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Foreword: New Perspectives on Brady and Other Disclosure Obligations: What Really Works?

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Recommended Citation

Ellen Yaroshefsky, *Foreword: New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 Cardozo L. Rev. 1943 (2010)

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FOREWORD:
NEW PERSPECTIVES ON *BRADY*
AND OTHER DISCLOSURE OBLIGATIONS:
WHAT REALLY WORKS?

*Ellen Yaroshefsky**

INTRODUCTION: SCOPE OF THE SYMPOSIUM

Nearly fifty years after the Supreme Court decided *Brady v. Maryland*, state and federal criminal justice systems appear less than adequate in assuring that prosecutorial disclosure obligations are met. Recent high-publicity cases have highlighted failures to disclose fundamental exculpatory evidence to the defense, whether intentional or not. Most notably, the reversal of the prosecution of Senator Ted Stevens led the Department of Justice (DOJ) to undertake an examination of its disclosure policies and practices.¹ Both before and after the DOJ examination, there have been repeated efforts on the state and federal level to amend court rules and statutes to clarify or expand disclosure obligations. Some state prosecutors' offices have adopted versions of "open file policies" that provide a wide range of information to the defense. However, few offices have gathered data or performed system-wide studies of the effect of these disclosure policies.

Long the subject of discussion, debate, scholarly articles, and conferences, prosecutorial disclosure obligations increasingly have become the focus in wrongful conviction cases. For example, the Innocence Project documented that in a high percentage of exonerations

* This Symposium met and surpassed the sponsors' collective expectations on many levels, including the participation of a remarkable assembly of professionals, and their productivity, collegiality, and commitment to an improved process. We thank all of the participants. I owe a debt of gratitude to my tireless and efficient Symposium coordinators, Jenny May and Chris Quirk, and to Marisa Harris and Ari Fontecchio, the Cardozo Law Review Symposium Editor and Editor-in-Chief, who insured that the Symposium and its corresponding publication met the highest standards of their future profession.

¹ In 2009, there were significant federal cases involving failure to comply with disclosure obligations that received public attention. See, e.g., *United States v. Zhenli Ye Gon*, 287 Fed. App'x 113 (D.C. Cir. 2008); *United States v. Grace*, 526 F.3d 499 (9th Cir. 2008); *United States v. Shaygan*, 661 F. Supp. 2d 1289 (S.D. Fla. 2009); *United States v. Jones*, 620 F. Supp. 2d 163 (D. Mass. 2009). See also Judge Sullivan's opinion in the Ted Stevens case, *United States v. Stevens*, No 08-231, 2009 U.S. Dist. LEXIS 125267 (D.D.C. Apr. 7, 2009).

where prosecutorial practice was, at least, part of the cause of the wrongful conviction, failure to produce exculpatory evidence was a major factor. Whether these wrongful conviction cases signal that prosecutorial errors are mistakes or intentional acts and whether instances of nondisclosure are episodic or endemic, these cases certainly suggest the need for an examination of systemic causes and remedies. What are the best systems for information management? What kinds of training, oversight, and accountability are the best practices? How do state and federal criminal systems encourage a commitment to these practices? This Symposium—*New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*—explored these issues in a unique framework for the criminal justice system. It considered lessons from the fields of medicine, business, psychology, and policing as to their methods for managing information, optimizing performance, and insuring quality. For example, the implementation of quality control techniques in hospitals and clinics has significantly improved information systems, resulting in fewer errors in diagnosis and treatment. The development of training and supervision models throughout the medical field has increased awareness and remedied defects, improving quality. This Symposium sought to examine the extent to which these lessons are applicable to the criminal justice system.²

The stated goals of the Symposium were: (1) to develop best practices for increasing the reliability of results obtained by guilty pleas, trials, and post-conviction proceedings; and (2) to optimize effective training, supervision, and control mechanisms for managing information within prosecutors' offices.

The Symposium proceeded within the following framework:

1. There is a lack of clarity as to the meaning of a "*Brady* obligation" and the required scope of disclosure. Constitutional law, statutes, criminal procedure rules, court rules, and ethics rules all have varying definitions of the obligation. Additional complications arise due to differences between federal and state law, within federal jurisdictions, among states and localities, and even within individual prosecutors' offices.
2. There is a lack of clarity as to the timing of the disclosure obligation. In some jurisdictions, material is turned over prior to a guilty plea, but in most places it is not. This is significant because more than ninety percent of defendants in federal and

² This Symposium addressed these issues for the prosecution function. Comparable issues for defense counsel training, supervision, management, and quality control will be addressed at a future conference.

state courts plead guilty; thus, they often do so without the benefit of disclosure. We assume that we have a functioning adversarial system that tests the quality of evidence through cross-examination; but, in fact, our system is functionally an administrative one, where the decisions as to charging and the ultimate conclusion of a case are made essentially within the executive function.³

3. *Brady* is a hidden problem for which it is impossible to gather accurate data because attorneys raise most *Brady* or other disclosure issues at trial, on appeal, or in post-conviction proceedings. Since most cases result in guilty pleas, it is very difficult to gather data and to actually study the extent to which disclosure issues are a significant problem.
4. This Symposium—and the profession—are unlikely to reach a consensus as to the extent to which disclosure problems exist.
 - a. Prosecutors believe that defense attorneys accuse them all too often of intentional violations of disclosure obligations when, in fact, most disclosure failures are the result of negligence that may not be the fault of an individual prosecutor. Additionally, prosecutors believe that, to the extent it is a problem, the problem arises as a result of caseload demands, non-receipt of information from the police, or the inability to anticipate a particular defense. Therefore, most prosecutors believe that disclosure errors are an episodic problem.
 - b. Defense lawyers have a very different view and often find that problems of nondisclosure are endemic to the system.
 - c. Scholars and practitioners who have studied the criminal justice system believe that there are very few consequences for the prosecutor's failure to disclose certain information.

A significant goal of this Symposium, therefore, was to shift the conversation from individual, blame-based rhetoric to one of working in

³ Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1404-05 (2003) ("Nor does it affect the identity of the key decision-maker: the prosecutor rather than the court. . . . Though the defendant may plead guilty to the original charge, he is still, as in the present system, pleading guilty to whatever offense the prosecutor, after his own private adjudication, insists on. There is no public airing of the evidence against the defendant or of his defenses, and no possibility of an independent public assessment of the justice of the outcome. Such an administrative determination of guilt by executive-branch officials may be a departure from traditional due process ideals. It is not, however, intrinsically unfair.").

concert to examine systemic change that would improve the disclosure process.

I. THE SYMPOSIUM'S PROCESS AND ORGANIZATION

Nine months in advance of the Symposium, we sought the co-sponsorship of six organizations. These included the Louis Stein Ethics Center at Fordham Law School, the Center on the Administration of Criminal Law at New York University Law School, the Criminal Justice Section of the American Bar Association, the Justice Center of the New York County Lawyers' Association, the National District Attorneys' Association, the National Association of Criminal Defense Lawyers, and the Jacob Burns Ethics Center at the Benjamin N. Cardozo School of Law.

The co-sponsors assisted in planning and in securing the attendance and participation of prosecutors, judges, defense lawyers, and academics from throughout the country. The organizers asked the speakers to offer ideas from their discipline and practice areas on how to improve—and what lessons could be adapted to—the disclosure processes of the criminal justice system. A summary of their speeches is included in this Volume.⁴ The morning speakers were:

- Hon. Charles Hynes, District Attorney, Kings County, New York: *Welcome*;
- Dr. Gordon Schiff, Brigham and Women's Hospital, Harvard Medical School: *Lessons from Errors and Disclosure in Medicine*;⁵
- Barry Scheck, Co-Director, The Innocence Project, Benjamin N. Cardozo School of Law: *Reflections on Prosecution and Policing from Wrongful Conviction and Civil Rights Cases*;⁶
- Dr. Maria Hartwig, Assistant Professor, John Jay College of Criminal Justice: *The Psychological Perspective: Lessons from Cognitive Scientists*;⁷
- Lou Reiter, Police Practices Expert: *Information Management and Control in Policing*;⁸ and
- Dr. Larry R. Richard, Organizational and Management

⁴ *Voices from the Field: An Inter-Professional Approach to Managing Critical Information*, 31 CARDOZO L. REV. 2037 (2010) [hereinafter *Voices from the Field*].

⁵ *Id.* at 2038.

⁶ See 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 (2010) (expanding on this presentation).

⁷ *Voices from the Field*, *supra* note 4, at 2061.

⁸ *Id.* at 2056.

Consultant, Hildebrant: *Organizational Psychology and Assessment Tools*.⁹

Their presentations were followed by a panel response that included remarks by: Hon. Nancy Gertner, U.S. District Court for the District of Massachusetts; Hon. Susan Gaertner, Ramsay County Attorney, St. Paul, Minnesota; Anthony Ricco, defense attorney, New York; and Zachary Carter, former U.S. Attorney, Eastern District of New York, and Partner, Dorsey and Whitney, New York.¹⁰ The afternoon speakers were:

- John Chisholm, District Attorney, Milwaukee, Wisconsin: *How Individuals Are Processed Through the Criminal Justice System*;¹¹
- Terri Moore, First Assistant District Attorney, Conviction Integrity Unit, Dallas, Texas: *Prosecution in an Innovative District: Post-Conviction Issues and Management Systems*;¹²
- Rachel Barkow, Professor, Center on the Administration of Criminal Law, New York University School of Law: *Lessons from Good Government Practices and Institutional Design*;¹³ and
- Barry Schwartz, Professor, Swarthmore College: *Education and Metrics of Evaluation*.¹⁴

The morning format was followed for the afternoon presentations as well. The panel response in the afternoon included remarks by: Hon. Charles J. Hynes, District Attorney, Kings County, New York; Hon. John Gleeson, U.S. District Court for the Eastern District of New York; Gerald Lefcourt, Law Offices of Gerald Lefcourt, New York; Hon. Mathias Heck, District Attorney, Montgomery County, Dayton, Ohio; and Amy Wrzesniewski, Professor, Yale School of Management.

The Symposium also featured a talk by guest speaker Cyrus R. Vance, Jr., District Attorney, New York County (Manhattan), New York (then the District Attorney-elect), who discussed his plans for the District Attorney's Office and took questions from attendees. Mr. Vance also had members of his transition team attending the Symposium to glean ideas for disclosure solutions that could be used in his new administration.

The second day of the Symposium was by invitation to participate

⁹ *Id.* at 2078.

¹⁰ The Department of Justice declined to participate in this Symposium. Mr. Carter, as well as other attendees from U.S. Attorneys' Offices and the federal bench, provided insight into the government's view of disclosure issues in various federal jurisdictions.

¹¹ *Voices from the Field*, *supra* note 4, at 2074.

¹² *Id.* at 2069.

¹³ See Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089 (2010) (expanding on this presentation).

¹⁴ *Voices from the Field*, *supra* note 4, at 2083.

in one of six groups charged with examining a specific aspect of disclosure in prosecutorial practice. These groups included: the Working Group on Prosecutorial Disclosure Obligations and Practices; the Working Group on the Disclosure Process; the Working Group on Training and Supervision; the Working Group on Systems and Culture; the Working Group on Internal Regulation; and the Working Group on External Regulation. Group Discussion Leaders and Reporters were selected six months in advance of the Symposium and asked to provide a detailed overview and discussion guide for their groups. Ten to twelve members were selected for each group, keeping in mind diversity among fields of practice and geographical distribution. Each group had at least five prosecutors. The detailed guides were provided to group members in advance of the Symposium. At the conclusion of the second day, each of the groups' reporters presented an overview of the areas of agreement, areas of divergent views, and issues for future discussion.

The works that follow include the summaries of certain presentations, the Working Group Reports, and articles by scholars that deepen and reflect upon aspects of the Symposium. The first piece, *Voices from the Field*, presents an inter-professional approach from the speakers addressing information systems in the medical, psychological, and policing professions. The speeches and presentations included in *Voices from the Field* led to the questions and issues addressed by the Working Group Reports contained in the second piece, *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*.¹⁵ The scholarly articles, generated from the presentations and Working Group Reports, provide ideas for future avenues of inquiry.

II. SUMMARY OF SPEECHES

Charles Hynes set the stage for this provocative Symposium, telling participants that he hoped that they would learn—not only from his office's policies, but from other innovative strategies—how to reduce unlawful and unethical nondisclosures. He ended his remarks with the following declaration: “[M]ake no mistake about it, disclosure is not only an ethical and legal obligation, it is a moral imperative.”¹⁶

Dr. Gordon Schiff then provided a fascinating overview of changes implemented in the medical system to improve quality assurance in

¹⁵ 31 CARDOZO L. REV. 1961 (2010).

¹⁶ Charles Hynes, Kings County District Attorney (Brooklyn), Presentation at the Cardozo Law Review Symposium: *New Perspectives on Brady and Other Disclosure Obligations: What Really Works?* (Nov. 15, 2009) (transcript on file with the Cardozo Law Review).

diagnosing errors in hospitals.¹⁷ He offered a useful perspective as to how these changes might be applicable to the legal system. Drawing upon extensive studies—including the influential medical report, *To Err Is Human*¹⁸—he explained how the medical system moved away from a system of individual blame for errors to systemic examination of their causes in “protected spaces,” where doctors and nurses were encouraged without fear of recrimination to learn from errors. He explored “parallel developments in health care that . . . are quite relevant to creating a more reliable system of evidence disclosure.”¹⁹ Dr. Schiff suggested that at least some of the changes in the medical field—notably a checklist system, “safety nets to prevent irreparable harm” from inevitable human error, and a streamlined and standardized electronic infrastructure—were transferable to better operation of the disclosure process in the criminal justice system.²⁰ He noted that this improved process for organization of and access to information would benefit prosecutors at least as much as defense attorneys.

Barry Scheck, co-founder of the Innocence Project, explored lessons from both criminal cases and post-exoneration civil rights cases that involved the prosecution’s failure to disclose evidence.²¹ Scheck explained that it is essential to focus upon internal mechanisms within prosecutors’ offices to improve systems for information control and disclosure particularly because mechanisms outside the prosecutor’s office—such as civil liability, judicial, and other external regulatory systems—were inadequate to remedy the problem. Scheck devised a “thought experiment” that carefully and systematically identified the top three causes of failure to disclose information as: (1) information failing to be transmitted from the police to the prosecutor; (2) the prosecutor’s failure to identify important information as *Brady* material; and (3) the prosecutor’s failure to disclose information he or she knows to be *Brady* material out of fear (generally, fear of losing).²² Drawing upon Dr. Schiff’s presentation and the Working Group Reports, Scheck’s article included in this volume makes suggestions for changes in training and supervision, changes in information gathering, and ways to create a “culture of safety,” which include the use of checklists, judicial supervision of disclosure compliance, clarity in the disclosure

¹⁷ *Id.* at 2038-56.

¹⁸ INST. OF MED., *TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM* (Linda T. Kohn et al. eds., 2000).

¹⁹ *Voices from the Field*, *supra* note 4, at 2040-41.

²⁰ *Id.* at 2049.

²¹ Barry Scheck, Co-Founder of the Innocence Project, Presentation at the Cardozo Law Review Symposium: New Perspectives on *Brady* and Other Disclosure Obligations: What Really Works? (Nov. 15, 2009) (transcript on file with the Cardozo Law Review); Scheck, *supra* note 6, at 2215.

²² Scheck, *supra* note 6, at 2236.

obligation, and random audits.²³ Additionally, he describes the effective operation of a Professional and Conviction Integrity Program in prosecutors' offices.

Dr. Maria Hartwig, cognitive psychologist at the John Jay College of Criminal Justice whose work focuses on the psychology of deception and detection, described various cognitive biases that affect us all, including confirmation bias—the tendency that people are prone to see information in the light that confirms their previously held views.²⁴ She described how easy it is to trivialize what is later seen as exculpatory evidence, not because of malicious intent, but because of human errors. Describing her work in the area of formation of social judgments, she explained that studies demonstrate that human beings are poor lie detectors and that they often compound their errors by mistakenly believing in their prowess to identify lies. This can cause them to overlook obvious implications of evidence and produce adverse results in criminal cases. Criticizing the “Bible” of investigation—the *Reid Manual*²⁵—Dr. Hartwig pointed out the dangers in these investigative techniques that merely reinforce cultural myths about lie detection. Her recommendations to avoid the effects of cognitive biases include demanding clearer outcome feedback—analyzing the cases where mistakes were made—as well as developing “more powerful and scientifically supported techniques” to avoid false confession and incorrect credibility judgments.²⁶

Dr. Larry Richard, Organizational and Management Consultant with Hildebrandt, has studied lawyers—notably prosecutors—for more than twenty years and concluded that lawyers have habitual ways of “thinking, feeling, and behaving,” that takes them off the bell curve for the population.²⁷ Documenting various personality testing tools, he presented behavioral data that shows lawyers to be highly skeptical, autonomous, time driven with a need for closure, low on the sociability scale, high in abstract reasoning, and significantly low in resilience. This last characteristic is one of a person who is likely to get defensive and ward off criticism. Referring to Dr. Hartwig's presentation about cognitive bias, Dr. Richard noted that a person with low resilience was more likely to suffer from cognitive bias and not to recognize the need for repair or the need to improve. He quipped, to the mirth of the many attorneys in attendance, that “even if you could convince a lawyer that a change were necessary they wouldn't do it.”²⁸ These and other

²³ *Id.* at 2247.

²⁴ *Voices from the Field*, *supra* note 4, at 2061.

²⁵ F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS (Williams & Wilkins 2d ed. 1967).

²⁶ *Voices from the Field*, *supra* note 4, at 2069.

²⁷ *Id.* at 2078.

²⁸ Dr. Larry Richard, Organizational and Management Consultant, Hildebrandt, Presentation at

characteristics can cause obstacles to revising policies and procedures that might relieve systemic problems.

Lou Reiter, an expert in police practices, traced the development of police practices regarding *Brady* and other disclosure obligations. He explained the three trends beginning in the 1990s that have affected police *Brady* practice and resulted in greater attention to, and perhaps compliance with, disclosure requirements. First, is the negative effect that failure to disclose has had on the credibility of police officers in subsequent cases. Second, is the closer attention that has been paid to problems in the investigative process and to police training to avoid commonplace violations of evidence gathering procedures. The third factor is that civil litigation—notably civil rights cases brought by the exonerated—has had an impact on compliance with disclosure obligations. Despite these inroads, Mr. Reiter pointed out that the police have yet to look for systemic issues for wrongful convictions caused at least in part by police practices of failing to disclose necessary evidence.

Hon. John Chisholm provided an overview of his office's effective and innovative strategies not only in disclosure, but also in various community-based initiatives.²⁹ Similar to the law's alternatives to incarceration described by Hon. Charles Hynes in his introduction, Milwaukee has extensive screening and diversion programs to insure that individuals are not placed in the criminal justice system unless there are no effective alternatives. As Chisholm notes, many offices are engaged in a fundamental reexamination of the prosecutor's role, moving from process-oriented systems to outcome-based ones. Part and parcel of the Milwaukee programs is early access to information by the defense to effectuate informed decision-making. Chisholm's office changed to an open file policy by which, with noted exceptions to protect witnesses, virtually all information from the prosecution file is disclosed to the defense. Contrary to fears and expectations of individual prosecutors in his office, the policy has enhanced effective guilty pleas and improved relationships among counsel.

Terri Moore, a Dallas County prosecutor, described the transformation of the Dallas County District Attorney's Office from one with a challenging record of wrongful convictions to the first office in the country to establish a Conviction Integrity Unit.³⁰ That unit was established to examine cases where defendants had requested and were denied access to DNA evidence. As a consequence, the office

the Cardozo Law Review Symposium: New Perspectives on *Brady* and Other Disclosure Obligations: What Really Works? (Nov. 15, 2009) (transcript on file with the Cardozo Law Review).

²⁹ *Voices from the Field*, *supra* note 4, at 2074.

³⁰ *Id.* at 2069-70.

implemented a range of new practices for hiring, training, and supervision. Moore provided one the Symposium's most noted suggested practices for reform: The office sends case law on disclosure obligations to potential hires and tells them to come prepared to discuss their role in satisfying the disclosure obligations. Reinforcing the obligations early on in the process is the beginning of good practices. Moore also described the office policy of requiring the preservation of all trial notes.

Professor Rachel Barkow reflected upon the experience of federal prosecutors in the 1990s, recognizing that cultural changes within corporate entities were essential to deter crime.³¹ The prosecution required entity-based corporate compliance programs that included the implementation of training, supervision, monitoring, and transparency policies. Carefully evaluating the comparison between compliance models for corporations and prosecutors' offices, Barkow provided an important framework that uses these corporate compliance programs within prosecutors' offices to deter *Brady* violations. As she cogently argues in her Article included in this volume, just as prosecutors have required the implementation of entity-based compliance programs for other organizations, prosecutors should implement this model for their own offices.³²

Barry Schwartz ended the day's presentations by offering important insights about implementing incentives and accountability mechanisms for prosecutors.³³ His important caveat was that incentives are based upon meeting certain explicit criteria when, in fact, many incentives actually rely upon a set of implicit criteria. Thus, creating incentive structures for compliance with disclosure obligations must take into account the implicit criteria, the cognitive biases and "naïve realism"—that is, the attitude we all have when we disagree with someone else that we are correct and that the other person "is being willfully insensitive to the true state of affairs."³⁴ Schwartz's cautionary tales ended with a reflection on the Symposium's theme of getting beyond individual blame. Schwartz thought that in the legal system, individual accountability was essential to effective functioning.

³¹ Rachel Barkow, Professor, Center on the Administration of Criminal Law, New York University School of Law, Presentation at the Cardozo Law Review Symposium: New Perspectives on *Brady* and Other Disclosure Obligations: What Really Works? (Nov. 15, 2009) (transcript on file with the Cardozo Law Review).

³² Barkow, *supra* note 13, at 2105-06.

³³ *Voices from the Field*, *supra* note 4, at 2083.

³⁴ *Id.* at 2084.

III. REPORTS OF THE WORKING GROUPS

The Working Group Reports³⁵ provide a thorough exploration of a wide range of issues identifying key areas with suggestions for improvement. These serve as a model for jurisdictions to consider specific policies and programs and proposed changes in court rules or legislation.

The first group was charged with considering the appropriate scope and timing of and exceptions to disclosure. The remaining five groups did not discuss what should be disclosed. Rather, each subsequent group had its own mission.

A. *Working Group on Prosecutorial Disclosure Obligations and Practices*

This group acknowledged that the boundaries of the disclosure obligation are uncertain and contested in great measure because of the materiality requirement and issues relating to the timing of disclosure.³⁶ It agreed on the necessity for greater clarity as to disclosure obligations and the need for internal policies to govern the obligations. While the group disagreed, *inter alia*, as to whether disclosure should be greater than that required by law, it reached broad consensus on many principles, notably on the scope and timing of disclosure. The Working Group on Prosecutorial Disclosure Obligations and Practices concluded that “[a]s a general principle, but subject to exceptions, prosecutors should disclose all evidence or information that they reasonably believe will be helpful to the defense or that could lead to admissible evidence.” As to timing, it agreed that “prosecutors should disclose evidence and information as soon as practicable.”³⁷ The report describes the various issues of contention across a wide range of topics and concludes that substantial ground was reached in defining and narrowing issues of agreement and disagreement worthy of future discussion.

B. *Working Group on the Disclosure Process*

This group considered “how to insure that, whatever the scope of

³⁵ *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961 (2010) [hereinafter *Report of the Working Groups*].

³⁶ *Id.* at 1962-70.

³⁷ *Id.* at 1971.

the disclosure obligation or commitment, it is effectuated.”³⁸ The group focused primarily on how to facilitate communication between police and prosecutors, as this appears to be the area with the greatest difficulty of ensuring compliance. First, the group emphasized the need for formal policies and procedures. It reached consensus that case information checklists were essential “to ensure full and timely transfer of all relevant information from police to prosecutors” and explored experiences from jurisdictions that utilize them.³⁹ It suggested technology-focused information checklists and discussed how a checklist-based system could be fostered in all jurisdictions. It concluded that a group of experts should develop a set of model checklists that could be tailored by local offices to meet their particular circumstances. The group noted that a significant issue is that important information is often not recorded and suggested that “procedures and tools” (including checklists) be implemented. The group further noted that for checklists to be effective there must be “audits that examine the extent to which police have met their information-sharing obligations.”⁴⁰ Other suggestions include the mandatory participation of police in pretrial discovery conferences to insure accountability to the courts as well as to increase cooperation and compliance with prosecutors.

The Working Group on the Disclosure Process also noted particular challenges in four areas: (1) when parallel investigations are conducted; (2) in the misdemeanor context; (3) the proper extent of required prosecutorial note taking; and (4) whether there should be electronic recording of interviews. The report provides insightful discussion of each of these issues. Finally, the group considered the thorny issue of the proper timing of certain disclosure to the defense. The report suggests that an appropriate resolution is for various jurisdictions to consider “open and early discovery in a small category of cases, and then evaluate those cases to determine if such disclosure creates any problems.”⁴¹

C. *Working Group on Training and Supervision*

This group considered a wide range of issues, beginning with the notion that “[p]rosecutors’ offices must accept responsibility for setting internal disclosure standards, training their new hires on those standards, and supervising and monitoring compliance with those

³⁸ *Id.* at 1972 (emphasis omitted).

³⁹ *Id.* at 1974.

⁴⁰ *Id.* at 1979.

⁴¹ *Id.* at 1983.

standards.” To the extent there are disclosure issues, solutions should focus on “raising awareness and implementing safeguards, not simply on trying to weed out a handful of rogues or bad apples.”⁴² First identifying problems, the group acknowledged the recognized dangers and consequences of tunnel vision, a chronically overtaxed system, the failure to memorialize information, and unclear standards and rules. The potential solutions include reframing the issue as “tell[ing] a full story” rather than as a “windfall for defendants and an opportunity to blame prosecutors.”⁴³

The Working Group on Training and Supervision then proposed hiring practices akin to that of the Dallas County District Attorney’s Office⁴⁴ so that disclosure obligations are identified as a key issue in the hiring process. As for training, the group emphasized the need for ongoing formal and informal training that utilizes videos and simulations. Significant attention was devoted to the need for “feedback loops” in the supervision process so that prosecutors can learn from the successes and failures of others. “Feedback should be standardized, periodic, and routine,” and should be not only internal but from colleagues, subordinates, public defenders, judges, and police, akin to an “eBay[] post-transaction email[], asking buyers to rate their sellers.”⁴⁵

D. *Working Group on Systems and Culture*

This group was charged with addressing aspects of systems and culture in a prosecutor’s office “that could best contribute to high compliance rates” with disclosure obligations.⁴⁶ First the group noted that prosecutors could not rely on rules and systems alone to influence culture. Rather, culture and systems need to reinforce each other to create a cultural norm of commitment to the underlying values that support disclosure. This begins with leadership that effectively conveys its commitment, in part, by ensuring that “success” is not confined to winning. To do so, the group suggested that internal stories told during training and as general office lore include cases of “litigation fairness” along with trial victories. It pointed out that a reversal on appeal should not be touted as the only failure in the disclosure context. Instead, the prosecutor’s office should examine “near misses”—a concept from the medical field—to study failures to disclose even when there is an

⁴² *Id.* at 1984.

⁴³ *Id.* at 1986.

⁴⁴ *Id.* at 1988-89.

⁴⁵ *Id.* at 1993.

⁴⁶ *Id.* at 1995.

appellate finding of no prejudice.⁴⁷

The Working Group on Systems and Culture also considered the effects of election versus appointment on the creation of office culture. It considered the dearth of material and need for study as to how attorneys form professional identities. Finally, it recognized that culture is embodied in incentive systems, acknowledging that such systems are more meaningful to outcomes than “verbal affirmations about the importance of fair play.”⁴⁸ It considered a range of incentives, offering quite different accounts of what incentives were currently at play. Drawing from the experience of large private firms that designate an attorney as Legal Counsel to the firm, it suggested that a highly regarded lawyer could be appointed as a Disclosure Expert to oversee, advise, gather, and disseminate information about the office’s disclosure issues. The group had a wide ranging discussion of the pros and cons of random internal and external audits and used parallel audits in the health care system as models of comparison.

E. *Working Group on Internal Regulation*

This group focused upon the development of written guidelines, auditing, and oversight.⁴⁹ Similar to conclusions of other groups, it called for the promulgation of clear written guidelines and procedures by which they should be effectuated. They weighed the pros and cons of “hard versus soft” guidelines (specific directives versus goal directives), with a majority concluding that the optimal approach is soft rules with commentary. The group detailed the proper use of checklists throughout the discovery process as an effective mode of internal regulation, during which the metaphor from the medical field of “putting a nurse in the room” gained traction. This refers to the separation of task performance from the responsibility of confirming task completion.⁵⁰ Finally, realistic models for best auditing practices were considered. The Working Group on Internal Regulation also recognized the significance of data gathering and recommended the gathering of data “to improve development of and compliance with [written] guidelines.”⁵¹ The thorough report describes the group’s range of views to guide further discussion of best practices.

⁴⁷ *Id.* at 1998.

⁴⁸ *Id.* at 2001.

⁴⁹ *Id.* at 2011.

⁵⁰ *Id.* at 2021.

⁵¹ *Id.* at 2026.

F. *Working Group on External Regulation*

This group considered “whether, how, and to what extent, courts, disciplinary authorities and other external bodies should regulate *Brady* disclosure obligations and correlative ethics rules.”⁵² It recommended greater judicial involvement, including mandatory pretrial conferences to enforce compliance with disclosure obligations, and requiring prosecutors to provide affirmations and certifications of compliance. The Working Group on External Regulation also recommended a range of checklist requirements, including disclosure to the court of items disclosed and a privilege log of items withheld. Finally, it recommended mandatory judicial reporting of prosecutors to disciplinary committees and called for vertical case assignments of judges.

IV. ARTICLES

In addition to the articles by Rachel Barkow⁵³ and Barry Scheck,⁵⁴ this volume includes Articles by other scholars that deepen the understanding of developing effective approaches to improve the exercise of prosecutorial discretion and systems for training, supervision, and accountability.

In *Talking About Prosecutors*, Alafair Burke develops a premise of the Symposium, which was to move beyond a culture of blame to one of examination of systems for improvement.⁵⁵ She surveys the literature on prosecutorial decision-making and notes that it is dominated by a language of fault-based rhetoric as the growing literature about innocence and wrongful convictions assumes that “prosecutorial misconduct” is deeply imbedded in prosecutorial culture. As an alternative explanation, she argues that most prosecutorial failures to produce evidence are the product of mistake or inadvertence, often the consequence of the unclear *Brady* policy itself, and that it behooves lawyers and academics to move beyond the language of fault-based rhetoric to discussions that will more likely persuade prosecutors to implement reforms.⁵⁶

Bruce Green challenges a fundamental premise of the Symposium:

⁵² *Id.* at 2029.

⁵³ Barkow, *supra* note 13.

⁵⁴ Scheck, *supra* note 6.

⁵⁵ Alafair S. Burke, *Talking About Prosecutors*, 31 CARDOZO L. REV. 2119 (2010).

⁵⁶ *Id.* at 2135.

that its lessons can be implemented.⁵⁷ Green questions whether prosecutors' offices can learn from their mistakes. Beginning with the DOJ's acknowledgement in the Ted Stevens case that it made mistakes and its promise to learn from those mistakes, Green identifies a host of reasons why this may not occur. Amplifying the Symposium's themes and presentations, Green suggests that the starting point for any office is to acknowledge and attempt to understand why errors occur. He notes that state and federal prosecutors might profess doubt about the value of studying such errors because of a perception of the lack of systemic problems and the adequacy of the current disclosure and accountability systems. Debunking these notions, Green identifies the challenges for prosecutors' offices in making improvements and suggests that, at the very least, prosecutors should develop processes to learn from their mistakes.

Lawton Cummings turns her attention solely to an understanding of intentional misconduct and undertakes an analysis of the social psychology of prosecutors who engage in willful misconduct.⁵⁸ Cummings draws upon moral disengagement theory—the mechanisms that operate to distance individuals from their individual moral codes and self sanctions to permit them to perform “questionable acts.” What allows a formerly ethical prosecutor to engage in unethical behavior? She discusses various mechanisms and factors that permit such behavior. She argues in favor of systemic reforms to ameliorate the potential effects of moral disengagement, including community-based solutions to public safety issues and “evaluating outcomes through measurements beyond conviction rates.”⁵⁹ Addressing the need for accountability, Cummings adopts the suggestion of creating “prosecution review boards” under the aegis of the state bar to conduct random reviews of prosecutorial decisions.

Daniel Medwed, noting that a discussion about prosecutorial disclosure policies and practice is incomplete without a parallel discussion of the exercise of discretion in the decision to charge, suggests that some of the proposals for effective internal and external regulation of disclosure should be implemented in the charging decision context.⁶⁰ Medwed discusses the effects of various cognitive biases on charging decisions and suggests a range of structural and policy changes to safeguard the innocent. These include raising the evidentiary threshold required to initiate a case, factoring defense evidence into the

⁵⁷ Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn from Their Lawyers' Mistakes?*, 31 CARDOZO L. REV. 2161 (2010).

⁵⁸ Lawton P. Cummings, *Can an Ethical Person Be an Ethical Prosecutor? A Social Cognitive Approach to Systemic Reform*, 31 CARDOZO L. REV. 2139 (2010).

⁵⁹ *Id.* at 2156.

⁶⁰ Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187 (2010).

decision-making process, and adding an “objective prong” to the subjective test that currently exists in most jurisdictions for deciding whether to file a charge. Moreover, Medwed advocates a secondary review structure within the prosecutor’s office to vet any borderline cases.

V. FUTURE WORK

The goal of the Symposium is to develop best practices to optimize effective training, supervision, and control mechanisms for managing information within prosecutors’ offices. It is our hope that the Symposium and this publication will be used to foster further discussion, meetings, conferences, and proposals to develop policies and practices that improve the criminal justice system.

