Notes

California's New Law Will Fail to Address the Larger Problem of *Brady* Violations

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Brady *violations have become a growing epidemic in California. As a result, California recently enacted a new law that amends section 141 of the Penal Code. The law changes the status of an "intentional"* Brady *violation from a misdemeanor to a felony, and imposes up to three years of prison time for those found guilty. This Note argues that this new law will fail to address the systematic problem of* Brady *violations. Part I discusses the legal history of the* Brady *decision and its progeny, as well as the shortcomings of the* Brady *rule. Part II explores the pervasiveness of* Brady *violations in California specifically. Part III explains why current safeguards are insufficient to control the problem. Part IV argues that California's new law will have little to no effect in reducing the number of* Brady *violations in California. Finally, Part V proposes alternative reforms that would address the fundamental problems that lead to* Brady *violations.*

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INTRODUCTION

In 1986, Mark Sodersten was found guilty of the rape and murder[1] of a twenty-six-year-old woman. However, the prosecution had virtually no direct physical evidence linking Sodersten to the crime.[2] Instead, the prosecution heavily relied on the testimony of two eyewitnesses: Nicole Wilson, the victim's three-year-old daughter, and Lester Williams, the victim's neighbor.[3] Two decades later, in the midst of Sodersten's habeas corpus proceedings, it was discovered that the prosecutor never disclosed four audiotapes of statements made by the two key witnesses, which were inconsistent with their trial testimony.[4] For example, one of the tapes

1. *In re* Sodersten, 53 Cal. Rtpr. 3d 572, 576 (Ct. App. 2007).
2. *Id.* at 619.
3. Mark Curriden, *Harmless Error? A New Study Claims Prosecutorial Misconduct Is Rampant in California*, A.B.A. J., Dec. 2010, at 18–19.
4. *Id.* at 18.

revealed that witness Lester Williams stated he did not remember the night of the murder because he was high on drugs.[5]

The Court of Appeal ruled that the tapes could have provided the defense with devastating impeachment evidence that likely would have resulted in a different verdict.[6] "This case," the court declared, "raises the one issue that is the most feared aspect of our system—that an innocent man might be convicted."[7] Unfortunately, Sodersten died six months prior to the ruling awarding him a new trial. He spent twenty-two years in prison, all the while maintaining his innocence.[8] Equally as troubling, the trial prosecutor never faced any consequences for neglecting to turn over the evidence, despite the fact that two of the recorded interviews were conducted by the prosecutor himself.[9]

Mark Sodersten's case is an example of what can happen when prosecutors fail to comply with their constitutional obligation to disclose exculpatory evidence to the defense, also known as a *Brady* violation.[10] The Supreme Court's decision in *Brady v. Maryland* was intended "to level the playing field between prosecutors and criminal defendants."[11] However, as exemplified by Mark Sodersten's case, it has not always been effective. California in particular has seen a growing epidemic of *Brady* violations.[12] It is a significant problem because it seriously undermines the fairness of criminal trials and can lead to wrongful convictions.[13]

While many prosecutors are honest and ethical, the reality remains that far too many *Brady* violations have occurred in California.[14] The structure of the prosecutorial system itself invites these *Brady* violations. Prosecutors hold an enormous amount of power in the criminal justice system, and they are given vast discretion in prosecuting cases.[15] At the same time, prosecutors are among the least accountable legal actors because the system currently lacks effective mechanisms to address

5. *Sodersten*, 53 Cal. Rptr. 3d at 622.

6. *Id.* at 617, 619.

7. *Id.* at 625.

8. Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xi (2015).

9. KATHLEEN M. RIDOLFI & MAURICE POSSLEY, N. CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at 5 (2010); *Sodersten*, 53 Cal. Rptr. 3d at 591–92.

10. Brady v. Maryland, 373 U.S. 83, 87 (1963).

11. Virginia Martucci, *Chapter 467: Re-discovering* Brady*, Shifting the Balance of Power in Criminal Discovery*, 47 U. PAC. L. REV. 462, 466 (2016).

12. United States v. Olsen, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, C.J., dissenting).

13. Margaret Z. Johns, *Unsupportable and Unjustified: A Critique of Absolute Prosecutorial Immunity*, 80 FORDHAM L. REV. 509, 510 (2011).

14. *See id.* at 513–14.

15. Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 276 (2007).

prosecutorial misconduct.[16] Since prosecutors hold absolute immunity from civil liability, they are empowered to act with impunity because there is no threat of monetary consequences.[17] Additionally, prosecutors rarely face professional discipline, so there are no career consequences in the vast majority of cases.[18] In California, judges have consistently failed to report prosecutors to the state bar and, in the event they are reported, the state bar rarely disciplines them.[19]

In response to the growing number of *Brady* violations, California recently enacted a new law that changes the status of an "intentional" *Brady* violation from a misdemeanor to a felony, and imposes up to three years of prison time for those found guilty.[20] This Note discusses why California's new law still fails to address the systematic problem of *Brady* violations. Part I discusses the legal history of the *Brady* decision and its progeny, as well as the shortcomings of the *Brady* rule. Part II explores the pervasiveness of *Brady* violations in California specifically. Part III explains why current safeguards are insufficient to control the problem. Part IV argues that California's new law will have little to no effect in reducing the number of *Brady* violations in California. Finally, Part V proposes alternative reforms that would address the fundamental problems that lead to *Brady* violations.

I. THE *BRADY* DECISION AND ITS SHORTCOMINGS

A. LEGAL BACKGROUND

The failure to turn over exculpatory evidence is one of the most common types of prosecutorial misconduct.[21] Examples of exculpatory evidence include third-party confessions to the crime, renunciations by the victim, eyewitness identifications of another person as the perpetrator or descriptions that are inconsistent with the defendant's appearance, and forensic evidence that excludes the defendant as the perpetrator or fails to link the defendant to the crime scene.[22] The prosecutor's obligation to disclose this type of evidence is a constitutional requirement that was first set out in *Brady v. Maryland*.[23]

16. *Id.* at 276–77; Hadar Aviram, *Legally Blind: Hyperadversarialism,* Brady *Violations, and the Prosecutorial Organizational Culture*, 87 ST. JOHN'S L. REV. 1, 2 (2013).

17. *See* Imbler v. Pachtman, 424 U.S. 409, 422 (1976).

18. *See* Kevin C. McMunigal, *Prosecutorial Disclosure Violations: Punishment vs. Treatment*, 64 MERCER L. REV. 711, 713 (2013).

19. RIDOLFI & POSSLEY, *supra* note 9, at 3.

20. 2016 Cal. Stat. Ch. 879, Sec. 1 (A.B. 1909).

21. Davis, *supra* note 15, at 279.

22. Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 424 (2010) [hereinafter Jones, *A Reason to Doubt*].

23. 373 U.S. 83, 87 (1963).

In *Brady*, the United States Supreme Court held that a prosecutor's failure to disclose such evidence is a violation of the defendant's due process rights.[24] Specifically, the *Brady* rule requires prosecutors to disclose evidence materially favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.[25] "Evidence is 'favorable' if it either helps the defendant or hurts the prosecution . . . ."[26] The evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[27] Importantly, the rule applies regardless of whether the prosecutor was acting in good or bad faith.[28]

In subsequent cases, the Supreme Court further expanded the prosecutor's discovery obligations under *Brady*. The rule now requires that exculpatory evidence be turned over even in the absence of a request from the defense.[29] Exculpatory evidence also includes impeachment evidence.[30] Impeachment evidence consists of information that "casts doubt on the ability of the witness to accurately perceive, recall, or report the facts related to the witness's testimony, including mental instability, substance abuse, memory loss, or any other physical or mental impairment."[31] Additionally, it includes information regarding incentives that are given to witnesses to encourage or coerce them to testify on behalf of the prosecution.[32]

The Court has also determined that even if the prosecutor is personally unaware of the evidence, the state is not relieved from its discovery obligations.[33] "[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[34] In sum, there are three components to a *Brady* violation: (1) the evidence is favorable to exculpation or impeachment; (2) the evidence is either willfully or inadvertently withheld by the prosecution; and (3) the withholding of the evidence is prejudicial to the defendant.[35]

24. *Id.*
25. United States v. Bagley, 473 U.S. 667, 675 (1985).
26. *In re* Sassounian, 887 P.2d 527, 532 (Cal. 1995).
27. *Bagley*, 473 U.S. at 682.
28. *Brady*, 373 U.S. at 87.
29. Kyles v. Whitley, 514 U.S. 419, 433–34 (1995).
30. *Bagley*, 473 U.S. at 676.
31. Jones, *A Reason to Doubt*, *supra* note 22, at 426.
32. Jones, *A Reason to Doubt*, *supra* note 22, at 426.
33. *Kyles*, 514 U.S. at 437.
34. *Id.*
35. Strickler v. Greene, 527 U.S. 263, 281–82 (1999).

B. THE "MATERIALITY" REQUIREMENT

Despite its seemingly expansive protection, *Brady* has failed to have a meaningful impact on a defendant's right to a fair trial. This is in large part due to the stringent materiality standard that was defined in the cases following *Brady*. In *Kyles v. Whitley*, the Court provided further clarity in regard to the standard:

> 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. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."[36]

The defendant bears the heavy burden of proving that the evidence was material.[37]

The materiality requirement to establish a *Brady* violation is a demanding and difficult standard for a defendant to meet.[38] Its narrow definition only requires the prosecutor to disclose exculpatory evidence that, "if suppressed, would deprive the defendant of a fair trial."[39] Moreover, it gives the court discretion as to whether a new trial should be granted.[40] This requires the judge to make a speculative determination about whether or not the evidence would have affected the outcome of the trial in hindsight, looking back on a trial that has ended with a determination of guilt.[41]

Using this type of retrospective analysis is not ideal. It can cause reasonable minds to differ, and the decision is rarely favorable to the defendant. *Strickler v. Greene* provides a salient example.[42] There, the defendant was charged with capital murder and was convicted and sentenced to death.[43] Anne Stoltzfus, the prosecution's key eyewitness to the actual crime, testified that she saw the defendant and his accomplice abduct the victim in a mall parking lot.[44] However, it was later discovered during the defendant's habeas corpus proceedings that the prosecutor did not turn over exculpatory evidence contained in the police file.[45] The

36. *Kyles*, 514 U.S. at 434 (quoting United States v. Bagley, 473 U.S. 667, 678 (1985)).

37. *See* United States v. Agurs, 427 U.S. 97, 106 (1976).

38. Lisa M. Kurcias, Note, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69 FORDHAM L. REV. 1205, 1214 (2000).

39. *Bagley*, 473 U.S. at 675.

40. *See* Brian Gregory, Note, Brady *Is the Problem: Wrongful Convictions and the Case for "Open File" Criminal Discovery*, 46 U.S.F. L. REV. 819, 825 (2012) (noting that the materiality of *Brady* violations is discretionary).

41. *Id.*

42. 527 U.S. 263 (1999).

43. *Id.* at 266.

44. *Id.* at 270.

45. *Id.* at 266.

evidence consisted of letters written by Stoltzfus to the detective investigating the case and notes taken during an interview with Stoltzfus.[46] Specifically, the documents revealed that Stoltzfus did not initially remember being at the mall and had only a vague recollection of the abduction, contradictory to her trial testimony.[47] Additionally, the detective's notes revealed that Stoltzfus could not initially identify the defendant in a photo lineup.[48] This evidence cast serious doubt on Stoltzfus' testimony.[49]

Despite the importance of this evidence, the Supreme Court held that the defendant received a fair trial even in the absence of the exculpatory evidence because there was not a "reasonable probability that his conviction or sentence would have been different had the suppressed documents been disclosed."[50] The Court reasoned that even if the defense could have impeached Stoltzfus' testimony, two other eyewitnesses placed the defendant at the mall on the day of the murder.[51]

However, this fails to take into account the fact that Stoltzfus was the only witness who testified that the defendant was the aggressor and initiated the abduction.[52] While the dissenting opinion stressed that this testimony could have influenced the jury's decision on whether or not to impose the death penalty, the majority disagreed.[53] There was also disagreement at the lower court level, and the majority acknowledged that "[t]he differing judgments of the District Court and the Court of Appeals attest to the difficulty of resolving the issue of prejudice."[54] This demonstrates that even devastating impeachment evidence may not rise to the level of materiality required for a *Brady* violation, and courts are often deferential to the prosecution in "close calls."

In cases such as *Strickler*, where the judge determines that the exculpatory evidence is immaterial, the conviction stands, and the judge is not required to report the prosecutor to the state bar.[55] California only requires judges to report misconduct when it results in reversal or modification of the judgment.[56] This means that a prosecutor can intentionally withhold exculpatory evidence and nonetheless escape any

46. *Id.*
47. *Id.* at 274.
48. *Id.* at 273.
49. *Id.* at 273.
50. *Id.* at 264.
51. *Id.* at 293–94.
52. *Id.* at 304 (Souter, J., dissenting).
53. *Id.* at 302 (Souter, J., dissenting).
54. *Id.* at 289.
55. Johns, *supra* note 13, at 517.
56. Johns, *supra* note 13, at 517.

consequence if the court finds that the evidence was immaterial.[57] Furthermore, a judge's conclusion that the evidence was immaterial is not equivalent to a trivial mistake on the part of the prosecutor since the egregiousness of the nondisclosure is not relevant to the determination of materiality.[58] Thus, prosecutors know that even if their misconduct is discovered, the consequence of a conviction reversal is rare because the materiality requirement is such a high bar for the defendant to meet.[59] This enables prosecutors to essentially "play the odds."[60]

C. *BRADY* IN THE CONTEXT OF PLEA BARGAINS

In practice, the *Brady* rule has no effect on the majority of criminal cases.[61] In *United States v. Ruiz*, the Court held that the Constitution does not require the prosecution to disclose material impeachment evidence prior to a plea agreement.[62] Prior to the Court's ruling in *Ruiz*, the Ninth Circuit had adopted a per se rule where a *Brady* violation automatically rendered a plea invalid because it precluded the plea from being "knowing and voluntary," two requirements of a valid plea bargain.[63] However, in *Ruiz*, the Supreme Court ultimately disagreed with the Ninth Circuit's conclusion that a guilty plea is not voluntary unless it is made after the full disclosure of material impeachment evidence.[64] Whether this holding applies to all exculpatory evidence is technically still an undecided question, but it almost certainly does since the Court previously held that "there is 'no such distinction between impeachment evidence and exculpatory evidence [for the purposes of *Brady*].'"[65]

Because the *Brady* rule does not apply to any case resolved through a plea bargain, if defense attorneys do not discover the exculpatory information through their own investigation, their "advice to [their] client[s] about whether to take the plea will not be fully informed."[66] Many commentators have argued that the decision to plead guilty is not necessarily based on whether the defendant is innocent, but instead on

57. Kurcias, *supra* note 38, at 1215.
58. Johns, *supra* note 13, at 517.
59. Davis, *supra* note 15, at 280–81.
60. Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 690 (2006).
61. Gregory, *supra* note 40, at 827.
62. 536 U.S. 622, 629 (2002).
63. Michael Nasser Petegorsky, Note, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory* Brady *Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3621 (2013) (discussing the Ninth Circuit's holding in Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995)).
64. *Id.* at 3623.
65. Gregory, *supra* note 40, at 825 (quoting United States v. Bagley, 473 U.S. 667, 676 (1985)).
66. Davis, *supra* note 15, at 286.

the defense's assessment of the strength of the prosecutor's case.[67] Additionally, prosecutors will add on as many charges as possible so as to make it too risky for a defendant to go to trial, even if he or she is innocent.[68] This is significant because ninety-seven percent of felony cases resolve without trial, and the majority through plea bargains, where there is a notable lack of judicial scrutiny.[69] Therefore, prosecutors are not required to disclose exculpatory evidence in the vast majority of criminal cases, further limiting the practical reach of *Brady*.[70]

D. *BRADY*'S REMEDY

Even when a *Brady* violation is discovered, the only remedy for the defendant is a new trial.[71] *Brady* does not require that prosecutors be sanctioned for violating their discovery obligations; it only acknowledges that a defendant's due process rights have been violated, which can be grounds for a new trial.[72] Thus, unless states enforce their ethical rules, prosecutors are left in no worse position than had they originally disclosed the evidence. Consequently, without adequate enforcement, there is no meaningful incentive for prosecutors to err on the side of disclosure.

II. *BRADY* VIOLATIONS ARE A SIGNIFICANT PROBLEM IN CALIFORNIA

In *Brady*, the Court declared that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair."[73] However, as *Brady* essentially imposes an affirmative duty on the prosecution to help the defense make its case, it has not always been followed.[74] In fact, empirical research demonstrates that *Brady* violations have become the norm rather than the exception.[75] Former Judge Alex Kozinski of the Ninth Circuit Court of Appeals stated that "*Brady* violations have

67. Petegorsky, *supra* note 63, at 3612.

68. Kozinski, *supra* note 8, at xxii.

69. Johns, *supra* note 13, at 513, 517.

70. Gregory, *supra* note 40, at 827.

71. *See generally* Brady v. Maryland, 373 U.S. 83 (1963).

72. *Id.* at 87. *But see* CAL. R. OF PROF'L CONDUCT 5-110(D) (Nov. 2, 2017) ("The prosecutor in a criminal case shall [m]ake timely disclosure to the defense of all evidence or information known to the prosecutor that the prosecutor knows or reasonably should know tends to negate the guilt of the accused . . . .").

73. *Brady*, 373 U.S. at 87.

74. Aviram, *supra* note 16, at 17.

75. Bennett L. Gershman, *Bad Faith Exception to Prosecutorial Immunity for* Brady *Violations*, HARV. C.R.-C.L. L. REV. 1, 31 (Aug. 10, 2010), http://harvardcrcl.org/bad-faith-exception-to-prosecutorial-immunity-for-brady-violations-by-bennett-gershman [hereinafter Gershman, *Bad Faith Exception*].

reached epidemic proportions in recent years," and that "prosecutors don't care about *Brady* because courts don't *make* them care."[76]

A. NORTHERN CALIFORNIA INNOCENCE PROJECT STUDY

In 2010, the Northern California Innocence Project conducted a statewide study on prosecutorial misconduct.[77] The study reviewed over 4,000 California state and federal appellate decisions from 1997 to 2009 in which there was an allegation of prosecutorial misconduct.[78] The courts found prosecutorial misconduct in 707 cases.[79] *Brady* violations were responsible for 66 of the 707 misconduct findings and were identified as one of the most pervasive forms of prosecutorial misconduct in the study.[80]

The Innocence Project's study provides a good frame of reference for the significance of the problem, but as acknowledged by the study, its findings probably grossly underestimate the actual number of cases involving *Brady* violations.[81] Prosecutorial misconduct is often difficult to uncover, which is especially true in the case of *Brady* violations.[82] By their very nature, *Brady* violations are difficult to uncover because "they involve evidence that is hidden from the defense."[83] Consequently, it is very difficult for the defense to find out if the prosecutor is complying with his or her disclosure obligations.[84] Furthermore, the extensive re-investigation effort that is necessary to uncover a post-conviction *Brady* violation is rarely conducted.[85] This is likely why most *Brady* violations are discovered by pure accident.[86] Thus, because the majority of violations are never discovered, the problem is more widespread than the number of reported violations indicate.[87] Indeed, many scholars have argued that the disclosure violations that have come to light are only the tip of the iceberg.[88]

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76. United States v. Olsen, 737 F.3d 625, 631 (9th Cir. 2013) (Kozinski, C.J., dissenting).
77. RIDOLFI & POSSLEY, *supra* note 9, at 2.
78. RIDOLFI & POSSLEY, *supra* note 9, at 2.
79. RIDOLFI & POSSLEY, *supra* note 9, at 2.
80. RIDOLFI & POSSLEY, *supra* note 9, at 25, 36.
81. Johns, *supra* note 13, at 513.
82. Johns, *supra* note 13, at 513, 521.
83. RIDOLFI & POSSLEY, *supra* note 9, at 37.
84. Kozinski, *supra* note 8, at xxii.
85. Sara Gurwitch, *When Self-Policing Does Not Work: A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Evidence to the Defense*, 50 SANTA CLARA L. REV. 303, 306–07 (2010).
86. Jones, *A Reason to Doubt*, *supra* note 22, at 433.
87. Davis, *supra* note 15, at 278.
88. *See* McMunigal, *supra* note 18, at 721.

B. ORANGE COUNTY SCANDAL

A recent scandal in Orange County provides further evidence of the pervasiveness of the problem in California. In 2011, Orange County attracted national attention for allegations of prosecutorial misconduct in a high-profile murder case.[89] Due to a child custody dispute, Scott Dekraai killed eight people in Seal Beach, including his ex-wife.[90] It was the worst mass shooting in Orange County's history.[91]

In March 2015, Orange County Superior Court Judge Thomas Goethals felt compelled to remove the entire Orange County District Attorney's 250-lawyer office from the case after evidence was discovered that the office had systematically hidden evidence and colluded with jailhouse informants for false testimony.[92] The evidence revealed that jailers in the county had moved a jailhouse informant next to Dekraai's cell to get him to incriminate himself, a violation of Dekraai's constitutional rights.[93] Dekraai's attorney, Scott Sanders, alleged that the prosecutors knew about this practice but failed to turn over the information to the defense in violation of *Brady*.[94]

After this revelation, it came out that the misconduct had been occurring for decades.[95] A secret database that was used by the Orange County District Attorney's office for over twenty-five years contained exculpatory data that was never produced despite numerous discovery orders.[96] Thus, prosecutors who knew about the database had violated *Brady* potentially hundreds or even thousands of times.[97] As this practice had been going on for years, it potentially tainted numerous convictions.[98]

The Orange County scandal presents an example of how *Brady* violations can be pervasive and concealed for decades before being

89. Matt Ferner, *Cheating California Prosecutors Face Prison Under New Law*, HUFFINGTON POST (Oct. 1, 2016, 7:15 PM), http://www.huffingtonpost.com/entry/california-prosecutor-misconduct felony_us_57eff9b7e4b024a52d2f4d65.

90. Lorelei Laird, *Secret Snitches: California Case Uncovers Long-Standing Practice of Planting Jailhouse Informants*, A.B.A. J., May 2016, at 46, 48 [hereinafter Laird, *Secret Snitches*].

91. *Id.* at 46.

92. *Id.*; Christopher Goffard, *Prosecutors Who Withhold or Tamper with Evidence Now Face Felony Charges*, L.A. TIMES (Oct. 3, 2016, 7:00 PM), http://www.latimes.com/local/lanow/la-me-prosecutor-misconduct-20161003-snap-story.html; Martucci, *supra* note 11, at 470–71.

93. Lorelei Laird, *California Makes It a Felony for Prosecutors to Withhold or Alter Exculpatory Evidence*, A.B.A. J., (Oct. 5, 2016, 3:00 PM), http://www.abajournal.com/news/article/california_makes_it_a_felony_for_prosecutors_to_withhold_or_alter_exculpato [hereinafter Laird, *California Makes it a Felony*].

94. *Id.*

95. Martucci, *supra* note 11, at 472–73.

96. Martucci, *supra* note 11, at 472–73.

97. Laird, *Secret Snitches*, *supra* note 90, at 46.

98. Laird, *California Makes It a Felony*, *supra* note 93.

discovered.[99] And yet, even with the national attention that the scandal drew, there have been very few consequences for the accused prosecutors in the Orange County District Attorney's office.[100]

III. CURRENT SAFEGUARDS ARE INSUFFICIENT

There is a general lack of accountability for prosecutors in the criminal justice system.[101] Even though prosecutors have a constitutional obligation to turn over exculpatory evidence, there are virtually no consequences if they do not.[102] In 1976, the Supreme Court ruled that prosecutors have absolute immunity from civil liability.[103] Thus, prosecutors do not fear the threat of monetary consequences when they make decisions regarding whether or not to comply with their obligation to disclose exculpatory evidence.[104] Additionally, there are only weak professional constraints on prosecutors, and prosecutors are rarely disciplined when they violate their disclosure obligations under *Brady*.[105] Prosecutors often go unpunished because judges fail to report the misconduct or the California State Bar opts not to impose disciplinary sanctions.[106] Moreover, prosecutors are easily able to evade the rule since most *Brady* violations are never discovered in the first place.[107] This lack of accountability has allowed prosecutors to act with virtual impunity.[108]

A. PROSECUTORS HAVE ABSOLUTE IMMUNITY FROM CIVIL LIABILITY

In *Imbler v. Pachtman*, the Supreme Court substantially narrowed one of the few remaining avenues for deterring prosecutorial misconduct by holding that prosecutors cannot be held civilly liable under a § 1983 lawsuit.[109] The Court reached this decision despite the fact that executive branch officials only receive qualified immunity under common law.[110] The Court reasoned that affording prosecutors only qualified immunity would have an adverse effect on the criminal justice system because

99. Martucci, *supra* note 11, at 472–73.
100. Laird, *California Makes It a Felony*, *supra* note 93.
101. Randall Grometstein & Jennifer M. Balboni, *Backing Out of a Constitutional Ditch: Constitutional Remedies for Gross Prosecutorial Misconduct Post* Thompson, 75 ALB. L. REV. 1243, 1268 (2012).
102. RIDOLFI & POSSLEY, *supra* note 9, at 76.
103. McMunigal, *supra* note 18, at 713.
104. RIDOLFI & POSSLEY, *supra* note 9, at 76.
105. Grometstein & Balboni, *supra* note 101, at 1268; McMunigal, *supra* note 18, at 713.
106. RIDOLFI & POSSLEY, *supra* note 9, at 3.
107. Gershman, *Bad Faith Exception*, *supra* note 75, at 4; McMunigal, *supra* note 18, at 713.
108. RIDOLFI & POSSLEY, *supra* note 9, at 60.
109. 424 U.S. 409, 431 (1976) (interpreting 42 U.S.C. § 1983 (2012)).
110. Gershman, *Bad Faith Exception*, *supra* note 75, at 20.

prosecutors would have greater difficulty in meeting the standard than other executive branch officials such as governors and police officers.[111]

Imbler's holding applies to all instances of prosecutorial misconduct, regardless of bad faith or malicious conduct.[112] Thus, prosecutors are immune from any real consequences regardless of whether their acts are intentional.[113] The Court decided that it is "better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."[114] *Imbler* created a broad rule of absolute immunity for prosecutors that applies when they are operating in their role as an advocate.[115] The Court's decision effectively altered the balance of power in the criminal justice system more heavily in favor of the prosecutor.[116]

Recently, in 2011, the Court decided whether a prosecutorial agency or municipality could be held civilly liable for a *Brady* violation under a § 1983 lawsuit.[117] The Court determined that, for a plaintiff to prevail, the plaintiff must show "a pattern of similar constitutional violations," which could establish "deliberate indifference" on the part of the prosecutorial agency in failing to train its attorneys regarding compliance with *Brady*.[118] However, deliberate indifference is an extremely difficult standard to meet, and it is unlikely that a plaintiff will ever be able to succeed in holding a prosecutorial agency liable for civil damages under the standard.[119]

In allowing prosecutors to have absolute immunity from civil liability, the Supreme Court justified its conclusion by stating that there were other remedial mechanisms by which prosecutors would be held accountable, namely criminal sanctions and professional discipline.[120] Despite the Court's confidence in these existing legal remedies, they have proven wholly ineffective in deterring *Brady* violations.[121] The Court in *Imbler* failed to take into account the special nature of the *Brady* rule and the ease with which prosecutors can escape consequences.[122]

111. Gershman, *Bad Faith Exception*, *supra* note 75, at 21.
112. Johns, *supra* note 13, at 521.
113. RIDOLFI & POSSLEY, *supra* note 9, at 75.
114. *Imbler*, 424 U.S. at 428 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).
115. Gershman, *Bad Faith Exception*, *supra* note 75, at 28.
116. Gershman, *Bad Faith Exception*, *supra* note 75, at 3.
117. Connick v. Thompson, 563 U.S. 51, 72 (2011) (Scalia, J., concurring).
118. *Id.* at 52.
119. Gregory, *supra* note 40, at 832.
120. Grometstein, *supra* note 101, at 1249; Johns, *supra* note 13, at 516.
121. Johns, *supra* note 13, at 521.
122. Gershman, *Bad Faith Exception*, *supra* note 75, at 28.

B. THERE IS A LACK OF DISCIPLINE FOR PROSECUTORS THAT VIOLATE *BRADY*

The Supreme Court's assumption that prosecutors would be deterred by the threat of disciplinary sanctions has proven to be entirely inaccurate.[123] Consequently, *Brady* has failed to produce a meaningful change in the criminal justice system, and instead, has become an illusory protection because it lacks enforcement and consequences.[124] Even in cases where a *Brady* violation occurs, the appropriate disciplinary bodies rarely take action.[125]

Judges routinely ignore their duty to report violators to the state bar despite their statutory obligation to do so imposed by section 6086.7 of the California Business and Professions Code.[126] The reporting statute does not afford judges the discretion to decide whether to report misconduct, even non-egregious conduct.[127] The statute recognizes that *any* conduct that results in a reversal is serious enough to require notification of the state bar.[128] Yet, there is little evidence to suggest that judges are meeting their reporting obligations under California law.[129] As former Judge Alex Kozinski put it, prosecutors will continue to engage in misconduct because there are "state judges who are willing to look the other way."[130] In part, this may be due to a judicial bias in favor of prosecutors as many judges were appointed during tough-on-crime eras.[131] Moreover, many judges were former prosecutors,[132] which may add to their bias.

The California State Bar has also been reluctant to discipline the prosecutors who are reported.[133] The State Bar has consistently failed to discipline prosecutors even in the most obvious and easily provable cases of disclosure violations where the court was explicitly clear that a violation had occurred.[134] The Innocence Project study concluded that only ten prosecutors were disciplined over the nearly thirteen-year

123. RIDOLFI & POSSLEY, *supra* note 9, at 71.

124. *See* Gershman, *Bad Faith Exception*, *supra* note 75, at 6.

125. Johns, *supra* note 13, at 518–19.

126. Johns, *supra* note 13, at 518–19.

127. RIDOLFI & POSSLEY, *supra* note 9, at 49.

128. RIDOLFI & POSSLEY, *supra* note 9, at 49.

129. RIDOLFI & POSSLEY, *supra* note 9, at 48.

130. Maura Dolan, *U.S. Judges See 'Epidemic' of Prosecutorial Misconduct in State*, L.A. TIMES (Jan. 31, 2015, 7:20 PM), http://www.latimes.com/local/politics/la-me-lying-prosecutors-20150201-story.html.

131. Martucci, *supra* note 11, at 473.

132. ALL. FOR JUSTICE, BROADENING THE BENCH: PROFESSIONAL DIVERSITY AND JUDICIAL NOMINATIONS 8 (2016), http://www.afj.org/wp-content/uploads/2014/11/Professional-Diversity-Report.pdf.

133. RIDOLFI & POSSLEY, *supra* note 9, at 3.

134. Gershman, *Bad Faith Exception*, *supra* note 75, at 34.

period from 1997 to 2009.[135] The study also found that many of the undisciplined prosecutors had engaged in misconduct more than once.[136] However, this is not due to a general reluctance by the California State Bar to discipline attorneys. As reported in the *California State Bar Journal*, California attorneys were publicly disciplined 4,741 times but only ten disciplinary reports involved prosecutors, and only six involved the handling of a criminal case.[137] Of the six prosecutors that were disciplined in the handling of a criminal case, three were suspended from the practice of law, while two were publicly reprimanded and one was placed on probation.[138] Not a single prosecutor has been disbarred in California for prosecutorial misconduct.[139]

The lack of discipline for *Brady* violations is not even unique to California. In 2003, the Center for Public Integrity conducted one of the most comprehensive studies of prosecutorial misconduct across the nation and concluded that only two percent of cases in the past fifty years resulted in public sanctions.[140] *Brady* violations were responsible for a large majority of the misconduct that resulted in reversed convictions.[141]

IV. CALIFORNIA'S NEW LAW WILL FAIL TO REMEDY *BRADY* VIOLATIONS

In response to the growing number of *Brady* violations, California recently passed a new law that raises the charge from a misdemeanor to a felony for intentionally withholding exculpatory evidence.[142] The law amended section 141 of the Penal Code and reads as follows:

> (c) A prosecuting attorney who intentionally and in bad faith alters, modifies, or withholds any physical matter, digital image, video recording, or relevant exculpatory material or information, knowing that it is relevant and material to the outcome of the case, with the specific intent that the physical matter, digital image, video recording, or relevant exculpatory material or information will be concealed or destroyed, or fraudulently represented as the original evidence upon a trial, proceeding, or inquiry, is guilty of a felony punishable by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months, or two or three years.[143]

Depending on the severity of the violation, a prosecutor now faces up to three years in prison.[144] However, by increasing the penalty, the law only reinforces what prosecutors already have a constitutional obligation to

135. RIDOLFI & POSSLEY, *supra* note 9, at 3.
136. RIDOLFI & POSSLEY, *supra* note 9, at 57.
137. RIDOLFI & POSSLEY, *supra* note 9, at 54.
138. RIDOLFI & POSSLEY, *supra* note 9, at 55.
139. RIDOLFI & POSSLEY, *supra* note 9, at 56.
140. Davis, *supra* note 15, at 278, 292.
141. Gershman, *Bad Faith Exception*, *supra* note 75, at 13.
142. Goffard, *supra* note 92.
143. 2016 Cal. Stat. Ch. 879, Sec. 1 (AB 1909).
144. Goffard, *supra* note 92; Ferner, *supra* note 89.

do—not violate *Brady*. This section addresses why the new law will be deficient in rectifying the *Brady* problem in California.

A. THE LAW WILL FAIL TO DETER EVEN THE MOST EGREGIOUS *BRADY* VIOLATIONS

The possibility of criminal sanctions was one of the remedies that the Supreme Court identified as a deterrent for prosecutorial misconduct in lieu of civil liability.[145] However, criminal prosecutions for prosecutorial misconduct are extremely rare.[146] There has not been a single criminal prosecution of a prosecutor in California since *Imbler* was decided forty years ago.[147] Indeed, former Judge Alex Kozinski wrote that the Supreme Court's suggestion that prosecutors would be held accountable through criminal prosecution "was dubious in 1976 and is absurd today."[148] It is very unlikely that prosecutors will prosecute one of their own.[149] Moreover, the fact that the law in California previously imposed a misdemeanor, and failed to redress the problem, shows that the threat of criminal sanctions is not an effective deterrent.

Even nationwide, there have been very few criminal charges against prosecutors for deliberate *Brady* violations.[150] Although prosecutors can be criminally prosecuted for violating constitutional protections under 18 U.S.C. § 242, only one prosecutor has ever been convicted under the statute.[151] Additionally, with the exception of a couple of very high-profile cases, state penal code laws that require criminal penalties for prosecutors that violate *Brady* are so infrequently enforced that the possibility of prosecution is almost nonexistent.[152]

The prosecution of Ken Anderson is one of the exceedingly rare examples of a prosecutor facing jail time for withholding evidence. In 1987, Anderson prosecuted Michael Morton for the murder of Morton's wife.[153] Anderson violated *Brady* when he intentionally did not inform the defense of a blood-stained bandana that was discovered near Morton's house.[154] The jury convicted Morton in the absence of this crucial evidence supporting Morton's innocence.[155] The evidence was eventually tested for DNA, which not only exonerated Morton, but

145. Johns, *supra* note 13, at 520.
146. Johns, *supra* note 13, at 521.
147. Gershman, *Bad Faith Exception*, *supra* note 75, at 33.
148. Kozinski, *supra* note 8, at xxxix.
149. Kozinski, *supra* note 8, at xxxix.
150. Gershman, *Bad Faith Exception*, *supra* note 75, at 33.
151. Johns, *supra* note 13, at 520.
152. Gurwitch, *supra* note 85, at 318–19.
153. Joe Nocera, Opinion, *A Texas Prosecutor Faces Justice*, N.Y. TIMES, Nov. 13, 2012, at A27.
154. *Id.*
155. *Id.*

pointed to another man.[156] Despite Anderson's blatant concealment of critical evidence, he only received a ten-day jail sentence.[157] However, even though the jail sentence was "insultingly short" in comparison to the twenty-five years that Michael Morton spent behind bars, because "prosecutors are so rarely held accountable for their misconduct, the sentence [was] remarkable nonetheless."[158]

The other rare instance of a prosecutor receiving jail time for withholding exculpatory evidence is that of Mike Nifong. Nifong was the prosecutor in a high-profile case involving members of the Duke University lacrosse team.[159] Nifong was prosecuted for withholding exculpatory DNA test results.[160] Similar to Ken Anderson, Nifong only received nominal criminal punishment: one day in jail.[161] Both these cases are unusual in that they garnered national publicity, which likely motivated the imposition of punishment.[162]

It is noteworthy that none of the prosecutors in the Orange County scandal have faced any consequences for their involvement in the blatant cover-up of decades-long *Brady* violations.[163] This is ironic because the Orange County scandal played a large role in prompting the proposal for the new law.[164] The California Attorney General's office has consistently argued that the Orange County Sheriff's Department was solely responsible for the misconduct.[165] However, according to Laura Fernandez of Yale Law School, who studies prosecutorial misconduct, the Orange County scandal was a "massive cover-up by both law enforcement and prosecutors—a cover-up that appears to have risen to the level of perjury and obstruction of justice."[166] The scandal affected at least three dozen cases, but not a single prosecutor has faced any consequences, let alone criminal consequences.[167]

The effectiveness of the new law as a deterrent depends on courts' ability to identify prosecutorial misconduct and the willingness of the

156. *Id.*

157. Editorial, *A Prosecutor Is Punished*, N.Y. TIMES, Nov. 9, 2013, at A20.

158. *Id.*

159. Gurwitch, *supra* note 85, at 318–19.

160. Gurwitch, *supra* note 85, at 318–19.

161. Jaime Gordon, *Prosecutor in Duke Lacrosse Case Mike Nifong Faces More Misconduct Allegations*, DUKE CHRON. (July 7, 2016), http://www.dukechronicle.com/article/2016/07/prosecutor-in-duke-lacrosse-case-mike-nifong-faces-more-misconduct-allegations.

162. Gurwitch, *supra* note 85, at 319.

163. Laird, *Secret Snitches*, *supra* note 90, at 48.

164. Goffard, *supra* note 92.

165. Laird, *Secret Snitches*, *supra* note 90, at 48.

166. Radley Balko, *The Jaw-Dropping Police/Prosecutor Scandal in Orange County, Calif.*, WASH. POST (July 13, 2015), https://www.washingtonpost.com/news/the-watch/wp/2015/07/13/the-jaw-dropping-policeprosecutor-scandal-in-orange-county-calif/.

167. *Id.*; Laird, *Secret Snitches*, *supra* note 90, at 48.

California Attorney General's office to actually prosecute those that are identified. As discussed above, it is unlikely that either of those things will happen. Thus, the issue is not that penalties for *Brady* violations are too lenient, but rather that penalties are not even being imposed in the first place. The fact that the new law imposes a harsher penalty is irrelevant if the law is not being enforced. Therefore, the law will likely fail to deter even the most egregious *Brady* violations.

B. THE LAW WILL HAVE NO EFFECT ON THE MAJORITY OF *BRADY* VIOLATIONS

Intentional *Brady* violations "occur when the prosecutor fully understands the *Brady* disclosure duty, is aware of the existence of favorable evidence in the government's possession, appreciates the exculpatory or impeachment value of the evidence, but intentionally withholds the evidence to gain a tactical advantage in the litigation."[168] While some *Brady* violations are in fact intentional and potentially malicious, the majority of violations occur due to the conviction-oriented behavior inherent in the prosecutorial role.[169] In fact, of the twenty-nine cases that former Judge Alex Kozinski noted in his dissenting opinion in *United States v. Olsen*, less than half of them involved intentional violations.[170]

Research indicates that the organizational culture of prosecutor offices is responsible for far more instances of *Brady* violations than malicious conduct on the part of individual prosecutors.[171] There are a variety of psychological factors that can cause even well-motivated prosecutors to commit disclosure violations.[172] Specifically, psychological errors such as confirmation bias and tunnel vision likely play a large role in the failure to disclose exculpatory evidence.[173] Tunnel vision and confirmation bias can subconsciously cause a prosecutor to only look for evidence that establishes a defendant's guilt, and in turn, ignore any evidence that is contradictory.[174] Tunnel vision can cause prosecutors to ignore, overlook or dismiss evidence as being irrelevant or unreliable.[175] Confirmation bias can cause prosecutors to discount evidence that is contrary to their theory of guilt.[176]

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168. Jones, *A Reason to Doubt*, *supra* note 22, at 428.

169. Aviram, *supra* note 16, at 4.

170. Jerry P. Coleman & Jordan Lockey, Brady *"Epidemic" Misdiagnosis: Claims of Prosecutorial Misconduct and the Sanctions to Deter It*, 50 U.S.F. L. REV. 199, 226 (2016).

171. Aviram, *supra* note 16, at 42.

172. McMunigal, *supra* note 18, at 716.

173. *Id.* at 712; Aviram, *supra* note 16, at 5.

174. McMunigal, *supra* note 18, at 716.

175. Gershman, *Bad Faith Exception*, *supra* note 75, at 9.

176. Gershman, *Bad Faith Exception*, *supra* note 75, at 9.

These psychological factors can cause prosecutors to overestimate the strength of their case and underestimate the evidence that undermines their case.[177] Additionally, prosecutors are also not good predictors of what evidence will be important to the defense's case because they are not trained to think like defense lawyers.[178] Moreover, they are not privy to the defense's strategy, and are thus bound to make incorrect assumptions about what evidence is material.[179] They may even discount exculpatory evidence that is potentially material because they can foresee how it might later be rebutted during trial.[180] As such, prosecutors are not in the position to properly guess what evidence might be helpful to the defense.[181] Accordingly, a prosecutor may reasonably view contradictory evidence as not rising to the high level of materiality required for disclosure under *Brady*.[182]

A prosecutor's conflicting role as advocate and minister of justice can also lead to the temptation to withhold exculpatory evidence.[183] The American criminal justice system was designed as an adversarial system, but *Brady* requires prosecutors to depart from their adversarial role.[184] Many studies have recognized that prosecutors are predisposed to ignore *Brady* because the obligations imposed by the rule are counterintuitive to the psychology of a prosecutor in his or her role as an advocate.[185] *Brady* expects prosecutors to have the capacity to set aside their personal biases and competitive inclinations in the search for truth that the justice system requires of them.[186]

Imposing criminal sanctions for intentional *Brady* violations is a futile approach if the majority of violations stem from unintentional behavior. Additionally, criminal sanctions only focus on the individual prosecutor rather than prosecutor offices as a whole where the culture likely plays a large role.[187] As California's new law impacts only individual prosecutors acting in bad faith, it fails to address the fundamental problem—the culture of prosecutor offices that leads to confirmation

177. Gershman, *Bad Faith Exception*, *supra* note 75, at 9–10.

178. Laurie L. Levenson, *Discovery from the Trenches: The Future of* Brady, 60 UCLA L. REV. DISCOURSE 74, 80 (2013) [hereinafter Levenson, *Discovery from the Trenches*].

179. *Id.*

180. *See id.* at 88 (discussing the current adversarial system that incentivizes guarding evidence).

181. *Id.*

182. Gershman, *Bad Faith Exception*, *supra* note 75, at 8.

183. RIDOLFI & POSSLEY, *supra* note 9, at 44.

184. Levenson, *Discovery from the Trenches*, *supra* note 178, at 76, 81.

185. Gershman, *Bad Faith Exception*, *supra* note 75, at 7–8.

186. Gershman, *Bad Faith Exception*, *supra* note 75, at 7.

187. McMunigal, *supra* note 18, at 715.

bias, tunnel vision and a strong incentive to secure convictions rather than seek justice.[188]

V. PROPOSED REFORMS

In addition to a lack of deterrent value, criminal sanctions are antithetical to the overall problem they seek to address. If the goal of criminal justice reform is to reduce criminalization, then further criminalization is not the desirable consequence. Rather, consequences should involve professional discipline, including sanctions, suspension, and disbarment. Additionally, increasing the severity of sanctions may create a disincentive for prosecutor offices to be transparent and cooperative.[189] It may also discourage prosecutors from participating in reform.[190] This section proposes alternative reforms that seek to avoid these drawbacks.

The first step in addressing the problem is to implement changes to make it more likely that prosecutors will be sanctioned for egregious violations in order to "make the risk of non-compliance too costly."[191] "A robust and rigorously enforced *Brady* rule is imperative because all the incentives prosecutors confront encourage them not to discover or disclose exculpatory evidence."[192] To ensure that prosecutors face consequences for violating *Brady*, California should implement the proposals laid out in the Northern California Innocence Project's study.[193]

The Innocence Project's study recommends a number of reforms.[194] One such reform is expanding section 6086.7 of the California Business and Professions Code to require judges to name prosecutors in opinions finding misconduct.[195] The California Supreme Court would be responsible for actively monitoring compliance with the statute.[196] This would provide more transparency and would notify prosecutors of their misconduct.[197] It would also have the important benefit of creating a

188. Aviram, *supra* note 16, at 5.

189. McMunigal, *supra* note 18, at 711 (arguing that increased sanctions will likely discourage prosecutors from creating and sharing information about when and why *Brady* violations occur—information that is necessary to deter future violations).

190. McMunigal, *supra* note 18, at 718 ("[B]lam[ing] prosecutors for *Brady* violations is counterproductive . . . because it alienates prosecutors and discourages prosecutorial participation in reform.").

191. Gershman, *Bad Faith Exception*, *supra* note 75, at 36 (quoting United States v. Shaygan, 661 F. Supp. 2d 1289, 1292 (S.D. Fla. 2009)).

192. United States v. Olsen, 737 F.3d 625, 630 (9th Cir. 2013) (Kozinski, C.J., dissenting).

193. RIDOLFI & POSSLEY, *supra* note 9, at 78–82.

194. RIDOLFI & POSSLEY, *supra* note 9, at 78–82.

195. RIDOLFI & POSSLEY, *supra* note 9, at 80.

196. RIDOLFI & POSSLEY, *supra* note 9, at 80.

197. RIDOLFI & POSSLEY, *supra* note 9, at 80.

deterrent since prosecutors would not want to be publicly named for misconduct.[198] Otherwise, it is too easy for prosecutors to hide from public scrutiny when only the judge and a few lawyers know about their misconduct.[199]

Currently, very few appellate courts name prosecutors in their opinions, which allows prosecutors to operate with little risk of public embarrassment or reproval.[200] This is not the same for defense attorneys, who regularly find their names written in judicial opinions regarding claims of ineffective assistance of counsel.[201] For some reason, judges seem reluctant to apply this same treatment when prosecutors are involved.[202] In fact, only eighty prosecutors were named out of the 707 cases identified in the study where courts found misconduct.[203] To identify the other prosecutors, the authors of the study had to conduct a difficult and time-consuming search of the trial records.[204]

The study also calls for more extensive training of prosecutors regarding their ethical duties.[205] Specifically, the California State Bar, California District Attorneys Association, California Public Defenders Association and California Attorneys for Criminal Justice should develop a course to address ethical issues that arise in criminal cases.[206] The study recommends that attorneys be required to retake the course every three years.[207] Additionally, district attorney offices and law enforcement agencies should adopt internal written policies regarding *Brady* compliance.[208] These policies would include "procedures for collecting *Brady* material, tracking its delivery and disclosing it to the defense."[209] Rather than leaving it up to individual prosecutors, establishing policies in prosecutor offices would ensure greater compliance.[210]

Most importantly, the study also calls for greater transparency from the California State Bar.[211] The current lack of transparency makes it

198. RIDOLFI & POSSLEY, *supra* note 9, at 80.
199. Kozinski, *supra* note 8, at xxxvi.
200. RIDOLFI & POSSLEY, *supra* note 9, at 50; Tracey Kaplan, *California Bar Reviewing 130 Prosecutors for Possible Disciplinary Action*, MERCURY NEWS (Oct. 17, 2010, 12:32 PM), http://www.mercurynews.com/2010/10/17/california-bar-reviewing-130-prosecutors-for-possible-disciplinary-action.
201. Kozinski, *supra* note 8, at xxxv.
202. Kozinski, *supra* note 8, at xxxv.
203. RIDOLFI & POSSLEY, *supra* note 9, at 50.
204. RIDOLFI & POSSLEY, *supra* note 9, at 51.
205. RIDOLFI & POSSLEY, *supra* note 9, at 78.
206. RIDOLFI & POSSLEY, *supra* note 9, at 78.
207. RIDOLFI & POSSLEY, *supra* note 9, at 78.
208. RIDOLFI & POSSLEY, *supra* note 9, at 79.
209. RIDOLFI & POSSLEY, *supra* note 9, at 79.
210. Kozinski, *supra* note 8, at xxviii.
211. RIDOLFI & POSSLEY, *supra* note 9, at 82.

difficult to assess whether the State Bar is actually holding prosecutors accountable.[212] In particular, the study proposes that the State Bar should make public the reasons for closing an investigation where a court reported misconduct.[213] Additionally, in its annual discipline report, the State Bar should specify the number of prosecutors that were investigated and received discipline.[214] However, in response to this recommendation, the State Bar's deputy trial counsel, Cydney Batchelor, stated that the State Bar is bound by confidentiality rules and statutes, and these changes would have to be implemented by an amendment to the statute.[215] Therefore, it is within the purview of the California legislature to take action and address these issues of transparency.

CONCLUSION

The criminal justice system needs clear rules for prosecutors' disclosure obligations and adequate disciplinary mechanisms to ensure that prosecutors comply with the rules. Currently, California lacks both, and the new law will fail to remedy these systemic flaws. The new law will not serve as an effective deterrent because prosecutors are rarely disciplined, and thus, the severity of the penalty is irrelevant. Additionally, as California's new law seeks to address only intentional disclosure violations, it fails to have any impact on the majority of violations—those that occur when prosecutors negligently overlook or fail to appreciate the probative value of the evidence. Although California's new law is a step in the right direction, it is a very small step in addressing the broader problem of *Brady* violations. It remains to be seen whether the law will have any effect at all in light of the above discussion. Instead, it would be more prudent for California to implement the proposals laid out in the Innocence Project study.

212. RIDOLFI & POSSLEY, *supra* note 9, at 82.

213. RIDOLFI & POSSLEY, *supra* note 9, at 82.

214. RIDOLFI & POSSLEY, *supra* note 9, at 82.

215. Diane Curtis, *Bar Responds to Innocence Project Report*, CAL. B. J. (Nov. 2010), http://www.calbarjournal.com/November2010/TopHeadlines/TH5.aspx.