
BEYOND TRAINING PROSECUTORS ABOUT THEIR DISCLOSURE OBLIGATIONS: CAN PROSECUTORS' OFFICES LEARN FROM THEIR LAWYERS' MISTAKES?

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ABSTRACT

Prosecutors, criminal defense lawyers, judges, and legal academics from around the country recently met at the Benjamin N. Cardozo School of Law in New York to discuss prosecutors' compliance with their disclosure obligations.¹ The overarching question was how prosecutors' offices could do a better job. To assist representatives of the legal profession in approaching this question from new directions, the Symposium organizers invited speakers from outside the legal profession to talk about the causes of error and methods used to reduce error in other contexts. One of the themes was that, outside the practice of law, individuals and institutions learn from their mistakes. This Article considers whether prosecutors' offices can identify and learn from their lawyers' disclosure mistakes.

INTRODUCTION

Early in President Obama's term, the U.S. Department of Justice (DOJ) acknowledged a big mistake and promised to learn from it. Senior federal prosecutors in the DOJ's Public Integrity Section had secured the indictment of a sitting U.S. Senator—Ted Stevens. The prosecutors put the Senator to the expense, time, and anxiety of lengthy proceedings that culminated in a guilty verdict—and influenced the course of an election—only to have the case dismissed after it was revealed that the prosecutors had withheld crucial evidence supporting

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¹ Symposium, *New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943 (2010).

the Senator's defense and contradicting the prosecution's key witness. Prior to the sentencing, the DOJ admitted that the prosecutors failed to comply with their constitutional obligation to disclose favorable evidence to the accused and decided not to retry the case.² The DOJ also resolved to rethink its disclosure policies and practices.³

The DOJ was motivated to pledge a reevaluation of discovery practices by its awareness that the Ted Stevens prosecution was only one in a series of federal criminal cases in which it was embarrassed by its lawyers' discovery failures. A similar failure previously plagued one of the biggest federal environmental prosecutions in history—a prosecution blaming executives of W.R. Grace Co. for decades of dangerous environmental abuses. The trial court ultimately instructed the jury that the DOJ lawyers had failed to meet their obligation to disclose evidence to the defendants; that and other rulings in response to the prosecution's discovery failure may have contributed to the jury's decision to acquit the defendants.⁴ In response to another federal prosecutor's disclosure violation, the U.S. Chief District Judge for the District of Massachusetts initiated disciplinary proceedings in his own court, having concluded from past experience that the DOJ was unable or unwilling to police prosecutors who violated these obligations;⁵ the court's opinion summarized close to seventy published federal court decisions involving federal prosecutors' nondisclosure or belated disclosure of discovery material.⁶ At around the same time, in Miami, another federal judge awarded substantial monetary damages to a federal criminal defendant who, the court found, had been victimized by a range of prosecutorial misconduct, not the least of which involved disclosure violations.⁷

² Motion of the United States to Set Aside the Verdict and Dismiss the Indictment with Prejudice, *United States v. Stevens*, No. 08-231 (D.D.C. Apr. 1, 2009). See generally Neil A. Lewis, *Tables Turned on Prosecution in the Stevens Case*, N.Y. TIMES, Apr. 7, 2009, at A1.

³ Press Release, U.S. Dep't of Justice, Remarks as Prepared for Delivery by Deputy Attorney General David W. Ogden at His Installation Ceremony (May 8, 2009) ("A team of senior prosecutors and Department officials—under the direction of Assistant Attorney General Lanny Breuer and Karin Immergut, Chair of the Attorney General's Advisory Committee of US Attorneys—are reviewing discovery practices in criminal matters and will recommend any necessary improvements.").

⁴ See Gregory F. Linsin, "A Cancerous Effect on the Administration of Justice"—What Can Be Done About the Rash of Flagrant DOJ Discovery Violations?, MONDAQ, July 1, 2009, <http://www.mondaq.com/unitedstates/article.asp?articleid=82080>.

⁵ *United States v. Jones*, 620 F. Supp. 2d 163 (D. Mass. 2009). In a subsequent decision, the court held that sanctions against the prosecutor were not necessary or appropriate. Among the reasons given, the court noted that in the aftermath of the incident, the prosecutor was contrite and furthered her education on the subject of discovery obligations, and that the United States Attorneys' Office also implemented significant new initiatives. *United States v. Jones*, 686 F. Supp. 2d 147 (D. Mass. 2010).

⁶ 620 F. Supp. 2d at 185-93.

⁷ *United States v. Shaygan*, 661 F. Supp. 2d 1289 (S.D. Fla. 2009). Other recent examples have been reported as well. See, e.g., Linsin, *supra* note 4 (reporting that in June 2009, the DOJ

In January 2010, based on the recommendations of its discovery working group, the DOJ unveiled a series of new initiatives.⁸ A principal product of the DOJ's study was a commitment to educate federal prosecutors more rigorously regarding their disclosure duties.⁹ Having previously called upon federal prosecutors' offices to designate discovery coordinators, the DOJ now called on the coordinators to provide annual training to their offices and "serve as on-location advisors,"¹⁰ and announced that it would develop resources for prosecutors regarding discovery.¹¹ The DOJ appointed a new national coordinator for criminal discovery initiatives to oversee the educational efforts and other initiatives.¹² The pedagogic focus presupposes that one important explanation for why federal prosecutors sometimes fail to comply with their disclosure obligations is that they are unaware of the relevant law, misunderstand it, misapply it, or do not know how to implement it.

The assumption that without adequate training, federal prosecutors will not adequately understand their minimal legal obligations, seems fair given that federal prosecutors' disclosure obligations have many

moved in two Ninth Circuit cases, *United States v. Kohring* and *United States v. Kott*, to remand the cases and release the defendants because "it had uncovered information that should have been, but was not, disclosed to the appellants prior to trial"); Del Quentin Wilber, *Justice Dept. Wants Charges Against Mexican Man Dropped*, WASH. POST, June 23, 2009, at B04 (reporting the DOJ's motion to dismiss charges against reputed international drug dealer after the district court criticized federal prosecutors for discovery failures).

⁸ See Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010) [hereinafter Ogden Memo re Criminal Discovery], available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00165.pdf; Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, Issuance of Guidance and Summary of Actions Taken in Response to the Report of the Department of Justice Criminal Discovery and Case Management Working Group (Jan. 4, 2010) [hereinafter Ogden Memo re Summary of Actions], available at <http://www.justice.gov/dag/dag-memo.pdf>; Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Department Litigating Components Handling Criminal Matters [and] All United States Attorneys, Requirement for Office Discovery Policies in Criminal Matters (Jan. 4, 2010) [hereinafter Ogden Memo re Requirement for Office Discovery Policies], available at <http://www.justice.gov/dag/dag-to-usas-component-heads.pdf>.

⁹ Mike Scarcella, *DOJ Outlines Changes After Backlash over Handling of Stevens Case*, LAW.COM, Oct. 19, 2009, <http://www.law.com/jsp/article.jsp?id=1202434690374> (reporting that in an October 13, 2009 speech, Assistant Attorney General Lanny Breuer announced plans for "mandatory annual discovery training for all [federal] prosecutors and the creation of a new position at Main Justice that will focus on discovery issues" while also vowing that "the department would fight any effort to require prosecutors to turn over all favorable information to the defense").

¹⁰ Ogden Memo re Summary of Actions, *supra* note 8, at 3.

¹¹ *Id.* at 3-4.

¹² Press Release, U.S. Dep't of Justice, Department of Justice Announces National Coordinator for Criminal Discovery Initiatives (Jan. 15, 2010). The responsibilities of the national coordinator are to include creating an online directory of resources on discovery, to produce a handbook on discovery and case management, to implement training for agents and paralegals, and to oversee a project to develop electronic storage of, and access to, investigative materials. *Id.*

sources and their scope is uncertain or contested in various respects.¹³ For example, the prosecutors in the Ted Stevens prosecution failed to comply with the constitutional minimum, as established by *Brady v. Maryland*¹⁴ and subsequent decisions. These decisions provide as a matter of due process that the prosecution generally must turn over certain evidence and other information favorable to the defense, whether because the information tends to establish the defendant's innocence or because it tends to undermine the credibility of the prosecution's witnesses.¹⁵ However, despite the passage of many years since *Brady* was decided, its scope remains contested. For example, the Supreme Court has said that due process has been violated only when prosecutors failed to turn over favorable evidence that was "material." But courts disagree about what materiality means and how much the concept narrows prosecutors' legal obligations;¹⁶ at best, the concept can be elaborated only in vague terms that leave much to the judgment of prosecutors and courts. In federal criminal prosecutions, federal statutes and rules of criminal procedure also establish disclosure obligations, and in some districts, local court rules and/or rules of professional conduct also do so, augmenting as well as overlapping with the federal constitutional dictates.¹⁷ The scope of some of these additional obligations is also unclear.¹⁸ Ultimately, judicial approaches to discovery vary among the federal district courts.¹⁹

¹³ See *infra* Part I.C and accompanying text.

¹⁴ 373 U.S. 83 (1963).

¹⁵ See, e.g., *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bagley*, 473 U.S. 667 (1985); *Giglio v. United States*, 405 U.S. 150 (1972).

¹⁶ Compare, e.g., *United States v. Naegle*, 468 F. Supp. 2d 150, 153 (D.D.C. 2007) ("The government is obligated to disclose all evidence relating to guilt or punishment which might be reasonably considered favorable to the defendant's case, that is, all favorable evidence that is itself admissible or that is likely to lead to favorable evidence that would be admissible, or that could be used to impeach a prosecution witness." (citing *United States v. Safavian*, 233 F.R.D. 12, 17 (D.D.C. 2005))), with *Boyd v. United States*, 908 A.2d 39, 61 (D.C. 2006) ("Materiality is an issue at the time that the prosecutor makes a determination regarding what he must disclose to the defense . . ."). The DOJ sides with the narrowest reading of prosecutors' constitutional duties. See U.S. ATTORNEYS' MANUAL § 9-5.001(B)(1) (U.S. Dep't of Justice 2010), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm; *infra* note 26; see also Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643 (2002) (arguing that *Brady* has minimal pretrial significance because of the stringency of the "materiality" standard).

¹⁷ See generally LAURAL L. HOOPER ET AL., FED. JUDICIAL CTR., TREATMENT OF *BRADY V. MARYLAND* MATERIAL IN UNITED STATES DISTRICT AND STATE COURTS' RULES, ORDERS, AND POLICIES: REPORT TO THE ADVISORY COMMITTEE ON CRIMINAL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (2004).

¹⁸ At the Symposium, participants who examined the scope of prosecutors' disclosure obligations noted the importance of clear statutory provisions. See, e.g., *New Perspectives on Brady and Other Disclosure Obligations: Report of the Working Groups on Best Practices*, 31 CARDOZO L. REV. 1961, 2016 (2010) [hereinafter *Report of the Working Groups*].

¹⁹ See generally HOOPER ET AL., *supra* note 17, at 6-16.

State prosecutors are in a similar position. They have to comply not only with the federal constitutional obligations but with disclosure obligations established by state constitutional decisions, statutes, procedural rules,²⁰ and/or ethics rules.²¹ For example, many state laws require prosecutors to disclose various writings and physical evidence. Typically, these include written and recorded statements of the prosecution's witnesses, writings and physical evidence that the prosecution intends to offer at trial, relevant laboratory reports, and statements of the accused.²² The specific materials that must be disclosed may contain some but not necessarily all *Brady* information in a case. They almost certainly will include much material that is not covered by *Brady* but that will nevertheless be important to defense counsel for purposes of advising the defendant, investigating, preparing for trial, and/or presenting a defense.

Prosecutors' offices often adopt internal discovery policies regarding disclosure—for example, policies establishing the process by which prosecutors in the office should comply with their legal obligations; or policies calling on prosecutors to disclose more evidence and information, or to make disclosure sooner, than the law requires.²³ Prosecutors must comply with these additional disclosure obligations. Although the failure to do so will have no legal consequences for the prosecution in a criminal proceeding, they may subject prosecutors to formal or informal sanction in the workplace. Internal policies on disclosure are ordinarily intended to reduce the risk that prosecutors will violate their legal obligations. Thus, an important question is how well

²⁰ See *Report of the Working Groups*, *supra* note 18, at 1962-63.

²¹ Most states have a rule corresponding to Rule 3.8(d) of the ABA Model Rules of Professional Conduct. The Supreme Court has assumed that the rule is more demanding than the constitutional obligation. See *Cone v. Bell*, 129 S. Ct. 1769, 1783 n.15 (2009) (“Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor’s ethical or statutory obligations.”). Several state courts seem to disagree, however. See *Disciplinary Counsel v. Kellogg-Martin*, 923 N.E.2d 125, 130 (Ohio 2010) (declining to construe the rule “as requiring a greater scope of disclosure than *Brady* and [Federal Rule of Criminal Procedure 16] require”); ABA Standing Comm. on Ethics and Prof’l Responsibility, Formal Op. 09-454 at 4 n.18 (2009) [hereinafter ABA Opinion 09-454] (citing cases and discussing the prosecutor’s duty to disclose evidence and information favorable to the defense). Recently, the ABA’s ethics committee issued an opinion concluding that, in several respects, the rule is significantly more demanding than constitutional doctrine. See generally ABA Opinion 09-454, *supra*. However, there is no evidence that courts generally hold prosecutors to the potentially stricter dictates of their jurisdictions’ disciplinary rule. The DOJ policy makes only passing reference to the ethics rules governing prosecutorial disclosure and guides federal prosecutors to take a more conservative approach to disclosure than the one required by the ethics rules both on their face and as interpreted by the ABA Committee on Ethics and Professional Responsibility. See U.S. ATTORNEYS’ MANUAL § 9-5.001 (U.S. Dep’t of Justice 2010); see also Ogden Memo re Criminal Discovery, *supra* note 8, at 1.

²² See *Report of the Working Groups*, *supra* note 18, at 1966-67.

²³ See *id.* at 2025 (concluding that prosecutors’ offices should promulgate written guidelines governing discovery that address both what must be disclosed and the process of disclosure).

they serve that objective and whether it is possible to improve the efficacy of policies without unduly sacrificing other law enforcement interests. Disclosure policies may promote other objectives as well, including: (1) the interest in promoting fair outcomes; (2) the interest in promoting public and judicial confidence in the office's fairness; and (3) particularly in the case of liberal disclosure policies, the office's administrative interest in encouraging early resolutions of criminal cases by enabling defendants to size up the cases against them at an early stage and make rational decisions, where appropriate, to plead guilty.

On the more generous side, some prosecutors' offices have "open file" disclosure policies permitting the defense to examine or reproduce all of the documents in the prosecutor's case file.²⁴ Other offices have policies that augment prosecutors' legal obligations far less generously. Still others may leave it to prosecutors, as a matter of individual autonomy, whether to disclose more than the law demands, and many prosecutors undoubtedly do so—either consistently with the Supreme Court's admonition to avoid "tacking too close to the wind"²⁵ or simply as a matter of administrative ease.

Prior to its new discovery initiatives, the DOJ's internal policy took a comparatively stingy approach. It now encourages prosecutors to err on the side of disclosure whenever they are uncertain whether evidence is "material" for purposes of constitutional case law²⁶ and

²⁴ See ABA Opinion 09-454, *supra* note 21, at 6 n.30; Warren Diepraam, *Prosecutorial Misconduct: It Is Not the Prosecutor's Way*, 47 S. TEX. L. REV. 773, 780 (2006) ("In addition to broad discovery rights, most jurisdictions across the state [of Texas] have open-file policies whereby the defense lawyer is allowed access to, and in many cases copies of, the prosecution's evidence."). At the Symposium, Hon. Charles J. Hynes, the District Attorney of Kings County, New York, and John Chisholm, the District Attorney of Milwaukee, Wisconsin, discussed their offices' "open file" policies. See Hon. Charles J. Hynes, Dist. Att'y, Kings County, New York, Presentation at the Cardozo Law Review Symposium: New Perspectives on *Brady* and Other Disclosure Obligations: What Really Works? (Nov. 15, 2009) [hereinafter Hynes Presentation] (transcript on file with the Cardozo Law Review); *Voices from the Field: An Inter-Professional Approach to Managing Critical Information*, 31 CARDOZO L. REV. 2037, 2074 (2010) [hereinafter *Voices from the Field*] (presentation by John Chisholm).

²⁵ *Kyles v. Whitley*, 514 U.S. 419, 439 (1995); *accord* *Cone v. Bell*, 129 S. Ct. at 1783 n.15 ("As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure.").

²⁶ U.S. ATTORNEYS' MANUAL § 9-5.001(B)(1) (U.S. Dep't of Justice 2010) ("Exculpatory and impeachment evidence is material to a finding of guilt—and thus the Constitution requires disclosure—when there is a reasonable probability that effective use of the evidence will result in an acquittal. Recognizing that it is sometimes difficult to assess the materiality of evidence before trial, prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence. While ordinarily, evidence that would not be admissible at trial need not be disclosed, this policy encourages prosecutors to err on the side of disclosure if admissibility is a close question." (citations omitted)). This guideline is undercut, however, by caution against over-disclosure. See *id.* § 9-5.001(A) ("The policy, however, recognizes that other interests, such as witness security and national security, are also critically important, and that if disclosure prior to trial might jeopardize these interests, disclosure may be

generally to comply with the constitutional obligation as soon as possible.²⁷ DOJ policy also calls for some disclosure of information beyond the constitutional and legal minimum. In general, it requires disclosure of information that is “inconsistent” with the charged crime or that “casts a substantial doubt upon the accuracy” of the prosecution’s evidence regardless of whether the information is likely to lead to an acquittal.²⁸ This requires far less disclosure, however, than that required by the analogous ABA Model Rule of Professional Conduct or ABA Standard for Criminal Justice, which, in the ABA’s understanding, call for disclosure of information favorable to the defense.²⁹ The DOJ standard also requires less disclosure than state prosecutorial policies that call upon prosecutors to open their case files to the defense regularly, thereby disclosing witness interview reports and other material that might be principally inculpatory but whose early disclosure might help the defense size up the case and better prepare for trial.³⁰ Compliance with the DOJ’s policy might reduce the risk of error, legal challenges, and criticism, but to a far lesser degree than an open file policy. Where internal policy calls, at a minimum, for caution, a prosecutor who withholds evidence in close cases will have made an error of judgment and have departed from internal regulatory policy—even if at the end of the day he or she has not broken the law.

The DOJ “guidance” issued in January 2010 does not purport to establish new disclosure obligations³¹ but elaborates on existing guidelines regarding the procedures by which individual prosecutors should gather and review potentially discoverable information.³² Rather

delayed or restricted . . .” (citation omitted)); *id.* § 9-5.001(C) (“The policy recognizes, however, that a trial should not involve the consideration of information which is irrelevant or not significantly probative of the issues before the court and should not involve spurious issues or arguments which serve to divert the trial process from examining the genuine issues. Information that goes only to such matters does not advance the purpose of a trial and thus is not subject to disclosure.”).

²⁷ *See id.* § 9-5.001(D).

²⁸ *Id.* § 9-5.001(C).

²⁹ *See* MODEL RULES OF PROF’L CONDUCT R. 3.8(d) (2008); STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION & DEF. FUNCTION § 3-3.11(a) (3d ed. 1993); ABA Opinion 09-454, *supra* note 21, at 4 (“Rule 3.8(d) is more demanding than the constitutional case law, in that it requires the disclosure of evidence or information favorable to the defense without regard to the anticipated impact of the evidence or information on a trial’s outcome.”); *see generally supra* note 21 (discussing state versions of Rule 3.8(d)).

³⁰ *See supra* note 24 and accompanying text (discussing open file policies).

³¹ Ogden Memo re Requirement for Office Discovery Policies, *supra* note 8, at 1.

³² Ogden Memo re Criminal Discovery, *supra* note 8, at 1-4. Interestingly, while recognizing that federal prosecutors’ disclosure obligations derive from various sources, such as constitutional law, the Jencks Act, Federal Rule of Criminal Procedure 16, and local rules of the district court, the new guidance does not acknowledge that federal prosecutors may have additional obligations under rules of professional conduct. The omission is striking because the Supreme Court and the ABA have recently expressed the view that rules of professional conduct modeled on Rule 3.8(d) of the ABA Model Rules of Professional Conduct place additional discovery obligations on prosecutors. *See Cone v. Bell*, 129 S. Ct. 1769, 1783 n.15 (2009) (“Although the Due Process

than establishing a uniform approach to disclosure by federal prosecutors and their offices, the DOJ directs offices to establish discovery policies with which its prosecutors should comply—subject to exceptions in individual cases³³—while noting that most offices already had such policies that could simply be reaffirmed or formalized.³⁴

Beyond that, the DOJ generally leaves it to the discretion of individual prosecutors and their offices whether to disclose more, or disclose sooner, than the disclosure law and the DOJ policy require.³⁵ Further, its guidance seemingly pushes prosecutors in opposite directions regarding whether to take a liberal or conservative approach as a matter of discretion. While encouraging prosecutors “to provide discovery broader and more comprehensive than the discovery obligations” in order to promote truth seeking, foster speedy resolutions, and provide a margin of error, the guidance also enumerates “countervailing considerations”—such as the need to protect victims and witnesses, protect witnesses’ privacy, prevent obstruction, enhance access to reciprocal discovery, and promote other strategic interests—that militate against liberal disclosure.³⁶ On the liberal side, the guidance generally calls upon prosecutors to have an agent memorialize witness interviews (without specifying how detailed the agent’s notes should be) and requires memorialization and disclosure of “[m]aterial variances in a witness’s statements.”³⁷ On the conservative side, it provides that “[t]rial preparation meetings with witnesses generally need not be memorialized,”³⁸ and the guidance is expressly agnostic as

Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor’s ethical or statutory obligations.” (citing, *inter alia*, Rule 3.8(d)); ABA Opinion 09-454, *supra* note 21. Insofar as professional conduct rules are more demanding, federal prosecutors would be expected to comport with them since federal prosecutors are statutorily obligated by the McDade Amendment to comply with the professional conduct rules of the states in which they practice. See generally Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207 (2000) (discussing the history and questioning the wisdom of the McDade Amendment).

³³ Ogden Memo re Requirement for Office Discovery Policies, *supra* note 8, at 2.

³⁴ *Id.* To the extent that the DOJ regarded the status quo as inadequate, one might question the idea that U.S. Attorney’s Offices should simply reaffirm or memorialize prior policies.

³⁵ Ogden Memo re Criminal Discovery, *supra* note 8, at 6. An exception is that the guidance requires disclosure of exculpatory information “reasonably promptly after discovery.” *Id.*

³⁶ *Id.*

³⁷ *Id.* at 5. The policy does not provide guidance about when variances between statements given by a witness at different meetings or at different times in a single meeting are “material.” Further, unless prosecutors require agents to take detailed notes, prosecutors may fail to recall inconsistent statements given to the prosecutor at different points in time and may be entirely unaware of inconsistent statements given to the agents outside the prosecutor’s presence.

³⁸ *Id.* The distinction between a witness interview and trial preparation is not necessarily clear or meaningful as a matter of actual practice. Presumably, interviews conducted prior to an indictment comprise witness interviews. Prosecutors may be tempted to regard post-indictment interviews as trial preparation, but that will not always be a fair characterization. For example, if

to whether reports of witness interviews must be disclosed.³⁹ One can posit that given discretion, in order to enhance the likelihood of securing a conviction if the case goes to trial, most federal prosecutors will hew closely to the legal minimum rather than making generous disclosure.⁴⁰

The question for the DOJ as well as for state prosecutors' offices seeking to facilitate discovery compliance is whether current policies, modes of training, levels of oversight, and the like are enough, or whether prosecutors' offices should amend their policies regarding when, how, and how much disclosure should be made, or adopt other reforms. Almost certainly, some federal and state prosecutors fail to meet their disclosure obligations for reasons other than, or in addition to, inadequate knowledge of the law and office policy.⁴¹ If this is so, then office-wide education may be necessary but not sufficient to address why prosecutors—even well-intentioned ones—might lapse. It may be useful, additionally, to direct prosecutors to make considerably broader or earlier disclosure than required by law; to reallocate responsibility for disclosure; to develop checklists or other methods to facilitate prosecutors' compliance;⁴² to develop better methods of

the prosecutor has not previously met with a potential witness and is not certain what testimony the witness will give, it seems fairer to view the meeting as a witness interview. But the prosecutor may adopt the alternative characterization to avoid note-taking.

³⁹ *Id.* at 5.

⁴⁰ Consider, for example, a scenario in which the prosecutor meets with a cooperating defendant on several occasions and fairly anticipates from the start that the cooperator's account will evolve over the course of the meetings. A prosecutor who took a generous approach to disclosure would have an investigator take virtually verbatim notes and disclose the notes to the defense for its use in cross-examining the cooperator. But, wholly apart from concerns about obstruction of justice or witness safety, many prosecutors will be disinclined to make such disclosure in the name of fair process, precisely because the defense may make effective use of the disparate accounts to suggest that the cooperator's trial testimony is fabricated. Instead, if the meetings take place after the target of the investigation is indicted, the prosecutor will likely regard the meetings as preparatory for trial and direct the investigator at the meeting not to take notes at all. To the extent the cooperator's account evolves, the prosecutor may not recall all the inconsistencies and omissions and may be inclined to regard inconsistencies as immaterial.

⁴¹ They may lack the knowledge of investigative agency practices and policies, or the necessary skill, to obtain from their investigators information that must be disclosed. They may be sloppy in keeping, filing, and reviewing material in their possession. They may make disclosure a relatively low priority, in order to preserve time for other tasks. They may rationalize non-disclosure out of fear that defense lawyers will use information to thwart a deserved conviction. They may take their obligations lightly because they perceive that violations are unlikely to be discovered and to have adverse consequences for them or the case. They may be acculturated to believe that scrupulous compliance is unnecessary and not valued. *See generally* Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 715-22 (2006) (“[P]rosecutors have increasingly sought to avoid and subvert the requirements of *Brady*.”). Any prosecutor's office or individual prosecutor has room for improvement when it comes to disclosure.

⁴² *Report of the Working Groups*, *supra* note 18, at 1973-74 (suggesting that to redress inadequacies in current disclosure practices, “each jurisdiction should adopt a rule requiring use of checklists to ensure full and timely transfer of all relevant information from police to

supervision and internal regulation;⁴³ to improve office culture;⁴⁴ or to take other institutional measures to enhance the office's compliance with the disclosure law, including the development of technology for electronically storing and accessing investigative material,⁴⁵ which the DOJ is now exploring.⁴⁶

An obvious starting point for improving institutional practices would be to identify and acknowledge disclosure errors and attempt to understand why prosecutors committed them.⁴⁷ Learning from mistakes, a common educational strategy, is often employed advantageously by businesses, and can also be used by professionals seeking to improve their work processes.⁴⁸ For example, medical professionals and institutions can examine cases of possible medical error (e.g., prescribing or administering the wrong medication or causing preventable infections) and look for ways to prevent their recurrence, whether through greater care by individuals or by the adoption of systems designed to reduce error on an institutional level.⁴⁹

The DOJ does not appear to be undertaking a systematic study of federal prosecutors' discovery errors for purposes of improving disclosure practices and policies. Nor does it appear that individual U.S. Attorneys' Offices or more than a few state prosecutors' offices have instituted processes for learning from discovery error or from mistakes in general. Why not?

Part I of this Article suggests a host of reasons why the DOJ and state prosecutors' offices might profess doubt about the value of studying disclosure errors for the purpose of improving internal

prosecutors"); *id.* at 2016-20 (discussing utility of a "discovery 'checklist'" for the prosecutor's office). See generally ATUL GAWANDE, *THE CHECKLIST MANIFESTO* (2009) (detailing the use of checklists to reduce medical error in hospitals).

⁴³ See *Report of the Working Groups*, *supra* note 18, at 1992 ("Supervision is another important yet often overlooked tool for improving prosecutorial discovery practices.").

⁴⁴ See *id.* at 1996 ("[P]rosecutors cannot rely on systems alone. Culture needs to reinforce systems, and vice versa. . . . [O]nly a deeper commitment to the values that support disclosure will accomplish the goal of full compliance.").

⁴⁵ See *id.* at 2005.

⁴⁶ Ryan J. Reilly, *Justice Department Requests Millions to Beef Up E-Discovery Capabilities*, MAIN JUSTICE, Feb. 11, 2010, <http://www.mainjustice.com/2010/02/17/justice-department-requests-millions-for-e-discovery/>.

⁴⁷ Cf. Erik Luna, *System Failure*, 42 AM. CRIM. L. REV. 1201, 1218 (2005) ("[T]o address the full breadth of errors that produce wrongful convictions, it may take a more comprehensive view of the criminal process and its systemic failure to protect the innocent."); see also Lawton P. Cummings, *Can an Ethical Person Be an Ethical Prosecutor? A Social Cognitive Approach to Systemic Reform*, 31 CARDOZO L. REV. 2139, 2156 (2010) (arguing that prosecutorial misconduct may result from prosecutors' moral disengagement, which can be reduced by such reforms as "community prosecution" and prosecutorial review boards).

⁴⁸ *Voices from the Field*, *supra* note 24, at 2038-56 (presentation by Dr. Gordon Schiff).

⁴⁹ See Peter E. Rivard et al., *Enhancing Patient Safety Through Organizational Learning: Are Patient Safety Indicators a Step in the Right Direction?*, 41 HEALTH SERVS. RES. 1633 (2006). See generally INST. OF MED., *TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM* (Linda T. Kohn et al. eds., 2000).

practices. It finds none of these wholly convincing. Part II identifies challenges that prosecutors' offices would likely face in designing and implementing a process of identifying, studying, and learning from disclosure errors.

I. WHY MIGHT PROSECUTORS BE SKEPTICAL ABOUT THE PROSPECTS FOR LEARNING FROM DISCLOSURE MISTAKES?

Hospitals have been urged to examine cases where patients may have been poorly treated in order to understand whether avoidable errors were made and, if so, to take steps to prevent similar errors in the future.⁵⁰ It seems obvious that prosecutors' offices could reduce the risk of disclosure errors by undertaking comparable inquiries. Participants at the Symposium were offered the example of the office of Dallas prosecutor Craig Watkins. Following his election, he established a unit to examine the integrity of convictions obtained by his predecessor, starting with capital cases. The unit concluded that many convicted defendants were innocent and helped secure their freedom.⁵¹ In the process, the office made efforts to determine *how and why* it had convicted innocent people. It built on what it learned to redesign its internal processes with the aim of reducing the risk of convicting innocent people in the future.⁵² A handful of other offices may also have formal processes designed to examine prosecutors' mistakes with an eye toward internal reform.⁵³ It is uncertain whether any prosecutor's office focuses especially on disclosure error.

One can imagine a host of reasons (as opposed to justifications) for why prosecutors' offices would hesitate to look systematically at cases in which individual prosecutors may have failed to comply with disclosure obligations established by law and office policy. Like most other lawyers, prosecutors tend to be skeptical. They may doubt the value of taking time away from other work to dissect potential mistakes that put them under a microscope. Like the legal profession generally, prosecutors' offices also tend to be conservative, and may therefore resist doing things differently. Prosecutors tend to be concerned about their public images. They may worry that measures instituted to look at possible mistakes will be viewed as an admission that they are imperfect

⁵⁰ See note 49 and accompanying text.

⁵¹ See Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 494-95 (2009) (discussing work of Dallas prosecutor's Conviction Integrity Unit).

⁵² *Voices from the Field*, *supra* note 24, at 2069-74 (presentation by Terri Moore).

⁵³ At the Symposium, Hon. Charles Hynes, the District Attorney of Kings County, New York, reported that his office had such a policy. Hines Presentation, *supra* note 24.

or unfair. Prosecutors, even those in administrative positions, generally come up the ranks without training in administration and supervision. They may not be confident in their ability to examine potential error and implement reform in a manner that is productive and not demoralizing, and they lack models of how to do so.

Medical professionals undoubtedly have similar concerns,⁵⁴ in addition to others of their own. In particular, while individual prosecutors and their offices are well protected from civil liability,⁵⁵ doctors and their workplaces are very much susceptible to malpractice liability. However, medical professionals are said to be able to overcome these concerns. When patients suffer or die because of possible medical error, hospitals can ascertain whether the harm was avoidable and, if so, seek ways to avoid such harms in the future. Done right, the institutional practice may contribute to a culture in which medical professionals are open to learning from mistakes. Medical professionals certainly have other important work to do, and they undoubtedly care about their professional reputations as well as the risk of malpractice liability. But reviewing cases where mistakes may have been made may be worth the effort, not only by leading to better individual and institutional practices, but also by enhancing the institutional culture.

One key difference between learning from medical error and learning from prosecutors' disclosure error is the nature of the mistakes in question and their relationship to the respective professionals' perceived mission. The doctor's role is to heal the sick, not make them worse. When doctors make mistakes that kill or otherwise harm clients, they achieve the very opposite of what they are fundamentally seeking to accomplish. This is not the case when prosecutors withhold discovery.

On an emotional level, many prosecutors probably regard their fundamental mission to be convicting guilty people.⁵⁶ But this is not true on an intellectual level. Most prosecutors would acknowledge that

⁵⁴ Although there is far more available education and training in hospital administration than prosecutorial administration (or in the administration of law offices generally), medical professionals presumably share prosecutors' interest in their public image and in using time productively.

⁵⁵ See generally Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 11 (2009) (describing prosecutorial immunity from civil liability).

⁵⁶ See Daniel S. Medwed, *The Prosecutor as Minister of Justice: Preaching to the Unconverted from the Post-Conviction Pulpit*, 84 WASH. L. REV. 35, 44 (2009) ("The minister-of-justice concept—while noble in theory—has not always translated seamlessly into practice at the trial level in light of the reality of prosecutorial culture and its organizational pressures. A series of factors cause trial prosecutors to view their jobs primarily through the lens of gaining 'wins' (convictions) and avoiding 'losses' (acquittals)."); Catherine Ferguson-Gilbert, Comment, *It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 291 (2001).

their job also includes weeding out cases where individuals are not guilty,⁵⁷ as well as cases where a conviction would be unduly harsh.⁵⁸ Likewise, they would acknowledge that their objective to convict some of the guilty is qualified by the duty to do so consistently with legal processes.⁵⁹ But fundamentally, disclosure in itself is not a core mission and may not be considered intrinsic to prosecutors' core missions.⁶⁰ On the contrary, in the perception of many prosecutors, obligatory disclosure may frustrate their objectives by arming defense lawyers with information that can be used to obtain acquittals of defendants whom the prosecutors believe to be guilty and who most often are in fact guilty.⁶¹ If prosecutors were to endeavor to learn from any of their errors, their preference would probably be to learn from investigative, strategic, and forensic errors that lead to acquittals, not from disclosure mistakes.

Prosecutors might not invoke any of these explanations as a public justification for eschewing measures to reduce the incidence of disclosure error. Surely, they would not admit to being indifferent to disclosure errors or to being afraid to make changes that would be useful in reducing the risk of violating disclosure law. But one can anticipate a raft of justifications that members of the DOJ task force or other prosecutors might publicly offer for concluding that better education about the law is good enough, and that mimicking businesses or medical professionals is unnecessary. These include: (1) that current disclosure practices and policies adequately protect against error; (2) that the harm of disclosure error is insignificant; (3) that compliance with disclosure obligations is relatively easy once one knows what the obligations are; and (4) that disciplinary cases provide sufficient information on which to predicate internal reform, insofar as reform is necessary. These claims may have rhetorical appeal, particularly when piled atop one another, but, as discussed below, none is especially convincing.

⁵⁷ See generally MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2008).

⁵⁸ See generally Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607-08 (1999).

⁵⁹ See generally *id.*

⁶⁰ Cf. *Report of the Working Groups*, *supra* note 18, at 2019 (noting that unlike in the medical profession, where "all [professionals] have a shared goal of achieving patient wellness and avoiding patient harm," participants in the criminal justice process (i.e., police, prosecutors, defense lawyers, and judges) "may have divergent motivations—even if all can agree that . . . a wrongful arrest or conviction is an event to be unequivocally avoided").

⁶¹ See Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 PENN ST. L. REV. 1133, 1144-47 (2005) (arguing that prosecutors seeking to convict guilty defendants have no incentive to disclose *Brady* material).

A. *The Perceived Adequacy of Current Disclosure Practices and Policies*

Prosecutors may maintain that it is unnecessary to study prosecutors' mistakes because there is no ultimate benefit to doing so; discovery violations are rare, and as long as prosecutors know the law and internal policy, errors will not occur. This argument is particularly likely to be made in prosecutors' offices that have adopted internal disclosure policies calling on prosecutors to provide the defense considerably more information than the law requires. The theory is that liberal disclosure policies guarantee that prosecutors make timely disclosure of *at least* what the law requires—a theory that undoubtedly fails in practice.⁶² Relatedly, prosecutors may argue that the incidence of discovery errors is insignificant and therefore too little would be gained from examining mistakes to justify the resources.

The DOJ in particular may downplay the risk of discovery error,⁶³ inclining for various reasons to assume that federal prosecutors are far less likely than their state counterparts to violate disclosure obligations.⁶⁴ After all, federal prosecutors' offices regard their lawyers as the professional elite. They are generally able to hire better credentialed lawyers because their work is regarded as more prestigious. They do not have the crushing caseloads that might motivate some state and local prosecutors to cut corners. They appear to be well-regulated internally: The DOJ has an internal manual establishing policy on issues that state and local prosecutors may decide on an ad hoc basis; the U.S. Attorney's Office must have a lawyer responsible for ethics compliance; and the DOJ offers guidance through its Professional Responsibility Advisory Office and oversight through its Office of Professional Responsibility, which investigates claims of prosecutorial misconduct.

Particularly when it comes to discovery obligations, however, the assumption that federal prosecutors are professional exemplars may be erroneous. To begin with, internal DOJ policy is far less generous than many state prosecutors' policies. While federal prosecutors are instructed to err on the side of disclosing *Brady* material, this is a far cry from an "open file" policy that requires disclosing both favorable and

⁶² Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 542-47 (2007) (identifying how prosecutors can subvert open file policies).

⁶³ See Scarcella, *supra* note 9 (noting that in a speech in October 2009 on federal prosecutors' disclosure obligations, Assistant Attorney General Lanny Breuer "played down criticism that prosecutor misconduct is widespread"); Ogden Memo re Summary of Actions, *supra* note 8, at 1 ("The Working Group's survey demonstrated that incidents of discovery failures are rare in comparison to the number of cases prosecuted.").

⁶⁴ See Zacharias & Green, *supra* note 32, at 216 ("[F]ederal prosecutors have long considered themselves unique . . .").

unfavorable information in the prosecutor's file. Further, federal law is less demanding than most state laws, which means that federal prosecutors are more likely than state prosecutors to have to decide whether evidence or information must be disclosed as a matter of minimal constitutional obligation under the *Brady* standard, whose vagueness may invite incautious prosecutors to err on the side of withholding. Federal prosecutors are also more likely than state prosecutors to possess non-memorialized information that is discoverable under *Brady*, because federal prosecutors spend more time interviewing witnesses and preparing them to testify.

Claims about the frequency of disclosure error are hard to prove or disprove, precisely because prosecutors have not systematically studied their mistakes. No one else can do so, given that prosecutors ordinarily have exclusive access to information needed to assess how and why—and often whether—disclosure errors occurred. Some assume, however, that prosecutors commonly violate the discovery obligations imposed by law,⁶⁵ and this perception is fueled by the recent high-profile cases in which federal prosecutors' discovery mistakes came to light,⁶⁶ as well as by cases in which innocent defendants have been exonerated.⁶⁷

In the end, it seems only logical to assume that the cases of disclosure error that have surfaced are just the tip of the iceberg, given how difficult it is to discover such errors after-the-fact.⁶⁸ Unlike other prosecutorial miscues, such as excessive jury arguments, discovery violations are essentially invisible. There is little reason for these violations ever to come to light. Consider, for example, a case where a prosecutor or police officer conducts a pretrial interview with a key prosecution witness who first exonerates but then inculpatates the defendant. The earlier statements must be disclosed to the defense because they are both exculpatory and useful to impeach the witness. But if the prosecutor or police officer does not write them down and disclose or—at least—preserve the writing, it will be almost impossible

⁶⁵ See, e.g., Gershman, *supra* note 41, at 688 (“[B]y extrapolating from judicial decisions, disclosures by the media, and anecdotal evidence, it is readily apparent that *Brady* violations are among the most pervasive and recurring types of prosecutorial violations. Indeed, *Brady* may be the paradigmatic example of prosecutorial misconduct.”).

⁶⁶ See, e.g., Amir Efrati, *It's Rare for Prosecutors to Get the Book Thrown Back at Them*, WALL ST. J., Apr. 16, 2009, at A11.

⁶⁷ See, e.g., Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999, at 1; Gershman, *supra* note 41, at 686 n.8.

⁶⁸ *United States v. Jones*, 620 F. Supp. 2d 163, 172 (D. Mass. 2009) (“The reported cases are not, however, a true measure of the scope of the problem, which it is impossible to measure precisely. The defense is, by definition, unaware of exculpatory information that has not been provided by the government. Although some information of this nature comes to light by chance from time to time, it is reasonable to assume in other similar cases such information has never come to light. There is, however, no way to determine how frequently this occurs.”); see also *United States v. Oxman*, 740 F.2d 1298, 1310 (3d Cir. 1984).

for the defense ever to learn that the statements were made.⁶⁹ Even if the statements are memorialized, if the prosecution does not disclose them, there is no process by which the writing will ordinarily come to light.⁷⁰

Once a proceeding ends—and most end rather quickly by way of guilty plea—few defendants will have an attorney to seek new evidence. In any case, defense counsel would not usually have access to prosecutors' and investigators' files, much less to information that was never memorialized. If defense counsel could not learn about the undisclosed evidence or information before the defendant's conviction, there are dim prospects for discovering it afterward.

Prosecutors' offices could test their assumption that discovery errors are rare by randomly auditing prosecutors after they have completed disclosure to determine whether their disclosure was adequate under the law and office policy.⁷¹ It is doubtful whether many prosecutors' offices conduct such audits; certainly, they are not the norm. Prosecutors might argue that the burden of proof should be on defense lawyers who claim to be shortchanged. But as long as prosecutors exclusively control the available evidence of their internal practices, it seems reasonable to assume that discovery errors are exponentially more common than the public record reveals.

B. *The Perceived Insignificance of Disclosure Error*

Prosecutors may argue that insofar as disclosure errors occur, their impact is usually insignificant and hence unworthy of burdensome efforts to reduce their incidence. Portraying disclosure obligations as

⁶⁹ See generally *United States v. Rodriguez*, 496 F.3d 221, 224-25 (2d Cir. 2007) (declaring that prosecutors have no constitutional obligation to take notes of witness interviews); *Report of the Working Groups*, *supra* note 18, at 1981 (noting debate over whether prosecutors should take notes of, or record, witness interviews); Sam Roberts, Note, *Should Prosecutors Be Required to Record Their Pretrial Interviews with Accomplices and Snitches?*, 74 *FORDHAM L. REV.* 257 (2005) (arguing that prosecutors should be obligated to record witness interviews to enable the defense to probe witnesses' credibility and thereby minimize the risk of false convictions).

⁷⁰ Prosecutors might preserve their files for possible post-conviction disclosure to the defense and/or judicial review in cases where defendants maintain that they were wrongfully convicted. However, this is not the usual practice.

⁷¹ *Report of the Working Groups*, *supra* note 18, at 2007. At the Symposium, the Working Group on Systems and Culture discussed the possible utility of audits and noted:

[O]ne prosecutor in the group has already instituted a randomized interim audit system.

On an unannounced basis, an ADA is asked to bring all of his or her files to the section chief, and to walk through each of them to explain past actions and future plans.

Disclosure of evidence is one topic that the section chief and the trial attorney discuss during this spot check.

Id. at 2008; see also *id.* at 2024-27 (discussing the utility of audits both as mechanisms of oversight and as data development tools).

excessive and deviations from them as technical, prosecutors may point to the many cases in which courts have held prosecutorial discovery failures to be “harmless” or the undisclosed information to be “immaterial.”

However, given the number of exoneration cases marked by prosecutors’ disclosure errors, it is hard to downplay the importance of seeking reasonable measures to improve prosecutors’ disclosure practices. Prosecutors’ compliance with legal disclosure obligations is not merely a technical requirement but goes to the integrity of the criminal process. In the United States, a premium is placed on avoiding convictions of innocent people,⁷² and the traditional safeguard is a trial at which defense counsel offers the best evidence and makes the best arguments for why, at the very least, there is a reasonable doubt about the defendant’s guilt.

The defense lawyer’s ability to test the prosecution’s proof in an adversarial setting depends crucially on the receipt of evidence and information from the prosecution. Even if defense lawyers had unlimited resources—which they do not—they might not be able to find significant evidence and information helpful to a defense because prosecution witnesses may be unwilling to cooperate with the defense or because written material and physical evidence may exist nowhere other than in government files. Further, procedural means of discovering and developing information, such as witness depositions, which are routinely available in civil litigation, are denied to defense lawyers, in part out of considerations of cost and in large part to reduce the risk of witness tampering and subornation of perjury.⁷³ And leaving aside paper-intensive white-collar criminal prosecutions, the material that must be disclosed in most criminal cases is likely to be more useful than the voluminous materials disclosed in civil litigation, precisely because the law is far more selective about what prosecutors must disclose. In sum, if prosecutors do not comply with their legal disclosure obligations, defense lawyers will not have the meaningful ability to put the prosecution’s proof to the test that our law presupposes is essential to reliable trial outcomes.

Prosecutors’ compliance with legal disclosure obligations is no less essential to the integrity of the criminal proceedings that culminate in guilty pleas, as most do.⁷⁴ Even innocent defendants experience

⁷² See generally Green & Yaroshefsky, *supra* note 51, at 505-07 (discussing prosecutors’ duty post-conviction to rectify wrongful convictions).

⁷³ See David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 714-18 (2006).

⁷⁴ The relevant ABA ethics opinion, Opinion 09-454, places considerable weight on the importance of prosecutorial disclosure prior to guilty pleas. See ABA Opinion 09-454, *supra* note 21; accord Kevin C. McMunigal, *Guilty Pleas, Brady Disclosure, and Wrongful*

enormous pressure to plead guilty because they know that criminal trials can produce erroneous outcomes. For example, juries overvalue eyewitness identifications; despite social science teachings and anecdotal knowledge about the fallibility of identification evidence,⁷⁵ juries may credit the testimony of a single eyewitness whose professed certainty about her identification is highly questionable.⁷⁶ Further, criminal defendants know that they will be sentenced more leniently if they plead guilty than if they are found guilty by a jury. Unless the prosecutor discloses both its own intended evidence and available evidence and information that supports the defendant's innocence or undermines the credibility of the prosecution's witnesses, an innocent defendant may rationally plead guilty for fear of an erroneous trial outcome.

C. *The Perceived Ease of Compliance*

Prosecutors might assume that education about the disclosure law and policy is an adequate measure to ensure compliance because once you know what you are required to do in theory, it is easy to comply in practice. The superficially objective and straightforward nature of some discovery provisions may promote this assumption.

However, disclosure is not necessarily a simple task.⁷⁷ Prosecutors may view pretrial disclosure as boring and ministerial, or as a nuisance or distraction from the more exciting job of preparing a case for trial, but compliance with the law calls for knowledge, skill, and judgment. This is true even in jurisdictions where prosecutors approach disclosure most generously. Prosecutors might vow to turn over every conceivably relevant item that they possess, but not every relevant item necessarily comes into their possession. Some "open file" policies have been called "open *empty* file" policies by defense lawyers who perceive that available documents have not found their way into the prosecutor's file. A prosecutor must understand the internal workings of investigative

Convictions, 57 CASE W. RES. L. REV. 651 (2007). In contrast, the DOJ policy regards prosecutorial disclosure as legally required and necessary only in cases that go to trial. U.S. ATTORNEYS' MANUAL § 9-5.001 (U.S. Dep't of Justice 2010).

⁷⁵ See Michael H. Hoffheimer, *Requiring Jury Instructions on Eyewitness Identification Evidence at Federal Criminal Trials*, 80 J. CRIM. L. & CRIMINOLOGY 585 (1989); Michael R. Leippe, *The Case for Expert Testimony About Eyewitness Memory*, 1 PSYCH. PUB. POL'Y & L. 909 (1995); Sandra Guerra Thompson, *Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487 (2008).

⁷⁶ See, e.g., *Ortega v. Duncan*, 333 F.3d 102 (2d Cir. 2003) (reversing trial court's findings based upon claims of witness perjury).

⁷⁷ See *Report of the Working Groups*, *supra* note 18, at 2021 (noting that many tasks necessary to fulfill prosecutors' disclosure obligations are time-intensive, complex, and "dependent upon a prosecutor's judgment").

agencies and deal skillfully with investigators to recognize what writings may exist and gain access to them.⁷⁸ It may take particular skill to extract exculpatory or impeaching information that an investigator did not consign to writing. Further, disorganized prosecutors may overlook items that they possess, and ill-trained prosecutors may misunderstand the significance of items of which they are aware, thereby failing to add them to the appropriate file.

Disclosure is even more complex in jurisdictions where prosecutors seek merely to comply with their minimum legal obligations—but not surpass them. Knowledge of *Brady* case law is crucial to determining what favorable and impeaching material to produce. But in many cases, the scope of the relevant law is contested or its application is unclear.⁷⁹ For example, the Supreme Court has said that prosecutors must turn over favorable evidence only if it is “material”; but courts disagree about what materiality means and its significance.⁸⁰ At best, materiality can be described only in vague terms that leave much to prosecutors’ judgment. Perhaps even more importantly, prosecutors often need judgment and experience—not just doctrinal knowledge—to recognize when information is favorable to the defense or is useful for impeachment. Prosecutors with limited trial experience may not perceive how information may be used advantageously by defense counsel. Likewise, courts hold that prosecutors are not accountable for withholding favorable evidence that the defense could have learned on its own through the exercise of due diligence.⁸¹ Prosecutors may need a sophisticated understanding of the defense’s capabilities and resources to make a reliable judgment about whether they can lawfully take advantage of this limitation. Finally, when prosecutors seek to do little more than to toe the line, even the most skillful, knowledgeable, and well-intentioned among them may step over the line because of unconscious biases and ordinary human imperfection.⁸²

⁷⁸ See *id.* at 2002 (“[A] functional working relationship between prosecutors and law enforcement is essential to effective discovery practices.”).

⁷⁹ See Am. Coll. of Trial Lawyers, *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 93, 94-107 (2004).

⁸⁰ See *supra* note 16.

⁸¹ See, e.g., *United States v. Kelly*, 35 F.3d 929, 937 (4th Cir. 1994); *United States v. Davis*, 787 F.2d 1501, 1505 (11th Cir. 1986).

⁸² For discussions of the influence of cognitive bias on prosecutorial disclosure in particular, see Alafair Burke, *Brady’s Brainteaser: The Accidental Prosecutor and Cognitive Bias*, 57 CASE W. RES. L. REV. 575 (2007); Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481 (2009). For discussions of the role of cognitive bias in various aspects of prosecutorial decision making, see, for example, Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475 (2006). See also Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM & MARY L. REV. 1587 (2006); Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J.L. &

D. *The Perceived Adequacy of Disciplinary Mechanisms*

Prosecutors' offices may also assume that internal and external disciplinary mechanisms are adequate to reveal problems that can be addressed through systemic reform. After all, disclosure violations may trigger disciplinary investigations, which will disclose cases where prosecutors innocently erred, on one hand, or engaged in willful misconduct, on the other. Prosecutors' offices, in theory, can learn from these examples. In particular, the DOJ might repose faith in disciplinary mechanisms since the DOJ has a highly professional office, the Office of Professional Responsibility (OPR), dedicated to investigating misconduct by federal prosecutors.

In general, reliance on disciplinary mechanisms as a source of learning would be misplaced. State disciplinary authorities rarely sanction prosecutors publicly or in general for wrongdoing in connection with their disclosure obligations,⁸³ and the cases involving public sanctions are generally limited to cases of willful and egregious misconduct.⁸⁴ In most jurisdictions, disciplinary agencies keep their findings and files confidential except when they issue public sanctions. Therefore, disciplinary cases are not a source of learning in the cases where prosecutors committed error but not sanctionable misconduct. Further, even in the rare disciplinary case in which a prosecutor is publicly sanctioned, disciplinary agencies make no effort to look at the root causes of disclosure violations or how they may be avoided through better institutional practices. In theory, disciplinary agencies could sanction chief prosecutors and supervisory prosecutors who fail to make reasonable efforts to ensure that junior prosecutors comply with their disclosure obligations.⁸⁵ For example, disciplinary agencies might rely

LIBERTY 512 (2007); Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183 (2007); Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291 (2006); Green & Yaroshefsky, *supra* note 51; Dianne L. Martin, *Lessons About Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847 (2002).

⁸³ Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275 (2007); Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275 (2004); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001).

⁸⁴ The most highly publicized example is the disbarment of North Carolina prosecutor Michael Nifong for prosecutorial misconduct, including withholding DNA evidence, in connection with the prosecution of members of the Duke University lacrosse team. See Excerpt Transcript, Findings of Fact and Conclusions of Law, and Order of Discipline, N.C. State Bar v. Michael B. Nifong, No. 06 DHC 35 (Disciplinary Hearing Comm'n of N.C. State Bar June 16, 2007). For other examples in which prosecutors were disciplined for discovery violations, see ABA Op. 09-454, *supra* note 21, at 2 n.6.

⁸⁵ See ABA Op. 09-454, *supra* note 21, at 1, 8; MODEL RULES OF PROF'L CONDUCT R. 5.1

on evidence adduced in civil rights cases against municipalities that suggests prosecutors received inadequate training regarding their *Brady* obligations.⁸⁶ But there is no indication that any prosecutor has been disciplined for failing to maintain adequate disclosure policies.⁸⁷

The DOJ's reliance on the OPR in particular would be misplaced. The OPR's annual reports suggest that it looks at only a handful of cases a year in which disclosure questions are raised. Like state disciplinary agencies, its objective is not to improve institutional practices by examining why individual prosecutors err but to investigate sanctionable misconduct. The OPR's annual reports suggest that it focuses on compliance with the law and legal ethics rules, not internal DOJ policy.⁸⁸ While it sometimes concludes that the prosecutor in question exercised poor judgment,⁸⁹ there is no evidence that it undertakes inquiries based on allegations of mere imprudence.⁹⁰ The opacity of its work undermines whatever pedagogic value its determinations might otherwise have.⁹¹

From the perspective of improving policies and practices, the OPR's work is at best unproductive and potentially counterproductive.

(2002).

⁸⁶ See, e.g., *Thompson v. Connick*, 578 F.3d 293 (5th Cir. 2009) (en banc) (upholding jury finding that the New Orleans Prosecutor's Office provided inadequate training regarding prosecutors' disclosure obligations), cert. granted in part, 130 S. Ct. 1880 (2010).

⁸⁷ Little is known about internal discipline in state and local prosecutors' offices, and whether and how offices sanction their prosecutors formally or informally for disclosure violations. However, evidence adduced in a civil rights action based on an alleged pattern of disclosure violations in the Bronx County District Attorney's Office in New York indicated that, at least in that office, during a substantial period of time there was no effective internal discipline. See Yaroshesky, *supra* note 83, at 280-82 (“[One Bronx] prosecutor, who had been named by courts in four cases for misconduct, was suspended for four weeks and lost two weeks’ pay. [But] after he returned to the office, he was granted a bonus, followed by a series of merit increases during the pendency of his case before the disciplinary committee.”).

⁸⁸ The office's mandate is to investigate “allegations of misconduct involving [DOJ] attorneys that relate to the exercise of their authority to investigate, litigate or provide legal advice.” 28 C.F.R. § 0.39a(a)(1) (2009). Only a small percentage of investigated allegations of misconduct involve noncompliance with DOJ rules and regulations. See, e.g., OFFICE OF PROFESSIONAL RESPONSIBILITY, U.S. DEP’T OF JUSTICE, ANNUAL REPORT 2008, at 8 (2008) (reporting that only four percent of new investigations in 2008 involved alleged failures to comply with DOJ rules and regulations); cf. Ellen S. Podgor, *Department of Justice Guidelines: Balancing “Discretionary Justice,”* 13 CORNELL J.L. & PUB. POL’Y 167, 186-89 (2004).

⁸⁹ See Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259, 285-86 (2001).

⁹⁰ According to a recent memorandum, OPR investigations may result in only “two types of misconduct findings”—a finding of intentional misconduct or a finding of reckless misconduct. Memorandum from David Margolis, Assoc. Deputy Att’y Gen., Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility’s Report of Investigation into the Office of Legal Counsel’s Memoranda Concerning Issues Relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation” Techniques on Suspected Terrorists 11 (Jan. 5, 2010).

⁹¹ See Bruce A. Green, *Regulating Federal Prosecutors: Let There Be Light*, 118 YALE L.J. (POCKET PART) 156 (2009).

The OPR focuses on individual prosecutors' alleged wrongdoing, not on office systems and culture. It seeks to weed out the few bad apples within the prosecutorial corps rather than help well-intentioned prosecutors improve their practices. At the same time, the threat of internal discipline (as well as the risk of being referred to external disciplinary agencies if the OPR concludes that misconduct clearly occurred) may very well tend to discourage prosecutors from discussing and seeking feedback on potential disclosure errors after they occur. Indeed, on top of the ordinary concern about potential embarrassment, the threat of discipline may motivate a federal prosecutor to conceal problematic behavior. And when, as in the Ted Stevens prosecution, federal prosecutors become subjects of a disciplinary investigation, they may not cooperate as candidly and extensively as necessary to best use the case as a subject of study and education.

II. INSTITUTIONAL CHALLENGES

In certain areas, such as the sentencing of criminal defendants and the conditions of their reentry into society upon their release, the DOJ's current administration seeks to develop and analyze data in order to develop policy based on evidence—not intuition, anecdote, or wishful thinking. In theory, it could easily do so with respect to disclosure policy as well. But one can imagine various challenges for the DOJ, as well as for state and local prosecutors' offices, in seeking to establish a process of identifying potential discovery errors, studying them, and learning how to implement better policies and practices. As discussed below, these include: (1) the difficulty of obtaining necessary data; (2) the need to avoid discouraging prosecutors from correcting their mistakes; and (3) the difficulty of studying a prosecutor's conduct while a case is ongoing.

A. *Finding Relevant Data*

One difficulty would be collecting data,⁹² beginning with identifying cases for study. For medical professionals, cases of potential error present themselves fairly clearly: Patients get sick or die. In contrast, as previously noted, most cases of discovery error probably never see the light of day. Further, potential medical errors are likely to

⁹² See *Report of the Working Groups*, *supra* note 18, at 2019 (“[W]hile the medical field has collected a significant amount of data on incidents of errors in patient care, the criminal justice system has little in the way of analogous empirical knowledge of the prevalence of discovery errors . . . [and is therefore] less able to fashion evidence-based rules and practices . . .”).

be discovered relatively soon after they occur. The same is not true of prosecutors' disclosure errors. They may come to light, if at all, only long after they occur.⁹³ By that time, the prosecutor in question may have left the office and may be uninterested in reconstructing why particular material was withheld. Even if the prosecutor is cooperative, her memory may have diminished too much to be helpful. These considerations suggest the value of auditing prosecutors' files while cases are ongoing rather than relying exclusively on cases in which courts have found that discovery violations occurred.⁹⁴

Additionally, prosecutors can widen their net by examining cases as soon as disclosure questions are raised in them, regardless of how the questions may eventually be resolved. Disclosure questions arise at all stages, including pre-trial when defense lawyers object that prosecutors are withholding necessary information, and during trial when defense lawyers make similar arguments or maintain that a new production of evidence was not sufficiently timely. Prosecutors need not limit themselves to cases in which defense lawyers learn of material that was not previously produced and seek to set aside the defendant's conviction on the ground that the material should have been produced for use in connection with the trial.

Relatedly, offices might have difficulty eliciting what prosecutors did and why. Prosecutors may be disposed to put their conduct in the best light, or even to give a false account. This problem is obviously intertwined with the nature of the review and the office culture generally. Ideally, inquiries will proceed in a non-punitive atmosphere in which prosecutors will not suffer for reconstructing events as they occurred. Preferably, the office would employ measures other than some of the more intimidating ones by which it often seeks to get at the truth.

B. *Promoting Self-Corrective Measures*

Another challenge would be to establish a review process that does not motivate prosecutors to conceal their errors.⁹⁵ It is obviously important that prosecutors come forward when they discover that they previously failed to make complete disclosure. An institutional review

⁹³ See, e.g., *Thompson v. Connick*, 578 F.3d 293, 313 n.1 (5th Cir. 2009) (“[M]any Brady violations are not uncovered until years after the event, if they are ever uncovered.”).

⁹⁴ See *supra* note 71 (noting two Working Groups at the Symposium that recommended auditing prosecutors' discovery decisions while cases are ongoing).

⁹⁵ Cf. *Zacharias & Green*, *supra* note 55, at 41-42 (discussing the risk that exposure to disciplinary sanctions will discourage prosecutors from correcting wrongful convictions).

process that embarrasses prosecutors or that leads to punishment would discourage prosecutors from doing so.

However, whether an internal review process will add to prosecutors' ordinary incentive to bury mistakes is questionable. To be sure, prosecutors will already be concerned that coming clean might lead to embarrassment, judicial opprobrium, or discipline. That said, it should be possible to construct a process for learning from error that avoids embarrassing or stigmatizing prosecutors, that encourages admissions of error, and, further, that preserves collegiality. Businesses have developed legal compliance programs and other programs that study errors in order to make improvements. Surely, prosecutors' offices are equally capable of developing methods of learning from mistakes without undermining the offices' culture and work.

C. *Maintaining Prosecutions While Investigating Error*

Perhaps the most interesting challenge would be to reconcile the interest in identifying and learning from error with the aim of preserving just convictions in cases where prosecutors complied with their legal obligations or their noncompliance was legally harmless. This is a challenge unlike those faced by medical professionals seeking to build a process to learn from medical error. Studying medical error does not interfere with the core mission of curing the patient. Particularly when the patient is deceased, medical care is over. At the time of alleged prosecutorial error, in contrast, the prosecution may be ongoing. That creates two problems: First, timely internal review of the prosecutor's conduct may appear to undermine the goal of securing or upholding a just conviction; and second, concern about securing or upholding the conviction may undermine the objectivity and completeness of the review.

For example, suppose that on appeal from a criminal conviction, the defendant argues that the prosecution failed to comply with its discovery obligations—that the prosecution withheld favorable evidence until mid-trial, by which time it was too late for the defense to make effective use of it. If the claim is credible, it provides what some might describe as a “teachable moment” for the prosecutor who tried the case and for the office. It offers an occasion to consider whether the prosecutor's conduct was both lawful and desirable. If the prosecutor acted poorly, the case provides a vehicle for encouraging more desirable conduct on the part of the particular prosecutor and other prosecutors in the office. It also provides an opportunity to consider whether the prosecutor's undesirable conduct was attributable, at least in part, to inadequate training or supervision, or to deficiencies in office culture or

policy. The office might consider whether institutional practices can be improved to make it more likely that individual prosecutors will act more desirably in the future.

In the context of the appeal, however, the office will be strongly motivated to defend the conviction and, in doing so, to defend the prosecution's discovery decision if at all possible. Ordinarily, the office will have brought the case because it believed the defendant was guilty, and the jury's verdict will only strengthen that belief. If possible, it will want to preserve the conviction to avoid the burden on witnesses and the expenditure of resources that would result from a retrial, as well as to avoid the risk of an acquittal the second time around. Strategically, the office may perceive that its success on appeal would be undermined by conceding that the trial prosecutor acted improperly, and, in any event, viewed through an adversarial lens, the office is more likely than an objective observer to believe sincerely that the conduct was indeed proper. Further, it might be perceived as disloyal, and undermine office morale generally, to fail to defend the prosecutor's potentially defensible conduct.

Should the office view the prosecutor's conduct objectively and use the *Brady* claim as an opportunity for both the trial prosecutor and the office at large to think about how to improve their practices? Should the office defend the prosecutor's conduct zealously on appeal, thereby potentially sending a signal to the prosecutor and the office that discovery practices like those undertaken in the case are perfectly fine? Can the office conceivably do both at once?

Ideally, an effective review process can be designed not only to avoid interfering with the prosecution but to promote a fair resolution. Prosecutors' offices should recognize that both their short-range and long-range interests may be promoted by contemporaneously reviewing challenged disclosure decisions as objectively and completely as possible and by giving the court a candid accounting of the prosecutor's decision-making process in the context of the case. If a prosecutor's conduct is believed to be both lawful and desirable, the office should obviously defend it. If the prosecutor's conduct fell short because it departed from law or office policy, the office should make available arguments for defending the conviction without defending the conduct in question at the same time. In the short term, saying *mea culpa* may be an effective strategy. Admitting that the failure to disclose evidence was imprudent or contrary to office policy gives away nothing. Conceding legal error may sacrifice an arguable legal ground for defending the conviction but will reduce the court's inclination to overturn the conviction to teach the prosecutor or her office a lesson. In the long term, candidly accounting for error will enhance the office's credibility with the court and the public.

Further, recognizing that candor is in the office's interest will help facilitate the effort to review disclosure decisions objectively rather than in the most favorable light.⁹⁶ That is also in the office's long-term interest, because an office that learns from its discovery mistakes will make fewer mistakes in the future.

CONCLUSION

The exoneration cases may have led the public to believe that prosecutors' failure to comply with their discovery obligations was primarily a problem in state court. But recently, federal prosecutors have come under fire for failing to comply with disclosure obligations in a series of high-profile cases. In response, the new DOJ administration resolved to reexamine how federal prosecutors and their offices meet these obligations. So far, however, its response has been modest, particularly given how conservative its disclosure policies are as compared to those of many state prosecutors' offices. The DOJ has put its faith in better training of prosecutors about their legal obligations, eschewing a host of additional measures. Critics might note the irony that the DOJ expects strong legal compliance programs from private institutions while holding itself to a relatively low standard when it comes to institutional compliance with prosecutorial disclosure obligations.⁹⁷

Given the importance of prosecutorial disclosure to ensuring reliable outcomes in criminal cases, prosecutors' offices should try harder to understand why their prosecutors sometimes err and to develop measures to reduce the risk of error. Given its superior resources and pride of place among prosecutors' offices nationally, the DOJ should take the lead. Experience in other contexts suggests that one of the most effective ways to learn how to do better would be to systematically examine prosecutors' mistakes. Notwithstanding various challenges, it should be feasible for prosecutors' offices to conduct such studies as a prelude to implementing institutional reform. In any event, there is no persuasive reason not to try.

⁹⁶ Obviously, other measures should also be taken to promote an unbiased review of the prosecutor's conduct, including not only developing a non-retributive culture but also assigning principal responsibility for the process to prosecutors who are not involved in the prosecution and are otherwise as detached as possible.

⁹⁷ Rachel E. Barkow, *Organizational Guidelines for the Prosecutor's Office*, 31 CARDOZO L. REV. 2089, 2104-05 (2010).