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COMMENTARY: *BRADY*'S BRAINTEASER: THE ACCIDENTAL PROSECUTOR AND COGNITIVE BIAS

Alafair Burke[†]

INTRODUCTION

In his Article, *Litigating Brady v. Maryland: Games Prosecutors Play*,¹ Professor Gershman rightly argues that it is bad for prosecutors to play Hide and Seek or Blind Man's Bluff with *Brady* material. It is bad to treat one's constitutional obligation to disclose exculpatory evidence as a gamble or a scavenger hunt. It is bad for prosecutors to play all of these games. Rather than disagree with Professor Gershman, I'd like to flesh out a point about a prosecutor's disclosure that I think, unfortunately, could get lost if we place too much emphasis on the comparison to games—in particular, if we take too literally the post-colon portion of this panel's title: "Games Prosecutors Play to Avoid Compliance."

To say that prosecutors play games to *avoid* compliance with *Brady* is to suggest that *Brady* itself is perfectly sound doctrine and that defendants would be in a fine position to have a fair shot in the adversarial system, just so long as those wily prosecutors would set aside their evil games, play fair, and comply with *Brady*. The story is more complicated, as Professor Gershman acknowledges in his piece, because the *Brady* doctrine itself invites many of the prosecutorial tactics that can be depicted as unfair gamesmanship.

[†] Professor, Hofstra Law School. My thanks to Case Western Reserve Law School for inviting me to participate in this symposium and to Professor Bennett Gershman for the opportunity to comment on his Article.

¹ Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE WES. L. REV. 531 (2007).

Without disagreeing with any of Professor Gershman's observations about purposeful, knowing, or ostrich-like prosecutorial failures to disclose evidence that qualifies as *Brady* material, I will talk about a problem that others have mentioned today but have not explored: how virtuous prosecutors—acting in good faith and trying to comply with *Brady*—might still fail to turn over exculpatory evidence. To continue the analogy of games, what I am exploring is not a game that prosecutors consciously play to avoid *Brady*, but instead a brainteaser that *Brady* itself forces prosecutors to engage in.

BRADY'S BRAINTEASER

As we know, the prosecutor's constitutional obligation to disclose exculpatory evidence, as defined by the Supreme Court, is limited by the materiality requirement. So when a previously paraphrased local prosecutor says, "it is not misconduct if I don't get reversed," he takes a defensible view, at least as far as *Brady* is concerned. *Brady* requires prosecutors to disclose if, *and only if*, the evidence at issue, viewed in light of the entirety of the case, is sufficient to undermine confidence in the proceeding's outcome.² In other words, *Brady* requires a prosecutor who is deciding whether to disclose evidence, *ex ante*, to apply the same standard an appellate court would use *ex post* to decide whether to reverse a conviction if the prosecutor has not disclosed.

By requiring a comparison of the potentially exculpatory evidence against the rest of the evidence in the case—remember, the case that hasn't been tried yet—*Brady* creates a brainteaser for the prosecutor who is trying to give literal compliance with *Brady*. The prosecutor must first envision the trial: "What do I think the evidence is going to look like once the case plays out?" And in step two of the brain teaser, the prosecutor is asked to hold up this piece of evidence at issue against everything else and say, "Do I think this piece of evidence is sufficient to undermine my confidence in a guilty verdict I haven't yet achieved based on the rest of the evidence?"

Now, we have all been stumped by brainteasers before. That is because all good brainteasers prey upon common fallacies in human cognition. I would like to focus on how the *Brady* standard preys upon cognitive biases that everyone, not just prosecutors, shares. My argument is that these cognitive biases introduce non-random errors into the system. It is not simply that prosecutors sometimes undervalue materiality, and sometimes overvalue it. Rather, *Brady*

² *Kyles v. Whitley*, 514 U.S. 419, 435 (1995); *see also United States v. Bagley*, 473 U.S. 667 (1985); *United States v. Agurs*, 427 U.S. 97 (1976).

invites prosecutors to systematically undervalue the materiality of evidence.

COGNITIVE BIASES

The first cognitive bias I want to talk about is confirmation bias. We have all heard that good scientists are supposed to seek out information that would disprove their own theory. The best way to prove your theory is to first attempt to disprove it; the failure to disprove a theory is proof that it may be correct.

Social science evidence indicates that instead, when humans try to test a theory, we look only for evidence that confirms that theory. For example, in one frequently cited study,³ researchers told half of their subjects to write out questions that they would ask a person to determine if that person was an extrovert, and told the other half of the subjects to write down questions to determine whether a person was an introvert. The subjects demonstrated classic confirmation bias. Those who were trying to test for extroversion would ask questions such as, "What do you do to liven up things at a party?" Those who were looking for evidence of introversion would ask questions like, "What is it about large groups that makes you feel uncomfortable?" These questions elicit answers that only support the subjects' operating theories, not disprove them if wrong. A suspected introvert, for example, would be encouraged to discuss what makes him uncomfortable at a party, without being asked whether parties, *as a whole*, in fact make him uncomfortable.

There is also evidence of confirmation bias in recall. When people are trying to test a theory by searching their own knowledge, they retrieve information from memory in a biased manner. For example, in another well-known study,⁴ all subjects were shown a list of attributes for a hypothetical woman named Jane. Some of these attributes suggested that Jane was an extrovert, some suggested she was an introvert, and some were neutral. Some days later, each subject was asked a question about Jane. Half of the subjects were asked, "Do you think Jane would be a good real estate agent?" These subjects tended to recall things about Jane that were consistent with extroversion, such as the fact that Jane struck up a conversation with a stranger. The other half of the subjects, who had been shown the same exact list of attributes about the hypothetical woman, were asked

³ Mark Snyder & William B. Swann, Jr., *Hypothesis-Testing Processes in Social Interaction*, 36 J. PERSONALITY & SOC. PSYCHOL. 1202 (1978).

⁴ Mark Snyder & Nancy Cantor, *Testing Hypotheses About Other People: The Use of Historical Knowledge*, 15 J. EXPERIMENTAL SOC. PSYCHOL. 330 (1979).

whether Jane would make a good librarian. These subjects recalled seemingly introverted facts, such as Jane's preference to take her coffee break by herself. In sum, people recall information from memory in a manner that is biased toward supporting their current hypothesis.

Another cognitive bias is selective information processing. This term is used to describe people's tendency to evaluate evidence based on their existing beliefs. If we don't recognize this in ourselves, we all at least recognize it in others with whom we've disagreed. We've all argued with someone who refuses to budge from his or her position. If you point out some objective piece of evidence that contradicts their theory, they undermine it. They may say, "That must be made up," or, "That sounds like junk statistics to me," or, "That can't be right." This kind of maddening reasoning is an example of selective information processing.

Here is another example from the social science literature.⁵ Subjects were given contradictory empirical studies about the death penalty, one purporting to show that capital punishment was a deterrent against crime, one purporting to show it was no deterrent at all. Those subjects who walked into the room favoring capital punishment thought the study showing it was a deterrent was well-conducted, but criticized the format of the study purporting to show no deterrence. Meanwhile, those subjects who walked into the room opposed to the death penalty found numerous problems with the pro-capital punishment study, as opposed to the study finding no deterrent effect. As a result of selective information processing, the subjects became more convinced of their own pre-existing views, even though they had all been exposed to the same contradictory information.

THE INFLUENCE OF COGNITIVE BIASES ON *BRADY'S* BRAINTEASER

Let us assume for a second that prosecutors are human. The last time I checked, all the ones I knew were carbon-based. If we know that people generally suffer from cognitive biases like selective information processing, it is only natural to assume that prosecutors fall prey to these same cognitive fallacies.

Look at how *Brady's* brain teaser invites even virtuous prosecutors to systematically undervalue materiality. Take a simple example. Suppose a prosecutor has a robbery case and learns that a critical eyewitness is a chronic alcoholic. The prosecutor doesn't actually

⁵ Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979).

know whether the eyewitness was drunk on the night of the robbery; she could very well have been sober. For purposes of our hypothetical, we have to assume that the prosecutor continues to believe the witness provided an accurate account because we are, after all, supposing a virtuous prosecutor. If the information were such that the prosecutor herself no longer believed the defendant was guilty, our virtuous prosecutor would dismiss the case.

Thus, it is just a question of whether the prosecutor has to tell the defense attorney that her witness is a chronic alcoholic. To apply *Brady*, the prosecutor first has to envision the trial without the disclosure of the witness's alcoholism. Because of confirmation bias, as she retrieves the evidence in the case from memory, she is likely to recall facts that support her existing belief in guilt, such as the existence of another eyewitness, the defendant's inculpatory admissions, or the fact that the defendant was found in possession of some of the robbery proceeds in a search incident to arrest. In addition, selective information processing comes into play. While evaluating all of the evidence that suggests the defendant is guilty, the prosecutor will say to herself, "It sounds like very good evidence of guilt. I still believe he is guilty."

In her analysis, the prosecutor is not likely to emphasize facts that might undermine her existing belief in the defendant's guilt. Perhaps the defendant's inculpatory admissions were accompanied by exculpatory denials. Maybe his statements were made under police pressure. Perhaps some of robbery proceeds are missing, with no explanation for their whereabouts. Maybe the other eyewitness also suffers from memory or credibility problems. Because of confirmation bias, the prosecutor may not even consider these facts when she envisions her case. She may recall only the evidence that suggests the defendant's guilt. Even if she does consider these exculpatory facts, she may give them short shrift because of selective information processing. In short, she is going to overestimate the strength of her own case.

The second step of *Brady* requires her to evaluate the exculpatory value of the evidence at issue in the context of the entirety of the case. But because of the cognitive biases at play in the first step, she has an inflated estimate of the strength of her own case. And because of selective information processing, she is going to scrutinize the potentially exculpatory evidence for flaws. So what if her witness is a chronic alcoholic? It doesn't mean the witness was drunk on the night of the robbery. Even so drunks can still make accurate IDs. Because the prosecutor underestimates the exculpatory value of the evidence at

issue, and overestimates the inculpatory value of everything else, she may conclude that the witness's alcoholism does not make a difference. Accordingly, she may decide not to disclose the information. This is not because she is trying to avoid *Brady* by playing games, but because she is trying to solve the brain teaser created by the *Brady* doctrine itself. At each step of the analysis, *Brady* invites cognitive biases that will systematically cause prosecutors to undervalue materiality.

I choose to emphasize this particular game—*Brady*'s game, rather than prosecutors' games—for a couple of reasons. First, I think it shapes the direction of reform. Some in this Symposium have suggested that prosecutors should be disciplined more, disbarred more, or even prosecuted criminally for *Brady* violations. However, upping the sanctions for purposeful violations is unlikely to alter the decision making of prosecutors who unwittingly and accidentally fail to disclose exculpatory information.

Secondly, it is important as a narrative matter to explore how even virtuous prosecutors might fail to disclose exculpatory evidence. If we discuss only glaring, purposeful violations, or even ostrich-like willful blindness, ethical prosecutors can quickly disregard the conduct of a few unethical lawyers without appreciating how they could still fall prey to *Brady*'s traps themselves.

Many prosecutors believe and say to themselves, "I don't need to worry about these things. I don't violate *Brady*. I would never do that. I am out to do justice," without considering the possibility that they might unwittingly err while trying to do the right thing. Explaining prosecutorial decision making through the lens of cognitive bias is a way to include prosecutors in a discussion of these problems and perhaps even in the solutions.