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Recommended Citation

Ellen Yaroshefsky, *New Orleans Prosecutorial Disclosure in Practice After Connick v. Thompson*, 25 Geo. J. Legal Ethics 913 (2012)

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New Orleans Prosecutorial Disclosure in Practice After *Connick v. Thompson*

ELLEN YAROSHEFSKY*

INTRODUCTION

This year, two highly publicized Supreme Court cases drew national attention to prosecutorial misconduct in the Orleans Parish District Attorney's Office. *Connick v. Thompson*¹ and *Smith v. Cain*² both involved significant and disturbing failures to disclose information to the defense as required under *Brady v. Maryland*.³ Both cases were tried during the nearly thirty-year tenure of Harry Connick (1974-2003) and defended in the Supreme Court by the current District Attorney, Leon Cannizzaro, who was elected in 2008.

In separate trials, John Thompson was convicted of attempted robbery and of capital murder, and incarcerated for eighteen years—fourteen of those in isolation on death row.⁴ A few weeks before his execution date, a defense investigation found exculpatory evidence in the robbery case that had been withheld from his trial counsel by prosecutors and law enforcement, including blood evidence.⁵ Once tested, the evidence established his innocence; the robbery case was dismissed and the murder conviction was overturned.

The prosecutors retried Thompson separately on the capital murder charge. He was acquitted, filed a civil rights action under 42 U.S.C. § 1983, and won a \$14 million damages award on the theory that the Office failed to train prosecutors on their constitutional responsibility to turn over exculpatory and

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1. 131 S. Ct. 1350 (2011) (holding that defendant John Thompson did not demonstrate a pattern of disclosure violations by the Orleans Parish District Attorney's Office sufficient to sustain a damages award on a "failure to train" theory of municipal liability).

2. 132 S. Ct. 627 (2012) (overturning the conviction of Juan Smith upon a finding that New Orleans prosecutors failed to turn over significant impeachment evidence, including conflicting statements of the sole eyewitness, to the defense).

3. 373 U.S. 83, 87 (1963). In *Brady*, the Supreme Court established that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." *Id.*

4. 131 S. Ct. at 1355; *Thompson v. Connick*, 553 F.3d 836, 844, 865 (5th Cir. 2008), *aff'd by divided en banc opinion*, 578 F.3d 293 (5th Cir. 2009), *rev'd*, 131 S. Ct. 1350 (2011).

5. *Connick*, 131 S. Ct. at 1355.

impeachment information. The Supreme Court reversed.⁶ In *Connick v. Thompson*, a controversial 5-4 decision, the majority characterized the Office's blatant misconduct as "a single *Brady* violation,"⁷ and held that a District Attorney's office may not be held liable under 42 U.S.C. § 1983 for failure to train its prosecutors based on a single *Brady* violation.

Justice Ginsburg, reading her dissent from the bench, disputed the characterization in Thompson's case as a "single *Brady* violation" and noted the longstanding *Brady* problems in Orleans Parish:

[Former New Orleans District Attorney Harry] Connick, who himself had been indicted for suppression of evidence, created a tinderbox in Orleans Parish in which *Brady* violations were nigh inevitable. And when they did occur, Connick insisted there was no need to change anything, and opposed efforts to hold prosecutors accountable on the ground that doing so would make his job more difficult.⁸

The following term, the Court returned to the issue of prosecutorial misconduct in Connick's office. In *Smith v. Cain*,⁹ the Court ordered a new trial for Juan Smith following revelations of the prosecutor's failure to disclose *Brady* material that was "breathtaking both in its scope and in its exculpatory and impeachment value."¹⁰ Smith's conviction was based solely on the eyewitness testimony of a survivor. The prosecution had failed to disclose numerous inconsistent statements of that survivor as well as other impeachment information. The Justices, asking "one incredulous question after another,"¹¹ expressed frustration with the argument of the Orleans Parish District Attorney that the suppressed material was not covered by *Brady*. Justice Scalia was brusque: "Surely it should have been turned over."¹² The decision to reverse the conviction was supported by eight of nine Justices on the Court. Clarence Thomas, who authored the majority opinion in *Connick*, dissented.¹³

These were not the first Supreme Court cases to address *Brady* violations in New Orleans. In the 1995 Connick-era case *Kyles v. Whitley*, the Supreme Court

6. *Id.* at 1366.

7. *Id.* at 1358 (determining that the issue was whether "Thompson could establish municipal liability for failure to train the prosecutors based on the single *Brady* violation without proving a prior pattern of similar violations").

8. *Id.* at 1387 (Ginsburg J., dissenting).

9. 132 S. Ct. 627 (2012).

10. Brief for Petitioner at 34, *Smith v. Cain*, 132 S. Ct. 627 (2012) (No. 10-8145).

11. Adam Liptak, *Justices Rebuke a New Orleans Prosecutor*, N.Y. TIMES, Nov. 8, 2011, <http://www.nytimes.com/2011/11/09/us/supreme-court-rebukes-a-new-orleans-prosecutor.html>.

12. See Bruce Alpert, *U.S. Supreme Court Justices Question Handling of Evidence by Orleans Parish Prosecutors*, TIMES PICAYUNE, Nov. 8, 2011, http://www.nola.com/crime/index.ssf/2011/11/us_supreme_court_justices_ques.html.

13. *Connick v. Thompson*, 131 S. Ct. 1350, 1387 (2011).

overturned the conviction of Curtis Kyles on similar grounds.¹⁴ Kyles's conviction for murdering an elderly woman in a parking lot was based upon eyewitness testimony. Later it was discovered that the prosecution had suppressed witness statements containing inconsistencies that would have been significant at trial.¹⁵

The Supreme Court admonished the prosecution for its conduct: "[i]ts responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable."¹⁶ Apparently, the *Kyles* decision had little impact upon the practices of Connick's office, now renowned for its *Brady* violations.¹⁷ This was no surprise. As Connick stated in his testimony in John Thompson's civil case nearly 20 years later: "I stopped reading law books . . . when I became the D.A., and looking at opinions."¹⁸

In 2008, Leon Cannizzaro was elected District Attorney of Orleans Parish, assuming office four months after the Fifth Circuit upheld John Thompson's \$14 million award by a Louisiana jury against his predecessor.¹⁹ He vowed to implement changes in the Office's practices and operations. During his election campaign in 2008, he ran on the promise of fulfilling three goals: "Re-establishing public confidence by prosecuting murder cases that have sat on the docket for years; expanding the diversionary program for first offenders; and stopping the 'revolving door' of youthful offenders at Juvenile Court."²⁰ Once elected, he directed his office to put into place a series of measures to address the Office's prosecutorial practices and culture,²¹ and appointed Graymond Martin, a former police official, as First District Attorney. Martin's role in the administration includes the design and implementation of systemic changes, including changes to the Office's discovery practices.

This Article explores the changes in *Brady* practices in the Orleans Parish District Attorney's Office in the Cannizzaro administration.²² I sought to determine the extent to which new policies and practices have been implemented and the extent to which the Office's *Brady* practices have changed. How can and

14. 514 U.S. 419, 441 (1995).

15. *Id.*

16. *Id.* at 438

17. See Brief for the Orleans Public Defenders as Amicus Curiae Supporting Petitioner, *Smith v. Cain*, *infra* note 32.

18. Transcript of Record at 183-85, *Thompson v. Connick*, No. 03-cv-2045, Dkt. No. 178 (E.D. La. Feb. 6, 2007) (Connick testimony).

19. *Thompson v. Connick*, 578 F.3d 293 (5th Cir. 2009), *rev'd*, 131 S. Ct. 1350.

20. See David Winkler-Schmit, *Strategies for Reform: The Four Candidates for Orleans Parish DA Promise Top-to-Bottom Improvements in the Beleaguered Offices*, GAMBIT ONLINE, Sept. 30, 2008, available at <http://www.bestofneworleans.com/gambit/strategies-for-reform/Content?oid=1251342>.

21. Interview with Graymond Martin, First Assistant Dist. Attorney, Orleans Parish, (Feb. 3, 2012). Some of those measures and practices are discussed in this Article.

22. "*Brady* practices" refers to policies and practices designed to comply with *Brady v. Maryland* and its progeny.

how does the prosecutorial culture in New Orleans adapt to the post-*Connick v. Thompson* era? To answer this question, this Article draws in great measure upon interviews with key stakeholders in the New Orleans criminal justice system, including the First District Attorney, former prosecutors (including those involved in the aforementioned Supreme Court cases), former judges, defense attorneys, civil rights attorneys, criminal law teachers in New Orleans, and criminal justice policy experts.²³ After reviewing the scant literature²⁴ on the Office's *Brady* policy, I conducted interviews with eighteen Orleans Parish lawyers and judges. The interviews revealed surprisingly disparate views of disclosure practices in the current office.²⁵ As described below, new *Brady* protocols have been operational, notably within the last few months, but it remains unclear whether the Office's history of noncompliance with *Brady* obligations is a feature of a broader and deeper culture of prosecution that will be impervious to new protocols in office policy.

Changing from a culture of nondisclosure to one that more readily conforms to new policies that facilitate compliance with *Brady* requirements is a difficult and ongoing process. The interviews revealed that lawyers in New Orleans see few signs of positive change in prosecutorial practice or culture. Some interviewees even suggested that the current caseload under the Cannizzaro administration and

23. The interviewees secured were promised anonymity. Graymond Martin, First Assistant District Attorney, agreed to have his name and programmatic initiatives mentioned. Some initial interviews were conducted by telephone in November and December 2011. Follow-up and other interviews were conducted in person from February 2-5, 2012. To ensure anonymity, the citations included in this article are only to "Interview," as well as to the date on which the interview took place.

24. There are few academic sources that contain up-to-date information on recent policy changes in the Cannizzaro administration. Aside from interviews, which form the basis for the majority of the information contained in this Article, most of the available information about the operation of the Parish D.A.'s Office is found in newspaper articles, primarily in publications such as the *TIMES PICAYUNE*, and in recent reports from policy organizations working in New Orleans since Hurricane Katrina, such as the Vera Institute. See, e.g., *THE VERA INSTITUTE OF JUSTICE: NEW ORLEANS OFFICE*, available at <http://www.vera.org/project/new-orleans-project> [hereinafter *VERA INSTITUTE REPORT*]. Criminal justice advocacy organizations such as the ACLU and the Innocence Project all compile a significant amount of information about the criminal justice system in New Orleans, as well. See, e.g., *AMERICAN CIVIL LIBERTIES UNION: LOUISIANA*, available at <http://www.aclu.org/affiliate/louisiana>; see also *THE INNOCENCE PROJECT NEW ORLEANS: CAUSES/CURES*, available at <http://www.ip-no.org/causes-cures>. Recently published books are also helpful in illuminating the practices of the Orleans Parish District Attorney's Office. See generally JOHN HOLLWAY & RONALD M. GAUTHIER, *KILLING TIME: AN 18-YEAR ODYSSEY FROM DEATH ROW TO FREEDOM* (2010) (providing a compelling in-depth analysis of the John Thompson case, as well as a penetrating view of prosecutorial culture in the Connick administration).

25. This, of course, is not unusual. In any system there are likely to be disparate views among stakeholders as a result of professional bias—all professionals tend to form opinions in line with their roles and duties, even in relation to ethical and moral judgments. See, e.g., Mervin H. Needell, *Are Medical Ethics Different From Legal Ethics?*, 14 *ST. THOMAS L. REV.* 31, 31 (2001) (addressing whether professional bias and lawyers' and doctors' distinct roles can actually impact moral judgments and intuitions). In the context of stakeholders in the criminal justice system in New Orleans, however, professional bias alone does not seem to account for the disparity in views between prosecutors, defense attorneys, and other criminal justice experts involved in the system. While one expects a range in viewpoints as a result of phenomena such as professional bias, the extent to which the views of criminal justice stakeholders in New Orleans differ is startling.

other workplace pressures make it worse, or at least as bad, as before. Enforcing *Brady* disclosure is but one of the serious challenges confronting the criminal justice system in New Orleans. As described in Section VI below, it is a challenge that likely can be met only through changes in both internal and external accountability measures. This Article sets forth an agenda for reform that includes changes in internal policies and practices, legislative implementation of full open file discovery, and external accountability through judicial enforcement, the disciplinary system, and the creation of an independent commission.

I. THE NATIONAL CONTEXT OF *BRADY* OBLIGATIONS AND VIOLATIONS

Despite prosecutors' nearly 50-year-old obligation to disclose favorable information to the defense as established in *Brady v. Maryland*,²⁶ compliance with disclosure requirements remains one of the most contested issues in the criminal justice system. Discovery obligations nationwide are a patchwork of state and federal statutes and ethics requirements²⁷ that, taken together, are confusing and provide disparate views as to the scope of information that must be revealed under *Brady*.²⁸ Scores of convictions are reversed each year for *Brady* violations, but the appellate standard for reversal of a conviction is only where the withheld evidence had a reasonable probability of affecting the outcome (the "harmless error" rule).²⁹ This "harmless error" rule dilutes appellate supervision

26. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). See, e.g., *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bagley*, 373 U.S. 83 (1963); *Napue v. Illinois*, 360 U.S. 264, 269-270 (1959); *Berger v. United States*, 295 U.S. at 78, 88-89 (1935); *Mooney v. Holohan*, 294 U.S. 103, *reh'g denied*, 294 U.S. 732 (1935).

27. This fundamental point has recently been the subject of numerous articles, legislative proposals and conferences related to revisions in the ABA Standards for the Prosecution and Defense Function. I, among others, have explored this previously. See Ellen Yaroshesky, *Prosecutorial Disclosure Obligations*, 62 HASTINGS L.J. 5, 1323 (2011) (and articles cited therein) ("[Prosecutorial disclosure obligations] are informed by [. . .] various sources [. . .] which include federal and state constitutional provisions, as interpreted by courts, federal and state statutes, court rules and orders, and state ethics rules. Another [nonbinding] source that guides prosecutorial disclosure decisions is the ABA Criminal Justice Standards for the Prosecution Function."). See *NACDL Model* 18 U.S.C. § 3014 (2011) (proposing broadening current disclosure guidelines to include "all information . . . that may reasonably appear to be favorable to the defendant with respect to the determination of guilt, or of any preliminary matter, or of the sentence to be imposed").

28. See, e.g., U.S. DIST. CT. RULES D. MASS., LR 116.2, § A(1-4) (amended by 2012 MASS. COURT ORDER 3002 (C.O. 3002)) (the government is required to turn over all exculpatory evidence that may "cast doubt on defendant's guilt . . . , cast doubt on the admissibility of [the government's] evidence . . . , cast doubt on the credibility or accuracy of [the government's] evidence . . . , [or] diminish the degree of the defendant's culpability"); see also OHIO REV. CODE ANN. CRIM. R. 16, § B(5) (2009) (requiring the government to turn over "any evidence favorable to the defendant and material to guilt or punishment").

29. See Janet Moore, *Democracy and Criminal Discovery Reform after Connick and Garcetti*, BROOKLYN L. REV. (forthcoming 2012) (manuscript at n.5) (citing studies of prosecutorial misconduct and harmful error resulting in the overturn of criminal convictions); see also Emily M. West, *Court Findings of Prosecutorial Misconduct Claims in Post-Conviction Appeals and Civil Suits Among the First 255 DNA Exoneration Cases*, INNOCENCE PROJECT, (Aug. 2010), www.innocenceproject.org/docs/Innocence_Project_Pros_Misconduct.pdf ("While not a perfect comparison, there has been one large, nationwide study, by the Center of Public Integrity on prosecutorial misconduct which found that among all 11,452 documented appeals alleging some type of

of disclosure obligations.³⁰ Without uniform oversight of prosecutors' disclosure decisions, it is difficult to know how many violations actually occur. If evidence is lost, neglected, or actively suppressed, and no one comes forward with it, this evidence may go undiscovered by the defense. In a study of sixty-five recent DNA exoneration cases, a report on prosecutorial misconduct and successful post-conviction appeals found that nearly twenty percent of cases were reversed as a result of harmful error on the part of the prosecuting attorneys—primarily because of failures to disclose evidence favorable to the defense.³¹ Even in prosecutions not involving DNA evidence, the error rate is likely to be similar.³²

Other factors also account for disclosure failures.³³ Within any given local jurisdiction, strained relationships between police departments, the District Attorney's office, and defense counsel may hinder vital communication of information. Even where the prosecution and police sustain an ongoing effective relationship, information does not always "flow" as quickly or efficiently as it should.³⁴ Some police officer training protocols advise that officers should conduct "materiality review" of evidence themselves and independently determine what information needs to be disclosed under *Brady*.³⁵ But this determination is supposed to be for the prosecution, not the police, and it is likely to result

prosecutorial misconduct between 1970 and 2002, 2,012 appeals led to reversals or remanded indictments, indicating harmful error—a rate of 17.6%. This is nearly identical to the rate of harmful error findings in the DNA exoneration cases of 18%.")

30. *United States v. Jones*, 620 F. Supp. 2d 163, 172 (D. Mass. 2009) (reported cases cannot measure scope of disclosure violations).

31. *See West, supra* note 29 ("Results from this study indicate that of the 65 DNA exoneration cases involving documented appeals and/or civil suits addressing prosecutorial misconduct, 31 (48%) resulted in court findings of error, with 18% of findings leading to reversals (harmful error).").

32. Brief for the Orleans Public Defenders as Amicus Curiae Supporting Petitioner, *Smith v. Cain*, 565 U.S. ____ (2012) (No. 10-8145), 2011 WL 3706111, at 6 n.3 ("Of course, [the rate of prosecutorial misconduct calculated by studying error on appeals] is likely to be 'a gross underestimation of the number of cases in which evidence may have been suppressed' because many *Brady* violations—which by their nature involve hidden or suppressed evidence—never come to light.").

33. Lack of competent defense counsel also exacerbates disclosure failures, as such lawyers may neglect to uncover material or potentially exculpatory evidence because they do not diligently pursue prosecutors, police officers, and crime labs to reveal all relevant information. Exoneration cases involving allegations of *Brady* violations often correlate directly to ineffective assistance of counsel claims. *See BARRY SCHECK ET AL., FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED: ACTUAL INNOCENCE*, Ch. 9 (1st ed. 2000) (describing cases in which ineffective counsel by defense attorneys has resulted in convictions, lost appeals, and sometimes even death sentences for indigent defendants).

34. *See Symposium, New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 1973 (2010) ("In many jurisdictions, there is no formal mechanism for ensuring that all case-related documents and materials are provided to prosecutors. Often, the procedure is informal, based upon implicit understandings and expectations. And even then, prosecutors often do not receive copies of all information developed by police.") [hereinafter *Cardozo Law Symposium*].

35. *See Richard Lisko, Agency Policies Imperative to Disclose Brady v. Maryland Material to Prosecutors, THE POLICE CHIEF*, (Feb. 2011), available at http://www.policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2329&issue_id=32011 (recommending that police departments implement policies taking into account what information constitutes *Brady* material and creating a standardized system of turning this information over to prosecutors).

in the failure of the prosecution to obtain information.

Caseload pressures and the emphasis on quickly prosecuting defendants and securing convictions can also influence the frequency or likelihood of disclosure violations.³⁶ Some prosecutors may fear that disclosing evidence to the defense is detrimental to their own cases and will “tack too close to the wind” in examining disclosure obligations.³⁷ Although broadening criminal discovery guidelines is likely to reduce *Brady* violations, most District Attorneys’ offices have not often shown support for the implementation of broader criminal discovery statutes. While a few states have adopted fairly broad criminal discovery guidelines, and local offices often implement versions of an “open file” discovery system, this practice of broadening criminal discovery obligations is not the norm.³⁸

When misconduct is uncovered, few jurisdictions provide adequate and consistent means of addressing it.³⁹ While some District Attorneys’ offices are beginning to recommend the imposition of professional discipline upon prosecutors found to have engaged in deliberate misconduct,⁴⁰ prosecutors often escape censure for repeated disclosure violations, even in their own workplaces.⁴¹ In

36. See Ellen Yaroshefsky & Bruce Green, *Prosecutors’ Ethics in Practice: Influence on Prosecutorial Disclosure*, in *LAWYERS IN CONTEXT: ETHICAL DECISION MAKING IN PRACTICE* Ch. 13 (Leslie C. Levin and Lynne Mather eds., 2012) (discussing two high-profile cases in which District Attorneys withheld exculpatory evidence from defense counsel, presumably amid intense pressure to win their cases); see also 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).

37. *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) (“a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence”); *United States v. Zinnel and Eidson*, No. S-11-0234 (E.D. Cal. 2011); see also Yaroshefsky & Green, *supra* note 36 *passim*.

38. See, e.g., N.C. GEN. STAT. § 15A-903-910 (2012) (the North Carolina criminal discovery laws, which now require the prosecution to provide the defense with all the information obtained during the criminal investigation); see also FL. R. CRIM. PROC. 3.220(b) (2011); MINN. R. CRIM. PROC. 9.01 (2010); N.J. COURT R. 3:13-3(a)-(c) (2011) (all examples of criminal discovery statutes that are broader than the norm); U.S. DIST. CT. RULES D. MASS., LR 116.2, § A(1-4) (amended by 2012 MASS. COURT ORDER 3002 (C.O. 3002) (the government is required to turn over all exculpatory evidence that may “cast doubt on defendant’s guilt . . . , cast doubt on the admissibility of [the government’s] evidence . . . , cast doubt on the credibility or accuracy of [the government’s] evidence . . . , [or] diminish the degree of the defendant’s culpability”); OHIO REV. CODE ANN. CRIM. R. 16, § B(5) (2009) (requiring the government to turn over “any evidence favorable to the defendant and material to guilt or punishment”). See *infra* for a discussion of the meaning and content of “open file” discovery.

39. See, e.g., Rudin, *supra* note 36, at 540 (“A number of commentators and scholars already have found that . . . the discipline of prosecutors rarely occurs. They also have analyzed the existing mechanisms for internal and external prosecutorial oversight and found that . . . such mechanisms fail to provide an effective structure for prosecutorial accountability.”); see also Angela J. Davis, *The Legal Profession’s Failure to Discipline Unethical Prosecutors*, 36 *HOFSTRA L. REV.* 275 (2008); Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 *U. ILL. L. REV.* 1573 (2003); Kevin C. McMunigal, *The (Lack of) Enforcement of Prosecutor Disclosure Rules*, 38 *HOFSTRA L. REV.* 847 (2010).

40. See Dist. Attorneys Ass’n of the State of N.Y., “*The Right Thing*”: *Ethical Guidelines for Prosecutors*, 6-7, (2011), available at <http://www.daasny.org/EthicsHandbook%208-11-11.pdf> (possible consequences of misconduct include censure, being fired, being formally reprimanded, demoted, criminally prosecuted, or civilly sued for damages).

41. See David Keenan et al., *The Myth of Prosecutorial Accountability after Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 *YALE*

New Orleans, no prosecutor has ever been sanctioned for misconduct—even when such misconduct was deliberate.⁴² The first New Orleans prosecutor to be brought before a state disciplinary committee and found to have engaged in misconduct⁴³ had his sanction suspended because the committee noted that he was the first prosecutor ever to be disciplined for a *Brady* violation.⁴⁴

Nationally, the lack of accountability for prosecutorial misconduct—either through disciplinary systems, court sanctions, or civil liability—is glaring, and a topic of ongoing concern. Scholars and commentators have long argued that accountability measures including the imposition of discipline, judicial sanctions, and statutes imposing civil liability are essential to reduce negligent or intentional violations of *Brady* and other disclosure requirements.⁴⁵ In addition to those external accountability measures, a court rule or statute requiring full open file discovery and pretrial disclosure compliance conferences are among the recommendations to improve criminal justice system discovery practices. Internally, enforceable policy and practice changes are essential to improve compliance. As described below, New Orleans under District Attorney Cannizzaro has at least begun the internal process to improve disclosure practices as required by *Brady*.

L.J. ONLINE 203, 205 (2011) (“Our findings, based on an investigation into the professional conduct rules and attorney discipline procedures of all fifty states, suggest that disciplinary systems as they are currently constituted do a poor job of policing prosecutors.”).

42. See Campbell Robertson & Adam Liptak, *Supreme Court Looks Again at Methods of D.A.’s Office in Louisiana*, N.Y. TIMES, (Nov. 21, 2011), <http://www.nytimes.com/2011/11/03/us/orleans-district-attorneys-office-faces-us-supreme-court.html?pagewanted=all>.

43. The use of the term “prosecutorial misconduct” in reference to all *Brady* violations is itself contentious. While good faith is immaterial to a finding of a due process violation when exculpatory evidence is withheld from a defendant, the American Bar Association (ABA) recommends distinguishing between intentional and unintentional misconduct in determining whether to sanction prosecutors. Its resolution calls for the use of the term “error” to refer to unintentional violations, and to reserve the term “misconduct” for instances when “a prosecutor knowingly or intentionally violates a constitutional or legal requirement.” Prosecutors resist the notion that most *Brady* violations are intentional except in extraordinary circumstances such as in *Connick*. See, e.g., ABA HOUSE OF DELEGATE REPORT NO. 100B (Aug. 2010); see also Yaroshefsky & Green, *supra* note 36, at 269 (“Prosecutors believe that intentional misconduct . . . is highly unusual; many defense lawyers dispute their claim.”).

44. “In 2005, the Louisiana Supreme Court barred Mr. Jordan from practicing law for three months for withholding evidence in a different case. Noting that was the first time that court had ever disciplined a prosecutor for violating the *Brady* decision, the court suspended the punishment.” Campbell, *supra* note 42.

45. See generally Moore, *supra* note 29; see also Cardozo Law Symposium, *supra* note 34; Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for A Broken System*, 2006 WIS. L. REV. 399, 425 (2006) (“For example, an open file discovery obligation would help to eliminate one of the major forms of prosecutorial misconduct—the suppression of material evidence, which is a leading cause of wrongful convictions. Under an open file discovery regime, the prosecutor could still seek a protective order to withhold some information from the defense counsel, but such a system would require a court to review the request.”) (internal citations omitted).

II. THE CULTURE OF THE NEW ORLEANS PROSECUTOR'S OFFICE AND ITS HISTORY OF *BRADY* VIOLATIONS

"Anything related to criminal justice and its misuse has to focus on New Orleans. It makes everywhere in the country pale by comparison."⁴⁶

New Orleans is notorious for its high crime rate and overburdened criminal justice system.⁴⁷ The city is also plagued by racial tensions, which play a significant role in its politics and the administration of the criminal justice system. This was true long before Hurricane Katrina devastated the city in 2005, destroying much of its law enforcement and criminal justice infrastructure.⁴⁸

It is not a secret that, before Katrina, the New Orleans criminal justice system had long been plagued with inefficiencies and structural barriers that interfered with the fair administration of justice. Before Katrina, almost all criminal justice system agencies in New Orleans faced substantial funding problems and had been repeatedly criticized for weak management.⁴⁹

Since Katrina, New Orleans has struggled to rebuild its infrastructure despite constraints on manpower and resources.⁵⁰ An overriding difficulty is coping with the crime rate in New Orleans. A Department of Justice study found that the murder rate in New Orleans is "ten times the national average,"⁵¹ making New Orleans the "nation's most murderous city."⁵² Similarly, as of 2009, New Orleans had the "highest rate of incarceration of any major city in the United States—almost three times the national average."⁵³ New Orleans' remarkably high crime rate has put pressure on law enforcement officials and prosecutors to be especially vigorous in responding to crime. In 2007, for example, former District Attorney Eddie Jordan was compelled to resign, at least in part, because

46. Interview 5 (Feb. 2, 2012).

47. See *Overview of the Vera Institute of Justice New Orleans*, Nov. 1, 2011 ("[Before Katrina] New Orleans led the nation in its local detention rate and spent one-third of its budget on public safety, yet violent crime and community distrust of the system ran sky high. The city's criminal justice system was troubled and inefficient before Hurricane Katrina—and devastated afterward."); see also *After Katrina: Washed Away? Justice in New Orleans*, THE URBAN INSTITUTE: JUSTICE POLICY CENTER, Aug. 2007, http://www.urban.org/UploadedPDF/411530_washed_away.pdf [hereinafter URBAN JUSTICE].

48. Brandon L. Garrett & Tania Tetlow, *Criminal Justice Collapse: The Constitution After Hurricane Katrina*, 56 DUKE L.J. 127, 127 (2006) ("The . . . criminal justice system collapsed after Hurricane Katrina, resulting in a constitutional crisis. Eight thousand people, mostly indigent and charged with misdemeanors such as public drunkenness or failure to pay traffic tickets, languished indefinitely in state prisons. The court system shut its doors, the police department fell into disarray, few prosecutors remained, and a handful of public defenders could not meet with, much less represent, the thousands detained.").

49. URBAN JUSTICE, *supra* note 47, at 1.

50. See generally URBAN JUSTICE, *supra* note 47.

51. See Brendan McCarthy, *New Orleans Criminal Justice System is Stronger Every Day, DA Says*, TIMES PICAYUNE, Jan. 26, 2011, http://www.nola.com/crime/index.ssf/2011/01/district_attorney_leon_cannizz_1.html.

52. *Id.*

53. American Civil Liberties Union, *In for a Penny: The Rise of America's New Debtors' Prisons*, Oct. 2010, 17 n.6, http://www.aclu.org/files/assets/InForAPenny_web.pdf.

of his failure to successfully prosecute several high profile cases.⁵⁴

Harry Connick has had a long-lasting and controversial impact on New Orleans during his twenty-nine years as the Parish's District Attorney (1974 to 2003). Over the course of his tenure he was re-elected five times,⁵⁵ and at the end of his final term he was given an award for distinguished service from "'Drug Czar"' John P. Walters "in recognition of exemplary accomplishment and distinguished service in the fight against illegal drugs."⁵⁶ Under Connick, New Orleans began to receive almost as much attention for its record-high rate of incarceration as for its record-high murder rate.

The current District Attorney, Leon Cannizzaro, was elected in 2008. Since then he has expressed ongoing concern about New Orleans' crime rate. He has regularly promised to make the city's response to crime "very tough . . . for local criminals."⁵⁷ In his annual address in 2010, he promised to "do whatever it takes"⁵⁸ to prosecute more violent felony cases, even though the Office has long struggled under its caseload.⁵⁹ At this same address, Police Superintendent Ronal Serpas vowed to take on the Herculean task of "mak[ing] New Orleans safe."⁶⁰ Although the police department is itself the subject of ongoing scrutiny for incidents and practices involving brutality, misconduct, and corruption,⁶¹ it remains committed to a public image of being "tough on crime."

In examining the New Orleans Parish District Attorney's Office, whether under the term of Harry Connick or current District Attorney Leon Cannizzaro, an overview of often mind-numbing concerns is essential to contextualizing any discussion of changes in prosecutorial disclosure policies. New Orleans' system is unique and infamous. Its complexity contributes to an environment where *Brady* violations are persistent. The high rate of violent crime and the distinctive

54. See David Meeks, *D.A. Eddie Jordan Resigns*, TIMES PICAYUNE, Oct. 30, 2007, http://blog.nola.com/times-picayune/2007/10/sources_talks_underway_for_jor.html ("[Jordan's] unprecedented move [out of office] ends a tenure mired in criticism over a widely perceived failure to successfully prosecute violent criminals.").

55. See *Executive Profile, Harry F. Connick*, BLOOMBERG BUS. WEEK, <http://investing.businessweek.com/research/stocks/people/person.asp?personId=6843928&ticker=PMD:US&previousCapId=298401&previousTitle=Psychemedics%20Corp>.

56. *Id.*

57. McCarthy, *supra* note 51.

58. *Id.*

59. See URBAN JUSTICE, *supra* note 47, at 4 ("Before Hurricane Katrina the DA's office had been routinely criticized for its high attrition rate and inexperienced attorneys. [Several years later, in 2007,] although the core staff is steadily working its way through the backlog of cases and appears to have a sufficient number of attorneys, the office remains critically short on staffing for the important auxiliary services.").

60. McCarthy, *supra* note 51.

61. A Department of Justice civil investigation "produced a scathing report on [the New Orleans police department's] practices and will eventually lead to a consent decree, a legally mandated blueprint for reform." Campbell Robertson, *Officers Guilty of Shooting Six in New Orleans*, N.Y. TIMES, Aug. 5, 2011, available at <http://www.nytimes.com/2011/08/06/us/06danziger.html?pagewanted=all>. The DOJ report referred to the "aorta of corruption" in reference to the New Orleans Police Department. U.S. Dept. of Justice, Investigation of the New Orleans Police Department (2011), available at <http://www.justice.gov/crt/about/spl/nopd.php>.

set of political forces which permits the elected District Attorney to remain “one of [the] two most powerful people in New Orleans”⁶² are among the most significant factors in understanding the operation of criminal justice in New Orleans.

The New Orleans system’s history—and many would argue its current structure—is “rife with conflicts of interest, political corruption and incestuous behavior.”⁶³ State and local funding for judicial administration, prosecutors’ offices, and defense attorneys is minimal, requiring that the Parish finance its criminal justice system through other means.⁶⁴ It is financed in part by “competing enterprises—the courts and the D.A.”⁶⁵ For example, probation fines and pretrial diversion monies go to financing the court’s judicial fund as well as to the New Orleans District Attorney’s Office.⁶⁶ Similarly, the Office also collects revenue from sources such as fees charged on debt collection, where a “state law . . . allows a district attorney to charge a 20 percent fee for collecting on worthless checks over \$500.”⁶⁷

Key stakeholders in New Orleans all mentioned a weak and underperforming judiciary as another significant factor in the poor quality of the criminal justice system. Those interviewed pointed to the problematic relationship between prosecutors and judges. “The District Attorney controls the judges. He scares

62. “The Sheriff is the other power.” Interview 1 (Dec. 1, 2011); Interview 4 (Jan. 18, 2012); Interview 6 (Feb. 2, 2012); Interview 8 (Feb. 3, 2012). It is widely understood in the context of New Orleans that the Sheriff plays an extremely important role in the city’s administration and politics. In discussing the appointment of Ronal Serpas to head the New Orleans Police Department in 2010, Mayor Landrieu said, “As mayor . . . my top priority is to transform the culture of death on the streets of New Orleans into a celebration of life . . . The first step, the one step that needs to be taken, is to find an individual who will help lead the New Orleans Police Department.” *Mitch Landrieu Names Nashville Police Chief Ronal Serpas as New Orleans’ Top Cop*, TIMES PICAYUNE, May 6, 2010, http://www.nola.com/crime/index.ssf/2010/05/new_orleans_native_ronal_serpas.html.

63. Interview 1 (Nov. 15, 2011); Interview 5 (Feb. 2, 2012); Interview 17 (Feb. 3, 2012).

64. See David Winkler-Schmit, *The Life of a New Orleans Public Defender*, TIMES PICAYUNE, Feb. 21, 2009, <http://www.bestofneworleans.com/gambit/the-life-of-a-new-orleans-public-defender/Content?oid=1255673> (“The Orleans Parish District Attorney’s office has an annual budget of approximately \$12.5 million, with 92 attorneys on staff and a total of 200 employees—including 18 investigators and six social workers. The DA covers Criminal and Juvenile courts, receiving approximately 15,000 cases a year from the New Orleans Police Department. Of those, the office accepts roughly 7,200 for prosecution. Compare those numbers to the public defenders’ office, which covers cases in Criminal, Municipal, Traffic and Juvenile courts and handles 50,000 cases a year on a budget of \$5.4 million. The office has 42 attorneys among 77 total employees, including eight investigators and two social workers.”); see also URBAN JUSTICE, *supra* note 47, at 4 (“Louisiana is the only state in the country that attempts to fund its indigent defense system almost entirely through local revenue, primarily traffic tickets and other court costs.”).

65. Interview 6 (Nov. 17, 2012) and (Feb. 3, 2012). Reflecting on the system’s financing and its political nature as responsible for causing serious problems, one policy expert remarked, “Anything related to criminal justice and its misuse has to focus on New Orleans. It makes everywhere in the country pale by comparison.” *Id.*

66. Interviews 4, 8, 17 (Feb. 2-3, 2012).

67. See John Simerman, *New Orleans District Attorney’s Office Could Get \$300,000 for Collecting \$1.5 Million Gambling Debt*, TIMES PICAYUNE, Nov. 12, 2011, available at http://www.nola.com/crime/index.ssf/2011/11/new_orleans_district_attorneys.html (“Debt collection, under threat of prosecution, has been a boon for Cannizzaro’s office, particularly on behalf of Harrah’s. According to the financial documents, the district attorney has taken in \$177,000 in fees over the past year, on top of \$860,000 paid to the victims. More than 40 percent, or \$73,000, has come from collecting on debts for [a local casino.]”).

them with use of the bully pulpit. They have to get elected and it is daunting without the support of the D.A. and Sheriff.”⁶⁸ Disturbingly, stakeholders also reported, “The trial judges do not possess the work ethic of judges in other jurisdictions. Working three hours per day appears to be the norm.”⁶⁹

The notoriously poor quality of public defense prior to Katrina makes matters worse.⁷⁰ The Orleans Public Defenders (OPD) was formed following Hurricane Katrina in 2007 and is funded by state, local, and federal grants.⁷¹ Despite OPD’s recognized achievements⁷² and improvements to the system of indigent defense, the Office has been experiencing ongoing budget crises in recent years. In February 2012, OPD announced its decision to lay off twenty-seven employees—nearly one-third of its total staff—due to budget shortfalls.⁷³ Although with the establishment of the Orleans Public Defenders the city has undergone significant positive reforms in its approach to indigent justice, many aspects of the system that undermine the efficient administration of justice remain in place today.⁷⁴

E. Pete Adams, Executive Director of the statewide District Attorneys Association, recently commented about the criminal justice system in New Orleans. “[T]he system down there has been fairly dysfunctional for a while because of the political battles between judges and the DAs, the defense bar and the DAs,” Adams said, “Everybody’s fighting down there. It’s always been kind

68. Interview 7 (Feb. 2, 2012).

69. *Id.*; see also Interview 2 (Dec. 13, 2011); Interviews 5, 8, 15, 18 (Feb. 2 and 3, 2012).

70. See also URBAN JUSTICE, *supra* note 47, at 4-5 (“Long before the storm hit, the OID [Orleans Indigent Defender] Program had been especially deficient, plagued by unreliable funding and conflicts of interest, and failing to adhere to standards that govern the provision of indigent defense Many stakeholders interviewed believe that the catastrophe of Katrina has given New Orleans a unique opportunity to reform the court system, and with it, the OID program.”).

71. “The Orleans Public Defenders (OPD) was created in 2007 to provide defense to people who cannot afford an attorney in Orleans Parish. The new office received funding from the state and federal government to hire and train a full-time staff able to meet the demands of the justice system.” THE ORLEANS PUBLIC DEFENDERS, OUR HISTORY, <http://www.opdla.org/history.html> (last visited June 12, 2012).

72. “The accomplishments of the Orleans Public Defenders since then have been tremendous and were recently recognized by the Southern Center for Human Rights (SCHR). SCHR awarded the office with the Frederick Douglass Award in 2009.” THE ORLEANS PUBLIC DEFENDERS, OUR HISTORY, *supra* note 71.

73. See John Simerman, *Public Defender Layoffs Could Gum Up the Works at New Orleans Criminal Court*, TIMES PICAYUNE, Feb. 2, 2012, http://www.nola.com/crime/index.ssf/2012/02/public_defender_layoffs_could.html (“A bloodletting this week at the Orleans Parish public defender’s office will mean a slowdown at Criminal District Court and leave many defendants on a waiting list for a free lawyer, Chief Public Defender Derwyn Bunton said Thursday. Bunton said he was forced to lay off 27 employees, including 21 lawyers—nearly a third of the public defenders on his staff—in the latest move to trim a deep shortfall in the office’s \$9.5 million budget.”); see also Laura Maggi, *Orleans Parish Public Defenders Cut Services Because of Lack of Funds*, TIMES PICAYUNE, Dec. 21, 2011 (“The public defender office has been asking both the city and state governments to pony up more operating dollars in recent years, saying it needed financing as grants obtained in the aftermath of Hurricane Katrina dried up. In recent years, the state public defender board has helped out, finding extra money at the end of the agency’s fiscal years.”).

74. See VERA INSTITUTE REPORT, *supra* note 24.

of like a war zone.”⁷⁵

III. THE OFFICE’S *BRADY* POLICIES AND PRACTICES

The Supreme Court’s 1995 decision in *Kyles v. Whitley* focused national attention on the New Orleans Parish District Attorney’s Office’s *Brady* policies and practices.⁷⁶ *Kyles*, a capital case, involved prosecutors’ “blatant and repeated violations of [that] well-settled constitutional obligation” in *Brady*, and featured “so many instances of the state’s failure to disclose exculpatory evidence.”⁷⁷

Despite the Court’s reversal of the defendant’s conviction in *Kyles*, Connick made no documented changes to the Office’s disclosure policies or procedures. “Connick indicated that he ‘saw no need, occasioned by *Kyles*, to make any changes’ in his office’s practices with respect to *Brady* compliance . . . because he was ‘satisfied with what [the] policy was.’”⁷⁸ Years later, he testified, “I think what sticks out in my mind most [about *Kyles*] is it wasn’t a *Brady* case.”⁷⁹

Thus, it is hardly surprising that “[t]he prosecutors’ record of compliance with *Brady* remained dismal even after *Kyles*, as evidenced by several *Brady* violations that prosecutors committed in trials after April 1995—including in two capital cases.”⁸⁰ Indeed, of the more than 100 *Brady* claims arising in state and federal court during Harry Connick’s tenure as Orleans Parish District Attorney, prosecutors were found to have withheld evidence in approximately half of the cases and the courts ordered relief in nearly one-third of the cases.⁸¹

John Thompson’s capital case was the epitome of egregious intentional misconduct during the Connick administration.⁸² John Thompson was convicted and sentenced to death after being charged with two separate crimes: murder and armed robbery. The prosecution, suppressing blood evidence which ultimately proved that Thompson was innocent of the robbery, made the decision to try Thompson on the robbery charge prior to his murder trial. This calculated decision virtually ensured that, if the prosecution were successful at the robbery trial, he would not take the stand in the subsequent homicide trial.⁸³ Convicted at

75. John Simerman, *Former DA Harry Connick Defends His Leadership, Reputation*, TIMES PICAYUNE, Apr. 1, 2012, http://www.nola.com/crime/index.ssf/2012/04/former_da_harry_connick_defend.html.

76. 514 U.S. 419 (1995). Connick maintained his belief in Curtis Kyles’ guilt even after the Supreme Court overturned the conviction in his case, and as District Attorney he unsuccessfully attempted to retry Kyles five more times before finally abandoning the effort.

77. *Id.* at 455 (Stevens, J., concurring).

78. Brief for the Orleans Public Defenders as Amicus Curiae Supporting Petitioner, *supra* note 32, at 9 (citing Transcript of Record at 184-85, Thompson v. Connick, No. 03-cv-2045, 2004 WL 1772060 (E.D. La. June 18, 2007) (Connick testimony)) (internal citation and brackets omitted).

79. Thompson v. Connick, No. 03-cv-2045, Dkt. No. 178, 183 (E.D. La. Feb. 6, 2007) (Connick testimony).

80. Brief for the Orleans Public Defenders as Amicus Curiae Supporting Petitioner, *supra* note 32, at 10.

81. Moore, *supra* note 29, at 9.

82. 131 S. Ct. 1350 (2011).

83. A defendant with a prior conviction for robbery would be highly unlikely to testify in a subsequent capital murder case where his prior conviction would be prime impeachment material.

both trials, Thompson spent eighteen years in prison.

A pro-bono legal team working on Thompson's behalf while he remained on Louisiana's death row fortuitously discovered that "a swatch of fabric stained with the carjacker's blood had been tested and never produced to the defense."⁸⁴ Later testing of this fabric revealed that the blood did not match Thompson's. As it turned out, one of the prosecutors on Thompson's case, Gerry Deegan, had made a deathbed confession to a former colleague, Michael Reihlmann, that he had hidden the blood swatch and report from the defense at trial. Some five years later, after the defense team's discovery of the blood evidence, Reihlmann came forward to reveal Deegan's confession. Eventually, Thompson's convictions were reversed, the robbery case was dismissed, and he was retried for the homicide and acquitted in less than an hour.⁸⁵ Of the five prosecutors involved in Thompson's wrongful conviction, the only one to be disciplined was Michael Reihlmann, who was the whistleblower for the prosecution's misconduct.⁸⁶

Justice Ginsburg's strong criticism of the former District Attorney in *Connick v. Thompson* (see *infra* note 8) is likely due, at least in part, to Connick's sworn statements in the record. In his testimony during the civil case, Connick not only admitted that he "stopped reading legal opinions"⁸⁷ when he became District Attorney, but he also "misstated *Brady* requirements"⁸⁸ and confirmed that prosecutors in his office received "no formal training" regarding *Brady* evidence.⁸⁹

Apparently, Connick and lawyers in his office learned little from *Kyles* and subsequent cases in which their Office was reproached for violating constitutional *Brady* requirements. Following Thompson's celebrated exoneration, Connick remained steadfast in his belief that Thompson was indeed guilty. As in *Kyles*, Connick would only concede that procedural errors accounted for the reversal of the conviction. Connick remarked, "I think that [Thompson] committed . . . a murder, and I think that obviously we thought we had enough

84. See Nina Totenberg, *Man Wrongly Convicted: Are Prosecutors Liable?*, NPR NEWS, Apr. 2, 2011, <http://www.npr.org/2011/04/02/135053529/man-wrongly-convicted-are-prosecutors-liable>.

85. The appellate court found that it was the "intentional hiding of exculpatory evidence" that caused the violations of Thompson's right to testify and present a defense, which in turn required a new trial on the murder charge. *State v. Thompson*, 825 So. 2d 552, 557 (La. Ct. App. 4th Cir. 2002), *rev. denied*, 829 So. 2d 427 (La. 2002); 825 So. 2d at 557 (reversing order denying Thompson a new trial).

86. See Keenan et al., *supra* note 41, at 219 ("Indeed, only one of the five prosecutors responsible for violating John Thompson's constitutional rights has ever been disciplined by the attorney grievance system in place in Louisiana. Ironically, that prosecutor is Michael Reihlmann, the only one of the five who was not directly involved in prosecuting Thompson's case or implicated in any of the *Brady* violations that occurred and the only attorney to ever report the violations to Louisiana's Office of Disciplinary Counsel (ODC)."); see also HOLLWAY & GAUTHIER, *supra* note 24 (documenting Connick's dismissal of the recommendation to prosecute two of the prosecutors in John Thompson's case, which ultimately resulted in resignation of a prosecutor who presented the criminal conduct of the Thompson prosecutors to the grand jury).

87. See Keenan et al., *supra* note 41, at 207.

88. *Id.*

89. *Id.* (citing *Connick*, 131 S. Ct. at 1379-80 (Ginsburg, J., dissenting)).

evidence to gain a conviction.”⁹⁰ This view persists among some former prosecutors, now defense lawyers, who said of John Thompson’s case, “If you were really innocent of the murder and had an alibi, your butt should have gotten on that witness stand. The prior robbery conviction? You *voir dire* it out.”⁹¹

IV. LOUISIANA: UNIQUE JUSTICE AMONG THE FIFTY STATES

Discovery laws in Louisiana are narrow,⁹² and prosecutors in Orleans Parish under Connick were famously reluctant to disclose any evidence to defense attorneys.⁹³ A former prosecutor said that in the Connick era, the Office had an “aggressive attitude with respect to disclosing potentially helpful evidence to the defense,”⁹⁴ and further noted that the Office standard was to respond to defense attorneys’ disclosure requests by declaring them “not entitled” to the information—regardless of the substance of the request.⁹⁵

State court judges in Louisiana have also expressed dissatisfaction with prosecutors’ attitudes towards disclosure in New Orleans, in some circumstances even holding prosecutors in contempt for failing to turn over *Brady* evidence.⁹⁶ However, judicial reprimand of the District Attorney’s Office is rare. The perception among all interviewees was that many judges do not understand or enforce *Brady* obligations.⁹⁷ As a former prosecutor recounts, “The stuff you can

90. *Id.*

91. Interview 10 (Feb. 2, 2012). This prosecutor, who was in the office during Thompson’s civil case and is now a defense lawyer, believed that conducting jury voir dire about a defendant’s prior conviction would be sufficient to insure lack of bias against the defendant when he testifies. This is an unusual view among defense lawyers. Any discussion with seasoned defense attorneys reveals that it is rarely the case that voir dire can remove the negative effect upon the defendant’s credibility of a prior conviction for a violent felony.

92. See LA. CODE CRIM. PROC. ANN. art. 716 (2011); see also LA. CODE CRIM. PROC. ANN. art. 718 (2011) (advising that the District Attorney is only required to provide evidence “favorable to the defendant and which [is] material and relevant to the issue of guilt or punishment . . . on motion of the defendant”). The language of these statutes is important, as it is inconsistent with federal constitutional law requiring disclosure of favorable evidence material to guilt or innocence regardless of whether requested by the defense.

93. See Campbell Robertson & Adam Liptak, *Supreme Court Looks Again at Methods of D.A.’s Office in New Louisiana*, N.Y. TIMES, Nov. 2, 2011, <http://www.nytimes.com/2011/11/03/us/orleans-district-attorneys-office-faces-us-supreme-court.html?pagewanted=all> (“Even Mr. Connick’s successor, Eddie Jordan, came close to acknowledging as much in a 2003 interview with The Times-Picayune. ‘The previous administration,’ he said, ‘had a policy of keeping away as much information as possible from the defense attorney.’”); see also Brief for the Orleans Public Defenders as Amicus Curiae Supporting Petitioner, *supra* note 32, at *9.

94. Interview 12 (Feb. 3, 2012).

95. “One former assistant district attorney in Connick’s office attributed this unsettling record to the office’s traditionally aggressive attitude with respect to disclosing potentially helpful evidence to the defense. He explained in an affidavit that the practice ‘was to be as restrictive as possible with Brady information The policy was when in doubt, don’t give it up.’” Brief for the Orleans Public Defenders as Amicus Curiae Supporting Petitioner, *supra* note 32, at *6.

96. “Judge Calvin Johnson repeatedly sounded the alarm regarding what he perceived as a ‘pattern . . . not just based on lethargy, but on an active unwillingness to follow the rule of law.’ To encourage compliance with *Brady*, he often ‘held prosecutors in contempt’ or ‘ordered them to take law classes.’” *Id.* at *7 (internal citations omitted).

97. Interview 17 (Feb. 3, 2012).

get away with [in court] is amazing. The degree of formality? It is very informal. Most of the judges do not know law, although one was a walking encyclopedia. They sometimes disregard it.”⁹⁸ Another former prosecutor remarked, “‘Abundance of caution’ in the judicial explanation of an action is a telltale phrase that they did not know [the] law.”⁹⁹

Reflecting on his years in the District Attorney’s Office, a highly regarded former prosecutor who questions whether the Office is even committed to a due process model said, “Part of our problem is the Napoleonic Code.”¹⁰⁰ Because of its French and Spanish heritage, Louisiana is the only state in the nation with a legal system that derives from a civil law, rather than a common law, framework.¹⁰¹ Although the state is obligated to observe constitutional requirements—of which *Brady* obligations are a part—so many aspects of the legal system in Louisiana are unique to that state that some stakeholders may feel as if they operate outside of the requirements of the rest of the country.

A seasoned policy expert reflected, “Federal law really does not matter much [here], because how many cases can the Supreme Court take? We are in Louisiana, and to the extent we follow the law, it is local law. The entire system is lawless.”¹⁰² For example, prosecutors may provide discovery *ex parte* to the trial court and consider doing so a fulfillment of their *Brady* obligations, although disclosure under *Brady* requires prosecutors to provide the *defense* with all potentially favorable material.¹⁰³ In *Smith v. Cain*, for example, some of the evidence that eventually came to light was in the court’s hands—but the court did not provide it to the defense. A New Orleans prosecutor remarked, “Look at *Smith v. Cain*. We said that we gave the information to the court. It was not our problem that the court did not turn it over.”¹⁰⁴ Some prosecutors thus believe that the problem lies with the judges themselves for failing to ensure that defense attorneys receive exculpatory evidence. “*Brady* problems belong to the court too. They have the information.”¹⁰⁵

Connick was replaced in 2003 by former United States Attorney Eddie Jordan, who enjoyed a brief tenure before resigning in 2007. Prior to leaving the District

98. Interview 10 (Feb. 2, 2012).

99. Interview 11 (Feb. 2, 2012).

100. Interview 17 (Feb. 3, 2012).

101. See A.N. Yiannopoulos, *The Civil Codes of Louisiana*, 1 CIV. L. COMMENT 1 (2008), available at <http://www.civil-law.org/v01i01-Yiannopoulos.pdf>; *Louisiana’s Napoleon Complex: The French Influence on Pelican State Jurisprudence*, SLATE MAGAZINE, Sept. 2, 2005, http://www.slate.com/articles/news_and_politics/explainer/2005/09/louisianas_napoleon_complex.html.

102. Interview 5 (Feb. 2, 2012).

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

104. Interview 10 (Feb. 2, 2012).

105. Interview 12 (Feb. 4, 2012). It is noteworthy that the Louisiana appellate and Supreme Court upheld Juan Smith’s conviction and did not consider the egregious failure to disclose information as a *Brady* violation. Some interviewees suggest that the Smith case exemplifies the failure of the judiciary to understand and enforce *Brady*.

Attorney's Office, Jordan admitted that the Office's policies under Connick regarding discovery obligations were troubling.¹⁰⁶ Jordan, however, had no opportunity to reform the Office's disclosure policies. Almost immediately after taking office, Jordan fired forty-three white employees, purportedly in an effort to overhaul the Office. These discharges ignited allegations of racism and resulted in a lawsuit. In 2005, "a federal jury found that Mr. Jordan, [New Orleans'] first black district attorney and a Democrat, had discriminated against 43 white employees when he summarily fired them."¹⁰⁷ The damages resulting from the lawsuit—totaling nearly four million dollars—threatened to bankrupt the Office.

Following the crisis visited upon the city by Hurricane Katrina, the District Attorney's Office could not withstand the weight of the civil damages suit. Jordan, who was at that point immensely unpopular, was forced to resign. Significantly, his inability to successfully prosecute several cases had already turned public opinion against him.¹⁰⁸ Many appeared glad to see him go. Some prosecutors hired by Jordan, however, believe his office "was headed in the right direction."¹⁰⁹ "Under Jordan," one said, "we were free to make decisions based on facts, evidence and the law. Cases were judged on merit alone."¹¹⁰ After the scandal following Jordan's resignation, "politics came into play and the lawyers became a player in a game."¹¹¹ Such was the view of many of the interviewees who worked in both administrations. And, despite the Office's changes since Connick's 2003 departure, *Brady* violations have persisted.

V. THE NEW ORLEANS D.A.'S OFFICE UNDER LEON CANNIZZARO

New Orleans District Attorney Leon Cannizzaro is regarded as hard working and savvy with the media. His administration sought to address a range of issues at the outset; compliance with *Brady* requirements was one of them. Doing so was unavoidable: the \$14 million judgment against the Parish in John Thompson's civil suit was awarded four months into Cannizzaro's tenure, and it focused national attention on the Office's disclosure practices. The Thompson case was a highly publicized embarrassment for an already beleaguered criminal justice system, causing significant public outcry and threatening to visit a significant cost upon a city already buckling under economic hardship.

Graymond Martin, appointed First Assistant District Attorney in the Cannizzaro administration, undertook responsibility for evaluating and overhauling the

106. See Robertson, *supra* note 61.

107. See Adam Nossiter, *New Orleans Prosecutor Quits Amid Lawsuit Woes*, N. Y. TIMES, Oct. 31, 2007, <http://www.nytimes.com/2007/10/31/us/31orleans.html>.

108. See Meeks, *supra* note 54.

109. Interview 15 (Feb. 3, 2012).

110. Interview 17 (Feb. 3, 2012).

111. *Id.*

Office, including its approach to complying with *Brady* requirements. While Cannizzaro has responded to the pressure to modify the Office's *Brady* practices, the administration remains circumspect when speaking on the record about the breadth of the misconduct under Connick. In an interview with a New Orleans publication focused on the District Attorney's Office policies after *Smith* and *Thompson*, Cannizzaro said, "There have been some [bad] cases. But whether it's a pattern of deliberate indifference [that existed under Connick], I just can't say."¹¹²

Martin, who has had a long career in the police department and is highly regarded as a "systems person," examined and redesigned many aspects of the District Attorney's Office. Among the changes Martin put into place was the decision to move all misdemeanor cases to a lower court so that his office could focus attention on serious felonies.¹¹³ He also changed the Office's internal structure for case assignment, screening, and follow-up to maximize effective case processing. Moving to a system of "vertical prosecution,"¹¹⁴ the office instituted a process of committee screening all serious crimes,¹¹⁵ requiring the lawyer who will handle the case to attend this initial committee meeting. According to Martin, "The process makes it hard for one or two lawyers to do something inappropriate. The changes were not driven by *Brady* concerns, but that was a consideration."¹¹⁶

The Office also now requires a highly structured review of all cases. No case obtains a plea offer without approval at the highest levels. Disclosure decisions are made at the highest levels as well. With high turnover and few lawyers with more than five years of prosecution experience, this is a tested method to ensure quality control of significant case-related decision-making. Nonetheless, this significant change from prior administrations has been viewed skeptically and is

112. See Kevin Allman, *The Gambit Interview with Leon Cannizzaro*, GAMBIT ONLINE, (Dec. 6, 2011), <http://www.bestofneworleans.com/gambit/the-gambit-interview-leon-cannizzaro/Content?oid=1920156>.

113. Other significant changes beyond the scope of this Article include working with police agencies and crime laboratories to improve evidence collection, testing, recording and transmission. According to Martin, "[c]rime laboratories were dysfunctional after Katrina. The state police were taking rape kits to private contractors who would send back CODIS hits. Those hits were kept in a drawer. We had to change all that." Interview with Graymond Martin, *supra* note 21 (Feb. 2, 2012).

114. "Vertical Prosecution" is a system in which a prosecutor is assigned to a criminal case from investigation onwards. A system of vertical prosecution is presumed to contribute to judicial efficiency, and to speed the rate at which documents such as police reports are completed and transferred to the D.A.'s Office. "In the context of New Orleans, Cannizzaro hopes that a system of vertical prosecution can lead to trying "every homicide defendant within 12 months of the date a murder was committed." David Winkler-Schmit, *Streamlining Justice: DA Leon Cannizzaro and the Public Defenders' Office Agree that 'Vertical Prosecution' Would Move Cases Faster at Criminal Court, but Some Judges Oppose the Idea*, GAMBIT ONLINE, (Mar. 1, 2010), <http://www.bestofneworleans.com/gambit/streamlining-justice/Content?oid=1256863>.

115. These crimes include homicide, rape, kidnapping, and sex crimes. Office systems internal forms (on file with author).

116. Interview with Graymond Martin, *supra* note 21.

criticized by some of the Office's former prosecutors.¹¹⁷ "The office is managed to a 'T.' Even where a person is charged with marijuana possession, the lawyer must go up to the D.A. to get permission to offer a plea."¹¹⁸ This was a common perspective: "You can't do anything on your own because every decision must go through a higher up. Disclose or not to disclose? You cannot decide. They must give you approval. They tell you 'turn this over—don't turn that over.' It is impossible to do something on your own but they blame you [if something goes wrong.]"¹¹⁹ Another former prosecutor was disillusioned: "When something hits the fan—first thing is to blame the ADA."¹²⁰

Moreover, several former prosecutors recounted specific instances of being "thrown under the bus" for decisions made at the highest levels. "[I]t's all politics—any good politician needs to master the art of passing the buck. [Cannizzaro's] office does that and did it historically."¹²¹ Whether such instances are representative of Office practice appears beside the point. The culture accepts this "passing the buck" as fact, and young prosecutors are fearful of getting blamed for errors they may be unable to anticipate—especially in a system that does not appear to trust them to make simple day-to-day decisions.¹²²

In perhaps Cannizzaro's most significant and controversial change, the administration now rarely exercises its discretion to screen cases to determine the merit of prosecution. Instead, the Office prosecutes most cases brought to them by the police. This change was made in an effort to improve relationships with police agencies. The acceptance rate of prosecutions from police agencies for 2008 to 2011 averaged 87 percent: the highest rate in the country.¹²³ This new policy has resulted in a conviction rate of only about 57 percent a year—in comparison with offices that utilize effective screening processes and have convictions rates upwards of 80 percent.¹²⁴ But officials believe that raising the acceptance rate will result in an overall improvement of the quality of cases and evidence brought to the office, as it will foster greater trust between the police department and the District Attorney's Office.¹²⁵ Just as prosecutors grow frustrated with police if evidence in a criminal investigation is lost or mismanaged, police departments grow frustrated with District Attorneys' offices

117. All interviewees discussed this process and its varied effects.

118. Interview 17 (Feb. 3, 2012).

119. Interview 10 (Feb. 2, 2012).

120. Interview 9 (Feb. 2, 2012) ("ADA" is the assistant district attorney).

121. Interview 11 (Feb. 2, 2012).

122. All former prosecutors interviewed expressed frustration about their lack of basic discretionary decision-making.

123. Washington D.C. has a comparable rate.

124. Data from New Orleans Parish for 2008-2011 (on file with author); See J. Mark Ranseyer et al., *Convictions Versus Conviction Rates: The Prosecutor's Choice*, at 22, available at NELLCO Legal Scholarship Repository, Harvard Law School (2008) (documenting conviction rates in jurisdictions above 80%).

125. Interview with Graymond Martin, *supra* note 21.

if they regularly fail to accept cases for prosecution.¹²⁶

The Office also instituted training programs to educate prosecutors about *Brady* requirements. Cannizzaro said that he “instructed lawyers on his staff to study the Supreme Court decisions relating to prosecutorial misconduct, including the one involving the Orleans Parish District Attorney’s Office in 1995 [(*Kyles*)].”¹²⁷ The Office conducts “multiple continuing legal education classes each year on these issues.”¹²⁸ No doubt, the *Thompson* and *Smith* cases are a focus for all New Orleans prosecutors.¹²⁹

Criminal justice policy experts, civil rights attorneys, and some defense lawyers commend the systemic changes, particularly the Office’s efforts to promote efficiency through vertical prosecution and to ensure that police agencies provide necessary documentation to the defense. A common view of Graymond Martin is that “he is a good guy trying to make changes.”¹³⁰ Another interviewee noted, in light of Martin’s background, that “Martin has a deep understanding of law enforcement practices and systemic changes necessary to ensure compliance with obligations.”¹³¹

However, most interviewees were skeptical about the changes, and their comments demonstrate that the high acceptance rate of cases from the police has significant unintended consequences. Although the salary at the District Attorney’s Office has increased over the last several years,¹³² it is still low relative to the enormous pressure on lawyers prosecuting crime in New Orleans. The low pay, miserable hours, and increased pressure to take on a growing number of cases under Cannizzaro’s new acceptance rate policy makes it difficult for prosecutors to remain in the Office for long, and contributes to a culture where *Brady* compliance is not likely to change much from the Connick era. “There are lousy cases. We have to prosecute them.”¹³³ Another former prosecutor remarked, “I could deal with the hours and the low pay—I loved the job. I stuck it out as long as I could, but I could not deal with the constant

126. Remarks of District Attorney to Orleans Parish City Council.

127. See Allman, *supra* note 112.

128. Robertson & Liptak, *supra* note 93.

129. Interview with Martin, February 2, 2012. Effective training programs require more than the reading of case law and discussion of civil liability. There is little information to suggest that the New Orleans Office has implemented an effective training program. See Cardozo Law Symposium, *supra* note 34, at 124 (discussion of the components of effective training programs).

130. Interview 4 (Jan. 18, 2012).

131. Interview 1 (Nov. 15, 2011). Systemic changes—including case processing, case conferences, recording and record keeping systems—appear to be significant. A full discussion is beyond scope of this article.

132. “Before Katrina, the DA’s office had been routinely criticized for its high attrition rate and inexperienced attorneys. Stakeholders interviewed hinted at inadequate compensation for assistant district attorneys (ADAs), whose starting salary was roughly \$30,000 before Katrina In mid-July 2007, the office announced major changes in the staffing structure Salaries of entry-level ADAs were raised from \$30,000 to \$50,000, and salaries of violent crime prosecutors were raised to \$80,000.” URBAN JUSTICE, *supra* note 47, at 2.

133. Interview 17 (Feb. 3, 2012).

second-guessing and lack of support from the higher ups.”¹³⁴ A third former prosecutor summed it up: “Turnover under Cannizzaro is ‘insane.’”¹³⁵

The high rate of acceptance is not likely to change soon, despite various internal and external complaints. As one former prosecutor noted:

The high rate of acceptance works well in the press. He accepts more cases than any other D.A. in America. There are many garbage cases and many people in jail who don’t belong there [as a result]. Louisiana is such an outlier in the criminal justice world, and New Orleans is the outlier within the state.¹³⁶

While the overhaul of the system was intended, at least in part, to facilitate compliance with *Brady* requirements, some interviewees were skeptical that these changes could achieve such a result. According to a former prosecutor, “The caseload pressures from the high rate of acceptance necessarily affect compliance with disclosure obligations. With such high caseloads, there is no question that errors will be made. You just don’t have time to do it all even if you were inclined to do so.”¹³⁷

A lawyer supportive of the systemic changes commented, “While the advances may be impressive, the Office is so blind to their bad discovery practices. They will defend those as well as bad Connick era cases.”¹³⁸ A prosecutor who recently left the Office said, “Not much has changed regarding *Brady* compliance.”¹³⁹ He explained that the practice is only to disclose information if it would be deemed “material,” by an appellate court. He said, “The hard part is always figuring out if it is material. We ask, ‘will this get reversed if we do not turn it over?’ Then it is material.”¹⁴⁰ This interviewee, along with several others, represented this calculus to be the analysis of *Brady* material in the current administration.

Despite these views, the Office has implemented significant written policies for disclosure compliance. In December 2011, Martin sent a detailed and thorough letter to the chiefs of three New Orleans police agencies, reminding them of their duty to produce documents, recordings, reports, and physical evidence in each case, and requesting that each department “inform [its] officers, investigators, and the custodians of any reports, documentation or recordings that they have a duty to disclose the existence of those items and to provide this office

134. Interview 10 (Feb. 2, 2012).

135. Interview 17 (Feb. 3, 2012).

136. Interview 7 (Feb. 2, 2012).

137. Interview 11 (Feb. 2, 2012).

138. Interview 4 (Jan. 18, 2012). Remarkably, current and some former prosecutors still defend the Orleans Parish DA’s argument in *Smith v. Cain*, arguing that the withheld information was not “material” because there was not a reasonable probability that it would have changed the outcome. Despite the utter rejection of this interpretation by Justices of the Supreme Court, the view persists. It demonstrates that “materiality” assessments by New Orleans prosecutors are troubling.

139. *Id.*

140. *Id.*

with a copy of those items.”¹⁴¹

In January 2012, Martin implemented a policy requiring prosecutors to sign a written disclosure document at both the case screening stage and the pretrial stage.¹⁴² The “screening review affidavit” contains provisions for compliance in four specific categories, including “*Kyles* efforts, D.A. file review, witness statements, and a category containing specific questions related to victim and witness impeachment information.” The affidavit then requires the prosecutor’s signature and affirmation that he or she is “not aware of any evidence that is exculpatory, favorable to the defendant or may be used to impeach a witness that is not accounted for in a Notice of Disclosure or in discoverable material.”¹⁴³

The extent to which such practices can change the culture in New Orleans remains questionable. First, prosecutors are suspicious about the “*Brady* affidavits.”¹⁴⁴ “These affidavits are just a way to blame individuals so that the Office does not have to take responsibility.”¹⁴⁵ Graymond Martin acknowledges that the disclosure affidavits and the letter to police agencies certainly will “plug any hole” for civil liability left open by *Connick v. Thompson*. Whether, and to what extent, these measures will have the effect of encouraging compliance remains to be seen. Cultural change in any context is slow going and often met with resistance; departure from deeply ingrained cultural practices is difficult.¹⁴⁶

Some stakeholders remarked that the Office’s new oversight procedures, its attempt to control all decisions, the culture of fear among prosecutors about being blamed for errors or losing cases, and the increasingly difficult working conditions—including the low pay and long hours—make it worse in Cannizzaro’s administration than in Connick’s. One former prosecutor said:

When Connick was running the Office, the prevailing attitude was to win at all costs. I don’t think the attitude is now win at all costs. There is no such mandate. What you have, however, is [a system where] if you lose a case, you are potentially going to be shifted off to juvenile court or child support. This is totally unfair and unrealistic because we have garbage cases all the time. No one will be fired, but everyone is terrified that they will be moved and chased out of the Office.¹⁴⁷

141. Letter from Graymond Martin, First Assistant Dist. Attorney, Orleans Parish, to Ronal W. Serpas, Chief of Police, Darryl Albert, Deputy Superintendent, Field Operations Bureau, and Kirk Bouyelas, Deputy Superintendent, Investigations and Support Bureau (Dec. 2, 2011) (on file with author).

142. The “Disclosure Obligation Review” contains different provisions for disclosure to the defense at the screening and pretrial stages (on file with author).

143. New prosecutorial measures (on file with author).

144. The document is not in the form of an affidavit but was referred to as a “*Brady* affidavit” by several interviewees and will be referred to herein as an “affidavit.”

145. Interview 10 (Feb. 2, 2012).

146. Cardozo Law Symposium, *supra* note 34, at 141.

147. Interview 17 (Feb. 3, 2012).

When asked whether this practice of “demoting” attorneys to juvenile court or child support might encourage attorneys to cheat, another former prosecutor replied, “Sure. The default position becomes ‘win at all costs.’”¹⁴⁸ Another former prosecutor emphasized, “No one is making a career of that office. Because prosecutors are transitory, [they are] likely to be motivated to maximize professional gain—which means they will aim to seek the most convictions possible, even if this means committing misconduct. They know they will not be punished for winning, so there is little incentive to comply with the law.”¹⁴⁹

Several recent cases may contribute to the perception that, despite some changes, disclosure violations persist in the District Attorney’s Office. In 2009, the murder conviction of Michael Anderson was reversed after the defense learned that prosecutors under Cannizzaro had failed to turn over video-taped testimony of a key eyewitness, who contradicted her own testimony “several times.”¹⁵⁰ Furthermore, the recent prosecution of Jamaal Tucker has raised additional suspicions following revelations that Cannizzaro personally brokered a deal for several witnesses on charges in another jurisdiction without revealing these deals to the defense before Mr. Tucker stood trial.¹⁵¹ Current and former prosecutors provide lengthy explanations for the prosecutors’ actions in both of these cases, but the press, defense and civil rights lawyers, and even some New Orleans judges appear skeptical of these explanations and regard these cases as instances of yet additional failures to comply with disclosure requirements. The willingness of the administration to reverse convictions, however, indicates to some that the Office is engaged in positive change.¹⁵² Some of those interviewed note that these reversals are not an indication of changes in policy, but are few in number and driven by concerns for the Office’s credibility.¹⁵³

Cannizzaro has not directly addressed the question whether instituting a system of open file discovery (OFD) would make the discovery process in New Orleans easier, or reduce the District Attorney’s work in reformulating its discovery practice. In an interview that touched on OFD as an efficient means of

148. Interview 9 (Feb. 2, 2012).

149. Interview 17 (Feb. 3, 2012); Christopher Deal, *Brady Materiality Before Trial: The Scope of the Duty to Disclose and the Right to a Trial by Jury*, 82 N.Y.U. L. REV. 1780, 1782 (2007).

150. See Gwen Filosa, *Judge Grants New Trial in 2006 Central City Massacre Case*, TIMES PICAYUNE, Mar. 8, 2010, http://www.nola.com/crime/index.ssf/2010/03/judge_grants_michael_anderson_new_trial.html.

151. See *Defense Attorneys Agree to Scrap 2010 Murder Conviction*, WWLTV.COM EYEWITNESS NEWS (Dec. 14, 2011), available at <http://www.wwltv.com/news/Cannizzaro-defense-agree-to-scrap-2010-murder-conviction-135620483.html>.

152. “While *Brady* violations have haunted the district attorney’s office for years—most notably during Harry Connick’s tenure—Loyola Law Professor Dane Ciolino said the response to this case is a step in the right direction. ‘In the past the DA’s office fought tooth and nail to preserve convictions, even when, to many observers, there were blatant *Brady* violations,’ Ciolino said. ‘It’s encouraging that the district attorney’s office realized that there was a *Brady* violation, acknowledged it and stepped up and voluntarily agreed to correct the conviction.’” *Id.*

153. Interview 1 (Nov. 15, 2011).

effecting change within the Office, Cannizzaro replied, “Well, right now the law in Louisiana is that we are not obligated to engage in open file discovery.”¹⁵⁴

VI. AN AGENDA FOR REFORM

What will change the practices and culture of the Orleans Parish District Attorney’s Office? Will it come from internal changes in policy and practices, external controls by disciplinary committees, courts, and commissions, or some combination of all these accountability mechanisms? The history of noncompliance with disclosure obligations and the current culture suggest that both internal and external changes are essential if there is to be significant progress in New Orleans. Internal changes alone appear to be insufficient. Despite the disclosure practices implemented by the Cannizzaro administration, the interviews point to the need for additional internal changes and external accountability to augment and reinforce internal policies. An interviewee who had a long and deep history with all aspects of the criminal justice system was blunt about the need for external controls to make any serious change in practice: “A few heads are going to have to roll, or I just don’t see it.”¹⁵⁵

A. INTERNAL PRACTICES AND POLICIES

A coherent and consistently applied internal policy is fundamental to insuring good disclosure practices. Such a policy must include not only clear, written disclosure standards, but also effective hiring, training, supervising and monitoring lawyers to insure that the standards are met.¹⁵⁶

The recent adoption of “*Brady* affidavits” is a step towards improved compliance with disclosure obligations. This written requirement alone is insufficient to ensure effective disclosure practices, however, because “compliance with rules and laws . . . is likely to be determined by the complex interplay of internal and personal considerations such as office culture and policy, office regulatory and supervisory practices, and prosecutors’ own professional values.”¹⁵⁷ Thus, the Orleans Parish District Attorney’s Office needs to implement changes in protocols, training, and enforcement mechanisms. It also must focus on cultural change, that is, a change in prosecutors’ overall understanding of their role in the criminal justice system.

An essential start to any significant reform is to eliminate the pretrial “materiality” determination of what constitutes discoverable information. The disclosure of information to the defense should not depend upon a prosecutor’s pretrial assessment of the likely effect of that information on the outcome as

154. See Allman, *supra* note 112.

155. Interview 7 (Feb. 2, 2012).

156. Cardozo Law Symposium, *supra* note 34.

157. Yaroshefsky & Green, *supra* note 36, at 270.

viewed from the appellate perspective—that is, whether the withheld information would create a reasonable possibility of a different result had it been disclosed to the defense in time to be used during the investigation and litigation of the original proceeding.¹⁵⁸ Cognitive biases such as tunnel vision and confirmation bias make plain that even well intentioned prosecutors cannot be expected to assess whether a defense attorney would consider information exculpatory or useful for impeachment purposes.¹⁵⁹ Prosecutors cannot and should not be expected to make accurate *ex ante* estimations of materiality that will inevitably be clouded by their belief that the defendant is guilty. For these reasons, the Orleans Parish District Attorney's Office should adopt a policy that "materiality" is not part of the pretrial disclosure assessment. Without such a change, the new practice of "*Brady* affidavits" that appear to require broader production of information to the defense will be ineffectual. This is of particular significance in New Orleans because, like many jurisdictions around the country, it does not have robust disclosure laws or policies. Instead, it is a jurisdiction where "both the culture of the office and the attitudes of individual prosecutors perceive themselves as participants in a highly adversarial, often non-cooperative process."¹⁶⁰ Consequently, prosecutors are likely to err on the side of nondisclosure even if materiality were not a consideration.¹⁶¹

Second, it is essential to adopt written protocols about disclosure obligations and mechanisms for their enforcement. This includes effective training programs, which do not currently exist. A 2009 conference of prosecutors, defense attorneys, judges, police personnel, and policy analysts from around the country discussed and reported on the substance of effective protocols, practices, training programs, and methods of enforcement.¹⁶² These include:

- clear, written guidelines;
- case information checklists;
- systems to ensure the full flow and retention of information from the police and other government agencies to the prosecutor's office;

158. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("The prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of [materiality] is reached."); *United States v. Agurs*, 427 U.S. 97, 108 (1976) ("the significance of an item of evidence can seldom be predicted accurately until the entire record is complete"), *overruled on other grounds*, *United States v. Bagley*, 473 U.S. 667, 682 (1985).

159. Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006); Ronald F. Wright, *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Group on Best Practices: Systems and Culture*, 31 CARDOZO L. REV. 1961, 1995-2010 (2010).

160. Yaroshefsky & Green, *supra* note 36, at 280.

161. Unfortunately, nondisclosure as a practice in the Orleans Parish District Attorney's Office has been well documented. *See infra* note 32.

162. *See generally* Cardozo Law Symposium, *supra* note 34.

- adoption of electronic systems for file retention and dissemination of information;
- random audits of files;
- formal and informal training that includes simulations and training on cognitive bias; and
- adoption and enforcement of effective internal disciplinary protocols and practices.

Finally, the Orleans Parish District Attorney should establish a Conviction Integrity Unit to examine wrongful conviction cases to determine their causes and remedies and to establish standard procedures for new cases to prevent wrongful convictions. Among other tasks, the Conviction Integrity Unit should conduct audits when the Office discovers that any prosecutor engaged in actions that constitute serious negligence or misconduct and affect the integrity of an investigation or judicial proceeding.¹⁶³ The audit is a standard practice in business, medicine, and other areas of government. The ultimate goal and practice of the Conviction Integrity Unit is to focus on “raising awareness and implementing safeguards, not simply on trying to weed out a handful of rogues or bad apples.”¹⁶⁴ Despite financial and time constraints, at least some of these practices could be developed and implemented without delay.

Even, however, if many of these suggestions are adopted, the Office must be cognizant that “office culture and informal understandings may subvert office policies.”¹⁶⁵ As in other jurisdictions, policy and training practices may require prosecutors to comply with the law and “if in doubt, disclose.” But actual practice differs due to an interplay of factors. A prosecutor in another jurisdiction provided commentary that appears applicable to New Orleans:

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

163. See Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2105-06 (discussing discovery audits); Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 CARDOZO L. REV. 2215, 2247 (2010) (documenting the need for audits and other procedures to improve the functioning of criminal justice systems).

164. Innocence Project New Orleans recently established the Criminal Attorney Accountability Working Group, (CAAWG) which seeks to improve accountability for unethical lawyers in the criminal system. The Working Group includes participants from the District Attorney's Offices from Orleans and Jefferson Parishes, the Louisiana Public Defender Board, the U.S. Attorney's Office for the Eastern District of Louisiana, the Louisiana Supreme Court, the Office of Disciplinary Counsel, the Louisiana Association of Criminal Defense Lawyers, the Louisiana House of Representatives, three of Louisiana's four law schools, the Louisiana State Bar Association, as well as members of the private bar. CAAWG will conduct simulation-based programs for prosecutors and defense attorneys to be jointly trained on their ethical obligations in criminal cases. The first training will be in New Orleans in October 2012. It will then be conducted in four other cities around the state. CWAAG will perform assessments of the effectiveness of the trainings and recommend “best practices” policies for prosecutors' and public defenders' offices on ethics issues. (Materials on file with author).

165. Yaroshefsky & Green, *supra* note 36, at 282.

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.¹⁶⁶

Consequently, if Orleans Parish expects significant compliance with discovery obligations, the Office's culture of disclosure needs significant change. This is best accomplished by the adoption of a formal system of full open file discovery. The term "full open file discovery" refers to a system where the prosecution insures that it has obtained all information about the case from the police and all agencies involved and discloses all case-related information to the defense. Narrow exceptions apply.¹⁶⁷ This could be implemented as internal policy. Most likely, it would have to originate from a legislative or judicial initiative.

B. OPEN FILE DISCOVERY

Louisiana should follow the example of North Carolina, the first state that adopted full open file discovery. Ohio adopted a similar law.¹⁶⁸ A recent study of the effect of North Carolina's statute in practice by scholar Janet Moore found that full open file discovery statutes increase the "fairness, finality, and efficiency of criminal adjudications and provide[] a model for national reform of discovery rules and laws."

The North Carolina statute requires the prosecutor to provide the complete investigative files, including any material obtained by law enforcement, to the defense before trial including investigators' notes, the required recordation of all oral statements, and any other information obtained during the investigation.¹⁶⁹ It provides for work product privileges to "protect the prosecuting attorney's mental processes while allowing the defendant access to factual information collected by the state."¹⁷⁰ The statute provides for *ex parte* motions to limit disclosure if there is any "substantial risk to any person" of harm, intimidation, or even "unnecessary annoyance or embarrassment."¹⁷¹ There is also reciprocal discovery.¹⁷² Moore concludes:¹⁷³

166. *Id.*

167. Many offices have an "open file policy," but the definitions vary 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. Some may have little in the file thus the term "open file" does not provide meaningful access to information. Yaroshefsky & Green, *supra* note 36, at 279. Consequently, the most effective enforcement of full open file discovery is by codification of the requirements in court rules or by statute ("Codified open file discovery").

168. *See supra* note 28.

169. N.C. GEN. STAT. § 15A-903(a)(1). The combination of provisions in the North Carolina statutes qualify North Carolina's reform as "full" open file discovery.

170. *See Moore, supra* note 29, at 8 (citations omitted).

171. N.C. GEN. STAT. § 15A-908.

172. *Id.* at § 15A-905-906.

173. Moore, *supra* note 29, at 43.

Fact-finders make better decisions when adversaries present their strongest admissible evidence in the most compelling manner. Reliable adjudications decrease the need for additional litigation to address errors through pretrial hearings, appeals, state and federal post-conviction procedures, and civil rights actions. The finality of reliable verdicts increases public confidence in the transparency and accountability of adjudicatory systems. Finality and reliability also reduce the significant costs resulting from alleged and actual error in criminal cases—costs borne by defendants, crime victims and survivors, their families, and the taxpayers who support prosecutors, public defenders, courts, and prisons.¹⁷⁴

It would be worthwhile to establish a commission of all stakeholders in the criminal justice system to study the implementation of open file discovery laws or rules in Louisiana.

C. EXTERNAL SYSTEMS OF ACCOUNTABILITY

Good disclosure practices require systems of monitoring and accountability.¹⁷⁵ New Orleans needs to improve external incentives toward better compliance with law and rules.

These incentives are unlikely to come from the judiciary, which appears to be unable or unwilling to monitor or control disclosure practices. “Judges are so beaten down by constantly having to battle with D.A.’s on these issues that they want to go the path of least resistance. They have to get elected.”¹⁷⁶ Despite this view, without enforcement of *Brady* requirements and sanctions for intentional violations of law, change will be difficult. “Judges should have a central role in ensuring that the attorneys practicing before them are abiding by the rules and ethics of the profession. This should happen at all stages—pretrial, at trial, and through the appellate process.”¹⁷⁷

One mechanism to encourage compliance with disclosure obligations is a mandatory formal pretrial conference where the court ensures that the prosecution has disclosed specific categories of information, and that the parties are fully aware of their respective disclosure obligations under statutes and ethical rules. The court enters an order requiring such compliance, and obtains the prosecutor’s

174. For data on prison costs alone, see, e.g., Council of State Governments, *Justice Reinvestment: Facts and Trends*, http://justicereinvestment.org/facts_and_trends; see also Robert P. 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, 264-85 (2008); Alafair Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481 (2010); Richard Rosen, *Reflections on Innocence*, 2006 WIS. L. REV. 237, 271-73 (recommending full open file discovery).

175. See generally Cardozo Law Symposium, *supra* note 34.

176. Interview 1 (Dec. 1, 2011).

177. Cardozo Law Symposium, *supra* note 34, at 2031.

assurances on the record.¹⁷⁸

However, most interviewees did not believe that the judiciary would assume a more active role in assuring compliance with discovery.¹⁷⁹ Instead, they suggested that controls over disclosure practices and the conduct of prosecutors will have to be imposed by the bar association and the Louisiana Supreme Court. This would require a sea change in the disciplinary system. Nationally, the bar disciplinary process has not been effective in sanctioning clearly identified acts of misconduct, and criminal prosecutions are so rare they do not serve as a deterrent.¹⁸⁰ New Orleans mirrors that experience. A former judge said: “We have never had a D.A. who was suspended from practice for failure to act in accordance with law. No one was ever disbarred. Disciplinary committees are ineffectual. We could, we should, incentivize good behavior by punishing bad behavior.”¹⁸¹ According to a person with extensive experience with the criminal justice practices in New Orleans, “All systems must punish bad actors—you can train till hell freezes over until we decide, as a system, that we will not tolerate these ethics anymore. Once we indicate that we won’t tolerate this, no training is needed.”¹⁸² Until disciplinary bodies assume responsibility for sanctioning misconduct, there will remain weak incentives for compliance with ethics rules.¹⁸³

The current system of lack of judicial and disciplinary oversight suggests that a judicial or legislative body should establish an Independent Oversight Board that would undertake a review of current systems to determine mechanisms to improve disclosure practices and restore public confidence in the criminal justice system. The District Attorney could initiate the creation of such a body with representation of all stakeholders in the criminal justice system. It could have a broad mandate to review current practices, hold hearings, and propose necessary changes.

CONCLUSION

The current Orleans Parish District Attorney’s Office continues to operate under the many serious constraints of the New Orleans criminal justice system

178. Brief of the American Bar Association as Amicus Curiae in Support of Petitioner, *Smith v. Cain*, 565 U.S. ____ (2012) (recommending pretrial compliance conferences).

179. It is disturbing that all interviewees had significant criticisms of the judiciary but had few expectations of positive change. There seemed to be resignation to a relatively dysfunctional judiciary. The Louisiana Supreme Court should undertake examination of the functioning of the lower courts.

180. KATHLEEN M. RIDDFI & MAURICE POSSLEY, *PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997-2009* (2010), available at http://law.scu.edu/ncip/file/Prosecutorial_Misconduct_BookEntire_online%20version.pdf; see also Keenan et al., *supra* note 41.

181. Interview 14 (Feb. 3, 2012).

182. Interview 7 (Feb. 2, 2012).

183. Improved enforcement of disciplinary rules requires that the conduct that violates the rules is reported to the disciplinary committees. Historically, few complaints of ethical violations by prosecutors have been reported to the Disciplinary Committee. Interview 1 (Nov. 15, 2011).

and its unique political and institutional concerns. The Cannizzaro administration has implemented changes in internal policy and practices, but whether any of them will improve compliance with disclosure obligations is an open question. In New Orleans, systemic changes in disclosure practices are unlikely to occur without improved internal controls and external interventions—from judges, disciplinary committees, and the legislature—designed to ensure accountability with the law. Because institutional reform often occurs slowly, perhaps the most effective mechanism to improve discovery practices is through the enactment of laws or court rules requiring the full disclosure of specified categories of information; these rules are referred to in jurisdictions such as North Carolina and Ohio as “full open file” discovery (codified open file discovery). Of course, the judiciary must enforce these statutory requirements. Pretrial compliance conferences and imposition of sanctions for violations of discovery orders are essential. Other suggested reforms include an independent commission to evaluate and recommend practices and policies to improve the functioning of the criminal justice system. Without serious consideration and implementation of such proposals, significant changes in discovery practice in New Orleans are unlikely.