NOTE

CO-OPTED COOPERATORS: CORPORATE INTERNAL INVESTIGATIONS AND *BRADY V. MARYLAND*

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In 2019, the United States District Court for the Southern District of New York criticized the Department of Justice for "outsourc[ing] its investigation" of alleged LIBOR manipulation practices within Deutsche Bank to the bank and its lawyers. The decision to "outsource" had, in the court's view, rendered the bank and its outside counsel agents of the government, and provided a basis for the defendant, a former Deutsche Bank employee, to claim that his statements to the bank's lawyers had been compelled in violation of the Fifth Amendment.

This Note considers the effect of such outsourcing on a prosecutor's duty to disclose evidence favorable to the accused under Brady v. Maryland. *To do so, it imagines a scenario where a corporation facing criminal indictment undertakes a comprehensive internal investigation. The investigation, which is itself part of the company's campaign to enter into a deferred prosecution agreement and avoid criminal charges, dredges up evidence of conduct that provides the basis for later charges against individual employees, as well as evidence that tends to exculpate them. This scenario sets up the central question: should the fruits of the outsourced investigation be*

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considered part of the government's file for the purposes of a Brady *claim?*

This Note argues that, where outsourced investigations make "the prosecution" indistinguishable from its corporate target, courts should consider answering this question in the affirmative. Using three doctrinal lenses to explore the relationship between the government and corporate cooperators, as well as case law touching on the issue, it offers a framework for enforcing the component of due process explicated in Brady *where one could reasonably argue that the government constructively possesses all the information collected during a company-sponsored investigation.*

I. INTRODUCTION

In May 2019, the United States District Court for the Southern District of New York called attention to a pervasive trend in corporate criminal law: the effective outsourcing of investigative work to corporate entities at risk of criminal indictment.[1] *United States v. Connolly* responded to a motion for *Kastigar* relief by Gavin Black, a former Deutsche Bank trader found guilty on charges related to the bank's LIBOR manipulation scheme.[2] Black, a co-defendant and colleague of Connolly, moved to vacate his conviction on the theory that his statements to the bank's outside counsel during an internal investigation had been improperly compelled in violation of the Fifth Amendment of the U.S. Constitution.[3]

[1] *See* United States v. Connolly, No. 16 CR. 0370, 2019 WL 2120523, at *9 (S.D.N.Y. May 2, 2019) ("Did the Government conduct a substantive parallel investigation into the 'internal' investigation at Deutsche Bank, or did it simply give direction to Deutsche Bank/Paul Weiss, take the results of their labor . . . and save itself the trouble of doing its own work? On the record presently before it, the Court would have to conclude the latter." (footnote omitted)); Abbe David Lowell & Christopher D. Man, *Federalizing Corporate Internal Investigations and the Erosion of Employees' Fifth Amendment Rights*, 40 GEO. L.J. ANN. REV. CRIM. PROC., at iii, iii (2011) (describing an enforcement landscape in which "corporations conduct internal investigations and then turn the results of those investigations over to the government for it to use as road maps for its prosecutions").

[2] *See Connolly*, 2019 WL 2120523, at *15 ("Any use, direct or indirect, of a defendant's compelled statements is unconstitutional under the Fifth Amendment's self-incrimination clause." (citing United States v. Kastigar, 406 U.S. 441, 453 (1972)).

[3] *See id.* at *9. In *Garrity v. New Jersey*, the Supreme Court held that statements made by defendants to police officers while under threat of termination from employment were involuntary and inadmissible. 385 U.S. 493, 497–98 (1967). This principle has since been interpreted to apply with equal force to private conduct that is "fairly attributable" to the government.

Specifically, he argued, Deutsche Bank's close coordination with the Department of Justice (DOJ) made its efforts to elicit employee testimony "fairly attributable to the government" and subject to constitutional constraints.[4] While the court ultimately denied the motion, it acknowledged, and chastised, the extent to which the government relied upon the labor of a corporate target to build its case against this individual defendant.[5] The opinion went so far as to point out the DOJ's failure to provide evidence of its own independent investigative process and to accuse the DOJ of failing to "treat[] th[e] matter with the seriousness it deserve[d]."[6]

The *Connolly* decision illustrates how the delegation of investigatory work to corporate targets can implicate the constitutional rights of employees prosecuted for their involvement in corporate wrongdoing. This is not a new observation; federal courts have previously ascribed corporate conduct to the state and granted constitutional relief where company policies have deprived individuals of the right against self-incrimination and the right to counsel.[7] The effect of such outsourcing on a defendant's right under *Brady v. Maryland*[8] to evidence in the hands of the prosecution is less clear.

The component of due process explicated in the *Brady* line of cases requires prosecutors to provide to the defense exculpatory or impeaching evidence that will be used at trial, including "material available in [prosecutors'] larger networks of investigative resources and agents."[9] The contours and

See United States v. Stein (*Stein V*), 541 F.3d 130, 146 (2d Cir. 2008) (citing United States v. Stein (*Stein II*), 440 F. Supp. 2d 314, 334 (S.D.N.Y. 2006)).

[4] *See Connolly*, 2019 WL 2120523, at *1.

[5] *See id.* at *9–10.

[6] *Id.* at *9.

[7] *See id.* at *2–3 (suggesting without deciding that Deutsche Bank's actions should be attributed to the state for the purposes of the Fifth Amendment right against self-incrimination); *Stein V*, 541 F.3d at 136 (imputing KPMG's actions to the government for the purposes of the Sixth Amendment right to counsel).

[8] 373 U.S. 83 (1963).

[9] Andrew Guthrie Ferguson, *Big Data Prosecution and* Brady, 67 UCLA L. REV. 180, 189 (2020).

outer limits of these "networks," however, lack definition. While courts have considered police officers and other federal and state agencies to be part of the prosecutor's "team" and the information in their possession part of the prosecutor's file, cooperating witnesses have generally been excluded.[10]

Corporate cooperators occupy a distinct position in this landscape. A cooperation agreement with an individual defendant generally provides that they will provide honest testimony to a grand jury and at trial in exchange for leniency at sentencing.[11] Companies, on the other hand, have bureaucratic structures that allow for internal coordination and compliance with regulatory regimes and criminal law.[12] These structures are compatible with heightened demands by the prosecution for actual production of documents and witnesses in exchange for charging and sentencing concessions. And since cooperation in a corporate context is often coextensive with aggressive investigation of internal wrongdoing by individual actors,[13] the corporate entity becomes a vast repository of inculpatory and exculpatory information about individual players—much like the prosecutor's file would be in a standard criminal investigation.

Where individual charges are the result of aggressive cooperation at the corporate level, a new framework for enforcing *Brady* is warranted. In order to develop such a framework, this Note imagines a hypothetical scenario based on *Connolly*: a corporation facing criminal indictment undertakes a comprehensive internal investigation at the

[10] *Compare* United States v. Blanco, 392 F.3d 382, 392–94 (9th Cir. 2004) (directing revelation of DEA and INS records), *with* United States v. Barcelo, 628 F. App'x 36, 38 (2d Cir. 2015) (rejecting *Brady* claim aimed at a cooperating witness), United States v. Graham, 484 F.3d 413, 417–18 (6th Cir. 2007) (same), *and* United States v. Johnson, 360 F. App'x 840, 841 (9th Cir. 2009) (same).

[11] 1 Stephen E. Arthur & Robert S. Hunter, Federal Trial Handbook: Criminal § 28:28, Westlaw (database updated Dec. 2020).

[12] *See* Michele DeStefano, *Creating a Culture of Compliance: Why Departmentalization May Not Be the Answer*, 10 HASTINGS BUS. L.J. 71, 87–103 (2014) (describing the development of compliance structures in large corporations).

[13] *See infra* notes 19–22 and accompanying text.

behest and ongoing direction of prosecutors.[14] The inquiry is designed to yield a deferred prosecution agreement (DPA), a contract between the government and the corporate target that offers a meaningful reduction of criminal liability at the corporate level in exchange for the corporation's ongoing cooperation.[15] During the investigation, the company uncovers evidence of conduct that provides a substantial basis for the government's subsequent prosecution of individual employees. However, the investigation also turns up information tending to exculpate those individuals or otherwise undermine the government's case.

If the government instigated the investigation that yielded both inculpatory and exculpatory information, what degree of control over that information should be imputed to the government itself? Does the corporation's relationship with the government render it "the state" for constitutional purposes? And, if so, does that mean that the fruits of an internal investigation are *Brady* material to which an employee prosecuted individually may be entitled? This Note argues that, where the line between "the prosecution" and a cooperating corporate entity is difficult to perceive from an individual defendant's perspective, courts should consider answering these questions in the affirmative.

Part II of this Note provides an overview of key trends in corporate prosecution and offers a brief summary of the *Brady* line of cases and related rules of discovery. It concludes by highlighting the tension between prosecution norms and this notoriously nebulous constitutional doctrine. Part III offers three doctrinal "lenses," or ways of analyzing the relationship between the government and a corporate cooperator. Part IV considers how courts have treated this issue to date by

[14] United States v. Connolly, No. 16 CR. 0370, 2019 WL 2120523, at *2–8 (S.D.N.Y. May 2, 2019) (describing such an investigation).

[15] *See id.* at *8 ("[T]he investigation was a conspicuous success for Deutsche Bank. On April 23, 2015, Deutsche Bank entered into a [DPA] with DOJ, under which Deustche Bank agreed to (*i*) pay $775 million in criminal penalties; (*ii*) continue cooperating with the government in its ongoing investigation; and (*iii*) retain a corporate monitor for the three-year term of the agreement."). For further discussion of DPAs, see *infra* Part II.A.2.

highlighting cases that have considered head-on whether *Brady* might apply to information in the hands of a corporation, as well as cases that have short-circuited the *Brady* analysis by construing the presence of a DPA as Rule 16 "control" over a corporation's file. Part V suggests a framework for enforcing *Brady* in cases where the government meaningfully outsources its investigative duties to a corporate target, using the doctrinal lenses and practices discussed in Parts III and IV. It concludes by acknowledging shortcomings of the proposed solution.

II. CORPORATE PROSECUTION PRACTICES AND THE DOCTRINAL BACKDROP

Part II proceeds in three sections. Section II.A discusses the meaning of cooperation in the corporate prosecution context and highlights three dynamics that break down conventional adversarial boundaries between the government and corporate entities facing charges. The resulting partnership between the government and its targets can undermine a seemingly culpable employee's ability to benefit from traditional due process protections, especially where an internal investigation responsive to government demands dredges up information relevant to their case. With this factual backdrop, Section II.B provides a brief overview of the *Brady* line of cases and related discovery rules, which establish a prosecutor's duty to disclose evidence favorable to the accused. Section II.C explains how the prosecution trends that have aligned corporations with the government complicate traditional due process protections under *Brady*.

A. Corporate Cooperation Trends

Under the doctrine of respondeat superior, U.S. corporations have long been held criminally liable for the conduct of employees acting within the scope of their employment.[16] Standing alone, this de jure system of

[16] *See* Jennifer Arlen & Samuel W. Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 S. CAL. L. REV. 697, 707 (2020) (noting also a requirement

enforcement provides perverse incentives to corporations dealing with internal malfeasance; the threat of vicarious liability "discourage[s] [corporations] from seeking to discover, disclose, and investigate" because "such efforts will only assist enforcement authorities in imposing higher corporate sanctions."[17] The DOJ has, in a series of revisions to the Justice Manual, attempted to counteract this dynamic by emphasizing individual, rather than corporate-level, liability in prosecuting business organizations, developing "a *de facto* regime for sanctioning and controlling corporate crime."[18]

The clearest articulation of this approach appeared in the 2015 DOJ Memorandum on Individual Accountability for Corporate Wrongdoing (Yates Memo).[19] While moderately revised in 2018, the thrust of the message, which has been incorporated into formal DOJ guidance, remains consistent: "The most effective deterrent to corporate criminal misconduct is identifying and punishing the people who committed the crimes."[20] Therefore, "any company seeking cooperation in criminal cases must identify every individual who was substantially involved in or responsible for the

that the employee have "some intent to benefit the company" (first citing N.Y. Cent. & Hudson R.R. v. United States, 212 U.S. 481, 494–95 (1909); then citing Thomas J. Bernard, *The Historical Development of Corporate Criminal Liability*, 22 CRIMINOLOGY 3, 8–11 (1984); and then citing Developments in the Law, *Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227, 1247–51 (1979)).

[17] *Id.*

[18] *Id.* at 707–08.

[19] *See* Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Just., to Assistant Att'ys Gen. & U.S. Att'ys, on Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) [hereinafter Yates Memo], https://www.justice.gov/dag/file/769036/download [https://perma.cc/3YYY-9WUN].

[20] *See* Rod J. Rosenstein, Deputy Att'y Gen., U.S. Dep't of Just., Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0 [https://perma.cc/H53B-GJWW]; Leah Hengemuhle, *Mea Culpa: Why Corporate Waivers of Attorney-Client Privilege Have Not Increased the Prosecution of Corporate Executives*, 60 B.C. L. REV. 1415, 1422–29 (2019) (discussing the evolution of DOJ guidance on this subject).

criminal conduct."[21] This policy is both practically and ideologically satisfying. In addition to addressing the counter-productive incentives promoted by a vicarious liability regime, it acknowledges public demand for individual accountability in bringing corporations to justice.[22]

It also provides the government with massive leverage against corporations engaged in criminal conduct. If an internal investigation can identify the specific source of the proverbial "stink" within a corporation's ranks, the corporate entity responsible for initiating the inquiry may avoid the full impact of a criminal indictment.[23] On the other hand, if it does not, the corporate entity might suffer harsh collateral consequences.[24] This stark tradeoff provides corporations with an extraordinary incentive to uncover and disclose foul play as quickly as possible. At the same time, the government can "address corporate wrongdoing without seeking an indictment."[25]

This de facto enforcement regime has been defended on efficiency and deterrence grounds.[26] However, it has

[21] *See* Rosenstein, *supra* note 20.

[22] *See* Sara Sun Beale, *The Development and Evolution of the U.S. Law of Corporate Criminal Liability and the Yates Memo*, 46 STETSON L. REV. 41, 42 (2016).

[23] See *infra* Part II.A.1 for further discussion.

[24] *See, e.g.*, Bruce A. Green & Ellen S. Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*, 54 B.C. L. REV. 73, 90 (2013) (noting that the Supreme Court's reversal of Arthur Andersen's conviction following the Enron scandal did nothing to prevent the firm from going bankrupt); Leonard Orland, *The Transformation of Corporate Criminal Law*, 1 BROOK. J. CORP. FIN. & COM. L. 45, 61 (2006) (interpreting the "increasing use of [DPAs]" and the "disintegration and corporate death of Arthur Andersen" as effectively introducing a choice between "escap[ing] organizational indictment" and "conviction and corporate death").

[25] *See* Barry A. Bohrer & Barbara L. Trencher, *Prosecution Deferred: Exploring the Unintended Consequences and Future of Corporate Cooperation*, 44 AM. CRIM. L. REV. 1481, 1481 (2007).

[26] *See* Arlen & Buell, *supra* note 16, at 706 ("In the U.S. system, corporations are able to detect and investigate individual misconduct at far less public cost than if the government attempted to police corporate crime in a manner comparable to policing of street crime. Firms can deploy compliance programs to deter and detect misconduct, pursue internal

simultaneously blurred the line between investigator and target and rendered corporations effective "branch offices" [27] or "de facto agent[s]"[28] of the DOJ in some cases. Three elements of this system sustain the unusually non-adversarial relationship between prosecutors and corporate defendants: the functional equivalence of indictment and conviction; the inevitability of deferred prosecution agreements; and the general absence of attorney-client privilege.

1. Equivalence of Indictment and Conviction

First, the government's framework for measuring cooperation and offering concessions apart from what would otherwise be a massively punitive respondeat superior liability rule causes companies to "relent[] to prosecutors' demands, irrespective of the severity of the attached conditions."[29] Indeed, the government's leverage arises not simply out of the possibility of conviction but out of the consequences of simply bringing of charges. The immediate consequences of indictment resemble those that would likely flow from an actual conviction.

> [A]n indicted company may face, *inter alia*, (1) a collapse in share price; (2) being found in default of loan covenants; (3) a lower bond rating; (4) a prohibition on contracting with government agencies; (5) the revocation of licensing requirements; and (6) severe reputational harm, resulting in an inability to find business partners or clients.[30]

investigations to develop proof of misconduct, report detected wrongdoing to the government, and assist the government in gathering probative evidence of crime.").

[27] Harry First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions*, 89 N.C. L. REV. 23, 28 (2010).

[28] Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputation of Corporate America*, 45 S. TEX. L. REV. 111, 117 (2003).

[29] *See* Bohrer & Trencher, *supra* note 25, at 1485. Bohrer and Trencher point out that "the unique characteristics of business entities make the consequences [of indictments] particularly dire." *Id.* at 1483.

[30] *See id.* at 1483.

Indeed, "upon the mere announcement of an indictment, a corporation is effectively punished as if a guilty verdict had been returned."[31] Thus, the "hallowed maxim of our criminal justice system that a criminal defendant is innocent until proven guilty" applies less to a corporate defendant than to an individual criminal defendant, who can weigh guilty pleas against trial penalties until the moment that the jury returns its verdict.[32] This reality virtually guarantees a corporation's presence at the bargaining table and fealty to prosecutors from the moment that the DOJ comes knocking.[33]

2. Inevitability of Deferred Prosecution Agreements

Prosecutors capitalize on the harsh consequences of indictment by holding out the possibility of DPAs as carrots to extract "complete[]" cooperation.[34] DPAs generally include a promise by prosecutors not to pursue charges immediately and, if the corporation fulfills its obligations under the contract, to dismiss them after one to two years.[35] "In return, corporations undertake reforms, pledge active and complete cooperation with the ongoing investigation, and pay substantial civil penalties and victim restitution."[36]

Because the terms of standard DPAs are so favorable to corporate defendants who receive and comply with them, these deals are not freely distributed. Indeed, the DOJ generally makes them available only *after* targets have initiated and substantially engaged in investigation and disclosure.[37] Ultimately, a corporation's efforts to earn a DPA

[31] *Id.*

[32] *See id.* (describing the serious consequences of indictment for corporate defendants).

[33] *See id.* at 1483–84 ("[F]ew rational business organizations [would be] willing to risk the consequences of an indictment[.]").

[34] *See* Yates Memo, *supra* note 19, at 3–4 .

[35] Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 322 (2007).

[36] *Id.* A typical DPA also includes a privilege waiver and a compliance monitor. *Id.* at 323 n.54.

[37] *See* Orland, *supra* note 24, at 62 ("[T]he [DOJ] 'would consider a deferred prosecution agreement when the company had voluntarily

and its formal entry into such an agreement "allow[] the government to exercise a measure of control over personnel and business decisions . . . . [and to] prescrib[e] what is good corporate governance rather than just prohibiting wrongful conduct."[38] By "obligat[ing] the corporation to act at the direction and on the behalf of the government in the investigation and prosecution of individuals," the process of pursuing DPA cooperation provisions "has the potential to turn corporations into agents of the state."[39]

3. Privilege "Waiver"

The third and final factor contributing to the non-adversarial relationship between the government and corporate defendants is the general absence of attorney-client privilege. Where corporations retain outside counsel to investigate internal wrongdoing, the results of such investigations are generally shielded from compelled disclosure.[40] However, the de facto "law" of corporate internal investigations expounded in DOJ memos since 1999 has "chipp[ed] away" at these protections by directing prosecutors to construe a corporation's decision to waive the attorney-client privilege as essential to cooperation.[41] The choice

disclosed the conduct, and where it cooperated and undertook to continue cooperating in [its] investigation.'" (quoting Leonard Post, *Deferrals on Rise in Foreign Bribery*, NAT'L L.J., Aug. 15, 2005, at 1, 1)).

[38] *See* Griffin, *supra* note 35, at 323–24.

[39] *See* Bohrer & Trencher, *supra* note 25, at 1481.

[40] *See* Upjohn Co. v. United States, 449 U.S. 383, 390–96 (1981).

[41] *See* Katrice Bridges Copeland, *The Yates Memo: Looking for "Individual Accountability" in All the Wrong Places*, 102 IOWA L. REV. 1897, 1903, 1907–08 (2017) (describing the rise, fall, and resurgence of waiver demands). The 1999 "Holder Memorandum," which identified factors to be used to assess whether corporate prosecution was appropriate, tied the corporation's degree of cooperation with the government to its willingness to waive attorney-client privilege and work-product doctrine protections. *Id.* The 2003 "Thompson Memorandum" further elevated the importance of waiver in measuring the extent of a corporation's cooperation but did not provide details on when such waivers might be appropriate. *Id.* at 1903–04. This lack of guidance normalized the practice of seeking waiver of attorney-client privilege and work-product protections on a regular basis. *Id.* at 1904. The coerciveness of this norm prompted widespread criticism and led to two

between cooperation (via privilege waiver) and indictment created what some commentators have called a "culture of waiver" in the corporate prosecution context.[42]

In response to significant criticism from the legal community and commentators across the political spectrum about the coerciveness of this enforcement regime, the DOJ has moved away from this practice; the latest material revision to the DOJ guidelines makes no explicit reference to the role of privilege waivers in measuring cooperation,[43] and the most recent version of the U.S. Attorney's Manual reinforces this stance.[44] However, the guidelines still demand that a corporation disclose "all relevant facts" about individual

revisions of DOJ guidance: the 2006 "McNulty Memorandum" and 2008 "Filip Memorandum" materially reduced, and ultimately eliminated, consideration of waiver in the DOJ's assessment of corporate cooperation. *Id.* at 1905–06. Under the Filip regime, the corporation had no obligation to produce any notes or memoranda created by outside counsel during an internal investigation, and prosecutors could not request such information. *Id.* at 1906. The corporation was still obligated to disclose relevant facts that emerged during interviews conducted by outside counsel, as well as "business records and e-mails." *Id.* The Yates Memo is less explicit on the topic. *Id.* at 1906–07.

[42] *See id.* at 1908 ("Th[e] 'culture of waiver' dictated that corporations would perform internal investigations, waive their attorney-client privilege and work-product protection, and provide the results of the investigation to the DOJ in order to receive cooperation credit.").

[43] The guidelines do, however, obliquely raise the issue. *See* Yates Memo, *supra* note 19, ("The requirement that companies cooperate completely as to individuals, within the bounds of the law and legal privileges, does not mean that [DOJ] attorneys should . . . merely accept what companies provide."). The Yates memo made cooperation credit absolutely contingent on the identification of responsible individuals by the corporation. *See Id.* at 3. Unlike the Filip regime, which permitted cooperation credit even if individual wrongdoers were not identified, companies had to determine and disclose individual culpability in order to receive concessions. *Id.*

[44] *Justice Manual Title 9: Criminal § 9-28.000*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations [https://perma.cc/P4BN-VKMK] (last updated July 2020) ("Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection.").

wrongdoers,[45] and this requirement has been read by some as the functional equivalent of forcing waiver.[46] Notably, the most recent adjustments to the guidance under former Deputy Attorney General Rosenstein did nothing to change this dynamic.[47] Thus, the robust protections typically used by defendants to shield private information from the government are often not at play in the corporate prosecution context.

B. Overview of Brady and Rule 16

The Justice Department's efforts to hold individuals accountable for corporate wrongdoing complicates the application and enforcement of traditional due process protections. This tension is especially apparent in the discovery context, where the inevitability of comprehensive internal investigations designed to identify culpable individuals means that a company might hold information relevant to an individual defendant's case.

Brady v. Maryland[48] and its progeny articulate the component of due process concerned with discovery: namely, the requirement that the prosecution disclose to the defense any material information that is "favorable to the accused, either because it is exculpatory or because it is impeaching."[49] Failure to provide a defendant with a comprehensive sense of the case against them might "obscure a trial's truth-seeking function and, in so doing, place criminal defendants at an

[45] *Id.* ("In order for a company to receive any consideration for cooperation under this section, the company must identify all individuals substantially involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all relevant facts relating to that misconduct.").

[46] *See, e.g.*, Hengemuhle, *supra* note 20, at 1426 ("Many perceived the Yates Memo's newfound focus on the individual as another attempt by the Justice Department to force corporations to waive their attorney-client privilege." (citing Copeland, *supra* note 41, at 1907)).

[47] *See id.* at 1427–28 ("In reality, DPAs under the current administration of the Justice Department include language protecting attorney-client privilege[,] but the cooperation credit remains tied to providing evidence of individual misconduct.").

[48] 373 U.S. 83 (1963).

[49] Strickler v. Greene, 527 U.S. 263, 281–82 (1999).

unfair disadvantage"[50] relative to the prosecution. In order to mitigate this potential unfairness, the doctrine imposes an affirmative disclosure duty on the government; the defense need not request exculpatory evidence for *Brady* to apply.[51]

Three elements must be established to prove a *Brady* violation.[52] First, the evidence at issue must be either exculpatory or impeaching.[53] Second, the evidence must have been suppressed by the prosecution, either willfully (by bad faith concealment of favorable information) or unintentionally (by failure in good faith to learn of favorable information).[54] Finally, defendants invoking *Brady* must "establish[] the prejudice necessary to satisfy the 'materiality' inquiry."[55] Evidence is "material" where there is "a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."[56]

In addition to their obligations under *Brady*, federal prosecutors must comply with Rule 16(a)(1)(E) of the Federal Rules of Criminal Procedure. The Rule requires that the government disclose any evidence in its "possession, custody, or control" that is "material to preparing the defense."[57]

[50] United States v. Mahaffy, 693 F.3d 113, 134 (2d Cir. 2012).

[51] *See* United States v. Bagley, 473 U.S. 667, 680–81 (1985) (plurality opinion).

[52] *Strickler*, 527 U.S. at 281–82.

[53] *See id.*; Giglio v. United States, 405 U.S. 150 152–53 (1972) (holding that the prosecution's failure to disclose to the defense a non-prosecution agreement with a witness would be grounds for new trial).

[54] *See Strickler,* 527 U.S. at 282.

[55] *Id.*

[56] Kyles v. Whitley, 514 U.S. 419, 434–35 (1995) (internal quotation marks omitted) (quoting *Bagley*, 473 U.S. at 682). The "reasonable probability" element of materiality at play in *Brady* is distinguishable from a preponderance of the evidence standard; specifically, it considers whether, in the absence of the evidence at issue, the defendant "received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* at 434.

[57] FED. R. CRIM. P. 16(a)(1)(E). In full, the Rule requires

> [u]pon a defendant's request, [that] the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of

It is worth noting that *Brady* and Rule 16 address different phases of the adjudicative process and thus are not coextensive.[58] For the purposes of measuring the scope of a prosecutor's discovery obligation, however, the two concepts run together. It is not unusual for defendants to request production of *Brady* and Rule 16 material in a single motion.[59] And because the government's ownership (either constructive or actual) of the material is necessary for both discovery rules, "courts often follow the defendant's lead by treating the issues identically in determining whether the prosecutor must disclose evidence."[60]

Thus, the extent of a prosecutor's duty to turn over evidence to the defense turns on the definition of "the prosecution"[61] or "the government."[62] The Supreme Court has held that prosecutors have a "duty to learn of any favorable evidence known to the others acting on the government's behalf,"[63] but the limits of "government" in this context are ill-defined and fluid.

> these items, if the item is within the government's possession, custody, or control and:
>
> > (i) the item is material to preparing the defense;
> > (ii) the government intends to use the item in its case-in-chief at trial; or
> > (iii) the item was obtained from or belongs to the defendant.

Id.

[58] *See* Peter J. Henning, *Defense Discovery of Documents in White-Collar Criminal Prosecutions*, 15 GA. ST. U. L. REV. 601, 613 (1999) ("*Brady* is a *post-trial* assessment of whether the prosecutor's suppression of evidence resulted in prejudice to the defendant, while Rule 16 regulates the *pre-trial* production of evidence without judicial involvement in triggering the duty to disclose evidence." (footnote omitted)).

[59] *See id.*

[60] *Id.*

[61] *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) ("[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process.").

[62] *See* FED. R. CRIM. P. 16(a)(1) (listing information subject to disclosure by "the government").

[63] Kyles v. Whitley, 514 U.S. 419, 437 (1995).

C. Reconciling Brady with Outsourced Investigations

The law generally views internal investigations as "private employment matters" not subject to statutes, rules of criminal procedure, or constitutional limitations that protect individuals from government overreach.[64] However, the cooperation requirements described in Section II.A have rendered "corporate internal investigations . . . extensions of government enforcement efforts."[65] This reality has led some defendants to argue that cooperating companies should be considered "the prosecution" for *Brady* purposes.[66]

If courts were to accept this proposition, a prosecutor's duty to disclose exculpatory information to the defense would expand significantly because they would be presumed to have constructive knowledge of material in the company's possession. Practically speaking, this means that government attorneys would push corporate targets to go through all testimony and materials obtained during an internal investigation and flag anything plausibly relevant or favorable to an individual defendant's case.

Prosecutors might push back on the proposition that their disclosure obligations should go so far—there is, after all, "no general constitutional right to discovery in a criminal case, and *Brady* did not create one."[67] Moreover, one could easily argue that ascribing to the government "possession and control" of every document possessed by a company is practically impossible given the size, scope, and complexity of many corporate entities, and the fact that other legal and

[64] *See* Green & Podgor, *supra* note 24, at 76–77. The reality is that the "whether," "when," and "what" of corporate internal investigations are left to the business sponsoring the effort, and regulatory tools such as Generally Accepted Accounting Principles (GAAP) and ABA guidelines for attorneys provide only "modest restraints" on those involved. *See id.* at 77.

[65] Griffin, *supra* note 35, at 311.

[66] ALEXANDER J. WILLSCHER, EVOLVING BRADY OBLIGATIONS AND THE POTENTIAL IMPACT ON PROSECUTORS, COMPANY COUNSEL, AND COUNSEL FOR INDIVIDUAL DEFENDANTS (2018), 2018 WL 6434531 ("Criminal defendants have argued that the same reasoning used to impute knowledge from U.S. regulatory agencies to the DOJ should be applied to impute knowledge from cooperating witnesses, including companies.").

[67] Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

regulatory frameworks might impede the transfer of such information.[68]

On the other hand, a criminal defendant facing charges related to his employment at a cooperating company might legitimately believe that information in the hands of their former employer is material to their defense. Assuming that this argument has some merit, a policy that forces companies (via pressure from prosecutors now carrying a heavier discovery burden) to be more exact in their investigative processes could enhance the truth-seeking function of a trial. The stakes of this line-drawing exercise are high and deserve attention.

III. "THE PROSECUTION" IN THEORY

Whether the hypothetical defendant imagined in this Note[69] can rely on *Brady* to receive exculpatory material in the hands of a corporate entity depends on how courts construe "the prosecution." There are multiple ways to approach this question, and this Part seeks to do so by way of three doctrinal "lenses."

A. Common-Law Lens: The Corporation as a Member of the Prosecution Team

The first approach to understanding "the prosecution" is to imagine prosecutors as part of a broader "team." Federal courts tasked with interpreting the scope of the government's disclosure obligations under *Brady* have drawn on analogous case law and their own understandings of the prosecutor's role in the adversary process to develop this doctrine. Section III.A.1 explains the policy and administrative considerations

[68] *See* Government's Omnibus Response to Defendant's Motion To Compel the Production of *Brady* Material & Rule 16 Discovery, Motion for Issuance of Letters Rogatory & Rule 17 Motion for Production of Evidence Before Trial at 1–2, United States v. Hoskins, No. 12cr238, 2015 WL 4874921 (D. Conn. Aug. 14, 2015) ("As a practical matter, it would be impossible for the Government responsibly to satisfy its discovery obligations of a 110,000-employee company located in 70 countries, a number of which have blocking or data-privacy statutes.").

[69] *See supra* Part I.

counseling against a limited definition of "the prosecution," using the Supreme Court's analysis of the relationship between prosecutors and police as a starting point.[70] The next sub-Section identifies specific indicators of "teamwork," using cases in which lower courts have construed "the prosecution" to include federal and state agencies.[71] The rationales for and factors signaling a finding of "teamwork" between the DOJ and other entities provide one way of thinking about whether *Brady* should cover information in the hands of corporate cooperators.

1. Police

Before delving into specific indicators of "teamwork," it is important to understand why "the prosecution" should ever include non-DOJ entities. The Supreme Court's analysis of the relationship between prosecutors and police in *Kyles v. Whitley*[72] answers this question. In that case, the Court found that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf, including the police."[73] This finding, which laid the groundwork for lower courts to conceive of "the prosecution" as "agencies whose activities so closely support a specific prosecution that justice requires them to be subject to the discovery obligations,"[74] followed from weighty policy and administrative feasibility considerations.[75]

[70] *See infra* Part III.A.1.

[71] *See infra* Part III.A.2.

[72] 514 U.S. 419 (1995).

[73] *Id.* at 437.

[74] Jonathan M. Fredman, *Intelligence Agencies, Law Enforcement, and the Prosecution Team*, 16 YALE L. & POL'Y REV. 331, 347 (1998). For a discussion of the relationship between prosecutors and law enforcement personnel, including factors that align the two groups, see generally Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003).

[75] *See* Stanley Z. Fisher, *The Prosecutor's Ethical Duty To Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 FORDHAM L. REV. 1379, 1381 (2000) (noting the Court's "appeals to precedent, administrative feasibility, and policy" in *Kyles*).

First, a prosecutor's ability to evade *Brady* obligations by disclaiming knowledge of material in the hands of police might transfer too much adjudicative power to law enforcement.[76] This shift would, the Court feared, cause the "adversary system of prosecution . . . to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth."[77] A broadened conception of the prosecution team could neutralize this dynamic by pressuring prosecutors to disclose anything potentially favorable[78] and, by extension, "justify trust in the prosecutor as '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.'"[79]

Second, drawing on its reasoning in *Giglio v. United States*,[80] the Court assumed that it would be easy to establish "procedures and regulations" to facilitate the flow of relevant

[76] *See Kyles*, 514 U.S. at 438 ("[A]ny argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials."). Also relevant to this discussion is the fact that the division of investigative and prosecutorial phases between law enforcement officers and government attorneys causes prosecutors to "labor under an informational disadvantage even in those systems where they formally have hierarchical power over police forces." *See* Richman, *supra* note 74, at 813. The practical effect of this reality in the *Brady* context is clear: if left accountable for only the information known to them, prosecutors would not turn over exculpatory information known to law enforcement because they likely would not know it at all. This would give law enforcement outsized influence on a defendant's knowledge of the case against him.

[77] *Kyles*, 514 U.S. at 439.

[78] *Id.* (noting that a larger prosecutorial obligation to turn over evidence in the hands of law enforcement would "mean[], naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence" to avoid the ramifications of a *Brady* violation (citing United States v. Agurs, 427 U.S. 97, 108 (1976)))

[79] *Id.* (quoting Berger v. United States, 295 U.S. 78, 88 (1935)). The court went on to point out that this structure would "tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations." *Id.* at 440.

[80] 405 U.S. 150 (1972).

information between law enforcement agencies and prosecutors' offices.[81]

These considerations seem broadly applicable to the hypothetical corporate cooperator introduced in Part I.[82] There is a natural correspondence between the role of the police in the fact-gathering process preceding a standard criminal prosecution and the role of a company-sponsored internal investigation in the fact-gathering process preceding a corporate prosecution. Namely, both provide the nucleus of information upon which individual indictments rest. Therefore, to allow prosecutors to disclaim knowledge of the fruits of a company-sponsored investigation would permit what the court sought to avoid in *Kyles*: the substitution of the corporation "for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials."[83] Ultimately, if a core component of due process could be circumvented by the mere delegation of the fact-collecting phase to a party outside of the prosecutor's office, the notion of constructive knowledge embraced by the Court in *Kyles* would be meaningless.

The Court's administrative feasibility argument is arguably more applicable to a corporate cooperator than to the police. Indeed, the *Kyles* Court's "crucial but dubious empirical claim" regarding a prosecutor's ability to establish "procedures and regulations" governing information flow between prosecutors and the police ignores the actual

[81] *Id.* at 154 ("The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government. To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to ensure communication of all relevant information on each case to every lawyer who deals with it." (citations omitted)).

[82] *See supra* Part I (imagining a scenario in which a corporation facing potential criminal liability, in an effort to avoid indictment at the corporate level, conducts an internal investigation at the behest and ongoing direction of federal prosecutors).

[83] *Kyles*, 514 U.S. at 438.

relationship between these parties.[84] Remedies for police violations do not incentivize proactive disclosure by officers,[85] and *Kyles* "did not obligate prosecutors to personally review police files in search of exculpatory information."[86] Given these dynamics, conformity with *Kyles* requires municipalities "expressly to train police to record, preserve, and reveal exculpatory evidence."[87]

Corporate cooperators are better positioned in this regard. In-house and external counsel for corporate entities often include former prosecutors and litigators well-versed in the demands of *Brady*. Unlike police officers, who may "assume that relevant evidence includes only inculpatory information" without further guidance,[88] the sophisticated attorneys representing corporate defendants could be reasonably expected to identify and share *Brady* material in cases involving individual employee defendants.

2. Federal and State Agencies

Given that the rationales supporting a more liberal definition of "the prosecution" seem to apply to the corporate cooperator at issue in this Note,[89] this sub-Section aims to identify aspects of the DOJ's relationship with outside entities that warrant a finding of teamwork. Cases in which the DOJ has investigated alleged corporate misconduct alongside other

[84] *See* Fisher, *supra* note 75, at 1382–84 ("[S]tate and local police agencies generally operate independently of prosecutors, and answer to different constituencies. As a result, prosecutorial access to information known to the police is a matter of persuasion and negotiation, rather than authority." (footnote omitted)).

[85] *See* Kevin Lipscomb, Note, *Fulfilling the Promise of* Brady*: The Need for Open Files and Complete Disclosure Between the Prosecution and the Police*, 22 TEX. J.C.L. & C.R. 187, 192–93 (2017).

[86] *Id.* at 190–91; *see also* United States v. Beaver, 524 F.2d 963, 966 (5th Cir. 1975) ("*Brady* clearly does not impose an affirmative duty upon the government to take action to discover information which it does not possess.").

[87] *See* Fisher, *supra* note 75, at 1434–35 (emphasis deleted).

[88] *Id.* (internal quotation marks omitted) (quoting Carter v. Harrison, 612 F. Supp. 749, 756 (E.D.N.Y. 1985)).

[89] *See supra* Part I.

federal and state agencies are particularly instructive;[90] outside of *Kyles*, which specifically added police to "the prosecution" under *Brady*, there are no firm rules governing the significance of cooperation with other government actors. Therefore, these cases have required lower courts to identify factors that they consider dispositive in construing "the prosecution" more broadly.

The nature of inter-agency collaboration is foundational to this analysis. Indeed, "whether parallel investigations are also 'joint' investigations must be evaluated in light of the disclosures being requested, and . . . the relevant context is one of fact-gathering, not charging determinations or otherwise."[91] It is not inevitable, however, that a coordinated fact-gathering effort will bring the second agency within the scope of the prosecution team. If "the prosecution" were so liberally construed, it could impose an impossibly heavy burden on prosecutors.[92] Thus, the scope of the prosecution team turns on the extent of the coordination between

[90] *See, e.g.*, United States v. Mahaffy, 693 F.3d 113, 133–34 (2d Cir. 2012) (failure of prosecutors to overturn SEC deposition transcripts at a later trial on conspiracy charges violated *Brady*); United States v. Gupta, 848 F. Supp. 2d 491, 495 (S.D.N.Y. 2012) (SEC's involvement in DOJ interviews and other prosecutorial decisions rendered the agency part of the prosecution team for *Brady* purposes); United States v. Martoma, 990 F. Supp. 2d 458, 461–62 (S.D.N.Y. 2014) (same). Indeed, one potential "cost of collaborating" with civil regulators is that the relationship might "compromise a criminal prosecution by adding to the prosecutor's discovery burdens" by expanding the prosecution team. *See* Anthony O'Rourke, *Parallel Enforcement and Agency Interdependence*, 77 MD. L. REV. 985, 1043 (2018).

[91] *Gupta*, 848 F. Supp. 2d at 494–95 ("For purposes of *Brady,* how the agencies use the facts discovered jointly is irrelevant, and the joint investigation need not result in a joint prosecution. And where the investigation is conducted jointly, the Government is charged with reviewing all information connected to that joint investigation and disclosing any exculpatory information.").

[92] *See* United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998) (noting that this approach "would inappropriately require [courts] to adopt 'a monolithic view of government that would condemn the prosecution of criminal cases to a state of paralysis.'" (quoting United States v. Gambino, 835 F. Supp. 74, 95 (E.D.N.Y. 1993), *aff'd*, 59 F.3d 353 (2d Cir. 1995)).

agencies.[93] Relevant factors include the outside agency's "participat[ion] in the prosecution's witness interviews . . .[,] involve[ment] in presenting the case to the grand jury," involvement in "review[ing] documents gathered by or shar[ing] documents with the prosecution," involvement "in the development of prosecutorial strategy," and presence, along with the prosecution, at "court proceedings."[94] Ultimately, "where the government and another agency decide to investigate the facts of a case together . . . the Government has an obligation to review the documents arising from those joint efforts to determine whether there is *Brady* material that must be disclosed."[95]

Thus, in a case in which the U.S. Attorney's Office (USAO) and the Securities and Exchange Commission (SEC) conducted parallel investigations but jointly interviewed forty-four out of forty-six witnesses, the court accepted the defense's argument that the prosecution's *Brady* obligation covered the SEC's notes from the joint interviews.[96] Dismissing the government's arguments about disparities in timing between the administrative and criminal proceedings and the lack of SEC involvement in prosecution strategy, the court found that the alignment of the USAO and the SEC with

[93] *See, e.g.*, United States v. Meregildo, 920 F. Supp. 2d 434, 441 (S.D.N.Y. 2013) ("Whether someone is part of the prosecution team depends on the level of interaction between the prosecutor and the agency or individual."), *aff'd sub nom.* United States v. Pierce, 785 F.3d 832 (2d Cir. 2015); United States v. Bryan, 868 F.2d 1032, 1036 (9th Cir. 1989) ("The prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant."); United States v. Upton, 856 F. Supp. 727, 749–50 (E.D.N.Y. 1994) ("The key to the analysis, therefore, is the level of involvement between the United States Attorney's Office and the other agencies.").

[94] *See* WILLSCHER, *supra* note 66 (first citing United States v. Middendorf, No. 18-CR-36, 2018 WL 3956494, at *5 (S.D.N.Y. Aug. 17, 2018); and then citing *Justice Manual Title 9: Criminal § 9-5.000*, U.S. DEP'T OF JUSTICE (Dec. 2017), https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings [https://perma.cc/ZN7C-X98K]).

[95] *See Gupta*, 848 F. Supp. 2d at 495.

[96] *Id.* at 493–94.

respect to the target and the extent of their collaboration in creating the requested *Brady* material controlled.[97]

In a second case involving the SEC, the court came to the same conclusion.[98] Noting that the USAO had conferred regularly with the SEC about its parallel investigation, jointly conducted twelve witness interviews, and received from the SEC all documents that the agency had obtained from the company defendant over the course of its investigation, the court concluded that "the USAO's obligation to produce communications . . . extend[ed] to documents in the sole possession of the SEC."[99] Lending further support to this conclusion was the fact that the SEC and USAO had coordinated depositions, shared information about the subjects of those depositions ahead of time, and provided regular updates to each other during the depositions themselves.[100]

Courts have taken a similar approach to defining the prosecution team in cases involving state agencies.[101] The Third Circuit confronted this issue in a case in which the federal government's key witness expected, and ultimately received, an extremely lenient plea agreement for unrelated state charges in exchange for his testimony against the defendant.[102] The federal prosecutors who questioned the witness lacked actual knowledge of the arrangement and failed to disclose the impeachment evidence, prompting the

[97] *Id*. at 495 ("An investigation may be joint for some purposes; it may be independent for others. But where, as here, the overwhelming bulk of witness interviews were jointly conducted, there can be no doubt that exculpatory disclosures made during these joint interviews that are reflected in the notes or memoranda of either agency must be disclosed to the defense.").

[98] United States v. Martoma, 990 F. Supp. 2d 458 (S.D.N.Y. 2014).

[99] *See id*. at 461–62.

[100] *Id*. at 461.

[101] *See* United States v. Antone, 603 F.2d 566, 570 (5th Cir. 1979) ("Imposing a rigid distinction between federal and state agencies which have cooperated intimately from the outset of an investigation would artificially contort the determination of what is mandated by due process. Rather than endorse a *per se* rule, we prefer a case-by-case analysis of the extent of interaction and cooperation between the two governments.").

[102] *See* United States v. Risha, 445 F.3d 298, 299 (3d Cir. 2006).

defendant to move for a new trial on *Brady* grounds.[103] On appeal, the court laid out a three-part framework for cross-jurisdictional constructive possession[104]:

> (1) whether the party with knowledge of the information is acting on the government's "behalf" or is under its "control"; (2) the extent to which state and federal governments are . . . participating in a "joint investigation" or are sharing resources; and (3) whether the entity charged with constructive possession has "ready access" to the evidence.[105]

Multiple circuits have adopted a similar approach in this area, rejecting the use of "rigid distinction[s]" to determine the scope of the prosecution team[106] and focusing instead on the degree of control and extent of cooperation between the relevant entities.[107]

The analysis supporting the inclusion of federal agencies on the prosecution team could easily be used to justify a definition of "the prosecution" that includes corporate cooperators. By sponsoring internal investigations that scrutinize past employee conduct, a corporation can play a vital role in the fact-gathering process that provides the

[103] *See id.*

[104] *See id.* at 303. The court noted that its framework resembled those employed by other circuits. *Id.* at 304.

[105] *Id.* at 304.

[106] *See Antone*, 603 F.2d at 570.

[107] *See, e.g.*, *id.* (concluding that knowledge of state prosecutors should be imputed to federal prosecutors because federal and state agencies had "cooperated intimately from the outset of [the] investigation" and that the "extent of [the] interaction and cooperation between the two governments" should control); United States v. Pelullo, 399 F.3d 197, 218 (3d Cir. 2005) (finding that the prosecution's relationship with the Pension and Welfare Benefits Administration did not put them on the same team for *Brady* purposes because they had not "engaged in a joint investigation or otherwise shared labor and resources" and there was no evidence that the prosecution exerted control over the agency officials charged with document collection); United States v. Brooks, 966 F.2d 1500, 1503 (D.C. Cir. 1992) (holding that the prosecution must search files of other branches of government if they are "closely aligned with the prosecution" or have a "close working relationship" with it (citing United States *ex rel.* Smith v. Fairman, 769 F.2d 386, 391 (7th Cir. 1985))).

factual basis for individual prosecutions.[108] Moreover, it would not be unusual for contributions to include witness interviews and document collection—actions that have been explicitly recognized as characteristic of a team effort.[109]

The cross-jurisdictional constructive possession framework articulated by the Third Circuit is similarly apropos. The government's upper hand in dictating the scope of an investigation could be interpreted as creating sufficient "control" over the corporate entity acting on its behalf.[110] And assuming some degree of resource-sharing and efforts to make information available to the government to maximize cooperation credit, one could easily argue that the government collaborated with and had "ready access" to information in the hands of its target.[111] In the same way that jurisdictional distinctions have been deemed irrelevant to the prosecution team analysis in state agency cases,[112] so too might the distinction between the DOJ and a corporation working in tandem.

B. Constitutional Lens: The Corporation as "The State"

Cases in which courts have imputed private conduct to the state provide an alternative basis on which *Brady* obligations might extend to information held by corporate cooperators. Of course, "most rights secured by the Constitution," including those embodied in *Brady* and its progeny, "are protected only against infringement by governments."[113] However, under a

[108] One can easily imagine a corporation conducting with prosecutors the joint interviews that the SEC conducted in *Gupta* and that the court deemed *Brady* material. United States v. Gupta, 848 F. Supp. 2d 491, 493–95 (S.D.N.Y. 2012).

[109] *See* United States v. Martoma, 990 F. Supp. 2d 458, 461–62 (S.D.N.Y. 2014).

[110] The bar for "control" under the Third Circuit's framework is quite low, and can be satisfied by indications of mere "intermingling of . . . forces." *See Risha*, 445 F.3d at 304.

[111] *See id.* at 304–05.

[112] *See Antone*, 603 F.2d at 570; *Risha*, 445 F.3d at 305–06.

[113] *See* Flagg Bros. Inc. v. Brooks, 436 U.S. 149, 156 (1978) (discussing a due process claim).

de facto enforcement regime[114] that "effectively bind[s] corporations to the needs of prosecutors,"[115] individual defendants' attempts to ascribe corporate conduct to the state and enforce constitutional entitlements against employers have prevailed on several occasions.

In order to qualify as state action, a corporation's conduct must be "fairly attributable to the government."[116] Conduct is fairly attributable when "there is a sufficiently close nexus between the State and the challenged action"[117]—that is, where the government "exercises coercive power, is entwined in the management or control of the private actor, or provides the private actor with significant encouragement, either overt or covert."[118] The nexus requirement "assure[s] that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains."[119] As such, a close nexus does not exist where "the state '[m]ere[ly] approv[es] of or acquiesce[s] in the initiatives' of the private entity, or when an entity is merely subject to governmental regulation."[120]

1. Sixth Amendment Right to Counsel

Corporate cooperation incentives can implicate an individual employee's constitutional right to counsel.[121] The

[114] *See* Arlen & Buell, *supra* note 16, at 707–08 (observing that corporate criminal enforcement, rather than invoking "the *de jure* rule of *respondeat superior*," reflects a de facto regime for assigning responsibility).

[115] *See* Bohrer & Trencher, *supra* note 25, at 1489.

[116] United States v. Stein (*Stein V*), 541 F.3d 130, 152 n.11 (2d Cir. 2008).

[117] Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (internal quotation marks omitted) (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974)).

[118] *Stein V*, 541 F.3d at 147 (emphasis deleted) (internal quotation marks omitted) (quoting Flagg v. Yonkers Sav. & Loan Ass'n, 396 F.3d 178, 187 (2d Cir. 2005)).

[119] *Yaretsky*, 457 U.S. at 1004.

[120] *Stein V*, 541 F.3d at 146 (alterations in original) (citation omitted) (quoting S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 457 (1987)).

[121] At the outset, it should be noted that the Filip Memorandum, promulgated in 2008 after *Stein V* and other decisions recognizing the

Sixth Amendment provides that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[122] This includes "a qualified . . . right to use wholly legitimate funds to hire the attorney of . . . [their] choice."[123] Where a corporate policy linking the provision of attorney's fees to individual cooperation with investigators can be traced back to DOJ pressure, courts have considered whether the arrangement is a form of state action that runs afoul of the Sixth Amendment.

This issue appeared in one of a series of orders by Judge Kaplan in *United States v. Stein*.[124] Following the collapse of Enron, Arthur Andersen, and other major U.S. corporations in 2001, the IRS and coordinate Senate committees began investigating abusive tax shelter practices by accounting firms, banks, and other entities.[125] KPMG was a key target of this effort, and despite its attempts to formulate a "cooperative approach" to dealing with federal authorities,[126] the IRS referred KPMG to the DOJ for criminal charges in early 2004.[127] The U.S. Attorney's Office for the Southern District of New York promptly initiated a grand jury investigation of the firm, which required the testimony of between twenty and thirty partners and employees.[128]

Until that point, KPMG's "common practice" had been to pay the legal expenses of its employees "when litigation

constitutional implications of withheld attorney's fees, attempted to eliminate the parts of DOJ guidance that threatened the right to counsel. *See* Memorandum from Mark R. Filip, Deputy Att'y Gen., U.S. Dep't of Just., to Heads of Dep't Components & U.S. Att'ys, on Principles of Federal Prosecution of Business Organizations 13 (Aug. 28, 2008), https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf [https://perma.cc/DLK9-NB35]. Nonetheless, the analysis of state action in the corporate internal investigation context remains instructive.

[122] U.S. CONST. amend. VI.

[123] United States v. Farmer, 274 F.3d 800, 804 (4th Cir. 2001).

[124] United States v. Stein (*Stein I*), 435 F. Supp. 2d 330 (S.D.N.Y. 2006), *aff'd*, 541 F.3d 130 (2d Cir. 2008).

[125] *Id.* at 337–38.

[126] *Id.* at 339 (internal quotation marks omitted).

[127] *Id.*

[128] *Id.* at 341.

loomed."[129] However, in response to contemporaneous DOJ guidance on measuring cooperation (outlined in the Thompson Memorandum)[130] and direct pressure from federal prosecutors, KPMG agreed to withhold the advancement of legal fees from employees who refused to cooperate with the investigation.[131] While this decision served its desired purpose (KPMG later entered into a DPA and used the policy as evidence of the firm's cooperation with the government),[132] the trial court found that pressure by the state drove KPMG to adopt a policy which had the effect of depriving individual litigants of their right to effective counsel.[133] The link between

[129] *Id.* at 341–42.

[130] Thompson's guidance laid out the factors governing charging decisions at the time of the KPMG case. It explained that prosecutors should consider

> whether the corporation appears to be protecting its culpable employees and agents. . . . [and whether] a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of the corporation's cooperation.

Id. at 337–38 (emphasis deleted) (internal quotation marks omitted) (quoting Memorandum from Eric Holder, Deputy Att'y Gen., U.S. Dep't of Just., to All Component Heads & U.S. Att'ys, on Bringing Criminal Charges Against Corporations (June 16, 1999), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF [https://perma.cc/6A97-N5QN]) (explaining the continuity of the quoted language from the 1999 Holder Memorandum to the 2003 Thompson Memorandum).

[131] *See id.* at 336.

[132] United States v. Stein (*Stein V*), 541 F.3d 130, 139 (2d Cir. 2008). As the Second Circuit observed, the company's pitch to the government about its "precedent setting" level of cooperation in pressuring employees to cooperate led to a deal "under which KPMG admitted extensive wrongdoing, paid a $465 million fine, and committed itself to cooperation in any future government investigation or prosecution." *Id.* (citing *Stein I*, 435 F. Supp. 2d at 349–50). Compliance with the deal eliminated the threat of indictment. *See id.*

[133] *See Stein I*, 435 F. Supp. 2d at 344–46.

company policy and government directive was clear: "but for the Thompson Memorandum and the prosecutors' conduct," the court found, "KPMG would have paid defendants' legal fees and expenses without consideration of cost."[134]

On appeal, the Second Circuit upheld the Sixth Amendment analysis and highlighted what it perceived to be key indicators of state action. The court noted that "the USAO 'significant[ly] encourage[d]' KPMG to withhold legal fees from defendants upon indictment."[135] This "encouragement" had conspicuously coercive undertones: "The government brought home to KPMG that its survival depended on its role in a joint project with the government to advance government prosecutions."[136] Unlike the collaborative dynamics at play in the prosecution team cases, the court seemed to infer that the non-negotiable terms of the "trade" rendered the government directly—rather than jointly—liable for the conduct at issue. The court also observed that the government sought to "share in the fruits of such intrusions" by reporting non-cooperators to the company in the hopes that KPMG's pressure (via threat of non-payment of fees) would incentivize individual employees to talk.[137]

At its core, this discussion concerned the unilaterally-imposed terms of the "trade" between corporation and government. DOJ guidance indicated that the advancement of fees would factor into the cooperation assessment, and KPMG understood the risk that, under its normal policy, "fees for defense counsel would be advanced to someone the government considered culpable."[138] As a result, "the only safe course was to allow the government to become (in effect)

[134] *Stein V*, 541 F.3d at 141 (citing *Stein I*, 435 F. Supp. 2d at 352–53) (summarizing the trial court's findings).

[135] *Id.* at 147 (alterations in original) (quoting Flagg v. Yonkers Sav. & Loan Ass'n, 396 F.3d 178, 187 (2d Cir. 2005)).

[136] *Id.* at 139. Note that this close nexus between state and corporate action satisfies the test articulated in *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

[137] *Stein V*, 541 F.3d at 139 (first quoting Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 615 (1989); and then quoting United States v. Stein (*Stein II*), 440 F. Supp. 2d 315, 337 (S.D.N.Y. 2006)).

[138] *Id.* at 148.

paymaster."[139] This analysis ultimately suggests that, where a government directive displaces a company's own agenda, such a move "provides a sufficient nexus between a private entity's employment decisions at the government's behest and the government itself."[140]

2. Fifth Amendment Right Against Self-Incrimination

Courts have recognized a relationship between corporate cooperation incentives and constitutional protections against self-incrimination on similar grounds. The Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[141] For the Fifth Amendment to apply to statements during a corporate investigation, the statements at issue must have been compelled, and "that compulsion must actually or functionally be brought to bear by a state actor."[142] This dynamic is not hard to imagine; given the risks associated with indictment and the benefits of total cooperation, corporations have every incentive to pressure employees to submit to interview or proffer.[143]

A separate ruling by Judge Kaplan in the *United States v. Stein* litigation provides a helpful case study.[144] In addition to unlawfully withholding legal fees from employee defendants in its pursuit of a DPA,[145] KPMG (through counsel) also

[139] *Id.*

[140] Griffin, *supra* note 35, at 367 (internal quotation marks omitted).

[141] U.S. CONST. amend. V.

[142] Griffin, *supra* note 35, at 353.

[143] *See id.* at 338 ("Firms that cite loyalty to employees and resist government demands to produce them for prosecution may be penalized. . . . By contrast, corporations that deliver their employees for prosecution are rewarded."). DOJ guidance on prosecuting business organizations illustrates the relationship between cooperation credit and formal employee statements. *See Justice Manual Title 9: Criminal § 9-28.000*, *supra* note 44 ("There are other dimensions of cooperation beyond the mere disclosure of facts, such as . . . making witnesses available for interviews[.]").

[144] United States v. Stein (*Stein II*), 440 F. Supp. 2d 315 (S.D.N.Y. 2006).

[145] *See supra* Section III.B.1.

agreed to advise those who retained independent counsel to hire firms "familiar with these types of proceedings and who understood that cooperation with the government was the best way to proceed."[146] The government "threatened . . . to consider any failure by KPMG to cause its employees to make full disclosure to the government as favoring indictment"[147] which, the court noted, amounted to "the corporate equivalent of capital punishment."[148] The company complied with the government's wishes and, in some cases, went so far as to tell employees "to cooperate with prosecutors or be fired."[149]

Following the implementation of this policy (and a favorable ruling on the attorney fee issue in *Stein I*), nine former KPMG employees facing charges for their involvement in tax shelter schemes moved to suppress statements made to the government in the early stages of investigation.[150] Even though the pressure to proffer came from KPMG, they argued that this pressure could be ascribed to the government and that Fifth Amendment protections therefore applied.[151] The trial court agreed, finding that employee statements made under threat of termination were improperly coerced and that KPMG's efforts to elicit them were attributable to the state.[152]

[146] *See* United States v. Stein (*Stein I*), 435 F. Supp. 2d 330, 345 n.54 (S.D.N.Y. 2006) (internal quotation marks omitted).

[147] *See Stein II*, 440 F. Supp. 2d at 318. This instruction was in line with contemporaneous DOJ priorities; at the time of the negotiation of the cooperation agreement in this case, the Thompson Memorandum provided that the corporation's willingness to make employees available and otherwise disclose internal materials would be a factor in assessing its cooperation. *Id.* at 319.

[148] *See id.*

[149] *Id.* at 318.

[150] *Id.* at 319.

[151] *Id.*

[152] *Id.* at 337. While the Second Circuit did not consider this Fifth Amendment compelled testimony issue, it did review Judge Kaplan's analysis in *Stein I*, which found that KPMG's refusal to advance defense costs was attributable to the state, and thus amounted to an unconstitutional deprivation of right to counsel. *See* United States v. Stein (*Stein V*), 541 F.3d 130, 135–36 (2d Cir. 2008). The Second Circuit endorsed this state action analysis, finding that "KPMG's adoption and enforcement of a policy under which it conditioned, capped and ultimately ceased advancing legal fees to defendants followed as a direct consequence of the

Echoing the Sixth Amendment analysis in *Stein I*, the court homed in on the degree to which "the state had involved itself in the use of a substantial economic threat to coerce a person into furnishing an incriminating statement."[153] In the court's eyes, the government's behavior rendered involuntary any subsequent decisions by the company or its employees:

> In this case, the pressure that was exerted on the Moving Defendants was a product of intentional government action. The government brandished a big stick—it threatened to indict KPMG. And it held out a very large carrot. It offered KPMG the hope of avoiding the fate of Arthur Andersen [which collapsed following indictment] if KPMG could deliver to the USAO employees who would talk, notwithstanding their constitutional right to remain silent, and strip those employees of economic means of defending themselves. In two instances, that pressure resulted in statements that otherwise would not have been made.[154]

On those grounds, it concluded that KPMG's conduct could be imputed to the state. The cooperation incentives offered by the U.S. Attorney (and validated by departmental guidance in effect at the time of the investigation) were designed to extract employee cooperation of the exact kind at issue.[155] That KPMG itself had served as a conduit for the government by communicating its threat to individual employees did not change the analysis.[156] More recently, the *Connolly* court

government's overwhelming influence, and that KPMG's conduct therefore amounted to state action." *Id.* at 136. Notably, the *Stein I* line of reasoning validated by the Second Circuit provided the basis for Judge Kaplan's subsequent finding of state action in *Stein II*. *See id.* at 146. Thus, one could read the Second Circuit's acknowledgement of the link between *Stein I* and *Stein II* lines of reasoning as implicit approval of both.

[153] *Stein II*, 440 F. Supp. 2d at 334 (internal quotation marks omitted) (quoting United States *ex. rel.* Sanney v. Montanye, 500 F.2d 411, 415 (2d Cir. 1974)).

[154] *Id.* at 337–38.

[155] *Id.*

[156] *See id.*

confronted a similar state action argument and used *Stein V* to attribute corporate conduct to the government.[157]

These cases do not stand for a categorical rule that a company's efforts to extract employee testimony in the midst of a government-prompted internal investigation automatically implicate the Fifth Amendment. In fact, courts have expressly rejected sweeping state action arguments,[158] as companies often have "supremely reasonable, independent interests for conducting . . . internal investigation[s] and for cooperating with a government investigation."[159] Specifically, where a private actor conducts an investigation "in pursuance of its own interests and obligations"[160] or to fulfill regulatory

[157] *See* United States v. Connolly, No. 16 CR. 0370, 2019 WL 2120523, at *14 (S.D.N.Y. May 2, 2019). After acknowledging that the entire "internal" investigation could be attributed to the government because of the degree to which the entire investigation had been outsourced to the company, the court looked for evidence that the government had "engineered" the interviews at issue. *Id.* at *12. This did not prove difficult; the court observed that

> [d]uring the period when Paul Weiss conducted the first three (of four) interviews of [movant] Black, the Government told Deutsche Bank whom to interview and when. It told Deutsche Bank to interview Gavin Black. Moreover, even as late as 2014—when the investigation was in its fourth year—the Government was still directing Paul Weiss's activities. When Paul Weiss wanted to interview Gavin Black on September 9, 2014, it sought the Government's permission to do so. And the Government did not simply give permission; it directed an experienced Paul Weiss partner and former Assistant U.S. Attorney for the Southern District of New York on the precise manner in which he should ask his questions.

Id. (citation omitted).

[158] *See* Gilman v. Marsh & McLennan Cos., 826 F.3d 69, 77 (2d Cir. 2016) (declining to adopt petitioners' proposed categorical rule that "acts . . . taken by a private company in response to government action, and that have as one goal obtaining better treatment from the government, amount to state action.").

[159] *Id.*

[160] United States v. Solomon, 509 F.2d 863, 869 (2d Cir. 1975).

duties "independent of governmental influence,"[161] its actions should not be imputed to the state. However, where a corporation's investigative policies respond *solely* to the threat of indictment (and its effects, trial outcome notwithstanding), a court may be more likely to ascribe the policies, and related conduct, to the state.

The Sixth and Fifth Amendment cases could support an argument that the government constructively possesses information in the hands of corporate cooperators. By framing the process of gathering and holding information as the "action" associated with the government's obligations under *Brady*, one can imagine a world in which the government's efforts to transform a corporation from adversary to valuable information repository via threat of indictment would render the corporation's ownership of information attributable to the state. This is especially so if the prosecutor's role in this transformation involves the factors considered dispositive in *Stein I*, *Stein II*, and *Connolly*. Insofar as the government has dictated the exact information to be collected and used the threat of indictment to deprive the corporation of its ability to adopt an alternative strategy for collecting and holding information, a state action argument could justify the expansion of a prosecutor's due process obligations under *Brady*.

3. Fourth Amendment Private Search Doctrine

The private search exception to the Fourth Amendment may also inform a court's response to the *Brady* hypothetical at issue,[162] as it concerns the point at which the government might be held constitutionally accountable for information discovered by a private party.

It is well-settled that the Fourth Amendment's prohibition against "unreasonable searches and seizures"[163] is enforceable

[161] D.L. Cromwell Invs., Inc. v. NASD Regul., Inc. 279 F.3d 155, 163 (2d Cir. 2002).

[162] *See supra* Part I.

[163] U.S. CONST. amend. IV.

against the state.[164] However, it also applies to private parties "act[ing] as . . . instrument[s] or agent[s] of the Government."[165] The existence of an agency relationship depends on "the degree of the Government's participation in the private party's activities, a question that can only be resolved 'in light of all the circumstances.'"[166] Lower courts applying this guidance generally consider "whether the government knew of and acquiesced in the intrusive conduct; whether the private party's purpose in conducting the search was to assist law enforcement" rather than pursue its own goals; and "whether the government requested the action or offered the private actor a reward."[167]

In practice, this inquiry boils down to whether the government has purposefully leveraged the searching private party's position relative to another target. For example, in a case in which a computer technician discovered illicit material on a client's hard drive while attempting to fix a technical issue and reported it to the government, the fact that he happened to be a confidential informant did not automatically render him a government agent for Fourth Amendment

[164] Benjamin Holley, *Digitizing the Fourth Amendment: Limiting the Private Search Exception in Computer Investigations*, 96 VA. L. REV. 677, 680 (2010); *see also* United States v. Jacobsen, 466 U.S. 109, 113 (1984) ("This Court has also consistently construed [Fourth Amendment] protection as proscribing only governmental action; it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.'" (quoting Walter v. United States, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)).

[165] Skinner v. Ry. Lab. Execs.' Ass'n, 489 U.S. 602, 614 (1989). The conduct of those acting as instruments or agents of the government can weigh heavily on the proceeding writ large, as evidence collected during an unconstitutional search is inadmissible at trial. *See* Elkins v. United States, 364 U.S. 206, 223 (1960).

[166] *Ry. Lab.*, 489 U.S. at 614–15 (citations omitted) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971)).

[167] United States v. Crowley, 285 F.3d 553, 558 (7th Cir. 2002) (first citing United States v. Hall, 142 F.3d 988, 993 (7th Cir. 1998); and then citing United States v. Shahid, 117 F.3d 322, 325 (7th Cir. 1997)). It should be noted that some courts drop the third prong of this analysis. *See, e.g.*, United States v. Miller, 688 F.2d 652, 657 (9th Cir. 1982).

purposes.[168] Rather, the court considered him a non-agent at the point of the preliminary search, because there was no evidence that he intended to assist law enforcement while attempting to solve a technical glitch.[169] His status changed after he reported the illegal content to the FBI and received instructions to copy the entire hard drive onto disks for review.[170] From that point forward, he "was not opening private files in an effort to repair the machine" but rather to "assist[] law enforcement officials."[171] And because law enforcement personnel had "ratified the intrusive conduct" via their instruction to "copy the entire hard drive," all subsequent searches were subject to Fourth Amendment restrictions.[172]

The government's "ratification" of private conduct must be affirmative. In another case involving the discovery of illegal material on a client's hard drive, a computer technician executed a search that resulted in the discovery of child pornography.[173] The technician reported the material to local authorities, as was required by state law.[174] The court found that the statutory reporting requirement did not, standing alone, render the technician a government agent for Fourth Amendment purposes.[175] Rather than "instruct[ing] computer technicians to search or investigate," the statute "merely require[d] technicians to report the identity of the owner or possessor of the computer" should they discover child pornography in the course of performing their duties as repairmen.[176] The court suggested that the outcome may have

[168] United States v. Barth, 26 F. Supp. 2d 929, 935–36 (W.D. Tex. 1998).

[169] *See id.* ("[T]here is no evidence that Keller intended to assist law enforcement officers when he initially viewed the image.").

[170] *Id.* at 936.

[171] *Id.*

[172] *Id.* at 935–36.

[173] United States v. Peterson, 294 F. Supp. 2d 797, 800 (D.S.C. 2003).

[174] *Id.*

[175] *Id.* at 805.

[176] *Id.* ("It cannot be said that the language of this statute shows that the government knew of and acquiesced in Griffin's search to the point of making Griffin an agent of the government.").

been different had the state law imposed a duty to search or investigate—in that case, the statute might have been understood as an affirmative effort to deputize the searching party.[177]

With these two case studies in mind, consider once again the hypothetical presented in Part I.[178] Analogizing a corporation's efforts to uncover information about internal wrongdoing via an internal investigation to a "search," it is easy to distinguish the corporate cooperator acting pursuant to (or with the intention of receiving) a DPA from the computer technicians deemed non-government actors for Fourth Amendment purposes. First, consider the factors lower courts use to establish an agency relationship between the government and a private party conducting a search.[179] Unlike the computer technician in *Barth*, who came across the material while doing his day job, information uncovered by a corporation in our hypothetical is directly responsive to government requests. Furthermore, such action is clearly taken to assist law enforcement in gathering facts about culpable individuals and done with the prospect of receiving a reward (either a DPA or, if a DPA already exists, dismissal of charges).

Second, the relationship between the government and a cooperating company might well include an affirmative duty to search distinguishable from the duty to report in *Peterson*. Consider once again the facts of *United States v. Connolly*.[180] The DPA between Deutsche Bank and the government required the company "to provide . . . any document, record or other tangible evidence relating to the conduct described in this Agreement . . . and other conduct under investigation by the Department."[181] It also required the company to "identif[y] witnesses who . . . may have material information regarding

[177] *See id.*

[178] *See supra* Part I.

[179] *See* United States v. Crowley, 285 F.3d 553, 558 (7th Cir. 2002).

[180] No. 16 CR. 0370, 2019 WL 2120523 (S.D.N.Y. May 2, 2019).

[181] Deferred Prosecution Agreement at 9, para. 5(a), *Connolly*, 2019 WL 2120523 (S.D.N.Y. May 2, 2019) (No. 16 Cr. 0370).

the matters under investigation."[182] In other words, the firm had an affirmative obligation under the terms of the cooperation agreement to "search" for relevant material and for employees with knowledge of the conduct at issue. One could argue that this affirmative obligation existed prior to the execution of a formal cooperation agreement, because the government's willingness to enter into the DPA was partially attributable to Deutsche's proactive initiation of an internal investigation after being alerted to potential misconduct.[183]

The extent to which the corporate cooperator in our hypothetical seems to fall under the "government" umbrella for Fourth Amendment search purposes lends further support to the argument that such an entity could be considered a state actor or "the prosecution" under *Brady*.

C. Privilege Lens: The Corporation as a Confidant

The complex status of the attorney-client privilege in the corporate prosecution context provides the final lens through which to consider the question presented in Part I. As discussed in Part II, corporations at risk of indictment generally waive privilege with external counsel in an effort to avoid formal criminal charges and the dire business consequences that often follow.[184] Even when voluntary, this practice has undesirable collateral effects: turning over otherwise privileged information to federal prosecutors can

[182] *Id.* at 10.

[183] *Id.* at 4. ("[U]pon being alerted to an investigation by the Department and other regulatory authorities, Deutsche Bank commenced an internal investigation and cooperated with authorities, including disclosing much of the misconduct described in the Information and Statement of Facts. Deutsche Bank collected, analyzed, and organized voluminous evidence, data, and information, and did so in a way that saved the Department significant resources by identifying certain documents and segments of audio files and providing translations for certain documents where applicable. Deutsche Bank also assisted and facilitated the Department's interviews of current and former employees, including foreign employees and Deutsche Bank communicated with and updated the Department with increasing frequency as the investigation progressed.").

[184] *See supra* Section II.A.3 (discussing the pressures to waive privilege).

vitiate a company's right to protect damaging information from civil adversaries in subsequent litigation.[185]

To avoid this "punitive result,"[186] corporations and legislators have debated the merits of selective waiver rules and legislation, which would allow companies to selectively disclose privileged information to federal entities and receive cooperation credit without waiving the privilege in later proceedings.[187] While the Eighth Circuit has embraced this approach,[188] nearly every other circuit has rejected selective

[185] Liesa L. Richter, *Corporate Salvation or Damnation? Proposed New Federal Legislation on Selective Waiver*, 76 FORDHAM L. REV. 129, 133 (2007). Under traditional privilege doctrine, the "price" of attorney-client privilege protection is complete confidentiality, and any disclosure triggers waiver. *See id.* at 183.

[186] *Id.* at 132.

[187] *Id*. at 132–33. In 2006, the Advisory Committee on the Federal Rules of Evidence proposed a new Federal Rule of Evidence, 502(c), which would have permitted parties to selectively waive privilege protections in their dealings with federal entities without waiving the privilege in their dealings with civil adversaries. *Id.* The Rule was designed to protect companies from the punitive consequences of waiver and "address[] inefficiencies created by common law waiver doctrine in the context of complex contemporary civil discovery." *Id.* at 155. Despite these corporate-friendly intentions, however, corporate counsel opposed its implementation out of fear that it would perpetuate the growing "culture of waiver" by "eliminat[ing] the most readily identifiable punitive consequence for corporations cooperating with the government." *Id.* at 158. This would, in turn, "further damage the relationship between corporate counsel and individual employees by emboldening the government and encouraging more waivers." *Id.* The conversation about benefits and drawbacks of selective waiver protections has since shifted to the legislative arena and continues to be a topic of debate. *See id.* at 158–59.

[188] *See* Diversified Indus. Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1977). The court held that the plaintiff's voluntary disclosure of a memorandum and report that its law firm had prepared during an internal investigation of the company did not obligate the company to provide the same information in a later civil suit. *See id.* at 610–11. The court also reasoned that an all-purpose waiver might impede the emerging—and efficient—practice of hiring outside counsel to conduct internal investigations and uncover employee wrongdoing. *Id.* at 611.

waiver[189] on the grounds that it is "inconsistent with bedrock privilege principles."[190]

Despite the general unavailability of selective waiver as an exception to traditional privilege waiver rules, there are ways to maintain attorney-client privilege following third-party disclosure. For example, under the joint-defense doctrine, parties may preserve privilege following a strategic breach of confidentiality upon a showing that the third-party recipient of the privileged information shares a common legal interest with the privilege holder.[191] Notably, however, this carve-out has not been proposed as a viable antidote for the punitive effects of waiver in the corporate context.

The absence of joint-defense arguments and centrality of selective waiver in the debate over privilege exceptions for corporate cooperators can be read in two ways. First, one could infer that corporations and the government lack "common interests." Indeed, if they could point to any, disclosure of material from corporation to prosecutor would not undermine the privilege as applied against future adversaries under the common interest doctrine, and the debate over selective

[189] *See* Richter, *supra* note 185, at 148–49.

[190] *See id*. at 133. While selective waiver "encourages the sharing of protected information with the government" by removing the punitive consequences of doing so, *id.* at 150–51, it also undermines foundational privilege principles: it does nothing to ensure open and honest communication between client and attorney, protects parties who choose to sacrifice the confidentiality of traditionally-protected information, and permits strategic behavior by allowing parties to invoke privilege when convenient and ignore it when inconvenient. *Id.* at 181.

[191] *See id.* at 183. The joint-defense doctrine (also known as the common-interest doctrine) relies upon different policy goals than traditional waiver doctrine. Rather than facilitating open communication between attorney and client, it "encourages collaboration between separately represented parties to 'encourage better case preparation and reduce time and expense,'" thereby promoting "the 'general efficiency of legal representation by giving parties the tactical advantage of access to information in the possession of others.'" *Id.* at 184 (first quoting C.B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 5.15 (2d ed. 1999); and then quoting Susan K. Rushing, *Separating the Joint-Defense Doctrine from the Attorney-Client Privilege*, 68 TEX. L. REV. 1273, 1280 (1990)).

waiver would be unnecessary.[192] And to the extent that a lack of common interest is coextensive with an adverse relationship[193] (and thus irreconcilable with the notion of a singular "team"), one could argue further that information held by corporate cooperators should *not* be covered by *Brady*.[194]

On the other hand, it is easy to conceive of legal interests shared by the government and a corporate cooperator:

> Unlike individual defendants for whom the government represents a true adversary, corporate targets of government investigation are [often] controlled by . . . . new management untainted by prior malfeasance that "partners" with the government in cleaning up and saving the corporate entity. Seen in this light, the government investigators and the corporate subjects of their investigation have a common interest in eradicating corporate fraud[.][195]

In distinguishing between corporate entities and "standard" criminal defendants, the negative inferences drawn from the centrality of selective waiver (rather than the joint-defense doctrine) in the corporate privilege debate appear less compelling. This lens therefore reveals no clear answer: the actual interests shared by corporate cooperators and the

[192] *See id.* at 185 (framing the common interest component of the joint-defense doctrine as the key factor differentiating that doctrine from the selective waiver doctrine).

[193] *See id.* ("While disclosure to a party with similar interests may not be inconsistent with the right to continued protection from compelled disclosure, voluntary disclosure to an adversary such as the federal government is fundamentally inconsistent with continued protection in any context.").

[194] *But see id.* at 185 n.217 (suggesting that "conflicting interests" have not been a barrier to invocation of the joint-defense doctrine). While appealing, this line of reasoning is belied by actual application of the joint-defense doctrine. Indeed, "it is universally accepted that parties pooling protected information under a joint-defense agreement may, and often do, have conflicting interests," and the "joint-defense doctrine contemplates disclosures to a potential adversary." *Id.* In other words, a common interest does not signal perfect alignment, and, conversely, the absence of common interest might not signal a purely adversarial relationship.

[195] *Id.* at 185–86 (footnote omitted)

government might well trump inference-based conclusions and provide additional support for a broader definition of "the prosecution" under *Brady*.

D. Summary of Doctrinal Lenses

The common-law, state action, and privilege lenses fleshed out in this Part provide three ways to think about the proper role of *Brady* in the hypothetical discussed in Part I.[196] The prosecution team lens suggests that sufficient collaboration between the DOJ and a non-DOJ actor during the fact-gathering process may justify a broader definition of "the prosecution" under *Brady*.[197] On this basis, one could argue that a company's efforts to uncover internal malfeasance render it part of the prosecution team, and that prosecutors therefore have a duty to find and turn over information in the company's file.

The state action lens suggests that the government's coercive influence on and efforts to deputize private entities (including corporations) can trigger the attribution of private conduct to the state.[198] This might support an argument that, where a company's survival (that is, its ability to escape indictment) depends on the way that it collects and shares information with the government, it actually assumes the role of the government relative to its employees. As such, the constitutional constraints that typically apply to the prosecutors, including those articulated in *Brady* and its progeny, should also be enforced against the corporate entity.

Finally, the privilege lens demonstrates how the relationship between corporate cooperators and the government may be evaluated in the context of common legal interests.[199] This framework might support an argument that cooperating corporate entities are insufficiently aligned to make the imputation of *Brady* obligations appropriate. The

[196] *See supra* Part I.
[197] *See supra* Section III.A.
[198] *See supra* Section III.B.
[199] *See supra* Section III.C.

next Part explores the relative importance of these lenses in practice.

IV. "THE PROSECUTION" IN PRACTICE

Federal courts have yet to accept the argument that a cooperating company should be considered "the prosecution" for *Brady* purposes. However, courts have hinted that this move could be warranted on the right set of facts. This Part attempts to organize these hints and the arguments that surround them. Section IV.A discusses cases where courts have considered but not reached—or considered and rejected—defendants' argument that a prosecutor's *Brady* obligation should cover information in the hands of a former employer. Section IV.B summarizes cases in which courts have interpreted formal prosecution agreements as indicators of Rule 16 "control," thereby expanding due process protections for the defendant while avoiding the need to analyze the underlying constitutional relationship between a corporation and the DOJ.

A. The "Relationship" Approach

While courts have been reluctant to accept the argument that a company should, by virtue of its cooperative relationship with prosecutors, be considered "the prosecution" under *Brady*, they have considered doing so on several occasions. The highest court to confront this question was the First Circuit in *United States v. Josleyn*.[200] In that case, the discovery of massive bribery and fraud within American Honda Motor Company prompted the prosecution and conviction of two executives.[201] After evidence material to their cases "trickled and then flooded out" of parallel civil litigation against Honda,[202] the defendants moved for a new

[200] 206 F.3d 144 (1st Cir. 2000).

[201] *Id.* at 147.

[202] *Id.* at 148. Following the criminal case, several dealers involved in the kickback scheme at issue initiated multi-district litigation against Honda. During that process, the dealer plaintiffs asked the court to remove the attorney-client and work-product privileges that Honda would have

trial, arguing that all of the new evidence that had emerged was *Brady* material to which they were entitled.[203] The court ultimately rejected the defendants' theory that the "close working relationship between" prosecutors and the corporation warranted attribution of Honda's knowledge to the government.[204] Looking past superficial indicators of teamwork between government and company,[205] the court delved into the actual dynamics between American Honda and the state using the common-law and constitutional lenses detailed in Part III.[206]

With respect to state action, the court did not find that the conduct of the government was so intertwined with that of Honda as to make Honda's knowledge and possession of exculpatory information attributable to the state.[207] On the contrary, Honda "had an interest in seeing that the government knew some information about the kickback schemes, but not too much."[208] This distinguished the case from the Fifth and Sixth Amendment cases discussed in Section III.B, where the government's leverage (vis-à-vis a

otherwise enjoyed with respect to certain communications among the parent, its North America subsidiary, and its attorneys. *Id.* at 149. The federal district court agreed to do so under the crime-fraud exception. *Id.*

[203] *Id.* at 152 ("[A]lthough the government literally did not know of the existence of the evidence at the time of the . . . criminal case, American Honda did. [Defendants argue that] American Honda's knowledge should be attributed to the government . . . because American Honda and the government portrayed themselves as partners in the criminal prosecution and American Honda cooperated with the government in producing the evidence used to prosecute the two defendants.").

[204] *Id.* at 152–53.

[205] *Id.* The lead prosecutor on the case at one point referred to American Honda's lawyers as members of the "'team' of 'prosecutors working on the case.'" *Id.* at 152. However, the court dismissed this label as mere "puffery." *Id.*

[206] *See supra* Sections III.A–.B.

[207] *See Josleyn*, 206 F.3d at 153 ("The defendants draw analogies to civil rights law where private action is sometimes held to be so intertwined with government action as to render it state action. But the context here is different. The government did not have access to the evidence at issue and did not suppress it either willfully or inadvertently." (footnote omitted) (citation omitted)).

[208] *Id.* at 154.

potential cooperation agreement) and the corporation's fear of indictment meant that the government's preferences effectively replaced those of the corporate target. In *Josleyn*, there were two parallel efforts: while the government sought total cooperation, Honda saw value in suppressing some of what it knew about internal wrongdoing.[209]

Flowing through this position were theories reminiscent of the prosecution team cases described in Section III.A. The court observed that American Honda did not engage in the sufficiently joint fact-gathering effort characteristic of those cases where courts included federal and state agencies on the prosecution team.[210] Rather, "both the government and the defendants [were] the victims of an interested private third-party (here, American Honda's top management and attorneys) withholding information even while it feign[ed] full cooperation with the government."[211] In reaching this conclusion, the court scrutinized the absence of meaningful collaboration between American Honda and the government in collecting the material requested by the defense.[212] While it accepted the defense's allegations that American Honda's lawyers "helped the prosecution in at least five areas,"[213] the court flagged misrepresentations that the company had made to the government about the completeness of its

[209] *See id.*

[210] On these fact gathering efforts, see *supra* Section III.A.2.

[211] *See Josleyn*, 206 F.3d at 153.

[212] *See id.* at 152.

[213] *Id.* The defense claimed that Honda's attorneys provided the DOJ with their own "prosecution memo," participated in the development of a "target list," provided information on the credibility of relevant witnesses, promised to address potential venue problems, "and agreed to give as much help as possible, as quickly as possible." *Id.* at 152 n.7. Taken together, these actions suggested that

> American Honda had a strong interest in helping the government: it did not want to be named as a target in the criminal investigation nor did it want to subject itself to civil liability. In addition [it] . . . did not want its top executives named as targets or conspirators.

Id. at 152–53.

investigation.[214] On these grounds, labeling the two parties as a "team" was inapposite.[215] Notably, the First Circuit's response to the defense's *Brady* argument seemed highly contingent on the facts of the case and the intricacies of the relationship between corporation and government over the course of the litigation.[216] Had American Honda been completely cooperative, a more expansive reading of *Brady* may have controlled.[217] Multiple lower courts have signaled a similar stance.[218]

B. The "Control" Approach

Courts have, on a few occasions, found that the legal right to access information under a formal prosecution agreement constitutes "control" of that information under Rule 16.[219] Assuming that Rule 16 and *Brady* requests are made simultaneously by defendants and treated identically by courts,[220] this approach creates a broader *Brady* obligation that includes information in the cooperating company's

[214] *See id.* at 152 n.6.

[215] *See id.* at 153–54.

[216] *See id.* at 153 ("On the facts here, we reject the defendants' attribution theory." (footnote omitted)).

[217] *See id.* at 154 ("[American Honda] had an interest in seeing that the government knew some information about the kickback schemes, but not too much. . . . As a result, only the evidence that the defendants have shown was actually known to the government is subject to the *Brady* standard.").

[218] *See, e.g.*, United States v. Duronio, No. CRIM.A.02-933, 2006 WL 1457936, at *2–3 (D.N.J. May 23, 2006) (applying the prosecution team factors set out in *United States v. Risha*, 445 F.3d 298, 304 (3d Cir. 2006), to determine whether the Government had constructive possession over a company's files, and concluding that expanding the prosecution team to include the company and/or its agent would be inappropriate), *aff'd*, No. 06-5116, 2009 WL 294377 (3d Cir. Feb. 9, 2009).

[219] *See* Bohrer & Trencher, *supra* note 25, at 1496–97; *see also* FED. R. CRIM. P. 16(a)(1)(E) (requiring the government, upon the defendant's request, to permit the inspection, copying, or photographing of records in the government's "possession, custody, or control" that are "material to preparing the defense").

[220] *See* Henning, *supra* note 58, at 622–23 (describing this treatment).

possession.[221] More importantly, it provides a simpler route to expanding the amount of material to which a defendant might lay claim in seeking reversal.

A separate ruling by Judge Kaplan in the *United States v. Stein* litigation recognized this interpretation of Rule 16.[222] After more than a year of "vigorous efforts to forestall . . . indictment" by federal prosecutors in the Southern District of New York, KPMG entered into a DPA requiring it to "provid[e], in responsive and prompt fashion, and, upon request, . . . all documents, records, information, and other evidence in [its] possession, custody, or control as may be requested by the" DOJ.[223] The court rejected the government's argument that, notwithstanding the DPA, it did not have "possession, custody, or control" of KPMG's documents "and that the implications of holding that such language places the documents in the government's control would be 'untenable.'"[224] Instead, it deferred to the plain meaning of Rule 16, noting that "[c]ontrol has been defined to include the legal right to obtain the documents requested upon demand."[225] Under this interpretation, a prosecutor's right to request any item held by the company would create an obligation to turn over such items that are material to an individual defendant's case.[226]

[221] *See* Bohrer & Trencher, *supra* note 25, at 1495–97. Because Rule 16 requires that the government permit access to any item in its "possession, custody or control" that is "material to preparing the defense" and *Brady* demands that the government produce evidence favorable to the defense and material to guilt or punishment, a finding of Rule 16 control may be "sufficient to bring [the company's material] within the requirements of Rule 16 and *Brady*." *Id.* at 1495–96.

[222] United States v. Stein (*Stein Quashal*), 488 F. Supp. 2d 350, 364 (S.D.N.Y. 2007).

[223] *Id.* at 352–53 (emphasis deleted) (internal quotation marks omitted).

[224] *Id.* at 363–64.

[225] *Id.* at 361 (emphasis deleted) (internal quotation marks omitted) (quoting 7 DANIEL R. COQUILLETTE ET AL., MOORE'S FEDERAL PRACTICE § 34.14[2][b], at 34-63 to 34-64 (3d ed. 2006)).

[226] *See id.* The First Circuit's opinion in *United States v. Josleyn* can be read as endorsing the same principle. 206 F.3d 144 (1st Cir. 2000). While it did not explicitly acknowledge Rule 16 in its analysis, the court

The court seemed unfazed by the burden that an expanded disclosure obligation would place on the government, declaring that "[i]f [the government] is uncomfortable with the consequences of such provisions, it need not insist upon them in future cases."[227] This posture reflects the court's interest in respecting the extent to which the company bound itself to the government in order to extract cooperation benefits. The "inconvenience" of the broadened duty to turn over material information in the company file was evidently outweighed by the fact that KPMG had aligned itself with the government on an ongoing basis by providing virtually unfettered access to evidence in its possession.[228] Subsequent decisions invoking and distinguishing *Stein* confirm the importance of this broad contractual alignment as a prerequisite for an expanded discovery obligation.[229]

emphasized the fact that "[t]he government did not have access to the evidence at issue" in refuting the defendant's argument that the prosecutors and company were one team for *Brady* purposes. *See id.* at 153. If the government enjoyed the right to access all of the information in the company's file, the court might have reached the opposite conclusion. *See id.*

[227] *See Stein Quashal*, 488 F. Supp. 2d at 364.

[228] *See id.* at 353–4. The terms of the DPA further obligated KPMG to continue to cooperate "even after the dismissal of the Information." *Id.* at 354 (internal quotation marks omitted). The firm committed itself to

> continue to fulfill the cooperation obligations set forth in this Agreement in connection with any investigation, criminal prosecution or civil proceeding brought by the Office or by or against the IRS or the United States relating to or arising out of the conduct set forth in the Information and the Statement of Facts and relating in any way to the Office's investigation.

Id. (emphasis deleted) (internal quotation marks omitted).

[229] *See, e.g.*, United States v. Buske, No. 09-CR-65, 2011 WL 2912707, at *9 (E.D. Wis. July 18, 2011) (rejecting the defendant's argument that the government "controlled" documents in the hands of a cooperating company and finding that "[t]here is no similar DPA or other legal requirement that SCJ cooperate with the government in this case. Thus, *Stein* is distinguishable."); United States v. Tomasetta, No. 10 CR 1205, 2012 WL 896152, at *5 (S.D.N.Y. Mar. 16, 2012) ("[T]he Government was never in 'control' of the materials in Munger's physical possession. Unlike *Stein*, there is no deferred prosecution agreement here, or any agreement of its

V. TOWARD A SOLUTION

It is clear that the outsourcing of internal investigations to corporate wrongdoers implicates and complicates the administration of individual due process. And it is equally clear that courts have been grappling with this reality in the *Brady* context, drawing on several bodies of law in the process.[230] In response, this Part recommends a framework for enforcing a criminal defendant's right to exculpatory information where "the prosecution" appears interchangeable with the defendant's former employer. Not surprisingly, importing analytical moves from analogous, but distinct, doctrinal contexts discussed in Parts III and IV raises issues and questions. Thus, this Part concludes by acknowledging the shortcomings of the proposed model.

A. Proposed Enforcement Framework

By mapping the doctrinal lenses presented in Part III onto the landscape outlined in Part IV, a two-step framework for enforcing *Brady* in cases involving corporate cooperators emerges. For the sake of efficiency and simplicity at the outset of the *Brady* inquiry, courts should first look to whether the corporate entity holding the exculpatory material at issue signed a DPA, and if so, whether the DPA appears to cover that material. If such an agreement exists, courts should,

kind, giving the Government the legal right to obtain materials from Vitesse (or Munger) on demand. To the contrary, when the Government sought information from Vitesse, it had to subpoena the documents."); United States v. Baroni, No. 15-cr-00193, 2015 WL 9049528, at *4 n.8 (D.N.J. Dec. 16, 2015) (rejecting an argument that documents in the hands of a non-party should be disclosed pursuant to Rule 16(a)(1)(E) on the grounds that, unlike in *Stein,* "the USAO did not (and does not) direct or control [the non-party's] activities and does not have possession, custody or control' of the materials Defendants seek" by virtue of a DPA); Order Granting in Part and Denying in Part Defendants' Motion To Compel at 5, United States v. Carson, No. SACR 09-0077 (C.D. Cal. Dec. 8, 2009) (rejecting the argument that a plea agreement requiring cooperation by the company extended the Government's Rule 16 obligations to the company and stating that "[b]y no stretch of the imagination did CCI enter into an agreement allowing the Government to request anything in the possession of CCI.").

[230] *See supra* Part IV.

applying Judge Kaplan's approach, presume that the legal right to obtain materials in the hands of the company is equivalent to "control" of that information under Rule 16 and establishes control under *Brady*.[231] The consistent use of this presumption would provide a helpful additional layer of protection to defendants who might otherwise be deprived of fair process as a consequence of an outsourced fact-gathering effort. It would also respect the interests of prosecutors, who would have the opportunity to rebut the presumption by showing that the terms of the DPA are too narrow to infer "control." While this framework might shift the focus of litigation to contractual interpretation, it has the benefit of being administrable and predictable, and it could lead to a more consistent set of DPA provisions, cooperation practices that honor individual rights, and lower negotiation costs in future cases.

The lenses discussed in Part III provide a convenient, albeit less straightforward, alternative to this DPA-centric approach. In the absence of a formal cooperation agreement, courts should define the scope of "the prosecution" by scrutinizing the relationship between the corporate entity and the prosecutors and deciding whether it reflects "teamwork,"[232] state action,[233] or "common interests."[234] Because this approach demands a more detailed, fact-sensitive analysis, it is essential that courts articulate the applicable analytical lenses and specific factors that weigh most heavily in their assessments. Should a defendant's argument evoke the prosecution team arguments explored in Part III.A, courts should highlight the factors that they consider most important in measuring the collaboration between prosecutors and the corporate target. Alternatively, if a defendant's *Brady* claim is best analyzed under a state action theory, explicit reference to the analogous scenarios highlighted in Part III.B would permit future litigants to perceive the boundary between impermissible coercion (i.e.,

[231] *See supra* Section IV.B.
[232] *See supra* Section III.A.
[233] *See supra* Section III.B.
[234] *See supra* Section III.C.

the government replacing a corporate agenda with its own) and permissible pressure (i.e., incentivizing cooperation while allowing the corporation to maintain decisional autonomy) in the fact-gathering context. Finally, if the relationship between the corporation and the DOJ is best captured by reference to shared interests, a court might invoke or analogize to the joint-defense doctrine to support a broader conception of "the prosecution" for *Brady* purposes. Given the constitutional stakes of this analysis, clarity and careful attention to the factual nuances of each particular case are paramount.

B. Limitations

This framework is, of course, imperfect. Corporations have myriad incentives and strategic priorities, even while facing potential indictment. Therefore, broad rhetoric by scholars and judges about the government's ability to "control" a corporation or supplant its "interests" by virtue of a formal cooperation agreement or dominant bargaining position may be nothing more than "puffery," to quote the First Circuit in *United States v. Josleyn*.[235] Indeed, even the most broadly sweeping DPA can fail to bind a corporation's interests to the government's.[236] And if we accept the premise that total alignment between prosecutors and corporate cooperators on every matter of company policy is unlikely, we must proceed with caution when utilizing analogous doctrines to fill in the *Brady* blank.

[235] 206 F.3d 144, 152 (1st Cir. 2000). The court recognized that, notwithstanding its clear interest in helping the government avoid criminal and civil liability, American Honda maintained a distinct (and secret) set of goals which led it to withhold certain information from the government. *Id.* at 152–53. Because of this imperfect alignment, the argument that American Honda's counsel constituted "the prosecution" for *Brady* purposes failed. *Id.* at 153.

[236] DPAs are regularly breached and often underenforced. *See* BRANDON L. GARRETT, TOO BIG TO JAIL: HOW PROSECUTORS COMPROMISE WITH CORPORATIONS 165–68 (2014) (observing that corporate recidivism rates have remained high despite the DOJ's increasing use of DPAs, and that prosecutors often decline to enforce breach provisions even upon discovering clear violations of criminal law by corporate entities under active agreements).

On the state action issue, this requires us to confront the difference between *doing something* to employees and merely *knowing* or *possessing* information relevant to an employee's case. When a company exchanges cooperation credit for a policy that effectively forces employees to testify, it can be inferred that the company's interests aligned closely enough with those of the government to make the benefits of that particular exercise outweigh the costs. In other words, even if the company had quietly hoped that its employees would stay silent, the government's "control" with respect to this particular action was enough for the two entities to act as one. This inference is not always clear in the *Brady* context. It is hard to tether a company's general knowledge about problematic employee conduct to a government pressure campaign. We should therefore be wary of arguments that advocate attribution of *Brady* obligations on the basis of general leverage.

The prosecution team line of reasoning, on the other hand, forces us to grapple with disparate motives of government and non-government actors. Police and federal and state agency actors, regularly considered part of the prosecution team,[237] have no obvious interest in preserving a "get-out-of-jail" card for a defendant in the event of conviction. Thus, it is unlikely that such actors will intentionally withhold exculpatory information from prosecutors or otherwise impede a prosecutor's ability to satisfy their obligations under *Brady*. However, it is reasonable to assume that companies might attempt to feign total compliance with prosecutors while shielding just enough information to give individual defendants a second bite at the apple post-conviction.

The upshot of these examples is simple: construing *Brady*'s reach too broadly could actually undermine valid convictions by giving defendants expanded grounds for challenging the integrity of the discovery process and the validity of the overall proceeding. Balancing this reality with the demands of due process is a fragile and complex undertaking.

[237] *See supra* Section III.A.

VI. CONCLUSION

At a time when companies facing the possibility of criminal indictment regularly commit to policies of total cooperation in order to win DPAs, it is important to consider how this practice, and the resulting alliance between companies and government, impacts the constitutional rights of employees implicated in corporate misconduct. To ignore the relevance of *Brady* in this effort would be a mistake. If prosecutors can categorically ignore the contents of a cooperating company's file, regardless of its exculpatory value or their own role in driving the information-gathering effort, the wholesale delegation of the investigative process to entities unconstrained by the Constitution becomes more and more likely. For defendants, this means facing adversaries who might be more concerned with winning or protecting certain constituents than ensuring that justice is done.[238]

This reality calls for a thoughtful approach to *Brady* enforcement where individual cases arise from government-prompted, but company-sponsored, internal investigations. This Note proposes a two-pronged approach to this issue. First, courts should look to the terms of a DPA to infer the prosecution's "control" over the contents of a company's file. If no formal cooperation agreement exists, courts should measure the scope of "the prosecution" under *Brady* by looking closely at the relationship between prosecutors and the corporate target under prosecution team, state action, and privilege "lenses." Whatever the strategy, courts must anticipate and address this issue in a manner that balances the interests of individual employee defendants, corporate entities pursuing cooperation agreements, and prosecutors.

[238] *See* Kyles v. Whitley, 514 U.S. 419, 438–39 (1995) (stating that *Brady* doctrine ought to encourage prosecutors to seek justice rather than mere conviction).