

## PROSECUTORS' DISCLOSURE OBLIGATIONS IN THE U.S.\*

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### *Introduction*

Thank you very much for inviting us to this workshop on “Prosecutorial Ethics.” It is an honor to speak with you and a special honor to be the guests of the JFBA at this workshop. Professor Green and I are very grateful to Professor Keiichi Muraoka and Hitotsubashi University School of Law for inviting us to Japan and asking us to participate in his project focusing on prosecutorial ethics, which the Ministry of Education is supporting. We are especially grateful to the JFBA for the opportunity to exchange our views with you. Professor Green and I apologize that we are unable to deliver our talks in Japanese, and we thank our translators for helping us to communicate with you.

Professor Green is a former Assistant U.S. Attorney, where he worked as a prosecutor for four years. Since becoming a law professor, Professor Green regularly provides training to prosecutors on their ethical obligations. Before becoming a law professor, I was lawyer in private practice, and I practiced both civil and criminal law. I often provide training to public defenders and other defense lawyers on their ethical obligations. We will provide you with perspectives of prosecutors and defense lawyers concerning discovery in criminal cases and the ethical obligations of prosecutors.

Our talks will proceed in four parts. In Part I, I will provide an overview of the prosecutor's discovery disclosure obligation in the U.S. In Part II, I will discuss defense attorney efforts to reform prosecutors' disclosure obligations. Professor Green will then discuss disclosure obligations from the prosecutor's point of view in Part III. In Part IV, Professor Green will discuss efforts beyond professional discipline and legal enforcement to advance and support a strong ethical approach to prosecutors' disclosure obligations.

### *I. Overview of Disclosure Obligation in the United States*

#### **1. Development of Criminal Discovery in United States**

In every country, the preparation for any type of litigation, whether it is civil or criminal litigation, involves the collection and examination of material that may be used as evidence. For

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\* This paper was presented at the Japan Federation Bar Associations Workshop on Prosecutorial Ethics held on December 17th and at the special lecture sponsored by the Hitotsubashi University School of Law on December 18th 2013.

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most of its history, there were few mechanisms in the United States to require opposing parties in either civil or criminal cases to provide each other with material that may be evidence or that may lead to admissible evidence before trial. Because of this lack of information about the possible evidence in cases in the 1800s and early 1900s, many lawyers referred to both civil and criminal trials as “sporting contests” in which neither side had a right to require the opposing party to produce potential evidence prior to trial. There was no discovery, and some viewed the trial process as a game full of surprises rather than a truth seeking process.

For civil litigation, this approach to trials changed in 1938 when new Federal Rules of Civil Procedure provided for the right of each party to obtain broad discovery from the opposing party of such matters and materials as the names and addresses of potential witnesses, documents, names of expert witnesses, and tests results the opposing party intended to introduce into evidence. While some states had adopted some discovery procedures before the new Federal Rules of Civil Procedure, it was only after the adoption of broad discovery rules at the federal level that most states adopted similar changes for civil cases.

Many prominent lawyers and judges were critical of the lack of pretrial discovery in criminal cases, especially after the implementation of broad discovery obligations for civil cases at both the federal and state levels in the 1930s and 1940s. They maintained that the accused should have access to much of the evidence in the possession of the prosecutor for the trial process to be fair. Otherwise, criminal trials would continue to be “trials by ambush” where the defendant first learned of the government’s evidence at trial.

In a typical criminal prosecution, the prosecutor has access to all of the law enforcement investigation and reports, physical evidence, photographs of the scene of the crime or victim, tests that may have been performed on the physical evidence, and statements of witnesses that the prosecutor intends to call at trial as well as those witnesses the prosecutor may not call because the witnesses are not helpful to the prosecution. If the defendant gave a statement, there will be a copy of the statement if it is in writing or electronically recorded. If the statement was not recorded or written, there will be the police notes of the statement. If there are codefendants, there may also be statements of the codefendants. Without an affirmative discovery disclosure obligation, the prosecutor was not required to turn over or permit the defense to view and copy any of this material or evidence.

The first step toward requiring prosecutors to provide some discovery to defendants at the federal level occurred in 1946 when Rule 16 of the Federal Rules of Criminal Procedure became effective. Rule 16 is the discovery rule and it “allowed the defendant access . . . to documents obtained by the government.”<sup>1</sup> The next step toward broader criminal discovery occurred in 1957, when the United States Supreme Court decided *Jencks v. United States*,<sup>2</sup> which held that a federal defendant is entitled to the prior statement of a government witness if the statement is related to the witness’ trial testimony so that the defense counsel may be able to use the statement to impeach the witness if the prior statement conflicts with the trial testimony. In reaction to the *Jencks* decision, the U.S. Congress passed the *Jencks Act*,<sup>3</sup> which prohibited the disclosure of witness statements until after the witness testified on direct examination. Thus, the Jencks Act limited the Supreme Court’s decision by delaying the defense

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<sup>1</sup> FEDERAL RULES OF CRIMINAL PROCEDURE, Rule 16 (1946).

<sup>2</sup> 353 U.S. 657 (1963).

<sup>3</sup> Pub. L. No. 85-269, 71 Stat. 595 (1957) (codified as amended at 18 U.S.C. § 3500 (2006)).

access to prior statements of government witnesses. In cases that involved guilty pleas, the government was not required to turn over the statements even if they would be helpful to the defendant.

In 1963, Associate Justice of the U.S. Supreme Court William J. Brennan, Jr., delivered a lecture entitled *The Criminal Prosecution: Sporting Event or Quest for Truth?*<sup>4</sup> In his lecture, Justice Brennan observed that most defendants were poor and represented by public defenders or appointed counsel who lacked the resources to investigate their clients' cases. Under the law at the time, the defendant's lawyer did not have the right to a copy of any statements the defendant gave the police, or a right to laboratory analyses, or reports of tests done on physical evidence. Justice Brennan argued that discovery for the criminal defendant was necessary to the presumption of innocence and served to enhance the possibility that the innocent would not be convicted. Without discovery for the accused, the criminal trial continued to be more of a game or sporting contest with the odds stacked against the defendant.

Justice Brennan also argued that expanded discovery for the accused would benefit the prosecution as well by exposing untenable arguments, sharpening the issues, and possibly resulting in more guilty pleas when defense counsel could discuss evidence pointing to guilt with the accused. Justice Brennan maintained that these benefits to the prosecution, as well as the protection broader discovery would give the defendant, far outweigh concerns that defense counsel would use access to broader discovery to construct a perjured defense.

A few months after Justice Brennan's 1963 lecture, the U.S. Supreme Court decided *Brady v. Maryland*,<sup>5</sup> which held that a prosecutor has a duty to disclose evidence favorable to the accused upon request where the evidence is material either to guilt or to punishment. More than twenty years later, the Supreme Court decided *United States v. Bagley*,<sup>6</sup> which explained that evidence is material if it is reasonably probable to change the result of the proceeding. The materiality requirement means that the prosecutor is required to disclose to the defendant only evidence that might affect the outcome of the trial or sentence.

After *Brady*, Rule 16 was revised in 1966 to provide for greater discovery in criminal cases and upon request of the defendant required the prosecutor to disclose: written or recorded statements or confessions made by the defendant; results or reports of physical or mental examinations, or scientific tests or experiments, such as fingerprint comparisons, made in connection with the case; recorded testimony of the defendant before a grand jury. The prosecutor was also required to permit the defense to inspect and copy or photograph books, papers, documents, or tangible objects in possession of the prosecutor provided the defense demonstrated that they were material to the preparation of the defense. Many states that had more restrictive discovery in criminal cases expanded discovery after the amendment to Rule 16 in 1966. Rule 16 was amended again to provide that the prosecutor turn over to the defendant

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<sup>4</sup> William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279.

<sup>5</sup> 373 U.S. (1963).

<sup>6</sup> *United States v. Bagley*, 473 U.S. 667, 682 (1985). Ten years after *United States v. Bagley*, the Court explained that the "question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). In determining whether undisclosed evidence is material, the suppressed evidence is considered collectively. *Id.* at 436. The defendant does not have to "demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough [evidence] left to convict." *Id.* at 434-35.

a written summary of any expert testimony the government intends to use at trial.

In 1972, the Supreme Court decided *Giglio v. United States*,<sup>7</sup> in which the Court held that the prosecutor's disclosure duty extends equally to impeachment evidence.<sup>8</sup> Impeachment evidence consists of materials that could impeach a prosecution's witness, for example incentives the witness has received to testify, such as dismissal of criminal charges or a promise of a lenient sentence. Impeachment evidence also includes prior statements a witness has given the police when the statements are different from the witness' trial testimony or are different from each other. When a defense lawyer has impeachment evidence, the defense lawyer is able to suggest reasons why the witness' trial testimony should not be believed.

These Supreme Court cases define the extent of the disclosure the prosecutor must give to protect the due process rights of the defendant – evidence material either to guilt or to punishment and impeachment evidence. The crux of these cases and the due process rights of the accused rely upon prosecutors correctly determining what is evidence favorable to the accused.

In 1990, twenty-six years after his first lecture about discovery, Justice Brennan delivered a second lecture, *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*.<sup>9</sup> In this lecture, Justice Brennan noted progress toward more open criminal discovery but he pointed out two weaknesses of the *Brady v. Maryland* case that commentators often repeat today. First, the prosecutor is only required to disclose material exculpatory evidence and no other evidence and information the prosecution has collected. Second, it is the prosecutor who decides whether the information in his or her hands is exculpatory and must be disclosed.

Justice Brennan argued for “full and free discovery” that the American Bar Association (ABA) Criminal Justice Standards recommend. He characterized this as open disclosure of the prosecutor's file, and would require the disclosure of all of the material and information within the prosecutor's control, including witness lists, statements, grand jury testimony, codefendant statements, criminal records, expert reports, and whether the prosecutor intended to offer other-offense evidence at trial.<sup>10</sup> Justice Brennan stated that a prosecutor could seek a protective order from the judge to prevent disclosure of the identity of secret informer, or material related to national security.

## 2. Federal and State Criminal Discovery Today

*Brady* and cases after *Brady* require prosecutors to disclose some evidence, but there still remains no constitutional right to discovery in criminal cases in the United States. Prosecutors do not need to disclose a list of prosecution witnesses before trial, and they do not have to disclose the results of police investigations. *Brady* does establish that they must disclose material evidence favorable to the defendant, and Rule 16 provides that upon request the prosecutor must disclose some other types of evidence and information discussed previously.

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<sup>7</sup> 405 U.S. 150 (1972).

<sup>8</sup> *Id.* at 154–55; see also *Bagley*, 473 U.S. at 676.

<sup>9</sup> William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U.L.Q. 1 (1990).

<sup>10</sup> *Id.* at 11. A current version of the ABA Criminal Justice Standards on discovery is available at [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_discovery\\_blk.html#2.1](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_discovery_blk.html#2.1).

Most states base their discovery rules on Rule 16 of the Rules of Criminal Procedure.

While criminal discovery is limited in much of the United States, some states and some cities have adopted “open-file discovery.” In these states or cities, witness statements and police reports are available to the accused well before trial. In North Carolina, where there has been open-file discovery since 2004, state law requires the prosecutor to make available to the defendant “the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant.”<sup>11</sup> This includes the defendant’s statements, codefendants’ statements, witness statements, investigating officers’ notes, results of tests and examinations, or any other material or evidence collected during the investigation.

Prior to the adoption of open-file discovery in North Carolina, its state prosecutors were only required to open their files and share all of the evidence with the defense in death penalty cases after the defendant was convicted and sentenced to death. In the seven years that this requirement was in place, on average one death penalty case a year was reversed based on evidence the prosecutors should have turned over to the defense. One particular reversal involved the prosecutors failing to turn over to the defense witness statements from seventeen witnesses who said that they saw the victim alive after the accused was in jail on other charges. This track record of reversals led to open-file discovery.

In 2011, North Carolina broadened its open-file discovery law to include all investigatory agencies, which includes all public and private entities that obtain information on behalf of a law enforcement agency or prosecutor’s office.<sup>12</sup> It also requires turning over preliminary test or screening results and bench notes from tests and examinations of evidence.

In North Carolina, and in other states with open-file discovery, the work product of the prosecutors, such as their legal research and trial preparation, are exempted from being turned over. The prosecutor also does not have to disclose the identity of a confidential informant, or personal identifying information about witnesses other than name, address, date of birth, and published telephone number.<sup>13</sup>

Some prosecutors in states with open-file discovery like the full disclosure for several reasons. First, showing the defense all of the evidence and information often times results in more guilty pleas when the defendant is aware of the extent of the evidence. Second, there is little chance for appeals based on claims of *Brady* violations when there is open-file discovery. No prosecutor likes to try a case twice, and open-file discovery helps to promote finality of convictions.

In North Carolina, and in most other states, criminal discovery has reciprocal obligations on the defendant who has to provide to the prosecutor a list of expert witnesses and other witnesses for the defense, the results of examinations or tests conducted by the expert witnesses, the opportunity for the prosecutor to review, photograph, or copy written and physical evidence the defendant intends to introduce at trial, and notice of intent to offer a defense of alibi, duress, entrapment, insanity, mental infirmity, diminished capacity, self-defense, accident, and voluntary or involuntary intoxication.<sup>14</sup> Like disclosure of information

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<sup>11</sup> NORTH CAROLINA G.S. § 15A-903 (2004).

<sup>12</sup> NORTH CAROLINA G.S. § 15A-903 (2011).

<sup>13</sup> NORTH CAROLINA G.S. § 15A-904 (2011).

<sup>14</sup> NORTH CAROLINA G.S. § 15A-905 (2011).

by the prosecutor, the reciprocal discovery obligation on the defense helps to narrow issues for trial, removes the element of trial by surprise, and helps to ensure that the criminal trial process is more a process of search for truth.

Civil discovery in the United States is still more expansive than open-file and reciprocal discovery in criminal cases. For example, only a handful of states permit pretrial discovery depositions of potential witnesses in criminal cases, and every state as well as the federal system permit pretrial discovery depositions in civil cases.

### 3. Ethical Requirements Versus Constitutional Disclosure Requirements

Ethics rules in nearly every state impose a greater disclosure obligation on the prosecutor than the constitutional due process cases decided by the Supreme Court or the discovery rules adopted at the federal and most state levels. The state ethics rules are based on Rule 3.8(d) of American Bar Association (ABA) Model Rules of Professional Conduct, which requires a prosecutor to “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor.”<sup>15</sup> The language of Model Rule 3.8(d) does not include a materiality standard, and thus contrasts with a prosecutor’s more limited constitutional duty. As a result, the plain language of Model Rule 3.8(d) appears to be in conflict with the legal obligation under *Brady/Giglio* cases.

Because of this conflict, the ABA Standing Committee on Ethics and Professional Responsibility examined the relationship between Model Rule 3.8(d) and the prosecutor’s constitutional obligation under the *Brady/Giglio* line of cases and issued Formal Opinion 09-454, an advisory ethics opinion on the subject.<sup>16</sup> The Committee found that the ethical duty of a prosecutor under Model Rule 3.8(d) was separate from and more expansive than the *Brady/Giglio* line of cases.<sup>17</sup>

The opinion further explains that the ethical obligation is more demanding in several ways: (1) There is no materiality standard; (2) A prosecutor must disclose to the accused all known favorable information even if the prosecutor does not believe that the information would affect the outcome of the case at trial; (3) Disclosure must be made early enough so that defense counsel may use the evidence and information effectively, including having it in order to advise a client before entering a guilty plea; and (4) A prosecutor may not seek to use a defendant’s waiver of the this ethical obligation to avoid Model Rule 3.8(d).<sup>18</sup>

If the prosecutor seeks to withhold favorable evidence or information for a legitimate purpose, such as to prevent witness tampering, the opinion advises the prosecutor to seek a protective order to limit what must be disclosed, or “seek an agreement from the defense to return[] and maintain the confidentiality of evidence and information it receives.”<sup>19</sup>

In 2008, the ABA amended to Model Rule 3.8 to include two new provisions, paragraphs

<sup>15</sup> MODEL RULES OF PROF’L CONDUCT R. 3.8(d) (1983).

<sup>16</sup> ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 09-454 (2009), available at [www.nacdl.org/WorkArea/DownloadAsset.aspx?id=17373](http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=17373).

<sup>17</sup> *Id.* at 1-3.

<sup>18</sup> *Id.* at 4-7.

<sup>19</sup> *Id.* at 7 & n.37.



(g) and (h), to require post-conviction disclosure obligations on prosecutors. Model Rule 3.8(g) requires the prosecutor to disclose to the court “new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted . . . .” Model Rule 3.8(h) requires a prosecutor to seek to remedy a conviction when “a prosecutor knows of clear and convincing evidence establishing that a defendant . . . was convicted of an offense that the defendant did not commit . . . .”

One state has adopted these new disclosure requirements as written, and eight states have adopted them with modifications. Eight more states are studying these new disclosure requirements. If adopted, these changes should help to correct wrongful convictions when they occur.

Because the ethical obligation under the state versions of Model Rule 3.8(d) is broader than the constitutional obligation, some state bar disciplinary authorities have refused to impose discipline as long as the prosecutor has complied with the constitutional disclosure obligation. I am not aware of any studies that show that prosecutors comply with their broader ethical obligations.

## II. *Defense Efforts to Reform Prosecutors' Disclosure Obligations*

### 1. **Defense View: Ideal Scope of the Prosecutor's Disclosure Obligation**

Most defense attorneys believe that open-file discovery is the best form of discovery disclosure obligation for prosecutors. Open-file discovery has existed in the U.S. military justice system for decades, and it has produced reliable trial results. Some state and federal prosecutors informally practice open-file discovery when they are not required to do so. As discussed previously, open-file discovery may result in more guilty pleas and helps to ensure no appeals based on allegations of *Brady* violations. In addition, open-file discovery sometimes points to weaknesses in the government's case or the probability that another person is responsible for the crime. In this way, open-file discovery helps to protect the factually innocent and convict the guilty.

Defense lawyers have sought changes to criminal discovery rules at the state and federal levels for many years. The primary changes recommended are to eliminate the materiality requirement and to require disclosure of information earlier in the process. In addition, many defense lawyers continue to advocate for open-file discovery.

In 2012, federal legislation was proposed after it was discovered that federal prosecutors had withheld exculpatory evidence in the prosecution of U.S. Senator Ted Stevens of Alaska, which led to his conviction and likely caused him to lose an election. Senator Lisa Murkowski of Alaska proposed the “Fairness in Disclosure of Evidence Act of 2012,”<sup>20</sup> which would require a federal prosecutor to disclose all favorable information to the accused. By removing the materiality requirement and requiring the disclosure of favorable *information* and not just *evidence*, the proposed law would have expanded a prosecutor's legal disclosure obligation and addressed a major problem with the current disclosure standard. The proposed legislation would have also required the disclosure without delay after arraignment and before the entry of

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<sup>20</sup> Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. (2012).

any guilty plea. In the U.S., approximately 95% of federal defendants plead guilty, so this legislation would have ensured that their guilty pleas would be fully informed pleas. The legislation also gave the trial judge the authority to impose a remedy for violations of the disclosure obligation, which ranged from postponement or adjournment of the proceedings to dismissal with or without prejudice depending on the circumstances of the violation.

The U.S. Department of Justice opposed the legislation, and it never came to a vote in committee. As Professor Green will explain, the Department of Justice argued that it was increasing the training of federal prosecutors and adopting better practices to ensure that federal prosecutors fulfilled their legal disclosure obligations. It is unclear if this federal disclosure legislation will be reintroduced in the future.

Overall, efforts to reform criminal discovery have met with mixed results. At the federal level, there has been no progress in over forty years. In 2003, the American College of Trial Lawyers proposed that Rule 16 be amended to: incorporate the legal ruling in *Brady*; clarify the nature and scope of favorable information; require prosecutors to use due diligence in locating information; and establish deadline by which the prosecutor must disclose favorable information. The Advisory Committee on Criminal Rules studied this request for four years during which time the Department of Justice opposed the amendments. In 2006, the Department of Justice revised the *U.S. Attorneys' Manual* to encourage federal prosecutors to take a broad view about what was exculpatory and impeaching evidence. In 2007, the Advisory Committee rejected the proposed amendments to allow the Department of Justice time to implement the policy change and to study whether there would be more awareness among federal prosecutors concerning their discovery obligations.

Since 2007, there have continued to be a number of cases involving federal prosecutors' failure to comply with their disclosure obligations. In June 2010, the Advisory Committee requested the Federal Judicial Center to conduct a national survey of judges, federal prosecutors, and defense attorneys concerning whether they felt Rule 16 should be amended to remove the materiality standard and to require prosecutors to provide to the defense all information that is either exculpatory or impeaching. Fifty-one percent of the judges favored the proposed amendment, 90% of defense lawyers favored the amendment, and the Department of Justice opposed any type of amendment.<sup>21</sup>

Efforts for a more expanded disclosure obligation have been more successful at the state level, especially after examples of wrongful convictions involving *Brady* disclosure violations. Studies show that *Brady* disclosure violations are the second most frequent cause or contributing cause to wrongful convictions.

In addition to reform efforts at the state level, there are also efforts aimed at bringing change in particular federal courts. For example, some judges interpret *Brady* more broadly and are issuing orders requiring prosecutors to disclose more information and evidence. These judges are using their supervisory authority to ensure fair trials as the basis for requiring prosecutors to disclose more information and evidence to the defense. Some judges are also using the broader disclosure requirements found in Model Rule 3.8(d), or the state equivalent to

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<sup>21</sup> LAURA HOOPER ET AL., A SUMMARY OF RESPONSES TO A NATIONAL SURVEY OF RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND DISCLOSURE PRACTICES IN CRIMINAL CASES: FINAL REPORT TO THE ADVISORY COMMITTEE ON CRIMINAL RULES, FED. JUDICIAL CTR. 11 (Feb. 2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/Rule16Rep.pdf/\\$file/Rule16Rep.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Rule16Rep.pdf/$file/Rule16Rep.pdf).



this rule, as the basis for requiring broader disclosure. The 2011 report from the Federal Judicial Center identified 38 out of 94 federal judicial districts that have a local rule or standing order that codifies the government's obligations to disclose material to the defense that is exculpatory or impeachment evidence and is broader than Rule 16.<sup>22</sup>

No one knows for sure how often violations of even the limited *Brady* disclosure obligation occurs. Using a database of 1130 exonerations in the U.S. from 1989 through May 2013, I found that 352 of 1130 exonerations, or slightly more than 31% of all exonerations, involved discovery violations. Most defense lawyers, many judges, and some prosecutors believe that reform of the discovery system in the United States is necessary to reduce the number of persons wrongfully convicted.

Views differ on the best way to bring about reform. As mentioned previously, true open-file discovery is, in the view of most defense lawyers, the best solution. In addition, I believe that individual prosecutor offices need to have clear rules about turning over information to the defense. Prosecutors need to be taught that when they want to withhold something because it may undermine the government's case, that is exactly the type of information or evidence that should be disclosed. When a prosecutor violates his or her disclosure obligation, the individual prosecutor's office needs to discipline the prosecutor. That is necessary to create a good ethical culture in an office.

Some also argue that there needs to be more bar discipline, criminal contempt, civil liability, and, in egregious situations, criminal prosecution. As Professor Green will discuss, a former prosecutor in Texas was recently convicted for withholding evidence after DNA evidence exonerated Michael Morton, who had served 25 years in prison for a crime he did not commit. This is the first time a prosecutor in the U.S. has been convicted of a crime for withholding evidence.

More bar discipline or other types of sanctions may be appropriate in some instances, but I do not believe that sanctions alone will solve the problem unless there is, as Justice Brennan argued more than thirty years ago, a change to the materiality standard for prosecutorial disclosure of evidence. The police and prosecutors are convinced that defendants are guilty, and this makes it difficult for prosecutors to believe that some of the evidence and information they have may be exculpatory. Open-file discovery, on the other hand, is clear and unambiguous. In open-file discovery, a prosecutor may always seek a protective order from the trial judge if there is something that the prosecutor has good reason to withhold, such as information about a confidential informant or a matter of national security.

In addition to making prosecutors' disclosure duty clear, there needs to be oversight in each prosecutor's office to ensure that prosecutors fulfill their disclosure obligations to the defense. Finally, when a prosecutor withholds material that should have been disclosed, there needs to be a realistic threat of discipline within the prosecutor's office and, in serious cases, by other authorities.

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<sup>22</sup> *Id.*

### III. *U.S. Disclosure Obligations from Prosecutors' Viewpoint*

#### 1. **Prosecutors' Public Positions on Disclosure Obligations – Introduction**

How do U.S. prosecutors' view their own disclosure obligations? And how do they view the occasional efforts of defense lawyers, judges and legislatures to expand their obligations?

It is not always possible to know exactly what U.S. prosecutors think about their work or even how they do their work. Most of their work takes place inside their offices, hidden from public view. Their visible work in the courtroom takes up only a small part of their time. U.S. prosecutors are very private about some aspects of their work and also about their views. Sometimes, they are afraid that public discussion will compromise their ability to be effective. Sometimes, they simply seek to avoid public scrutiny or criticism. For example, prosecutors make very significant decisions that are entrusted to their discretion. These include decisions about whether to charge a person with a crime, which charges to bring, and the terms and conditions of a plea bargain. Most prosecutors are secretive about how they make these everyday decisions within their offices.

Prosecutors' disclosure obligations are different, however. This is a subject that U.S. prosecutors have discussed frequently in public in recent years. That is because the subject has become very visible and controversial in the past decade.

There have been important cases in which the defendant was convicted, and it was discovered afterward that prosecutors withheld significant information that would have helped establish the defendant's innocence. After the development of DNA testing, hundreds of defendants were exonerated through DNA testing. In many of those cases, it was discovered that the police or prosecutors had exculpatory evidence that they never gave to the defense and that therefore was never used at trial.

Some innocent defendants have been imprisoned for long periods of time. One defendant, John Thompson, spent many years in prison under a death sentence and was almost put to death. Then defense lawyers discovered that the prosecutors never disclosed important evidence: There was a piece of clothing that had the blood of the person who committed one of the crimes in question. The prosecutors possessed a blood test showing that the blood on the clothing was not Thompson's blood type. After he was released, Thompson sued the prosecutor's office to try to obtain compensation for the harm caused by its illegal conduct. But the U.S. Supreme Court decided that the prosecutor's office could not be sued.

Within the past few months, in another well publicized case, a former prosecutor in Texas named Ken Anderson was briefly imprisoned and required to forfeit his law license because he violated his disclosure obligation in a criminal case almost 30 years ago. In that case, a defendant named Michael Morton was convicted of murdering his wife. The prosecutors never disclosed several pieces of very exculpatory information. For example, the police knew that Morton's 3-year-old son told his grandmother that he saw the murder and that his father, the defendant, was not home at the time. Mr. Morton was exonerated by DNA evidence two years ago. Afterward, because of this case, the state of Texas adopted a new law named after Michael Morton. The law went into effect on January 1, 2014. It requires prosecutors to disclose all relevant evidence, whether the evidence is exculpatory or inculpatory.

Even federal prosecutors, who are considered the elite U.S. prosecutors, have been caught

violating their disclosure obligations. One notable case involved a senior U.S. Senator from Alaska, Ted Stevens. Soon after a jury found Senator Stevens guilty, and before he was scheduled to be sentenced, an investigator disclosed that prosecutors had withheld important evidence. That evidence contradicted the testimony of the key prosecution witness. The Department of Justice agreed that the judge should overturn the Senator's conviction and dismiss the charges. Afterward, the trial judge appointed a lawyer to investigate why the prosecutors violated their obligations and to advise the judge about whether to punish the lawyers. The special investigator issued a lengthy report – more than 500 pages long. It found that two federal prosecutors intentionally withheld significant evidence from the defense. However, the report concluded that the judge did not have power to punish the prosecutors for their misconduct. That was because the judge had not specifically ordered prosecutors to disclose exculpatory evidence.

Because of cases such as these, there has been much public discussion in legislatures, courtrooms and bar associations as well as in the press, on television and on the internet. Prominent U.S. newspapers, such as the New York Times, have published articles and editorials about prosecutors' disclosure obligations. As a result, prosecutors cannot easily remain private and secretive about this subject. They have had to take public positions, in an effort to assure the public that they take their responsibilities seriously. Because it is such an important subject, prosecutors also discuss it informally in different settings.

U.S. prosecutors discuss their disclosure obligations in several different settings. Some prosecutors' offices as well as some organizations representing prosecutors publish policies or guidelines on disclosure obligations. These publications are meant to regulate or influence the work of junior prosecutors who make everyday decisions about what to disclose to the defense. For example, the U.S. Department of Justice has published policies on this subject as well as other subjects. An organization called the National District Attorneys Association, which represents local prosecutors, has published a book giving similar guidance to members. The book is called "Doing Justice: A Prosecutor's Guide to Ethics and Civil Liability" and it includes a chapter on discovery. The state district attorneys' association in New York has published a small volume called "The Right Thing: Ethical Guidelines for Prosecutors." It also contains guidance on discovery.

Additionally, prosecutors sometimes respond to proposals by defense lawyers to expand prosecutors' obligations. As noted earlier, prosecutors are governed by different laws and rules, each of which concerns different aspects of prosecutors' disclosure duties. Each law or rule might be changed and expanded. Congress has recently considered passing a law requiring greater disclosure by federal prosecutors, and some state legislatures have considered passing laws to do the same. Representatives of federal judges have also considered changing the criminal procedure rules to add to what prosecutors must disclose to the defense. Federal and state prosecutors usually disagree with these proposals.

Also, prosecutors sometimes express their views and their internal practices in the course of individual criminal cases when there is an argument over whether the prosecutor turned over evidence and information as the law and rules required. Some of these cases have been reviewed by the Supreme Court. In these cases, prosecutors file briefs setting forth their views.

U.S. prosecutors have many opinions and beliefs that they do not express in formal settings. But there are some opportunities to learn their private views, because some prosecutors participate in informal bar association activities and interact informally with lawyers

in other settings. In the U.S., there is informal interaction because prosecutors are members of the bar. They are part of a unified legal profession that is made up of lawyers in private practice, government lawyers and judges, all of whom are educated and regulated together. Also, there is mobility between prosecutors' offices and the private bar. For example, the Manhattan district attorney, Cy Vance (whose father was the U.S. Secretary of State) became a prosecutor in Manhattan after graduating from law school, then spent many years as a defense lawyer, first in Seattle and then in Manhattan, and was then elected District Attorney in 2010. Prosecutors do not ordinarily talk about their current cases with people outside their offices, but they talk generally about their work with friends and former colleagues.

It is important, however, to acknowledge that there are limitations on what one can learn about prosecutors' point of view. There are thousands of U.S. prosecutors. They work in many different offices - federal, state and local. The offices have different practices, different training, and different policies. Prosecutors in different states are governed by different laws. Nobody in the U.S. speaks for all prosecutors. Their experiences are different, and no single point of view is shared among the thousands of U.S. prosecutors on any issue, including the appropriate scope of their disclosure obligations. For example, in Texas, when lawmakers recently decided to expand prosecutors' disclosure obligations after the Michael Morton case, some prosecutors objected but many did not, because they already voluntarily opened their entire files to the defense. The association representing Texas prosecutors published an article about the new law that was supportive. The article reminded prosecutors that they have a duty "not to convict, but to see that justice is done," and that this means, "They shall not suppress evidence or secrete witnesses capable of establishing the innocence of the accused."

Moreover, it is hard to know everything that prosecutors are concerned about. Prosecutors express some views formally or informally, but some prosecutors undoubtedly hold views that they do not even express privately. So what we say about U.S. prosecutors' point of view is not true of all prosecutors and is not a complete description.

## 2. Prosecutors' Response to Defense Arguments

Very few U.S. prosecutors disagree with the basic idea behind the famous *Brady* decision and prosecutors' disclosure obligations. In principle, prosecutors recognize that the criminal justice process must be fair. They agree that, for the process to be fair, the defense must receive certain evidence from the police and prosecutors so that defense lawyers can represent their clients competently. For the most part, prosecutors accept their existing disclosure obligations and have learned to live with these obligations. But many prosecutors oppose changes.

Let us begin with how prosecutors respond when defense lawyers argue for the reform of prosecutors' disclosure obligations. In general, U.S. prosecutors disagree with defense lawyers on two important questions: First, *how much* information should prosecutors give to the defense? And, second, *when* should prosecutors give information to the defense.

Defense lawyers' answer is that they should receive more information from prosecutors and that they should receive the information sooner. Some prosecutors disclose favorable evidence only if they believe the evidence is significant, because that is all that the Constitution requires. Some prosecutors try to persuade the defendant to plead guilty before receiving all the evidence to which the defendant would be entitled if the defendant went to trial. Some

prosecutors wait as long as possible before the trial starts or during the trial before providing information that must be given to the defense. Defense lawyers would like to receive all favorable evidence, including evidence that prosecutors do not believe to be significant or “material”. Defense lawyers also want unfavorable or incriminating evidence – the evidence that the prosecutor plans to use against the defendant – to evaluate the strength of the prosecution’s case and plan how to defend against it, without unfair surprise. Ideally, defense lawyers say, prosecutors should give them everything in the prosecutor’s file as soon as possible after a criminal case begins.

The defense arguments for this position are simple, straightforward, and, standing alone, very persuasive. In U.S. civil proceedings, when parties are litigating mostly about money, both sides broadly disclose their evidence. This is thought to be required to ensure a fair and reliable outcome. In criminal cases, where individuals’ liberty and reputations are at stake – and sometimes even their lives are at stake – fairness should require no less. For example, in a *civil* lawsuit, if the government accuses a defendant of participating in a securities fraud or some other fraudulent scheme, the defendant is entitled to learn the government’s proof and to question witnesses before trial. It seems odd that if the same defendant is prosecuted in a *criminal* case based on the same fraud, the government will disclose much less about its case.

Defense lawyers say that in criminal cases they need to know as much information as possible, as soon as possible, for at least four reasons. However, some prosecutors dispute some or all of these arguments.

First, defense lawyers say more information is needed sooner, and certainly before a guilty plea, so that they can give the defendant good advice about whether or not to plead guilty. In the U.S., most criminal cases end with a guilty plea. However, the defendant’s decision about whether to plead guilty or go to trial must be well informed. It is a very important decision because there is a high cost to going to trial, even though one has a constitutional right to do so. Punishments are very harsh in the U.S., and defendants who are convicted after trial receive much harsher punishment than those defendants who plead guilty. Very often, prosecutors and defendants “plea bargain” – they negotiate an agreement that will result in more lenient treatment for the defendant who pleads guilty. The decision about whether to plead guilty is usually based, at least in part, on the defense lawyer’s evaluation of the evidence: Is the defendant likely to be convicted or acquitted if there is a trial? To give the best answer to this question, the defense lawyer must know the prosecution’s evidence. Otherwise, some defendants will make unwise decisions. Some innocent defendants may even plead guilty because they worry unnecessarily about being wrongfully convicted at trial.

Some prosecutors disagree that disclosures are needed before a guilty plea for this purpose. They take a narrow view of what a defendant must know for a guilty plea to be fair. Some prosecutors would say, “The defendants know what they did or did not do. They know whether or not they are guilty. They should not consider what will happen at trial. If they are guilty, they should admit it. If they are innocent, they should not plead guilty.” Other prosecutors agree that it is right for the defendant to consider whether the prosecutor has a strong case, but they say that the defense does not need to make a perfectly accurate assessment. No matter how much information is given to the defendant and defense lawyer before deciding whether to plead guilty, they will just be making a guess about how a trial would end. One can never know exactly what witnesses will say, how believable they will be or how they will respond to questioning. Defendants are not the only ones who have

incomplete information when they make decisions about plea bargaining; prosecutors also make decisions with limited knowledge.

Second, defense lawyers say that more information is needed sooner so that the defense lawyer can conduct a better investigation and prepare a more effective defense in cases that will go to trial. That seems obvious, because our criminal justice process is an adversarial process. The most basic premise of our process is that the truth will come out if both sides – the prosecution and the defense – present the best evidence and make the best arguments in the courtroom for their positions. But the truth will not come out if one side – the defense – is not able to present the strongest case. That is why the U.S. system requires broad disclosure in civil cases. In criminal cases, resources are less equal, so the defense relies more on the prosecution. The defense cannot obtain much information on its own. The police and prosecutors have much greater access to witnesses and evidence. The defense cannot present the best case unless the police and prosecutors provide helpful evidence and any other information that might lead to the discovery of helpful evidence.

Some prosecutors are skeptical. They believe that the defense needs only what the law already entitles them to. The defense needs helpful evidence that is significant or “material” and that it cannot obtain through its own diligent investigation. But if the evidence is not “material” – if it would not lead to an acquittal – then why does the defense need it?

The defense might answer that prosecutors are not very good at deciding before trial whether evidence is or is not significant: Prosecutors believe strongly that the defendant is guilty and prosecutors want to win their cases. So they have a natural tendency to look at evidence that might help the defendant and say, “it is not significant.” And the defense might say that after a trial, judges are not very good at evaluating whether evidence that is withheld by the prosecutor was or was not significant: Judges do not want to have to set aside convictions and order new trials, so they tend to look at the same evidence and also say, “it is not significant.” Therefore, prosecutors who are acting honestly and trying to meet their obligations cannot be confident that the evidence hidden in their files is as unimportant as they believe. Defense lawyers can point to cases in which innocent defendants were wrongly convicted, in part, because the prosecution withheld evidence in the honest but mistaken belief that the evidence was not material.

But prosecutors think this is a very rare occurrence. The Supreme Court’s advice is that if the prosecutor is not sure whether the evidence is significant, a wise and careful prosecutor will disclose the evidence. The Department of Justice policy supports this cautious approach. Prosecutors say that following this advice will solve the problem. It should be noted, however, that not all prosecutors have been taught to disclose more than the law allows. In the Supreme Court case involving John Thompson, mentioned earlier, the New Orleans prosecutor admitted that prosecutors in his office were trained to disclose only what the law requires and nothing more. Similarly, the ethics training manual for New York State prosecutors tells prosecutors that they must obey the disclosure laws. But it says nothing about avoiding mistakes by disclosing more than the law requires.

Third, defense lawyers say that prosecutors are not reliable about fulfilling their responsibilities under the current law. Occasionally, that is because prosecutors are lawless. But often it is because the current laws are complicated. Again, the problem is the requirement that favorable evidence must be provided to the defense only if it is “material.” It is sometimes hard for a prosecutor to decide whether or not information is “material” and must therefore be



disclosed. Although prosecutors are told to decide doubtful situations in favor of giving the information to the defense, some prosecutors do not listen to that advice. Defense lawyers argue that to help make sure that they receive whatever evidence they need, the law should require prosecutors to disclose more.

Prosecutors disagree. They say: There are hundreds of thousands of criminal cases, but courts rarely find that prosecutors withheld significant evidence. Prosecutors say that is because most prosecutors are conscientious and obey the law. Defense lawyers argue that there are many more violations of discovery obligations that have not come to light. There is no way to decide which side is right. This is one of several ways in which the different perspectives of prosecutors and defense lawyers are based on different but unprovable assumptions.

Fourth, and finally, defense lawyers argue there is no good reason for prosecutors to close their files. Therefore, any doubts should be resolved in favor of more open discovery. Perhaps there is uncertainty about whether open discovery is needed so that defendants can make better informed decisions or to ensure that the truth comes out at trial, or because prosecutors have difficulty complying with the current law. But it is unnecessary to study and debate these questions because no harm would be done by an open-file policy.

Some prosecutors, especially federal prosecutors, disagree. For reasons to be discussed next, their public position is that opening their files is not only unnecessary – it is dangerous.

### **3. Prosecutors' Official View about the Harms of Broader and Earlier Disclosure**

In their official statements, prosecutors focus on three types of harms that would result from broader or earlier disclosure requirements: first, harms to public safety; second, harms to the truth-seeking process; and third, administrative burdens and costs.

First, prosecutors make arguments about public safety. These are very dramatic. For example, the Deputy Attorney General testified before Congress in 2012 in opposition to the proposed Fairness in Disclosure of Evidence Act of 2012. This proposed law that would require prosecutors to turn over all favorable evidence, even if the prosecutor did not consider the evidence “material” or significant. As noted, the sponsor of the law was a Senator from Alaska whose colleague, Ted Stevens, had been the victim of prosecutors' misconduct. In his testimony, the Deputy Attorney General agreed that what happened to Senator Stevens was terrible. But he said that if criminal defendants receive more evidence, bad things will happen: defendants and their friends will use the information to retaliate against witnesses and intimidate witnesses; the disclosures will intrude on the privacy of victims and witnesses; the disclosures will interfere with ongoing criminal investigations; there will even be threats to critical national security interests. The Deputy Attorney General gave some powerful examples in which witnesses and their families in cases involving gangs and violent drug organizations were killed by members of these groups.

No one disputes that there are cases in which witnesses and victims are harmed or intimidated. There is disagreement about several things, however. How frequent are these public harms, such as injuries to victims and witnesses? Would these harms increase if prosecutors disclosed more information or are violent organizations already able to identify victims and witnesses? Is it possible to protect the public by identifying particular criminal cases or kinds of criminal cases in which there is a risk, and then limiting disclosures only in

those cases, or is it necessary to limit disclosures in all cases? Does the risk of harm in a small number of cases outweigh the interest of criminal defendants in receiving a fair process? Defense lawyers point out that in states and counties where prosecutors open their files, there is no evidence that the public is harmed as a result. They also observe that there are already procedures in place to protect against the disclosure of secret information relating to national security and procedures to prevent other harms that might result from disclosures.

Second, prosecutors argue that more and earlier disclosures may undermine the truth-seeking process rather than enhancing it. That is because some defendants and defense witnesses testify falsely. If they know the prosecution's evidence in advance, they can more easily create a false story that is consistent with the prosecution's proof. This concern helps explain why federal prosecutors are not required to disclose witnesses' names and statements before a trial starts.

Third, broader and earlier disclosures may be costly and burdensome for prosecutors and police or other investigators with whom prosecutors work. Under discovery laws, if the defendant goes to trial, prosecutors must gather evidence from the police. Prosecutors must then review the evidence to determine what must be given to the defense. This takes time and often involves a struggle with the police, who do not want to be bothered. The burden is avoided in most cases, because most cases end in a guilty plea before the prosecutor makes disclosures. If prosecutors had to make disclosures before defendants pleaded guilty, prosecutors' work would multiply.

Prosecutors also identify a second kind of burden: the time and expense of having to litigate in individual cases over whether the prosecutors met their obligations. There are some prosecutors, particularly state prosecutors, who agree in principle that the defense should receive more information than they receive under the current law. Some of these prosecutors open up their files to the defense even though the law does not require them to do so. But these prosecutors still oppose changing the law to require them to open their files. Even now, there are frequent arguments before, during and after a trial about whether prosecutors have met their disclosure obligations. Prosecutors worry that more demanding disclosure laws will lead to more of these fights in court.

An important question is how to balance the benefits of broader disclosures against the possible harms. Defense lawyers point out that in civil lawsuits, there is a similar risk that parties with more information will create false testimony, or that there will be unnecessary arguments in court over whether the parties and lawyers complied with their obligations. But procedural fairness, which is achieved through broader disclosure, is thought to justify broad disclosure nonetheless in civil cases. Defense lawyers say the same should be true in criminal cases. Some prosecutors disagree.

#### **4. Prosecutors' Unofficial Views**

Prosecutors have many concerns and beliefs that are not necessarily stated publicly and officially in their testimony and publications. Some of these concerns are implicit in prosecutors' statements and writings. Some come out in private and informal conversation.

First, some prosecutors believe that their disclosure obligation is unfair even the way it is, because defendants do not have a similar obligation. Defendants do not have to disclose in advance whether or how they will testify at trial. Their disclosure obligations are minimal. For

example, in some jurisdictions, before a trial the defense must provide the names of its alibi witnesses; they must disclose books, records and physical evidence that the defense intends to introduce at trial; and they must turn over copies of reports of laboratory tests and mental health examinations on which the defense intends to rely. Prosecutors complain that defense lawyers do not even diligently comply with these minimal obligations. Some prosecutors perceive that adding to their own disclosure burdens will only increase the unfairness.

This is where defense lawyers' comparison of civil and criminal justice breaks down. In civil cases, both sides have identical obligations. Discovery is reciprocal: both sides give and take equally. Of course, as a general matter, there is nothing symmetrical about the criminal process. Prosecutors have some advantages, such as access to the police who are able to conduct searches, make arrests and conduct interrogations. Prosecutors have some disadvantages, such as the greater disclosure obligations that come with greater investigative resources. But prosecutors do not always see disclosure as a fair responsibility that comes with greater power.

Second, many prosecutors may support liberal discovery in principle but still oppose laws that would expand their disclosure obligations. They oppose new laws that would be enacted by legislatures, criminal procedure rules to be adopted by judges, new rules of professional ethics, or court decisions interpreting the Constitution more demandingly. They do not want the law to tell them what to do; they want the decision to be left to internal office policies or individual prosecutors.

We already noted one reason why prosecutors may oppose new laws even if they support broader disclosures: disclosure laws lead to litigation over whether prosecutors have violated them. But there are other reasons. Prosecutors may be punished by the courts or others if they violate laws or rules. The Texas prosecutor mentioned earlier who went to prison and lost his law license is an unusual and rare example. But prosecutors nevertheless worry about being punished, perhaps even for innocent mistakes. They say that this concern can interfere with their work by making them too cautious. Additionally, prosecutors generally favor their independence and their ability to regulate themselves. Therefore, they tend to oppose any laws telling them what to do, no matter what the laws say.

Prosecutors also worry that it is difficult to write a law that tells them exactly what they must disclose in each case without the law being too confusing or too demanding. They believe that they can make better and fairer decisions on their own – decisions that balance the defendant's need for evidence against the public harms and other interests that might justify smaller disclosures.

Third, some prosecutors believe that disclosing more evidence and information will make it harder to convict guilty defendants. Of course, defense lawyers might respond that the defendant is entitled to make the prosecution prove guilt beyond a reasonable doubt and the defendant is entitled to try to prove that there is a reason for doubt. If evidence would help establish a reasonable doubt, then that is evidence that the defense needs and that prosecutors should disclose. But some prosecutors worry that skilled defense lawyers can take evidence that is not really believable or probative and use it to raise doubts that are not really reasonable. This concern suggests a little bit of mistrust of juries and of the ability of judges to control the proceedings in a way that properly guides the jury's determination. This view may also reflect that some young prosecutors have too much fear of defense lawyers' abilities and too little confidence in their own abilities. Finally, this view may reflect that some prosecutors are very

confident in their own ability to tell which defendants are guilty and that these prosecutors do not think the trial has a very important role in this determination.

#### IV. *Alternatives to Expanding and Enforcing Disclosure Obligations*

Much of the discussion about U.S. prosecutors' disclosure obligations focuses on reforming the law. For example, in Texas, as noted, the state legislature recently expanded prosecutors' obligations. Much of the discussion also focuses on enforcing the existing law. It is generally agreed that most prosecutors are conscientious and that when they violate their obligations, they do so negligently, not intentionally. But there have also been some "rogue prosecutors" who know that they are violating their obligations. They might be punished by the courts in which they commit misconduct. Or they might be punished by the authorities that regulate lawyers, since all U.S. prosecutors are lawyers who are subject to regulation by the courts of the states in which they are licensed to practice law. Defense lawyers generally believe that, at least until recently, courts have not done a good job of regulating and disciplining prosecutors. The recent Texas case suggests that this may change.

Not all of the discussion has been about expanding and enforcing the law, however. There has also been much discussion about other ways to make sure that defendants receive the evidence and information they need in order to make informed decisions and receive a fair trial. The discussion has focused on two basic questions. First, what should be done, other than changing the laws, to make sure that defendants receive necessary information in addition to what the law requires prosecutors to give them? Second, what should be done, other than having courts punish rogue prosecutors, to make sure that prosecutors comply with their existing legal obligations? Two themes emerge from these discussions.

##### 1. **Prosecutors' Discretion**

When U.S. prosecutors resist changes in the law that would require them to disclose more information to the defense, prosecutors argue that decisions about what more to disclose should be left to their discretion or good judgment. Prosecutors' offices might be more generous in certain types of cases. For example, one prosecutor's office in New York City has an open file policy in most cases, but not in cases involving crimes of violence. Individual prosecutors might also decide on a case-by-case basis whether to provide more evidence than the law requires. The U.S. Department of Justice strongly supports the idea that federal prosecutors may choose to give more information than the law demands.

This approach has advantages, if one is confident that prosecutors are making fair decisions. It allows prosecutors to disclose different amounts of information depending on whether broad disclosures pose a risk, such as a risk of harm to witnesses and victims or other possible harms. Leaving part of the decision to prosecutors' discretion also reduces litigation over this issue.

The idea that additional disclosures should be left to prosecutors' discretion is highly controversial. Defense lawyers argue that many prosecutors cannot be trusted to comply with existing laws. Therefore it is unrealistic to expect them to give more than the law requires.

The problem, of course, is that there are so many U.S. prosecutors with different attitudes

and approaches. Many prosecutors already open their files voluntarily. Others do the bare minimum required by law. Entrusting decisions to prosecutors' discretion may be a good approach for some but not for others.

## 2. Internal Regulation

When prosecutors resist stricter enforcement of the disclosure laws, they emphasize the importance of internal regulation. As noted, prosecutors are often reluctant to discuss what goes on in their offices behind closed doors. But on the issue of disclosure obligations, prosecutors have been under some pressure to assure the public that they have good internal policies and procedures to ensure that individual prosecutors do what the law requires. Recent discussions have identified several possible components of a good system of internal regulation.

Internal policy. One recurring theme is the need for formal policies. The U.S. Department of Justice has published policies on how prosecutors should make disclosures to the defense. Some state and local prosecutors' offices have written policies as well, although very few (if any) make their policies public. Depending on what the policies say, they may or may not promote greater compliance with the law. The federal guidelines encourage prosecutors to be generous in their disclosures. This approach would seem to reduce the risk of violations, although there have still been notable failures by federal prosecutors. Some policies are not so generous, however. The policy of the New Orleans prosecutor came to light in the Thompson case. The New Orleans prosecutor admitted that he instructed prosecutors to give only what the law required. Perhaps inevitably, some prosecutors would make mistakes about their legal obligations and wrongfully withhold evidence.

Internal procedures. Another theme is the need for internal procedures to make sure that prosecutors know their obligations and comply with them. Several procedures have been identified.

First: training. In the New Orleans case, it was discovered that the prosecutor's office did a poor job of training prosecutors about their legal obligations and how to meet them. The office assumed that its prosecutors learned what they needed to know when they were in law school or learned on their own what else they needed to know. But this is not a realistic assumption. In contrast, following the case of Senator Ted Stevens, the Department of Justice began a major national training program and appointed an official to be in charge of it.

Second: record-keeping and checklists. Some prosecutors' offices have created forms that prosecutors must fill out as they conduct disclosure. The forms remind prosecutors of their obligations and provide some guidance in fulfilling their obligations.

Internal regulation and supervision. Defense lawyers perceive that, when prosecutors have not taken their disclosure obligations seriously, part of the reason has been inadequate regulation and supervision. Some have suggested that supervisors should occasionally audit prosecutors' cases to make sure that prosecutors fulfill their disclosure responsibilities. When errors occur, and certainly when deliberate violations occur, the prosecutor's office should take appropriate remedial or disciplinary measures. This does not always appear to happen. An on-line investigative journal called "propublica" recently published an article saying that some New York prosecutors were not punished when they committed disclosure violations. Instead, they were promoted.

### 3. The Judicial Role

Finally, there has been discussion about judges' role in promoting prosecutors' compliance with their disclosure obligations, aside from the possibility of punishing prosecutors who engage in misconduct. In the U.S., judges have significant responsibility for overseeing criminal cases to ensure that the process is fair. They have the ability, if they choose, to oversee the discovery process. Traditionally, judges have simply trusted prosecutors to know their disclosure obligations and to meet their obligations. But some judges conduct a hearing before trial to ensure that discovery obligations have been met. After the Ted Stevens case, some defense lawyers have suggested that trial judges should specifically direct prosecutors to comply with disclosure laws. A prosecutor who intentionally violates the judge's direction can later be prosecuted for the crime of contempt of court.

### *Conclusion*

There is much more that could be said about prosecutors' disclosure obligations in the U.S., where this has been the subject of spirited discussion and debate in recent years. We hope there is something to be learned from the challenges faced by the U.S. criminal justice process and the ways in which those challenges are being addressed. We believe that in the U.S. system, the discussions have been leading to improvements in the law and in prosecutors' practices. We are confident that more improvements will be made in the coming years and hope that future U.S. developments will be of continuing interest.