The Story of *Brady v. Maryland*: From Adversarial Gamesmanship Toward The Search for Innocence?

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Brady v. Maryland[1] is unusual among the great landmark criminal procedure decisions of the Warren Court. *Brady* requires prosecutors to give criminal defendants evidence that tends to negate their guilt or reduce their punishment. In other words, *Brady* mandates limited discovery instead of trial by ambush. *Brady*'s test turns not on whether the prosecutor misled a jury or acted in good faith, but on whether the evidence is favorable and material to guilt or punishment. Thus, *Brady* marked a potentially revolutionary shift from traditionally unfettered adversarial combat toward a more inquisitorial, innocence-focused system. Yet, unlike *Mapp v. Ohio*[2] and *Miranda v. Arizona*,[3] *Brady* has sparked little public controversy or commentary. This may be because innocence is an appealing touchstone for criminal procedure, one with enormous potential to transform the adversarial criminal trial into a collaborative search for the truth.

Brady, however, has meant much less in practice than it could have. Few potential *Brady* claims come to light, and fewer defendants walk free, because our system remains an adversarial contest rather than a neutral inquiry into innocence. First, *Brady* requires prosecutors to look out for defendants' interests, and adversarial-minded prosecutors are poorly suited to do that job. Second, *Brady* is hard to implement and enforce. Favorable evidence is often spread across many agencies' files; defendants cannot learn of evidence hidden in these files; and judges are loath to reverse convictions long after trial. Empirical evidence shows that few *Brady* claims succeed and that most *Brady* material is ambiguous enough that prosecutors can easily overlook it. Third, *Brady* requires relatively little discovery, though statutes and rules have broadened discovery beyond the constitutional minimum. Much broader discovery would alleviate many of the adversary system's problems, at the cost of more witness intimidation, fabricated alibis, and revelation of undercover and confidential informants. Fourth, *Brady* applies only at the trial stage, but hardly any defendants go to trial any more. About 95% plead guilty, and *Brady* may not even apply to the plea bargaining process, when defendants need this information most. Finally, though *Brady* ignores the prosecutor's good faith (mens rea), its test continues to require

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[1] 373 U.S. 83 (1963).

[2] 367 U.S. 643 (1961) (requiring exclusion from criminal proceedings of evidence obtained in violation of the Fourth Amendment).

[3] 384 U.S. 436 (1966) (requiring police to warn suspects in custody of their rights to remain silent and to consult with an attorney before questioning them).

some prosecutorial misdeed (actus reus). It does not focus exclusively on the defendant's guilt or innocence of the crime or punishment.

Brady's ringing rhetoric of innocence, then, is in some ways a hollow promise. Far from transforming the adversarial system into a quest for truth, it has merely tinkered at its margins.

The Tradition of Adversarial Criminal Procedure

In much of continental Europe, magistrates and judges actively seek out evidence and question witnesses, even the defendant himself. This approach is known as the inquisitorial system, because judges themselves inquire directly into the truth of the case. Judges find both the facts and the law, and they can hop back and forth between digging up evidence and witnesses and hearing the testimony of those witnesses. Thus there is no separation between discovery and trial, and the parties cannot question or coach witnesses before judges take their testimony. While they may begin by hearing the evidence and witnesses proposed by either side, they may also pursue other leads, including names mentioned by witnesses. Thus judges, rather than prosecutors, run the show. Their job is to develop a full picture of the evidence that bears on guilt or punishment, not simply the case presented by either side. The English, however, rejected the inquisitorial system, as it reminded them of the Spanish Inquisition and the Star Chamber, which had used torture to extract confessions. Instead, England entrusted fact-finding to lay juries who heard the arguments of each party. Crime victims dug up their own evidence and witnesses and argued their own cases in court, and criminal defendants brought in their own evidence and defended themselves in court. Laymen, not lawyers, ran the system, which sharply divided pre-trial discovery from trial testimony.[4]

By the late eighteenth century, lawyers had taken over the criminal process. Public prosecutors (appointed or paid for by the state) took the place of victims, and criminal defense lawyers took the place of defendants who could afford them. The lawyers investigated the evidence before trial and then questioned witnesses at trial in front of juries. Prosecutors came to see police officers almost as their clients and worked closely with them to dig up evidence and witnesses and prepare witnesses' testimony for trial. Now that lawyers ran the show, judges could develop rules of procedure and evidence to regulate trials. Judges guarded the procedural fairness of trials but left substantive questions of guilt or innocence to juries. The adversarial system trusted that, if each side fought hard to present its own arguments, the truth would emerge from the collision of truth and error. The American colonies inherited this adversarial criminal process from England.

Each lawyer, then, was supposed to be a zealous partisan rather than a neutral arbiter of truth. The main limit on zealous advocacy was that lawyers were in some sense officers of the court. As such, they could not lie to or mislead the tribunal. Short of falsehood, however, lawyers were free to advance their own clients' interests and to leave issues of ultimate truth to the jury. If a fact hurt one's client or weakened an argument, that lawyer was under no

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[4] I draw the account in this and the next paragraphs from the work of John Langbein. *See generally* John H. Langbein, *The Origins of Adversary Criminal Trial* (2003).

obligation to find or disclose it; it was the opposing lawyer's job to do that. Thus, the parties did not have to reveal information to each other in discovery.

In theory, prosecutors hold themselves to even higher ethical standards. Prosecutors do not have human clients, but rather represent the State in its quest for justice. As the Supreme Court stated in 1935, the prosecutor "is the representative . . . of a sovereignty whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . He may prosecute with earnestness and vigor–indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones."[5] If the adversarial trial remains a boxing match, at least the prosecutor must fight by the Marquis of Queensbury rules and avoid striking below the belt. Thus, beginning in 1935 with *Mooney v. Holohan*, the Supreme Court adopted narrow due process limits on prosecutorial misconduct. Prosecutors must not elicit testimony that they know is perjurious or misleading, because doing so would "deliberate[ly] dece[ive] court and jury."[6]

Fundamentally, though, the prosecutor remains an adversary, a boxer rather than a referee. If prosecution is a mere game or a sporting event, prosecutors may feel entitled to fight to win at all costs. Prosecutors are the heirs to the partisan role of victims, whom they supplanted. Their incentives also push them toward maximizing convictions: if they rack up many wins and few losses, they receive promotions or lucrative jobs in private practice.[7] Though conscientious prosecutors also want to free the innocent and show mercy on sympathetic guilty defendants, at root, they see their job as convicting and punishing the guilty. This adversarial mindset may endanger the quest for truth. Partisan prosecutors may conclude early on that defendants are guilty and so fail to see or discount the importance of later evidence that undercuts their case. And because partisan lawyers find and prepare witnesses, they may consciously or unconsciously coach them to slant their stories and omit unfavorable details. In particular, they may leave out crucial details that might contradict or impeach a witness's testimony. Or, lawyers may simply avoid calling witnesses who undercut their theory of the case. Unless the adversary system works perfectly and the other side finds all of the damaging information on its own, the jury will not hear the crucial damaging evidence. Defense counsel, however, often are underfunded and lack the broad subpoena powers and investigative agencies to which prosecutors have access. In addition, each side may not know the evidence and witnesses that the other will use, so each is in a poor position to investigate and poke holes in the other's evidence. Moreover, witnesses sympathetic to the defendant or victim may refuse to talk to opposing counsel, which impedes investigating the weaknesses in witnesses' stories. As a result, each side often will not find on its own the helpful evidence possessed by the other side.

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[5]Berger v. United States, 295 U.S. 78, 88-89 (1935) (reversing criminal conviction in part because the prosecutor had misstated facts, assumed facts not in evidence, badgered witnesses, and proclaimed personal opinion in closing argument).

[6]Mooney v. Holohan, 294 U.S. 103, 112 (1935) (per curiam); *see also* Napue v. Illinois, 360 U.S. 264, 265, 267, 269-70 (1959); Alcorta v. Texas, 355 U.S. 28, 31 (1957) (per curiam) (reversing conviction because prosecutor knowingly elicited and failed to correct testimony that "gave the jury [a] false impression" even though it may have been technically truthful); Pyle v. Kansas, 317 U.S. 213, 216 (1942).

[7]*See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2471-72 (2004).

John Brady's Crime

John Brady was a twenty-five-year old man who had bounced around from job to job. He had fallen in love with another man's wife, Nancy Boblit Magowan, and now she was expecting their child. Brady was broke but felt he had to come up with money to take care of Nancy and their child. On June 22, 1958, Brady had written her a post-dated check for $35,000 and promised her that he would come up with that money in the next two weeks.[8]

Together with Nancy's brother, Donald Boblit, Brady hatched a scheme to rob a bank. But to pull off the robbery, they needed a fast, reliable car. Brady suggested that they steal the new Ford Fairlane that his friend William Brooks had just bought. So, late on June 27, 1958, Brady and Boblit placed a log across the road near Brooks' home and waited for him to return home from work. When Brooks pulled up and got out of his car to move the log, one of the men hit him over the head with a shotgun, knocking him unconscious. Brady and Boblit put him into the back seat and stole his wallet, and Brady drove them to a secluded field ten miles away. The two men walked Brooks to a clearing at the edge of the woods, and one of the men strangled Brooks to death with a shirt. They both carried his corpse farther into the woods and left it there. The key issue in the case turned out to be the identity of the actual killer. Who had strangled Brooks–Brady or Boblit?

The Confessions

Brady later gave a series of statements to the police. In his first two statements, Brady said that he, not Boblit, had stolen the car, hit Brooks over the head with a pipe, loaded him into the back seat, and dumped him elsewhere. He made no mention of any murder or death.[9] In Brady's third statement, he asserted that after the two of them had stolen the car, Boblit had hit Brooks over the head. Boblit, he claimed, had suggested killing Brooks over Brady's opposition and had strangled Brooks as Brady stood by silently. He claimed that he had agreed to take the blame for Boblit.[10] In his fourth statement, Brady said that he and Boblit had agreed that Boblit would have to kill Brooks. Although Boblit had wanted to shoot him, Brady had suggested strangling him. Once again, Brady admitted that he had stood by silently.[11] At trial, Brady "admitted virtually everything set forth in his confessions"[12] but denied having personally killed Brooks.[13]

Boblit also gave a series of statements to the police, and in all but one of them he accused Brady of doing the actual killing. In the first and second statements, Boblit said that he had helped Brady to rob Brooks but had not known that Brady would kill him. In both statements, he claimed that Brady had committed the actual killing. In the second statement, Boblit added

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[8]I draw the facts in this and the next paragraph from Richard Hammer, *Between Life and Death* 15-52 (1969).

[9]*Id.* at 85, 87.

[10]*Id.* at 103-07.

[11]*Id.* at 111-12.

[12]Brady v. State, 154 A.2d 434, 435 (Md. 1959).

[13]Brady v. State, 160 A.2d 912, 913 (Md. 1960), *rev'd and remanded*, 174 A.2d 167 (Md. 1961), *aff'd*, 373 U.S. 83 (1963).

that Brady had hit Brooks with a gun and that Boblit had told Brady not to kill him.[14] Boblit's third and fourth statements repeated the second one, except that Boblit admitted that he and Brady had both thought that "Brooks had to be killed."[15]

The key confession at the heart of *Brady v. Maryland* was Boblit's fifth statement, made on July 9, 1958. In that statement, Boblit admitted that he, not Brady, had hit Brooks on the head with the shotgun. He also said that after they got back into the car, he had planned to shoot Brooks, but Brady had persuaded him to strangle him instead. Boblit had strangled him, he admitted, and both men had carried his corpse into the woods.[16]

In short, both men repeatedly admitted to taking part in the robbery and murder, but each at times blamed the other for the actual killing. This disagreement was irrelevant to guilt but possibly relevant to whether one or the other deserved the death penalty.

Lower Court Proceedings

Before trial, Brady's lawyer asked the prosecutor for any confessions that Brady or Boblit had made. The prosecutor turned over Boblit's other statements but did not turn over Boblit's July 9 statement, in which he had admitted doing the actual killing.[17]

Brady and later Boblit were convicted at jury trials and sentenced to death. Afterwards, Brady's new lawyer read the transcript of Boblit's trial and learned of the July 9 statement, which Brady's trial lawyer had never received. He filed a collateral attack, requesting a new trial based on newly discovered evidence. The trial court denied the motion, but the Court of Appeals of Maryland reversed. It held that "the suppression or withholding by the State of material evidence exculpatory to an accused is a violation of due process."[18] Even though Brady did not claim that the prosecutor had acted out of "guile," the prosecutor's guile is irrelevant to the due process violation.[19] Though it seriously doubted whether Boblit's confession would have done Brady any good, the court gave Brady the benefit of the doubt. It refused to order a new trial on the issue of guilt, as the withheld evidence cast no doubt on that issue. Instead, the court remanded for a new trial solely to determine punishment.[20]

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[14]Hammer, *supra* note 8, at 97-98.

[15]*Id.* at 100.

[16]*Id.* at 114-15.

[17]Brady v. Maryland, 373 U.S. 83, 84 (1963). The State's Attorney claimed that he had never turned over any of Boblit's statements, but the courts appear to have credited Brady's lawyer's claim that he had received Boblit's other statements. *See id.*; Hammer, *supra* note 8, at 259-60.

[18]174 A.2d 167, 169 (Md. 1961).

[19]*Id.*

[20]*Id.* at 171-72. Today, courts bifurcate death-penalty trials into one phase on guilt and another one (or two) on punishment, but at the time the idea of a punishment mini-trial was novel.

In the Supreme Court

Brady petitioned for *certiorari*, seeking a new trial on both guilt and punishment. The Fourteenth Amendment 's Due Process Clause, he contended, entitled him to use Boblit's statement throughout the trial to sway the jury, which might even have persuaded it to acquit.[21]

The Supreme Court of the United States affirmed. Writing for the majority, Justice Douglas "h[e]ld that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." [22]

Brady did not further define materiality. But later cases held that evidence is material if there is "a reasonable probability" that disclosing it would have changed the outcome of the proceeding. "A 'reasonable probability' [is] 'a probability sufficient to undermine confidence in the outcome.'"[23] *Brady* also defined the reach of exculpatory evidence narrowly, as evidence that would tend to negate guilt or reduce punishment. *Giglio v. United States* expanded *Brady*'s rule to include evidence that would tend to impeach government witnesses,[24] such as payments to witnesses or promises of leniency.

The point of due process, the *Brady* Court stated, is not to punish prosecutorial misdeeds but to give defendants fair trials.[25] Even though Brady's prosecutor had not acted out of "guile," his actions had denied Brady's right to a fair trial.[26] In other words, prosecutors can violate due process even if they lack any mens rea and act in good faith. As the Court later put it, "[i]f the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."[27] The *Brady* Court accepted the Court of Appeals' holding that under state law, the suppressed evidence would not have been admissible on the issue of guilt. Thus, the Court affirmed.[28]

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[21]Brady also invoked the Equal Protection Clause of the Fourteenth Amendment. 373 U.S. at 90-91. Future similarly situated defendants, Brady argued, would be able to use exculpatory evidence throughout their trials, and so he should have been able to do the same. Though Brady made this his lead argument, it was opaque. Neither the majority nor Justice White's concurrence devoted any space to it, presumably because the evidence would have been inadmissible as to guilt in any event.

[22]373 U.S. 83, 87.

[23]United States v. Bagley, 473 U.S. 667, 682 (1985) (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)); *see also id.* at 685 (White, J., concurring in part and concurring in the judgment) (agreeing with the test set forth in the first of the two sentences quoted in the text).

[24]405 U.S. 150, 153-54 (1972). Napue v. Illinois, 360 U.S. 264 (1959), had foreshadowed this rule by extending Mooney v. Holohan, 294 U.S. 103 (1935) to impeachment evidence, though *Napue*'s holding was limited to "knowing[] use [of] false evidence" or allowing that evidence to go uncorrected. *See* 360 U.S. at 265, 267, 269-70.

[25]*Brady*, 373 U.S. at 87 (discussing *Mooney*, the seminal due process case in this area).

[26]*Id.*

[27]United States v. Agurs, 427 U.S. 97, 110 (1976).

[28]*Brady*, 373 U.S. at 90-91.

Justice White concurred in the judgment. He pointed out that it was not clear whether the Maryland Court of Appeals had relied on the Maryland or Federal Constitution.[29] Moreover, the State had not cross-petitioned to challenge the due process holding below. Accordingly, the only issue properly before the Court was whether the Federal Constitution guaranteed Brady a new trial on guilt as well as punishment. Having decided that Brady had no such right, the majority should not have reached the broader due process issue, and its whole due process "hold[ing]" amounted to dictum.[30] Finally, the majority's sweeping opinion created a broad new rule of criminal discovery. The majority, he argued, should have left the scope of the right to legislation and rule-making in the first instance.[31]

Life After Death Row

After the Supreme Court affirmed, Brady was in limbo. He had a right to a new trial limited to the question of punishment. But he did not want to exercise this right, lest the jury again sentence him to death. The State had a right to retry Brady, but it had never conducted a punishment-only trial and was not sure how to do it. So for years neither side made a move. Brady was transferred off death row and housed in a series of prisons and jails and took part in a work-release program during the daytime. After fifteen years, his lawyers figured that the State's evidence had decayed too much to retry Brady, so they finally moved for a speedy trial. Rather than retry Brady, the Governor commuted his sentence to life imprisonment. After eighteen years, Brady was paroled.[32]

While on death row, Brady had married a Baltimore nurse. After his release, the two had several children before divorcing. Brady then moved south, married again, and started another family. He remains steadily employed as a truck driver and has not been in serious trouble with the law before or since the Brooks murder. He remains sorry that the murder occurred but maintains that he never intended to kill Brooks, who had been his friend.

Brady's *Overbreadth*

While Brady himself retired into obscurity, the Supreme Court case bearing his name eventually became famous for what seemed to be its sweeping holding. Justice Douglas's majority opinion went much further than was necessary to resolve Brady's case. First, Justice White is correct that the majority's famous "hold[ing]" was no more than dictum. Second, Brady's prosecutor never denied that he had possessed Boblit's July 9 statement and had known about it

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[29] *Id.* at 91 (White, J., concurring in the judgment).

[30] *Id.* at 92 ("[T]he due process discussion by the Court is wholly advisory"); *accord id.* at 92 n.1 (Harlan, J., dissenting) (agreeing with Justice White that the majority's due process discussion was unnecessary); *see id.* at 87 (majority opinion) ("We now hold that . . . .").

[31] *Id.* at 92 (White, J., concurring in the judgment).
Justice Harlan, joined by Justice Black, dissented. They were uncertain about whether Boblit's statement would have been admissible as to Brady's guilt under Maryland law, and so whether there was an equal protection violation. Thus, they preferred to vacate and remand for further proceedings in light of the governing constitutional principle set forth by the majority. *Id.* at 92-95 (Harlan, J., dissenting).

[32] The information in this paragraph and the next one comes from Telephone Interview with Clinton Bamberger, counsel in the Supreme Court for John Brady (Mar. 3, 2005).

all along. Indeed, he had repeatedly tried to use that same statement at Boblit's trial.[33] Moreover, when Brady's lawyer had asked for Boblit's statements, the prosecutor had turned over the other four statements but not the fifth one.[34] This selective discovery created the misleading impression that there were no others. Given this evidence of mens rea, it is odd that the Supreme Court made its rule "irrespective of the good faith or bad faith of the prosecution." [35] Third, because the due process "hold[ing]" was on a point not briefed nor contested by either party, the Court lacked the benefit of a developed adversarial record. As Justice White notes, perhaps the Court should not have defined this sweeping new right on its own in the first instance. If its holding had been more modest, legislatures, the bar, and lower courts could have experimented and developed the precise contours of this new right. In short, Justice White' s suggestion of judicial activism is largely correct. Justice Douglas's majority opinion reached far beyond the questions presented and actual facts to create a broad new due process right.

The Emphasis on Innocence

To say that a decision is activist, however, is not to say that it is wrong. *Brady* came in the 1960s, a decade in which the Court created many broad new criminal-procedure protections. Many of these other decisions sparked great controversy and resistance. *Mapp v. Ohio*,[36] for example, led to decades of case law expanding and then narrowing the Fourth Amendment exclusionary rule, often over bitter dissents. *Miranda v. Arizona*[37] became famous and infamous, and Congress passed legislation in an unsuccessful effort to overturn the *Miranda* warning requirement.[38]

In contrast, *Brady* elicited hardly a peep of protest. This difference, I suspect, has to do with innocence. *Mapp* and *Miranda* let guilty criminal defendants walk free, in order to protect broader constitutional principles and values and punish or regulate police misconduct. Suddenly, guilty criminal defendants were the good guys and police were the bad guys, a flip-flop that many people resented. As crime rose in the turbulent 1960s, courts that freed guilty criminal defendants on technicalities seemed to be part of the problem. Richard Nixon successfully campaigned for president against the Warren Court and appointed Warren Burger Chief Justice, partly because Burger was hostile to criminal procedure technicalities.[39]

Innocence, however, is not a technicality tangential to the criminal process. It is the main touchstone of the criminal process. The justice system must not only strive to convict the guilty but also to acquit the innocent. If it mistakenly convicts the wrong person, it inflicts a

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[33]Hammer, *supra* note 8, at 237.

[34]*Brady*, 373 U.S. at 84.

[35]373 U.S. at 87.

[36]367 U.S. 643 (1961).

[37]384 U.S. 436 (1966).

[38]*See* Title II, Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 90th Cong,., 2d Sess., 82 Stat. 210 (codified as amended at 18 U.S.C. § 3501). The Supreme Court declared this statute ineffective to abrogate *Miranda* in Dickerson v. United States, 530 U.S. 428 (2000).

[39]*See* Bob Woodward & Scott Armstrong, *The Brethren: Inside the Supreme Court* 4, 6-7 (1979).

grave injustice while leaving the guilty party free to commit more crimes. Due process is not simply about punishing prosecutors who lie or mislead. Instead of focusing on the prosecutor's mens rea, bad faith, or guile, *Brady* shifts the focus to the defendant's innocence. Prosecutors must now take affirmative steps so that the jury can discern the truth.

Moreover, *Brady* does not let defendants walk free. At most, it requires a new trial, at which the state will have a second opportunity to prove guilt beyond a reasonable doubt. And in *Brady* itself there was no danger that the punishment retrial would let Brady or Boblit walk free. The most that either could hope for was to avoid the death penalty and instead receive a life sentence. Brady was not innocent of murder, but he could plausibly claim to be innocent of a murder bad enough to deserve the death penalty. In the 1960s, the tide of judicial and popular opinion was turning against the death penalty. Some states abolished the death penalty, and polls showed that at the time only a minority of Americans favored it.[40] Courts scrutinized death sentences far more carefully than other sentences and halted many executions. As a result of these forces, the flow of executions slowed to a single-digit trickle by 1965, less than two years after the Supreme Court decided *Brady*.[41]

Even today, innocence has the potential to transform criminal procedure. DNA testing has documented many wrongful convictions of the innocent.[42] As a result, the governor of Illinois halted and later commuted all death sentences in that state.[43] In addition, scholars have highlighted flaws in interrogation and identification procedures and legislatures have considered increasing funding for defense counsel. As habeas corpus review grows ever narrower, compelling new evidence of actual innocence can still unlock the door to the courthouse or win executive clemency.

If one had taken *Brady* seriously, it would have portended a major shift away from the traditional adversarial system towards a focus on innocence. This major shift never occurred, however, because crucial features of *Brady* and our adversarial system have limited *Brady*'s impact upon trials. The remainder of this chapter will explain five basic features of our system that hobble *Brady*. First, despite *Brady*'s exhortation to do justice, prosecutors and police remain fundamentally *adversarial*. Second, *Brady* has a *weak enforcement mechanism*. Because it depends upon these partisans to dig through their own files to find information for the other side, *Brady* violations rarely come to light. When violations do surface, long after trial, judges are loath to reverse convictions and order retrials. Third, *Brady* is limited to *exculpatory* and impeachment evidence, rather than the incriminating evidence that is much more common. *Brady* is a very narrow discovery rule, and statutes and rules have expanded upon *Brady*'s discovery, but nonetheless neither side knows all of the other side's evidence. Fourth, though *plea bargaining*

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[40] *See* Hammer , *supra* note 8, at 287.

[41] *See id.* at 285-86.

[42] *See generally* Barry Scheck et al., *Actual Innocence: Five Days to Execution and Other Dispatches from the Wrongly Convicted* (2000).

[43] *See* Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. Times, Jan. 12, 2003, § 1, at 1; Dirk Johnson, Illinois, Citing Faulty Verdicts, Bars Executions, N.Y. Times, Feb. 1, 2000, at A1.

resolves most cases, *Brady* is designed for trials and poorly suited to plea bargaining. And finally, though prosecutorial "guile" is irrelevant, *Brady* still requires some *prosecutorial misconduct* and not simply innocence. In other words, while *Brady* requires no prosecutorial mens rea, it still requires some actus reus, some act of withholding favorable evidence.

Adversarial Barriers to Focusing on Innocence

The documented wrongful convictions reveal important flaws in our adversary system. While funding better defense counsel might prevent some of these errors, others are beyond defense counsel's control or capacity to investigate. Police and prosecutors are human, and humans tend to jump to conclusions and then discount later information that undercuts their earlier beliefs. Their adversarial mindset conditions them all the more to hypothesize guilt and then focus on finding corroborating evidence. Thus, police and prosecutors who become too convinced early on of a suspect' s guilt may simply fail to appreciate or investigate contrary leads. Even if they come across exculpatory evidence, they may minimize or not see its significance.[44] (In other words, even if they see that the evidence is exculpatory, they may not see how it is material.) They may thus conclude that because a piece of evidence does not change their own minds about guilt, it would not change jurors' minds either and so is not *Brady* material. This over-stringent perspective could lead prosecutors to decide that nothing is *Brady* material unless it persuades them to dismiss a case, so the rate of *Brady* disclosures could approach zero. Prosecutors may also be too willing to believe paid informants who tell them what they want or expect to hear. In addition, their interrogations and line-ups may subtly communicate what they expect or hope to find, eliciting false or skewed evidence.

If the adversarial system is the problem, then maybe the inquisitorial system is the solution. Prosecutors could view their job not as a partisan struggle to convict, but as a neutral, detached investigation into the truth. *Brady v. Maryland* appeared to be a step in that direction. The Court took seriously prosecutorial rhetoric about seeing that justice is done. By obligating prosecutors to cooperate with defense counsel, the Court cast defense counsel not as enemies of prosecutors but as partners in the quest for justice. Rather than leaving adversarial combat unregulated, courts were to actively supervise the search for truth. At least one commentator, writing shortly after *Brady*, thought that prosecutors might have to turn over their entire files to trial judges. These judges would then review all the evidence in camera to find possible *Brady* material.[45] This move could have been the first step toward a more inquisitorial system, with active judicial oversight.

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[44]*See* United States v. Agurs, 427 U.S. 97, 117 (Marshall, J., dissenting) (arguing that prosecutors naturally tend "to overlook evidence favorable to the defense, and [have] an incentive . . . to resolve close questions of disclosure in favor of concealment."). Psychological studies confirm that people tend to interpret new evidence so as to confirm their initial judgments. *See, e.g.*, Charles G. Lord et al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. Personality & Soc. Psychol. 2098, 2102 (1979); S. Plous, *Biases in the Assimilation of Technological Breakdowns: Do Accidents Make Us Safer?*, 21 J. Applied Soc. Psychol. 1058, 1059 (1991).

[45]*See* James M. Carter, *Suppression of Evidence Favorable to an Accused*, 34 F.R.D. 87, 90-91 (1964). For a modern proposal to give judges a similar inquisitorial role, see Darryl Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 Calif. L. Rev. (forthcoming Dec. 2005).

As it turned out, judges did not take up this supervisory role. *In camera* review of all possible evidence would be extremely time-consuming, and judges are too busy to take on additional duties voluntarily. Moreover, judges traditionally have not been deeply involved in criminal cases until right before trial. They do not know the issues and the evidence, so usually they cannot see what evidence might fit with various possible defense theories of the case. Thus, they leave the *Brady* determination of favorable evidence up to the prosecutor, whose mindset is fundamentally partisan.

Simple exhortations to be neutral or pursue justice cannot transform our adversarial system into an inquisitorial one. The traditions, culture, and incentives of our adversarial system are deeply rooted and hard to change. As mentioned, prosecutors receive promotions and better jobs if they have favorable win-loss records and rack up many convictions. And as discussed below, most cases are strong and result in convictions, which makes finding or appreciating evidence of innocence like looking for a needle in a haystack. The press of business does not encourage this slow, detached rumination over the evidence.

Moreover, prosecutors face off against defense counsel who are paid to be zealous advocates. The ethical rules require zealous advocacy and rarely penalize overly aggressive behavior. The defense lawyer's flesh-and-blood client, of course, asks the lawyer to do whatever he can to win acquittal or a low sentence. Defense lawyers are not about to turn over inculpatory evidence to prosecutors, particularly because the privilege against self-incrimination and the attorney-client privilege forbid many disclosures. If defense lawyers are fighting hard and concealing their cards, a prosecutor might think, why should I show any more than the bare minimum of mine? Because the system depends on prosecutorial self-policing, defense counsel are unlikely ever to learn of *Brady* violations. And if they do come to light at trial, judges may treat any error as harmless, as defense counsel winds up with the evidence in time for trial. Thus, prosecutors do not fear being penalized for violating *Brady* or interpreting it very narrowly.

The adversarial norms and roles of each side keep reinforcing each other. In America, unlike England, lawyers serve exclusively on one side or the other of this divide, at least for a period of years. Thus, pro-prosecution lawyers become full-time prosecutors and pro-defendant lawyers become full-time defense counsel. Each group of lawyers then works and socializes in offices filled with like-minded people, which reinforces and polarizes their original leanings. Each also practices against adversaries who are similarly polarized, which may antagonize and exacerbate the gulf between them.

Brady's *Weak Enforcement Mechanism*

Brady's enforcement difficulties and weak, retrospective enforcement mechanism exacerbate these problems. Many different federal, state, and local agencies share overlapping responsibilities for investigation and prosecution. For any moderately complex conspiracy spanning several states, half a dozen police and prosecutorial offices may have information relevant to the case. Defense counsel cannot search these files, and a single prosecutor may not know about, let alone be able to search, all of them. How far does the *Brady* obligation go? Courts have charged prosecutors with the knowledge that is in their offices and their

investigative agencies,[46] but not other jurisdictions' files. As a practical matter, however, prosecutors will never learn of much of this material, and it will never come to light.

This problem highlights another one: *Brady* relies on ineffective prosecutorial self-policing in the first instance. Because *Brady* material is hidden in prosecutors' and police files, defense lawyers probably will never learn of its existence. Most defendants lack the investigative resources to dig up *Brady* material. (The next Section discusses how modern discovery has alleviated this problem somewhat.)

Furthermore, *Brady*'s test is a retrospective one. In other words, reviewing courts ask ex post whether the withheld evidence was material in light of all the evidence presented at trial. But prosecutors must determine whether evidence is material ex ante, before trial. Because of the adversary system, prosecutors have a poor sense of the defense's evidence and theory of the case until trial. And before trial, prosecutors expect to plea-bargain away most cases, so often they do not finish investigation and familiarize themselves with the evidence until trial is imminent. Prosecutors, unfamiliar with their own and the other side's evidence, have difficulty forecasting before trial what evidence will in retrospect seem to have been material.

In addition, the only enforcement mechanism is retrospective. If *Brady* material somehow does come to light, it most likely surfaces after the time has expired for a motion for new trial or appeal. Defendants must instead file collateral attacks such as habeas corpus petitions, seeking to reopen convictions that have already become final. By this time, however, defendants no longer have a right to court-appointed counsel, so most proceed pro se. Courts are flooded with other pro se habeas petitions, many of which are frivolous and few of which succeed. The volume of meritless claims may easily lead courts to view the entire exercise as a waste of time. In other words, jaded judges find it hard to spot the occasional innocence needle in the haystack.[47]

The psychology of hindsight exacerbates this problem. Psychologists have noted that people suffer from an inevitability bias. In other words, once people learn what actually happened, that outcome seems to have been inevitable all along. Thus, when reviewing convictions, people discount evidence that might have led to a different outcome, such as an acquittal.[48] A related problem is that of jumping to conclusions: people latch onto the evidence that they learn first and discount or explain away evidence that conflicts with their initial

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[46] *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 437 (1995) (charging the individual prosecutor with "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"); Pennsylvania v. Ritchie, 480 U.S. 39, 43, 51, 67 (1987) (requiring *Brady* disclosure of information in the files of a government agency that investigates child abuse and neglect); Giglio v. United States, 405 U.S. 150, 154 (1972) (charging each prosecutor with knowledge of all promises made by other lawyers in the same office, whether or not the prosecutor had actual knowledge or was negligent).

[47] *See* Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring in result) ("It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search.").

[48] For a discussion of how this same problem infects retrospective review of ineffective-assistance-of-counsel claims, together with citations of the psychological literature, see Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel Claims*, 2004 Utah L. Rev. 1.

impressions. On habeas, a judge reviews a conviction by a trial court that an appellate court has also upheld. Judges see trial records that convinced juries of guilt beyond a reasonable doubt, and they are wary of second-guessing those verdicts. Psychologically, it is easier to discount the new piece of evidence than to upset the entire factual premise and solemn verdict of the trial.

The intrusiveness of the remedy also makes judges reluctant to upset convictions based on *Brady* violations. Retrials before juries are cumbersome and time-consuming. In inquisitorial justice systems, judges (not juries) find the facts at trial, often based on paper records or dossiers. The emphasis is not on live, dramatic, in-court testimony before a jury. Thus, if an appellate court finds an evidentiary error at trial, it can simply fix the error and decide for itself whether the conviction stands or not. In our adversarial system, however, we claim that juries are the sole arbiters of facts. If a *Brady* violation prevented the jury from hearing exculpatory evidence, the appellate court cannot overtly fix the error, as that would intrude upon the jury's province. Instead, it must order an entire new trial, even if years have passed and witnesses have long since died.

The judge's temptation is to claim that the evidence was not material to the outcome–that there is no reasonable probability that the evidence would have produced a different result. Of course, if the withheld evidence is a DNA test that positively proves innocence, no judge will block that claim. But then again, a prosecutor would have to be both evil and stupid to bring such a case in the first place, or not to dismiss it as soon as that evidence came to light. The much more common *Brady* situations are ambiguous ones, where a piece of evidence might have bolstered a claim of reasonable doubt, but there is still much evidence of guilt. The prosecutor may think the evidence creates only a fleeting doubt as to guilt (and so probably is not material). Defense counsel, in contrast, might view the doubt as substantial (which probably is material). Because the two sides read the same evidence through different partisan lenses, each side is overly confident in its own arguments. If this evidence surfaces on habeas corpus, what is a judge to do? The judge may not be comfortable ordering a new trial for a defendant who is 85% or maybe 99% likely to be guilty, particularly if that judge has to run for re-election. The evidence arguably creates a reasonable doubt as to guilt, but arguably it does not. The judge's inclination may be to minimize the evidence's materiality and so find no *Brady* violation.

Empirical Evidence of How Rarely Brady *Works in Practice*

Empirical evidence confirms that, perhaps for these reasons, *Brady* claims infrequently succeed. I examined 210 *Brady* and *Giglio* cases decided in 2004. Of the sixty-three *Giglio* claims, thirteen (20.6%) succeeded (typically meaning a retrial), three others (4.8%) were remanded for evidentiary hearings, and forty-seven (74.6%) were unsuccessful. Non-*Giglio Brady* claims are even less successful. Of the 148 cases in this category, twelve (8.1%) succeeded, eight (5.4%) were remanded, and 128 (86.5%) were unsuccessful.[49] If one combines the two categories, one finds that twenty-five of 210 claims (11.9%) succeeded, eleven (5.2%) were remanded, and 174 (82.9%) were unsuccessful.

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[49]On April 3, 2005, my research assistant ran the search SY,DI(Giglio (Brady /3 Maryland) (Brady /s (material claim exculpatory))) & DA(AFT 12/31/2003) & DA(BEF 1/1/2005). The search returned 214 hits, of which 210 were relevant. One of the cases contained *Giglio* and non-*Giglio Brady* evidence, so it falls into both categories.

My sense as a former prosecutor is that not many cases involve significant *Brady* material and that smoking guns are almost unheard of, for otherwise the prosecutor would never have brought the case. The exception is that government informants and cooperating witnesses can frequently be impeached with their criminal records and cooperation agreements. But prosecutors routinely air this information during witnesses' direct examinations, to comply with *Giglio*, and juries very often convict anyway.

Empirical evidence confirms that most *Brady* and *Giglio* claims involve not smoking guns but ambiguous evidence, which prosecutors can easily overlook. My research assistants and I reviewed 448 *Brady* and *Giglio* claims that succeeded or were remanded between 1959 and August 2004.[50] This sample of cases is weighted toward and most comprehensive over the last decade. Success typically means that the court sent the case back for a new trial. Of these cases, 315 (70.3%) involved exculpatory information while 262 (58.5%) involved impeachment information. (Some cases involved both). The most common claims involved undisclosed plea agreements or promises of leniency or immunity to witnesses, which occurred in sixty-four cases (14.3% of the overall total). Other commonly concealed *Giglio* information included witnesses' criminal records (32 cases, 7.1%), financial or other tangible incentives to testify (six cases, 1.3%), witnesses' prior inconsistent statements unrelated to identification (fifty-four cases, 12.1%), witnesses' having been hypnotized (nine cases, 2.0%), and other evidence of witness bias (thirteen cases, 2.9%). In thirty-six cases (8.0%) the *Brady* material consisted of the prosecution's failure to identify or make available witnesses who might have had helpful information. In twenty-one cases (4.7%) other evidence tended to support an affirmative defense. Twenty-six cases (5.8%) involved witness statements that related to misdescriptions, misidentifications, or failures to identify defendants. Seventy-one cases (15.8%) involved forensic, physical, or documentary evidence, and most of the forensic involved weaknesses in forensic methodology, failures to test evidence, or evidence that the defendant or victim was intoxicated during the crime. In about seven of these cases (1.6%) the withheld forensic evidence strongly supported innocence. In other words, only about one-fourteenth of the successful or remanded cases fall into the most compelling categories: identification evidence or strong forensic evidence. Of all the cases in the sample, only twenty-seven (6.0%) persuaded me that the defendant was likely innocent. (Perhaps that just goes to show how partisan and jaundiced an ex-prosecutor's perspective is.)

What is striking to an ex-prosecutor is that, even in the small universe of successful cases, most of the *Brady* and *Giglio* evidence is quite consistent with guilt. Juries often convict in the face of impeachment evidence, for example. Indeed, in *Brady* itself the Maryland Court of Appeals doubted that the identity of the strangler was significant but gave Brady the benefit of the doubt. From the defense's perspective this evidence might create a reasonable doubt as to

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[50] I drew these cases from the Capital Defense Network's lists of successful and remanded *Brady* claims in the United States Supreme Court, United States District Court, and state courts, updated through August 2004 (*available at* http://www.capdefnet.org/ in the Habeas Assistance and Training directory, WebSite Contents, Constitutional Issues, Exculpatory Evidence, Successful Brady Cases and Cases Remanded (last visited Apr. 26, 2005)). The lists attempt to be and appear to be comprehensive.

punishment, but in the heat of battle prosecutors may not see it that way. Thus, prosecutors can easily overlook this evidence.

Brady's *Failure to Reach Incriminating Evidence, and Discovery*

Another complaint about *Brady* is that it is limited to exculpatory and impeachment material. Defendants would prefer discovery that went far beyond *Brady* in two ways. First, most defendants have little money and few investigative resources of their own. Appointed defense counsel are often chronically underfunded, overworked, and of uneven competence.[51] Some are hardly able to function as the vigorous, effective adversaries idealized by the adversary system. The government, in contrast, has superior resources, more investigative powers, and sometimes better knowledge of the case. Thus, defendants would like the government not only to turn over exculpatory material that it already has, but also to investigate and develop other possible exculpatory leads. In other words, they would prefer a quasi-inquisitorial system, with a neutral magistrate who is charged with digging up the truth. Due process, however, does not require the police "to use a particular investigatory tool."[52] It does not even forbid the good-faith destruction of evidence that might be exculpatory.[53]

Second, defendants would prefer that prosecutors turn over inculpatory as well as exculpatory evidence. While few cases involve significant exculpatory evidence, all involve much inculpatory evidence. One chronic complaint about the adversary system is that it encourages trial by surprise or ambush, in which each side must guess about the other side's strength and theory of the case. It is difficult to plan a defense in the dark. Each side would prefer to know the other's key contentions and evidence and to research and prepare for them ahead of time.

Once again, the Supreme Court has refused to require this drastic departure from the traditional adversarial model. "Whether or not procedural rules authorizing [routine disclosure of prosecutors' entire files] might be desirable, the Constitution surely does not demand that much."[54] As a matter of constitutional law, the Court is right: there is no text, history, or tradition that requires open-file discovery. But, as a matter of policy, the traditional trial by ambush is troubling, exalting an extreme sporting theory of justice over the quest for truth.

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[51] *See* Bibas, *supra* note 7, at 2476, 2479, 2481-82.

[52] Arizona v. Youngblood, 488 U.S. 51, 59 (1988).

[53] *Id.* at 58; California v. Trombetta, 467 U.S. 479, 488-89 (1984).

[54] United States v. Agurs, 427 U.S. 97, 109 (1976); *accord* United States v. Bagley, 473 U.S. 667, 675 (1985) (*Brady*'s "purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. Thus, the prosecutor is not required to deliver his entire file to defense counsel . . . ." (footnotes omitted)); Weatherford v. Bursey, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case"); *see also Agurs,* 427 U.S. at 112 n.20 (rejecting a defendant's right to all evidence that would help trial preparation, because "that standard would necessarily encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense.").

Oddly, since the 1930s criminal discovery has been far more restrictive than civil discovery. In civil cases, the parties can depose each other's witnesses, submit interrogatories, request admissions, and request extremely broad document discovery.[55] In criminal cases, however, most civil discovery devices do not exist. For example, very few states allow pre-trial depositions, in which each side can question the other side 's witnesses on the record. This discovery imbalance seems backwards. Because more is at stake in criminal cases, one might think that criminal cases would allow even broader discovery. But traditionally, the opposite has been true.

Brady was part of a larger trend toward requiring more cooperation between the traditional adversaries. Even though the Constitution did not require it, the federal government and all states guaranteed defendants more discovery than *Brady*'s constitutional minimum. Three years after *Brady*, for example, Federal Rule of Criminal Procedure 16 authorized pre-trial disclosure of defendants' statements, examination or test results, documents, and tangible objects. In its current form, Rule 16 is even broader, requiring disclosure of all of these items if the government intends to use them at trial. It also requires disclosure of the defendant 's criminal record and reports of expert witnesses whom the government intends to use at trial.[56] Once the case reaches trial, the government must disclose written or recorded statements by witnesses that relate to the subject of their testimony.[57] A majority of states provide similar discovery. A solid minority of states go even further than the federal rules. They require disclosure of the names, addresses, and (in some states) even prior statements of witnesses whom the government intends to call at trial.[58]

To prosecutors, this unilateral discovery seemed to be lopsided and unfair. After all, if defendants needed evidence to prepare their defenses, so too did prosecutors. If defendants needed a preview of the government's theory of the case, prosecutors needed a preview of the defense. The common refrain of these critics was that discovery ought to be a two-way street.[59]

Thus, the pendulum swung again, and procedural rules began to require discovery from the defense. In 1974, for example, the Federal Rules of Criminal Procedure were amended to require reciprocal discovery.[60] Today, in the federal and many state systems, defendants must notify prosecutors before trial that they intend to raise certain defenses, such as alibi, insanity, or

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[55]*See* Fed. R. Civ. P. 30, 33, 34, 36.

[56]Fed. R. Crim. P. 16(a)(1); Fed. R. Crim. P. 16 advisory committee's note (1966).

[57]18 U.S.C. § 3500(a), (B); Fed. R. Crim. P. 26.2(a).

[58]*E.g.,* Alaska R. Crim. P. 16(b); Ariz. R. Crim. P. 11.4, 15.1; Ark. R. Crim. P. 17(1); Fla. R. Crim. P. 3.220(b)(1); N.J. Ct. R. 3:13-3(c)(6), (7) (also requiring disclosure of witnesses' past statements and criminal records)

[59]One might have thought that the privilege against self-incrimination forbade discovery from defendants. But Williams v. Florida, 399 U.S. 78, 81-86 (1970), upheld discovery of a defendant's alibi defense against a Fifth Amendment challenge, opening the way for other discovery obligations.

[60]As the Advisory Committee on the Federal Rules of Criminal Procedure explained, in the course of proposing the 1974 amendments: "[P]rosecution and defense discovery . . . are related and . . . the giving of a broader right of discovery to the defense is dependent upon giving also a broader right of discovery to the prosecution." Fed. R. Crim. P. 16 advisory committee's note (1974).

self-defense. They must also disclose the names of the witnesses who will support these defenses.[61] In addition, if defendants seek documents, books, tangible objects, and expert reports from the government, they must reciprocate with the same kinds of evidence.[62]

Brady *Is Designed for Trials, Not Plea Bargaining*

All of these expansions of discovery have reduced the ambush factor. But in most states, pre-trial discovery does not reach the evidence defendants want most: the names and statements of lay fact witnesses, such as eyewitnesses to a crime. Simply opening all prosecutorial and police files to defense inspection would eliminate trial by ambush, but at a high cost. Prosecutors are reluctant to disclose this information because they fear a variety of repercussions: Defendants may kill, intimidate, or bribe government witnesses into staying silent or changing their stories, particularly in violent, gang, and drug cases. Defendants may tailor their stories and alibis to fit the evidence. And many government witnesses are undercover agents or confidential informants. Revealing their names prematurely could not only jeopardize their safety but also undermine their usefulness in ongoing or future investigations.

In the federal and many state systems, defendants receive witnesses' names and statements at or on the eve of trial.[63] This trial timing is consistent with *Brady*'s focus on "avoidance of an unfair trial to the accused."[64] *Brady* is designed to give juries the information they need in time to reach accurate verdicts. So long as the defense has these statements shortly in advance of cross-examination, it can use them to impeach witnesses and prepare the defense case. (Some pieces of evidence, however, might require investigative follow-up, which would take longer.) Defendants are therefore less susceptible to trial by ambush. The prosecution may still be surprised, as the defense usually does not have to reveal its witnesses' names or statements until the close of the government's case.

Trials, however, are the exception rather than the rule. Today, only about 5% of adjudicated cases go to trial. 95% plead guilty, and most of these pleas result from plea negotiations and bargains between the prosecution and defense. *Brady* and discovery rules are designed to "avoid[] an unfair trial" by informing the jury, on the assumption that there will be a trial and a jury. Their timing is geared towards trial preparation and cross-examination, not plea negotiations. Most discovery rules require some prosecutorial disclosures shortly after indictment, but typically not witnesses' names and statements until trial.

The parties sometimes choose to supplement this discovery with informal discovery, giving each other a preview of their proof to facilitate plea bargaining. If, for example, the prosecution reveals to the defendant that five eyewitnesses saw him commit the crime, he may see that a trial conviction is inevitable and plead guilty. But informal discovery is sporadic and

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[61] *E.g.*, Fed. R. Crim. P. 12.1, 12.2; Alaska R. Crim. P. 16(c)(5); Ariz. R. Crim. P. 15.2(b); Ark. R. Crim. P. 18.3.

[62] *E.g.*., Fed. R. Crim. P. 16(b); Ala. R. Crim. P. 16.2, 25.5; Alaska R. Crim. P. 16(c)(4), (6) (expert reports and physical evidence only); Ariz. R. Crim. P. 11.4, 15.2(c); Ark. R. Crim. P. 18.2 (reports of medical and scientific tests only).

[63] *E.g.*, 18 U.S.C. § 3500; Fed. R. Crim. P. 26.2.

[64] 373 U.S. at 87.

incomplete, and prosecutors are least likely to reveal their cards when they are bluffing with weak hands.

Because defendants do not have this information in time for plea bargaining, they must bargain in the dark. Typically, guilty defendants know that they are guilty and have a rough idea of what witnesses and other proof might link them to the crime. But defendants who are innocent or were intoxicated or mentally ill at the time of the crime have little knowledge of the evidence against them. Defendants who may be the most sympathetic may thus be at the greatest disadvantage in plea bargaining. They may be most susceptible to prosecutorial bluffing.

Some courts tried to extend *Brady* to plea bargaining, accelerating its timing to require disclosure in time for bargaining. They reasoned that disclosure was essential to the integrity of the plea-bargaining process. They contended that defendants needed exculpatory and impeachment information to make voluntary, knowing, intelligent pleas. And they saw *Brady* and *Giglio* information as necessary to ensure that guilty pleas are accurate and reliable.[65]

The Supreme Court, however, appears to have rejected these arguments. In *United States v. Ruiz*, the Court held that plea bargains may require defendants to waive their rights to impeachment material.[66] In a unanimous opinion, the Court reasoned that defendants have no right to impeachment information before trial. *Brady* is designed to prevent juries from being deceived at trial, the Court reasoned, not to facilitate plea negotiations and tactical decisions. Thus, this trial right does not apply before trial. Though the Court's holding is limited to *Giglio* impeachment material, much of its reasoning could apply with equal force to classic *Brady* exculpatory material.[67] True, most states require prosecutors to disclose *Brady* material at some point before trial.[68] But in the rest of the states, as well as the federal system, plea bargaining can continue to go on in the dark.

Whether this secrecy is a good or a bad thing depends on why prosecutors want to keep their cards hidden. If prosecutors bluff despite doubts about factual guilt, then actually innocent defendants might be convicted instead of persevering to possible acquittal at trial. The tradeoff is more complex when witnesses die: revealing their deaths may let factually guilty defendants walk free, but concealing them induces guilty pleas from those who could never have been convicted at trial.

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[65] *See, e.g.*, Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995); Banks v. United States, 920 F. Supp. 688, 691 (E.D. Va. 1996); Fambo v. Smith, 433 F. Supp. 590, 598-99 (W.D.N.Y.), *aff'd*, 565 F.2d 233 (2d Cir. 1977).

[66] 536 U.S. 622, 628-33 (2002).

[67] *See id.* at 629-33 (citing both *Brady* and *Giglio*).

[68] *See* Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 Fordham L. Rev. 1379, 1417 n.206 (2000) (cataloguing forty-three states that require *Brady* disclosures at some point before trial).

Often, prosecutors have good reasons to hide their cards besides covering up holes in the evidence. First, as noted, they fear witness intimidation and tampering and alibi fabrication and offer plea discounts to avoid these risks. Second, they offer plea discounts to keep undercover agents and confidential informants from having to testify, so they can develop future cases. Third, prosecutors want to spare traumatized witnesses, such as child-molestation and rape victims, from having to relive their victimization. If they can avoid releasing victims' names, sexual histories, or accounts of victimization, they plea-bargain cases away to do so. Fourth, prosecutors may be so overwhelmed with cases that they offer especially generous deals in exchange for not having to search for discovery. For example, to dispose of the flood of immigration cases swiftly, federal prosecutors in much of the Southwest offer huge discounts in exchange for waivers of all rights and immediate pleas.[69]

In short, prosecutors sometimes have legitimate reasons to buy off discovery rights with favorable plea bargains, and defendants have good reason to take these deals. Without more information, we cannot know how often non-disclosure jeopardizes innocent defendants and how often it simply protects witnesses, saves time and effort, and speeds up cases. *Brady* simply does not speak to the issue. Its focus on jury trials leaves plea-bargaining discovery unregulated by the Constitution.

The odd thing about the plea-bargaining system is that it looks vaguely like an inquisitorial model, with prosecutors trying unsuccessfully to fill judges' shoes.[70] Prosecutors sift evidence and make quasi-adjudicatory decisions about whether to charge and what punishments defendants actually deserve. Prosecutors and defense counsel cooperate and negotiate seemingly just compromises instead of fighting to complete victory or utter defeat. Yet, at root, prosecutors and defense counsel still come out of the traditional adversarial culture. They may cooperate much more than they used to, but at bottom prosecutors still see themselves not as neutral examiners but as partisan advocates.

Why Require Prosecutorial Misdeeds, Not Just Innocence?

A fifth limit on *Brady* is that, while it purported to disregard prosecutorial "guile," it nonetheless required a prosecutor's wrong rather than just a defendant's innocence. The Court's pendulum has swung back and forth on whether to emphasize the lawyers' and police's blameworthiness, the defendant's innocence, or some of both. In *Mooney* it required knowing prosecutorial use of perjury, but in *Brady* it treated the prosecutor's good faith as irrelevant. In cases involving preservation of possibly exculpatory evidence, however, the Court swung back again. *Arizona v. Youngblood* held that destruction of evidence does not violate due process unless the defendant can prove that the police acted in bad faith.[71] The same pendulum has swung back and forth on the importance of defense counsel's diligence. In *United States v. Agurs* the Court's materiality test hinged on defense counsel's actions. A piece of evidence was more

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[69] *Id.* at 625.

[70] *See generally* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 6 Fordham L. Rev. 2117, 2124-51 (1998).

[71] 488 U.S. 51, 58 (1988); *see also* California v. Trombetta, 467 U.S. 479, 488-89 (1984).

likely to qualify as material when defense counsel specifically requested it than when defense counsel made no request or only a general request.[72] But in *United States v. Bagley*, the Court rejected the *Agurs* framework. *Bagley* applies the same standard of materiality regardless of whether defense counsel specifically requests a piece of evidence.[73] (If, however, the prosecutor has rebuffed a specific request, a court will be more likely to find that the defense lawyer relied on the prosecutor's answer, so good defense lawyers still make specific requests.) In short, the Court is torn between emphasizing the badness of the lawyers and police and the innocence of the defendant. It wants both to punish misconduct and to free the innocent, but each goal may compete with the other. The bottom line today is that prosecutorial mens rea and defense counsel requests are largely irrelevant (except in destruction-of-evidence cases). But, as we shall see, prosecutorial misconduct (actus reus) still matters greatly.

If *Brady* is fundamentally about innocence and not prosecutorial misconduct, why should it depend on whether the prosecutor happened to have a material fact and withheld it? In other words, should courts reverse convictions wherever there is significant new evidence of actual innocence, regardless of whether the police and prosecutor ever found it?

The law focuses on procedural violations rather than substantive innocence in order to preserve the jury's privileged place in the adversary system. Recall that judges supervise procedural issues and juries determine substantive ones. A trial or appellate judge cannot simply find a defendant innocent or guilty, as that would intrude on the jury's sacred province. Rather, the judge usually has to find a procedural error. For example, the judge may rule that the prosecutor made an improper kind of argument or introduced a prejudicial piece of evidence. The ordinary remedy is to send the case back for another jury trial. (A judge may, however, occasionally find that the evidence was insufficient to sustain a conviction or that the interests of justice require a new trial.) In other words, defendants argue their innocence to juries, but legal points to judges. A defendant who wants to challenge a conviction after trial or on appeal must argue that there was a procedural defect in the trial. If the trial or appellate court agrees, the remedy is a whole new trial, unless the procedural error was not properly preserved or was harmless.

Judges are human and are most willing to reverse convictions when they think that defendants may be factually innocent. But claims of factual innocence, by themselves, do not show any procedural errors in jury verdicts. To persuade, defendants must take claims of factual innocence and dress them up as procedural errors. For example, they may argue that their

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[72] *Compare* United States v. Agurs, 427 U.S. 97, 104-06 (1976) ("When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable."), *with id.* at 112 (in general-request or no-request cases, evidence is material "if the omitted evidence creates a reasonable doubt that did not otherwise exist").

[73] 473 U.S. at 682 (opinion of Blackmun, J.) (holding that the same standard covers specific requests, general requests, and no requests: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."); *id.* at 685 (White, J., concurring in part and concurring in the judgment) (agreeing with the test set forth in the first quoted sentence of the previous parenthetical).

lawyers were ineffective and that there is a reasonable probability that the jurors would have acquitted if counsel had made a certain argument. In other words, while doubt about guilt may sway a judge's heart, a defendant also needs the hook of a procedural claim to open the courthouse door.[74]

In inquisitorial systems, in contrast, judges find both facts and law, without juries and the elaborate procedures surrounding them. Judges focus on the substantive questions of guilt and punishment instead of evidentiary and procedural rules. On appeal, defendants can again argue their innocence. If the trial court neglected to consider a piece of evidence, the appellate court need not send the case back for trial. It can decide for itself on the paper record whether, in light of the additional evidence, the defendant is guilty.

Brady claims exemplify the adversary system's blend of procedural error and substantive doubts about guilt. The *Brady* test requires that evidence be both exculpatory and material– there must be a reasonable probability that it would have led to acquittal or lesser punishment. But it also requires that the prosecution withheld or suppressed this evidence. Perhaps prosecutorial withholding is a proxy for very damaging evidence,[75] but it is at best an imperfect proxy. Even though *Brady* purports to ignore prosecutorial fault, it still requires some prosecutorial withholding or suppression, whether intentional or not. Under this standard, some guilty defendants receive windfalls simply because their adversaries goofed, while some innocent defendants receive no relief because their prosecutors played by the rules. In this way, the sporting theory of justice lives on.

Conclusion

Brady was a significant step toward making adversarial combat fairer, and it was part of a trend towards liberalizing discovery on both sides. It indirectly promotes reliability by modestly leveling the adversarial playing field, compensating a bit for prosecutors' superior resources and access to evidence. *Brady* could have meant much more, though. It could have portended a shift away from adversarial combat at trial towards a joint search for guilt or innocence. Ultimately, though, our proceduralized adversarial model has rendered *Brady*, if not a dead letter, not a very vigorous one either. Judges are too weak, prosecutors are too partisan, enforcement is too difficult, discovery is too limited, and plea bargains are too widespread for *Brady* to influence many cases. *Brady* remains an important symbol but in some ways a hollow one.

One can only speculate about whether *Brady*'s activism contributed to its failings. When the Court creates a sweeping new rule, without the benefit of common-law experimentation, it cannot know how the rule will fare in practice. The Court could instead have let courts,

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[74]The Supreme Court has left open the possibility that "a truly persuasive demonstration of 'actual innocence'" might itself trigger a due process right to federal habeas relief, even without any other procedural error. But even if the Constitution guarantees such a due process right, the standard is an extremely high one that defendants will rarely satisfy. *See* Herrera v. Collins, 506 U.S. 390, 417 (1993).

[75]*See* Arizona v. Youngblood, 488 U.S. 51, 58 (1988) (confining the police duty to preserve evidence to "those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.").

legislatures, and the bar experiment with more workable rules and enforcement mechanisms. Perhaps, if it had, *Brady* would have had more impact on our adversary system. Justice White's concurrence may have been prescient after all.