

## A VIEW FROM INSIDE THE ROPES: A PROSECUTOR'S VIEWPOINT ON DISCLOSING EXCULPATORY EVIDENCE

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The qualities of a good prosecutor are as elusive and as impossible to define as those which mark a gentleman. And those who need to be told would not understand it anyway. A sensitiveness to fair play and sportsmanship is perhaps the best protection against the abuse of power, and the citizen's safety lies in the prosecutor who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility.<sup>1</sup>

In late August 2009, after thirty years as a local and state prosecutor, I began a new position as a Visiting Assistant Professor at the Hofstra University School of Law. Within three weeks of my first class, I received a call from Professor Roy D. Simon, the Howard Lichtenstein Distinguished Professor of Legal Ethics at Hofstra, inviting me to attend the conference he had organized, "Power, Politics & Public Service: The Legal Ethics of Lawyers in Government," and to supervise a "breakout session" with other conference participants. When I saw the distinguished panel Professor Simon had assembled for the conference, I replied by thanking him for the opportunity but suggested that I had nothing to contribute compared to the other speakers. Professor Simon responded that I possessed something unique that would be a useful addition to the program: a perspective based on a three-decade career of

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1. Robert H. Jackson, U.S. Attorney Gen., The Federal Prosecutor, Address at the Second Annual Conference of U.S. Attorneys (Apr. 1, 1940), *in* 31 J. AM. INST. CRIM. L. & CRIMINOLOGY 3, 6 (1940).

public service as a prosecutor.<sup>2</sup> I agreed to provide a career prosecutor's viewpoint on fairness in general and disclosure obligations in particular.

As a resident of Nassau County and a member of the local legal community, I am proud to be associated with Hofstra, which has developed a well-earned reputation for expertise, scholarship, and leadership in the field of legal ethics through the work of Professor Simon, as well as Professor Monroe Freedman and the other extraordinary faculty members. This seventh in a series of legal ethics conferences held at Hofstra—focusing on the ethical responsibilities of government attorneys—could not be more timely or important.

The issue most frequently associated with prosecutorial ethics (or lack thereof), and usually the source of claims of prosecutorial misconduct, is the duty to disclose favorable evidence to the defense in a criminal case, otherwise known as *Brady* material.<sup>3</sup> To summarize the general law in this area, the prosecutor is constitutionally required to notify the defense of information that is helpful to the defendant and which may have some impact on the outcome of the criminal case.<sup>4</sup> Basically, prosecutors are obligated to review their own work (and that of the people working with them) and call the other side's attention to anything in that work which could help them.<sup>5</sup> The failure to disclose exculpatory information has been attributed to a significant number of wrongful convictions.<sup>6</sup>

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2. In this conference dealing with the ethics of government attorneys, it is interesting to note that none of the presenters were active prosecutors. See Hofstra Univ. Sch. of Law, Power, Politics & Public Service: The Legal Ethics of Lawyers in Government (Oct. 18-20, 2009), [http://law.hofstra.edu/pdf/NewsAndEvents/Conferences/EthicsConference/ethics\\_brochure.pdf](http://law.hofstra.edu/pdf/NewsAndEvents/Conferences/EthicsConference/ethics_brochure.pdf). While several of the speakers were former prosecutors and one was campaigning for District Attorney, none were presently burdened with the pressures of that position. See *id.* Were present District Attorneys invited but declined to attend? Surely, one District Attorney in the metropolitan New York area was available. Compare a conference held at Cardozo Law School a week later entitled "New Perspectives on *Brady* and Other Disclosure Obligations: What Really Works?" where several current prosecutors appeared as presenters and panelists. See Press Release, Benjamin N. Cardozo Sch. of Law, Yeshiva Univ., Conference: New Perspectives on *Brady* and Other Disclosure Obligations: What Really Works 2-4 (Nov. 15-16, 2009), [http://www.cardozolawreview.com/content/Nov\\_2009\\_Symposium.pdf](http://www.cardozolawreview.com/content/Nov_2009_Symposium.pdf).

3. See *Brady v. Maryland*, 373 U.S. 83, 85-87 (1963).

4. *Id.*

5. *Id.* at 87-88.

6. See TASK FORCE ON WRONGFUL CONVICTIONS, N.Y. STATE BAR ASS'N, GOV'T PRACTICES SUBCOMM., SUBCOMMITTEE REPORT AND FINAL PROPOSALS 19 (2009), in N.Y. STATE BAR ASS'N, FINAL REPORT OF NEW YORK STATE BAR ASSOCIATION'S TASK FORCE ON WRONGFUL CONVICTIONS (2009), available at <http://www.nysba.org/Content/ContentFolders/TaskForceonWrongfulConvictions/FinalWrongfulConvictionsReport.pdf>; Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies For a Broken System*, 2006 WIS. L. REV. 399, 403.

This obligation has always reminded me of a sports analogy.<sup>7</sup> As distinct from baseball, football, basketball or hockey, the golfer has a unique duty to penalize himself for an infraction which has not been detected by the competition, the judges, or even the viewing public.<sup>8</sup> Could you imagine, for instance, a batter in baseball calling a strike on himself when the umpire thought the pitch was a ball? Or a quarterback calling “offsides” on his team when nobody else had noticed? Unlike other sports, the actions of the golfer are frequently seen by only the golfer himself, yet he has the responsibility to self impose a penalty for a rules infraction.

Likewise, the information in a prosecutor’s file is normally known only to the prosecution team and not observable by the defense, the court, or the public.<sup>9</sup> Yet the criminal justice system relies on the government lawyer to find the information, recognize its significance to the defense and self impose a “penalty” by disclosing it to the

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7. I am not the first to use sports in the discussion of prosecutor’s ethics. See David L. Botsford & Stanley G. Schneider, *The “Law Game”: Why Prosecutors Should Be Prevented From a Rematch; Double Jeopardy Concerns Stemming From Prosecutorial Misconduct*, 45 S. TEX. L. REV. 729, 730 (2006) (“The teams line up, the accused faces the prosecutors, the gavel cracks, and the game begins.”); William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest For Truth? A Progress Report*, 68 WASH. U. L.Q. 1, 16 (1990) (stating that the adversary system has commonly been compared to “a fight” or “a boxing match”); Kenneth Bresler, “*I Never Lost a Trial*”: *When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 541-46 (1996) (opining that “prosecutorial score-keeping” is “absurd,” “egotistical,” and “unprofessional”); Bennett L. Gershman, *Litigating Brady v. Maryland: Games Prosecutors Play*, 57 CASE W. RES. L. REV. 531, 538 (2007) (“Discussion of U.S. litigation frequently employs the metaphors of sports and games.”). Cf. Susan Hayes Stephan, *Blowing the Whistle on Justice as Sport: 100 Years of Playing a Non-Zero Sum Game*, 30 HAMLINE L. REV. 587, 588-89 (2007) (disputing the “sporting theory of justice” by arguing that litigation is not a zero-sum game). I have not found, however, the previous use of golf as an analogy to a prosecutor’s ethics.

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[G]olf is played, for the most part, without the supervision of a referee or umpire. The game relies on the integrity of the individual to show consideration for other players and to abide by the Rules. All players should conduct themselves in a disciplined manner, demonstrating courtesy and sportsmanship at all times, irrespective of how competitive they may be. This is the spirit of the game of golf.

U.S. Golf Ass’n, *Golf Etiquette 101*, <http://www.usga.org/etiquette/tips/Golf-Etiquette-101/> (last visited Aug. 21, 2010). In 1925, the legendary golfer Bobby Jones (who also later became an attorney), lost the U.S. Open golf tournament by one stroke after penalizing himself for an inadvertent infraction that no one but himself had observed. See MARK FROST, *THE GRAND SLAM: BOBBY JONES, AMERICA, AND THE STORY OF GOLF* 227-30 (2004); see also STEVEN PRESSFIELD, *THE LEGEND OF BAGGER VANCE: GOLF AND THE GAME OF LIFE* 202-06 (1995) (describing the moment when Rannulph Junah calls a one-stroke penalty on himself at a critical point in his match against Walter Hagen and Bobby Jones, despite the fact that only he and his young caddy saw the infraction.).

9. See Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 835 (“[D]efendants in criminal cases are afforded less access to information than civil defendants.”).

“competition” with the possibility that it may adversely affect the likelihood of a conviction.<sup>10</sup> If the golfer’s failure to disclose an infraction is fortuitously uncovered, it can result in the sanction of disqualification from the match.<sup>11</sup> If the prosecutor’s failure to disclose exculpatory information is somehow uncovered, it can lead to the reversal of a conviction and personal penalties being separately imposed on the prosecutor.<sup>12</sup>

Of course, this simplistic analogy of a prosecutor to a golfer is not completely accurate. The golfer’s immediate objective is to win the match and obtain the accompanying financial rewards and national ranking, thereby giving him a strong motive not to penalize himself. The prosecutor’s objective, on the other hand, is not that easy to define. The prosecutor’s goal is not to “win” the case by obtaining a conviction. It is the prosecutor’s responsibility to be a “minister of justice,” whatever that is taken to mean, and while in doing so the prosecutor “may strike hard blows, he is not at liberty to strike foul ones.”<sup>13</sup> Basically, as the Supreme Court has recognized, the prosecutor should seek the truth in every investigation no matter where that leads.<sup>14</sup> In the words of a former Attorney General of the United States and Justice of the Supreme Court, “[a]lthough the government technically loses its case [with an acquittal], it has really won if justice has been done.”<sup>15</sup> Therefore, there is a stronger motive for a golfer to suppress an infraction than for a prosecutor to suppress exculpatory information. While unknown violations of the rules will not adversely affect the golfer’s goal of winning, when the prosecutor gets away with rules violations, innocent people may suffer, thereby defeating the pursuit of justice.

Yet from a review of recently published decisions of various courts or even by just reading the national or local news, it is apparent that there is a large distinction between the integrity of the prosecutor and the professional golfer. Through the recent expansion in the use of DNA

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10. See *Brady*, 373 U.S. at 87-88.

11. See U.S. Golf Ass’n, *supra* note 8.

12. See *Brady*, 373 U.S. at 87-88; see also Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 3-8 (2009) (explaining the case law surrounding civil liability and immunity for prosecutorial misconduct).

13. *Berger v. United States*, 295 U.S. 78, 88 (1935).

14. See *Banks v. Dretke*, 540 U.S. 668, 696 (2004) (“We have several times underscored ‘the special role played by the American prosecutor in the search for truth in criminal trials.’”); see also Bennett L. Gershman, *The Prosecutor’s Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 337 (2001) (“Although not articulated in judicial decisions, a prosecutor’s duty to truth embraces a duty to make an independent evaluation of the credibility of his witnesses, the reliability of forensic evidence, and the truth of the defendant’s guilt.”).

15. Jackson, *supra* note 1, at 4.

technology, the hard work of defense attorneys and judges, and even review of previous convictions by successor prosecutors, we have frequently been exposed to government lawyers who have failed to comply with their legal and ethical responsibility to penalize themselves by providing information to the other side.<sup>16</sup> Although the vast majority of prosecutors undoubtedly perform their work with dedication and adherence to the rules, the conduct of a small minority has served to tarnish the profession at least in the eyes of some.<sup>17</sup> While this can occasionally be “corrected” before it results in unwarranted incarceration, too many times the discovery leads to the exoneration of innocent persons after they have served lengthy prison sentences.<sup>18</sup> Some scholars have attributed these miscarriages of justice to inexperienced and overworked prosecutors or those who need to keep conviction rates high for re-election purposes.<sup>19</sup> While these are certainly correct observations in some cases, recent high profile cases have involved a District Attorney himself and highly experienced federal prosecutors who are not directly subject to the electorate as well as trial level prosecutors who are insulated from politics.<sup>20</sup> A review of these cases highlights the difficulties in preventing this form of prosecutorial misconduct.

In the “Duke Lacrosse case,” District Attorney Michael Nifong, from 2006-2007, led the prosecution of several white college students for the alleged rape of an African American woman who was hired to perform a sexually suggestive dance at a party attended by members of the college lacrosse team.<sup>21</sup> At the time, Nifong was involved in a campaign to be elected District Attorney and was relying on the support of the African American community to prevail.<sup>22</sup> In addition to the

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16. See Joy, *supra* note 6, at 403.

17. Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 374 (2001) (stating that “generally, prosecutors routinely validate and perpetuate [the] sorry state of affairs” in the criminal justice system).

18. See Joy, *supra* note 6, at 403.

19. See, e.g., Joy, *supra* note 6, at 405 (“At the state level, nearly all chief prosecutors are elected, thus directly accountable to the public.”); Carrie Johnson, *Shortfalls Unraveled Stevens’s Conviction*, WASH. POST, Apr. 12, 2009, at A1 (quoting Gerald E. McDowell, who stated that supervisors generally do not “nitpick” their subordinates “because there is not enough time, given crushing case loads”).

20. See *infra* notes 21-22, 31, 46-47 and accompanying text.

21. See Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257, 285-306 (2008) [hereinafter Mosteller, *Exculpatory Evidence*] (describing the Duke Lacrosse case); Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to “Do Justice,”* 76 FORDHAM L. REV. 1337, 1341-47 (2007) [hereinafter Mosteller, *The Duke Lacrosse Case*] (describing the Duke Lacrosse case).

22. See Mosteller, *The Duke Lacrosse Case*, *supra* note 21, at 1354-57.

inherent weakness of a sex crimes case involving an “escort” with a criminal record who has already given multiple inconsistent statements about what happened, Nifong was confronted with DNA results from items relating to the complainant which not only virtually excluded every male at the party but which pointed to other males as DNA contributors.<sup>23</sup> Rather than informing the defense of this information which any rational attorney would recognize as helpful to those charged, he initially instructed the lab director to omit it from the report, falsely informed the court that all DNA information had been disclosed, and subsequently buried the raw exculpatory data in 1844 pages of material that was turned over to the defense.<sup>24</sup> Whether this was an attempt on his part to help his election chances or merely sharp advocacy intended to prevent or delay disclosure of information that would devastate the prosecution’s case, it resulted in his disbarment, criminal conviction, serving a day in jail, and potential civil liability.<sup>25</sup>

The Duke Lacrosse case has been rightfully described as a “disaster” and “a fiasco” that “will likely not be seen again soon.”<sup>26</sup> Yet, in the 2008 prosecution of Ted Stevens for failing to list information on required financial disclosure forms, the U.S. Department of Justice was also discovered to have repeatedly failed to meet its required disclosure requirements, leading the Attorney General himself to request that the ultimate conviction be vacated.<sup>27</sup> The catalyst for the dismissal was discovery after the verdict, but before sentence, of notes of prosecutors’ interview with the main witness which had not previously been disclosed to the defense.<sup>28</sup> These notes were inconsistent with the witness’ trial testimony that directly inculpated the defendant.<sup>29</sup>

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23. *Id.* at 1347 & n.33, 1359.

24. *Id.* at 1359, 1361-62.

25. Mosteller, *Exculpatory Evidence*, *supra* note 21, at 302.

26. Mosteller, *The Duke Lacrosse Case*, *supra* note 21, at 1337-38.

27. *See* Johnson, *supra* note 19, at A1 (describing the Stevens investigation); Neil A. Lewis, *Tables Turned on Prosecution in Stevens Case*, N.Y. TIMES, Apr. 8, 2009, at A1 (describing the Stevens investigation); Neil A. Lewis & David Johnston, *Dismayed Lawyers Lay Out Reasons for Collapse of the Stevens Conviction*, N.Y. TIMES, Apr. 7, 2009, at A20 (describing the Stevens investigation and the reasons for its failure); Joe Palazzolo & Mike Scarcella, *Losing Integrity: How Justice Fumbled its Case Against Ted Stevens*, LEGAL TIMES, Apr. 6, 2009, at 1 (setting forth a timeline of the events in the Stevens investigation); Steven R. Peikin & Jordan T. Razza, *Failed Stevens Prosecution Reveals Need for New DOJ Policy*, N.Y. L.J., Apr. 23, 2009, at 4 (describing the Stevens investigation).

28. *See* Palazzolo & Scarcella, *supra* note 27, at 6.

29. The witness had testified at the trial that he did not send a bill to the Senator for work done on his house, which had been requested by the Senator, because a third party acting for the Senator told him the Senator really did not want to receive a bill. *See* Lewis, *supra* note 27. The notes of the prosecutors indicated, however, that prior to the trial the witness denied having any knowledge of such a conversation. *Id.*

This blatant misconduct would have been sufficiently disgraceful based on the fact that Stevens was a sitting U.S. Senator, the longest serving Republican in the history of the Senate.<sup>30</sup> One would think that the prosecution would attempt to be scrupulously fair in such a high publicity case. It was even more egregious, however, because the prosecution was led by the veteran Deputy Chief of the Justice Department's Public Integrity Unit, the group of lawyers responsible for prosecuting public officials for misconduct.<sup>31</sup> After concluding that, "In nearly 25 years on the bench, I've never seen anything approaching the mishandling and misconduct that I've seen in this case," the federal judge who dismissed the case appointed a special prosecutor to investigate the possibility of bringing criminal charges against members of the prosecution team for their own misconduct.<sup>32</sup>

Finally, there was the comparatively routine prosecution in *United States v. Jones*,<sup>33</sup> which was the subject of the conference presentation of Hon. Mark L. Wolf, Chief Judge in the Federal District Court in Massachusetts.<sup>34</sup> Mr. Darwin Jones was being prosecuted by the U.S. Attorney's Office for possessing a handgun.<sup>35</sup> It was alleged by the arresting officer during the suppression hearing that, after he recognized the defendant from previous encounters and the defendant uncharacteristically tried to avoid him, he had a reasonable suspicion to pursue him, which ultimately led to his apprehension and seizure of the gun.<sup>36</sup> Unfortunately for the Assistant U.S. Attorney, however, her notes from three previous interviews she conducted with the officer surfaced during an *in camera* review by Judge Wolf, not having been disclosed to the defense earlier, which showed that he had told the prosecutor on each occasion that he did not recognize the defendant until after the apprehension.<sup>37</sup>

Significantly, the circumstantial evidence surrounding these previous interviews makes it difficult to credit the prosecutor's subsequent assertion that the failure to disclose the notes was inadvertent. On April 7, 2008, the prosecutor's notes reflect that the

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30. *Id.*

31. Johnson, *supra* note 19.

32. *Stevens Off the Hook, But Not Prosecutors*, CBSNEWS.COM (Apr. 7, 2009), <http://www.cbsnews.com/stories/2009/04/07/politics/main4924428.shtml>.

33. See *United States v. Jones*, 620 F. Supp. 2d 163, 164-68 (D. Mass. 2009) (stating the facts of the case and procedural history); see also Brink, *supra* note 12, at 22-24 (discussing facts of the *Jones* case).

34. See Hofstra Univ. Sch. of Law, *supra* note 2.

35. *Jones*, 620 F. Supp. 2d at 164.

36. *Id.*

37. *Id.* at 164-65.

officer told her twice that he did not recognize the defendant.<sup>38</sup> Yet in a written court filing eight days later, the prosecutor asserted that the officer did recognize the defendant.<sup>39</sup> Judge Wolf concluded that the prosecutor had not “provided any comprehensible, let alone credible, explanation for these blatant inconsistencies.”<sup>40</sup>

Additionally, on October 6, 2008, the prosecutor was again told by the officer that he did not recognize the defendant.<sup>41</sup> Yet four days later, when she disclosed some exculpatory material to the defense, she made no reference of these additional inconsistent statements.<sup>42</sup> Finally, on October 24, 2008, the officer again told the prosecutor that he did not recognize the defendant and this statement was also not disclosed to the defendant, but four days later the prosecutor allowed the officer to testify under oath that he did recognize the defendant.<sup>43</sup> The next day, when the judge ordered the prosecutor to review her notes and disclose any exculpatory information, including impeachment material, the prosecutor replied that she had done so and there was nothing to disclose.<sup>44</sup> After providing her notes to the judge who found the glaring discrepancies, the prosecutor then conceded that her review (and that of her supervisor) “was too quick and cursory.”<sup>45</sup>

From this brief description, a thoughtful reader might conclude that this prosecutor had little prior experience, particularly in the courtroom. The facts, however, are otherwise. She had been a state prosecutor who, for at least five years, had prosecuted child abuse and homicide cases.<sup>46</sup> While an Assistant U.S. Attorney, she had been assigned to the Major Crimes Unit before being promoted to the Organized Crime Unit.<sup>47</sup> Despite this impressive experience, her training supplied by the U.S. Attorney’s Office and the Department of Justice, and the judge’s specific direction for her to review her notes for exculpatory impeachment material the day after the officer testified, Judge Wolf concluded that she “did not understand her discovery obligations.”<sup>48</sup> He declined to institute criminal contempt proceedings against the prosecutor for violating his

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38. *Id.* at 166.

39. *Id.*

40. *Id.* at 181.

41. *Id.* at 166-67.

42. *Id.* at 181.

43. *Id.* at 167.

44. *Id.* at 181-82.

45. *Id.* at 182.

46. *Id.* at 182-83.

47. *Id.* at 183.

48. *Id.* at 181.



orders.<sup>49</sup> As a result of this case and many others in his district that Judge Wolf considers “a dismal history of intentional and inadvertent violations” of disclosure rules, he decided to organize training sessions on criminal discovery given by federal judges and invited government attorneys to attend.<sup>50</sup> He has not decided whether to order federal prosecutors to attend.<sup>51</sup>

I respectfully suggest that these three recent prosecutorial disasters demonstrate that there is no simple explanation for why exculpatory material is withheld or how to prevent it. In the Duke Lacrosse case you have the District Attorney himself engaging in the flagrant suppression of obviously exculpatory evidence in a case closely watched by the public and defended by several well-funded and highly competent attorneys.<sup>52</sup> One could argue that the pressures of a contested election led to the result but it is hard to believe that those pressures could lead to such stupidity, particularly in a state with a strong full open-file discovery rule which made locating the information inevitable.<sup>53</sup> You cannot explain the Stevens case on electoral politics, however. The Department of Justice was responsible for that dismissal, not prosecutors subject to reelection.<sup>54</sup> Moreover, the Senator was in the same party as the sitting President.<sup>55</sup> The offending attorneys were veterans of cases involving corruption of public officials, not the sort of prosecutors who are normally subject to political considerations or who were inexperienced or lacking in resources.<sup>56</sup> Finally, the Jones case involved possession of a single gun, not the sort of prosecution with political implications particularly for a U.S. Attorney’s Office.<sup>57</sup> Additionally, the government attorney involved was a veteran prosecutor who has previously been involved in serious criminal cases.<sup>58</sup>

Why then did these prosecutors, like so many others, engage in this type of misconduct? I do not think that any prosecutor knowingly fails to

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49. In response to a question put to Judge Wolf by this author during his conference presentation, he acknowledged that, despite the above record, he found it difficult to find intentional misconduct in this case but could not point to a specific reason for that.

50. *Jones*, 620 F. Supp. 2d at 165, 167.

51. *Id.* at 167. The U.S. Attorney for the District of Massachusetts has already determined that she will not order her assistants to attend the court’s criminal discovery training sessions. Sheri Qualters, *New U.S. Attorney in Boston Plans to Target Financial Fraud, Child Exploitation*, NAT’L L.J., Dec. 2, 2009, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202436008330>.

52. Mosteller, *Exculpatory Evidence*, *supra* note 21, at 298.

53. *Id.* at 262-63.

54. Palazzolo & Scarcella, *supra* note 27.

55. *See id.*

56. *See id.*

57. *United States v. Jones*, 620 F. Supp. 2d 163, 164 (D. Mass. 2009).

58. *Id.* at 182-83.

disclose exculpatory evidence in order to convict an innocent person. But I would not be the first to suggest that the failure to disclose exculpatory information results from an office culture that rewards convictions and breeds an attitude that the prosecution is engaged in a battle against the guilty, so the ends justify the means.<sup>59</sup> Once the prosecution has decided in its own mind that the defendant is guilty, the goal becomes one of marshalling the evidence to ensure conviction and avoiding or minimizing any other evidence that gets in the way.<sup>60</sup> Since the police have solved the case and the defendant is guilty, any evidence to the contrary is not reliable, and therefore not “material,” so the rationalization goes.<sup>61</sup> Or the prosecutor who has already become convinced of the defendant’s guilt and who has little time to devote to further investigation, ignores the importance of affirmatively looking for exculpatory evidence in his own files, or those of the police, or fails to recognize the significance of such evidence of which he is aware.<sup>62</sup>

There is no shortage of scholarly articles that have recommended measures to curtail this form of prosecutorial misconduct, including judicial supervision of discovery and disciplinary proceedings against offending prosecutors.<sup>63</sup> Others have suggested that these remedies have already proved to be ineffective and new ideas need to be developed, such as offering financial incentives to prosecutors for ethical practices and full open-file discovery.<sup>64</sup> At the Hofstra conference, several ideas were promoted by presenters and in “break out” sessions including internal audits and other quality control mechanisms to learn from past misconduct and to deter such behavior in the future. One scholar has even proposed setting up independent ethics commissions, separate from

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59. See, e.g., Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 484 (2006); Abby L. Dennis, *Reining in the Minister of Justice: Prosecutorial Oversight and the Superseder Power*, 57 DUKE L.J. 131, 138 (2007); Uphoff, *supra* note 9, at 822-23.

60. See Uphoff, *supra* note 9, at 786 (noting how prosecutors sometimes exploit evidence to induce guilty pleas).

61. Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 292, 330; Paul C. Giannelli, *Prosecutorial Ethics and the Right to a Fair Trial: The Role of the Brady Rule in the Modern Criminal Justice System*, 57 CASE W. RES. L. REV. 593, 601 (2007); Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Discretion and Post-Conviction Evidence of Innocence*, 6 OHIO ST. J. CRIM. L. 467, 488 (2009).

62. See Findley & Scott, *supra* note 61, at 292.

63. See, e.g., Michael E. Gardner, *An Affair to Remember: Further Refinement of the Prosecutor’s Duty to Disclose Exculpatory Evidence*, 68 MO. L. REV. 469, 480-81 (2003).

64. Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. LAW 441, 448 (2009); Peter A. Joy, *Brady and Jailhouse Informants: Responding To Injustice*, 57 CASE W. RES. L. REV. 619, 641-42; Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct With Financial Incentives*, 64 FORDHAM L. REV. 851, 873 (1995).

existing disciplinary proceedings and presumably composed of defense attorneys, to investigate and police prosecutorial misconduct.<sup>65</sup>

In my opinion, however, these measures are only reactions to the culture which causes the problem and do not address the problem itself: the practice of seeing the role of the prosecutor as seeking a conviction rather than seeking truth. If the government attorneys in the three examples above had been as interested in letting the fact finders consider all the evidence and come to their own conclusions on guilt instead of trying to impose their own opinions on the fact finders, they would have saved themselves much aggravation and humiliation. The answer does not lie in further attempts to investigate or deter prosecutorial misconduct; it can only be found in the ethical education of lawyers before they become prosecutors, in electing or appointing lead prosecutors who will impose these values on the offices that they lead, and in prosecutors using clear and unambiguous guidelines for disclosure.<sup>66</sup>

Law schools must assume the obligation to not only teach students the rules and skills they will need for the practice of law but also to instill the values that will ensure that these students are promoting justice.<sup>67</sup> For future prosecutors, the most effective means to accomplish this is for the law school to establish a prosecution externship course with on-site and seminar components.<sup>68</sup> In such a program, the student is placed in a prosecutor's office where he spends a specified amount of time each week. He will assist the attorneys with their work and perhaps handle some cases himself under the supervision of the prosecutors and a faculty member. In this way, the student is exposed to the actual work of a prosecutor and has an opportunity to experience the office culture as well as the inherent pressure of the job. There is also a seminar component run by the faculty member where the student reflects on his work along with other students in similar positions. The curriculum includes significant time devoted to the prosecutor's role, to ethical issues that frequently arise for prosecutors, and to values that contribute

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65. Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 297-98 (2004).

66. Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 997, 1003 (2009).

67. Peter L. Davis, *Why Not a Justice School? On the Role of Justice in Legal Education and the Construction of a Pedagogy of Justice*, 30 HAMLIN L. REV. 513, 525 (2007) ("Law schools bear a major responsibility for the adverse changes that occur in students while they are under our tutelage.").

68. Stacy Caplow, *"Tacking Too Close to the Wind": The Challenge to Prosecution Clinics to Set our Students on a Straight Course*, 74 MISS. L.J. 919, 920-21 (2005); Peter A. Joy, *Prosecution Clinics: Dealing With Professional Role*, 74 MISS. L.J. 955, 967 (2005).

to a just result. Specific cases should be discussed which resulted in wrongful convictions, such as *The Palladium*<sup>69</sup> and *Martin Tankleff*<sup>70</sup> aborted convictions. It is helpful if the faculty member has substantial experience as a prosecutor not only to be familiar with the myriad issues that confront law enforcement but also to serve as a role model for the students as an ethical prosecutor.

Last semester in the prosecution externship that I supervise, one of the students in the seminar presented a description of her work in the complaint room of an urban district attorney's office, which included interviewing witnesses and having them confirm their police statements. She described that one witness in a domestic violence incident told her that what was in her police statement was not true and that the defendant did not intentionally strike her. I asked the student whether she documented this different version and she said she had not. When I asked why she failed to do this, another student working in another prosecutor's office interjected: "Why would she want to create ammunition for the other side?" Seizing on this "teaching moment," I then lectured on the constitutional and ethical responsibilities of a prosecutor, to which the students had apparently never been exposed. It generated hours of discussion on *Brady* issues,<sup>71</sup> unethical behavior that other students had observed at their placements, and why the prosecutor should be concerned with the truth and not only convictions. If not for this course, the students may never have absorbed these values. I also showed a video documenting a wrongful conviction and had the students read about a defendant who was freed after eighteen years in prison to generate additional discussion and thoughts and to impress upon the students that these things really do happen.<sup>72</sup>

Next, the responsibility for ensuring ethical behavior by the staff falls on the main prosecutor, whether the elected District Attorney or the appointed U.S. Attorney. The assistants take their lead from the top and the top should lead by example. It is insufficient to have ethical

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69. Green & Yaroshefsky, *supra* note 61, at 467-70; *Lemus Acquitted After 13 Years in Prison*, MSNBC.COM (Dec. 7, 2007, 05:32 PM), [http://www.msnbc.msn.com/id/22152228/ns/dataline\\_nbc-crime\\_reports/](http://www.msnbc.msn.com/id/22152228/ns/dataline_nbc-crime_reports/).

70. See RICHARD FIRSTMAN & JAY SALPETER, *A CRIMINAL INJUSTICE: A TRUE CRIME, A FALSE CONFESSION, AND THE FIGHT TO FREE MARTY TANKLEFF* 564-65 (2008) (describing the court decision which overturned Martin Tankleff's conviction).

71. For instance, is exculpatory information likely to be disclosed if it is not written down? See Robert P. Mosteller, *The Special Threat of Informants to the Innocent Who Are Not Innocents: Producing 'First Drafts,' Recording Incentives, and Taking a Fresh Look at the Evidence*, 6 OHIO ST. J. OF CRIM. L. 519, 564, 567 (2009). See generally *United States v. Rodriguez*, 496 F.3d 221 (2d Cir. 2007) (holding that the U.S. Government is not required to make notes of a witness's statements).

72. See *supra* notes 69-70 and accompanying text.

instruction come only from an appellate attorney or one responsible for training, which is usually the case in most prosecution offices.<sup>73</sup> The District Attorney should personally emphasize that ethics and fairness are of equal importance to the work of the office as is securing the conviction of the people prosecuted.<sup>74</sup> She should stress that prosecutors are not always right and that they should maintain an open mind while leaving the determination of guilt to the fact finder.<sup>75</sup> In my opinion, this can best be accomplished by having the District Attorney personally deliver an ethical lecture at regular intervals, discussing issues such as plea bargaining, discovery, and witness preparation. Supervisors should also be hired based on their embracing of and adherence to strict ethical standards. The supervisors should periodically meet with the trial assistants to go over their individual cases with particular focus on ensuring that they are meeting their *Brady* and other ethical obligations. The Office should investigate disclosure problems identified by defense attorneys and judges, affirmatively sanction violations, and monitor individual prosecutors who have a history of this behavior. Training should also include exposure to the wrongful convictions that have resulted from the suppression of exculpatory information. If the prosecutor's office is structured to emphasize seeking the truth, if hiring is guided by that principle, and if advancement requires adherence to it, we might see the gradual retreat of the emphasis on convictions as the primary measure of success. Of course, this requires that elected prosecutors educate the public on the importance of fairness and make it part of their campaign.<sup>76</sup>

Finally, and perhaps most importantly, prosecution offices must abandon reliance on the crutch of "materiality" to determine what should be disclosed to the defense in the first instance. While I have no objection to the use of materiality as a standard for appellate review in deciding whether a *Brady* violation should result in vacating a conviction, it is a poorly designed measure to use in deciding whether

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73. See Bibas, *supra* note 64, at 997-98.

74. See *id.* at 998-1000.

75. See *id.* at 999-1000. As Attorney General, Eric Holder recently told new government lawyers at a swearing in ceremony: "Your job as assistant U.S. attorneys is not to convict people. . . . Your job is not to win cases. Your job is to do justice. Your job is in every case, every decision that you make, to do the right thing. Anybody who asks you to do something other than that is to be ignored. And I mean that." Nedra Pickler, *U.S. Attorneys Told to Expect Scrutiny: Senator's Case Leaves Taint, Holder Says*, BOSTON GLOBE, Apr. 9, 2009, [http://www.boston.com/news/nation/articles/2009/04/09/us\\_attorneys\\_told\\_to\\_expect\\_scrutiny/](http://www.boston.com/news/nation/articles/2009/04/09/us_attorneys_told_to_expect_scrutiny/).

76. Recently, candidates for District Attorney have won elections by stressing to the public the need for innovative programs. See Bibas, *supra* note 66, at 986 & n.102; Jennifer Emily & Steve McGonigle, *Battle for Justice Turns for Ethics: Prosecutors Hiding Evidence Need to be Punished*, *Watkins Says*, DALLAS MORNING NEWS, May 4, 2008, at 1A.

information should be disclosed to a defendant before trial. First, the definition of materiality is too vague and confusing to be left to the discretion of individual prosecutors. Is information “material” when: (a) it is “probable” that disclosure would have resulted in a different outcome;<sup>77</sup> (b) it is “possible” that disclosure would have created a different result;<sup>78</sup> or (c) considering the suppressed evidence would “undermine confidence in the verdict?”<sup>79</sup> Second, if the trial assistant has already personally determined from the evidence that the defendant is guilty, how can she produce an objective determination that the information in question might lead to a different result? As one scholar (and former prosecutor) has thoughtfully proposed, psychological factors such as confirmatory bias, selective information processing, and resistance to cognitive dissonance inherently lead to *Brady* violations even by the most ethical of prosecutors.<sup>80</sup> Prospectively making a determination of “materiality” based on a retrospective analysis of the evidence is hardly the way to make an accurate decision.<sup>81</sup> Lastly, even an experienced and ethical prosecutor is not equipped with the knowledge and perspective that the defendant’s attorney has to determine what information is helpful to the client and how to make the best use of it given the defense that will be asserted.<sup>82</sup> It should be left to the defense attorney to make that evaluation, not the prosecutor.<sup>83</sup>

These considerations and others have resulted in attempts to eliminate or water down the “materiality” issue from the decision about whether to disclose exculpatory evidence. In New York, Rule 3.8(b) of the Rules of Professional Discipline, adopted in April 2009, does not require that exculpatory evidence be “material” before its suppression

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77. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

78. *People v. Vilaridi*, 555 N.E.2d 915, 920 (N.Y. 1990).

79. *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

80. See Alafair S. Burke, *Brady’s Brainteaser: The Accidental Prosecutor and Cognitive Bias*, 57 CASE W. RES. L. REV. 575, 579-80 (2007); Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1593-1602 (2006) [hereinafter Burke, *Improving Prosecutorial Decision Making*]; Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 494-96 (2009).

81. See Burke, *Improving Prosecutorial Decision Making*, *supra* note 80, at 1610.

82. See *Jencks v. United States*, 353 U.S. 657, 668-69 (1957) (stating that only defense attorneys are properly equipped to determine the usefulness of witness statements).

83. This is comparable to the reason witness statements are disclosed to the defense: “Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government’s witness and thereby furthering the accused’s defense, the defense must initially be entitled to see them to determine what use may be made of them.” *Id.* “[O]missions, contrasts and even contradictions, vital perhaps, for discrediting a witness, are certainly not as apparent to the impartial presiding judge as to single-minded counsel for the accused; the latter is in a far better position to appraise the value of a witness’ pretrial statements, for impeachment purposes.” *People v. Rosario*, 173 N.E.2d 881, 883 (N.Y. 1961).

will subject a prosecutor to disciplinary sanctions.<sup>84</sup> Moreover, the National District Attorneys Association has likewise eliminated “materiality” from its recommended National Prosecution Standards on disclosure.<sup>85</sup> The New York City Legal Aid Society has also left out a “materiality” requirement from its recommended overhaul of the New York State law of discovery.<sup>86</sup> The New York Court of Appeals has reduced the evidentiary showing for a *Brady* violation to a “possibility” of a different result if the evidence had been disclosed where the defense has made a specific request for it<sup>87</sup> and has recently held that reversal will be required even where “this is a close question.”<sup>88</sup>

After the Ted Stevens prosecution collapsed, the Department of Justice was directed by the Attorney General to review the government’s discovery practices and to formulate rules that would prevent this from recurring.<sup>89</sup> Ironically, in the resulting Memorandum for Department Prosecutors entitled “Guidance for Prosecutors Regarding Criminal Discovery,” dated January 4, 2010, there is virtually no change in the requirement of “materiality” to disclose exculpatory information.<sup>90</sup> Despite some basic instructions as to the process to engage in to determine if disclosure should occur and a broad “encouragement” to provide more disclosure than is required, this Memorandum merely refers to the previous policy contained in the U.S. Attorney Manual.<sup>91</sup> That document in turn, although suggesting that prosecutors take “a broad view of materiality” and claiming to require disclosure by a

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84. Contrary to *Brady*, however, Rule 3.8(b) does require that a prosecutor is actually aware of the favorable information before sanctions may be imposed. N.Y. R. PROF’L CONDUCT R. 3.8(b) (2009), available at [http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/FinalNYRPCswithComments\(April12009\).pdf](http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/FinalNYRPCswithComments(April12009).pdf).

85. NAT’L DIST. ATTORNEYS ASS’N, NAT’L PROSECUTION STANDARDS 53.5 (2d ed. 1991).

86. LEGAL AID SOC’Y, CRIMINAL DISCOVERY REFORM IN NEW YORK: PROPOSAL TO REPEAL C.P.I. ARTICLE 240 AND TO ENACT A NEW C.P.I. ARTICLE 245, at 14-16 (2009), <http://www.legal-aid.org/en/mediaandpublicinformation/inthenews/thelegalaidsocietyproposescriminaldiscoveryreform.aspx> (follow “Download the Proposal for Discovery Reform” hyperlink) (listing proposed Article 245.20 for automatic discovery).

87. *People v. Vilardi*, 555 N.E.2d 915, 920 (N.Y. 1990).

88. *People v. Hunter*, 892 N.E.2d 365, 368 (N.Y. 2008). See also *Cone v. Bell*, 129 S. Ct. 1769, 1786 (2009), where the Supreme Court reiterated the “reasonable probability” standard but remanded the case to determine if it was “possible” that the suppressed information may have persuaded the jury to give more consideration to defendant’s drug use in mitigation of the sentence.

89. Press Release, U.S. Dep’t of Justice, Attorney General Announces Increased Training, Review of Process for Providing Materials to Defense in Criminal Cases (Apr. 14, 2009), <http://www.justice.gov/opa/pr/2009/April/09-opa-338.html>.

90. Memorandum from David W. Ogden, Deputy Att’y Gen., to Dep’t Prosecutors (Jan. 4, 2010), <http://www.justice.gov/dag/discovery-guidance.html>.

91. *Id.* (“[P]rosecutors should be aware that Section 9-5.001 details the Department’s policy regarding the disclosure of exculpatory and impeachment information and provides for broader disclosures than required by *Brady* and *Giglio*.”).

standard that is broader than “‘material’ to guilt,” still retains discretionary standards on the part of the individual prosecutor that control the disclosure decision.<sup>92</sup> For example, only impeachment material which “casts a substantial doubt upon the accuracy of any evidence” or “might have a significant bearing on the admissibility of prosecution evidence” need be disclosed.<sup>93</sup> Moreover, disclosure is not authorized where, in the opinion of the individual prosecutor, it is “irrelevant or not significantly probative” and involves “spurious issues or arguments which serve to divert the trial process from examining the genuine issues.”<sup>94</sup>

In the name of correcting the abuses which caused the failure of the Stevens prosecution, the Department of Justice has just replaced one ambiguous standard (“materiality”) with several others (“substantial doubt,” “significant bearing,” “significantly probative,” and “spurious”) and left it to the discretion of individual lawyers to apply them.<sup>95</sup> Despite the lofty words of the Attorney General,<sup>96</sup> without more guidance and clarity than this, the federal government should not expect much improvement in its attorneys’ disclosure performance.

I am not naïve to think that external controls will no longer be needed if the above suggestions are implemented. Just as in any profession, organization, or environment, there will always be those who, for their own reasons, fail to comply with the rules. Internal prosecution sanctions, court supervision, and disciplinary proceedings, along with appellate reversal of convictions when appropriate, will still be needed to deter and punish the outliers. However, the increased focus on education, leadership, and unambiguous standards, along with the existing regulatory devices, should help to reduce the problems associated with disclosure of exculpatory information and allow prosecutors to pursue their mission with their fairways being wide and the wind always at their backs.

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92. U.S. DEP’T JUSTICE, U.S. ATTORNEY’S MANUAL §§ 9-5.001(B)(1), (C), (E), [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/5mcrm.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm) (last updated June 2010).

93. *Id.* § 9-5.001(C)(2).

94. *Id.* § 9-5.001(C).

95. *See supra* notes 92-94 and accompanying text.

96. *See supra* note 75. Moreover, despite a request from the federal judge in the Ted Stevens prosecution that the Federal Rules of Criminal Procedure and local rules in the District of Columbia be amended to eliminate the materiality standard for disclosing exculpatory information, the Department of Justice has opposed any such change. *See* Mike Scarcella, *DOJ Outlines Changes After Backlash Over Handling of Stevens Case*, LAW.COM, Oct. 19, 2009, <http://truthinjustice.org/DOJ-discovery.htm>; Mike Scarcella, *Federal Judge in Washington Pushes for Local Rule Changes*, THE BLT (Dec. 7, 2009, 03:04 PM), <http://legaltimes.typepad.com/blt/2009/12/federal-judge-in-washington-pushes-for-local-rule-change.html>.