

Committee Newsletter | Vol. 1, No. 2, Winter 2017

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UPDATE FROM YOUR CHAIR

Dear YLD Civil Rights & Social Justice Committee Members,

It gives me great pleasure to welcome you and thank you for your interest in our committee. In this quarterly newsletter and on our website you will find information about our publications, sponsored programming, and upcoming events. To stay abreast of committee developments, please join our email list by clicking the “Join Our Committee” link on our website.



*Ms. Simpson is an associate at Hunton & Williams LLP.*

It has been a busy fall and winter for the YLD Civil Rights and Social Justice (CR&SJ) Committee. The YLD Fall Conference in Detroit, MI featured several programs of interest to our membership, including CLE programs such as *Justice for Flint: Failures, Lessons Learned and Next Steps; Gender Identity, Title IX, and K-12 Education and Prosecutorial Discretion in the Wake of Public Outcry*. On Thursday,

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December 15, we co-sponsored a YLD webinar entitled *Best Practices for Environmental Justice Advocacy*, which featured a distinguished panel exploring the ways in which environmental litigation and advocacy is being pursued using disparate impact cases under Title VI of the Civil Rights Act.

We hope to see many of you at the ABA Midyear Meeting in Miami, FL on February 2-4 (registration available [here](#)), where our committee is co-sponsoring three resolutions before the YLD General Assembly. These resolutions and the accompanying reports are available [here](#), and will be circulated to General Assembly members in several weeks. Please let us know if you have questions, comments, or concerns about the resolutions we are co-sponsoring, or about other resolutions that you believe our committee should support or oppose. The CR&SJ Committee is also co-sponsoring two CLE programs at the Midyear Meeting:

- *Bridging the Gap: Issues with Equal Pay*, Friday, February 3 from 10:30 to 11:30 a.m.
- *Disability and Due Process: Equal Access to the Justice System for People with Disabilities*, Friday, February 3 from 10:30 to 11:30 a.m.

We hope to have all of you in attendance. If you have an interest in writing and publishing newsletter articles, drafting resolutions for the YLD's consideration, or brainstorming ideas for a CLE program or national teleconference, please let me know. I would be excited to work with you, and I am honored to continue serving as your Chair for the 2016-2017 year.

Sincerely,

Carter Coker Simpson  
Chair, YLD Civil Rights and Social Justice Committee  
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## ARTICLES

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### **New York City Bar: Prosecutors' Duty to Disclose Held Broader than Duty Imposed by *Brady v. Maryland***

By Reem Sadik

In *Brady v. Maryland*, the Supreme Court held that due process requires prosecutors to disclose favorable evidence to defendants.<sup>1</sup> In later cases, the Court clarified that favorable evidence includes exculpatory and impeachment evidence.<sup>2</sup> The Court also explicitly stated that the failure to disclose *Brady* evidence violates due process “irrespective of the good faith or bad faith of the prosecution.”<sup>3</sup> But the Court limited *Brady*'s reach by extending it only to *material* evidence, which it has defined as evidence that is so favorable to the defense that “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”<sup>4</sup>

On August 29, 2016, the New York City Bar Association's Professional Ethics Committee considered whether Rule 3.8(b) of the New York Rules of Professional Conduct incorporates a “materiality” limitation in the constitutional sense and focused on what constitutes “timely disclosure” under the Rule.<sup>5</sup>

Rule 3.8 imposes special ethical duties on prosecutors and other lawyers representing the government in criminal litigation, including duties to the defendant.<sup>6</sup> Rule 3.8(b), in particular, imposes an obligation to disclose certain information favorable to the accused, requiring a prosecutor in a criminal litigation to fulfill the following:

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<sup>1</sup> 373 U.S. 83, 87 (1963) (holding that prosecutors have affirmative legal duties to disclose certain exculpatory information to the defense).

<sup>2</sup> See, e.g., *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150, 154-55 (1972).

<sup>3</sup> *Brady*, 373 U.S. at 87.

<sup>4</sup> *Bagley*, 473 U.S. at 682.

<sup>5</sup> See N.Y. Bar Comm. on Prof'l Ethics, Formal Op. 2016-3.

<sup>6</sup> N.Y. RULE OF PROF'L CONDUCT 3.8.

Make timely disclosure to counsel for the defendant or to a defendant who has no counsel of the existence of evidence or information known to the prosecutor or other government lawyer that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence, except when relieved of this responsibility by a protective order of a tribunal.<sup>7</sup>

The New York City Bar Association's Professional Ethics Committee found that while a prosecutor's responsibility under *Brady* and its progeny tends to embrace material or exculpatory evidence, Rule 3.8(b) requires more in its instruction to make "timely disclosure" of evidence "that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the sentence."

New York's ethics rules, like those in a growing number of other states,<sup>8</sup> rightly recognize that a prosecutor's ethical obligation to disclose evidence favorable to a defendant is broader than the constitutional minimums imposed by the Supreme Court in *Brady v. Maryland*. "[T]he prosecutor's role transcends that of an adversary: he 'is the representative not of an ordinary party to a controversy, but of a sovereignty. . . whose interest. . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'"<sup>9</sup> It will be interesting to see other states that choose to join New York on the issue.

**Reem Sadik** is an associate in the Special Matters & Government Investigations Practice Group in King & Spalding's Washington, D.C. office. Ms. Sadik is a 2015-2016 ABA YLD Scholar, and currently serves as the Vice-Chair of the ABA YLD Law Student Outreach Team.

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<sup>7</sup> N.Y. RULE OF PROF'L CONDUCT 3.8(b). In addition, a federal or state prosecutor must disclose certain prior statements (exculpatory or otherwise) of any witness the prosecutor intends to call at trial prior to when that witness testifies. See 18 U.S.C. § 3500 (the "Jencks Act"); *People v. Rosario*, 9 N.Y.2d 286 (1961).

<sup>8</sup> Several courts, including those in Wisconsin and Ohio, have found that a prosecutor's ethical duty is to comply with applicable law. See, e.g., *In re Reik*, 834 N.W.2d 384, 390 (Wis. 2013) (finding that interpreting the disciplinary rules as requiring a broader scope of disclosure than the constitutional requirements set out in *Brady* would "impose inconsistent disclosure obligations on prosecutors" and generate confusion); *Disciplinary Counsel v. Kellogg-Martin*, 923 N.E.2d 125, 127 (Ohio 2010) (declining to construe their disciplinary rule as requiring a scope of disclosure broader than that imposed by *Brady*). By contrast, other courts or ethics committees in, for example, Texas and the District of Columbia, all hold that disclosure requirements are not coextensive with *Brady*. See, e.g., Tex. Bd. of Disciplinary Appeals Formal Op. 55649 ("Based on the plain language of Rule 3.09(d) and significant differences between the purpose and application of the duty under the disciplinary rule and the constitutional duty under *Brady*, we hold that Rule 3.09(d) is broader than *Brady*."); *In re Kline*, 113 A.3d 202, 213 (D.C. App. 2015) ("Rule 3.8(e) requires a prosecutor to disclose all potentially exculpatory information in his or her possession regardless of whether that information would meet the materiality requirements of *Bagley*, *Kyles*, and their progeny.").

<sup>9</sup> *Bagley*, 473 U.S. at 675 n.6 (1985) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

## Transparency in the Aftermath of Police Shootings

By Zachary J. Phillipps

There are many benefits to governmental transparency. Transparency adds legitimacy to the government's actions, builds trust between the government and the people, provides a check against corruption and abuses of power, and holds governmental actors accountable to other branches of government and to the citizenry. On the other hand, lack of transparency can lead to a lack of trust and legitimacy and can allow corruption and abuse of power to go unchecked.

The benefits of transparency and the adverse effects of lack of transparency are particularly visible following police shootings of civilians. Police in America shoot and kill around a thousand people annually.<sup>10</sup> While this fact alone is a cause for concern, the racial disparities found in those shot and killed by police is alarming. When adjusting for population, black Americans are two-and-a-half times as likely as white Americans to be shot and killed by a police officer, and unarmed black Americans are five times as likely as unarmed white Americans to be shot and killed by a police officer.<sup>11</sup> These racial disparities have led to widespread protests, and sometimes-violent backlash, in response to police shootings, especially of unarmed African-Americans. While each police shooting involves a unique set of facts relevant to whether the use of force was justified, two high-profile police shootings in 2016—the shootings of Terence Crutcher and Keith Lamont Scott—provide particularly compelling examples of how transparency can help mitigate the ensuing fallout and help build trust between the community and the police.

On Friday, September 16, 2016, a white police officer in Tulsa, Oklahoma shot and killed Terence Crutcher, an unarmed African-American man.<sup>12</sup> By Monday, the Tulsa Police Department had released videos of the encounter showing that Mr. Crutcher was unarmed, raised his hands above his head, walked toward a car and leaned against it before being shot.<sup>13</sup> The Department's spokesman said that it "released the video out of a commitment to 'full

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<sup>10</sup> *The Counted: People Killed by Police in the US*, THE GUARDIAN, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> (last visited Dec. 27, 2016); *Police Shootings 2016 Database*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings-2016/> (last visited Dec. 27, 2016); *Police Shootings 2015 Database*, WASH. POST, <https://www.washingtonpost.com/graphics/national/police-shootings/> (last visited Dec. 27, 2016).

<sup>11</sup> Wesley Lowery, *Aren't More White People Than Black People Killed by Police? Yes, but No*, WASH. POST (July 11, 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/07/11/arent-more-white-people-than-black-people-killed-by-police-yes-but-no/?utm\\_term=.256c13f07023](https://www.washingtonpost.com/news/post-nation/wp/2016/07/11/arent-more-white-people-than-black-people-killed-by-police-yes-but-no/?utm_term=.256c13f07023). *But see* Heather MacDonald, Opinion, *Police Shootings and Race*, THE VOLOKH CONSPIRACY (July 18, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/07/18/police-shootings-and-race/?utm\\_term=.915c2a294ad2](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/07/18/police-shootings-and-race/?utm_term=.915c2a294ad2) (arguing that police shooting data should be measured against crime rates, not population percentages, and that this comparison shows police are not lethally biased).

<sup>12</sup> Liam Stack, *Video Released in Terence Crutcher's Killing by Tulsa Police*, N.Y. TIMES (Sept. 19, 2016), [http://www.nytimes.com/2016/09/20/us/video-released-in-terence-crutchers-killing-by-tulsa-police.html?\\_r=1](http://www.nytimes.com/2016/09/20/us/video-released-in-terence-crutchers-killing-by-tulsa-police.html?_r=1).

<sup>13</sup> *Id.*

transparency and disclosure,” and that “[t]his city will be transparent, this city will not cover up, this city will do exactly what is necessary to make sure that all rights are protected and to make sure that all rights shall be done.”<sup>14</sup> Three days later, the officer was charged with first-degree manslaughter.<sup>15</sup>

On Tuesday, September 20, 2016, an African-American police officer shot and killed Keith Lamont Scott, an African-American man who police officials claimed was “armed with a gun” and “posed an imminent deadly threat.”<sup>16</sup> Relatives of Mr. Scott who viewed the videos of the shooting claimed the videos “revealed no hint of aggression” in Mr. Scott and stated that the videos should be made public; nonetheless, the Charlotte Police Department initially refused to release videos of the shooting to the public.<sup>17</sup> The officer who shot Mr. Scott was not charged.<sup>18</sup>

Although the Tulsa incident involved facts that would appear to make it more egregious and more likely to cause violent protests and riots than the Charlotte incident, Tulsa experienced peaceful rallies, protests, and demonstrations.<sup>19</sup> On the other hand, in Charlotte, where the officer was African-American and the police claimed the victim was armed and aggressive, experienced protests, riots, and further violence in the days following Mr. Scott’s death, resulting in a state of emergency and requiring hundreds of National Guard troops and State Police officers to help prevent further harm.<sup>20</sup>

While there are myriad reasons why the communities’ reactions in Tulsa and Charlotte differed, including the decision whether to prosecute the officers involved, one main difference was whether the police department released the videos depicting the shooting. Releasing the videos helps quell backlash often fueled by feelings of distrust, anger over injustice, and suspicions that the police are lying about the facts surrounding the incident to protect

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<sup>14</sup> *Id.*

<sup>15</sup> Mary Fernandez, *Manslaughter Charge for Tulsa Officer Who Killed Black Driver*, N.Y. TIMES (Sept. 22, 2016), <http://www.nytimes.com/2016/09/23/us/tulsa-officer-charged-in-fatal-shooting-of-black-driver.html>.

<sup>16</sup> Alan Blinder, *Protests Erupt in Charlotte After Police Kill a Black Man*, N.Y. TIMES (Sept. 20, 2016), <http://www.nytimes.com/2016/09/21/us/protests-erupt-in-charlotte-after-police-kill-a-black-man.html>.

<sup>17</sup> Alan Blinder, Niraj Chokshi, & Richard Pérez-Peña, *Keith Scott’s Family See Video of His Killing, and Says the Public Should, Too*, N.Y. TIMES (Sept. 22, 2016), <http://www.nytimes.com/2016/09/23/us/charlotte-protests-keith-scott.html>.

<sup>18</sup> Richard Fausset & Alan Blinder, *Charlotte Officer ‘Justified’ in Fatal Shooting of Keith Scott*, N.Y. TIMES (November 30, 2016), <http://www.nytimes.com/2016/11/30/us/charlotte-officer-acted-lawfully-in-fatal-shooting-of-keith-scott.html>.

<sup>19</sup> Arianna Pickard & Paris Burris, *Protests, Rallies Continuing a Week and a Half after Terence Crutcher’s Death*, TULSA WORLD (Sept. 27, 2016), [http://www.tulsaworld.com/news/local/protests-rallies-continuing-a-week-and-a-half-after-terence/article\\_4728194d-275d-505e-b92c-fdfc67ca5a99.html](http://www.tulsaworld.com/news/local/protests-rallies-continuing-a-week-and-a-half-after-terence/article_4728194d-275d-505e-b92c-fdfc67ca5a99.html); *Hundreds of Protestors Show Support for Terence Crutcher During Tulsa Rally*, KFOR (Sept. 27, 2016), <http://kfor.com/2016/09/27/hundreds-of-protesters-show-support-for-terence-crutcher-during-tulsa-rally/>.

<sup>20</sup> Blinder, Chokshi, & Pérez-Peña, *supra*, note 8.

themselves. Even in situations where the video will reveal an injustice, like in Tulsa, the release of the video brings clarity to the situation and reinforces for the community that, although there may have been an injustice caused by a police officer, the police department is still dedicated to protecting the community and individual civil rights. And in situations where the video will vindicate the police officer and reveal that the use of force was necessary and reasonable, releasing the video will help the public better understand why a citizen was killed by a governmental official and will show the public that the police have nothing to hide.

In recent years, states have taken a varied approach towards legislation concerning the release of videos depicting a police shooting. For example, in 2015, Connecticut made all records, including videos, depicting an arrest or custody public records subject to state freedom of information laws, generally making the videos more accessible to the public.<sup>21</sup> Oklahoma recently amended its Open Records Act to require that law enforcement agencies “make available for public inspection” records concerning arrests, including audio and video recordings depicting a death “effected by a law enforcement officer.”<sup>22</sup> However, others, like North Carolina, have made it more difficult for the public to obtain videos of shootings by requiring a court order that the video be released.<sup>23</sup>

Transparency following a police shooting is not a cure-all that will prevent unjustified use of deadly force or stop all violence in the aftermath of a shooting. Rather, it is one piece of a much larger and more complicated solution to those ills and, importantly, is a relatively easy step typically within the control of the police department. Police should release the videos depicting fatal police shootings and state legislatures should make it easier for police to do so by passing legislation like that in Connecticut and Oklahoma. Such action will build trust between police and the communities they serve, legitimize reasonable uses of force, and help achieve justice for victims of excessive force.

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<sup>21</sup> H.B. 6750, 2015 Reg. Sess. (Conn. 2015).

<sup>22</sup> H.B. 1037, 2015 Reg. Sess. (Okla. 2015) (amending OKLA. STAT. tit. 51, § 24A.8 (2011)).

<sup>23</sup> H.B. 972, 2015 Gen. Assemb., Reg. Sess. (N.C. 2016).

## NEWS AND ANNOUNCEMENTS

### **ABA 2017 Midyear Meeting in Miami, FL Programming Highlights**

Friday, February 3

- *Fees & Costs: Barriers for Justice-Involved Youth and Young Adults* (CLE), 9:15-10:15 a.m.
- *Bridging the Gap: Issues with Equal Pay* (CLE), 10:30-11:30 a.m.
- *Disability & Due Process: Equal Access to the Justice System for People with Disabilities* (CLE), 10:30-11:30 a.m.
- Luncheon, *Cross-Generational Collaboration to Conquer Implicit Bias* (CLE)
- Diversity Forum, *Implicit Gender Bias: Why It Matters & How to Approach It*, 2:40-3:40 p.m.

Saturday, February 4

- YLD Diversity Dialogue Breakfast, *Is Justice Blind? Eliminating Racial Bias in the Criminal Justice System* (invitation only), 7:45-8:45 a.m.

### **Call for Newsletter Submissions**

We are now accepting **article submissions** for the Spring Newsletter. Please send article proposals, as well as any suggestions for **CLE or conference programming**, to [zphillipps@wrkk.com](mailto:zphillipps@wrkk.com). We welcome the opportunity to collaborate with you!

