

The Challenge of Convincing Ethical Prosecutors That Their Profession Has a *Brady* Problem

Adam M. Gershowitz*

Abstract

In recent decades, both the media and legal scholars have documented the widespread problem of prosecutors failing to disclose favorable evidence to the defense—so called Brady violations. Despite all of this documentation, many ethical prosecutors reject the notion that the criminal justice system has a Brady problem. These prosecutors—ethical lawyers who themselves have not been accused of misconduct—believe that the scope of the Brady problem is exaggerated. Why do ethical prosecutors downplay the evidence that some of their colleagues have committed serious errors?

This essay, in honor of Professor Bennett Gershman, points to what psychologists have termed social identity theory and ingroup bias. Under these concepts, people derive part of their identity and self-esteem from membership in social groups. When someone from the group is accused of misconduct, members of the ingroup are psychologically less able to recognize or accept that a group member has committed the misconduct. Social scientists have documented this phenomenon in children, sports fans, Democrats, Republicans, racial groups, and warring religious factions.

Ethical prosecutors are also likely susceptible to ingroup bias and therefore probably find it more difficult than the average person to acknowledge that individuals from their group have engaged in Brady violations. This is particularly true given the nature of the Brady doctrine, which is an amorphous test that requires judgment calls in close cases. Ingroup bias does not mean that prosecutors as a group are unethical, but simply that they are susceptible to the same types of psychological errors as members of other groups. This paper applies social identity theory and the concept of ingroup bias to prosecutors and offers some modest suggestions for helping ethical prosecutors to recognize and respond to the Brady problem.

* Associate Dean for Research and Faculty Development and Professor of Law, William & Mary Law School. I am grateful to Elizabeth Brightwell and Fred Dingley for exceptional research assistance.

I. INTRODUCTION

More than a dozen years ago, I moderated a symposium panel about *Brady v. Maryland*¹ that featured Bennett Gershman. The symposium audience consisted of students, professors, and, most notably for purposes of this paper, prosecutors. Professor Gershman pointed out that *Brady* had failed as a discovery doctrine because, even though there are many *Brady* violations, it is exceedingly difficult to discover them. And even when *Brady* violations are unearthed, courts often do not reverse convictions. Professor Gershman thus concluded that “it is readily apparent that *Brady* violations are among the most pervasive and recurring types of prosecutorial violations” and that “[n]umerous studies have documented widespread and egregious *Brady* violations.”²

Multiple prosecutors in the audience responded with hostility to Professor Gershman’s presentation. One prosecutor angrily raised his voice and expressed outrage that Professor Gershman had suggested that prosecutors as a group were unethical. But Professor Gershman had done no such thing. He had simply pointed out some basic facts: (1) there are a considerable number of *Brady* violations; (2) those violations have been widespread in some offices; and (3) innocent defendants have been convicted because of *Brady* violations. Professor Gershman never suggested that *all* prosecutors were engaged in misconduct, and he certainly never suggested that the particular prosecutors in the audience had engaged in misconduct. The prosecutor in the audience nevertheless acted as though he had been personally attacked and seemed unable to acknowledge the existence of *Brady* problems in the criminal justice system.

What should we make of this story? Perhaps it was an isolated incident. Perhaps most prosecutors recognize that some of their colleagues have committed misconduct. Certainly, Professor Gershman and other scholars have chronicled more than enough prosecutorial misconduct to make the entire criminal justice system aware that *Brady* problems exist.³ Yet, I do not think the prosecutor’s hostile response to Professor Gershman’s presentation was an isolated instance.⁴ Rather,

¹ 373 U.S. 83 (1963).

² Here I quote from the subsequent law review article Professor Gershman contributed to the symposium. Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 688 (2006).

³ Professor Gershman’s treatises are required reading for scholars in both the ethics and criminal procedure fields and they are geared not only to academics but to lawyers as well. See BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT (2d ed. 1999); BENNETT L. GERSHMAN, CRIMINAL TRIAL ERROR AND MISCONDUCT (3d ed. 2015).

⁴ As Professor Ellen Yaroshefsky has explained:

Prosecutors believe that the problem of prosecutorial misconduct is overstated. . . . [P]rosecutors believe that (1) meritless claims of prosecutorial misconduct have become a standard defense tactic; (2) they face misperceptions and negative images of their activities

because prosecutors are part of a tight-knit group, there is reason to believe their group identity makes it more difficult for them to appreciate wrongdoing by members of their group.⁵ Psychologists call this phenomenon social identity theory and ingroup bias.

Social identity theory posits that people define themselves and improve their self-esteem based on their group memberships.⁶ To the extent that a person's social group is seen positively, the individual's self-esteem also improves. Put differently, the better a person's social group is perceived, the better the person feels about themselves. This, in turn, opens the door to ingroup bias. People tend to attribute success of their group or group members to merit or hard work. By contrast, there is a tendency to attribute failure or misconduct by the group or group members to external factors or to downplay the existence of those failures or misconduct.⁷ When a group member behaves poorly, others in the group may have a tendency to protect the group (and thus their own self esteem) by finding another explanation for the poor behavior or by discounting the existence of the misconduct altogether.

This essay aims to make a small addition to the burgeoning literature about the psychology of prosecutorial behavior. In doing so, I do not intend to be more critical of prosecutors than of the average citizen though. As I have written elsewhere, I believe the vast majority of prosecutors are ethical, over-worked public servants⁸ and that a large amount of prosecutorial misconduct is in fact accidental.⁹ At the same time, the belief that most prosecutors are hard-working, well-intentioned, and ethical does not mean that there are not widespread *Brady* violations in the criminal justice system. This essay aims to explain how simultaneously (1) there can be widespread *Brady* problems throughout the United States, and (2) ethical prosecutors can fail to recognize the scope of the *Brady* problem. The article points to social identity theory and ingroup bias as part of the explanation.

in the media, such as charges that “prosecutors feel that [they] are above the law”; and (3) it is incorrect to assume that they are not subject to professional discipline.

Ellen Yaroshefsky, *Wrongful Convictions: It Is Time to Take Prosecution Discipline Seriously*, 8 UDC L. REV. 275, 292–93 (2005); see also Bruce A. Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 60 (2016) (quoting a prominent prosecutor as saying that prosecutorial misconduct is “more episodic than epidemic”). Recently, a federal prosecutor argued that “prosecutorial misconduct occurs with admirable infrequency.” See Timothy C. Harker, *Faithful Execution: The Persistent Myth of Widespread Prosecutorial Misconduct*, 85 TENN. L. REV. 847, 850 (2018).

⁵ Professor David Harris has made this point with respect to police. DAVID A. HARRIS, FAILED EVIDENCE: WHY LAW ENFORCEMENT RESISTS SCIENCE 11, 106 (2012).

⁶ See *infra* notes 41–42 and accompanying text.

⁷ See *infra* notes 43–68 and accompanying text.

⁸ See Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 261 (2011).

⁹ See *id.* at 263.

Part II of this essay recounts the well-known fact that there are a lot of *Brady* violations throughout the United States. Part III then explores the language—a language of fault—that we use to discuss those *Brady* violations. Part IV then delves into the social science literature on social identity theory and ingroup bias. In particular, Part IV explores studies and data about children, sports fans, Republicans, Democrats, racial groups, and rival religious groups to demonstrate that when an individual perceives criticism of someone in their group that they are less willing to accept objective evidence. Part V then considers some ways in which we can approach the discussion of *Brady* violations to make it more likely for prosecutors to appreciate the scope of the *Brady* problem.

II. THE SCOPE OF THE *BRADY* PROBLEM

It is difficult to know how many *Brady* violations are committed by prosecutors each year.¹⁰ Scholars typically cite to major studies by newspapers, nonprofits, and academics. For instance, the *Chicago Tribune* reviewed 11,000 homicide convictions between 1963 and 1999 and found that courts reversed 381 cases for *Brady* violations.¹¹ In 2003, the Center for Public Integrity reviewed more than 11,000 appellate decisions that involved claims of prosecutorial misconduct and found that more than 2,000 cases involved reversible errors, the majority of which were *Brady* violations.¹² A *Pittsburgh Gazette* study of 1,500 cases found numerous *Brady* violations.¹³ The Northern California Innocence Project documented dozens of *Brady* violations in California courts between 1997 and 2009.¹⁴ In an earlier paper, I found that more than two-dozen death penalty cases were reversed for *Brady* violations between 1997 and 2007.¹⁵ Indeed, in his landmark study on capital

¹⁰ See Ellen Yaroshefsky, *Foreword: New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 CARDOZO L. REV. 1943, 1945 (2010) (“*Brady* is a hidden problem for which it is impossible to gather accurate data.”).

¹¹ See Ken Armstrong & Maurice Possley, *The Verdict: Dishonor*, CHI. TRIB., Jan. 10, 1999.

¹² See Steve Weinburg, *Breaking The Rules: Who Suffers When a Prosecutor is Cited for Misconduct*, The Center For Public Integrity (June 26, 2003), <https://publicintegrity.org/accountability/breaking-the-rules/> (last updated May 19, 2014).

¹³ See Bill Moushey, *Win at All Costs: Hiding the Facts*, PITTSBURGH POST-GAZETTE, Nov. 24, 1998.

¹⁴ See KATHLEEN M. RIDOLFI & MAURICE POSSLEY, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, NORTHERN CALIFORNIA INNOCENCE PROJECT 37 (2010), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1001&context=ncippubs>.

¹⁵ See Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1076 (2009).

reversals, Professor James Liebman found that *Brady* violations were the most common reversible error in death penalty cases.¹⁶

While these studies show a widespread *Brady* problem, they offer an incomplete picture and actually understate the problem.¹⁷ Many *Brady* violations never come to light because it is by definition very difficult to unearth evidence that prosecutors never provided to defendants. Moreover, most studies of *Brady* violations principally focus on deliberate prosecutorial misconduct. Newspapers and reform organizations draw our attention to prosecutors who actively hide evidence and recidivist *Brady* violators.¹⁸ These cases are sensational and outrageous. But, of course, the problem goes further because a prosecutor can commit a *Brady* violation accidentally.¹⁹ A prosecutor runs afoul of *Brady* by failing to turn over favorable evidence that is material. Multiple scholars have observed that it is quite difficult for prosecutors, who are looking at a case from the prosecution's perspective with the belief that a defendant is guilty, to easily see all of the evidence that a defendant might use to show he is innocent.²⁰

Moreover, favorable evidence includes not just exculpatory evidence but also impeachment material. Ethical prosecutors may not recognize impeachment evidence staring them in the face. For instance, imagine a domestic violence case in which it is obvious that the victim was beaten by her husband. As too often occurs, the victim initially denies that her husband hit her.²¹ After talking with investigators though, she eventually acknowledges that her husband was the

¹⁶ See JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995* ii (2000).

¹⁷ See Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 *FORDHAM L. REV.* 509, 513 (2011) (“The failure to discover prosecutorial misconduct is especially likely in cases of *Brady* violations.”).

¹⁸ See *supra* notes 11–12 and accompanying text.

¹⁹ The prosecutor need not have a culpable mental state to commit a *Brady* violation. See *Strickler v. Greene*, 527 U.S. 263, 288 (1999) (“[U]nder *Brady* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment.”); *United States v. Agurs*, 427 U.S. 97, 110 (1976) (“Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. If evidence highly probative of innocence is in his file, he should be presumed to recognize its significance even if he has actually overlooked it.”).

²⁰ See, e.g., Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 *WASH. & LEE L. REV.* 1533 (2010); Alafair S. Burke, *Talking About Prosecutors*, 31 *CARDOZO L. REV.* 2119, 2132 (2010); Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors' Offices Learn from Their Lawyers' Mistakes?*, 31 *CARDOZO L. REV.* 2161, 2163–65 (2010); Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 *IND. L.J.* 481, 513 (2009); Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 *WIS. L. REV.* 541, 569.

²¹ See, e.g., *United States v. Brooks*, 367 F.3d 1128, 1137 (9th Cir. 2004) (explaining that officer testified that it was “‘very common’ for victims of domestic abuse initially to deny that they had been assaulted” and reviewing cases noting that victims “may fear that by complaining to police, he or she might expose himself or herself to likely future harm at the hands of a hostile aggressor who may remain unrestrained by the law.”).

perpetrator. Because prosecutors may be completely convinced of the husband's guilt, they might not recognize that the wife's initial denial that the husband hit her is *Brady* material that must be disclosed to the defense. This scenario and others like it is common because misdemeanors and low-level felonies are often handled by junior prosecutors with only a few months or years of experience under their belts.²²

Additionally, we must recognize that law schools typically do an inadequate job of training future lawyers about *Brady* situations they will likely encounter,²³ and instead focus on dry legal language about how to define materiality.²⁴ The ethics rules also do an inadequate job of helping prosecutors to avoid misconduct.²⁵ Nor do all district attorneys' offices do a capable job of training their prosecutors about *Brady* obligations.²⁶ And to top it off, consider that the average prosecutor is extremely overburdened and is rushing through more cases than she can carefully handle.²⁷ The result is not just flagrant *Brady* violations by unethical prosecutors, but also accidental violations by well-meaning prosecutors who are inadequately trained and overburdened.

In short, as Professor Gershman explained in 2010, "a large and growing body of empirical and anecdotal evidence exists suggesting that *Brady* violations are the most common type of prosecutorial misconduct" in all criminal cases.²⁸

III. HOW DO WE TALK ABOUT PROSECUTORS AND *BRADY* VIOLATIONS?

After recognizing that we have a lot of *Brady* violations, the next question to ask is how do we talk about those violations. The traditional approach taken by

²² See Gershowitz & Killinger, *supra* note 8, at 271.

²³ The Supreme Court's suggestion in *Connick v. Thompson*, 563 U.S. 51, 64–66 (2011), that attorneys receive adequate training for the *Brady* doctrine in law school and through their own efforts at continuing education is simply not correct.

²⁴ For a thoughtful discussion of how clinicians can teach beyond the black letter law and bring *Brady* cases to life, see Lara A. Bazelon, *Hard Lessons: The Role of Law Schools in Addressing Prosecutorial Misconduct*, 16 BERKELEY J. CRIM. L. 391, 415–18 (2011).

²⁵ See Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399.

²⁶ See Bennett L. Gershman, *Educating Prosecutors and Supreme Court Justices About Brady v. Maryland*, 13 LOY. J. PUB. INT. L. 517, 521 (2012) (describing the lack of training in the New Orleans District Attorney's Office that gave rise to *Connick v. Thompson*, 563 U.S. 51 (2011)).

²⁷ See Gershowitz & Killinger, *supra* note 8.

²⁸ Bennett L. Gershman, *Bad Faith Exception to Prosecutorial Immunity for Brady Violations*, HARV. C-R-C.L. L. REV., AMICUS (2010), http://harvardcrcl.org/wp-content/uploads/2010/08/Gershman_Publish.pdf; see also Green & Yaroshefsky, *supra* note 4, at 52 ("[T]here has been increased acceptance of the argument that prosecutorial misconduct is widespread and systemic . . .").

academics and reformers is what Professor Alafair Burke has termed a language of fault. As Professor Burke has explained:

[T]he literature on prosecutorial decision-making is dominated by a language of fault. When examining the ways that prosecutorial decisions contribute to wrongful convictions, scholars and commentators have generally attributed bad prosecutorial decisions to widespread prosecutorial “misconduct” that is symptomatic of a deeply flawed prosecutorial culture. . . .

The language of fault similarly permeates the discourse surrounding the discussion of prosecutorial disclosure of evidence to the defense. Advocates of expanded discovery rights for defendants portray prosecutors as valuing conviction rates over justice. Motivated by the accolades, bragging rights, and future career advancements that come with high win-loss records, the prosecutors described in much of the traditional *Brady* literature intentionally, knowingly, or at least recklessly withhold potentially exculpatory evidence, playing “games” with a doctrine that allows them to maximize their conviction rates [my] [sic] gambling with justice. From this perspective, a critical flaw in *Brady* is the doctrine’s entrustment of the disclosure process to wily prosecutors who rationally conclude that they can withhold exculpatory evidence with impunity because the odds favor them at every stage of the process.²⁹

Many scholars have embraced the language of fault, some of them quite unabashedly. For instance, Professor Abbe Smith describes a “prosecutor personality”³⁰ and tells stories of “smugness, self-importance, and lack of imagination” in describing “how many prosecutors think.”³¹ Professor Smith suggests full-throated criticism of prosecutors is appropriate because it is not “wrong to find fault where there has been some.”³² Other critics, while less overt, nevertheless seem to paint prosecutors with a broad brush of fault. For instance, then-Judge Alex Kozinski (before resigning in scandal) suggested that prosecutors

²⁹ Burke, *Talking About Prosecutors*, *supra* note 20, at 2127–28.

³⁰ Abbe Smith, *Are Prosecutors Born or Made?*, 25 GEO J. LEGAL ETHICS 943, 955 (2012).

³¹ *Id.* at 949.

³² *Id.* at 958 n.88. Professor Smith asserts that “prosecutors bear some responsibility for mass incarceration, an obscene condition of American life that we will one day look back on in shame.” *Id.* at 952. For present purposes, I am not interested in the question of whether prosecutors are culpable for contributing to mass imprisonment. Instead, I am interested in the more practical question of whether the language we use to talk about prosecutors is impeding our ability to effectuate needed reforms.

as a group do not play fair.³³ In a recent and high-profile book, Professor John Pfaff laid the blame for mass incarceration at the feet of prosecutors.³⁴

Increasingly, however, academics are looking at the problem somewhat differently. Professor Burke advocates for less fault-based rhetoric in discussing *Brady* violations, wrongful convictions, and other criminal justice system flaws.³⁵ Professor Susan Bandes has likewise embraced the idea that we should direct our attention to the ethical prosecutors who act in good-faith “because the focus on fault and blame is in many respects counterproductive.”³⁶ And in critiquing Professor Pfaff’s book, my colleague Jeffrey Bellin has colorfully rejected the idea that “[p]rosecutors are the Darth Vader of academic writing: mysterious, powerful and, for the most part, bad.”³⁷

Although cases of flagrant prosecutorial misconduct do call for aggressive condemnation, I want to add my voice to the view that the language of fault can sometimes be counterproductive. In particular, when trying to convince ethical prosecutors to recognize the existence of *Brady* violations around the country, a fault-based rhetoric may be counterproductive. As described in Part IV below, prosecutors are likely susceptible to social identity theory and ingroup bias. These psychological phenomena make it difficult for prosecutors to accept that their colleagues have committed misconduct. And this problem is likely only exacerbated by aggressive criticism of prosecutors as a group.

IV. PROSECUTORS ARE LIKELY SUSCEPTIBLE TO INGROUP BIAS

Legal scholars have increasingly turned to social science literature in an effort to understand some of the problems with prosecutorial decision-making. For instance, in their influential article, Professors Keith Findley and Michael Scott showed how well-meaning prosecutors can develop tunnel vision about defendants’ guilt because of confirmation bias, hindsight bias, and outcome bias.³⁸ Professor Alafair Burke has written widely about how prosecutors’ exercise of discretion is affected by cognitive bias, selective information processing, belief perseverance,

³³ See Hon. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, viii (2015).

³⁴ See JOHN F. PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* (2017).

³⁵ See Burke, *Talking About Prosecutors*, *supra* note 20.

³⁶ Susan Bandes, *Loyalty to One’s Convictions: The Prosecutor and Tunnel Vision*, 49 HOW. L.J. 475, 485 (2006); *see also* Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1328 (1999).

³⁷ Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 837 (2018).

³⁸ See Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291.

and the avoidance of cognitive dissonance.³⁹ These scholars demonstrate how cognition problems and tunnel vision adversely affect investigation, charging decisions and *Brady* disclosures, and cause incorrectly sticky presumptions of guilt both before and after trial.⁴⁰ In short, social science helps to explain how ethical prosecutors face psychological obstacles in handling specific criminal cases.

Social science can also help explain why ethical prosecutors may fail to recognize that their profession has a *Brady* problem. Psychologists have long recognized the related concepts of social identity theory and ingroup bias. Under social identity theory, people derive part of their identity and self-esteem from membership in social groups.⁴¹ The way we think of ourselves is determined by group characteristics that are immutable (for instance, nationality, gender, and race) as well as from chosen group memberships such as political parties, sports teams, or professional affiliations.⁴² The concept of ingroup bias provides that when someone from a group is accused of misconduct, other members of that group are psychologically less able to recognize that their colleague may have engaged in misconduct. As one group of psychologists has explained:

People prefer their ingroup to an outgroup, they interpret more leniently an ambiguous behavior performed by an ingroup member than by an outgroup member, they excuse more readily antinormative behaviors committed by an ingrouper than by an outgroup member, they perceive bias in neutral reports of their conflict with an outgroup, they attribute more positive attributes to the ingroup than to the outgroup, and so on.⁴³

A key part of social identity theory and ingroup bias is the salience with which the individual identifies with the group. If an individual makes identity in a particular group especially important to them, they are even more prone to ingroup

³⁹ See Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587 (2006); Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183 (2007); Alafair S. Burke, Commentary, *Brady's Brainteaser: The Accidental Prosecutor and Cognitive Bias*, 57 CASE W. RES. L. REV. 575 (2007).

⁴⁰ See Burke, *Improving Prosecutorial Decision Making*, *supra* note 39, at 1603–13; Findley & Scott, *supra* note 38, at 307–22. Of course, there are other factors beyond psychology that cause prosecutors to resist viable claims of innocence. See Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125 (2004) (considering, *inter alia*, institutional culture and politics).

⁴¹ See, e.g., Sabine Otten & Ernestine H. Gordijn, *Was It One of Us? How People Cope with Misconduct by Fellow Ingroup Members*, 8 SOC. & PERSONALITY PSYCHOL. COMPASS 165, 166 (2014).

⁴² See *id.*

⁴³ Jacques-Philippe Leyens et al., *The Emotional Side of Prejudice: The Attribution of Secondary Emotions to Ingroups and Outgroups*, 4 PERSONALITY & SOC. PSYCHOL. REV. 186, 187 (2000) (citations omitted).

bias.⁴⁴ Social science research also indicates that “ingroup favouring responses are expressed more strongly when the group’s identity is threatened.”⁴⁵

There are a variety of related psychological explanations for discounting misconduct by ingroup members. Some researchers have posited that “people not only have a conception of who they are as individuals but also derive part of their self-image from the social groups to which they belong.”⁴⁶ Under that theory, association with a group creates a sense of identity and increases self-esteem.⁴⁷ As a result, psychologists have demonstrated that people tend to attribute more uniquely human characteristics to their ingroup than to outgroups.⁴⁸ Other researchers have observed:

People are more likely to refuse incorporation of negative elements into their group’s collective identity in order to maintain a positive group (self) image Consequently, group members might engage in denial of their group’s negative behavior, legitimization of their ingroup’s actions or simply claim that the ‘current’ ingroup is not the one that committed those horrible things.⁴⁹

A diverse set of examples help to illustrate social identity theory and ingroup bias in practice. Sports is the most obvious starting point. In sporting events, fans are less likely to see fouls and misconduct by their own team. At the same time, they are likely to interpret behavior by the other team (the outgroup) as misconduct.

⁴⁴ See Bertjan Doosje et al., *Guilty by Association: When One’s Group Has a Negative History*, 75 J. PERSONALITY & SOC. PSYCHOL. 872, 872 & 885 (1998) (describing the hostile reaction of Germans to Daniel Jonah Goldhagen’s book, *Hitler’s Willing Executioners*, and explaining that “for those people whose German identity is relatively important, defensive behavior is a more likely means of dealing with their nation’s unfavorable past”); Sheldon Stryker & Peter J. Burke, *The Past, Present, and Future of an Identity Theory*, 63 SOC. PSYCHOL. Q. 284 (2000) (discussing identity salience).

⁴⁵ Paul Hutchison & Dominic Abrams, *Ingroup Identification Moderates Stereotype Change in Reaction to Ingroup Deviance*, 33 EUR. J. SOC. PSYCHOL. 497, 498 (2003); see also Nyla R. Branscombe & Daniel L. Wann, *Collective Self-Esteem Consequences of Outgroup Derogation When a Valued Social Identity Is on Trial*, 24 EUR. J. SOC. PSYCHOL. 641 (1994).

⁴⁶ Bertjan Doosje et al., *supra* note 44, at 873.

⁴⁷ See *id.*

⁴⁸ See Jacques-Philippe Leyens et al., *Psychological Essentialism and the Differential Attribution of Uniquely Human Emotions to Ingroups and Outgroups*, 31 EUR. J. SOC. PSYCHOL. 395 (2001).

⁴⁹ Sabina Čehajić et al., *What Do I Care? Perceived Ingroup Responsibility and Dehumanization as Predictors of Empathy Felt for the Victim Group*, 12 GROUP PROCESS & INTERGROUP RELATIONS 715, 717 (2009) (citations omitted); see also Michael J.A. Wohl et al., *Collective Guilt: Emotional Reactions When One’s Group Has Done Wrong or Been Wronged*, 17 EUR. REV. SOC. PSYCHOL. 1, 2 (2006) (“According to social identity theory, people are motivated to perceive their ingroup positively.”) (citations omitted).

In a famous study of a rough, injury-filled 1951 football game between Princeton and Dartmouth, fans of each team thought the other side had engaged in more flagrant misconduct.⁵⁰

Modern sports fans are also quick to discount the misconduct of their team and its players. For instance, Baltimore Ravens fans were able to minimize the significance of domestic violence charges against star player, Ray Rice, after a video surfaced of him punching his wife in an elevator.⁵¹ During the DeflateGate controversy, New England Patriots fans were far less likely to believe their star quarterback, Tom Brady, had broken the rules by using intentionally deflated footballs during the AFC championship. In a survey conducted by the *New York Times*, only 16% of Patriots fans believed Brady had broken the rules, compared with 67% of fans of other teams.⁵² Numerous other studies show ingroup favoritism and bias in the sports context.⁵³

Children exhibit ingroup bias as well. Psychologists' studies of children have found that they are more forgiving and more forgetful of bad behavior by children in their group.⁵⁴ For instance, in a study of Euro-Canadian and Native-Canadian elementary school children, researchers showed pictures of groups of children and told them about positive and negative behaviors.⁵⁵ The Euro-Canadian children recalled more positive and fewer negative behaviors about children from their ingroup.⁵⁶ Those same children recalled more negative and fewer positive behaviors about children in the other group.⁵⁷ Researchers found the same results with the Native-Canadian children. In short, children saw less negative behavior in the ingroup and more negative behavior in their outgroup.

⁵⁰ See Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129 (1954).

⁵¹ For a video of fan reactions, see *The Ladies of Ravens Nation on Ray Rice*, WASH. POST (Sept. 12, 2014), https://www.washingtonpost.com/posttv/sports/the-ladies-of-ravens-nation-on-ray-rice/2014/09/12/4d39ab5a-3a67-11e4-a023-1d61f7f31a05_video.html?utm_term=.1f237cd9676f.

⁵² See Brendan Nyhan, *Tom Brady and Political Beliefs: It Depends What Team You're On*, N.Y. TIMES, Oct. 15, 2015.

⁵³ See, e.g., Daniel L. Wann et al., *The Impact of Team Identification on Biased Predictions of Player Performance*, 56 PSYCHOL. RECORD 55 (2006); Daniel L. Wann & Frederick G. Grieve, *Biased Evaluations of In-Group and Out-Group Spectator Behavior at Sporting Events: The Importance of Team Identification and Threats to Social Identity*, 145 J. SOC. PSYCHOL. 531 (2005).

⁵⁴ See Antonia Misch et al., *The Whistleblower's Dilemma in Young Children: When Loyalty Trumps Other Moral Concerns*, 9 FRONTIERS PSYCHOL. 250 (2018).

⁵⁵ See Brandon Corenblum, *What Children Remember About Ingroup and Outgroup Peers: Effects of Stereotypes on Children's Processing of Information About Group Members*, 86 J. EXPERIMENTAL CHILD PSYCHOL. 32 (2003).

⁵⁶ See *id.* at 42.

⁵⁷ *Id.*

There is also evidence of ingroup bias with respect to race. In the infamous O.J. Simpson case, the reaction to Simpson's acquittal diverged on racial lines. A substantial majority of Black observers cheered the decision, while a majority of White observers believed Simpson escaped justice.⁵⁸ Social identity theory helps to explain that divergence. Black Americans, as a group, tend to distrust the criminal justice system.⁵⁹ They could see Simpson as a member of their ingroup who was unfairly targeted by an outgroup of White law enforcement agents seeking to set him up.⁶⁰ Researchers have found similar dynamics in laboratory studies based on race, gender, and nationality.⁶¹

Scholars have also identified ingroup bias in perceptions of violence between religious groups. In one study, researchers showed both Catholics and Protestants from Northern Ireland video footage of violence instigated by each group.⁶² Both the Protestant and Catholic respondents were more willing to downplay violence initiated by their own group. In both cohorts, group members were "two-and-a-half to four times more likely to attribute violence to external rather than internal causation."⁶³

And then, of course, there is politics. It should not be shocking that people who identify with a political party are less likely to find blame or misconduct by members of their own party. To take a recent and high-profile example, consider reaction to Robert Mueller's investigation into whether the Trump campaign colluded with Russia during the 2016 election. A poll taken at the end of 2017 found that 52% of respondents believed there had been election collusion, in contrast to 13% for Republican voters.⁶⁴

The same dynamic was at play when allegations arose that President Clinton had an extramarital affair with Monica Lewinsky. The scandal first broke in January 1998 and President Clinton continued to deny the relationship into the summer of

⁵⁸ See Victoria Kuhl, *Disparities in Judgments of the O.J. Simpson Case: A Social Identity Perspective*, 53 J. SOCIAL ISSUES 531 (1997).

⁵⁹ See, e.g., ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY* (2014).

⁶⁰ See Kuhl, *supra* note 58, at 541–42.

⁶¹ See Miles Hewstone, *The 'Ultimate Attribution Error'? A Review of the Literature on Intergroup Causal Attribution*, 20 EUR. J. SOC. PSYCHOL. 311 (1990) (reviewing numerous studies, though cautioning against over-reading the evidence).

⁶² See J.A. Hunter et al., *Intergroup Violence and Intergroup Attributions*, 30 BRIT. J. SOC. PSYCHOL. 261 (1991).

⁶³ See *id.* at 264.

⁶⁴ See Brennan Weiss, *Poll: Majority of Trump Voters Would Support Him Even if He Colluded with Russia*, BUSINESS INSIDER (Dec. 16, 2017), <https://www.businessinsider.com/trump-voters-support-him-even-he-colluded-with-russia-2017-12>.

1998.⁶⁵ As of early August 1998, a majority of the public and nearly 70% of Republicans believed that Clinton had not only had an affair but had also attempted to have Lewinsky cover it up.⁶⁶ By contrast, a far smaller percentage of Democrats—less than 30%—believed the allegations.⁶⁷ According to polling data from just before impeachment proceedings began:

The public divides sharply along partisan lines over who they believe more—Clinton or Lewinsky. Two-thirds of Republicans (66%) said they would believe Lewinsky if she and Clinton offer different accounts of their relationship, while 64% of Democrats said they would believe Clinton. Among those who believe Clinton more than Lewinsky, most (57%) would not be swayed even if Lewinsky provided new evidence, such as tape recorded messages from her answering machine or personal gifts from Clinton.⁶⁸

Ignoring negative evidence based on political party goes well beyond the Trump and Clinton scandals. Politically-involved individuals even tune out news coverage that does not comport with the views of their political or ideological group.⁶⁹

From sports to children to politics to O.J. Simpson to war in Northern Ireland, social scientists have shown ingroup bias in action. Perfectly normal, ethical people are less willing to recognize improper behavior when it involves someone in their group. Should this same logic apply to prosecutors? Although there is a surprisingly small literature about ingroup behavior and lawyers,⁷⁰ there is reason to believe prosecutors would likewise be susceptible to ingroup bias.⁷¹

⁶⁵ Peter Baker & John F. Harris, *Clinton Admits to Lewinsky Relationship, Challenges Starr to End Personal 'Prying,'* WASH. POST, Aug. 18, 1998, at A01.

⁶⁶ See *Americans Unmoved By Prospect of Clinton, Lewinsky Testimony*, PEW RESEARCH CENTER (Aug. 4, 1998), <http://www.people-press.org/1998/08/04/americans-unmoved-by-prospect-of-clinton-lewinsky-testimony/>.

⁶⁷ See *id.*

⁶⁸ *Id.*

⁶⁹ See Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 328.

⁷⁰ For a discussion of the limited research on lawyers, see Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1, 12–16 (2009) (discussing Hugh Gunz & Sally Gunz, *Hired Professional to Hired Gun: An Identity Theory Approach to Understanding the Ethical Behaviour of Professionals in Non-Professional Organizations*, 60 HUM. REL. 851, 859 (2007)).

⁷¹ See Rebecca Hollander-Blumoff, *Social Psychology, Information Processing and Plea Bargaining*, 91 MARQ. L. REV. 163, 181 (2007) (explaining that group membership and bias could

Serving in the trenches together gives prosecutors a distinct identity. They are on the team that is “doing justice” and “locking up the bad guys.”⁷² As the late Professor Andrew Taslitz explained, prosecutors “want to paint a flattering portrait of the organization with which they identify.”⁷³ And for many prosecutors who work long hours side-by-side with their colleagues,⁷⁴ it is likely a salient identification.⁷⁵

To the extent prosecutors see themselves as “doing justice” by “taking the bad guys off the streets,” they are the ingroup to be contrasted with various outgroups—think of public defenders and the defendants themselves—whom the prosecutorial group see as adverse players. Finally, prosecutors can see their identity (doing justice and serving the good guys) as threatened when the news media and academics point out instances of prosecutorial misconduct. As noted in Part II above, there has been considerable reporting and scholarship identifying both individual and systemic cases of prosecutorial misconduct in recent decades.⁷⁶

Now circle back to what the social science literature tells us: a cohesive ingroup that perceives itself as under attack from various outgroups provides a recipe for ingroup bias.⁷⁷ It should therefore seem quite plausible that prosecutors might have trouble recognizing or acknowledging *Brady* violations. This does not mean these prosecutors, as a group, are unethical. It does not mean that prosecutors are indifferent to misconduct or that they condone *Brady* violations. It means that ethical prosecutors, as a group, are more susceptible to psychological error because ingroup bias alters their perceptions.⁷⁸ Prosecutors are, therefore, more prone to under-diagnose the *Brady* problems around them.

affect plea bargaining and that “lawyers may not be paradigms of rational actors in the plea bargaining context.”).

⁷² See Kay L. Levine & Ronald F. Wright, *Images and Allusions in Prosecutors’ Morality Tales*, 5 VA. J. CRIM. L. 38, 43 (2017) (“Our interviewees often explained their commitment to the job or described prosecution itself in terms of ‘wearing the white hat.’ The white hat is, at its most basic level, a metaphor for the prosecutor’s identity as the good guy in the criminal justice system.”).

⁷³ Andrew E. Taslitz, *Trying Not To Be Like Sisyphus: Can Defense Counsel Overcome Pervasive Status Quo Bias in the Criminal Justice System?*, 45 TEX. TECH. L. REV. 315, 363 (2012).

⁷⁴ See Gershowitz & Killinger, *supra* note 8.

⁷⁵ Many prosecutors strongly identify with their group. See, e.g., Levine & Wright, *supra* note 72, at 48–53 (recounting how some prosecutors label colleagues as “traitors” or turning to the “dark side” if they leave to become defense attorneys).

⁷⁶ The work of Bennett Gershan alone is voluminous. See BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT (1999); BENNETT L. GERSHMAN, CRIMINAL TRIAL ERROR AND MISCONDUCT (2015); see also *supra* Part II.

⁷⁷ See *supra* notes 43–68 and accompanying text.

⁷⁸ In some circumstances however, researchers have found a “black sheep effect.” To maintain a positive view of the group, members react very harshly to the ingroup member who committed misconduct in order to demonstrate that the deviant’s behavior is not consistent with the norms of the group. See Otten & Gordijn, *supra* note 41, at 167 (citing J. Marques & V. Y. Yzerbyt, *The Black Sheep Effect: Judgmental Extremity Toward Ingroup Members in Inter- and Intra-Group Situations*,

V. CONVINCING ETHICAL PROSECUTORS THERE IS A *BRADY* PROBLEM

How then do we convince ethical prosecutors that their colleagues have violated *Brady v. Maryland*? There is no magic solution, but there are a few possibilities that may help: (1) *Brady* training that is specifically designed to overcome cognitive bias; (2) a greater academic focus on inadvertent *Brady* violations that steps back from the “us versus them” approach; and (3) continued efforts to humanize the victims of *Brady* violations.

A. *Training*

Numerous scholars have advocated increased *Brady* training.⁷⁹ Professor Gershman’s approach is particularly instructive. In a 2012 article, Professor Gershman laid out a *Brady* Training Program with a course syllabus.⁸⁰ His framework includes all of the key legal issues that criminal procedure professors would cover in a traditional law school class, while also encouraging lawyers to look beyond the Supreme Court and consider local rules, professional norms, and governing ethics rules.⁸¹ Even more importantly, Professor Gershman’s framework includes ten hypothetical questions that a facilitator can use to help prosecutors analyze real-world situations, rather than just a list of legal rules.⁸²

In addition to teaching legal rules and reviewing real-world problems, *Brady* training should also alert prosecutors to cognitive biases that might affect them. As Professor Alafair Burke has explained, “[a]lthough research on debiasing suggests that awareness of cognitive biases is no panacea for perfect rationality, some evidence suggests that educating people about the cognitive processes that cause bias can improve the quality of decision making.”⁸³ In particular, Professor Burke points out that “empirical evidence demonstrates that the biasing effects of people’s

18 EUR. J. SOC. PSYCHOL. 287 (1988)). Nevertheless, research seems to indicate that “people tend to give ingroup members the ‘benefit of the doubt’ when intent is ambiguous but decidedly not when hostile intent is clear.” *Id.* at 174. In other words, “ingroup bias can be viewed as sort of a default reaction, operating automatically to protect ingroup positivity.” *Id.*

⁷⁹ See, e.g., Rachel E. Barkow, *Organizational Guidelines for the Prosecutor’s Office*, 31 CARDOZO L. REV. 2089 (2010); Yaroshefsky, *supra* note 10.

⁸⁰ See Gershman, *supra* note 26, at 533–49.

⁸¹ See *id.*

⁸² See *id.* at 544–49.

⁸³ Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 206 (2007).

pre-existing beliefs are mitigated when people are forced to articulate the opposing perspective.”⁸⁴

B. *Focusing on Accidental Brady Violations*

While prosecutors are engaged in training, academics and reformers should dial down the temperature a little and focus some of their attention on accidental rather than flagrant *Brady* violations. A Westlaw search for accidental or inadvertent prosecutorial error turns up a fraction of results compared to a search for flagrant or intentional prosecutorial misconduct.⁸⁵ Put simply, the news media, reform organizations, and academics devote a lot more ink to outrageous prosecutorial behavior than to negligent conduct. This is obviously to be expected from the media because they are in the business of selling copies and logging site hits. However, academics and reformers should have a broader agenda.

To be clear, I am not suggesting that academics and reformers should ignore overt misconduct. Prosecutors who commit intentional misconduct should be identified and fired, and their offices should be put in the limelight in order to pressure them to improve their training and hiring practices.⁸⁶ But that should not be the only focus, particularly in a world where social identity theory and ingroup bias cause an “us versus them” dynamic. In order to reach ethical prosecutors and convince them their colleagues are not performing adequately, the information campaign cannot be entirely negative. A relentless focus on only flagrant prosecutorial misconduct will cause an ingroup of prosecutors—even ethical prosecutors—to downplay or ignore evidence in front of them. Rather, academics and reformers should also highlight accidental *Brady* violations in an effort to make a less hostile appeal to ethical prosecutors.

C. *Humanizing Victims*

While advocates may want to redirect their attention to accidental *Brady* violations, they should stay the course with respect to the wrongful conviction movement. Over the last few decades, academics and reformers have drawn

⁸⁴ *Id.* at 207.

⁸⁵ On July 6, 2018, a search in the secondary sources database for “inadvertent or accident! or negligent /5 prosecutor! /5 error or misconduct” turned up less than 100 results. By contrast, a search “intentional or flagrant or purpose! or outrageous /5 prosecutor! /5 misconduct or error” returned more than 600 results.

⁸⁶ I have previously advocated naming and shaming those who engage in reversible *Brady* violations. See Gershowitz, *supra* note 15.

enormous attention to those who have been wrongfully convicted.⁸⁷ The innocence movement is credited not only with freeing the wrongly convicted, but also with contributing to the decline in the death penalty,⁸⁸ enhancing DNA testing, improving police investigation procedures, and increasing funding for indigent defense.⁸⁹ This focus on the suffering of victims—as opposed to the misconduct of prosecutors—could prove beneficial in fighting ingroup bias and convincing ethical prosecutors to recognize their profession has a *Brady* problem.

In studying mass atrocities, psychologists have found that dehumanization of the victims allows the ingroup to psychologically reject full responsibility and engage in moral disengagement.⁹⁰ By contrast, perceiving another person as human activates empathetic reactions.⁹¹ To the extent, academics and reformers can tell the story of those who have suffered *Brady* violations and humanize them, it may serve to reduce prosecutorial indifference to the *Brady* problem.

VI. CONCLUSION

There are tens of thousands of ethical prosecutors across the United States.⁹² At the same time, there are widespread *Brady* violations across the country. In some cases, prosecutors have engaged in flagrant misconduct, but more often *Brady* violations are probably accidental. This should not be surprising given that many prosecutors receive minimal *Brady* training and carry heavy caseloads. Yet, prosecutors—including ethical prosecutors—seem to resist the idea that their profession has a *Brady* problem.

Social identity theory and ingroup bias may help to explain why prosecutors downplay the *Brady* problem. Prosecutors likely identify strongly with their colleagues and constitute a salient social group. In turn, psychological research teaches us that when someone from the group is accused of misconduct, members

⁸⁷ See, e.g., BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* (2011); HUGO ADAM BEDAU ET AL., *IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES* (1994).

⁸⁸ The story, however, is more complicated than simply a change in public opinion because of exonerations. See Brandon L. Garrett, *The Decline of the Virginia (and American) Death Penalty*, 105 GEO. L.J. 661 (2017); Michael L. Radelet, *The Role of the Innocence Argument in Contemporary Death Penalty Debates*, 41 TEX. TECH. L. REV. 199 (2008).

⁸⁹ See Lara A. Bazelon, *The Long Goodbye: After the Innocence Movement, Does the Attorney-Client Relationship Ever End?*, 106 J. CRIM. L. & CRIMINOLOGY 681, 699–700 (2016).

⁹⁰ See Emanuele Castano & Roger Giner-Sorolla, *Not Quite Human: Infrahumanization in Response to Collective Responsibility for Intergroup Killing*, 90 J. PERSONALITY & SOC. PSYCHOL. 804, 805 (2006).

⁹¹ See *id.*; see also Jodi Halpern & Harvey M. Weinstein, *Rehumanizing the Other: Empathy and Reconciliation*, 26 HUM. RTS. Q. 561 (2004).

⁹² See U.S. BUREAU OF JUST. STAT., *PROSECUTORS IN STATE COURTS*, 2007 Tbl. 2 (2011).

of the ingroup are psychologically less able to recognize or accept that a group member has committed the misconduct. Social scientists have documented this phenomenon in children, sports fans, Democrats, Republicans, racial groups, and warring religious factions. Prosecutors should be no different.

While academics and advocacy groups should be commended for identifying *Brady* violations and advocating for change, the often-used language of fault may contribute to ethical prosecutors downplaying the scope of the *Brady* problem. Accordingly, academics and advocates should broaden their focus to hone in on not just flagrant prosecutorial misconduct, but also accidental *Brady* violations. In addition, we should continue to focus on wrongful convictions to humanize the victims of *Brady* violations. Finally, law schools and district attorneys' offices must do better on training prosecutors to recognize *Brady* material and disclose it. These modest steps will not be a panacea, but they should help ethical prosecutors to recognize that their profession has a *Brady* problem. That recognition, in turn, can continue to move us in the right direction of stamping out both flagrant and accidental *Brady* violations.