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by Kevin C. McMunigal*

I. INTRODUCTION

Recent scholarship on prosecutorial disclosure violations[1] proposes preventing violations through understanding and remedying the causes of violations, such as cognitive error. Scholars who adopt this view—what I call here the "treatment perspective"—often call for greater transparency and cooperation from prosecutors. A frequently unacknowledged tension exists between such a treatment perspective and a more traditional perspective—what I call here the "punishment perspective"—that seeks to deter disclosure violations through greater use of sanctions such as professional discipline.

The tension arises because increasing the certainty and severity of sanctions, as the punishment perspective urges, creates a powerful disincentive for individual prosecutors and prosecutor offices to be transparent and cooperative, as the treatment perspective requires. In brief, *using* information about disclosure violations to punish prosecutors is likely to discourage them from *creating* and *sharing* information necessary to understand and remedy such violations. In this Article, I argue those concerned about prosecutorial disclosure violations need to confront and address this tension.

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1. I use the phrase "disclosure violation" rather than the more common term "*Brady* violation" because prosecutorial disclosure obligations are found in ethics rules, criminal procedure rules, and statutes as well as in the *Brady* line of constitutional cases.

II. WHAT WE DON'T KNOW

My first law review article dealt with *Brady v. Maryland*[2] and argued that its disclosure duty should apply in the context of negotiated guilty pleas.[3] In the more than two decades since the publication of that article, I have been reading, writing, and attending conferences about *Brady* and prosecutorial disclosure. During that time, uncertainty about the answers to two key empirical questions regarding prosecutorial disclosure has persisted. Both questions are raised regularly in scholarship and at conferences devoted to *Brady* and prosecutorial disclosure.

How often do disclosure violations occur? This is the first of these questions. Some, such as the keynote speaker at Mercer Law Review's *Defining and Enforcing the Federal Prosecutor's Duty to Disclose Exculpatory Evidence: The 13th Annual Georgia Symposium on Ethics and Professionalism*, Andrew Goldsmith of the United States Department of Justice, are confident that violations such as those that came to light during the prosecution of Senator Ted Stevens are aberrations. They claim that most prosecutors routinely honor their constitutional, statutory, and ethical disclosure obligations. But others, including many who were in the audience for Mr. Goldsmith's presentation, are skeptical of such claims. Skeptics argue the disclosure violations that have come to light—such as those in the Stevens case and others revealed through DNA exonerations—are not aberrations, but rather the "tip of the iceberg" of improper prosecutor conduct.

Why do prosecutorial disclosure violations occur? This is a second question regularly raised by those who think, write, and attend conferences about *Brady*. At conferences such as Mercer Law Review's Symposium, I have often heard critics of prosecutors offer a simple answer to this question. In their opinion, prosecutors withhold exculpatory information because they want to win cases to improve their conviction track records, and because they have little fear of getting caught. This explanation treats nondisclosure as the product of conscious calculation by the prosecutor. In contrast to this relatively simple "rational actor" explanation, some contemporary scholars offer the possibility of more complex and nuanced explanations for disclosure violations. These scholars argue that a variety of psychological errors and systemic factors likely play a role in disclosure failures.

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2. 373 U.S. 83 (1963).

3. Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957 (1989).

So who is right on these questions? Are disclosure violations rare? Or are they routine? When they do occur, is it the result of callous cost-benefit calculation? Or are complicated psychological and situational factors at play? For a variety of reasons, including the nature of disclosure violations, the infrequency of imposition of disciplinary sanctions, and the prevalence of negotiated guilty pleas, prosecutorial disclosure violations remain largely hidden from view. So the stark reality is that we currently have very little information with which to answer either of these critical questions.

Without knowing either how often or why disclosure violations occur, how can we rationally shape policy regarding prosecutorial disclosure? To be able to answer the questions posed above, we need greater access to information about prosecutorial disclosure practices. But how do we obtain this information if those who have it—prosecutors—fear being disbarred or suspended from law practice if they disclose it? This is the crux of the problem this Article addresses.

III. COMPETING PERSPECTIVES

Lack of negative consequences for violations of the disclosure obligation imposed by *Brady* and its ethics counterpart in Rule 3.8(d) of the Model Rules of Professional Conduct has long been a chronic problem in our criminal justice system. The broad "materiality" standard used by the United States Supreme Court makes reversal of a conviction based on a *Brady* violation difficult to obtain.[4] Prosecutorial immunity makes recovery of monetary damages through civil litigation extremely difficult as well.[5] Furthermore, ethics authorities generally have been reluctant to impose disciplinary sanctions on prosecutors who fail to disclose.[6]

For many years both defense lawyers and academic commentators have, with good reason, lamented this situation. They have adopted a punishment perspective calling for greater certainty and severity of sanctions against prosecutors who violate their disclosure obligations. I include myself among those who have adopted a punishment perspective. But in recent years, *Brady* commentary increasingly has reflected

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4. *See, e.g.*, United States v. Bagley, 473 U.S. 667 (1985); Christopher Deal, Brady *Materiality Before Trial: The Scope of the Duty to Disclose and the Right to a Trial by Jury*, 82 N.Y.U. L. REV. 1780 (2007).

5. *See, e.g.*, Connick v. Thompson, 131 S. Ct. 1350 (2011); Randall Grometstein & Jennifer M. Balboni, *Backing Out of a Constitutional Ditch: Constitutional Remedies for Gross Prosecutorial Misconduct Post Thompson*, 75 ALB. L. REV. 1243, 1244-65 (2012).

6. *See, e.g.*, Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987).

a treatment perspective, focused on revealing, understanding, and remedying the underlying causes of disclosure violations such as cognitive error and systemic factors.[7]

A few words of explanation are in order about my choice of the words *punishment* and *treatment* to label the competing perspectives I describe in this Article. The phrase "punishment versus treatment" is not typically associated with responses to lawyer misconduct. It is typically used instead to refer to debate about how a society, and in particular a criminal justice system, should deal with social problems closely associated with crime, such as drug addiction and mental illness.[8]

In the context of drug addiction and mental illness, the punishment-versus-treatment debate poses a choice between a punishment approach that relies on blame and deterrence, and a treatment approach that seeks to understand and remedy some pathology. Punishment here refers to criminal punishment, and treatment refers to professional medical and psychological care aimed at remedying an underlying physical or mental pathology.

In using *punishment* in the context of disclosure violations, I am not suggesting that those who adopt this perspective urge that prosecutors be criminally punished. Instead, I mean measures that, like criminal punishment, reflect notions of blame and deterrence. And, in using *treatment* in this Article, I am not suggesting that those who adopt this perspective call for medical or psychological treatment of prosecutors. What this perspective calls for, though, is treatment in the broad sense that, unlike punishment, it seeks to understand individual and institutional pathologies causing disclosure violations and remedy them by a means other than punishment or the threat of punishment.[9]

I purposely use this "punishment-versus-treatment" terminology regarding attitudes toward prosecutorial disclosure violations for several reasons. First, I hope it will help readers recognize a significant difference that has been emerging in perspectives toward dealing with prosecutorial misconduct. These perspectives are analogous in important

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7. An interesting collection of recent *Brady* scholarship, much of which reflects the treatment perspective, can be found in a 2010 symposium issue of the Cardozo Law Review. *Symposium: New Perspectives on* Brady *and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943 (2010).

8. *See, e.g.*, Yuval Melamed, *Mentally Ill Persons Who Commit Crimes: Punishment or Treatment?*, 38 J. AM. ACAD. PSYCHIATRY L. 100 (2010); Yara Costa, *Female Drug Offenders: Punishment or Treatment?*, WOMEN OUT OF PRISON (Feb. 28, 2012, 8:41 PM), http://www.nyunewsdoc.wordpress.com/alternatives-to-prison/female-drug-offenders-punishment-or-treatment/.

9. I use the word *deterrence* in this Article not as a synonym for prevention but to refer to prevention through threat or fear of punishment.

ways to the perspectives found and more easily recognized in the debate about punishment versus treatment regarding drug addiction and mental illness. Second, I use these terms because the choice between these perspectives on prosecutorial disclosure violations creates the same informational tension between use and access as the choice between punishment and treatment of drug use and mental illness, as described in detail below.

A. The Punishment Perspective

A speaker at this Symposium beautifully exemplified the punishment perspective when he told us that what we need to remedy prosecutorial disclosure violations is some "good old-fashioned deterrence." As previously mentioned, I have often adopted the punishment perspective myself, lamenting the general lack of enforcement of *Brady* and Model Rule 3.8(d) and arguing for expansion of disclosure duties.[10] Punishment here would entail disciplinary sanctions, such as suspension or disbarment, or internal sanctions imposed by a prosecutor's office, such as a demotion or monetary fine.

The punishment perspective is characterized by a number of attributes. It tends to reflect notions of deterrence and retribution, and thus tends to involve assessment of blame. It generally adopts an ex post, or retrospective, viewpoint, addressing what we should do *after* a disclosure violation has been revealed. This viewpoint often focuses on instances that indicate the prosecutor had a high level of subjective culpability, such as purpose, knowledge, or recklessness regarding the existence of the information and the act of failing to disclose it. The punishment perspective also tends to adopt narrow framing in assessing blame, focusing on the individual prosecutor as opposed to the office, culture, or situation in which the prosecutor operates. Further, it tends to assume rational calculation on the part of the prosecutor—that the duty to disclose loses out as the result of a rational calculation in which prosecutors give greater weight to winning a case, their track record, and career interest than their duty to disclose.

Compelling rationales support a punishment approach to prosecutorial disclosure violations. Some prosecutors who fail to disclose exculpatory information are clearly blameworthy and deserve to be punished. Sanctions such as job loss, disbarment, or suspension would create a powerful specific and general deterrent to disclosure violations.

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10. Kevin C. McMunigal, *The (Lack of) Enforcement of Prosecutor Disclosure Rules*, 38 HOFSTRA L. REV. 847 (2010); Kevin C. McMunigal, *Guilty Pleas,* Brady *Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. REV. 651 (2007); McMunigal, *supra* note 3.

Imposition of sanctions would help educate prosecutors about their disclosure obligations and incapacitate some prosecutors if the sanction was disbarment or job loss. It would also help avoid the hypocrisy and loss of respect for the criminal justice system that results from failing to enforce clear ethical rules against prosecutors.

B. The Treatment Perspective

The treatment perspective differs from the punishment perspective in several ways. Importantly, it does not focus on assessing blame or using fear to deter violations. Rather, it focuses on understanding the behavior rather than blaming it. And it seeks to change the behavior through mechanisms other than the threat of sanctions.

The treatment perspective tends to adopt an ex ante, or prospective, viewpoint, addressing what we should do *before* a disclosure violation has been revealed. This viewpoint tends to focus on instances that indicate the prosecutor had a low level of culpability, or perhaps no culpability, regarding the existence of the information at issue, the act of failing to disclose it, or both. The treatment perspective also favors broad framing, focusing on the office, culture, or situation that surrounds the prosecutor rather than just the individual prosecutor.[11] And rather than focusing on rational calculation, it emphasizes barriers to rational calculation, such as cognitive errors on the part of the prosecutor.

Some who use the treatment perspective point to a variety of psychological impediments to judgment that can cause even well-motivated prosecutors to commit cognitive error leading to disclosure failures. One example is what is often referred to as "tunnel vision." Prosecutors and police, like all human beings, tend to engage in non-rational escalation of commitment to positions they have adopted.[12] Once a prosecutor has committed to the belief that a particular person is guilty of a crime, she will tend to escalate that commitment rather than re-examine it. Then, the prosecutor will often look for and see only information that confirms this position and ignore information contrary to it. Lawyers, like doctors, tend to see what they expect to see and fail to spot what they do not expect to see. Prosecutors and defense lawyers alike, both of whom deal mostly with guilty people, come to expect those charged with crimes to be guilty and have a hard time seeing innocent,

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

12. *See, e.g.*, Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 351 (2006).

or possibly innocent, criminal defendants.[13] If one expects guilt, one will expect that exculpatory evidence does not exist, thus reducing the incentive to look for and the capacity to recognize it.

IV. THE TENSION

A. *The Maternal Drug Use Analogy*

Underlying many informational rules is a tension between the *creation of* and *access to* information on the one hand and *use of* that information once it exists on the other.[14] The debate about punishment versus treatment of drug offenses illustrates this tension.

For example, during the crack cocaine epidemic, fetal endangerment through maternal use of crack cocaine was a prominent item on the agendas of prosecutors and legislators across the country.[15] The question of how best to respond to such maternal drug abuse involved a tension between the use of and access to information about maternal drug abuse.[16] Once information was obtained about maternal drug abuse, some prosecutors sought to use that information to prosecute the mothers on a variety of criminal charges for harming or creating a risk of harm to the fetuses they were carrying.[17] Such a punishment approach would allow use of information about maternal drug abuse to criminally prosecute the mothers. But use of this information to prosecute the mothers would reduce the access of medical personnel to information needed to treat the women and the fetuses they were carrying. In short, a punishment approach would discourage women from seeking drug treatment and prenatal care out of fear of providing information that could be used to prosecute them.

A treatment approach, in contrast, would restrict use of information about maternal drug use for punishment purposes in order to encourage pregnant women to seek treatment and medical care for both the mother's addiction and the fetus, and to share information about drug

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13. *See* Kevin C. McMunigal, *Prosecutors and Corrupt Science*, 36 HOFSTRA L. REV. 437, 446-47 (2008).

14. For a discussion of this tension, see Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 313 (1981); McMunigal, *supra* note 3, at 997-1005.

15. Paul A. Logli, *Drugs in the Womb: The Newest Battlefield in the War on Drugs*, 9 CRIM. JUST. ETHICS 23, 27-28 (1990).

16. For a representative array of arguments from various viewpoints on whether to criminally punish fetal endangerment through maternal drug use, see *Symposium: Criminal Liability for Fetal Endangerment*, 9 CRIM. JUST. ETHICS 11, 11-51 (1990).

17. *See, e.g.*, State v. Luster, 204 Ga. App. 156, 419 S.E.2d 32 (1992); Whitner v. State, 492 S.E.2d 777 (S.C. 1997).

use with the providers of such treatment and care. A treatment approach, however, allows some women who may be quite blameworthy and dangerous to escape punishment for the harm they cause or risk to the fetuses they are carrying. Interestingly, when faced with the choice between the punishment and treatment approaches to maternal drug use, legislatures across the country almost uniformly opted for a treatment approach.[18]

The same sort of tension between use of information and access to that information underlies the choice between punishment and treatment of prosecutorial disclosure violations. In the disclosure context, using information about violations once we have it to punish violators is likely to reduce access to information about when, why, and how often disclosure violations occur—information necessary for effective treatment.

B. Recent Scholarship

As noted previously, some interesting recent scholarship on prosecutorial disclosure violations reflects a treatment perspective. These scholars tend not to address the informational tension that is the focus of this Article. For example, Alafair Burke wrote an article encouraging those working in this area to shift their focus from blaming prosecutors to explaining and remedying what causes prosecutors to violate *Brady*.[19] She identified three potential sources of *Brady* violations: (1) the structure of the *Brady* doctrine; (2) cognitive bias; and (3) the prosecutor's competing dual roles.[20] Importantly, in my view, she argues that use of a "rhetoric of fault" that blames prosecutors for *Brady* violations is counterproductive in terms of changing prosecutorial behavior because it alienates prosecutors and discourages prosecutorial participation in reform.[21] It invites prosecutors to "resist and disengage."[22]

Professor Burke's argument relies on the logical inference that verbal blaming of prosecutors will lead to a lack of prosecutorial transparency and cooperation. She clearly sees the tension between blaming on the one hand and transparency and cooperation on the other. Indeed, it is critical to her argument. But the logic of that argument, which I find convincing, is not limited to the rhetoric of blame. It extends as well to the actual imposition of sanctions. If simply *talking* about prosecutors

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18. *Substance Abuse During Pregnancy*, STATE POLICIES IN BRIEF (GUTTMACHER INSTITUTE), Feb. 1, 2013, http://www.guttmacher.org/statecenter/spibs/spib_SADP.pdf.

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

20. *Id.* at 2132-36.

21. *Id.* at 2121-27.

22. *Id.* at 2130-31.

as blameworthy discourages transparency and cooperation by prosecutors, surely *treating* them as blameworthy by imposing sanctions on them, as a punishment approach insists, creates an even greater disincentive for prosecutorial transparency and cooperation.

Professor Burke's article does not explicitly address the tension between actually punishing prosecutors and encouraging transparency and cooperation. I would be interested in hearing her views on how this tension should be handled. Should we abandon, along with rhetoric based on blame, sanctions based on blame because they too discourage prosecutorial transparency and cooperation?

In another article published alongside Professor Burke's piece discussed above, Rachel Barkow suggests using the current Department of Justice ("DOJ") approach to corporate compliance as a model for dealing with prosecutor offices regarding disclosure violations.[23] Like Professor Burke, she seeks to enlist prosecutor offices in helping remedy wrongdoing by individual prosecutors. Again, I find her proposal and arguments persuasive. But she does not address the tension between use of information about prosecutorial wrongdoing and creation of and access to that information.

The interaction of two key features appears to drive the DOJ approach to corporate compliance as Professor Barkow describes it. One is an increase in criminal penalties for corporate wrongdoing.[24] The other is the promise of insulation from (or reduction of) corporate criminal penalties if the corporation cooperates in preventing crimes and indentifying individual wrongdoers.[25] In sum, the corporation is encouraged to find and share information about internal wrongdoing by the promise that the information will not be used against it.

Professor Barkow's proposal raises some interesting questions about how this DOJ model would be adapted to prosecutor offices. How would entity liability be created for prosecutor offices? Presently, ethics codes do not recognize liability analogous to corporate entity liability for law firms or other similar entities. Does she envision the creation of such ethical entity liability for prosecutor offices that would be analogous to the corporate entity liability that motivates corporations to cooperate with the DOJ?

And, more importantly for purposes of this Article, how would Professor Barkow deal with the use-versus-access informational tension addressed above? Would she propose creating some sort of insulation

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

24. *Id.* at 2099.

25. *Id.* at 2100.

from threatened punishment for an individual prosecutor who blows the whistle on another prosecutor's disclosure violation? Or, like the DOJ corporate compliance model, would she propose insulation from sanctions—a type of immunity or amnesty—if the prosecutor's office prevents disclosure violations and indentifies individual wrongdoers? If so, who would be insulated from liability?

V. BALANCING USE AND ACCESS

How should we balance punishment and treatment? The point of this Article is to prompt those of us working on issues of prosecutorial disclosure to address this question and confront the tension between use of and access to information about prosecutorial disclosure violations. I include myself in this group. I have adopted both a punishment perspective and a treatment perspective at times in my work without addressing the use-versus-access tension. This Article is not the place to fully explore this question, but I briefly sketch two possibilities for balancing the use-versus-access tension in the paragraphs that follow.

A. Mental States

One possibility would be to use prosecutorial mental states to restrict punishment. One approach to this would be to limit sanctions to prosecutors who have a high level of culpability, perhaps knowledge or recklessness, about the existence of information required to be disclosed. No sanction at all would be imposed on prosecutors who are only negligent or lack culpability entirely.

Alternatively, a "graded" approach to mental states could be adopted. Under this approach, the level of sanction would be proportionate to the prosecutor's mental state regarding the existence of the information at issue, just as the level of offense and punishment in the law of homicide are proportionate to an actor's mental state about death caused by the actor's actions. The highest punishment would be imposed on a prosecutor who had knowledge. Progressively less severe sanctions, such as reprimands, would be used for prosecutors who were reckless or negligent.

Insulating prosecutors from liability or limiting their liability to relatively mild sanctions for violations where they have no, or a relatively low, culpable mental state would maintain punishment but might create sufficient incentive for prosecutors to be open and cooperative.

B. Amnesty or Immunity

Another approach would be to create some sort of amnesty or immunity for disclosure violations if the prosecutor reports the violation. One variation, as mentioned above in connection with Professor Barkow's article, might be to create entity liability for a prosecutor's office and simultaneously create immunity if the office reports violations and cooperates in identifying and prosecuting individual prosecutors. Under this approach, individual prosecutors who violate disclosure rules would still be subject to punishment. This raises an interesting question of whether prosecutor offices would be as willing as corporations have been in cooperating and identifying individual violators.

A bolder immunity approach would be to create an amnesty provision for individual prosecutors. One possibility might be granting amnesty for revealing past violations that have not yet come to light. Another would be amnesty for revealing past violations that lead to exoneration of a person wrongfully convicted. Such amnesty could be offered for a limited time period.

VI. CONCLUSION

The status quo regarding prosecutorial disclosure violations is unsatisfactory from both a punishment perspective and a treatment perspective. The difficulty of discovering and sanctioning violations means there is currently little effective punishment to deter, educate, or incapacitate prosecutors who violate their disclosure obligations. Nor do some of those prosecutors receive the sanctions they deserve. At the same time, with some notable exceptions, prosecutor offices typically are quite resistant to the sort of openness and cooperation that would allow us to diagnose and treat various factors that contribute to disclosure violations. So we do not have either effective punishment or effective treatment.

We need to think clearly about and discuss what is the best way forward from this unacceptable status quo. This Article raises a question that, in my view, is central to that discussion but has largely gone unaddressed: Can we reasonably expect prosecutors to be open and transparent in helping us discover and treat the causes of prosecutorial disclosure violations while at the same time punishing prosecutors who commit those violations? In the terminology of this Article, can the punishment perspective and the treatment perspective be reconciled? If so, how? If not, which should we rely on going forward? I look forward to listening to and participating in the discussion of how these questions should be answered.

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