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# Why Do Brady Violations Happen? Cognitive Bias and Beyond

By Ellen Yaroshefsky

Stop. Do you need to read another article that begins with, “Despite its fifty year history, the *Brady* promise remains unfulfilled”? You know that. You know the law. You know that the actual practice is far afield from what Justice Brennan might have envisioned in the noble pursuit of fairness in *Brady v. Maryland*.<sup>1</sup>

## Problems Persist

You are cynical about the ongoing debate about prosecutors and *Brady*. Despite this decade’s highly publicized reversals for failures to disclose *Brady* information in both state and federal courts, and despite federal and state judges’ pointed criticism of prosecutors, the problems persist.<sup>2</sup> Maybe there was incremental change in federal cases, with new training and revised policies at the Department of Justice after Judge Sullivan said in *United States v. Stevens*, “In nearly 25 years on the bench, I’ve never seen anything approaching the mishandling and misconduct that I’ve seen in this case.”<sup>3</sup> If there has been change, you think it has not made that much difference.

You compare state and federal criminal justice systems to the civil system in which there is robust discovery. You ask why the quest for financial justice to remedy a perceived wrong offers more due process and fairness than the criminal justice system, which may imprison — or perhaps execute — someone accused of a crime.

You also believe that a prosecutor who intentionally fails to disclose a key piece of information rarely will be disciplined or sanctioned.<sup>4</sup> In fact, you believe that he or she will be rewarded within the prosecutor’s office for securing a conviction, and that no one may ever know—or will look the other way—if key information was not disclosed. In the rare cases in which a disciplinary authority becomes involved, you think that the local DA will defend the line prosecutor for her conduct.<sup>5</sup> Go figure. You believe that the prosecutor’s “minister of justice” role is just words in the trenches. Nothing changes.

When asked, “Why does it happen?” you have ready answers. Ben Gershman, former prosecutor turned academic, long ago made it simple: “because it works.”<sup>6</sup> It works to secure convictions, there are no effective sanctions, and the culture supports the practices.

“But what about the law?” Surely, most prosecutors will follow the law? You begin to explain that the law is not so clear in most jurisdictions and that, in any event, it is about power. Prosecutors do not have to disclose information because they control legislatures that pass laws that limit their disclosure obligations and, even where codified, prosecutors read the obligations very narrowly. Furthermore, judges do not enforce these obligations. Perhaps this is because, in many jurisdictions, prosecutors indirectly control the judges, who are mostly former prosecutors, and even where not, are concerned about newspaper articles calling them “soft on crime” for enforcing due process obligations.

You know that defense attorneys and prosecutors do not agree as to whether disclosure problems are endemic or episodic. Overwhelmingly, prosecutors believe that intentional misconduct is highly unusual. Scores of defense lawyer accounts of intentional *Brady* failures are met with the prosecutorial claim that these are overblown accounts by biased defense lawyers and, in any event, these cases are a mere fraction of the thousands handled each year by the prosecutor's office. In other words, there is no systemic issue but only "rare cases of intentional misconduct" by a few "rogue prosecutors."

So what else is there to say about the cause of disclosure failures 50 years after *Brady*?

Perhaps you think there is little more to know about prosecutorial disclosure practices, but I hope that you will indulge a slightly different view — offered from the perspective of interviewing state prosecutors in jurisdictions around the country.

### **Influences on Disclosure Practices**

In 2010, my office interviewed 35 current and former state prosecutors who worked in seven offices located in the Northeast, Southeast and Midwest of the United States.<sup>7</sup> In each office we talked to the chief prosecutor or another high-level member of the office; a supervisor with five to ten years' experience; a training coordinator; and other prosecutors with one to three years' experience.

The size of the offices, and the communities they served, varied greatly. The smallest office had only three prosecutors, while the largest had over 500 prosecutors and a total staff of over 1,200. The communities served ranged from fewer than 50,000 to over two million individuals. All prosecutors had heavy caseloads. In urban districts, one prosecutor may handle approximately 60-80 felonies cases per year and another may handle hundreds of misdemeanor cases. Although this was not a large or random sample, it offered a reasonably varied perspective on prosecutors' offices around the country. We obtained limited information from judges and former prosecutors in these jurisdictions, but most of our conclusions are drawn from interviews with prosecutors, prior studies, and related materials.<sup>8</sup> It is difficult to conduct studies of prosecutors' decision making, and any conclusions necessarily reflect the inherent bias of results based upon self-reporting.

### **Cognitive Bias**

Despite limited research, it is likely that prosecutors' violations of their disclosure obligations are most often the result of negligence, cognitive bias, or mistakes. High caseloads and underfunding, notably in large urban jurisdictions, create an environment with insufficient documentation of witness statements, failure to follow up on police evidence, and lack of attention to items of evidentiary value. Police agencies may not comply with the most diligent prosecutor in producing information. Discretion may be driven less by carefully considered ethical judgments than by time constraints preventing careful file review. We rarely found formal or informal retrospective reviews of disclosure decisions, such as spot-checking case files to determine compliance with disclosure requirements, random audits of entire case files, or

evaluation of the reasons for disclosure failures where courts determined that there were *Brady* violations.<sup>9</sup>

Cognitive bias is a well-known cause of prosecutors' failure to disclose information.<sup>10</sup>

It is a universal, human phenomenon that does not refer to "deliberate malfeasance, a negative character trait, or 'bad cop' behavior ... and it is largely a unconscious process and cannot be overcome by force of will, good intentions, or even training. Knowing that bias exists can be helpful in preventing it, but it is subtle and pervasive, and so knowledge alone is no real defense."<sup>11</sup> Confirmation bias, an aspect of cognitive bias, "suggests a natural tendency to review the reports, not for exculpatory evidence that might disconfirm the tested hypothesis, but instead for inculpatory, confirming evidence."<sup>12</sup> Some prosecutors, convinced of their theory of guilt, cannot perceive an alternative theory of how information could be used by the defense. Defense lawyers say, "They are thinking like prosecutors, not recognizing how the defense lawyer may use the evidence at trial." As District Judge Paul Friedman reflects, "[m]ost prosecutors are neither neutral (nor should they be) nor prescient."<sup>13</sup>

None of this, of course, excuses lapses due to negligence. Nor does it begin to confront cases involving a prosecutor's intentional or knowing failure to produce required information. But an understanding of the causes may lead to proposals for systemic reform.

## **Office Policies**

Our interviews explored how prosecutors made decisions about disclosure of information.<sup>14</sup> We looked at a wide range of factors from individual personality differences, to office policies, office culture, and leadership. We looked at recruitment, training, and accountability. We tried to find out the extent to which disclosure decisions are guided by and based upon law, rules and ethics provisions, office policies, leadership, and office culture, and how much is based upon the individual's ethical or moral values beyond those imposed by existing laws, policies, or office culture.

We learned that the primary influence on pretrial disclosure practices is less the law itself, but a combination of office culture and policy, and the prosecutors' own professional values.<sup>15</sup>

The law, of course, provides the baseline for decision making but it is often ill-defined and subject to dispute even within the same office. Constitutional law, rules of criminal procedure and statutes, and rules of professional conduct are well known to readers of *The Champion*. Federal constitutional standards, after the Supreme Court decision in *Brady v. Maryland*, require all prosecutors to disclose, in a timely fashion, evidence that is "material" to guilt or punishment, including impeachment information.<sup>16</sup> This constitutional minimum standard is supplemented by state court rules and statutes that may call for the disclosure of specified documents, physical items and other information. Unlike in the federal system, where prosecutors need not list their witnesses prior to trial, prosecutors in many states must make prompt and full disclosure of the names and statements of witnesses.

We found that prosecutors were well versed in state statutory requirements and case law requiring proof of “materiality” to reverse a conviction — that is, a reasonable probability that the outcome would have been different had the information been disclosed.<sup>17</sup> However, prosecutors often reflexively used this *appellate* standard of materiality to define their pretrial obligation, even when that was not the law in the individual jurisdiction. To complicate matters, there was often no office directive or policy on the materiality issue even when the law was not clear. The policy in many offices was espoused as “when in doubt, disclose,” but this did not reflect the fundamental question of whether the appellate “materiality” standard was the baseline for pretrial disclosure.<sup>18</sup> When in doubt about what? Whether failure to disclose will result in reversal? Whether the information was significant to the defense? The policy in practice was unclear.

There was also wide disparity about the timing of necessary disclosure in narrow compliance jurisdictions. Many courts require prosecutors to disclose information well in advance of trial.<sup>19</sup> Others do not require production until the eve of trial or, in the case of information useful to impeach prosecution witnesses, after the relevant witness testifies on direct examination. We found that these determinations were primarily in the hands of the line assistant prosecutors.<sup>20</sup> In tough cases, some prosecutors wait until the last minute to disclose. As one prosecutor said, “Did he do it or not? If he did, why should I help the defense win its case by turning over information to discredit my witness before I have to? Lives of victims can hang in the balance.” Timing of disclosure often depended on the nature of the case. In white collar cases, disclosure was made earlier and more extensively. And trust of the defense lawyer was a factor. Where the prosecutor had a good relationship with the adversary and had discretion, they reported that disclosure was forthcoming.

Few prosecutors said that they were guided by Rule of Professional Conduct 3.8, which imposes obligations beyond constitutional and statutory ones.<sup>21</sup> An ABA advisory opinion interpreted Rule 3.8 as requiring *Brady* disclosure prior to the entry of a guilty plea, and disclosure of broader categories of information than required by constitutional law. It also required disclosure regardless of materiality to the outcome of the case.<sup>22</sup> State courts do not necessarily agree with the ABA analysis and few prosecutors were aware of the opinion.<sup>23</sup>

### **Liberal Disclosure, Narrow Compliance**

Because the law leaves substantial room for interpretation, office policy and culture was of utmost significance. Some offices had a policy calling for liberal disclosure, which limits the need for line prosecutors to make hard legal judgments. Indeed, some disclosure practices such as those in Ohio and North Carolina are controlled by statutory versions of “open-file discovery.” The statutory requirements are so expansive as to call for production of virtually the entire prosecution file. Other offices were “narrow compliance jurisdictions” — that is, they require prosecutors to produce only the minimal legal requirements, or left it to individual prosecutors to decide for themselves whether to disclose more than the law requires.

Many offices had some version of an “open-file” policy, but their definitions varied considerably. One office might invite defense counsel to view all information gathered in a case, while another office may simply give the defense substantial, but not total, access to its files.

However, all “open-file” policies had significantly broader disclosure than was legally required. This definition is typical of such practices: “We turn over everything to the defense as soon as possible including all investigative reports, all reports from experts and labs, grand jury testimony, the defendant’s criminal history, and anything else we have that would not be our own work product.” One office had a system in which the police provided the prosecution with two copies of every document for review and disclosure to the defense as soon as practicable — often at arraignment. All open-file systems had exceptions to disclosure where there were witness safety or similar concerns. One jurisdiction’s open-file policy excluded all homicides and most sex crimes because of the large number of such cases in which witness safety is an issue.

In open-file and other robust disclosure jurisdictions, defense lawyers report that, in general, the prosecutors are “highly ethical and very competitive in trial. ... In big cases we get information months before trial. The police department brings the file to the prosecutor’s office and we review it. Often we find information that the DA has not seen. ... There are rare prosecutors in that office who do not turn over information until the last minute to obtain an advantage, but that is the exception not the rule.”

By contrast, in narrow compliance jurisdictions, it is far more significant how the particular prosecutor interprets the law. Some prosecutors in these jurisdictions might err on the side of disclosure by reading the law liberally, but that is not generally the practice. The narrow compliance policy tends to influence both the culture of the office and the attitudes of individual prosecutors, who perceive themselves as participants in a highly adversarial, often noncooperative process. This seemed to be true even in jurisdictions where prosecutors knew that they had discretion to disclose more information than legally required. A former prosecutor in a narrow compliance jurisdiction said, “There was no intentional hiding of information or malicious acts. We did what the law said and nothing more. ... I used to be a jerk and held onto material until trial was actually starting. I held onto material until the last moment. We did no favors for the defense. ... Unless you have an open-file policy, the adversarial dynamic will influence prosecutors.”<sup>24</sup>

Whether in robust or narrow compliance jurisdictions, we found that office policies adopted and promoted by the chief prosecutor or supervisory prosecutors were a significant factor in shaping prosecutors’ disclosure practices. If taken seriously, those become the “law” of the particular office. For example, in one office with an open-file policy, a laudatory story about a prosecutor’s compliance with the policy to the office’s *strategic disadvantage* had entered office lore: several different prosecutors recounted it independently.

Conversely, informal understandings that become the office culture may subvert the policies. Several former prosecutors and judges identified an office in which prosecutors are told to comply with the law and “if in doubt, disclose,” but actual practice differs. One former prosecutor explained, “What we learned in training is not what happened in practice. We were told that if it was debatable you should turn it over. In practice, supervisors would not tell you not to turn it over, but there was pressure and you were carefully scrutinized if you did not hold on until the bitter end with discovery.”

In one office with a narrow compliance policy and the training caveat “when in doubt disclose,” prosecutors did not disclose information that a robbery victim was intoxicated at the time of making the identification. The theory for nondisclosure was that it “has nothing to do with whether the defendant committed the crime.” Prosecutors in this jurisdiction appear to “resist disclosure of [evidence relating to an] investigation of law enforcement officers as a matter of course without looking to determine whether those police internal investigations contain exculpatory evidence. Prosecutors learned from peers or supervisors that the accepted practice is not to make those disclosures, and these lawyers did not seem to make decisions on their own about what the law might require.

A judge in a narrow compliance jurisdiction said that its prosecutors “resist disclosure as a matter of course,” and that they justified such conduct by questionably narrow interpretations of law. For example, that office interpreted appellate decisions in which failure to disclose certain evidence was deemed harmless error as authority for the proposition that this type of evidence generally need not be disclosed pretrial. Prosecutors in that jurisdiction also withheld arguably exculpatory evidence on the dubious ground that the evidence did not in itself prove the defendant’s innocence.

We found that other factors such as leadership, public opinion, external accountability mechanisms and judicial oversight mattered less in disclosure decision making. Leadership was important but hardly dispositive. The chief prosecutor set the tone in the office, but unless his or her policies were translated through supervision, training, accountability and informal practices, even excellent disclosure policies were not followed.<sup>25</sup> Nor did public opinion appear to have a significant impact upon disclosure policies of the chief prosecutor, and certainly not on the conduct of junior prosecutors.<sup>26</sup>

## **Professional Sanctions**

Prosecutors were highly unlikely to be influenced by concern about criminal or civil liability or professional discipline for noncompliance with disclosure obligations. Criminal liability is not a meaningful risk for prosecutors and there is effectively no civil liability. Prosecutors have absolute immunity for trial conduct as well as for administrative activities in the areas of “training, supervision, or information system management.”<sup>27</sup> It is also extremely difficult to hold district attorney offices civilly liable for inadequate disclosure obligation policies and practices.<sup>28</sup> Moreover, disciplinary authorities have been reluctant to examine alleged prosecutorial ethical violations.<sup>29</sup> As one prosecutor acknowledged, “It’s not a fear of being called into question later on that dictates behavior because prosecutors do not tend to get punished anyway.”

In rare situations, judges impose professional sanctions, exclude evidence, or dismiss indictments for violations of disclosure obligations. However, the supposed “stigma of appellate reversal” for failure to disclose *Brady* information does not appear to be much of a factor in most prosecutors’ discretionary decision making. Most cases result in guilty pleas. In the small percentage of cases that go to trial, the chances of appellate reversal for disclosure violations are slim, and even in those cases courts do not typically name the prosecutors who were to blame.

Local judges have some impact on prosecutors' disclosure practices, most commonly through questions or comments that express disapproval. In jurisdictions where the court exercises some authority over the discovery process — either informally or pursuant to court rules — prosecutors appear to be more diligent in complying with their obligations in “grey areas.” One prosecutor complained that a particular judge believes “discovery is whatever the defendant wants.” As a result, prosecutors from this office rarely fight discovery motions and review their cases to ensure that they are complying with the judge’s perception of the law: “We would rather give the defense everything than face the wrath of this particular judge.” However, most judges tend to be “hands off.” Another judge said that the judiciary was partly responsible for prosecutorial failure to disclose exculpatory evidence because of the court’s inattention to discovery issues.

None of the offices we interviewed have mechanisms in place to reward good disclosure practices and some have a culture that affirmatively discourages good disclosure practices. In offices that emphasize prosecutors’ win-loss records and measure individual performance by conviction rates, the concept that a prosecutor’s “success means more than winning” is less likely to be translated into practice.<sup>30</sup> As one former prosecutor explained, “The trial atmosphere is that you’re there to win and have to win. That was really pushed, not a spoken rule but there was that pressure. You got it from the supervisor, his boss, and those around you. It’s celebrated when you win.”<sup>31</sup> In such offices, cohesion is valued and the office may consciously or unconsciously tolerate disclosure violations for fear of undermining morale.<sup>32</sup>

And certainly, different prosecutors in an office often make different disclosure decisions in similar situations. Prosecutors who seek to cultivate a professional reputation for fairness or reasonableness may be more forthcoming than prosecutors who place a higher value on securing convictions or who seek a reputation for toughness. Disclosure decisions may also be affected by the extent of the prosecutor’s self-confidence and experience: Those with more confidence in their ability at trial may make disclosure in cases where less self-confident prosecutors will believe it is advantageous to withhold or delay disclosure of information. “These lawyers are more confident, they have been ‘burned by experience’ and if there are bad facts, they would rather turn them over early. Experienced prosecutors can deal with discrepancies in information.” But this is not invariably true. Experience may also translate into “playing discovery games.” One younger prosecutor made the following observation about some highly experienced prosecutors: “They are not in it for the money and they don’t have room to move up in the office. They are tired and burned out. Some are lazy. All they have to hang onto is their power and they take out their frustration on the system.”

Some prosecutors thought their colleagues were unwilling to make liberal pretrial disclosure because they were being “overly paranoid and a little too competitive”; “too much of an advocate”; being “trial jocks” and “well intentioned” but too “strongly believ[ing] in the defendant’s guilt.” In one office, “there are committed ideologues particularly in sex offenses and child pornography cases” who will not disclose any information unless forced to do so by the court. Conversely, many prosecutors have a “deeper commitment to the values that support disclosure.”<sup>33</sup>



These comments about individuals and their effect upon discovery decisions were made by prosecutors in narrow compliance jurisdictions. In those jurisdictions, the combination of office policy and culture as well as these individual differences led to disparate disclosure practices that often appeared to be unpredictable and sometimes legally questionable.

## Conclusion

These interviews and existing literature reinforce the view that fairness and efficiency in the criminal justice system is best achieved through full open-file discovery statutes or other robust disclosure policies and practices. The few studies in existence demonstrate that open-file discovery statutes such as that in North Carolina promote more reliable adjudications, cost savings, and increased confidence in the criminal justice system.<sup>34</sup> Certainly increased attention to training, supervision, and accountability within prosecutors' offices is essential, but it is likely that the most significant change that will move toward the systemic fairness contemplated 50 years ago by *Brady v. Maryland* is statutory open-file discovery.

## Notes

1. *Brady v. Maryland*, 373 U.S. 83 (1963).
2. See Innocence Project, *Prosecutorial Oversight Tour Begins in New York City*, [http://www.innocenceproject.org/Content/The\\_Innocence\\_Project\\_Online\\_February\\_2012.php](http://www.innocenceproject.org/Content/The_Innocence_Project_Online_February_2012.php).
3. Transcript of Motion Hearing, *United States v. Stevens* (2009).
4. Robert A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. Rev. 693 (1987); Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies That Prove That Assumption Wrong*, 80 Fordham L. Rev. 537 (2011); Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. Rev. 275 (2004). Empirical studies discussed in these articles demonstrate the lack of prosecutorial discipline.
5. Rudin, *supra* note 4 at 544-58 (discussing the Bronx District Attorney's Office); Yaroshefsky, *supra* note 4.
6. Bennett L. Gershman, *Why Prosecutors Misbehave*, 22 Crim. L. Bull. 131 (1986).
7. Ellen Yaroshefsky & Bruce A. Green, *Prosecutors' Ethics in Context: Influences on Prosecutorial Disclosure*, in *Lawyers in Practice: Ethical Decision Making in Practice* 269 (Leslie C. Levin & Lynn Mather eds., 2012).
8. *Id.*
9. *Id.*
10. Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 Wm. & Mary L. Rev. 1587, 1590-91 (2006) ("Perhaps prosecutors sometimes fail to make decisions that rationally further justice, not because they fail to value justice, but because they are, in fact, irrational. They are irrational because they are human, and all human decision makers share a common set of information-processing tendencies that depart from perfect rationality."); see also Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 Marq. L. Rev. 183 (2007); Alafair S. Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J. L. &

- Liberty 512 (2007); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291 (2006).
11. Erin Morris, Ph.D., *Cognitive Bias and the Evaluation of Forensic Evidence*, The Champion, May 2012 at 12.
  12. Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 Wm. & Mary L. Rev. 1587, 1603 (2006).
  13. *United States v. Safavian*, 233 F.R.D. 12, 16 (D.D.C. 2005).
  14. Yaroshefsky & Green, *supra* note 7.
  15. *Id.*
  16. *Brady v. Maryland*, 373 U.S. 83 (1963). Evidence is deemed to be “material” if there is a reasonable probability that the outcome would have been different had the evidence been disclosed. (*United States v. Bagley*, 473 U.S. 667 (1985)). The *Brady* rule was extended to require the disclosure of impeachment evidence including the disclosure of “an alleged promise to a government witness that he would not be prosecuted if he testified on behalf of the government.” (*Giglio v. United States*, 405 U.S. 150, 153-55 (1972)). Prosecutors are also required to make a reasonable request of the police to obtain information from their files that is subject to disclosure. (*Kyles v. Whitley*, 514 U.S. 419 (1995)); *see also* Ellen Yaroshefsky, *New Orleans Prosecutorial Disclosure in Practice After Connick v. Thompson*, 25 Geo. J. Legal Ethics 913 (2012); *See also* Excerpts from National Prosecution Standards (Nat’l Dist. Attorneys Ass’n 2009) (The National District Attorneys Association has long been on record as opposing “materiality” as the basis for pretrial disclosure); H.R. Rep. No. 105D (ABA adopted a resolution making clear that materiality should not be the factor for pretrial disclosure).
  17. Yaroshefsky & Green, *supra* note 7.
  18. *Id.*
  19. Justice Project, *Expanded Discovery in Criminal Cases: A Policy Review* (2007).
  20. Yaroshefsky & Green, *supra* note 7.
  21. ABA Model Rule 3.8(d) requires the prosecution to “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal. Chief prosecutors, trainers, and supervisors discussed ethics rules generally during our interviews but lower level prosecutors seemed to be unfamiliar with their specific provisions. Some had only vague memories from professional responsibility classes in law school and the Multistate Professional Responsibility Examination. Law, not disciplinary rules, was the base line for disclosure compliance.
  22. ABA Op. 09-454 (2009).
  23. Yaroshefsky & Green, *supra* note 7.
  24. Yaroshefsky & Green, *supra* note 7.
  25. Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B. U. L. Rev. 125 (2004); Rachel E. Barkow, *Organizational Guidelines for the Prosecutor’s Office*, 31 Cardozo L. Rev. 2089 (2010); Alafair S. Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J. L. & Liberty 2512 (2007); Yaroshefsky & Green, *supra* note 7. In other words, regardless of what the chief prosecutor says to the public or within the office about the importance of procedural

fairness, prosecutors get the message that winning at trial is the key to career success and that fair-process values are comparatively unimportant.

26. See 30 Cardozo L. Rev. (2009); Yaroshefsky & Green, *supra* note 7. Pretrial disclosure practices are unlikely to come to the public's attention, or directly to contribute to the public's perception of the office, except in the rarest of high-profile cases such as the Duke lacrosse case in which disclosure decisions become a matter of public controversy. Hiring and training practices are important, but if disclosure policies are of significant concern, these need to be constantly reinforced. For example, the district attorney in Dallas, Texas, inaugurated in 2007, sends all potential candidates *Brady* and other cases and tells them to be prepared to discuss the issues during the interview, hoping to impart the values of full and fair disclosure.
27. See *Imbler v. Pachtman*, 424 U.S. 409 (1976) (discussing qualified immunity for investigative functions with good faith defense); *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009).
28. *Connick v. Thompson*, 131 S. Ct. 1350 (2011) (denying civil liability for *Brady* violations by New Orleans prosecutors).
29. Robert A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. Rev. 693 (1987); Joel B. Rudin, *The Supreme Court Assumes Errant Prosecutors Will Be Disciplined by Their Offices or the Bar: Three Case Studies That Prove That Assumption Wrong*, 80 Fordham L. Rev. 537 (2011); Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. Rev. 275 (2004).
30. Yaroshefsky & Green, *supra* note 7.
31. *Id.*
32. Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 Cardozo L. Rev. 2089 (2010).
33. Ronald F. Wright, *Systems and Culture in New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Group on Best Practices*, 31 Cardozo L. Rev. 1995 (2010).
34. Janet Moore, *Democracy and Criminal Discovery Reform After Connick and Garcetti*, 77 Brooklyn L. Rev. 1329 (2012); Robert Mosteller, *Exculpatory Evidence, Ethics and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open File Discovery*, 15 Geo. Mason L. Rev. 257 (2008).