

Revisiting Prosecutorial Disclosure

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After the exoneration of more than 200 people based on post-conviction DNA evidence, a growing movement against wrongful convictions has called increased attention to the prosecutorial suppression of material, exculpatory evidence. Commentators frequently study prosecutorial failures to disclose as a form of intentional misconduct, coloring both the description of the problem and the recommended solutions. This Article, in contrast, explores how even ethical prosecutors might fail to disclose exculpatory evidence because of flaws in the Brady doctrine itself – specifically, the Court’s limitation of the doctrine to “material” exculpatory evidence. The materiality standard preys upon cognitive biases that distort even an ethical prosecutor’s application of Brady, leading to systematic underdisclosures of exculpatory evidence. The doctrine also inflates the tension between a prosecutor’s dual obligations to protect the innocent while punishing the guilty, causing conscientious prosecutors to conclude they are “doing justice” by suppressing exculpatory evidence that does not appear to be material. Accordingly, it is the doctrine itself that must be re-examined.

*This Article proposes a prophylactic open-file rule to effectuate defendants’ Brady rights. This doctrinal move would expand defendants’ federal constitutional rights to discovery, while respecting the Court’s long-established view that only access to material exculpatory evidence is essential to due process. The Article situates the proposal within a jurisprudence of constitutional criminal procedure that often favors clear rules over open-ended standards, and compares the current need to safeguard defendants’ Brady rights to the necessity more than forty years ago to shift to a rule-based approach in *Miranda v. Arizona* to regulate custodial interrogations.*