

IN THE SHADOWS OF DOUBT AND PERSONAL BIAS: HOW CURRENT DISCLOSURE STANDARDS AND A LACK OF PROSECUTORIAL ACCOUNTABILITY RESULT IN WRONGFUL CONVICTIONS

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Wrongful convictions are exacerbated by a tactic frequently employed by the government: the inadvertent or intentional withholding of critical information in a defendant's case. The trial of certain Proud Boys members, convicted for their participation in the January 6 storming of the United States Capitol, piqued many questions about the relationship between disclosure standards and the rights of the accused. It is imperative to recognize that distaste toward a defendant is not an excuse to strip them of their rights. Enabling such practices creates an extremely dangerous precedent, allowing prosecutors to abuse the rights of not only disfavored defendants but everyone. Vague standards and lack of accountability have plagued our nation with thousands of wrongful convictions, a number that continues to grow. By shedding personal biases and evaluating disclosure standards as they currently stand, this Article clearly demonstrates that changes are needed to preserve public trust in the justice system. While ethical guidelines and Brady obligations theoretically address these concerns, the current standards are arbitrary at best, yielding inconsistent results and allowing officials to persevere unscathed—even when errors are evident. This Article advocates for three measures to counter both personal bias and unjust outcomes: (1) the clarification of vague terms; (2) the consistent enforcement of obligations and standards to deter future flagrant behavior; and (3) an expansion of disclosure standards to cover areas otherwise unaddressed by current law. These proposals aim to establish a fair and accountable system where justice is not a selective privilege but a universal right for all.

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I. INTRODUCTION

The United States Constitution is the foundational building block outlining fundamental freedoms guaranteed to those in its jurisdiction. One such freedom is the right to a fair trial, which is granted explicit protection at both the federal level through the Sixth Amendment¹ and the state level through the Fourteenth Amendment’s Due Process Clause.² The right to a fair trial has been characterized by the Supreme Court as one of “the most fundamental of all freedoms”³ and “recogni[z]ed internationally as a fundamental human right, which countries are required to respect.”⁴ The Sixth Amendment is universally necessary because it,

“embodies the paradigm of a system of justice that furnishes the individual with the pertinent tools with which to defend against the organized power of the state. The complex of rights delineated in the amendment are meant to equalize the balance of power in the criminal process by granting the

¹ U.S. CONST. amend. VI states, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.” *E.g.* *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (“We hold today that the Sixth Amendment’s right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment.”).

² U.S. CONST. amend. XIV, § 1 provides that a state may not “deprive any person of life, liberty, or property, without due process of law.” *E.g.* *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (“[A] provision of the Bill of Rights which is fundamental and essential to a fair trial is made obligatory upon the States by the 14th Amendment.”) (internal quotes omitted).

³ *Estes v. Texas*, 381 U.S. 532, 540 (1965) (“We have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs”).

⁴ *The Right to a Fair Trial*, FAIR TRIALS, <https://www.fairtrials.org/the-right-to-a-fair-trial/>.

defendant an indispensable shield against the natural advantage the prosecution enjoys in a criminal trial.”⁵

However, the promises embedded in this amendment have not always been upheld.⁶ Although this safeguard to promote equitable trials has been in place since the United States’ inception, the criminal justice system is not perfect in its execution. The unfortunate reality is that “our procedure has been always haunted by the ghost of the innocent man convicted.”⁷ The rates at which this tragedy occurs shock the conscience. According to The National Registry of Exonerations, as of November 2023, there have been 3,411 exonerations since 1989—a consistently rising statistic.⁸ Though impossible to know the actual number of people who have been wrongly accused or convicted of a crime throughout history, it has been estimated that “the rate of false convictions for serious violent felonies in the United States may be somewhere in the range from 1% to 5%.”⁹ For lesser offenses, such as armed robbery and aggravated assault, false conviction rates potentially approach 6%.¹⁰ Multiple factors are attributed to causing wrongful convictions, including faulty forensics, mistaken eyewitness identifications, and false witness testimony.¹¹ Unfortunately, the variety of unpredictable variables contributing to wrongful convictions makes them unfeasible to prevent in every instance. However, there is one far too common culprit that is highly preventable—misconduct by officials.¹² This term includes instances of both police and prosecutorial misconduct.¹³ Though both are equally egregious, this Article will focus on prosecutorial actions.

⁵ See ALFREDO GARCIA, *THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE* 1 (1992).

⁶ See *id.*

⁷ See *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923).

⁸ See THE NATIONAL REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/about.aspx> (last visited Nov. 2023) (displaying a 23 person rise in exonerations from when visited in September to November 2023).

⁹ See SAMUEL R. GROSS, *WRONGFUL CONVICTIONS AND MISCARRIAGES OF JUSTICE* (Martin Kiliyas & C. Ronald Huff eds., 2013).

¹⁰ See Michael W. Berger, *Wrongful Convictions Reported for 6% of Crimes*, PENN TODAY (May 8, 2018), <https://penntoday.upenn.edu/news/first-estimate-wrongful-convictions-general-prison-population>.

¹¹ See *Wrongful Convictions*, EQUAL JUSTICE INITIATIVE, <https://eji.org/issues/wrongful-convictions/> (last visited Nov. 5, 2023).

¹² *Exonerations in 2018*, THE NATIONAL REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Documents/Exonerations%20in%202018.pdf> (finding 107 cases of official misconduct in 2018 alone).

¹³ See *Official Misconduct*, INNOCENCE PROJECT, <https://innocenceproject.org/official-misconduct/> (last visited Nov. 5, 2023).

A prosecutor's primary duty is not merely to secure convictions but rather to seek justice.¹⁴ According to Supreme Court Justice Sotomayor, a former prosecutor herself, "[J]ustice is served when a guilty man is convicted, and an innocent man is not."¹⁵ Excessive zeal is frowned upon when a prosecutor loses sight of justice and equity and instead prioritizes conviction rates.¹⁶ That is not to say a prosecutor should not be passionate in their work. As the Court pointed out in *Berger v. United States*,

"[T]he prosecutor is the representative ... of a sovereignty whose interest ... 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 earnest 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."¹⁷

At the end of the day, there is a difference between trial tactics and trial manipulation. To convict someone, the prosecution must make their case, demonstrating that a defendant is guilty beyond a reasonable doubt. If prosecutors cannot do so effectively without violating a defendant's rights, they have failed to fulfill their mission, and the defendant should be released. Losing sight of the overall purpose of justice can lead to erroneous convictions. One alarming study analyzing the role of prosecutorial misconduct in wrongful convictions found that "in cases where the conviction was overturned based on new DNA evidence... prosecutorial

¹⁴ See Somil Trivedi & Jared Keenan, *Coerced Out of Justice: How Prosecutors Abuse Their Power to Secure Guilty Pleas*, ACLU (July 8, 2021), <https://www.aclu.org/news/criminal-law-reform/coerced-out-of-justice-how-prosecutors-abuse-their-power-to-secure-guilty-pleas> (discussing the ABA standards for the duties and functions of the prosecutor); see also AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, Standard 3-1.2 Functions and Duties of the Prosecutor (b) (2017).

¹⁵ See *Case-Based Tools*, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, <https://www.nacdl.org/Landing/CaseBasedTools#:~:text=Prosecutorial%20Misconduct,the%20rights%20of%20the%20accused> (last visited Nov. 18, 2023) (quoting Justice Sotomayor under the "Prosecutorial Misconduct" heading).

¹⁶ See David Alan Sklansky, *The Problems with Prosecutors*, 1 ANN. REV. OF CRIMINOLOGY 451, 451-58 (2018).

¹⁷ *Berger v. United States*, 295 U.S. 78, 88 (1935).

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misconduct was a factor in 36% to 42% of the convictions.”¹⁸ Both intentional and inadvertent prosecutorial misconduct, which are equally harmful to defendants,¹⁹ have been said to be avoidable or reducible by implementing preventative measures.²⁰ Though “[p]rosecutors have a duty to take reasonable steps to prevent errors,”²¹ merely implementing standards on paper is insufficient. In fact, in 2022, there was a record number of wrongful convictions caused by official misconduct, posing the question of why these mistakes occur so frequently.²² How are so many innocent people’s rights stripped and lives destroyed without cause?

Prosecutorial overreach and misconduct taint the truth-finding process and create distrust in the criminal justice system and its outcomes.²³ When a prosecutor engages in misconduct, they not only compromise the defendant’s right to a fair trial but also the public’s faith in the rule of law: “Our criminal justice system depends on the integrity of the attorneys who present their cases to the jury. When even a single conviction is obtained through perjurious or deceptive means, the entire foundation of our system of justice is weakened.”²⁴ Thus, to build trust in the system and lower rates of both prosecutorial misconduct and wrongful convictions, an in-depth inquiry into the constitutional and ethical underpinnings of our justice system is required.

¹⁸ *Prosecutorial Misconduct Doesn’t Always Result in Termination*, CALIFORNIA INNOCENCE PROJECT, <https://innocenceproject.org/issues-we-face/prosecutorial-misconduct/#:~:text=Prosecutorial%20Misconduct%20Statistics,42%20percent%20of%20the%20convictions> (last visited Nov. 5, 2023).

¹⁹ *See Examples of Prosecutorial Misconduct*, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (July 13, 2022), <https://www.nacdl.org/Content/ExamplesofProsecutorialMisconduct> (stating that insidious harm is caused when a prosecutor either “carelessly, or purposefully, fails in his or her duties”).

²⁰ *See, e.g., Definition of Prosecutorial Misconduct*, CENTER OF PROSECUTORIAL MISCONDUCT, <https://www.prosecutorintegrity.org/registry/definition/#:~:text=Some%20cases%20of%20prosecutorial%20misconduct,these%20inadvertent%20errors%20are%20avoidable> (last visited Nov. 5, 2023) (“For example, the Texas District and County Attorneys Association (TDCAA) analyzed several cases of prosecutorial misconduct involving unintentional Brady violations. The TDCAA concluded, ‘in each of these cases, a Brady violation could have been avoided if the prosecutor’s office had an open-file policy.’”).

²¹ *Definition of Prosecutorial Misconduct*, CENTER FOR PROSECUTOR INTEGRITY, <https://www.prosecutorintegrity.org/registry/definition/#:~:text=Prosecutors%20have%20a%20duty%20to,ongoing%20oversight%20to%20their%20employees> (last visited Nov. 5, 2023) (stating that prosecutors may satisfy this duty “by such means as establishing office policies, fulfilling CLE requirements...., ongoing oversight to their employees,” and other measures).

²² *See* Jamiles Lartey, *In 2022, Exonerations Hit a Record High in the U.S.*, THE MARSHALL PROJECT (May 20, 2023), <https://www.themarshallproject.org/2023/05/20/wrongful-conviction-exoneration-2022-record-kim-foxx>; *see also* Christina Carrega, *Black Men Continue to be Overrepresented in Annual Wrongful Conviction Report*, CAPITAL B NEWS (May 18, 2023), <https://capitalbnews.org/exonerations-annual-report/> (stating that “[a] vast majority of the 233 exonerations in 2022 stemmed from patterns of misconduct by police officers”).

²³ *Prosecutorial Misconduct Doesn’t Always Result in Termination*, *supra* note 18.

²⁴ *Hayes v. Brown*, 399 F.3d 972, 988 (9th Cir. 2005).

This Article will reveal that current standards present troubling indications of vast loopholes allowing prosecutors to escape accountability. Current standards are meaningless without proper enforcement. Nationwide prosecutorial reform is necessary to preserve the right to a fair trial, as current standards fall short of preserving this right.

When potential prosecutorial misconduct is at play, one would assume the community would unite in outrage and demand accountability. After all, our criminal justice system has procedures established with the laudable goal of only convicting the guilty.²⁵ However, as one can imagine, the voices of anger tend to grow quiet when unfavorable defendants—or even those viewed as guilty—are cheated. Common American phrases such as “they got what they deserved” and “karma is a [insert expletive of choice here]” reflect society’s views about disliked individuals. In essence, the public consensus is that bad people deserve the punishment coming their way. However, even “bad” or “guilty” people are owed due process and the right to a fair trial in the American justice system. Fundamental rights are not dependent on individuals’ character—they are universal and unwavering. Accordingly, an inquiry must be conducted when those rights are potentially being deprived. One such situation requiring a misconduct analysis surrounds the trial of the Proud Boys for their participation in the storming of the United States Capitol on January 6, 2021.

II. BACKGROUND

A. The Need for Recognizing and Eliminating Personal Bias in Legal Analysis

The ideal of the American justice system is impartiality. Regardless of a defendant’s actions or public perception towards them, anyone charged with a crime in the United States is entitled to a fair trial.²⁶ Though our judicial system is far from perfect, allowing procedural or ethical violations to be overlooked because we view an individual as unfavorable or guilty sets a dangerous precedent that may harm even likable or innocent defendants. Therefore, in cases of possible misconduct, ensuring equity and preventing wrongful convictions requires a thorough investigation into a trial’s fairness, irrespective of the defendant’s identity. As Benjamin Franklin said, “It is

²⁵ See U.S. CONST. amend. XIV, § 1; *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963); *Estes v. Texas*, 381 U.S. 532, 540 (1965).

²⁶ See *id.*

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better a hundred guilty persons should escape than one innocent person should suffer.”²⁷

Exemplifying this philosophy, many attorneys have put aside their personal beliefs to represent individuals they disagree with in the name of justice and legal representation for all. One example is David Goldberger, a Jewish law professor who worked for the American Civil Liberties Union (ACLU) as an attorney in the 1970s.²⁸ While there, a neo-Nazi group sought to conduct a demonstration in the downtown area of Skokie, Illinois, a town north of Chicago.²⁹ Skokie, home to a large population of Jewish people, fought adamantly to prevent this antisemitic and hateful public demonstration from occurring.³⁰ However, Goldberger, a fierce advocate and expert of the First Amendment, chose to represent the group’s right to peaceably assemble.³¹

Though the neo-Nazis’ beliefs and actions directly opposed everything Goldberger believed in, he still chose to represent the group based on the principle that “if the government can prevent lawful speech because it is offensive and hateful, then it can prevent any speech that it dislikes.”³² The Supreme Court agreed, and as a result, Goldberg and the ACLU received tremendous backlash, including threats, vandalism, and immense hate from the community.³³ Almost 50 years after the *Skokie* case, Goldberger stated, “To this day, the case still brings up difficult feelings about representing a client whose constitutional rights were being violated but who represented the hatred and bigotry that continues to erupt into America’s consciousness.”³⁴ Nevertheless, Goldberger prioritized defending foundational rights over his personal disgust of the group’s character.³⁵ If these unfavorable individuals’ rights had not been defended, a disastrous precedent would have been set, in effect allowing the government and courts

²⁷ See *Blackstone’s Ratio: Is it more important to protect innocence or punish guilt?*, CATO INSTITUTE, <https://www.cato.org/policing-in-america/chapter-4/blackstones-ratio#:~:text=Benjamin%20Franklin%20went%20further%20arguing,one%20innocent%20person%20should%20suffer.%22&text=Other%20notable%20historical%20figures%20have%20worried%20more%20about%20punishing%20the%20guilty> (last visited Nov. 5, 2023).

²⁸ See David Goldberger, *The Skokie Case: How I Came to Represent The Free Speech Rights of Nazis*, ACLU (Mar. 2, 2020), <https://www.aclu.org/issues/free-speech/skokie-case-how-i-came-represent-free-speech-rights-nazis>.

²⁹ See *id.*

³⁰ See *id.*

³¹ See *id.*

³² See *id.*

³³ See *id.*

³⁴ See *id.*

³⁵ See *id.*

to enact legislation infringing even on the rights of people more “favorable” to the public.³⁶

Goldberger stands as a pristine example, not only to current and future legal professionals, but also to the world. The message behind this monumental situation is to stand up against wrongdoing—no matter the victim, one’s views, or the opposition one may receive. Representing someone with beliefs contrary to one’s own does not indicate support for their actions or ideologies; it demonstrates a willingness to look beyond bias and stand up for people who have been wronged. Respect is owed to attorneys like Goldberger, who take seriously their oath to uphold the Constitution of the United States.³⁷ This oath is continuous and unwavering, irrespective of a client’s views.

Periodically turning a blind eye to possible prosecutorial misconduct based on a defendant’s identity enables prosecutors to deprive individuals of their constitutional rights. This practice sets a dangerous precedent paving the way to denying liberty to all, including people who are favored now but may become disfavored in the future. As Martin Luther King Jr. once said, “Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects all indirectly.”³⁸

B. *A Consolidated Summary of United States v. Nordean et al.*

Members of the Proud Boys, an extremist and fascist male group, often find themselves in the spotlight for a variety of violent acts motivated by their radical ideologies.³⁹ Attention on the group has increased in recent years following the storming of the United States Capitol building on January 6, 2021. The group was one of the main culprits behind the riot, with

³⁶ Goldberger pointed out, in response to the *Skokie* case, “a state legislator introduced a bill in the Illinois General Assembly seeking to criminalize the display of racial hatred.” *See id.* (internal quotes omitted). However, the proposed law used broad language potentially allowing “criminal prosecution of a Black Lives Matter leader for making a speech blaming white racism for police shootings of African Americans.” *See id.* Thus, without Mr. Goldberger’s adamant representation of this unfavorable group, the government would have been able silence voices far and wide. The precedential impact would have been substantial and affected the rights of all.

³⁷ *See* Robert Anthony Gottfried, *The Anatomy of Our Oath*, AMERICAN BAR ASSOCIATION (Jan. 8, 2021), https://www.americanbar.org/groups/young_lawyers/resources/after-the-bar/professional-development/anatomy-of-our-oath/?abajoin=true (asserting that although oaths vary from state to state, they all require lawyers to “(1)...support the Constitution of the United States, (2)...faithfully discharge the duties of an attorney, and (3)...conduct oneself with integrity and civility.”)

³⁸ Martin Luther King Jr., *Letter from a Birmingham Jail [King, Jr.]*, AFRICAN STUDIES CENTER-UNIVERSITY OF PENNSYLVANIA (Apr. 16, 1963), https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

³⁹ *See* The Editors of Encyclopaedia Britannica, *Proud Boys*, BRITANNICA (Oct. 17, 2023), <https://www.britannica.com/topic/Proud-Boys>.

around 55 members being charged as defendants,⁴⁰ a few of which are more well known than the rest. Specifically, defendants Ethan Nordean, Enrique Tarrío, Joseph Biggs, Dominic Pezzola, and Zachary Rehl were at the center of the media frenzy surrounding this case. The government tried them together in a consolidated case titled *United States v. Nordean et al.*⁴¹

In March 2023, the defendants were set to call a witness—a fellow Proud Boy and “friend”—to testify on their behalf, but a day before, the prosecution called an emergency hearing announcing the witness’s status as a confidential informant for the preceding two years.⁴² The defense stated that it disclosed its intent to call this witness to aid its case four months prior, under court mandate.⁴³ Yet the government denied knowing of the defense’s plan to call this individual as a witness until shortly before the emergency hearing.⁴⁴ This late revelation by the government blindsided the defense and left them questioning the fairness of the legal process.⁴⁵ This case yields

⁴⁰ Reports range between 54-55 individuals. See *Proud Boys*, MAPPING MILITANTS PROJECT (Sept. 15, 2016), https://drive.google.com/file/d/1chKWxDgRbFFcvKqO3H_a2kdv4cXa3f1g/view (stating that, “[a]s of January 2023, 55 of the group’s members have been indicted on charges connected with the assault [on the capitol]”); see also Michael Jensen et al., *Proud Boys Crimes and Characteristics*, NATIONAL CONSORTIUM FOR THE STUDY OF TERRORISM AND RESPONSES TO TERRORISM (Jan. 2022), https://www.start.umd.edu/sites/default/files/publications/local_attachments/Proud%20Boy%20Crimes%20and%20Characteristics%20January%202022%20FINAL.pdf (stating that 54 members participated in the breach of the Capitol).

⁴¹ See *USA v. Nordean et al.*, 579 F. Supp. 3d 28 (D.D.C. 2021). See United States Attorney’s Office District of Columbia, *Jury Convicts Four Leaders of the Proud Boys of Seditious Conspiracy Related to U.S. Capitol Breach*, U.S. DEPARTMENT OF JUSTICE (May 4, 2023), <https://www.justice.gov/usao-dc/pr/jury-convicts-four-leaders-proud-boys-seditious-conspiracy-related-us-capitol-breach>; see also Office of Public Affairs, *Proud Boys Leader Sentenced to 22 Years in Prison for Seditious Conspiracy and Other Charges Related to U.S. Capitol Breach*, U.S. DEPARTMENT OF JUSTICE (Sept. 5, 2023), <https://www.justice.gov/opa/pr/proud-boys-leader-sentenced-22-years-prison-seditious-conspiracy-and-other-charges-related>; see also Rebecca Beitsch, *DOJ Appeals Sentences of Proud Boys Members*, THE HILL (Oct. 16, 2023), <https://thehill.com/regulation/court-battles/4259174-doj-appeals-sentences-proud-boys-members/>.

⁴² See Kyle Cheney, *Proud Boys Attorneys: Informant Had Contact with Defense Team, Defendants*, POLITICO (Mar. 22, 2023, 5:00 PM), <https://www.politico.com/news/2023/03/22/proud-boys-informant-00088413> (stating that the informant began working for the government in 2021). See Michael Kunzelman & Lindsay Whitehurst, *Federal Prosecutors Reveal Proud Boys Witness was Informant*, ASSOCIATED PRESS (Mar. 22, 2023, 8:41 PM), <https://apnews.com/article/proud-boys-enrique-tarrío-capitol-riot-informant-ce0a1cf20c17c95b1ea3306fb70d93c4>.

⁴³ See Defendants’ Corrected Motion to Compel Disclosure of All FBI Interview Reports and All DOJ Memos Relating to the Recording and Reporting of the Defense Team, *USA v. Nordean et al.*, No. 21-CR-175 (TJK) (D.D.C. 2023) (dating the disclosure to December 2022).

⁴⁴ See Robert Legare, *Proud Boys Trial Disrupted After Defense Says its Witness was Paid FBI Informant*, CBS NEWS (Mar. 23, 2023, 9:07 PM), <https://www.cbsnews.com/news/proud-boys-trial-defense-witness-paid-fbi-informant/>; see also Beitsch, *supra* note 41.

⁴⁵ Norman Pattis, attorney for Joseph Biggs, expressed that he has “lost confidence in the process” and explained that the informant had dozens of calls with his client, which included discussion of

sealed hearings and documents at every turn, yet many questions have nevertheless surfaced based on the accessible information.

Did the prosecution commit ethical violations by failing to disclose this information earlier? Did this decision present a constitutional violation? What can be done to mend the public's broken trust in the system following a situation like this? These questions are answered below and all generally lead to the same conclusion: seemingly intentional, last-minute disclosures by the prosecution strip defendants of their rights, violate prosecutors' ethical and constitutional obligations, and should not be permitted without consequence.

This Article is not arguing for the innocence or acquittal of the Proud Boys for the crimes for which they were convicted; rather, its focus is promoting equitable outcomes for all by recognizing where reform is needed. *Nordean* illustrates that prosecutors far too often fail to protect the fundamental rights of the accused in their path to securing a guilty verdict, enabled by current standards.

C. *A Brief History of the Proud Boys and Their Involvement in the Storming of the Capitol*

The storming of the Capitol on January 6th disrupted a joint session of Congress as it was certifying the 2020 presidential election results.⁴⁶ Most of the rioters involved believed they were called to action by former President Donald Trump, whom they saw as the motivator for their participation.⁴⁷ Their goal was to stop the election certification from taking place⁴⁸ after Donald Trump made claims of election fraud in the 2020

legal issues. See Lindsay Whitehurst & Alanna Durkin Richer, *Informant Didn't Spy on Proud Boys Defense, Prosecutors Say*, ASSOCIATED PRESS (Mar. 23, 2023, 8:00 PM), <https://apnews.com/article/proud-boys-jan-6-capitol-riot-informant-22492fa90fc83fde9fea6a1b93ae011e>.

⁴⁶ United States Attorney's Office District of Columbia, *One Year Since the Jan. 6 Attack on the Capitol*, U.S. DEPARTMENT OF JUSTICE (Dec. 30, 2021), <https://www.justice.gov/usao-dc/one-year-jan-6-attack-capitol> (following President Trump taking office in 2025, this source was removed from the Department of Justice's Website; however, the website can still be accessed through this web-archive link: <https://web.archive.org/web/20211230215638/https://www.justice.gov/usao-dc/one-year-jan-6-attack-capitol>).

⁴⁷ Rupa Shenoy & Hafsa Quraishi, *New Harvard Study Concludes U.S. Capitol Rioters Were Primarily Motivated by Trump*, WBUR (July 27, 2022), <https://www.wbur.org/news/2022/07/27/harvard-shorenstein-research-january-6-insurrection-president> (stating "that most people who attacked the U.S. Capitol...were primarily motivated by former President Donald Trump and his appeals").

⁴⁸ *Id.* (noting that rioters stated that the movement "was essentially to, in any way, shape or form, prevent the certification of the election" after "Trump called for help"); one rioter stated that Trump had only asked him for two things: his vote and his attendance on January 6. See Cresencio

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election.⁴⁹ The Capitol breach resulted in around \$1.5 million in property damage and hundreds of arrests⁵⁰— about 55 of which involve known Proud Boys members.⁵¹ This figure includes the five co-defendants named above. Quite frankly, defendants who are members of radical groups such as the Proud Boys do not elicit strong feelings of sympathy from the majority of the public.

The principles upon which the Proud Boys were established and operate under are viewed as distasteful by a majority of the public. The group's founding is relatively recent, dating back a mere eight years.⁵² Its official "ideology includes allegiance to Western culture and stresses elevating masculinity, opposing Islam, and defending its community from a perceived 'war on whites.'"⁵³ In the beginning stages of membership, prospects must publicly state, "I am a Western chauvinist, and I refuse to apologize for creating the modern world."⁵⁴ Chauvinism has a variety of definitions, all of which are rooted in sexist or racist ideologies. The Merriam-Webster dictionary defines "chauvinism" as "an attitude of superiority toward members of the opposite sex" and "excessive or blind patriotism."⁵⁵ Likewise, the Cambridge Dictionary defines the term as "the strong and unreasonable belief that your own country or race is the best or most important."⁵⁶ These definitions are consistent with the Proud Boys' actions. Since its origin, the group has been ostracized for being Islamophobic, homophobic, transphobic, and xenophobic, as well as spreading hate and violence in the name of its cause.⁵⁷ The all-male group

Rodriguez-Delgado & Associated Press, *WATCH: 'Trump asked us to come,' rioters said during Jan. 6 attack*, PBS (June 9, 2022), <https://www.pbs.org/newshour/politics/watch-trump-asked-us-to-come-rioters-said-during-jan-6-attack>.

⁴⁹ See Rodriguez-Delgado, *supra* note 48; see also *Thompson v. Trump*, 590 F. Supp. 46 (2022) (stating that in his 75-minute speech, Trump repeatedly talked about how the election was stolen and rigged and encouraged protestors to march up Pennsylvania Avenue and "fight like hell" or they were not "going to have a country anymore").

⁵⁰ Whitehurst & Richer, *supra* note 45, at 8.

⁵¹ See *Proud Boys*, *supra* note 40.

⁵² Jensen et al., *supra* note 40, at 8 (stating that the group was formed in 2016 during the presidential election).

⁵³ The Editors of Encyclopedia Britannica, *supra* note 39, at 8.

⁵⁴ See *Proud Boys*, *supra* note 40.

⁵⁵ *Chauvinism*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/chauvinism> (last visited Nov. 6, 2023).

⁵⁶ *Chauvinism*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/chauvinism> (last visited Nov. 6, 2023).

⁵⁷ Since the 2021 attack on the Capitol, the group has seemingly "shied away" from any large-scale protesting; however, their acts of violence are at soaring rates. To illustrate, some of their attacks have targeted members of Antifa, members of the LGBTQ+ community (specifically at events involving drag queens), and individuals who oppose their anti-abortion/pro-life views. In 2020, affiliates with the group adamantly counter-protested at Black Lives Matter events, notably being especially violent at the protests in Portland over the death of George Floyd. Additionally, members

officially denies ties to neo-Nazism, white supremacy, and sexism, but their conduct and words indicate advocacy for these beliefs.⁵⁸ In sum, the members of the Proud Boys are generally viewed as radical individuals and present as unsympathetic defendants in a court of law. Nevertheless, whether someone is liked, respected, or popular should never be a factor in a legal inquiry.

D. The “Late Disclosure” Present in *Nordean*

In *Nordean*, the defense learned of the confidential informant’s status several months into the trial.⁵⁹ Immediately following the disclosure during trial, the defense filed motions alleging two main points. First, the informant was present for conversations involving privileged information on multiple occasions.⁶⁰ Thus, the defense suspected the informant reported back privileged information to the prosecution.⁶¹ Second, the defense asserted that the late disclosure was intentional and unfair because the government knew the defense planned to call the confidential informant as a witness for a month yet allowed the defense to prepare for trial under false

have openly attended anti-Islamic events. See The Editors of Encyclopaedia Britannica, *supra* note 39, at 8.

⁵⁸ See generally *id.* The Proud Boys appear to exhibit sexism towards career-focused women, illustrated through their demeaning statements and exclusion of women from formal membership. The Proud Boys claim “venerate[e] the housewife,” meaning celebrating women who choose to be housewives. See Cassie Miller, *Proud Boys Aid the Right-Wing Assault on the LGBTQ Community and Reproductive Justice*, SPL CENTER (July 13, 2022), <https://www.splcenter.org/hatewatch/2022/07/13/proud-boys-aid-right-wing-assault-lgbtq-community-and-reproductive-justice>. On its face, their claim to support housewives may seem to dispel accusations of sexism; however, a further examination of the organization’s statements indicates otherwise. For example, a Wisconsin chapter of the Proud Boys made a statement in 2020 expressing that because they venerate the housewife, their wives “are happier than any of these barren career cat ladies.” Additionally, a Minnesota chapter formally denounced efforts to promote equality for women when they stated that “women are not equal, until they are no longer a protected class. Bet you never see a feminist advocate for that.” Their conduct and words indicate views of ‘male chauvinism’ in addition to ‘western chauvinism.’ See “Venerating the Housewife:” *A Primer on Proud Boys’ Misogyny*, ANTI-DEFAMATION LEAGUE (Aug. 12, 2021), <https://www.adl.org/resources/blog/venerating-housewife-primer-proud-boys-misogyny>; see accompanying text at notes 54-56. Male chauvinism is defined as “the belief that women are naturally less important, intelligent, or able than men.” See *Male Chauvinism*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/male-chauvinism>. Finally, the group’s attribution of the creation of the modern world solely to themselves suggests they do not acknowledge the contributions of women. See accompanying text at note 54.

⁵⁹ See Andy Campbell, *Proud Boys ‘Took Aim At Democracy’ On Jan. 6, Prosecutors Sat At Sedition Trial*, HUFFINGTON POST (Jan. 12, 2023), https://www.huffpost.com/entry/proud-boys-opening-statements_n_63bc8111e4b0d6f0b9fd682d (dating the beginning of the case as early-mid January 2023, three months before the late disclosure occurred).

⁶⁰ Beitsch, *supra* note 41, at 8.

⁶¹ See *id.*

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pretenses.⁶² The informant was confirmed to be active from April 2021 to at least January 2023.⁶³ However, there is no way to confirm that the informing did not exceed this timeline. Further, even if it only occurred when the government asserts, there is still an overlap of time from when the defense listed the informant as a potential witness.⁶⁴

These seemingly underhanded tactics from the prosecution prevented the defendants from conducting comprehensive trial preparation, in effect denying their right to a fair trial. The government disclaimed fault and deemed all accusations by the defense as meritless.⁶⁵ To support its stance, the government stated the confidential informant's purpose, which did not include "spying" on opposing counsel.⁶⁶ In the absence of concrete evidence, the public is left questioning whether to believe this claim, considering the suspicious actions of the prosecution and recognizing the government's ability to withhold information without the public's knowledge.

As previously mentioned, not all details of this case are accessible. This case may be cut and dry; however, the lack of specifics has led to questions regarding the conduct that occurred. It is no surprise that the defense team opposed what happened or that the government disclaimed fault. After all, it is only natural for parties to defend their interests. Even if the confidential informant did not spy on the defense, the optics are unfavorable for the government given the potential for such actions. Allowing the defense to rely on and trust this witness in the months leading up to the trial could have exposed privileged information to the prosecution, unfairly tipping the scales of justice toward the government. Distrust in our system arises when there is a lack of transparency coupled with prosecutorial actions that appear unfair to defendants.⁶⁷ Public trust in the system is essential because

[t]he ability of courts to fulfill their mission and perform their functions is based on the public's trust and confidence

⁶² See *id.* (stating that the government was aware since the defense's December 2022 disclosure).

⁶³ See *id.*

⁶⁴ See *id.* (recognizing that the disclosure was made in December, yet communications did not cease until January at the very latest).

⁶⁵ See Government's Response to Zachary Rehl's Motion to Compel Disclosure of All FBI Interview Reports and All DOJ Memos Relating to the Recording and Reporting of the Defense Team, *U.S. v. Nordean et al.*, No. 21-CR-175 (TJK) (D.D.C. 2023).

⁶⁶ See *id.*

⁶⁷ Anonymous Student, *Discuss Some of the Reasons that People Distrust the Justice System?*, STUDOCU (July 2023), <https://www.studocu.com/en-us/messages/question/2974633/discuss-some-of-the-reasons-that-people-distrust-the-justice-system#:~:text=Some%20of%20the%20most%20common,is%20not%20being%20served%20equally.>

in the judiciary. In large part, the judiciary earns that trust and confidence by faithfully performing its duties; adhering to ethical standards; and effectively carrying out internal oversight, review, and governance responsibilities. These responsibilities include accountability for a failure to observe scrupulous adherence to ethical standards. The surest way to lose trust and confidence is failure to live up to established ethical standards and failure to hold judges and judiciary personnel accountable for misconduct. Transparency in efforts to ensure accountability for misconduct, where possible and appropriate, helps foster public trust and confidence.⁶⁸

The serious nature of the trials surrounding the January 6th attack on the Capitol restricts full access to the *Nordean* docket, thus creating a lack of transparency about what occurred behind the courtroom doors. Accordingly, there are speculative questions of constitutional and ethical importance, which are discussed below.

III. CURRENT STANDARDS FOR WHEN DISCLOSURE OF AN INFORMANT'S IDENTITY SHOULD BE PERMITTED

Confidential informants play a crucial role in criminal investigations, often pivotal in securing convictions of guilty individuals.⁶⁹ Generally, a confidential informant's identity can remain undisclosed by the prosecution, but this rule is not absolute.⁷⁰ Exceptions apply in some situations for reasons of judicial fairness such as ensuring an individual's Sixth Amendment right to a fair trial.⁷¹ However, there is not an established

⁶⁸ *Issue 2: Preserving Public Trust, Confidence, and Understanding*, UNITED STATES COURTS (Nov. 6, 2023), <https://www.uscourts.gov/statistics-reports/issue-2-preserving-public-trust-confidence-and-understanding#:~:text=The%20ability%20of%20courts%20to,and%20confidence%20in%20the%20judiciary>.

⁶⁹ Office of the Inspector General, *The Federal Bureau of Investigation's Compliance with the Attorney General's Investigative Guidelines (Redacted)*, U.S. DEPARTMENT OF JUSTICE (Sept. 2005), <https://oig.justice.gov/sites/default/files/archive/special/0509/chapter3.htm> ("Since the inception of the FBI in 1908, informants have played major roles in the investigation and prosecution of a wide variety of federal crimes.").

⁷⁰ Alexis Kelly, *Learning the Identity of a Confidential Informant*, NOLO (Nov. 8, 2023), <https://www.nolo.com/legal-encyclopedia/learning-the-identity-confidential-informant.html#:~:text=The%20general%20rule%20is%20that,been%20talking%20to%20the%20cops>.

⁷¹ *Id.* (stating that the general "rule has many exceptions; if a criminal defendant can show the importance of the CI's identity to the case, it may be possible to find out who's been talking to the cops").

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timeline for when the disclosure of an informant's identity is required. Eventually, the delayed disclosure of material information will disadvantage the uninformed party, inhibiting proper trial preparation. The question is, when is disclosure delayed?

The importance of the confidential informant's identity is a determining factor in making this decision. In *Roviaro v. United States*, the Court held that "where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way."⁷² Therefore, "the government must disclose an informant's identity if [their] ... testimony is crucial to the defense."⁷³ A balancing of factors is required to weigh "the public interest in protecting the flow of information against the individual's right to prepare his defense."⁷⁴ Specifically, courts should consider "the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors," depending on the circumstances of the case.⁷⁵ One consideration that would fall under "other relevant factors" is "whether the defendant wants to call the informant as a witness."⁷⁶

In *Nordean*, the defense planned to call the confidential informant as a witness since December 2022, without knowledge of the witness's informant status.⁷⁷ The government maintained contact with the informant through at least January 2023,⁷⁸ constituting a minimum one-month overlap between the defense's witness disclosure and the cessation of informant communication.

Importantly, *Nordean* can be distinguished from other situations concerning the disclosure of a confidential informant's identity.⁷⁹ Typically, a court decides whether to reveal the identity of an informant—by balancing the factors discussed above—when the defense inquires into the identity of a witness set to testify for the prosecution.⁸⁰ However, in *Nordean*, the witness was not set to testify for the prosecution but rather for the defense.⁸¹ The defendants in *Nordean* could not inquire into the identity of the confidential informant because they were unaware one existed at all.⁸² The

⁷² *Roviaro v. United States*, 353 U.S. 53, 60 (1957).

⁷³ *Discovery*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 324, 335 (2006).

⁷⁴ Kelly, *supra* note 70, at 6.

⁷⁵ See Meredith J. Duncan, *Digital Ecosystem of Accountability*, 59 AM. CRIM. L. REV. 393, 430 (2022) (quoting *Roviaro v. United States*, 353 U.S. 53, 62 (1957)).

⁷⁶ *Issue 2: Preserving Public Trust, Confidence, and Understanding*, *supra* note 68.

⁷⁷ See Beitsch, *supra* note 41.

⁷⁸ See *id.*

⁷⁹ See, e.g., Kelly, *supra* note 70.

⁸⁰ See, e.g., *id.*

⁸¹ See Beitsch, *supra* note 41.

⁸² See *id.*

news of a confidential informant being involved was shocking, but it did not compare to the shock from learning the informant was the defense's own witness. This reality was not only detrimental to their trial plans set to occur the following day but also introduced concerns of breach of confidentiality and privilege. The informant had participated in prayer meetings and discussed matters pertaining to trial with the defendants' families—including whether to replace one of the defendant's attorneys.⁸³ The informant had also been in contact with the defendant's attorneys.⁸⁴ The defendants asserted prosecutorial misconduct for surreptitiously interfering with their trial preparation via a confidential informant.⁸⁵

There is no test specifically pertaining to the disclosure of an informant's identity when the informant is testifying on behalf of the defense rather than the prosecution. Consequently, the *Roviaro* factors are the strongest guideline currently offered. When applying these factors to *Nordean*, there is a very strong argument that the informant's testimony was *crucial* and *significant* to the defense because, in this situation, the confidential informant was supposed to be speaking on the defense's behalf.⁸⁶ If this is not considered a significant testimony, it is unclear what would qualify. Thus, the scales weigh in favor of disclosure. The prosecution should have revealed the informant's identity in a timely manner, allowing the defense adequate time to prepare, which is tantamount in ensuring a fair trial.

IV. AVAILABLE INFORMATION POINTS TO A HIGH PROBABILITY OF CONSTITUTIONAL VIOLATIONS BEING PRESENT IN *NORDEAN*

A. *Potential Brady Violation in Nordean*

In 1963, the Supreme Court decided *Brady v. Maryland*, which established a higher standard of conduct for prosecutors.⁸⁷ These efforts ensured the protection of a defendant's constitutional rights, attempted to provide a level playing field for defendants, and prevented "trial by ambush."⁸⁸ Prior to *Brady*, the pre-trial and trial rights of a defendant were murky at best, forcing defendants to fight an uphill battle from the very beginning. For example, prosecutors had limited obligations, and the disclosure of evidence was not mandatory. Arguably, the uphill battle for

⁸³ *See id.*

⁸⁴ *See id.*

⁸⁵ *See id.*

⁸⁶ *Supra* accompanying text at notes 42-45.

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

⁸⁸ *See* CAROL STIEKER, CRIMINAL PROCEDURE STORIES 129 (2006).

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defendants remains today,⁸⁹ but *Brady v. Maryland* was a huge step in raising the bar for prosecutorial conduct.

The *Brady* rule requires prosecutors to disclose certain information to the defense, regardless of whether ill intent is present.⁹⁰ Breaches of the *Brady* rule are classified as Due Process violations under the Fifth Amendment.⁹¹ When a prosecutor deprives a defendant of access to favorable information to negate their guilt or lessen their punishment, they are depriving the defendant of their life and/or liberty without affording them due process. Additionally, there are significant connections between the *Brady* rule and the guarantees in the Sixth Amendment.⁹² Some scholars have gone as far as to argue that the *Brady* rule should be backed by the Sixth Amendment's language, which provides the accused the right to a fair trial.⁹³

In *Brady*, the Court held that “suppression by the prosecution of evidence favorable to an accused...violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”⁹⁴ Subsequently, the Court in *Brady* set out a three-part test to constitute a prosecutorial misconduct claim.⁹⁵ First, “the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching.”⁹⁶ Second, the “evidence must have been suppressed by the State, either willfully or inadvertently.”⁹⁷ A *Brady* analysis explicitly disregards intent as a necessary element because accidental suppression of information is just as harmful as intentional nondisclosure. Finally, the third element of *Brady* requires prejudice resulting from suppression.⁹⁸

Banks v. Dretke provides some guidance on the first element of the *Brady* test: evidence that is favorable to the accused. In this case, “the State

⁸⁹ “Brady, however, has meant much less in practice than it could have. Few potential Brady claims come to light, and fewer defendants walk free, because our system remains an adversarial contest rather than a neutral inquiry into innocence.” *Id.* “Brady’s ringing of rhetoric of innocence...is in some ways a hollow promise. Far from transforming the adversarial system into a quest for truth, it has merely tinkered at its margins.” *Id.* at 130.

⁹⁰ See *Cone v. Bell*, 556 U.S. 449, 451 (2009) (“[W]hen a State suppresses evidence favorable to an accused that is material to guilt or punishment, the State violates the defendant’s right to due process, irrespective of the good faith or bad faith of the prosecution.”) (internal quotes omitted).

⁹¹ See *Brady*, 373 U.S.

⁹² See *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984) (“The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment.”).

⁹³ See, e.g., Peter Westen, *The Compulsory Process Clause*, 73 MICH L. REV. 75 (1964); see also, e.g., Elizabeth Napier, *A Fair Trial Remedy for Brady Violations*, 115 YALE LJ. 1450 (2006).

⁹⁴ See *Brady*, 373 U.S., at 87.

⁹⁵ *Strickler v. Greene*, 527 U.S. 263, 263 (1999) (“There are three essential components of a true Brady violation[.]”).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See *id.*

knew of, but kept back, [an informant's] arrangement with a [deputy]."⁹⁹ The witness's informant status was evidence the defense could have used to impeach the witness's credibility. Similarly, in *Nordean*, a witness was secretly a paid police informant who had been intensively coached by the prosecution and law enforcement in his testimony.¹⁰⁰ In fact, the prosecution put two different witnesses on the stand, knew the witnesses testified falsely, and instead of correcting the misinformation, doubled down and told the jury the witness was being open and honest in every way.¹⁰¹ The suppressed evidence here would have clearly benefitted the defendant by allowing him to discredit witnesses testifying against him.¹⁰² Additionally, this information would have benefitted the defense's preparation for trial through its ability to ensure that privilege information was not leaked and its ability to seek out alternative witnesses on its behalf. Thus, the defense would not have appeared to be manipulated by the prosecution had this disclosure occurred. Therefore, relying on *Banks* as precedent, it is probable that *Nordean* would also satisfy the first element of a *Brady* violation.

As for the second element, suppression of evidence, the inquiry is rather simple. In *Strickler v. Greene*, there was no dispute that the evidence in question was "known to the Commonwealth but not disclosed to the trial counsel," and it was therefore considered satisfactory for the second *Brady* element.¹⁰³ In *Nordean*, the prosecution was allegedly aware of both the defense's intent to call the witness and the witness's status as an FBI informant, yet failed to disclose this information to the defense until the eve of testimony.¹⁰⁴ *Nordean*'s situation is sufficiently analogous to *Strickler* and would likely satisfy the second prong of *Brady*.

The third and most challenging component to assess is "whether [the] petitioner has established the necessary prejudice."¹⁰⁵ Prejudice is defined as "injury or damage resulting from some judgment or action of another in disregard of one's rights."¹⁰⁶ If the government's late disclosure of a confidential informant's identity did not cause harm to the defendant, then there is no prejudice.¹⁰⁷ To constitute prejudice in a *Brady* claim, the evidence must be "material," meaning there is "any reasonable likelihood"

⁹⁹ See *Banks v. Dretke*, 540 U.S. 668, 671 (2004).

¹⁰⁰ See *id.* at 674.

¹⁰¹ See *id.*

¹⁰² See *id.*

¹⁰³ See *Strickler v. Greene*, 527 U.S. 263, 264 (1999).

¹⁰⁴ See *Cheney*, *supra* note 42.

¹⁰⁵ See *Strickler*, 527 U.S., at 264.

¹⁰⁶ *Prejudice*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/prejudice> (last visited Nov. 8, 2023).

¹⁰⁷ See Steven Warshawsky & Gregory D. Bassuk, *Discovery*, 84 GEO. L.J. 992, 1004 (1996).

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it could have “affected the judgment of the jury.”¹⁰⁸ Additionally, the “materiality standard for *Brady* claims [are] met when ‘the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.’”¹⁰⁹ *Brady*, however, applies to the potential undermining of either the punishment or the verdict, not just the conviction.¹¹⁰

Brady’s mandate for prejudice, however, has faced substantial criticism. The requirement of “harmful error” is intended to prevent the reopening of numerous cases over a minor error where the defendant would have likely been convicted regardless of the violation. However, contrary to its purpose, this standard is not practical or fair, frequently yielding both “arbitrary and inconsistent results.”¹¹¹ For example, there are many cases of almost identical misconduct being treated differently by the courts—some deemed harmful and others harmless.¹¹² Therefore, the “prejudice” aspect of the *Brady* test is not only impractical but also yields conflicting results in its application.

In *Nordean*, the extent to which the government utilized information from the confidential informant during the trial remains unclear. The government likely had other evidence against the defendants that would have resulted in a conviction. However, it is possible that the defendants’ punishments may not have been as severe absent the assistance from the confidential informant, including potentially privileged information obtained from the defense. If the government’s case was air-tight, employing flagrant manipulative tactics would have been unnecessary. Ultimately, the determination of this inquiry is up to the trier of fact. Although we may never uncover the full truth, the first two *Brady* requirements indicate qualification,

¹⁰⁸ *Weary v. Cain*, 577 U.S. 385, 392 (2016) (quoting *Giglio v. United States*, 405 U.S. 150, 153-54 (1972)). See Warshawsky & Bassuk, *supra* note 107. However, it is important to note that the phrase “material” is in dispute. See generally Brief for Oklahoma Criminal Defense Lawyers Association, Bob Wyatt et al. as Amicus Curiae in Support of Petitioner, *Coddington v. Oklahoma State Penitentiary* (No. 20-7341). The Supreme Court has set out many tests of “materiality” in different circumstances, and it has been argued that a lower bar should be afforded in certain circumstances, requiring only a “substantial and injurious effect or influence” standard because it is “better tailored to the nature and purpose of collateral review[.]” See Warshawsky & Bassuk, *supra* note 107, at 8; see also *Brecht v. Abrahamson*, 507 U.S. 619 (1993) (referencing the *Kotteakos* standard).

¹⁰⁹ See *Strickler*, 527 U.S. at 290 (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)).

¹¹⁰ See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

¹¹¹ *Definition of Prosecutorial Misconduct*, *supra* note 21; see generally Fred P. Boy, *Harmless Error - The Need For A Uniform Standard*, 53 ST. JOHN’S L.R. 541, 541-570 (1979).

¹¹² See Kathleen M. Ridolfi & Maurice Possley, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009*, NORTHERN CALIFORNIA INNOCENCE PROJECT (Oct. 1, 2010), <https://digitalcommons.law.scu.edu/ncippubs/2> (comparing the similar instances with contrary outcomes on pages 21-23).

and the third has been shown to be inconsistent and unfair—regardless of what the result would have yielded.

Brady violations, which involve the withholding of favorable evidence from the defense, are typically discovered post-conviction.¹¹³ Nevertheless, “[i]f a *Brady* rule violation is discovered during trial, the court can...declare a mistrial,”¹¹⁴ among other remedial measures. In *Nordean*, the defendants’ attorneys attempted to motion for a mistrial on multiple occasions but were unsuccessful.¹¹⁵ The defense’s unawareness of an informant’s presence hindered their ability to request disclosure of the informant’s identity. However, the failure of the defense to request disclosure is irrelevant because, under *United States v. Bagley*, “the prosecution has a constitutional duty to disclose...regardless of whether the defense...request[s].”¹¹⁶ Given the available information, it is quite possible, if not probable, that constitutional violations were present in *Nordean*.

The purpose behind the *Brady* rule is not to punish society for a prosecutor’s misdeeds but to avoid conducting unfair trials.¹¹⁷ The *Brady* rule is fundamental to fulfilling the promise of a fair trial to all defendants, no matter the crime or the identity of the accused. By ensuring transparency and accountability, it upholds the integrity of the criminal justice system. As Justice William Douglas stated in the conclusion of *Brady*, “Society wins not only when the guilty are convicted, but when criminal trials are fair; our system of the administration of justice suffers when any accused person is treated unfairly.”¹¹⁸ Ultimately, the *Brady* rule reflects a broader commitment to just outcomes, reminding us that fairness in the courtroom is a victory for all.

V. ETHICS

A. *Current Ethical Standards Regarding the Timing and Obligations of Disclosure*

Regardless of whether a *Brady* violation occurred in *Nordean*, the failure to meet constitutional requirements does not conclude the inquiry. The next question pertains to the ethical obligations of prosecutors. It has been said that:

¹¹³ See *Brady Rule*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/brady_rule (last visited Nov. 8, 2023) (“Initially, the *Brady* rule was only applicable if the defendant made a pretrial request[.]”).

¹¹⁴ See *id.*

¹¹⁵ See *e.g.*, Pezzola’s Motion for Mistrial and New Trial for Multiple *Brady* Violations with Included Memorandum of Law, *U.S. v. Nordean et al.*, No. 21-CR-175 (TJK) (D.D.C. 2023).

¹¹⁶ See *United States v. Bagley*, 473 U.S. 667, 667, 711 (1985).

¹¹⁷ See *Brady v. Maryland*, 373 U.S. 83 (1963).

¹¹⁸ *Id.* at 87.

“The prosecution disclosing material and exculpatory evidence to the defense on the eve of trial may comply with *Brady*’s mandates, but such late disclosure does not fulfill the prosecution’s ethical responsibilities. However, the ethics rules seem to require such disclosure prior to entry of a plea. The prosecution failing to disclose such information before and during plea negotiations is unethical, although not a violation of constitutional directives.”¹¹⁹

Prosecutors must comply with special ethical obligations and “a heightened duty of candor” that reach far beyond their constitutional mandates.¹²⁰ The American Bar Association has compiled “Model Rules of Professional Conduct” to “define the ethical responsibilities of lawyers...as they conduct their jobs.”¹²¹ Though created as a guideline, these rules currently “function as the bases for legal ethics rules in all fifty states.”¹²² Rule 3.8 is explicitly dedicated to the “Special Responsibilities of a Prosecutor.”¹²³ Under this rule, in a criminal case, the prosecutor shall:

make **timely** disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal[.]¹²⁴

Additionally, Rule 3.3 states, “A lawyer shall not knowingly...make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, unless correction would require disclosure of information that is prohibited by Rule

¹¹⁹ See Duncan, *supra* note 75.

¹²⁰ See *Barriers to Accountability*, DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/policy-issues/prosecutorial-accountability/barriers-to-accountability> (last visited Nov. 8, 2023) (quoting the *Criminal Justice Standards for the Prosecution Function*, AMERICAN BAR ASSOCIATION (2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition).

¹²¹ See Jack Levinson, *Model Rules of Professional Conduct*, LAWYEREDU, <https://www.lawyeredu.org/model-rules-of-professional-conduct/> (last visited Nov. 8, 2023).

¹²² *Id.*

¹²³ See *Rule 3.8: Special Responsibilities of a Prosecutor*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_8_special_responsibilities_of_a_prosecutor/ (last visited Nov. 8, 2023).

¹²⁴ See *id.*

1.6.”¹²⁵ It has been suggested in some jurisdictions, including the District of Columbia where *Nordean* took place, that “there may be circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.”¹²⁶

The American Bar Association also outlines ethical obligations for prosecutors under its *Fourth Edition of the Criminal Justice Standards for the Prosecution Function*. Subsection (a) of Standard 3-5.4, which covers the “Identification and Disclosure of Information and Evidence,” states:

After charges are filed if not before, the prosecutor should diligently seek to identify all information in the possession of the prosecution or its agents that tends to negate the guilt of the accused, mitigate the offense charged, impeach the government’s witnesses or evidence, or reduce the likely punishment of the accused if convicted.¹²⁷

This provision puts the prosecution on a clock and obligates it to seek information both incriminating and mitigating for the accused. The obligations continue under subsection (b), which ultimately compels the prosecutor to act with diligence and advise governmental agencies involved in the defendant’s case “to identify, preserve, and disclose to the prosecutor [all] information” tending to negate the defendant’s guilt, mitigate the offense charged, reduce the punishment of the defendant if convicted, or impeach evidence or witnesses.¹²⁸ Unless otherwise stated in a court’s protective order, subsection (c) mandates disclosure of said information to the defense prior to trial “*regardless* of whether the prosecutor believes it is likely to change the result of the proceedings.”¹²⁹ This standard reduces the ability of prosecutors to withhold evidence based on biased judgment calls.

Additionally, the duty of a prosecutor to seek and disclose information continues through the entirety of a criminal case to ensure the inclusion of critical information.¹³⁰ The diligence of a prosecutor to fulfill this duty is of extreme importance because “prosecutors are responsible for

¹²⁵ See *Rule 3.3: Candor Toward the Tribunal*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_3_candor_toward_the_tribunal/ (last visited Nov. 8, 2023).

¹²⁶ See *Rules of Professional Conduct Rule 3.3: Candor to Tribunal*, DC BAR, <https://www.dcbars.org/For-Lawyers/Legal-Ethics/Rules-of-Professional-Conduct/Advocate/Candor-to-Tribunal>.

¹²⁷ See *Prosecution Function*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ (last visited Nov. 8, 2023).

¹²⁸ See *id.*

¹²⁹ See *id.* (*emphasis added*).

¹³⁰ See *id.*

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‘any favorable evidence known to others acting on the government’s behalf in the case, including [law enforcement].’¹³¹ In *Nordean*, had the government disclosed the informant’s role in a timely manner, the defendants would have been able to adequately prepare for trial and thus possibly lessened the defendants’ sentences.

The key words in the ABA’s ethical guidelines are “timely disclosure.” This vague standard allows for case-by-case variations. In *Nordean*, the prosecution’s disclosure was the day before the informant’s testimony would have commenced. As mentioned, although *Brady* mandates may be satisfied when a prosecutor discloses information on the eve of trial, this delay fails to comply with prosecutorial ethical obligations.¹³² The Court has not laid out a distinct test for timeliness, but it is safe to assume that an “eve of trial” disclosure is not timely. The government claims it did not know of the defense’s intent to call the informant as a witness.¹³³ However, so long as the defense’s assertion that it disclosed its witnesses months prior is true, the government either *knew* or *should have known* this information and thus will be at fault.¹³⁴

VI. WHAT NEEDS TO CHANGE

A. Clarification of Vague Terms: Vagueness Allows Unjust Outcomes

Ethical and constitutional standards contain a plethora of vague terms, especially in relation to late disclosure guidelines. This vagueness has detrimental implications and makes room for unjust outcomes. For example, the Model Rules of Professional Conduct were meant to serve as a framework for jurisdictions to build upon and create their own ethical codes. To provide flexibility, several terms were left to jurisdictional discretion, but many jurisdictions maintained broad and vague definitions for the sake of workability, leaving vast discretion to judges. This approach seems practical and provides adaptability for any situation that may arise, but unfortunately, it results in inconsistent outcomes.¹³⁵ Vagueness leaves room for bias, and bias contributes to wrongful convictions. If states band together and promulgate more precise standards in their state ethical codes, they can apply pressure on the ABA to address the deficiencies within the current model

¹³¹ See *Banks v. Dretke*, 540 U.S. 668 (2004) (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)).

¹³² See *Rule 3.8*, *supra* note 123.

¹³³ See *Beitsch*, *supra* note 41.

¹³⁴ See *cf.* *United States v. Agurs*, 427 U.S. 97, 103 (1976) (identifying a *Brady* violation when the prosecution knew or should have known that the information it utilized was perjured).

¹³⁵ See *Levinson*, *supra* note 121.

code.¹³⁶ Clarification and specificity within the ethical guidelines are an absolute necessity.

The vagueness of constitutional tests is equally troubling. To reiterate, the third element of *Brady* is problematic and difficult to apply consistently because of the arbitrary nature of the “harmful error” requirement.¹³⁷ This requirement makes it mandatory to prove that the prosecution’s withholding of information prejudiced the defendant. In practice, this vague burden is often out of reach. Furthermore, even when a defendant is able to demonstrate prejudice, the conclusions reached by the Court are inconsistent.¹³⁸

Vagueness permits manipulation, which attacks the core of our fundamental values—the presumption of innocence until proven otherwise. When the government does not bear its burden to overcome this presumption beyond a reasonable doubt, it tips the scales of justice, leaving the accused defenseless. Clarifying our standards is essential to mitigating the wrongful convictions looming large over our current framework.

B. *Lack of Accountability and Enforcement*

Adjusting legal standards will not bring about the desired changes unless they are also better enforced. As of now, “there are no reliable systems to hold prosecutors accountable for their misdeeds.”¹³⁹ “Safeguards” such as the *Brady* rule and the Model Rules of Professional Conduct exist to protect the rights of the accused and hold prosecutors to a higher standard. According to the Innocence Project, “The prosecutor has more control over life, liberty, and reputation than any other person in America.”¹⁴⁰ However, lack of enforcement enables prosecutors to repeatedly evade punishment following a violation. Thus, “in many district attorneys’ offices, the *Brady* rule is considered nothing more than a suggestion, with prosecutors routinely holding back such evidence to win their cases.”¹⁴¹

On the one hand, the *Brady* rule itself leads to arbitrary and inconsistent results in the finding of official misconduct. *Brady*’s holding

¹³⁶ See David Keenan, et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203 (2011).

¹³⁷ See *Definition of Prosecutorial Misconduct*, *supra* note 20.

¹³⁸ See *id.*

¹³⁹ See Emma Zack, *Why Holding Prosecutors Accountable Is So Difficult*, INNOCENCE PROJECT (Apr. 23, 2020), <https://innocenceproject.org/why-holding-prosecutors-accountable-is-so-difficult/>.

¹⁴⁰ See *id.*

¹⁴¹ *Bad Prosecutors/Bad Cops – What You Need To Know*, INSIDER EXCLUSIVE, <https://insiderexclusive.com/bad-prosecutors-bad-cops-what-you-need-to-know/> (last visited Nov. 8, 2023).

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that official misconduct must have caused the defendant prejudice allows for repeated egregious misconduct by prosecutors without consequence.¹⁴² Due to the harmless error rule, *Brady* violation reversals are rare, and professional discipline and civil liability are even rarer.¹⁴³

Misconduct is also difficult to prove, meaning there are low odds of prosecutors getting caught and disciplined.¹⁴⁴ Moreover, prosecutors “take steps to conceal their misdeeds” to avoid disciplinary action.¹⁴⁵ The lack of external oversight in prosecutors’ offices further allows misconduct to go undetected due to self-serving internal policies at most offices, with almost unlimited discretion.¹⁴⁶ Finally, judges, other prosecutors, defense attorneys, and their clients are the individuals best situated to report misconduct, but for strategic and political reasons, they are disincentivized in doing so.¹⁴⁷ Thus, a check on prosecutorial misconduct is clearly needed.¹⁴⁸

As discussed above, official misconduct is extremely difficult to uncover: “[W]e know that official findings of misconduct represent only a fraction of the misconduct that actually occurs.”¹⁴⁹ Even in situations of gross and deliberate prosecutorial misconduct, punishment rarely occurs.¹⁵⁰ One study showed that only six of 707 identified cases of prosecutorial misconduct involved discipline of the offending prosecutor.¹⁵¹ Another

¹⁴² See *Definition of Prosecutorial Misconduct*, *supra* note 20.

¹⁴³ See *Why Do Brady Violations Happen?: Cognitive Bias and Beyond*, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, <https://www.nacdl.org/Article/May2013-WhyDoBradyViolationsHappenCogn> (last visited Nov. 18, 2023).

¹⁴⁴ See Zack, *supra* note 139.

¹⁴⁵ See Keenan et al., *supra* note 136.

¹⁴⁶ See *id.*

¹⁴⁷ See *id.*

¹⁴⁸ See *id.*

¹⁴⁹ See Zack, *supra* note 139.

¹⁵⁰ See e.g., Ridolfi & Possley, *supra* note 112 & *Why Do Brady Violations Happen?*, *supra* note 143; see also *Government Misconduct and Convicting the Innocent, The Role of Prosecutors, Police and Other Law Enforcement*, Page 115, NATIONAL REGISTRY OF EXONERATIONS (Sept. 1, 2020),

https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf (finding that misconduct by prosecutors in criminal trials that ultimately resulted in exonerations had a rare disciplinary rate of 4%); see *id.* at page 8 (stating that deliberate misconduct could include violent interrogation tactics, forensic fraud, perjured statements by law enforcement officers, etc.); *Why is Missouri so Afraid of Finding Out Whether Lamar Johnson is Innocent of Murder*, ACLU, <https://www.aclu.org/news/smart-justice/why-is-missouri-so-afraid-of-finding-out-whether-lamar-johnson-is-innocent-of-murder> (last visited Oct. 7, 2024) (stating that examples of gross misconduct include knowingly presenting perjured testimony, paying lone witnesses for identification testimony, not checking an alibi, and fabricating facts to negate said alibi); *‘An Inadvertent Nondisclosure’: St. Louis Circuit Attorney Responds to Allegation of Withholding Evidence in Lamar Johnson Case*, KSDK, <https://www.ksdk.com/article/news/local/st-louis-circuit-attorney-responds-allegation-withholding-evidence-lamar-johnson-case/63-0f3d1c42-787e-4126-8894-607cf7040d75> (last visited Oct. 7, 2024).

¹⁵¹ See Ridolfi & Possley, *supra* note 112.

survey conducted by multiple organizations, including the Innocence Project, found that only one prosecutor was disciplined out of 660 cases of prosecutorial misconduct.¹⁵² In the history of the United States, only one prosecutor has ever gone to jail for their actions.¹⁵³ The threat of being fired or disbarred for misconduct holds little weight because of its infrequency.¹⁵⁴ Courts typically give prosecutors the benefit of the doubt, usually resorting to warnings, often not in public.¹⁵⁵

Additionally, prosecutors' actions in preparation for trial or judicial proceedings have absolute immunity from federal civil rights suits.¹⁵⁶ This blanket immunity fails to hold prosecutors accountable when they engage in egregious and deliberate misconduct.¹⁵⁷ Although this hazardous standard receives continuous criticism, the Court seems unwilling to infringe upon prosecutorial discretion. This goal is important and legitimate; however, it does not withstand scrutiny.¹⁵⁸ The broadness of prosecutorial discretion favors abuse of discretion by prosecutors over the rights of defendants. Thus, it should be lessened to allow aggrieved parties to hold their prosecutors accountable.

The current system of accountability and enforcement fails to provide redress to those wronged by the government. Absent reliable enforcement mechanisms to hold officials accountable for their misconduct, the standards discussed in the above Part are a mere façade of justice. This lack of accountability strips people of their liberty and subverts the criminal justice system's foundational goal of seeking justice.¹⁵⁹

C. Expansion of Disclosure Standards

In the United States, there is no requirement for the disclosure of a confidential informant's identity when the informant is testifying for the defense rather than the prosecution. To protect defendants, the law should hold prosecutors to the same standard, regardless of which side the informant is testifying for.

¹⁵² See Zack, *supra* note 139.

¹⁵³ See *id.*

¹⁵⁴ See *Why Do Brady Violations Happen?*, *supra* note 143 (stating that there is no fear of being questioned later because prosecutors "do not tend to get punished anyway").

¹⁵⁵ See *id.*; see also *Bad Prosecutors/Bad Cops*, *supra* note 141.

¹⁵⁶ See *Why Do Brady Violations Happen?*, *supra* note 143; see also *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976) (holding that prosecutors have absolute immunity from any suit under 42 U.S.C. § 1983).

¹⁵⁷ See generally Karen McDonald Henning, *The Failed Legacy of Absolute Immunity Under Imbler: Providing A Compromise Approach to Claims of Prosecutorial Misconduct*, 48 GONZ. L. REV. 219 (2012).

¹⁵⁸ See *id.* at 223.

¹⁵⁹ *Id.* at 278 (quoting Theodore Roosevelt).

A partial solution to provide for more equitable disclosure standards is to broaden the required disclosure standards. For instance, in Canada, rather than requiring only “material” information to be disclosed as under *Brady*, the Canadian legal system requires the government to “disclose all materials and information that is in its possession or control that is not clearly irrelevant, regardless of if the evidence is to be called at trial or is inculpatory or exculpatory.”¹⁶⁰ Canada considers materials and information in the government’s possession to be public property to promote a fair trial.¹⁶¹ Canada upholds this standard, irrespective of whether the material or information is deemed “harmless” because disclosure of information is not dependent on favorability or admissibility. Rather, the standard encourages a more free flow of information between defendants and the government.¹⁶² So long as the information disclosed is not out of the government’s control, irrelevant, barred by statute, or privileged, disclosure cannot be refused.¹⁶³ Implementing this language in the United States may increase transparency and trust between the government and the public and aid in leveling the playing field between the prosecution and defense.¹⁶⁴

Another measure long advocated for is an open-file discovery system, where the prosecution provides the defense with everything in its files, regardless of materiality or any other factors. Some states, such as North Carolina and Texas, have implemented open-file discovery statutes. The North Carolina statute requires the prosecution “to provide to the defense before trial the complete investigative files, including any material obtained by law enforcement, investigator’s notes, the required recordation of all oral statements and any other information obtained during the investigation.”¹⁶⁵ This flow of information mends gaps in knowledge between parties and builds trust. The timeline of discovery disclosure remains important here. Eve-of-trial disclosures might meet open-file statutory obligations but still fail to fulfill ethical obligations.¹⁶⁶ Clearly, evidence disclosure is not a one-size-fits-all issue that can be addressed by a single change in the law and requires a well-rounded approach to address all moving parts.

¹⁶⁰ See Peter Dostal, *Crown Duty to Disclose*, THE CRIMINAL LAW NOTEBOOK, https://criminalnotebook.ca/index.php/Crown_Duty_to_Disclose. (last visited Nov. 11, 2023).

¹⁶¹ See *id.*

¹⁶² See *id.*

¹⁶³ See *id.*

¹⁶⁴ See *Brady v. Maryland*, 373 U.S. 83 (1963) (discussing how current standards, namely *Brady* standards, fail to level the playing field and are instead an illusionary promise).

¹⁶⁵ See Keenan et al., *supra* note 136, at 19.

¹⁶⁶ See *id.*

In the United States, the courts are the primary check on prosecutorial misconduct.¹⁶⁷ For federal courts, the United States has implemented Administrative Oversight and Accountability to “hold judges and Judiciary staff responsible for their conduct as government officials and for the management of public resources.”¹⁶⁸ On the other hand, state courts differ on what their state’s oversight may look like.¹⁶⁹ To ensure consistency and promote the accountability of government officials, a few changes could make a significant difference. Reliance on self-regulation creates pitfalls of suspicion relating to biased proceedings.¹⁷⁰ For jurisdictions without reporting requirements in place, judges should be mandatory reporters of “error or misconduct, regardless of the impact on the case, to state entities with oversight responsibility.”¹⁷¹ This overseeing entity should be an independent agency of the state, or an unaffiliated existing state agency that has the resources and authority to both investigate potential misconduct and impose remedial measures or sanctions.¹⁷² Some states allow up to one third of a grievance committee to be non-lawyers to further ensure nonbiased outcomes of the proceedings.¹⁷³ Ultimately, “[l]egitimacy and the perception of fairness decrease when self-regulation is the chosen method for governing attorney conduct.”¹⁷⁴

There have been countless other proposals to deter misconduct such as mandating law students to take a course regarding evidence disclosure, creating a public database of prosecutorial misconduct cases, and encouraging prosecutors to collaborate with defense organizations in training sessions to ensure a mutual understanding of obligations and rules.¹⁷⁵ All

¹⁶⁷ See Martha Kinsella, *Congressional Interference in the Trump Prosecution*, BRENNAN CENTER FOR JUSTICE (Apr. 14, 2023), <https://www.brennancenter.org/our-work/analysis-opinion/congressional-interference-trump-prosecution>.

¹⁶⁸ *Administrative Oversight and Accountability*, UNITED STATES COURTS, <https://www.uscourts.gov/about-federal-courts/judicial-administration/administrative-oversight-and-accountability> (last visited Nov. 11, 2023).

¹⁶⁹ Compare Utah, which only has Judiciary Oversight Committees (nothing specifically for prosecutors statewide), with Georgia’s Senate Bill 92 that gives a politically appointed committee the power to discipline and remove prosecutors. See Jessica Miller, *One Utah County has Decided to Create an Oversight Panel for its Prosecutors*, THE SALT LAKE TRIBUNE (Aug. 22, 2017), <https://www.sltrib.com/news/2017/08/22/one-utah-county-has-decided-to-create-an-oversight-panel-for-its-prosecutors/> (stating that one county in Utah made steps towards creating a prosecutorial conduct committee for their county); see also Stanley Dunlap, *Georgia DAs Challenge New Law Allowing State Oversight of their Prosecution Choices*, GEORGIA RECORDER (Aug. 2, 2023), <https://georgiarecorder.com/brief/georgia-das-challenge-new-law-allowing-state-oversight-of-their-prosecution-choices/>.

¹⁷⁰ See Keenan et al., *supra* note 136.

¹⁷¹ See *id.*

¹⁷² See *id.*

¹⁷³ See *id.* (stating that these states include Arizona, Connecticut, Delaware, Idaho, Louisiana, Massachusetts, Oregon, New Jersey, and New Mexico).

¹⁷⁴ See *id.*

¹⁷⁵ See *id.*

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these measures work toward the same goal—preventing one class of people with expansive power from acting above the law when they confiscate one’s liberty. The absurd number of wrongful convictions and ignored cases of egregious misconduct illustrate that our current system is not working. Regardless of which measures are chosen, a more thorough mechanism of enforcement is necessary to restore confidence in our justice system and ensure that defendants are presumed innocent until proven otherwise beyond a shadow of a doubt.

VII. CONCLUSION

The relationship between constitutional obligations and ethics is complex, and its regulation is essential to protect the rights of the accused. Considerations of the Constitution and precedent reflect our nation’s intention to continue to prioritize these fundamental protections.¹⁷⁶ Applying the current standards to *Nordean* suggests that both constitutional and ethical violations were present. The prosecution seems to fail both the *Brady* test and prosecutorial duties under the Model Rules of Professional Conduct. Though the Court did not recognize these violations, the circumstances of this case prompted an in-depth inquiry into current ethical and constitutional standards regarding disclosure. The result of this examination exposes major deficiencies that will continue to harm innocent individuals if unaddressed.

It is important to emphasize the impossibility of conducting a thorough inquiry into every aspect of *Nordean*. Thus, some of the analysis above includes speculation exploring the violations and obligations present if particular facts are presumed. However, regardless of what happened in *Nordean*, one thing is for sure: the United States criminal justice system is meant to seek truth and punish culpable individuals for the crimes of which they are accused. Failure to adopt a comprehensive approach to overseeing prosecutorial actions could jeopardize the fair trial rights of future defendants, innocent or guilty. The prosecution’s actions in *Nordean* allow for a perilous precedent to be set, paving the way for the recurrence of manipulative last-minute behavior in future cases. Looking beyond personal biases against the accused is necessary to prioritize the individual rights of defendants. Malcolm X once said, “I’m for truth, no matter who tells it. I’m for justice, no matter who it is for or against. I’m a human being first and foremost, and as such I’m for whoever and whatever benefits humanity as a whole.”¹⁷⁷ More thorough disclosure standards will achieve this goal.

¹⁷⁶ See, e.g., *Brady v. Maryland*, 473 U.S. 667 (1985).

¹⁷⁷ 97 *Best Quotes About Justice to Inspire Positive Change*, GOODGOODGOOD (June 1, 2022), <https://www.goodgoodgood.co/articles/justice-quotes.heir>.

Rising wrongful conviction and prosecutorial misconduct rates are detrimental to society. By clarifying vague terminology, expanding disclosure standards, and implementing measures to ensure prosecutors are held accountable for their misdeeds, the government may be able to regain public trust in the system and minimize the suffering of innocent individuals. Prosecutors cannot be allowed to roam above the law. This proposal for enforcement and clarity stands for truth and justice, wholly benefitting society. Even if just one innocent person's liberty is protected, the proposed changes would be worth it: the culpability of the Proud Boys in *Nordean* is irrespective of this fact.

The urgent need for enforcement of current standards and implementation of more thorough and clear standards is not meant to suggest that the defendants in *Nordean* are innocent. Rather, the purpose of highlighting this case is to illustrate how easily prosecutors can strip individuals of their fundamental rights without fear of punishment and show that, no matter who the defendant is, the treatment in this case should not have happened. The culpability or likeability of the defendants does not make prosecutorial misconduct any more acceptable—the law is meant to be applied consistently.

A prosecutor, acting on behalf of the government, should not cherry-pick which laws to apply and which standards to follow depending on the identity of a defendant: “The job of a prosecutor is to do justice; the structure in which the prosecutor works should, at a minimum, enable and encourage ethical behavior in this pursuit.”¹⁷⁸ The prosecution must carry the burden of proof, using honest tactics to prove beyond a shadow of a doubt that the accused is guilty. Those willing to turn a blind eye to potential mistreatment of a defendant unfavorable to them cannot claim to be a supporter of justice. As Dr. Martin Luther King Jr. famously stated, “It is not possible to be in favor of justice for some people and not be in favor for justice for all people.”¹⁷⁹

¹⁷⁸ See Keenan, et al., *supra* note 136.

¹⁷⁹ *Martin Luther King Day 2020: MLK quotes, inspiration to honor late civil rights leader*, AL (Jan. 20, 2020), <https://www.al.com/news/2020/01/martin-luther-king-day-2020-mlk-quotes-inspiration-to-honor-late-civil-rights-leader.html> (quoting Martin Luther King Jr.).