecutor’s statement even rose to the level of a constitutional violation.

Whether the prosecutor’s comments violated the defendant’s Fifth Amendment right should not depend on the subjective intent of the prosecutor in making the comment, but on the effect of the statement on the fairness of the trial. In *United States v. Johnston*, 127 F.3d 380 (5th Cir. 1997), the Fifth Circuit stated that a “prosecutor’s remarks constitute impermissible comment on a defendant’s right not to testify, if the prosecutor’s manifest intent was to comment on the defendant’s silence or if the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant’s silence.” *Id.* at 396. While the latter proposition, regarding the effect on the jury, is unassailable, the court’s reference to the prosecutor’s “manifest intent” was misguided. Whether or not a prosecutor intends to bring the defendant’s silence before a jury is irrelevant to determining, first, whether in fact the statement referred to the defendant’s failure to testify, and second, whether that reference prejudiced the defendant by rendering the proceeding unfair. A wholly innocent reference to a defendant’s silence is as much of a Fifth Amendment violation as a calculated effort to call the jury’s attention to the fact that a defendant did not testify. Similarly, a prosecutor who endeavors to subtly raise the defendant’s silence, but was too subtle to make the point with sufficient clarity to prejudice the defendant, has not violated the Fifth Amendment regardless of the presence of an improper intent.

The Supreme Court’s invited response analysis for reviewing prosecutorial statements at trial means that the conduct of one advocate in response to the zealous representation of an opponent can fall within the parameters of acceptable advocacy. If these responsive comments do not constitute prosecutorial misconduct, then no matter how much courts might castigate the government for its conduct, the improper comments cannot serve as the sole basis of a due process or double jeopardy violation. Prosecutorial intent should be irrelevant to determining whether the defendant’s rights were violated by misconduct occurring during trial. The prosecutor’s entire focus as an advocate at trial is to secure a conviction, so prosecutorial intent to prejudice a defendant is axiomatic.

403. 455 U.S. 209 (1982).

404. *Id.* at 219.

the judicial system in the proceeding in which they occur. In most cases involving prosecutorial misconduct, there is no vehicle in the original proceeding to redress the government's action when it had no direct impact on the fairness of the process.

The question of remedy in prosecutorial misconduct cases is further complicated by the almost complete unavailability of civil redress against a prosecutor.⁴⁰⁵ In *Imbler v. Pachtman*,⁴⁰⁶ the Supreme Court held that prosecutors were absolutely immune for their actions that were "intimately associated with the judicial phase of the criminal process."⁴⁰⁷ The Court noted that effective checks on the prosecutor aside from civil liability included possible criminal prosecution for willful acts and professional discipline.⁴⁰⁸

While most prosecutorial acts are absolutely immune, certain conduct may subject the prosecutor to civil liability. In divining the line between the prosecutor's role as an advocate and his role as an ordinary governmental official, the Court held in *Burns v. Reed*⁴⁰⁹ that a prosecutor giving legal advice to the police received only qualified immunity, and, in *Buckley v. Fitzsimmons*,⁴¹⁰ refused to recognize absolute immunity for prosecutors who allegedly made false statements at a press conference announcing the return of an indictment. In *Kalina v. Fletcher*, its most recent decision on absolute prosecutorial immunity,⁴¹¹ the Court held that a prosecutor could not be sued over her preparation of a criminal information, motion for an arrest warrant, and certification of probable cause, all of which allegedly were based on false information.⁴¹²

405. See Anthony Meier, Note, *Prosecutorial Immunity: Can § 1983 Provide an Effective Deterrent to Prosecutorial Misconduct?*, 30 ARIZ. ST. L.J. 1167, 1168 (1998) ("Victims of prosecutorial abuse often lack options for redressing the wrongs done to them. They can seek criminal punishment or professional discipline of the prosecutor, or bring a civil suit. However, the wrongdoer's fellow prosecutors and the local bar are not likely to provide an adequate remedy.").

406. 424 U.S. 409 (1976).

407. *Id.* at 430. The Court based its analysis on the contrast between the prosecutor's role as an advocate for the state, which is protected by absolute immunity, and those prosecutorial activities related to the investigative or administrative role that would not necessarily be protected by absolute immunity. *Id.* at 430-31.

408. *Id.* at 429. Unlike prosecutors, the police and other executive officers receive only qualified immunity for their actions, which means that they are protected from civil liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

409. 500 U.S. 478 (1991).

410. 509 U.S. 259 (1993).

411. 118 S. Ct. 502 (1997).

412. *Id.* at 509. The prosecutor's personal testimony regarding the veracity of the certification, however, meant she was only protected by qualified immunity because the prosecutor no longer acted as an advocate for the government, but as a complaining witness. *Id.*

Imbler provides a good example of how the doctrine of absolute immunity protects from civil liability even prosecutorial conduct that is subject to constitutional constraint. The plaintiff in *Imbler* alleged that the prosecutor wrongfully commenced the case, knowingly introduced false testimony at trial, and withheld exculpatory evidence from the defense, all violations of the plaintiff's constitutional rights in the criminal proceeding.⁴¹³ Even though the prosecutor may have acted improperly, the *Imbler* Court imposed an absolute bar on bringing a civil action based on constitutional violations that occur during a judicial proceeding. As the Court noted in *Kalina*, its decisions since *Imbler* "have confirmed the importance to the judicial process of protecting the prosecutor when serving as an advocate in judicial proceedings."⁴¹⁴ While *Imbler* has been criticized, and recent cases have cut back somewhat the prosecutor's absolute immunity, the core protection remains largely intact by shielding the vast majority of prosecutorial conduct from subsequent civil claims, even for those wrongful acts done intentionally.⁴¹⁵ The only avenue available for most defendants, therefore, is to claim that the government violated their rights in pursuing the case, and to seek a direct remedy in the criminal prosecution.⁴¹⁶

413. 424 U.S. at 415-16.

414. 118 S. Ct. 502, 507. The Court noted that absolute immunity protected the prosecutor's actions as an advocate for most of what she did:

[F]or her drafting of the certification, her determination that the evidence was sufficiently strong to justify a probable-cause finding, her decision to file charges, and her presentation of the information and the motion to the court. Each of those matters involved the exercise of professional judgment; indeed, even the selection of the particular facts to include in the certification to provide the evidentiary support for the finding of probable cause required the exercise of the judgment of the advocate.

Id. at 509-10. What it did not cover was her testimony regarding the truth of the facts contained in the certification, "[n]o matter how brief or succinct it may be." *Id.* at 510.

415. See *Buckley*, 509 U.S. at 273 ("We have not retreated . . . from the principle that acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity.").

416. Congress recently adopted a provision known as the Hyde Amendment that permits defendants acquitted in federal prosecutions to sue for their attorneys fees and other litigation expenses "where the court finds that the position of the United States was vexatious, frivolous, or in bad faith." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440, § 617, 18 U.S.C. § 3006A) (1994). The Conference Report for the section states that a grand jury finding of probable cause does not insulate the government from an award under the provision. H.R. REP. NO. 105-405 (1997). On the other hand, one of the first decisions construing the provision pointed out that "acquittal alone does not automatically entitle [a plaintiff] to compensation under the statutory scheme. The Court is required to look beyond the fact that the defendant prevailed, and determine whether the Government acted reasonably in its decision to prosecute." *United States v. Troisi*, 13 F. Supp.2d 595, 597 (N.D. W. Va. 1998). While the Hyde Amendment does not make the individual prosecutor liable, it will provide defendants found not guilty with an avenue to challenge the government's decision to pursue charges, and any prosecutorial misconduct during the course of trial may be relevant

A. Are Due Process and Double Jeopardy Interchangeable?

Some courts have tried to avoid the problem of prescribing an acceptable remedy for prosecutorial misconduct by analogizing it to conduct that violates the Double Jeopardy Clause. Double jeopardy does not weigh the defendant's guilt for the underlying offense, or yield a remedy less than a complete prohibition on a second proceeding by the same sovereign. Even if the Double Jeopardy Clause cannot be stretched to cover a particular type of prosecutorial misconduct, that has not foreclosed defendants from requesting a remedy identical to one granted for a violation of that constitutional protection: the dismissal of the indictment and a prohibition on further prosecution. Can the fact of prosecutorial misconduct alone trigger dismissal of a case and bar future proceedings against the defendant for the underlying conduct, a result similar to a double jeopardy violation, without having to meet the requirements of that provision?

For some due process violations caused by prosecutorial misconduct, the Supreme Court has mentioned dismissal of the case as a potential remedy, although it has never had to discuss the rationale for such a result. For example, it is certainly possible that if the government intentionally destroyed evidence that it knows would have been probative of the defendant's innocence, then dismissal of the indictment would be the likely remedy under *Trombetta* and *Youngblood*. That remedy, however, would be contingent on a showing of substantial prejudice, without which there would be no constitutional violation. When a defendant has not been prejudiced specifically by the prosecutorial misconduct, or if a second trial could be conducted fairly, it is not clear why a court should order dismissal of the charges based solely on the prosecutor's misconduct that prohibits any determination of guilt for the charge, regardless of the defendant's actual culpability. Relief that is not responsive to the direct prejudice arising from a violation, or that can be granted regardless of the ability to cure a defect by ordering a second proceeding, appears to furnish a windfall to defendants without any real gain to the criminal justice system.⁴¹⁷

evidence to a finding that the government pursued its case in bad faith.

417. See Kades, *supra* note 10, at 1490 (defining "windfalls" as gains "independent of work, planning, or other productive activities that society wishes to reward."). Professor Amar characterizes the remedy of dismissal with prejudice as a type of exclusionary rule, "but one designed to protect innocence." Amar, *supra* note 237, at 672. He criticizes applying the dismissal remedy outside the context of those violations in which the defendant's ability to prove his innocence is seriously jeopardized, arguing that in other contexts dismissing a case with prejudice is an "upside-down exclusion" and that "[p]recisely

The Supreme Court recognized that the remedy for a double jeopardy violation may give a defendant an unearned benefit, but was willing to tolerate that result in order to vindicate the underlying policies of the constitutional protection. For a vindictive prosecution claim, the remedy granted is identical to that for a double jeopardy violation, although courts have not considered why that remedy is appropriate if the defendant has not been prejudiced in the conduct of the criminal proceeding. Much like a defendant making a double jeopardy claim, a defendant alleging that he was subjected to vindictive prosecution does not dispute his guilt in raising the claim, yet seeks to have the charges dismissed and further prosecution barred. His challenge concerns the process of choosing the particular defendant or the decision to file increased charges after his assertion of a right, not the factual basis for the prosecution.⁴¹⁸ The relief ordered in the two successful Supreme Court vindictive prosecution cases was reversal of the conviction and dismissal of the *higher* charge, to which the presumption of vindictiveness applied.⁴¹⁹ Barring the higher charges in a vindictive prosecution case is appealing because they were the product of a constitutional violation, triggered by the presumption of vindictiveness regardless of whether there was any actual vindictiveness.

The Court's opinions in the cases successfully asserting improper vindictiveness imply that due process and double jeopardy are interchangeable, or at least not materially different. In *North Carolina v. Pearce*,⁴²⁰ the Supreme Court rejected the defendant's argument that the increased sentence imposed after a successful appeal violated the Double Jeopardy Clause, holding that the reversal of the first conviction "wiped clean" the slate and permitted imposition of a penalty after the second trial.⁴²¹ The Court found that due process limited the judge's discretion to impose the higher sentence, but that result was much less restrictive than the absolute bar to a higher sentence that double jeopardy

because this [remedy] seems so perverse, as nonlawyers intuit, it's convenient and comforting for lawyers to tell themselves that the Constitution compels this, and that there is no other way." *Id.* at 674-75.

418. In *Armstrong*, the Court noted that "[a] selective prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *United States v. Armstrong*, 517 U.S. 456, 463. The same holds true of a vindictive prosecution claim because the argument is that the government violated the Due Process Clause, not that the defendant is innocent of the greater crime.

419. The cases to which I refer are *Thigpen v. Roberts*, 468 U.S. 27 (1984) and *Blackledge v. Perry*, 417 U.S. 21 (1974). Although the cases did not address whether the government could prosecute on the original charges without violating the defendant's due process rights, this would appear to be permissible.

420. 395 U.S. 711 (1969).

421. *Id.* at 721 ("A new trial may result in an acquittal. But if it does result in a conviction, we cannot say that the constitutional guarantee against double jeopardy of its own weight restricts the imposition of an otherwise lawful single punishment for the offense in question.").

would have required. *Blackledge v. Perry*, which adopted *Pearce*'s prophylactic rule for prosecutors seeking increased charges after a successful appeal, similarly rejected double jeopardy as the basis for the restriction on improper vindictiveness, relying instead on the Due Process Clause to supply the constitutional basis for the decision. Nevertheless, *Blackledge*'s application of the due process protection had the same effect as if the Court had found a double jeopardy violation.

The Court's flat rule that an appearance of vindictiveness protected the defendant from increased charges for the same offense forced the government to live with its initial charging decision, much as double jeopardy limits the prosecution to the result of the first proceeding in which jeopardy attached. Indeed, it is questionable whether the Court saw any difference between due process and double jeopardy in *Thigpen v. Roberts*,⁴²² in which it applied *Blackledge* to reverse a conviction after a second trial on more serious charges. The defendant sought a trial *de novo* in the circuit court after a guilty verdict in a justice of the peace court for misdemeanors arising from a fatal accident, and the government then indicted him on felony manslaughter charges.⁴²³ The Fifth Circuit reversed the second conviction on double jeopardy grounds and barred prosecution on the higher charges.⁴²⁴ The Supreme Court reached the same result, but affirmed the lower court decision under *Blackledge*'s due process analysis rather than applying the double jeopardy protection to bar the second prosecution for the same offense.⁴²⁵ *Thigpen* insinuated that the lower court's decision was a "right result but wrong analysis," although the Court never discussed why the remedy for a due process violation should be identical to the relief for double jeopardy.

There is an important distinction between due process and double jeopardy claims, at least from a procedural point of view. In *Abney v. United States*,⁴²⁶ the Court recognized the right of a defendant to pursue an interlocutory appeal of a denial of a double jeopardy claim because "if a criminal defendant is to avoid exposure to double jeopardy and thereby enjoy the full protection of the

422. 468 U.S. 27 (1984).

423. *Id.* at 30-31. The Court noted that the Mississippi two-tier trial court system at issue in *Roberts* was "essentially identical" to the North Carolina scheme at issue in both *Pearce* and *Blackledge*. *Id.* at 30.

424. 693 F.2d 132 (5th Cir. 1982), *aff'd* 468 U.S. 27 (1984).

425. *Thigpen*, 468 U.S. at 30. Justice Rehnquist dissented, noting that the Court's grant of certiorari was to review the double jeopardy issue and assailing the majority's alternative analysis as an "unexampled bit of procedural footwork." *Id.* at 33 (Rehnquist, J., dissenting).

426. 431 U.S. 651 (1977).

Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.”⁴²⁷ For a vindictive prosecution claim, however, the Court rejected an interlocutory appeal despite the apparent similarity after *Thigpen* between due process and double jeopardy. In *United States v. Hollywood Motor Car Company*,⁴²⁸ the Court held that only those constitutional protections that incorporate a right not to be tried, such as double jeopardy, can be appealed prior to a conviction, while rights that permit a remedy involving dismissal of charges can be vindicated after a trial and therefore cannot be appealed prior to trial.⁴²⁹ The Court found that denial of the defendant’s vindictive prosecution claim, which involved due process but not double jeopardy, could not be appealed before trial on the merits because “[t]he right asserted . . . is simply not one that must be upheld prior to trial if it is to be enjoyed at all.”⁴³⁰

Rather than being interchangeable, due process appears to be a type of fall-back position to a double jeopardy claim, available to a defendant who cannot meet the requirements of double jeopardy but who can show that the prosecutor acted improperly. By postponing appellate review and requiring a defendant to go to trial despite the possibility of vindictiveness before that proceeding, *Hollywood Motor Car* makes prejudice to the defendant from the misconduct a key component of the analysis; otherwise, why delay deciding whether actions taken before trial violated a defendant’s constitutional right not to be charged with those crimes? Prosecutorial misconduct, standing alone, would not empower a court to dismiss an indictment unless the misconduct had a direct impact on the propriety of the underlying charges or the fairness of the criminal proceeding. Therefore, due process and double jeopardy are fundamentally different despite instances in which the remedy is identical. Although the defendant in *Hollywood Motor Car* advanced a plausible due process claim that the increased charges were constitutionally impermissible, the Court rejected an interlocutory appeal so as not to delay a trial on otherwise valid charges, regardless of whether they were the product of prosecutorial vindictiveness.

After *Hollywood Motor Car*, the only instance in which prosecutorial

427. *Id.* at 662.

428. 458 U.S. 263 (1982) (per curiam).

429. *Id.* at 269 (“This holding reflects the crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges. The former necessarily falls into the category of rights that can be enjoyed only if vindicated prior to trial. The latter does not.”). In addition to double jeopardy, the Court in *Hollywood Motor Car* noted that the right to reasonable bail and the immunity conferred under the Speech and Debate Clause are subject to interlocutory appeals. *Id.* at 265-66.

430. *Id.* at 270.

misconduct that violates due process should result in dismissal of an indictment and a bar on further proceedings before trial is when, but for the prosecutorial misconduct, there would have been *no* probable cause to charge the defendant. In that circumstance, the real problem is the insufficiency of the evidence, and prosecutorial misconduct is secondary to the lack of credible evidence to charge the defendant. Prosecutorial misconduct may explain why a court dismissed the case, but such a finding, without reference to any prejudice to the defendant from the misconduct, should not result in dismissal of the charges. If the prosecutorial misconduct did not violate any other right of the defendant, and if there was probable cause to indict, then after *Hollywood Motor Car* it is not clear why dismissal of the indictment would be appropriate to redress prosecutorial misconduct if the relief would prevent the government from trying the defendant on otherwise valid charges. A due process violation caused by prosecutorial misconduct is not a violation of a right not to be tried, unlike a double jeopardy violation, so any assessment of whether there was a violation should incorporate consideration of prejudice to the defendant. *Hollywood Motor Car* effectively limits, at least before trial, the remedy of dismissal of the indictment and prohibition of further proceedings to violations of the Double Jeopardy Clause, unless prosecutorial misconduct made the criminal charges invalid.

If prosecutorial misconduct should not prevent a defendant from being tried unless the charges were unsupported by probable cause, what rationale supports the dismissal of charges in vindictive prosecution cases? In such cases, the government's evidence is generally sufficient to prove the elements of the accused's crime beyond a reasonable doubt, and indeed, defendants generally do not contest the validity of the proof when raising a constitutional claim. The rationale for dismissing such charges appears to be the link between the government's improper motivation and the filing of charges that prosecutors and investigators should not be permitted to give vent to retaliatory intentions. A remedy may then appear to have some deterrent value in discouraging prosecutors from acting in response to the defendant's legitimate assertion of rights.⁴³¹

431. In seeking higher charges on retrial, the prosecutor stands to lose only the added punishment the new or increased charges would bring, so prosecutors may feel that they can risk seeking the added counts, hoping that they can convince the judge not to apply a presumption of vindictiveness. In *United States v. Meyer*, 810 F.2d 1242 (D.C. Cir.), *aff'd en banc sub nom. Bartlett v. Bowen*, 824 F.2d 1240 (1987), the D.C. Circuit made this point in affirming the dismissal of all charges due to prosecutorial vindictiveness after the government dropped the added counts because otherwise "the prosecutor will have nothing to lose by acting vindictively . . . [and] the government's position, if accepted, would remove the deterrent effect

This returns us to the question of why courts should dismiss charges when a defendant presumably can still receive a fair trial. The reason simply may be that no other remedy is available to correct a due process violation. Unlike violations that invoke the exclusionary rule, prosecutorial misconduct usually does not taint any evidence, so the remedy of exclusion is unavailable to permit a trial on the charges while providing real relief from the violation.⁴³² The Supreme Court did not discuss any rationale for dismissing the increased charges in *Blackledge v. Perry* and merely substituted due process for double jeopardy in *Thigpen v. Roberts* as the basis for granting relief from the higher charges.

While dismissing charges and barring reprosecution has a visceral appeal because it removes the “taint” of prosecutorial misconduct in vindictive prosecution cases, it is not clear that a court should grant the same relief for a selective prosecution violation. In *Armstrong*, the Court stated in a footnote that “[w]e have never determined whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of prosecution on the basis of his race.”⁴³³ Although earlier selective prosecution cases dismissed charges against defendants,⁴³⁴ the lower courts

of the doctrine of prosecutorial vindictiveness.” *Id.* at 1249. Dismissing all charges, and not just those tainted by vindictiveness, would certainly have a deterrent effect on prosecutors, but does this remedy relate to the violation at issue? The logic of *Meyer* would be compelling if the remedy served to keep prosecutors from acting with a retaliatory motivation because freeing the defendant from all charges imposes a substantial cost on society that prosecutors would not care to see happen. For that remedy to really work, however, a judicial finding of the prosecutor’s actual motive in responding to the defendant’s assertion of a right would be necessary. Permitting this remedy when there is only a presumption of vindictiveness may not provide any actual deterrence if the prosecutor did not have the intent that the remedy seeks to thwart. The presumption can operate even in the absence of actual vindictiveness because the Supreme Court has made inquiry into the prosecutor’s actual intent irrelevant. Allowing the dismissal of all charges has a more direct deterrent effect when there is proof of actual vindictiveness, but should not necessarily be the remedy when the court finds only that a presumption of vindictiveness applies.

432. The proposition that the exclusionary rule should be the primary remedy for Fourth Amendment violations has been criticized, in part because it is not an effective deterrent to investigatory misconduct. See Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 56 (calling the exclusionary rule “an exceptionally crude deterrent device. It is not merely crude; to the extent obeyed, it systematically over deters, because it imposes social costs that are greatly disproportionate to the actual harm to lawful interests from unreasonable searches and seizures.”). My point is that, regardless of the desirability of the exclusionary rule, it does provide a uniform remedy for violations of constitutional rights in the investigatory stage of a case.

433. *United States v. Armstrong*, 517 U.S. 456, 461 n.2 (1996). The district court dismissed the indictment before trial, so there had been no determination of guilt or innocence before the dismissal. See Karlan, *supra* note 299, at 2004 (“This footnote captures the ambivalence of the Court in trying to articulate remedies for equal protection violations in the criminal procedure context.”).

434. See *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972) (reversing conviction); *United States v. Crowthers*, 456 F.2d 1074 (9th Cir. 1972) (reversing conviction); *United States v. Robinson*, 311 F. Supp. 1063 (W.D. Mo. 1969) (dismissing indictment before trial). In *United States v. Falk*, 479 F.2d 616

never discussed the appropriateness of the remedy.⁴³⁵ Unlike a vindictive prosecution, dismissing the charges in a selective prosecution case also should preempt any prosecution by the same sovereign.⁴³⁶ While the remedy is quite similar to that available under the Double Jeopardy Clause, a dismissal of charges can mean that the defendant will never be prosecuted because the selective prosecution claim is one that will arise before trial.

Dismissing all charges without the possibility of reindictment imposes an enormous cost on society. The problem in a selective prosecution case is finding a remedy, short of outright dismissal, that will address the underlying constitutional violation. Equal protection is one of the sacred principles of American society, and its violation calls for a strong response. One can argue that a remedy to deter prosecutors from acting on illicit racial or sexual biases is the only means of advancing the Equal Protection Clause. Unlike a vindictive prosecution, where society arguably wants a measure of retaliation but not a motive that is too suspect, there is no basis for permitting discrimination of any type. But dismissing all charges for an impermissible selective prosecution to deter prosecutorial misconduct encounters the same problem as a *Batson* violation: the court imposes a remedy without regard to any harm done to the defendant. Perhaps the systemic harm in such a case justifies such a result, but dismissing charges with prejudice is hard to defend when potentially guilty defendants are freed from any possibility of conviction because of governmental actions that were largely irrelevant to the criminality of the underlying conduct and will not affect the fairness of a trial.

(7th Cir. 1973) (en banc), the Seventh Circuit remanded the case for a hearing to determine whether the government's motivation in charging the defendant was improper—this hearing would give the defendant the opportunity to question the Assistant United States Attorney. *Id.* at 623. None of the cases that found a constitutional violation in the selection of the defendant for prosecution discussed whether the government could refile the charges after further review, or whether a different sovereign could bring a prosecution for the same conduct.

435. See Clymer, *supra* note 140, at 736 (“If a less draconian remedy [than dismissal] was available, courts might be more willing to review charging decisions.”). Consonant with his proposed rationality review of federal charges when there are parallel state provisions available, Professor Clymer advocates remedying violations of equal protection in the decision to pursue a federal prosecution by granting defendants the same procedural and sentencing rights that a defendant in the state system would receive. *Id.* at 737.

436. I limit the effect of the remedy to the same sovereign because under double jeopardy principles a different sovereign, such as another state or the federal government, could pursue identical charges in its own criminal justice system without violating the defendant's double jeopardy rights. See *Heath v. Alabama*, 474 U.S. 82 (1985) (successive prosecutions for same kidnapping and murder by different states did not violate double jeopardy). It is not clear, however, whether a case brought by a different sovereign after a finding of selective prosecution would be subject to the same assertion of an equal protection violation.

While a *Batson* violation requires only a new trial even though those harmed were the broad group of potential jurors and not necessarily the defendant, dismissal for selective prosecution is a draconian remedy that bestows on a defendant a windfall regardless of that person's guilt. Given the almost insurmountable hurdles to establishing a selective prosecution claim erected by *Armstrong*, perhaps the Supreme Court would require dismissal of the charges because evidence of improper bias would have to be so compelling for a successful claim. As a practical matter, dismissal may be the only remedy, but as a matter of constitutional law, it is hard to justify permitting that result for a defendant who disputes the exercise of prosecutorial discretion, not his culpability.

B. Sanctioning Prosecutors Directly

Ordering a particular form of relief, such as dismissal of an indictment, may be a practical necessity in a selective prosecution case, because there appears to be no reasonable alternative for such a serious constitutional violation. Dismissal of charges, however, should not be available simply to deter prosecutorial misconduct. Courts should not rely on granting a particular defendant relief to serve as a check on future prosecutorial actions in other cases except to the extent necessary to vindicate a specific constitutional protection breached by the prosecutorial misconduct. If a court's goal is to send a message to prosecutors, the message should not be communicated by granting a defendant relief without consideration of the harm that the misconduct caused to the defendant. The constitutional protections belong to individuals, not to courts for use as a means to police the conduct of prosecutors. While deterrence of misconduct may be an appealing rationale for dismissing a case, no constitutional basis exists for employing a remedy to address an institutional problem that did not result in an unfair proceeding or an unsupported verdict.⁴³⁷

437. In the absence of a specific constitutional violation, the Supreme Court has admonished lower courts that dismissing an indictment under the supervisory power of the judiciary is inappropriate if the purpose is only to chastise prosecutors and not to correct a harm to the defendant. *See United States v. Hasting*, 461 U.S. 499, 506-07 (1983). Professor Steele asserts that prosecutorial misconduct is "pervasive," yet notes that "no practical way has yet been found to measure the frequency of prosecutorial misconduct, except to rely upon impressions gained from the volume of appellate opinions and the language contained therein as to the frequency of such misconduct." Steele, *supra* note 10, at 970. Professor Jonakait claims that prosecutorial misconduct is rampant and in large part hidden because prosecutors act "unconsciously" in committing violations. *See Randolph J. Jonakait, The Ethical Prosecutor's Misconduct*, 23 CRIM. L. BULL. 550, 562-63 (1987). *See also* Rona Feinburg, Note, *The Second Circuit Reacts to Prosecutorial Misconduct: United States v. Modica*, 49 BROOKLYN L. REV. 1245, 1245 n.1 (1983) (prosecutorial misconduct continues to "plague" the Second Circuit). There are

What remedies are available to curb prosecutorial misconduct? For actions that take place in court, the trial judge has a number of alternatives available, from a simple admonishment to the imposition of a contempt citation upon the prosecutor.⁴³⁸ Appellate courts that conclude prosecutorial misconduct tainted the lower court proceeding, even if it did not harm the defendant sufficiently to overturn the conviction, can sanction the prosecutor and inform the appropriate disciplinary authorities that the prosecutor acted inappropriately. As members of the bar, government attorneys are subject to disciplinary proceedings for misconduct that violates ethical rules of the profession. In *United States v.*

not a large number of reported cases in which prosecutorial misconduct that did not violate a specific constitutional protection has been raised successfully, by which I mean the court granted some remedy and not just that it admonished the prosecutor or applied the label "prosecutorial misconduct" without taking additional action. An argument that such misconduct is rampant must rely on the assumption that a great deal of improper action goes undiscovered. In order to assert that prosecutorial misconduct is of such a degree that courts must stretch the constitutional remedies to deter it, one must assume that because prosecutors do not want their transgressions exposed, their wide-ranging discretion must also allow them to successfully hide many instances of misconduct. The solution then flows from the assumption, that restricting prosecutorial discretion and granting relief to defendants to deter future misconduct will eliminate actions assumed to be taking place. Absent proof that more misconduct takes place than judges can detect, the rationale for limiting prosecutorial discretion and granting relief without regard to harm to the defendant loses much of its force.

It is easy to justify calling for increased judicial intervention, whether through the Due Process Clause or courts' supervisory powers, by asserting that there must be more misconduct taking place than has been publicly disclosed. There is another assumption that leads to a different conclusion, one which is as unprovable as the one that posits widespread abuse based on the prosecutor's ability to misuse the authority of the office. This different assumption is that the vast majority of "hidden" prosecutorial misconduct, by which I mean misconduct that may be shielded from exposure by the discretionary authority of the prosecutor's office, does eventually come to light. The basis for this assumption is that prosecutors and investigatory agents are basically honest, which may account for their choice of a career in law enforcement, and that they take seriously their obligation to uphold the law, even if in certain instances they abuse their authority. Based on that assumption, one can infer that attempts to keep information about prosecutorial misconduct secret are doomed to failure in most cases because there is such strong personal and institutional pressure to act honestly. If this assumption is correct, then there would be relatively few instances of prosecutorial misconduct that are not eventually exposed.

There are cases in which serious prosecutorial misconduct has been exposed. For example, in Illinois, three former prosecutors and four police officers were indicted for fabricating evidence used to convict two defendants who were sentenced to death. *See* Bennett L. Gershman, *Prosecuting Prosecutors*, N.Y.L.J., Dec. 20, 1996, at 1. Sometimes, the very prosecutor accused of acting improperly discloses the misconduct. In *United States v. Horn*, 811 F. Supp. 739 (D.N.H. 1992), the court found that the lead prosecutor had committed serious misconduct in failing to seal documents that disclosed defense counsel's work product. Despite requests from the defense lawyers and the court's instructions not to review the documents, the lead prosecutor had the documents copied and shown to a government witness. *Id.* at 741-44. The conduct came to light primarily through the lead prosecutor's own disclosure regarding the continued use of the documents; there was no attempt to cover up the improper use. *Id.* at 748-750.

438. In *Pounders v. Watson*, 521 U.S. 982 (1997), the Supreme Court reiterated its position regarding the authority of trial judges to cite an attorney for contempt, noting that "[w]here misconduct occurs in open court, the affront to the court's dignity is more widely observed, justifying summary vindication." *Id.* at 988.

Wilson,⁴³⁹ the Eleventh Circuit noted that trial courts do have some avenues to police prosecutorial misconduct: “(1) contempt citations; (2) fines; (3) reprimands; (4) suspension from the court’s bar; (5) removal or disqualification from office; and (6) recommendations to bar associations to take disciplinary action.”⁴⁴⁰

As to the last option, however, commentators point out that the professional disciplinary system has proved inadequate in addressing prosecutorial misconduct.⁴⁴¹ Some have proposed changes to improve the disciplinary system to address prosecutorial misconduct outside of the particular case in which it arose. For example, Professor Meares made an innovative proposal that would offer financial incentives for prosecutors to structure their decisions and courtroom tactics to avoid misconduct and exercise their discretion so as not to overcharge cases.⁴⁴² Others have argued that the ethical rules should more specifically address the role of the prosecutor as both a minister of justice and zealous advocate on behalf of a client.⁴⁴³ Recently, Congress adopted a

439. 149 F.3d 1298 (11th Cir. 1998).

440. *Id.* at 1304. The circuit court noted that “we want to make clear that improper remarks and conduct in the future, especially if persistent, ought to result in direct sanctions against an offending prosecutor individually.” *Id.*

441. See Meares, *supra* note 1, at 899 (“The practical reality is that few prosecutors are ever disciplined by these regulatory entities.”); Reiss, *supra* note 26, at 1432 (“[F]or the most part, ethical guidelines are too general, too infrequently revised, and too rarely refined through actual application to serve as the primary vehicles for delineating the constraints on prosecutorial activity.”); Steele, *supra* note 437, at 966 (“[B]ar grievance committees have paid scant attention to prosecutorial ethicality, and consequently, prosecutors may have developed a sense of insulation from the ethical standards of other lawyers.”); Zacharias, *supra* note 37, at 105 (“In trying to maintain the bar’s professionalism, discipliners naturally prefer to focus their limited resources on attorney misconduct driven by personal self-interest or greed.”).

442. Meares, *supra* note 1, at 901-02 (“Financial incentives could motivate prosecutors to behave ethically. The hypothesis is simple: Rewarding prosecutors for behaving ethically will motivate them to do so.”). One potential weakness in Professor Meares’ proposal is that appellate courts would have to monitor prosecutorial performance to provide a basis for the financial rewards, a task that they may be loath to accept.

443. See Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 927 (1996) (“New provisions are necessary to assist the federal attorney in conforming her conduct to ethical standards and to further the ends of truth-seeking in the investigation and the administration of justice.”); Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 737 (1998) (“An ethical rule delineating the Appearance of Impropriety Standard would allow courts to sanction, and disciplinary bodies to punish, prosecutorial conduct which appears to be improper.”); Zacharias, *supra* note 37, at 50 (offering a framework that “rulemakers can use to develop more specific, coherent ethical rules” for prosecutorial conduct at trial); Paul M. Secunda, Note, *Cleaning Up the Chicken Coop of Sentencing Uniformity: Guiding the Discretion of Federal Prosecutors Through the Use of the Model Rules of Professional Conduct*, 34 AM. CRIM. L. REV. 1267, 1290 (1997) (proposing a new model rule to require prosecutors to disclose all information relevant to sentencing of the defendant and “not to make [the] number of convictions or severity of sentences the

provision that subjects all federal prosecutors to the ethical rules of each state in which the attorney acts on behalf of the federal government.⁴⁴⁴

Whether or not the system of professional discipline can control prosecutorial misconduct adequately, the goal of deterring such misconduct is best addressed outside the confines of a particular criminal prosecution. As Professor Meares' proposal makes clear, policing the actions of prosecutors must be done in ways in which the effect of misconduct is visited directly on the malefactor. Constitutional remedies are ill-suited for changing the behavior of prosecutors because the consequences of granting relief are felt only indirectly by the individual prosecutor. In those cases in which a defendant cannot show any direct harm from the misconduct, only society pays the price when courts grant remedies which make a conviction harder, if not impossible, to achieve. On the other hand, a disciplinary proceeding need not consider harm to the defendant, but look only at the broader issue of the integrity of the judicial system and the need to uphold the rule of law. If a message needs to be sent to a prosecutor, it must be transmitted directly and not by the incidental means of granting relief to a defendant.

Judges sometimes protest that they are powerless to combat prosecutorial misconduct if they cannot order the dismissal of charges, regardless of the constitutional basis of that authority. Yet, when faced with prosecutorial misconduct, some judges shy away from "naming names" and making it clear that a particular prosecutor has violated the norms of a government attorney.⁴⁴⁵ For example, in *United States v. Kojayan*,⁴⁴⁶ the Ninth Circuit found extensive and continuing prosecutorial misconduct, including misrepresentations to the trial court by the Assistant United States Attorney. After reversing the conviction, the circuit court remanded the case to the trial court to consider whether to dismiss the indictment due to the severity of the prosecutorial misconduct.⁴⁴⁷ Yet, while the slip opinion reported the prosecutor's name, the

index of her effectiveness."); cf. Fisher, *supra* note 37, at 256 ("But if competent prosecution demands the integration of personal values and professional skills, then prosecution agencies must encourage prosecutors to reunite their personal and professional selves, which many learned to separate as students. . . . A suitable program would involve recruitment, training, and reinforcement.").

444. 28 U.S.C. § 530B(a) (1998). Congress adopted the provision, called the McDade Act, Pub. L. 105-277, § 801, in October, 1998, and the provision became effective on April 19, 1999. The law overturns Department of Justice rules that exempted federal prosecutors from certain provisions of state ethical rules concerning contacts with persons represented by counsel. See 28 C.F.R. § 77.2 (1998).

445. See Steele, *supra* note 10, at 977-78 ("Since reversing cases is such a dysfunctional way to impose sanctions for unethical conduct, one cannot help but wonder why appellate courts, with their inherent power over discipline, have not structured more formidable and sanction-specific remedies.").

446. 8 F.3d 1315 (9th Cir. 1993).

447. *Id.* at 1325.

final version does not state who the miscreant was, nor mention whether the court planned to refer the matter to disciplinary authorities.⁴⁴⁸ Why withhold the identity of a prosecutor the court found had essentially lied to the trial judge and to the defense counsel and then tried to cover up the misconduct?

All one takes from *Kojayan* is the impression that the defendants, who may well be guilty of the crime, might see all charges dismissed while the prosecutor who provoked such a result remains anonymous to the general public and, perhaps, will be able to engage in misconduct in future cases that could jeopardize otherwise meritorious prosecutions. The Supreme Court noted in *Imbler v. Pachtman* that among the remedies available to control prosecutorial misconduct is publicly naming the prosecutor who acted improperly in a judicial opinion. Naming the prosecutor is such a simple tool, yet the court in *Kojayan* retreated from it, for no apparent reason and despite misconduct that might trigger a remedy that punishes society by permitting a guilty person to go free so the courts can send a message to a United States Attorney's Office about how it should handle cases in the future.⁴⁴⁹

CONCLUSION

Prosecutorial misconduct is a serious problem whenever it occurs, regardless of its frequency, and courts cannot shirk their duty to police it. On the other hand, as the Supreme Court has made clear, judges may not exercise a chancellor's foot veto over the government by deciding how to investigate a case, what charges to file, or what evidence to introduce to prove the defendant's guilt. Within that delicate balance is the temptation to make prosecutorial intent the focal point of judicial review, punishing those prosecutors who act with bad intent. While a tempting source of evidence, inquiry into the actual motives of the prosecutor causes more harm than good.⁴⁵⁰

448. See STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 473 (5th ed. 1998) ("In the original version of *Kojayan*, Judge Kozinski printed the name of the trial assistant in the body of the opinion. Then he amended the opinion to eliminate the name.").

449. In *United States v. Horn*, 811 F. Supp. 739 (D.N.H. 1992), the District Court found that the prosecutor engaged in grave misconduct by violating a defendant's work product privilege and then using the information after the court instructed her not to. *Id.* at 742-43. The opinion, however, noted at the outset that it had "been revised to eliminate the name of the lead prosecutor." *Id.* at 741 n.1. Given the apparent seriousness of the violation, the trial court's unexplained decision not to name the prosecutor seems to blunt the effect of its findings.

450. See Reiss, *supra* note 26, at 1434. As Professor Reiss has noted:

[E]ven if the prosecutor's disclaimer of any improper intent is entirely truthful, which will often be the case, a defendant on the losing end of a motion will be reluctant to accept it as such. From a defendant's standpoint, a ruling that turns on accepting the prosecutor's professed "good" intentions at her word loses

Combining the serious effect of governmental malfeasance with the limited judicial review of the prosecutor's discretion does not necessarily mean that a significant body of prosecutorial misconduct must take place undetected by the courts. Simply because prosecutors can abuse their authority does not mean that they must be abusing it. Moreover, it is misleading to rely on the recurrent use of the term "prosecutorial misconduct" as evidence of its widespread nature.⁴⁵¹ That label comprehends a wide variety of conduct that may or may not involve a violation of a criminal defendant's rights. The breadth of prosecutorial discretion makes it difficult for courts to police the conduct of prosecutors, so that in most cases the judiciary must take a hands-off approach to monitoring prosecutors' decisions. To the extent that courts do review prosecutorial conduct, such courts are better served by not asking prosecutors why they chose a particular course of action. In large part, the Supreme Court has made judicial inquiry into prosecutors' motives off-limits, not because it is unimportant, but because the inquiry itself can be damaging and is unlikely to produce any useful information upon which a court can act. Prosecutorial discretion should not be a

much of its legitimacy.

Id.

451. Professor Alschuler's article on prosecutorial misconduct has been cited frequently for its assertion that "commentators who have examined the problem of prosecutorial misconduct have almost universally bemoaned its frequency. Moreover, even a brief glance at the digests of appellate decisions, especially in the state courts, indicates that courtroom misconduct by prosecutors provides one of the most frequent contentions of criminal defendants on appeal." Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 631 (1972). The ease with which a party can assert a claim of prosecutorial misconduct, and the willingness of appellate courts to assume the prosecutor's actions constitute misconduct as a prelude to the more important issue of whether the violation prejudiced the defendant, means that repeated judicial use of the term is not particularly strong evidence that misconduct does in fact take place to any significant degree.

Some commentators contend that prosecutorial misconduct occurs with great frequency, but offer no empirical support for the proposition beyond a claim that instances in which it has taken place signal a much greater problem that exists beyond the purview of the courts. For example, Professor Jonakait charged that misconduct by prosecutors is "rampant," Jonakait, *supra* note 437, at 562, and Professor Steele declared that "flagrant misconduct by prosecutors appears to be increasing." Steele, *supra* note 10, at 966. Similarly, in discussing *Brady* violations by prosecutors, Professor Weeks declared that "[f]or every one of these cases, we have every reason to suspect that there are many more in which the prosecutor's refusal to disclose exculpatory evidence was never discovered by the defendant or his attorney." Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. REV. 833, 869 (1997). These articles call on courts and legislatures to impose greater restraints on prosecutors based on the presumed degree of prosecutorial misconduct that remains undetected. Professor Green pointed out the flaw in this type of analysis: one cannot automatically infer widespread instances of prosecutorial misconduct from the motive and opportunity to engage in such actions. See Bruce A. Green, *The Ethical Prosecutor and the Adversary System*, 24 CRIM. L. BULL. 126, 127 (1988); see also Bruce A. Green, *Policing Federal Prosecutors: Do Too Many Regulators Produce Too Little Enforcement?*, 8 ST. THOMAS L. REV. 69, 70 (1995) ("[C]ritics exaggerate the prevalence and seriousness of prosecutorial misconduct.").

license to abuse the rights of suspects and defendants, but policing the conduct of prosecutors is a complex task that requires courts to remain sensitive to the discretion the system vests in the government's representatives to investigate and prosecute crime. Asking prosecutors to respond to judicial inquiry, or, if you will, asking them to lie, about their motives undermines the integrity of the judicial system as much as any other prosecutorial act. Granting relief to a defendant just to send a message to prosecutors works a similar harm by twisting the Constitution.