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Flipping the Script on Brady

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Flipping the Script on *Brady*

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Brady v. Maryland *imposes a disclosure obligation on the prosecutor and, for this reason, is understood to burden the prosecutor. This Article asks whether* Brady *also benefits the prosecutor, and if so, how and to what extent does it accomplish this?*

This Article first considers Brady*'s structural impact—how the case influenced broader dynamics of litigation. Before* Brady*, legislative reform transformed civil and criminal litigation by providing pretrial information to civil defendants but not to criminal defendants. Did this disparate treatment comport with due process?* Brady *arguably answered this question by brokering a compromise: in exchange for imposing minor obligations on the prosecutor at trial, the Court signaled to the prosecutor that to withhold information before trial does not violate due process.*

This Article also explores Brady*'s narrative treatment. This Article contends that the narrative that* Brady *imposes a significant burden on prosecutors, despite scholarly efforts to move past it, is pervasive. This narrative of prosecutorial burden confers unearned legitimacy to case outcomes. This Article finally examines how prosecutorial interests have deployed* Brady *politically, focusing on how the Department of Justice has wielded the* Brady *obligation to deflect political attempts to expand pretrial discovery.*

In the attempt to provide a fuller account of the case's benefits and burdens on litigants, this Article suggests the possibility that Brady *can also be viewed as a prosecutorial ally. This Article uses this possibility as an opportunity to consider alternative approaches to assessing whether the criminal pretrial procedural regime comports with due process.*

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INTRODUCTION

Brady v. Maryland, a landmark case in the criminal procedure canon, will confound those who attempt to frame it. The case's command—that a prosecutor must turn over material information favorable to a defendant[1]—has left a legacy of contestation. Some celebrate the case for announcing a bold vision of due process.[2] Others lament that a conservative doctrinal countermand dashed any potential.[3]

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

2. JOSHUA DRESSLER & GEORGE THOMAS, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES, AND PERSPECTIVES 892 (5th ed. 2013) ("The Court's first constitutional discovery case was a 'shot heard 'round the world.'"); RUSSELL L. WEAVER, LESLIE W. ABRAMSOM, RONALD BACIGAL, JOHN M. BURKOFF, CATHERINE HANCOCK, DONALD E. LIVELY & JANET C. HOEFFEL, CRIMINAL PROCEDURE: CASES: PROBLEMS & EXERCISES 888 (3d ed. 2007) ("*Brady*'s due process obligation to disclose exculpatory evidence overrides any limitations on discovery provided for by a jurisdiction's discovery statutes or rules."). Justice Marshall would assert the "original theory and promise of *Brady*" was to be as broad as the duty of the prosecutor to disclose all evidence in his files that "might reasonably be considered favorable" to the defendant's case. United States v. Bagley, 473 U.S. 667, 702 (1985).

3. Bennett L. Gershman, *Reflections on* Brady v. Maryland, 47 S. TEX. L. REV. 685, 686 (2006) ("Reflecting on this landmark decision forty-three years later, one is struck by the dissonance between *Brady*'s grand expectations to civilize U.S. criminal justice and the grim reality of its largely unfulfilled promise."); Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1535–36 (2010) (arguing that subsequent *Brady* decisions have failed to live up to the ideals of the original decision); Colin Starger, *Expanding Stare Decisis: The Role of Precedent in the Unfolding Dialectic of* Brady v. Maryland, 46 LOY. L.A. L. REV.

Almost all commentators perceive the case as a benefit to the defendant and a burden to the prosecutor. But might *Brady* also confer certain benefits to prosecutors? This Article recasts *Brady* as a potential prosecutorial ally in important respects, raising new questions over the doctrine's ability to ensure due process in criminal disputes.

One benefit that *Brady* conferred to prosecutors is structural in nature. Under common law, civil and criminal disputes shared a similar procedural template. Before *Brady* was decided, a federal effort was launched to reform civil litigation.[4] The transformative result simplified pleading, permitted joinder of claims, and created a pretrial discovery phase.[5] The federal reform effort then took up *criminal* litigation with a proposal that mirrored the civil template.[6] But the final draft did not include pretrial discovery for criminal disputes. Did a system that afforded pretrial information to *civil* defendants, but not to *criminal* defendants, comport with due process?

This Article argues that *Brady* implicitly resolved this question. By constraining due process review to the trial moment, *Brady* fortified prosecutorial power over the distribution of information during pretrial proceedings, where virtually all cases (ninety-five percent) resolve.[7] As to the five percent of criminal cases that advance to trial, defendants in those cases have no constitutional right to any pretrial disclosures—however essential such information might be to preparing for trial. In carving out an unused space (trial) to constitutionally insist on prosecutorial disclosure, the Court signaled that the pretrial record was free from constitutional scrutiny. Under this view, *Brady* can be understood to have validated the larger procedural project in the late 1930s and early 1940s to reform litigation, a restructuring that significantly favored prosecutorial interests.

Another benefit that *Brady* confers to prosecutorial interests is *narrative*. Narratives generated in law school curriculum, scholarship, and popular accounts portray *Brady* to impose on the prosecutor a duty to do damage to her own case.[8]

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77 (2012).

4. Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 961 (1987).

5. *Id.* at 923–34.

6. Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 FORDHAM L. REV. 697, 706–07 (2017).

7. *See* RICK JONES, GERALD B. LEFCOURT, BARRY J. POLLACK, NORMAN L. REIMER & KYLE O'DOWD, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL AND HOW TO SAVE IT 14, 62 n.2 (2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf [https://perma.cc/6DCC-W6PJ] (finding that approximately ninety-seven percent of federal criminal cases are resolved before trial); Erica Goode, *Stronger Hands for Judges in the 'Bazaar' of Plea Deals*, N.Y. TIMES (Mar. 22, 2012), https://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html [https://perma.cc/2Z55-NGBW] (reporting that "97 percent of federal cases and 94 percent of state cases end in plea bargains").

8. *See, e.g.*, Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 643–44 (2002) ("*Brady* is often heralded as the Supreme Court case that granted the criminally accused a constitutional right to discovery. . . . Certainly when I first started teaching *Brady*, I taught it from this heroic viewpoint.").

Portraying *Brady* as requiring a self-inflicted wound enhances the image of the prosecutor as a minister of justice who searches for the truth, and not for any particular result. This portrayal helps conceal the reality that the prosecutor has license to engage in truth-suppressing tactics during the pretrial period. Often portrayed as a game-changing doctrine that reflects a special concern for due process in the criminal arena, an inflated narrative distributes significant benefits to prosecutorial interests in conferring legitimacy, however unearned, to outcomes.

This Article also examines a *political* use of the case that has furthered prosecutorial interests. In individual cases, prosecutors will always argue *Brady* is limited to trial, and the Court has agreed. Despite this agreement that *Brady* does not apply to pretrial proceedings, in the political arena, prosecutorial interests have argued that the *Brady* burden should protect them against legislative efforts to expand pretrial discovery. In this way, prosecutors not only have relied on *Brady* to limit the constitutional review of information to the trial phase but have effectively deployed *Brady* to beat back legislative proposals to expand pretrial discovery.

In identifying how *Brady* has potentially distributed benefits to prosecutorial interests, this Article is situated within scholarship that questions how rights, within political and social contexts, can work to reinforce entrenched power.[9] In providing a lens to understand *Brady* not just as a check on executive power but also as a doctrine of executive empowerment, this Article questions prevailing explanations of *Brady*'s role in criminal disputes, and it further questions whether the Court's present approach adequately addresses process concerns in criminal disputes.

In Part I, this Article turns to *Brady*'s origin story, examining its doctrinal roots and how the legal community initially received the case. This Part also seeks to situate *Brady* within the political context: the case followed political reform that dramatically altered litigation and increased prosecutorial power. Part II considers the structural, narrative, and political implications of *Brady* that potentially distribute benefits to prosecutorial interests. Part III uses the possibility that *Brady* is a prosecutorial ally to consider alternative approaches to assessing whether the criminal pretrial procedural regime comports with due process.

I. *BRADY*, A MODEST DOCTRINE, A MOMENTOUS IMPACT

Decided in 1963, *Brady* announced a prosecutor must disclose evidence "favorable" to the defendant and "material" to the case.[10] *Brady* is considered a landmark due process case. *Brady*'s vague language is subject to contestation, though

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9. *See, e.g.*, DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 3 (1999); RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007); Derrick Bell, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980); Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1425–26 (2016); Lani Guinier, *From Racial Liberalism to Racial Literacy:* Brown v. Board of Education *and the Interest-Divergence Dilemma* 91 J. AM. HIST. 1 (2006); Alice Ristroph, *Power-Conferring Criminal Procedure* (2019) (unpublished manuscript) (on file with author) (revealing how a constitutional right has a power-conferring nature—that is, in creating a zone of regulation, the Court facilitates the exercise of state power within these constraints).

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

much of the debate surrounding *Brady*'s meaning and importance is of a recent vintage. As post-conviction litigation took on new significance with a growing innocence movement, *Brady*'s visibility increased, as did scrutiny.[11] Some viewed *Brady*'s disclosure obligations to be significant, early enough, and readily enforced by prosecutors exercising their role as ministers of justice.[12] Others identified features of *Brady* that diluted its effectiveness.[13] However disparate these voices are in assessing *Brady*, there is widespread agreement that the doctrine was designed to *burden* the prosecutor. Left undertheorized is the consideration that *Brady* also operated to *benefit* prosecutorial interests. To examine this possibility, it is beneficial to step away from the current debates and to consider *Brady*'s origin story.

A. Brady *at Birth, a Modest Proposition*

Initially, *Brady* received a quiet reception. The legal community viewed the case as a minor adjustment to existing rules of trial engagement. Bar journals referenced *Brady* a few times, accompanied by an obligatory summation.[14]

For contrast, the legal ecosystem's reaction to *Gideon v. Wainwright*, decided that same year, filled bar journal pages.[15] As the legal community absorbed a new paradigm of practice under *Gideon*, any significance of *Brady* escaped notice. The following year, *Gideon* often served as a publication's centerpiece: "*The Year of*

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11. The references to "*Brady v. Maryland*" begin to grow in the mid-1970s, and exponentially in the early 2000s. *See Timeline Graph*, LEXISNEXIS, https://advance.lexis.com/ (searching "*Brady v. Maryland*").

12. *See, e.g.*, Kelly A. Zusman & Daniel Gillogly, *Getting a Clue: How Materiality Continues to Play a Critical Role in Guiding Prosecutors' Discovery Obligations*, 60 U.S. ATT'Y BULL. 5, 13–20 (2012) (referring to some *Brady* disclosure requirements as "self-executing" and arguing that the broad view of materiality at the pretrial stage used by some trial court judges "does not reflect the constitutional rule").

13. *See infra* notes 110–114 and accompanying text.

14. A search on Hein Online for "'brady maryland'~4" calls up two bar journals in 1963; the same search for *Gideon* resulted in seventy-seven references. In 1963–64, scholarship addressing *Brady* only provided a quick, accessible summary of the holding. *See, e.g.*, Carolyn Jaffe Andrew, *Abstracts of Recent Cases*, 54 J. CRIM L. CRIMINOLOGY & POLICE SCI. 488, 493 (1963); Notes, *Contracts—Minor's Contract—An Absolute or Relative Nullity?*, 38 TUL. L. REV. 755, 760–63 (1964); George Rossman & Rowland L. Young, *Review of Recent Supreme Court Decisions*, 49 A.B.A. J. 895, 899 (1963). *But c.f.* Richard A. Bradshaw, Comment, *Discovery in Criminal Cases: The Problem in Texas*, 1 HOUS. L. REV. 158, 162 nn.30–31 (1963); John C. Tyson, III, *Whither: On Habeus*, 24 ALA. LAW. 271 (1963).

15. Examples of *Gideon*'s uptake abound. In Missouri, "[L]eaders of the Bar [now] realize that further progress must be made in providing counsel for indigents. Roy Swanson, *Report of President Roy P. Swanson*, 19 J. MO. B., 592, 593–94 (1963); *see also* Edward Thorton, *Sections for the Alabama Bar Association*, 24 ALA. LAW. 335, 336, 341 (1963). In New York, *Gideon* is a "significant achievement." *Lawyers Guide to Current Thought as Culled from the Periodicals*, 21 B. BULL. N.Y. 146, 150 (1963). In North Carolina (where state-rights adherents bristled at federal incursion), the state deputy attorney general wrote: "I apologize to you for again mentioning this much discussed subject. Now that the Supreme Court of the United States has begun its process of legislation . . . the next question is: What is the probable extent of this Act now that it has passed?" Honorable Ralph Moody, *Probable Extent of Assignment of Counsel of Indigent Defendants*, N.C. ST. B. Q., Nov. 1963, at 21, 22.

Gideon," announced the Kentucky State Bar Journal;[16] "*The Gideon Case, A Mandate for the Organized Bar*," stated the Boston Bar Journal;[17] "*The Impact of Gideon v. Wainwright*," announced the Pennsylvania Bar Association Magazine.[18] Having a similar period of time to reflect over *Brady*'s potential import, the legal community remained silent—though a bar journal did take up discussion on *Brady* in 1964 for its possible contribution to understanding an arcane civil-procedure point about the *Erie* Doctrine.[19]

The muted reaction was understandable. The opinion traveled well-tread precedent, the majority viewing the decision as "an extension" of *Mooney v. Holohan*.[20] Decided in 1935, *Mooney* stood for the proposition that due process was offended if a prosecutor presented trial testimony "known to be perjured."[21] Like *Mooney*, *Brady* regulated the quality of information heard by a jury: if *Mooney* governed what evidence could *not* be presented at trial (perjured evidence), *Brady* governed what evidence *had* to be disclosed at trial (material and exculpatory evidence).[22] A few months after *Brady*, the Third Circuit granted a new trial where a prosecutor withheld a witness statement that the murder victim had aggressed toward defendant,[23] and the Second Circuit ordered a new trial where the prosecutor failed to disclose eyewitnesses who contradicted the State's case.[24] These cases reveal *Brady*'s provision of a remedy where *Mooney* did not—at issue was not what the prosecutor did disclose, but what information the prosecutor failed to disclose. Highlighting *Brady*'s low profile, the Massachusetts Supreme Court in 1966 stated, as to prosecutorial duties of disclosure, the "leading case is *Mooney v. Holohan*."[25] A broad review of cases in the five years following *Brady*'s arrival indicates *Brady* did not disrupt business as usual.[26]

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16. Arnold Trebach, *The Year of* Gideon, 28 KY. ST. B.J. 37 (1964).

17. Frederick Norton, *The* Gideon *Case: A Mandate for the Organized Bar*, 8 BOS. B.J. 7 (1964).

18. Richard Thornburg, *Indigents in the Pennsylvania Criminal Courts: The Impact of* Gideon v. Wainwright, 36 PA. B. ASS'N Q. 59 (1964).

19. *See* Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964), *reprinted in* 19 REC. ASS'N B. CITY N.Y. 64 (1964).

20. Brady v. Maryland, 373 U.S. 83, 86 (1963) (citing Mooney v. Holohan, 294 U.S. 103, 111–12 (1935)).

21. *Mooney*, 294 U.S. at 111–12. *Mooney* was not only modest in ambition but was in operation unenforceable (even if one could prove a witness perjured himself, the prosecutor could deny knowledge of the perjury).

22. Other cases are often cited on the path from *Mooney* to *Brady*: in *Pyle v. Kansas*, 317 U.S. 213, 215–16 (1942), the Court suggested a due process violation if a prosecutor suppressed evidence favorable to defendant, though the ruling was based on the State presenting perjured testimony; in *Napue v. Illinois*, 360 U.S. 264, 269 (1959), the Court held that a prosecutor offends due process where he fails to correct false evidence.

23. United States *ex rel.* Butler v. Maroney, 319 F.2d 622, 625 (3d Cir. 1963).

24. United States *ex rel.* Meers v. Wilkins, 326 F.2d 135, 138 (2d Cir. 1964).

25. Commonwealth v. Heffernan, 213 N.E.2d 399, 404 (Mass. 1966) (citation omitted).

26. Searches of Hein Online for "*Brady v. Maryland*" from 1963–73 reveal few mentions of the case in bar journals (forty-five) or American Bar Association journals (twenty-one). Many of the mentions were syllabi of the case, informing readers of the facts, issue, and outcome. *See, e.g.*, Rossman & Young, *supra* note 14. Several more relate to antitrust

The early consensus among federal and state courts was that trial triggered *Brady* and that the constitutional regulation of information did not extend to the pretrial period. One such decision even held a prosecutor need not consider a *Brady* disclosure until the "government has closed its case in chief."[27] Courts deemed the pretrial space off limits to defendants who attempted to use *Brady* as a pretrial discovery right.[28] On this point, a district court in *United States v. Manhattan Brush Co*. was emphatic, a subheading in its order stating, "The Principles of Fair Play in the Conduct of a Criminal Prosecution Do Not Supply Defendants with a Basis for Pre-Trial Discovery."[29] The court continued that the defendant's position was "predicated on the alleged right of the defense to learn all the Government's evidence in advance of trial. . . . [But in *Brady*] [t]he entire discussion of the Court related to the resulting deception upon the Court and jury."[30] The court observed that pretrial discovery was governed by legislative rules, not court-superintended constitutional review.[31] Similarly, an Alabama decision declining to provide relief under *Brady* referred the defendant to the state's legislative rules for guidance on pretrial discovery rights.[32] In Iowa, a defendant's assertion that *Brady* entitled him to pretrial depositions, so as to permit effective cross-examination at trial, was rejected as an attempt to transform *Brady* into a "right of discovery."[33] A Floridian defendant attempting to deploy *Brady* as a tool to compel pretrial discovery was similarly rejected.[34] A Wisconsin court, rejecting a *Brady* claim, added that any pretrial right to information would need to be found in state law, since Wisconsin "[did] not recognize a right in defendant to a pretrial discovery of the prosecution's evidence."[35] The Missouri Supreme Court, in 1967, found nothing in *Brady* to permit a defendant "prior to trial to inspect all evidence in the hands of the prosecution favorable to the accused."[36]

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litigation. *See, e.g.*, Charles D. Mahaffie, Jr., *Criminal Antitrust Investigations,* 41 ANTITRUST L.J. 521, 521–26 (1971). In the five years post-*Brady*, only forty-five federal cases and sixty-five state cases mention *Brady v. Maryland*. The references to *Brady* begin to grow in the mid-1970s, and exponentially in the early 2000s. *See supra* note 11.

27. United States v. Leighton, 265 F. Supp. 27, 35 (S.D.N.Y. 1967).

28. *E.g.*, United States v. Manhattan Brush Co., 38 F.R.D. 4, 5–6 (S.D.N.Y. 1965); Sanders v. State, 179 So. 2d 35, 39 (Ala. 1965) (stating that *Brady* provides no authority for defendant to engage in a "mere fishing expedition").

29. *Manhattan Brush*, 38 F.R.D. at 5–6.

30. *Id.* at 6.

31. *See id*. at 6–7.

32. Sanders, 179 So. 2d at 38–39 (citing L. Drew Redden, *The Right of the Defendant to Discovery in Criminal Prosecutions*, 22 ALA. LAW. 115 (1961)).

33. State v. Tharp, 138 N.W.2d 78, 81 (Iowa 1965).

34. United States v. Venn, 41 F.R.D. 540, 541 (S.D. Fla. 1966). The Floridian defendant attempted to avoid reciprocity (in requesting information, a defendant waives any objection to similar information requested by the State) by attempting to use *Brady* to effectuate a right of discovery (presumably without triggering a reciprocity obligation). The court not only viewed *Brady* as "advisory" but also stated that *Brady* does "not provide additional discovery."

35. State v. Miller, 151 N.W.2d 157, 169 (Wis. 1967).

36. State v. Reynolds, 422 S.W.2d 278, 281 (Mo. 1967) (emphasis omitted) (quoting James M. Carter, *Suppression of Evidence Favorable to an Accused*, 34 F.R.D. 87, 87 (1964)).

During those first years of *Brady*'s quiet arrival, courts understood *Brady* to provide a modest gap-filling amendment to *Mooney*—where *Mooney* barred the disclosure of certain evidence by the prosecutor, *Brady* announced what evidence a prosecutor could not withhold at trial.[37] Attempts by defendants to expand *Brady* to the pretrial phase were broadly rejected by state and federal courts. Understood as imposing a modest burden on the prosecutor, no court or commentator considered whether the decision to *cede the pretrial process to legislative regulation* constituted a significant realignment of power that favored prosecutorial interests.

B. Brady *in a Broader Context, a Momentous Impact*

Brady was not decided in a procedural vacuum. In the interim between *Mooney* and *Brady*, litigation in the United States had been transformed by legislative reform. The Court in *Brady*, however, did not acknowledge the dramatic procedural realignment that afforded pretrial information to civil defendants, but not to criminal defendants. This Article contends *Brady* legitimated this new order. Under this view, what was understood as a modest adjustment to existing doctrine had implicitly validated sweeping legislative reform that granted pretrial discovery to civil defendants but denied it to criminal defendants.

1. The Transformation of Litigation After *Mooney*

When the Court decided *Mooney* in 1935, civil and criminal parties were subject to similar treatment.[38] Governed by the common law, civil and criminal disputes occurred in two stages: *pleading* and *trial*.[39] Criminal and civil claimants typically were constrained to presenting a single issue against a single defendant.[40] Pleading

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37. Outlier courts detected (however mistakenly) change afoot. *E.g.*, United States v. Gleason, 265 F. Supp. 880, 884 (S.D.N.Y. 1967) ("It seems doubtful, however, that there should be a blanket rule postponing to the trial all [*Brady*] disclosures . . . ."). A district court in Indiana, in 1967, noted interplay between the Federal Rules of Criminal Procedure, the Jencks Act, and *Brady*, opining that the "Supreme Court today favors broader disclosure in criminal cases." United States v. Westmoreland, 41 F.R.D. 419, 424 (S.D. Ind. 1967). And yet, this court found no basis to grant defendant access to a list of government witnesses, including eyewitnesses who could not identify defendants. *Id.* at 427.

38. Criminal litigants, for example, would seek instruction from a civil treatise, and vice versa. Meyn, *supra* note 6, at 701–02.

39. Ellen E. Sward, *A History of the Civil Trial in the United States*, 51 KAN. L. REV. 350–52 (2002); *see also* JOSEPH H. KOFFLER & ALISON REPPY, HANDBOOK OF COMMON LAW PLEADING 13–14 (1969); BENJAMIN J. SHIPMAN, HANDBOOK OF COMMON-LAW PLEADING 8–9 (3d ed. 1923). The pleadings stage determined whether a plaintiff had a cognizable claim and, if so, endeavored to precisely identify the dispute's legal and factual topography. *See id.* at 9; Charles E. Clark, *History, Systems, and Functions of Pleading*, 5 AM. L. SCH. REV. 716, 717 (1926).

40. *See, e.g.*, Stubblefield v. Commonwealth, 246 S.W. 444, 445 (Ky. 1923) (noting that the particularities of pleading in criminal law "emanated from the extreme technical exactness of the common law with reference to pleading in both civil and criminal causes"); 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 508 (1883); Franklin G. Fessenden, *Improvement in Criminal Pleading*, 10 HARV. L. REV. 98, 99 (1896) ("As in ancient

was a technically demanding phase, but if litigants made it past judicial scrutiny of the claim and defense, they advanced directly to trial. No process empowered parties to develop and interrogate a pretrial record. *Mooney* precluded the prosecutor from knowingly presenting perjured evidence at trial,[41] as that was when, under common-law procedure, information was disclosed, developed, and interrogated.

After *Mooney*, however, legislative reform transformed litigation. Due to the "extreme technical exactness" of pleading in "both civil and criminal causes,"[42] common-law procedure drew criticism from all litigants.[43] Within this criticism, the New Deal ethos of centralized, expert-based policy interventions provided impetus for federal reform.[44] Congress enabled the Supreme Court to create the Federal Rules of Civil Procedure.[45] In creating a new approach to litigation, a civil rules advisory committee (appointed by the Court) eased pleading requirements, permitted joinder of claims and parties, and installed a pretrial discovery phase—this last part a centerpiece, critical to the determination of cases on their merits.[46] Civil reform balanced competing interests by giving plaintiffs easy access to the courts while giving defendants the pretrial opportunity to check the factual integrity of plaintiffs' allegations. Many states adopted the federal template as their own.[47]

Following a broadly positive reception, federal reformers took up *criminal* litigation with a proposal that mirrored the civil template.[48] Under this proposal, a

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days the test was whether the case could be brought to fit the writ, so now the inquiry . . . is whether the case fits the form of indictment."). As to single-issue pleading, see Tomlinson v. Territory, 33 P. 950, 952 (N.M. 1893) ("There being but one count in the indictment, not more than one offense could properly be proved. It is a principle of common law pleading, applicable to both civil and criminal cases, that all pleadings must be single."); THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 424, 426 (5th ed. 1956) (describing pleading requirements as to criminal disputes); Ronald Hamowy, *F.A. Hayek and the Common Law*, 23 CATO J. 241, 248, (2003) (describing pleading requirements as to civil disputes); Subrin, *supra* note 4, at 915. As to the reference to "litigants"—until the professionalization of police and the rise of public prosecutors in the late 1800s, it was most common for a private citizen to serve as a plaintiff in the criminal law actions. *See* PLUCKNETT, *supra*, at 424.

41. Mooney v. Holohan, 294 U.S. 103, 111–12 (1935).

42. *Stubblefield*, 246 S.W. at 445.

43. Meyn, *supra* note 6, at 701–03.

44. *See* David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 438 n.2 (2011); Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 272–73 (1989); Laurens Walker, *The End of the New Deal and the Federal Rules of Civil Procedure*, 82 IOWA L. REV. 1269, 1271 (1997).

45. 28 U.S.C. § 723(b)–(c) (1934) (current version at 28 U.S.C. § 2072 (2018)); Charles E. Clark, *Fundamental Changes Effected by the New Federal Rules I*, 15 TENN. L. REV. 551, 555–56 (1939). The Supreme Court appointed an Advisory Committee on Civil Rules consisting of lawyers, academics, and judges to draft a proposal. Meyn, *supra* note 6, at 705; Subrin, *supra* note 4, at 971–72.

46. *See* Subrin, *supra* note 4, at 976–82.

47. *See* Jerold H. Israel, *On Recognizing Variations in State Criminal Procedure*, 15 U. MICH. J.L. REFORM 465, 484–85 (1982).

48. Meyn, *supra* note 6, at 707–10. This approach had academic and political support. *Id.* at 709–10. For example, Jerome Hall, a preeminent criminal procedure scholar, commented: "[T]he new civil rules are always suggestive and sometimes can be applied almost literally to criminal procedure." Jerome Hall, *Objectives of Federal Criminal Procedural Revision*, 51

prosecutor could join issues and easily pass through the courthouse door, but in exchange for this privilege, a defendant could require the prosecutor to immediately turn over information relevant to the dispute, then test that information through depositions. The full Advisory Committee on Criminal Rules ("Criminal Committee"), however, produced a significantly modified draft, keeping civil-joinder and notice-pleading rules but striking discovery provisions.[49] As a result of these changes, only one party to a criminal dispute has some degree of formalized pretrial agency—the prosecutor, who receives information either through the grand jury process (which affords the power to compel the disclosure of relevant information) or from law enforcement (imbued with the authority to search and seize). If civil reform created a finely tuned, hydraulic system intended to reach the merits through adversarial testing, criminal reform worsened an already existing asymmetry that favored prosecutors.[50]

This transformation of civil and criminal litigation occurred *after* the Court decided *Mooney* but well *before* the Court decided *Brady*. When the Court decided *Brady* in 1963, it looked across a transformed procedural plain. The new federal rules of procedure had created two separate and unequal worlds—in the civil forum, procedural reform constructed a pretrial discovery phase, but in the criminal forum, it significantly expanded prosecutorial control over the pretrial period.

2. The Court in *Brady* Ignores the Procedural Transfer of Power to the Prosecutor

The Court ignored these transformative changes when it decided *Brady*. The Court instead looked to *Mooney*—a case that superintended constitutional notions of due process in a world that no longer existed. Following *Mooney*, the Court announced that due process imposed certain obligations on the State *at trial*. Justice White, in *Brady*'s concurrence, was the most explicit about the line of demarcation, writing that the Court left pretrial discovery obligations to the "legislative process after full consideration by legislators, bench, and bar."[51] What Justice White failed to mention was that many legislatures across the country *had already* given full

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YALE L.J. 723, 739 (1942).

49. *See* Meyn, *supra* note 6, at 727–30. The Committee preserved notice pleading and expanded joinder, but discarded discovery, noticed motions, and pretrial influence of courts. *Id*.

50. Police power has expanded in terms of staffing, resources, and investigative scope, channeling more information to the State's file. Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 396 (1992). These conditions reinforce police and prosecutorial power. *Id*. Prosecutors have long used the grand jury as an investigative tool. *See, e.g.*, Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1191 (1960).

51. Brady v. Maryland, 373 U.S. 83, 92 (1963) (White, J., concurring). A few scholars shared Justice White's worry that the case would justify unwarranted judicial intervention. *See, e.g.*, Robinson O. Everett, *Discovery in Criminal Cases—In Search of a Standard*, 1964 DUKE L.J. 477, 515–16 ("For purposes of . . . [a *Brady*] petition, the defendant . . . will probably make allegations in very broad terms . . . and then seek discovery of the documents which were not exhibited to the defense . . . ."); David B. Wexler, *The Constitutional Disclosure Duty and the Jencks Act*, 40 ST. JOHN'S L. REV. 206, 211 (1966) (stating that *Brady* represents a "constitutional discovery ambit").

consideration to these issues in establishing separate and unequal civil and criminal forums, giving form to a new procedural structure that conferred significant benefits to prosecutors.

3. Prosecutorial Power Expands After *Brady*

After the Court announced *Brady* in 1963, a second, more sustained legislative period occurred that further increased prosecutorial pretrial discretion. During the tough-on-crime movement in the 1970s, the prosecutorial hammer became heavier and the radius of its sweep grew wider.[52] The Court opted to take on spectator status, staying true to the approach first fashioned in 1935 in *Mooney*, an approach of judicial restraint that became more radical as the world around the Court continued to change.

The legislative changes that occurred after *Brady* were substantive in nature but exacerbated the procedural pretrial asymmetry existing between the criminal defendant and the prosecutor. These changes are well documented. The 1970s marked a hard turn toward crime control, along with a "revolutionary expansion . . . in criminal discovery *by the prosecution* against the defense."[53] As the scope of criminally regulated conduct increased,[54] more severe sentencing regimes proliferated.[55] These conditions increased the prosecutor's "charge bargaining" discretion, in which she chooses from a menu of penalties for the same conduct,[56] as well as her "fact bargaining" discretion, in which a prosecutor determines what facts to credit or disregard, providing penalty swings for the same conduct.[57] The widespread implementation of mandatory minimums—including the Federal

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52. Ion Meyn, *The Haves of Procedure*, 60 WM. & MARY L. REV. 1765, 1798–99 (2019).

53. Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CALIF. L. REV. 1567, 1569 (1986) (emphasis added). Any discovery gains by defendants in the 1960s would encounter a vigorous, sustained, counterresponse. *See* Edward J. Imwinkelried, *The Worst Surprise of All: No Right to Pretrial Discovery of the Prosecution's Uncharged Misconduct Evidence*, 56 FORDHAM L. REV. 247, 253 n.44 (1987); Meyn, *supra* note 52, at 1798–1800; Ellen S. Podger, *Criminal Discovery of Jencks Witness Statements: Timing Makes a Difference*, 15 GA. ST. U. L. REV. 651, 662 nn.71–75 (1999).

54. Gershman, *supra* note 50, at 406 (surveying expansion of the substantive criminal law).

55. BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 58–61 (2007) (charting proliferation of severe sentencing regimes in 1980s and 1990s); Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 81–82 (2016) (describing effect of tough-on-crime rhetoric that emerged in the 1970s); Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U. L. REV. 161, 169–70 (2016) (describing how rehabilitation was replaced by retribution in the second half of the 20th century).

56. *See* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 961 (2009); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 55–59 (1997).

57. William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2559–60 (2004). Fact bargaining is seen in *Bordenkircher v. Hayes*: the prosecutor threatened to credit a repeat-offender enhancement, transforming a sentence for forgery from ten years to life. 434 U.S. 357, 358–59 (1978).

Sentencing Guidelines in 1984—transferred discretion from the judiciary to the prosecutor, further marginalizing the role of courts in criminal litigation.[58] The prosecutor's control over the plea process grew as judges were prevented from making downward departures, converting a prosecutor's presentence offer into the sentence itself.[59] As reforms in the early 1940s removed the trial court from the front end of litigation (it no longer served as a gatekeeper during the pleading stage), legislative change after the 1970s removed the judge from the back end of litigation (sentencing no longer served as a check on prosecutorial overreaching).

The Court remained on the sidelines, and the *Brady* doctrine remained anchored to its noninterventionist origins. The Court rebuffed challenges to the trial/pretrial line that constrained the scope of its due process review, holding fast to the proposition that the prosecutor's disclosure obligation is triggered by the onset of trial.[60] The Court has rejected arguments that pretrial proceedings are inextricable from the quality of a trial or that a certain indicia of information should inform the decision to plea.[61] Providing insight into the justification for its commitment to nonintervention, in *United States v. Bagley*, the Court explained its approach was careful "not to displace the adversary system as the primary means by which truth is uncovered."[62] But the Court was more explicit in *United States v. Agurs*, stating, "[w]e are not considering the scope of discovery authorized by the Federal Rules of Criminal Procedure, or the wisdom of amending those Rules to enlarge the defendant's discovery rights."[63] Only Justice Marshall, in dissent, has challenged the pretrial/trial boundary, stating in *Bagley* that courts gave "too much deference to the federal common law policy of discouraging discovery in criminal cases, and too little regard to due process of law for defendants."[64] After Marshall's dissent in *Bagley*,

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58. For a discussion of the origins of mandatory minimums, see Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 936 (2006) ("Liberals worried about racial and class disparities . . . conservatives inveighed against lenient sentences by soft-on-crime judges."). For accounts of judges criticizing loss of discretion due to mandatory minimums, see United States v. Gregg, 435 F. App'x 209, 217–22 (4th Cir. 2011) (Davis, J., concurring); Alan Abrahamson, *Judicial Panel Seeks Repeal of Mandatory Sentence Law*, L.A. TIMES (Jan. 29, 1990), https://www.latimes.com/archives/la-xpm-1990-01-29-me-675-story.html [https://perma.cc/M4JP-Z93Z]; Michael A. Ponsor, *The Prisoners I Lose Sleep Over*, WALL ST. J. (Feb. 12, 2014), https://www.wsj.com/articles/the-prisoners-i-lose-sleep-overthe-prisoners-i-lose-sleep-over-1392240190 [https://perma.cc/3NL4-K4FR].

59. Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 835, 856 (2018) (finding that eliminating mandatory sentences and narrowing overbroad laws would dramatically reduce prosecutorial leverage).

60. Sundby, *supra* note 15, at 643 ("[T]he courts have understood *Brady* as not requiring disclosure until the trial itself, unless the failure to disclose earlier rendered the trial unfair.").

61. None of the Court's majority opinions deviate from the following principles: (1) *Brady* is a trial right; (2) *Brady* is a prosecutorial obligation; and (3) *Brady* requires disclosure of material evidence favorable to defendant.

62. 473 U.S. 667, 675 (1985).

63. 427 U.S. 97, 107 (1976).

64. *Bagley*, 473 U.S. at 702 (Marshall, J., dissenting) (quoting United States v. Oxman, 740 F.2d 1298, 1310–11 (3d Cir. 1984)). *See* Sundby, *supra* note 15, at 661 ("By the time of Bagley, he had come to believe that a prosecutor should have to 'turn over to the defendant, all information known to the government that might reasonably be considered favorable to the

no justice would seriously propose to move the pretrial/trial boundary line. In this sense, the Court's more recent holding in *United States v. Ruiz*—proclaiming a prosecutor's *Brady* obligation is waived in the event of a pretrial plea—was a die already cast.[65] In 1977, the Court had already confirmed that the prosecutor's due process duty is limited to ensuring "trials are fair," that *Brady* information is essential to "trial preparation," and that "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one."[66] The Court in *Ruiz* remained true to the boundary lines that the Court has articulated since deciding *Mooney* in 1935.[67]

The Court's remaining role has been reduced to calling balls or strikes on the issue of whether the prosecutor, at trial, disclosed information that was material to the defendant—determining whether consideration of withheld information would have led to a "reasonable probability" of a different result.[68] *Smith v. Cain* is the nadir of this development: Justice Roberts and Justice Thomas disagree over whether the suppressed information would have reasonably led to a different outcome—two lawyers having the final argument over the meaning of the same factual record.[69] Justice Scalia's dissent in *Kyles v. Whitley* was prescient in this sense:

> In a sensible system of criminal justice, wrongful conviction is avoided by establishing, at the trial level, lines of procedural legality that leave ample margins of safety (for example, the requirement that guilt be

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defendant's case.'"). In *Moore v. Illinois*, Justice Marshall, in dissent, had earlier sought to expand the prosecutor's disclosure obligation to information that is "clearly relevant." 408 U.S. 786, 809 (1972) (Marshall, J., concurring in part and dissenting in part). Unthreatened by Marshall's dissent, the majority brushed off his proposal, remarking that there was "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case." *Id*. at 795 (majority opinion).

65. *See* 536 U.S. 622, 633 (2002) ("[T]he Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant."). In *Bagley*, the Court rejected any distinction between impeachment evidence and exculpatory evidence. *Bagley*, 473 U.S. at 676; *see also* United States v. Meregildo, 920 F. Supp. 2d 434, 439 (S.D.N.Y. 2013) ("While discovery is a pretrial mechanism for defendants to secure information to marshal their defense, *Brady* and its progeny are concerned with determining whether withheld information was material to the outcome of a trial."); Miriam H. Baer, *Timing* Brady, 115 COLUM. L. REV. 1 (2015) (explaining how the late trigger for *Brady* material further dilutes its effectiveness).

66. Weatherford v. Bursey, 429 U.S. 545, 559 (1977), *reaff'd*, United States v. Ruiz, 536 U.S. 622, 629 (2002).

67. Under *Ruiz*, it does not offend due process to force a defendant to determine whether to advance to trial without the benefit of assessing information in the State's possession that would lead to acquittal. *Ruiz* thus permits a prosecutor to misrepresent the strength of her case by omission. Should the prosecutor successfully secure a plea by bluff, *Ruiz* rewards the misrepresentation by immunizing her from a *Brady* claim. *See Ruiz*, 536 U.S. at 629.

68. *Bagley*, 473 U.S. at 682. The Court expanded the scope of "material" in *Kyles v. Whitley* to explicitly make the prosecutor responsible for eligible evidence in police files. 514 U.S. 419 (1995). *Brady* may be triggered for failure to disclose evidence of the following: impeachment, Smith v. Cain, 565 U.S. 73 (2012); a flawed investigation or an alternative suspect, *Kyles*, 514 U.S. at 445; incentivized testimony, Giglio v. United States, 405 U.S. 150, 154 (1972); and an alibi, State v. Larimore, 17 S.W.3d 87, 91–92 (Ark. 2000).

69. *See Smith*, 565 U.S. at 73.

> proved beyond a reasonable doubt)—not by providing recurrent and repetitive appellate review of whether the facts in the record show those lines to have been narrowly crossed.[70]

Embedded in Justice Scalia's frustration is a broader observation that the Court has long held in abeyance any significant change to its due process jurisprudence governing the distribution of information in criminal disputes. As litigation continues to change, the Court's decision to hold the line and cede the assessment of due process during the pretrial phases to other branches begins to look less like judicial restraint and more like an act of judicial abdication.

II. *BRADY*, ASSESSING THE BENEFITS TO THE PROSECUTOR

Brady has been understood as a burden on the prosecutor and a benefit to the defendant. This is doctrinally correct, as the holding of the case imposes an affirmative obligation on the prosecutor and constrains prosecutorial discretion. *Brady*'s obligation even incentivizes some prosecutorial offices to conduct thorough pretrial reviews of law enforcement files and to make disclosures during the pretrial period.[71] Scholarship, meanwhile, has thoroughly vetted *Brady*'s doctrinal treatment, providing insights into how *Brady*'s promise has been diminished and proposing ways in which the doctrine might be more effectively enforced or replaced altogether.[72]

The questions of whether and how *Brady* confers *benefits* to prosecutors, however, remains unaddressed. This Article approaches this question by examining both some structural, narrative, and political implications of *Brady* and the resulting benefits that potentially accrue to the prosecutor. Structurally, *Brady* can be understood to have validated the reform's transformation of litigation that empowered civil defendants with pretrial discovery rights but deprived criminal defendants of the same. The structural component of this Article's approach builds on other scholars' contributions, such as Scott Sundry's and Eugene Cerruti's criticisms about the absence of *Brady*'s pretrial presence within the procedural realities of criminal litigation, and Jennifer Laurin's insights about the Court's deference to executive actors in the pretrial space.[73] The main benefit of *Brady*'s structural impact was that the case constitutionally legitimized a prosecutor's pretrial

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70. *Kyles*, 514 U.S. at 456 (Scalia, J., dissenting).

71. As to jurisdictions that attempt to comply with a prosecutor's *Brady* obligation by instituting an open-file policy, doing so is often underinclusive—*Brady* requires a prosecutor to review more than her file, but also law enforcement files—and overinclusive, as *Brady* requires no disclosure of information that is merely relevant to the case. *See* Section I.A.

72. *See infra* notes 110–114 and accompanying text.

73. Eugene Cerruti, *Through the Looking Glass at the* Brady *Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process*, 94 KY. L.J. 211, 214 (2005) (*Brady* is now a rule that both encourages and shields pretrial nondisclosure by the prosecutor); Jennifer E. Laurin, *Quasi-Inquisitorialism: Accounting for Deference in Pretrial Criminal Procedure*, 90 NOTRE DAME L. REV. 783, 789–90, 794–97 (2014); Sundby, *supra* note 15, at 643 ("Once *Brady*'s development as a constitutional law doctrine is coupled with the realities of criminal practice, it should not be surprising that *Brady* has not generated a large amount of pre-trial discovery.").

control over information. Narratively, popular accounts surrounding *Brady* inflate the doctrine's impact, scope, and reach. The main benefit of *Brady*'s narrative impact is its legitimization of case outcomes.[74] Politically, prosecutors have used *Brady* to defeat legislative efforts to expand pretrial discovery. The main benefit of *Brady*'s political impact is its prestige; what the doctrine demands acts as the reference point from which arguments to expand pretrial disclosures must contend.

A. Structural Benefits: The Constitutional Validation of Pretrial Power

When *Mooney* was decided, the Court's due process approach reflected the underlying dynamics of litigation: it was during trial when information was developed and interrogated by parties. In deciding *Brady*, the Court would influence what process was due within a new world of litigation that understood pretrial discovery's power to shape litigation outcomes. But where civil procedure provided for pretrial discovery, criminal litigation did not. Did this dramatic disparity comport with due process where trial no longer functioned, at least in *civil* disputes, as the engine of factual contestation? With the creation of a system that provided for much more robust development of pretrial information to *civil* litigants, did an adjacent system that provided for virtually *no* pretrial information to *criminal* litigants comport with due process? The Court answered the question without commenting on it by announcing that the prosecutor's affirmative obligation to turn over information under the Constitution did not mature until trial.[75] In doing so, the Court implicitly legitimated a pretrial regime that deprived criminal defendants of information, even as civil defendants were afforded powerful pretrial discovery tools.

The timing of *Brady*'s disclosure requirement—triggered by trial—is not the only factor to consider in understanding *Brady*'s validation of two separate and unequal systems of litigation. *Brady* also defined *what* information was constitutionally required in criminal litigation. And it is certainly not the broad sweep of relevant, inadmissible information that characterizes civil discovery entitlements. Instead, *Brady* requires that a prosecutor turn over admissible evidence if it effectively constitutes a "smoking gun" that favors a defendant. If due process only requires disclosure of this narrowly defined category of information at trial, what information could possibly be constitutionally required during the pretrial phase? Certainly nothing more than what is triggered by trial, and yet, it is not possible to conceive of a narrower category of information than "material and exculpatory."[76]

Brady thus constructed a wall; on one side of the wall was trial, where a prosecutor had to turn over a narrow category of information, and on the other side of the wall was a vast pretrial territory, where virtually all disputes resolve and where due

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74. *See, e.g.*, Sundby, *supra* note 15, at 643–44 ("*Brady* is often heralded as the Supreme Court case that granted the criminally accused a constitutional right to discovery . . . . Certainly when I first started teaching Brady, I taught it from this heroic viewpoint.").

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

76. Sundby, *supra* note 15, at 651 ("This piece of evidence is so exculpatory in nature that it actually undermines my belief that a guilty verdict would be worthy of confidence. Under *Brady*, therefore, I need to turn this evidence over to the defense. Then, once I turn the evidence over and satisfy my constitutional obligation, I can resume my zealous efforts to obtain a guilty verdict that I have just concluded will not be worthy of confidence.").

process is *never* offended when a prosecutor withholds information from a defendant.[77] The doctrine is not framed in its inverse, but to do so leaves a sense that something is amiss: *Brady* also stands for the proposition that it does not offend due process for a prosecutor to withhold *any* and *all* information from a defendant during the pretrial phase.[78] In proposing a minor adjustment in due process doctrine under the guise of judicial restraint, *Brady* might be reframed as a moment in which the Court left a defendant equally vulnerable to the political process and prosecutorial influence.

How can *Brady*'s benefit to prosecutors be fully understood? The Court implicitly brokered a compromise that imposed limited obligations on the prosecutor at trial but signaled to prosecutors that due process concerns did not apply before trial. Virtually all cases resolve during the pretrial period; thus, in terms of case volume, the prosecutor is statistically the chief beneficiary of *Brady*'s constitutional compromise. The prosecutor is also particularly well positioned to benefit from *Brady*'s facilitation of prosecutorial discretion as to the distribution of pretrial information. The State, through its exercise of state power, typically has superior resources, better access to critical case information, and the privilege to be that information's interpreter.[79] The *Brady* compromise already amplifies this information and resource asymmetry by giving the prosecutor constitutional clearance to withhold information that is not material and exculpatory. But the *Brady* compromise also leaves defendants more vulnerable to these dynamics in denying them any due process right to test *any* information before trial. Examples abound: A defendant has no constitutional right to propound document requests for investigative material essential to a "failure to investigate" defense. A defendant has no constitutional right to depose law enforcement officers, insulating officers from impeachment opportunities at trial. A defendant has no right to depose eyewitnesses, leaving the witness's motivations a blank slate and foregoing an opportunity to develop sophisticated expert testimony that is only possible through a detailed, pretrial, accounting of the incident. These type of pretrial opportunities (common place to civil litigation) obviously and profoundly shape not only settlement but also any trial. Under a robust pretrial discovery regime, the trial is no longer the singular moment of adversarial testing but is part of an information-gathering, information-testing adversarial continuum. In civil litigation, there is just no debate over whether the quality of a trial is dependent on the quality of pretrial discovery. As to anyone embedded in the criminal system who might adhere to the magical thinking that trial-by-surprise provides an adequate adversarial forum,[80] *Brady* does much of the work to legitimate this specious assertion.

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77. *See supra* note 7 and accompanying text.

78. Ristroph, *supra* note 9.

79. Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 BROOK. L. REV. 1091, 1095 (2014); *see also* Laurin, *supra* note 73, at 797.

80. The Supreme Court contributes to this magical thinking. As Jennifer Laurin astutely observes, the Court has construed police officers, for example, to be technocrats that should be trusted to rely on their own "certification and training regimes," because police have a "strong incentive" not to waste limited time and resources. Laurin, *supra* note 73, at 815–16. For the Court to adopt this perspective is to ignore empirical and qualitative data that reveal systemic conduct and cultural features that contradict the Court's depiction. *See, e.g.*,

It is difficult to construe *Brady*'s *subsilencio* compromise—imposing a narrow disclosure obligation on the prosecutor in exchange for constitutional permission to refrain from disclosing pretrial information—as an oversight by the Court. As the Court considered *Brady*, it looked upon an unprecedented procedural experiment that the Court itself had superintended. The Court was also aware that the Criminal Committee, appointed by the Chief Justice, was controlled by prosecutors. By the time that the Court had considered *Brady*, two pretrial systems, disparate and unequal in their distribution of information, were defining features of the litigation landscape. And where civil litigation's pretrial experiment was celebrated by the legal community during this time, judicial and academic voices were increasingly criticizing the comparative disadvantage that the criminal pretrial period visited on defendants.[81] In announcing that constitutional review would be limited to trial, *Brady* nevertheless signaled that any challenge to the sufficiency of the pretrial record would fall outside constitutional review. In this way, *Brady* had a "power-conferring" aspect; that is, in creating a zone of regulation, the Court facilitated the exercise of state power not only in the trial phase (permitting the prosecutor to withhold exculpatory evidence that is merely relevant) but also during the pretrial phase (permitting the prosecutor, as a constitutional matter, to withhold any and all information from the defendant during the pretrial phase).[82]

Under this view, *Brady* is also situated within what Jennifer Laurin observes as a "structure of American criminal procedure doctrine" that "approaches the pretrial realm with a comparatively light regulatory touch."[83] *Brady*, in reserving a large swath of territory free from constitutional review, was reflective of a judicial commitment to "broad [prosecutorial] pretrial discretion as an embedded feature of criminal procedure doctrine."[84] In restricting due process review of the record at trial, the Court favored the institutional preferences of the prosecutors that the court not intervene in pretrial matters and that any perceived overstepping be addressed internally by the prosecutor's office.[85] Laurin observed that courts have been a willing partner in this arrangement:

> [I]n regard to the prosecutorial role, the Court has repeatedly advanced a conception of the prosecutorial function as being meaningfully overseen

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COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP'T, CITY OF NEW YORK, COMMISSION REPORT 1994, 36–37 (1994) (reporting significant level of officers falsifying reports and committing perjury); INDEPENDENT COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT, at ix-xiv (1991) (reporting widespread police misconduct).

81. *See infra* Section II.C.1.

82. Ristroph, *supra* note 9.

83. Laurin, *supra* note 73, at 785 ("Notwithstanding efforts by the Warren Court . . . criminal procedure doctrine protects against little other than deliberate law enforcement overreach in the course of an investigation . . . .").

84. *Id.* at 799.

85. There are multiple instances in which members of the advisory committee pushed back against proposed rules in criminal litigation that interfered with prosecutorial intentions—even the idea that a court could set a status conference or control the court calendar was deemed too invasive. *See* Meyn, *supra* note 6, at 717–20.

> through a professionally inculcated justice-seeking orientation, mechanisms of internal, administrative regulation that guide prosecutorial discretion, and viable claims to comparative expertise with regard to review, charging, and even (in the context of pleas) case disposition.[86]

This institutional agreement is self-reinforcing. The judiciary cedes territory to the prosecutor based on the presumption that a prosecutor inhabits a special role as a minister of justice, a role conception that in turn legitimizes the abdication of judicial oversight.[87]

By circumscribing the affirmative disclosure obligation of the prosecutor, *Brady* communicated to criminal justice stakeholders that the distribution and interrogation of information during the pretrial period was not subject to constitutional review, and thereby conferred constitutional legitimacy to the redesign of litigation. In this way, the Court's modest *Brady* doctrine might be understood as much more sweeping in scope and purpose. Viewed as a line-drawing compromise that facilitates the exercise of state power during the pretrial period, when most cases resolve, *Brady* can be viewed as a decision that distributed significant benefits to prosecutorial interests.

B. Narrative Benefits: Legitimizing the Prosecutor's Role

A pervasive narrative portrays *Brady* as imposing a significant burden on the prosecutor. Law students are often left with the impression that *Brady* established a special burden on the prosecutor to act against her own interests in service of our commitment to due process. Prosecutors portray *Brady* as a cross to be borne; that is, disclosing information damaging to their own case is essential to a full accounting of the factual record and a just result. Court opinions, media accounts, as well as postconviction briefs filed by defendants will portray *Brady*'s prosecutorial burden as significant. As scholars push back on these conceptions of *Brady*, the burden-embellishment narrative continues to persist, and in doing so, provides benefits to the prosecutor: the narrative of a burdened prosecutor adds legitimacy to the prosecutorial role (to be burdened is to act responsibly) and reinforces the rightness of outcomes (to have satisfied a special disclosure obligation is to have ensured that a defendant had sufficient information in which to advance a defense).

In law school, casebooks that introduce students to core concepts must cover impressive territory—in criminal procedure, for example, this includes gaining an understanding of rights and remedies surrounding investigations, pretrial proceedings, trial, sentencing, and appeal. Given the breadth of treatment, emphasis in these survey courses is by necessity doctrinal. For this reason, *Brady* is often construed as the judiciary might express its purpose; that is, *Brady* burdens the prosecutor and benefits the defendant. A representative casebook asserts a "Defendant's Right to Discover the State's Case" with the subtitle: "The classic right of a defendant to discover the state's case comes from *Brady v. Maryland*."[88] Another

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86. Laurin, *supra* note 73, at 789–90.

87. *See id.* at 810.

88. ARNOLD H. LOEWY, CRIMINAL PROCEDURE: CASES, MATERIALS, AND QUESTIONS 1239 (3d ed. 2010). But see Weatherford v. Bursey, 429 U.S. 545, 559 (1977) (stating prosecutor's

coursebook, consistent with the account that the Warren Court's jurisprudence had effects beyond national borders, observes, "The Court's first constitutional discovery case was a 'shot heard 'round the world.'"[89] Another account highlights the case's constitutional supremacy over statewide legal regulation: "*Brady*'s due process obligation to disclose exculpatory evidence overrides any limitations on discovery provided for by a jurisdiction's discovery statutes or rules."[90]

Reflecting the influence of a curricular approach that focuses on doctrine, the prosecutorial-burden narrative readily finds traction in student articles.[91] "By recognizing that basic fairness and the integrity of the criminal process were at stake," wrote a future clerk for the Supreme Court, "*Brady* departed from the view of criminal trials as purely adversarial contests. The *Brady* rule rests on the notion that a criminal trial is a search for the truth."[92] "*Brady* placed new, significant disclosure requirements on the prosecution."[93] "*Brady v. Maryland* is a landmark holding . . . to expand the prosecutor's duty of disclosure."[94] "Because the

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duty in *Brady* is limited to ensuring that "trials are fair"); United States v. Agurs, 427 U.S. 97, 109 (1976) ("If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice. Whether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much."); Wardius v. Oregon, 412 U.S. 470, 474 (1973) ("Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, it does speak to the balance of forces between the accused and his accuser.").

89. DRESSLER & THOMAS, *supra* note 2, at 892. But see scholarship of comparativists who note that the "level of nondisclosure" *Brady* tolerates "would *not* be tolerated [by] public prosecutors in virtually any other mature system of law." Cerruti, *supra* note 73, at 214.

90. WEAVER ET AL., *supra* note 2, at 888. Arguably absent from this account is an example of *Brady* overriding state legislation; to conflict with *Brady*, a state law would have to require a prosecutor to withhold exculpatory information at trial. Such a statute presumably has never existed.

91. Law students have identified cause to criticize *Brady*, but the case is still understood to burden prosecutors. *See, e.g.*, James M. Grossman, Note, *Getting* Brady *Right: Why Extending* Brady v. Maryland*'s Trial Right to Plea Negotiations Better Protects a Defendant's Constitutional Rights in the Modern Legal Era*, 2016 BYU L. REV. 1525, 1526 (finding, "[i]n today's criminal justice system, where pleas and plea bargaining are the norm, *Brady*'s promise to defendants rings hollow," and yet stating, "*Brady* is a clear and powerful asset for defendants").

92. Robert Hochman, Note, Brady v. Maryland *and the Search for Truth in Criminal Trials*, 63 U. CHI. L. REV. 1673, 1673–74 (1996). This Note reflects a common sentiment about *Brady*—that disclosure itself is incompatible with adversarialism. Yet it seems that civil pretrial proceedings are adversarial even as they require disclosure. Interestingly, one of the most influential writers on procedural reform, George Ragland, thought that regimes providing for partial disclosures undermine the truth. GEORGE RAGLAND, DISCOVERY BEFORE TRIAL 251–52 (1932) (noting "full and equal discovery" was the best "preventative of perjury," whereas "limited or unequal discovery" fostered "perjury, manufactured testimony, and kindred evils.").

93. Michael A. Jeter, Note, *Criminal Law—The Right to an Impartial Trial Is Protected by an Opportunity to Prove that Juror Bias or Prosecutorial Misconduct Affected the Outcome of the Trial* Smith v. Phillips, 26 HOW. L.J. 799, 808 (1983).

94. Blaise Niosi, Note, *Architects of Justice: The Prosecutor's Role and Resolving*

government has vastly superior investigative resources with which to discover information . . . one of the most valuable rights that a criminal defendant enjoys is his constitutional right to all evidence in the government's possession that is material either to his guilt or punishment."[95] These observations not only highlight the impression soon-to-be lawyers will have of *Brady*'s burden but also illustrate the powerful link between the narrative of prosecutorial burden and the legitimation of criminal-law outcomes.

Courts also contribute to this narrative. The Supreme Court proclaimed *Brady* "our seminal case on the disclosure of prosecutorial evidence."[96] The Court maintains *Brady* is a "broad obligation" that is "illustrative" of "the special role played by the American prosecutor in the search for truth in criminal trial";[97] language that is oft cited in federal and state decisions.[98] Courts portray *Brady* as exceptional: "[T]he government's *Brady* obligation [can be understood] in terms of the special status of the American prosecutor."[99] Courts also tie *Brady*'s obligation as a guarantee of legitimate outcomes: "Courts, litigants, and juries properly anticipate that obligations to refrain from improper methods to secure a conviction . . . will be faithfully observed."[100] The Seventh Circuit contends *Brady* imposes "a special duty to 'get it right.'"[101] The implication: because of *Brady*, prosecutors get it right.

The burden-embellishment narrative unsurprisingly receives prosecutorial buy-in.[102] For example, Boise Senior Deputy Prosecutor James Dickinson stated, prosecutors "understand and accept the high ethical obligation" imposed by *Brady*.[103] New York Assistant District Attorney Kristin Hamann wrote of *Brady*'s "ever-present" demands: the prosecutor is "charged with constructive knowledge of the

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Whether Inadmissible Evidence Is Material Under the Brady *Rule*, 83 FORDHAM L. REV. 1499, 1307 (2014).

95. Mark D. Villaverde, Note, *Structuring the Prosecutor's Duty to Search the Intelligence Community for* Brady *Material*, 88 CORNELL L. REV. 1471, 1481–82 (2003).

96. Cone v. Bell, 556 U.S. 449, 473 (2009). This articulation approaches deception—though the word "disclosure" is suggestive of a discovery right, the word "evidence" only applies to trial.

97. Strickler v. Greene, 527 U.S. 263, 281 (1999).

98. *See, e.g.*, Ross v. Pineda, 549 F. App'x 444 (6th Cir. 2013); Milke v. Ryan, 711 F.3d 998, 1012 (9th Cir. 2013); Fields v. Wharrie, 672 F.3d 505, 513 (7th Cir. 2012); Villasana v. Wilhoit, 368 F.3d 976, 979 (8th Cir. 2004); Williams v. Whitley, 940 F.2d 132, 133 (5th Cir. 1991); United States v. Sperling, 726 F.2d 69, 72 (2nd. Cir. 1984); People v. Morris, 756 P.3d 843, 861 (Cal. 1988); People *ex. rel.* E.G., 368 P.3d 946, 949 (Colo. 2016); People v. Hayes, 950 N.E.2d 118, 120 (N.Y. 2011); Commonwealth v. Willis, 46 A.3d 648 (Pa. 2012); *In re* Pers. Restraint of Gentry, 972 P.2d 1250, 1272 (Wash. 1999) (Sanders, J., dissenting).

99. Boyd v. United States, 908 A.2d 39, 59 (D.C. Cir. 2006) (citing *Strickler*, 527 U.S. 263).

100. Tuma v. Commonwealth, 726 S.E.2d, 365, 379 n.10 (Va. Ct. App. 2012) (citing Banks v. Dretke, 540 U.S. 668, 696 (2004)).

101. *Fields*, 672 F.3d at 514.

102. *See* Robert Don Gifford, *Ethics and the Criminal Prosecutor: Guilt Shall Not Escape nor Innocents Shall Suffer*, 76 OKLA. B. J., 2845 (2005).

103. Jim Dickinson, *Prosecutor's Duty to Disclose Favorable Evidence*, ADVOCATE, Jan. 2010, at 25.

police investigation and constructive possession of police files," even though the prosecutor may not have "received the information from the police and does not know it exists."[104] This account of a significant discovery burden would strike a civil litigator as wanting. A civil litigator is expected to secure a much broader sweep of information in each and every case, not just a narrow band of information in the exceptional case that advances to trial.[105] And while a prosecutor works with the same players, civil litigators often manage the discovery obligations of multinational corporate clients by responding to interrogatories, document production requests, and depositions—all from which a prosecutor is excused. The typical account of *Brady*'s burden, however, avoids such comparisons.

The prosecutorial-burden narrative can come from unlikely sources. Defense attorneys contribute to the narrative; their position in litigation often demands making this case. In postconviction motions seeking new trials, defense attorneys will often introduce *Brady* in truth-seeking terms to describe a doctrine that requires something significant of the prosecutor, a strategically sound approach to push against *Brady*'s doctrinal margins in the hope of receiving postconviction table scraps.[106] It may also be surprising that progressive media outlets will contribute to a popular understanding that *Brady* imposes a heavy burden on the prosecutor. Andrew Cohen at *The Atlantic* wrote that the Supreme Court used *Brady* as "a vehicle to memorialize a constitutional rule that burdened prosecutors with an affirmative duty to share with criminal defendants evidence that by its very definition would undermine the prosecution's case."[107] Linda Greenhouse included *Brady* among the key cases representing the "Warren Court's progressive constitutional revolution at the peak of its energy and transformative power," signaling that *Brady* contributed to significant, prodefendant, change.[108] Radley Balko in *The Huffington Post* wrote, "The *Brady* decision was really about establishing fundamental fairness in the criminal justice system and making trials a search for truth, rather than lawyering competitions."[109]

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104. Kristin Hamann, *Getting It Right: Practical Approaches to 21st Century Prosecution*, N.Y. L.J., Sept. 3, 2013, at 2.

105. Sundby, *supra* note 15, at 659 ("[T]he fact that nine out of ten cases are resolved by guilty pleas ensures that Brady plays a minimal role in triggering prosecutorial disclosure of exculpatory evidence.").

106. *See, e.g.*, Shima Baradaran Baughman, *Subconstitutional Checks*, 92 NOTRE DAME L. REV. 1071, 1098 (2017) (noting low success rate of *Brady* claims); Stephanos Bibas, Brady v. Maryland*: From Adversarial Gamesmanship Toward the Search for Innocence?*, *in* CRIMINAL PROCEDURE STORIES 129, 144–45 (Carol S. Steiker ed., 2006) (noting low success rate of *Brady* claims); Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 489 (2009) (contending a prosecutor can suppress information "knowing there is little chance the evidence will ever come to light").

107. Andrew Cohen, *Prosecutors Shouldn't Be Hiding Evidence from Defendants*, ATLANTIC (May 13, 2013), https://www.theatlantic.com/national/archive/2013/05/prosecutors-shouldnt-be-hiding-evidence-from-defendants/275754/ [https://perma.cc/33DJ-WZ2K].

108. Linda Greenhouse, *The Rigorous Romantic: Anthony Lewis on the Supreme Court Beat*, 79 MO. L. REV. 907, 907 (2014).

109. Radley Balko, Brady v. Maryland *Turns 50, But Defense Attorneys Aren't Celebrating*, HUFFINGTON POST (May 13, 2013), https://www.huffingtonpost.com/2013/05/13/brady-v-maryland-50_n_3268000.html [https://perma.cc/HG86-KLQQ].

Against these strong currents, scholarship has labored to move past this narrative. For example, scholars have broadly critiqued *Brady*'s enforcement mechanisms: that placing compliance in the hands of the prosecutor leads to underenforcement;[110] that the late timing of its disclosure obligation undermines a prosecutor's ability to be objective;[111] and that obstacles particular to postconviction procedure undermine efforts to prove up violations.[112] In the course of identifying doctrinal flaws, some frame the case as having had the *promise* to impose a significant burden on the prosecutor.[113] Some proposed alternative means—like open file policies—are

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110. *See, e.g.*, Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391, 397 (1984) (arguing that the pretrial burden of determining the favorability of evidence should be on an independent, objective fact finder of the trial court through an *in camera* review); Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 463–64 (2001) ("Congress and state legislatures should pass legislation establishing Prosecution Review Boards."); Adam M. Gershowitz, *Prosecutorial Shaming: Naming Attorneys to Reduce Prosecutorial Misconduct*, 42 U.C. DAVIS L. REV. 1059, 1088–1105 (2009) (proposing a list to shame prosecutors who violate *Brady*); Jason Kreag, *The* Brady *Colloquy*, 67 STAN. L. REV. ONLINE 47, 47 (2014) (proposing a pretrial, on the record colloquy in which a judge would question the prosecutor about her efforts to comply with *Brady*); Medwed, *supra* note 3, at 1542 (proposing remedies to address "lapses of judgment regarding prosecutor's disclosure obligations"); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 731 (1987) (contending that given evidence of "intentional *Brady*-type misconduct, the instances of discipline are too rare" and arguing for a bad faith standard); Joseph R. Weeks, *No Wrong Without a Remedy: The Effective Enforcement of the Duty of Prosecutors to Disclose Exculpatory Evidence*, 22 OKLA. CITY U. L. Rev. 833, 870 (1997); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 722 (2001) (noting "dearth of cases in which disciplinary authorities have sanctioned prosecutors").

111. Baer, *supra* note 65, 35–38 (observing that, as the eve of trial approaches, prosecutors are less able to objectively review a case).

112. *See, e.g.*, Burke, *supra* note 106, at 484; Justin Murray, *Prejudiced-Based Rights in Criminal Procedure*, 168 U. PA. L. REV. 277, 302 (2020) (examining how the outcome-determinative appellate review standard serves to dilute *Brady*'s burden); Eve Brensike Primus, *The Illusory Right to Counsel*, 37 OHIO N.U. L. REV. 597, 606, 608 (2011) (finding state procedure typically leaves defendants to bring postconviction *Brady* claims *pro se*); Ellen Yaroshefsky, *Wrongful Convictions: It's Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. Rev. 275, 291 ("[P]rosecutors know that there is little, if any, remedy for misconduct because the appellate standard of review is harmless error.").

113. *See, e.g.*, Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 190 (1983) (noting that *Brady* was the case that "promoted the system's capacity to adjudicate guilt more reliably"); Capra, *supra* note 110, at 392 (noting *Brady* "was a major step forward in equalizing access to exculpatory evidence"); Davis, *supra* note 110, at 431 (noting that *Brady* was intended to be "expansive" in its requirements); Harvey Gee, *Chasing the Dragon: The Forgotten Story of* Wong Sun v. United States, 17 MICH. J. RACE & L. 159, 160 (2011) (reviewing CRIMINAL PROCEDURE STORIES (Carol S. Steiker ed., 2006)) (noting *Brady* is considered a consensus candidate in the "Criminal Procedure Revolution" canon that "strengthened the constitutional rights of individuals within the criminal justice system"); Bruce I. Kogan & Cheryl L. Robertson, *Chief Justice Joseph R. Weisberger's Page of History*, 6 ROGER WILLIAMS U. L. REV. 501, 525–26 (2001) (noting *Brady* as a "seminal decision" that "constitutionalized the

necessary to achieve *Brady*'s due process aspirations.[114] A consistent message of these wide-ranging critiques, however, is the doctrine's present failure to impose a demanding burden on the prosecutor.[115]

Yet, this scholarship competes with the drumbeat of the many sources that proclaim *Brady*'s prosecutorial burden to be significant. Many, if not most, law students will not have the opportunity to delve into the rich criticism that reveals *Brady*'s shortcomings. Instead, they will enter the profession with an impression that *Brady* imposes a special burden, unique to the American prosecutor—*Brady* is a case that speaks to our identity as to the values we hold.[116] This inflated, unearned narrative in turn confers a benefit to prosecutors by lending legitimacy to outcomes and promoting "the system's capacity to adjudicate guilt more reliably."[117]

C. Political Benefits: A Shield Against Legislative Efforts to Expand Pretrial Discovery

In assessing the potential benefits of *Brady* to prosecutors, another use of the case emerges: its deployment to achieve policy objectives. When the Criminal Committee in the early 2000s considered making amendments to pretrial rules governing the exchange of information, the Department of Justice (DOJ) was well positioned to lobby for its preferences. The DOJ is formally represented on the Criminal Committee, and in addition, DOJ representatives are permitted to voice concerns directly to the Criminal Committee.[118] The use of *Brady* as a vehicle to influence any changes by the Committee did not occur until the early 2000s, when it became a centerpiece over the state of pretrial discovery in criminal disputes. In some ways, *Brady*'s lack of earlier influence on the rulemaking process reflects its quiet reception and the impression that the case had little to do with the Committee's work, which

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State's obligation to disclose evidence"); Medwed, *supra* note 3, at 1540 (noting that *Brady* was intended to be "broad" in its requirements).

114. *See, e.g.*, Burke, *supra* note 106, at 512, 514 (proposing an open-file disclosure requirement that requires disclosure of inculpatory and exculpatory evidence); Medwed, *supra* note 3, 1158–59 (proposing the possibility of an open-file disclosure requirement to counteract the doctrine's inherent flaws); Janet Moore, *Democracy and Criminal Discovery Reform After* Connick *and* Garcetti, 77 BROOK. L. REV. 1329, 1376–77 (2012) (proposing an open-file regime to replace *Brady*); Yaroshefsky, *supra* note 112, at 295 (observing that changes "in discovery obligations from less of a 'cat and mouse game' to relatively open discovery would afford the true believer less opportunity to stretch ethical boundaries").

115. *See, e.g.*, Gershman, *supra* note 3 at 686 ("[O]ne is struck by the dissonance between *Brady*'s grand expectations to civilize U.S. criminal justice and the grim reality of its largely unfulfilled promise"); *id.* at 713 (discussing how the materiality standard's lack of any rigor "in practice rendered suppression of favorable evidence a routine and rational act"); Moore, *supra* note 114, at 1376–77 ("From *Brady*'s inception onward, constitutional doctrine has prioritized deference to prosecutorial discretion over enforceability.").

116. *See, e.g.*, Greenhouse, *supra* note 108, at 907 (including *Brady* among cases representing the "Warren Court's progressive constitutional revolution at the peak of its energy and transformative power"); Hochman, *supra* note 92, at 1674 ("The *Brady* rule rests on the notion that a criminal trial is a search for the truth.").

117. Kogan & Robertson, *supra* note 113, at 525–26.

118. *Id.*

was to regulate information exchange during the pretrial (versus trial) phase of litigation.[119]

1. The Legislative Process Encounters *Brady*

Consistent with *Brady*'s quiet arrival, as the Criminal Committee convened and considered its rulemaking agenda after *Brady* was decided, there was no mention of the case.[120] This silence was even more pronounced given that key terms in the Federal Rules of Criminal Procedure (FRCP) mirrored terms in the *Brady* standard. Where *Brady* required disclosure of "material" information, so did the FRCP. In 1946, the original version of Rule 16, for example, provided a defendant could request the court order the prosecutor to permit the examination of "material" documents that were seized from defendant or third parties.[121] Nevertheless, after the Court announced the *Brady* decision, the Committee did not think the decision sufficiently notable to merit mention in the meetings immediately following the case.

In the 1960s, academics and jurists began calling attention to the disparity between civil and criminal discovery.[122] *Gideon*'s mandate had propagated public-

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119. *See supra* text accompanying notes 48–50.

120. Minutes from Rules Committee meetings between 1963 and 1967 make not a single mention of *Brady*. *See* THE ADVISORY COMM. ON CRIMINAL RULES, MEETING MINUTES (Oct. 14–16, 1963), https://www.uscourts.gov/sites/default/files/fr_import/CR10-1963-min.pdf [https://perma.cc/NJ6C-5A6Z]; THE ADVISORY COMM. ON CRIMINAL RULES, MEETING MINUTES (Jan. 13–15, 1964), https://www.uscourts.gov/sites/default/files/fr_import/CR01-1964-min.pdf [https://perma.cc/FD8G-88ND]; THE ADVISORY COMM. ON CRIMINAL RULES, MEETING MINUTES (May 3–4, 1965), https://www.uscourts.gov/sites/default/files/fr_import/CR05-1965-min.pdf [https://perma.cc/W76D-9ELF]; THE ADVISORY COMM. ON CRIMINAL RULES, MEETING MINUTES (May 23, 1966), https://www.uscourts.gov/sites/default/files/fr_import/CR05-1966-min.pdf [https://perma.cc/9W2X-ZND3]; THE ADVISORY COMM. ON CRIMINAL RULES, MEETING MINUTES (Sept. 11–12, 1967), https://www.uscourts.gov/sites/default/files/fr_import/CR09-1967-min.pdf [https://perma.cc/9XRF-4D89]. Though proposals initiated in 1961 did not finalize until 1966, *Brady*'s publication in 1963 had no discernible impact on Committee discussions. THE ADVISORY COMM. ON CRIMINAL RULES, MEETING MINUTES 8–13 (Jan. 13–14, 1964), https://www.uscourts.gov/sites/default/files/fr_import/CR01-1964-min.pdf [https://perma.cc/D2S2-6KHE] (relating to FED. R. CRIM. P. 16, proposing disclosure of defendant's statements, results of relevant examinations, and defendant's recorded grand-jury testimony). The Committee did refer to and discuss other contemporaneous cases in determining appropriate changes; for example, in 1967, the Committee discussed *Warden v. Hayden*, 387 U.S. 94 (1967), and *Miranda v. Arizona*, 384 U.S. 436 (1966). THE ADVISORY COMM. ON CRIMINAL RULES, MEETING MINUTES (SEPT. 11–12, 1967), *supra*, at 3, 14.

121. FED. R. CRIM. P. 16 (1946) (last amended 2013).

122. *See, e.g.*, Robert L. Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293 (1960); Goldstein, *supra* note 50; Hall, *supra* note 48; Sheldon Krantz, *Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice*, 42 NEB. L. REV. 127, 144–51 (1963); David W. Louisell, *The Theory of Criminal Discovery and the Practice of Criminal Law*, 14 VAND. L. REV. 921, 927–28 (1961); Comment, *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 1057 (1961) (recommending exchange of witness lists coupled with opportunity to depose witnesses); Comment, *Pre-Trial Disclosure in Criminal Cases*, 60 Yale L.J. 626, 640–46 (1951) (recommending adoption of civil discovery, including

defender offices, and from these ranks emerged a more organized push for criminal discovery.[123] Congress proposed a bill in 1966 that "would direct the Supreme Court, [and therefore the Advisory Committee] to make adequate discovery rules."[124] In 1968, the Committee amended Rule 16 to include documents "material" to the "preparation of [the] defense," a change that reflected political currents favoring the expansion of pretrial criminal discovery.[125] And yet, despite the shared language, one could sense the Committee's wariness about *Brady*'s significance to the FRCP—meeting notes in 1968 indicate, "*Brady v. Maryland* should be left to the development of the case law and should not be in the rule. A note should be added to the effect [that] the committee is not attempting to codify *Brady v. Maryland* at present."[126] In recognizing the case's nonapplication to pretrial discovery, the Committee was still acknowledging *Brady*'s shadow.

The Committee would in fact note this sentiment in its annotation to the 1976 Amendment to the FRCP.[127] By then, Rule 16 was changed to remove the court as an obstacle; a defendant only needed to issue a request to the prosecutor to initiate the requirement that the State turn over documents material to the preparation of the defense.[128] What, if any, was *Brady*'s impact on this obligation? The Committee was vague: "[T]he committee had 'decided not to codify the *Brady* Rule.' . . . [But] 'the requirement that the government disclose documents and tangible objects "*material* to the preparation of his defense" underscores the importance of disclosure of evidence favorable to the defendant.'"[129] Some courts would interpret Rule 16's materiality limitation to require a broader sweep of information than *Brady*, while other courts would interpret Rule 16's demand to be coterminous with *Brady*.[130] In

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depositions). A few judges explicitly recognized disparities between civil and criminal procedure. Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228, 233 (1964).

123. William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2192 (2002) (noting *Gideon* led to a growth in public defender offices); Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defende*r, 84 GEO. L.J. 2419, 2426, n.33 (noting rapid expansion of public defender offices after *Gideon*). Vermont and Florida afforded discovery rights to criminal defendants in the 1960s. 1961 Vt. Acts & Resolves 174–76; *In re* Fla. Rules of Criminal Procedure, 211 So. 2d 203 (Fla. 1968); Peter Forbes Langrock, *Vermont's Experiment in Criminal Discovery*, 53 A.B.A. J. 732, 732 (1967).

124. THE ADVISORY COMM. ON CRIMINAL RULES, MEETING MINUTES (May 23, 1966), *supra* note 120, at 7.

125. FED. R. CRIM. P. 16(b) (1968) (last amended 2013).

126. THE ADVISORY COMM. ON CRIMINAL RULES, MEETING MINUTES 15 (Sept. 30–Oct. 1, 1968) (emphasis added), https://www.uscourts.gov/sites/default/files/fr_import/CR09-1968-min.pdf [https://perma.cc/EJV7-8UJG]; *see also* FED. R. CRIM. P. 16.

127. FED. R. CRIM. P. 16 (1976) (advisory committee's note to its amendment effective 1976).

128. *See id.*

129. LAURAL L. HOOPER, JENNIFER E. MARSH & BRIAN YEH, TREATMENT OF *BRADY V. MARYLAND* MATERIAL IN UNITED STATES DISTRICT AND STATE COURTS' RULES, ORDERS, AND POLICIES: REPORT TO THE ADVISORY COMMITTEE ON CRIMINAL RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, FEDERAL JUDICIAL CENTER 2 (2004) (emphasis added) (footnote omitted) (quoting FED. R. CRIM. P. 16 advisory committee's note).

130. *See, e.g.*, United States v. Ross, 511 F.2d 757, 762 (5th Cir. 1975).

some respects, this split was a tempest in a teapot; in the end, Rule 16 provided for little more than it did in 1946, given that Rule 16's expansion to include all documents in the prosecutor's "possession, custody, and control"[131] was diminished by a provision that relieved the prosecutor from disclosing police reports—a sweeping exemption.[132] Compared to civil discovery, the amendments were anemic: no criminal rule was in sight of civil rules that empowered parties to compel the disclosure of relevant information through powerful tools.[133]

Within these inconsequential moves of the dial on criminal pretrial discovery, *Brady*'s role in rulemaking was uncertain, which was evident by the Committee's struggle to contextualize *Brady*. The Committee seemed inclined to treat *Brady* as a floor, not a ceiling. At the same time, the Committee avoided a declaration of independence from *Brady*. On display was *Brady*'s power to disorient the process of constructing pretrial discovery, even as *Brady* had, according to the Court, nothing to do with pretrial discovery. However momentarily the Committee might have been inspired to expand pretrial discovery in the late 1960s, it did not stray far from *Brady*'s articulation of due process, and it built in the doctrine as a reference point. If *Brady* had nothing to do with pretrial discovery, it also seemed to superintend and constrain it.

2. Prosecutors Learn to Wield *Brady*

The Court's decision in *United States v. Ruiz explicitly* relieved prosecutors from making any *Brady* disclosure in a case that resolved by plea.[134] Although *Ruiz* was consistent with prior decisions of the Court that announced *Brady*'s obligation was

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131. FED. R. CRIM. P. 16(a)(1).

132. FED. R. CRIM. P. 16(a)(2); ROBERT M. CARY, CRAIG D. SINGER & SIMON A. LATCOVICH, FEDERAL CRIMINAL DISCOVERY 135–36 (Am. Bar Ass'n ed., 2011).

133. Meyn, *supra* note 79, at 1094 (distinguishing discretion given to civil litigants from limited disclosures extended to criminal defendants); Jeffrey E. Stone & Corey B. Rubenstein, *Criminal Discovery: Leveling the Playing Field*, 23 LITIG. 45, 45 (1997) (observing that, under the federal rules, a defendant is entitled to "(1) any statement [he] was foolish enough to make . . . (2) his criminal record . . . (3) documents . . . to be used by the government at trial; (4) reports of examinations . . . and (5) expert witness summaries. State prosecutors often have similar discovery obligations . . . ."). The rules do not "require the parties to disclose witnesses." CARY ET AL., *supra* note 132, at 417. Views on changes to federal rules widely differ. *Compare* Susan R. Klein, *Monitoring the Plea Process*, 51 DUQ. L. REV. 559, 570 (2013) ("The 1966 amendments . . . hugely increased the range and scope of pretrial discovery . . . ."), *with* Cary Clennon, *Pre-Trial Discovery of Witness Lists: A Modest Proposal to Improve the Administration of Criminal Justice in the Superior Court of the District of Columbia*, 38 CATH. U. L. REV. 641, 652–53 (1989) (contending 1966 reciprocity provision advantaged the State), Meyn, *supra* note 79, at 1135–36 (observing no amendment has ever provided defendant discretionary discovery), *and* Sara Kropf, Andrew George, William C. Cleveland & Julie Rubenstein, *The 'Chief' Problem with Reciprocal Discovery Under Rule 16*, CHAMPION, Sept.–Oct. 2010, at 20, 20 (arguing Rule 16 is harmful to defendants). Rule 16(a)(2) exempts most police reports from disclosure. Doctrinal treatment has also narrowed scope of rules. *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 462 (1996) (giving "material to the preparation of [his] defense" a tight frame).

134. 536 U.S. 622, 625 (2002).

limited to trial,[135] the Court's "we mean what we say" moment in *Ruiz* stunned the many who had assumed *Brady* meant something more. After all, coursebooks, and prosecutors and defendants rallied around the idea that *Brady* required something special of the prosecutor, distinct from other litigants in the American system, and distinct from prosecutors around the world.[136] Although the Court in *Ruiz* announced that *Brady*'s wet blanket on due process (which was always there) was in fact there, the decision also inspired action. Notably, the opinion moved the American College of Trial Lawyers (ACTL) to attempt to persuade the Criminal Committee to expand pretrial disclosures to defendants. ACTL submitted to the Committee a report entitled, "Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure" ("ACTL Report"),[137] drafted by ACTL's Committee on Federal Procedure, which included Judge Charles Breyer (Northern District of California), R. Stan Mortenson (President Nixon's former attorney), Ty Cobb (President Trump's former attorney), and white-collar defense attorneys like John Cooney, Robert Tarun, Thomas Dwyer, and Douglas Young.[138] The opening salvo reads:

> In the 1963 landmark decision of *Brady v. Maryland*, the Supreme Court held that prosecutors have a constitutional duty to turn over "evidence favorable to an accused. . . . [sic] where the evidence is material either to guilt or to punishment." Four decades later, [the federal rules that] govern federal plea negotiations and criminal discovery . . . still do not address, let alone require, the government to timely disclose favorable information to the defendant that is material to either guilt or sentencing. Without a clear definition of favorable evidence nor a disclosure timetable, prosecutors have interpreted the constitutional discovery obligation inconsistently and too often disclosed favorable information on the eve, during, or after trial or not at all.[139]

The ACTL Report emphasized how pretrial disclosure of information is critical to ensuring a fair process of plea bargaining and that the early disclosure of information favorable to a defendant is essential to obtaining legitimate outcomes, due to its impact on plea negotiations.[140]

ACTL's proposal claimed to codify *Brady* in the pretrial space. In fact, ACTL attempted to broaden the disclosure obligation to information "favorable" to defendant. Thus, the ACTL Report sought to move the boundary lines of *Brady* in

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135. *See supra* text accompanying notes 61–67.

136. *See supra* text accompanying notes 88–95.

137. AMERICAN COLLEGE OF TRIAL LAWYERS, PROPOSED CODIFICATION OF DISCLOSURE OF FAVORABLE INFORMATION UNDER FEDERAL RULES OF CRIMINAL PROCEDURE 11 AND 16 (2003).

138. The American College of Trial Lawyers states that membership "is extended only by invitation . . . to those experienced trial lawyers [with a minimum 15 years of experience] . . . whose professional careers have been marked by the highest standards . . . ." *Fellowship in the College*, AM. COLL. OF TRIAL LAWYERS (2019), https://www.actl.com/home/membership [https://perma.cc/4QLS-BPWK].

139. AMERICAN COLLEGE OF TRIAL LAWYERS, *supra* note 138, at 1 (quoting Brady v. Maryland, 372 U.S. 83, 87 (1963)).

140. *Id.* at 1–2.

terms of timing (as early as two weeks after a complaint was filed) and scope (removing the materiality requirement and rendering any relevant information favorable to defendant discoverable).[141] The proposal was reasonable, argued ACTL, given that robust discovery rights were granted to civil litigants: "It is anomalous that in civil cases, where generally all that is at stake is money, access to information is assured; however, in contrast, in criminal cases, where liberty is at issue, the defense is provided far less information."[142] The Criminal Committee put the ACTL Report on its agenda.[143] ACTL, then, in arguing for pretrial discovery, had attempted to weaponize *Brady*—arguing that, due to *Brady*'s inadequate obligations, the Committee needed to intervene in the pretrial discovery space.

Minutes of the Committee's first full meeting in May 2004 indicate that Member Donald J. Goldberg (who practiced white-collar defense) "agreed with the Department of Justice's view that *Brady* is really a *post-trial* rule."[144] The DOJ liaison, Deborah J. Rhodes, objected that "the proposed amendment is inconsistent with the case law and would transform a trial right into a discovery right, which conflicts with the Jencks Act."[145] The Committee voted to further investigate ACTL's proposal, appointing a subcommittee; notably Goldberg and Rhodes, along with three others, were placed on the subcommittee.

The Committee met five months later. The DOJ attempted a new framing: prosecutors already practiced what the proposal required.[146] Proponents of ACTL's proposal had an easy retort: if prosecutors already did what the proposed rule required, what harm was there in adopting the proposal?[147] This question, however rational, ignored the real stakes at issue. The proposed rule threatened the sanctity of the prosecutor's minister-of-justice role that conferred privileges of self-regulation

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141. The ACTL Report's proposal

> contains no requirement that the information be "material" to the defense. . . . [That] "[i]nformation favorable to the defendant" is sufficiently clear to guide the government attorneys at the pre-trial stage. [And, in addition, a] materiality standard is only appropriate in the context of an appellate review since determinations of materiality are best made in light of all the evidence addressed at trial.

Id. at 20.

142. *Id.* at 11.

143. THE ADVISORY COMM. ON CRIMINAL RULES, MEETING MINUTES 12 (May 6–7, 2004), https://www.uscourts.gov/sites/default/files/fr_import/CR5-2004_0.pdf [https://perma.cc/ZGU8-3XJZ].

144. *Id.* (emphasis added).

145. *Id.* The Jencks Act requires the prosecutor to turn over a statement of a government's witness after that witness has testified. 18 U.S.C. § 3500 (2018). In requiring the disclosure after a witness has testified, the Act has been interpreted to relieve a prosecutor from turning over such information at an earlier date. Some conflicts arise as to whether the prosecutor's *Brady* obligation (to divulge exculpatory impeachment evidence before trial, for example) trumps the Jencks Act, which requires a prior statement of a witness after testimony. United States v. Casas, 356 F.3d 104, 117 n.2 (1st Cir. 2004).

146. THE ADVISORY COMM. ON CRIMINAL RULES, MEETING MINUTES 7 (Oct. 30, 2004), https://www.uscourts.gov/sites/default/files/fr_import/CR10-2004.pdf [https://perma.cc/WML6-3PWE].

147. *Id.*

and an absence of external accountability measures. In the next meeting, the DOJ objected to the proposed rule's scope (that a prosecutor turn over information "favorable to defendant") as it was "difficult to distinguish between inculpatory and exculpatory evidence" (even though Rhodes had earlier argued that adequate protection was offered by *Brady*, which was somehow clear even though it requires a prosecutor turn over "exculpatory" evidence).[148] The DOJ's arguments led to an October 2005 dilution of ACTL's proposal:

> [U]pon a defendant's request, the government must make available no later than the start of trial all information that is known to the government . . . that the government has reason to believe may be favorable to the defendant because it tends to be either exculpatory or impeaching. The court may order disclosure earlier, but in no instance more than 14 days before trial.[149]

The DOJ was still opposed, however, objecting that the amendment went "*well beyond the constitutional standard identified by Supreme Court case law*."[150] Viewing *Brady* as a ceiling on the prosecutor's affirmative disclosure obligations, the DOJ was deploying the doctrine to defeat efforts to expand discovery in the pretrial period.

The DOJ proposed a compromise; in exchange for dropping the proposal, the DOJ would consider integrating the proposal's language for "possible inclusion in the U.S. Attorney's Manual."[151] In April 2006, Deputy Attorney General Paul McNulty attended Committee discussions, representing that the DOJ had circulated revisions to the manual "as an alternative to amending Rule 16."[152] The amended manual would require prosecutors "to weigh materiality before disclosing . . . but [prosecutors] would be encouraged to construe materiality broadly."[153] Proponents of the proposal still thought a rule would better ensure compliance, but the DOJ's suggestion had some effect, as Committee support for the proposal weakened. The issue was tabled.

In September 2006, the DOJ informed the Committee that the manual had received approval from "all relevant Department officials, including Deputy

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148. THE ADVISORY COMM. ON CRIMINAL RULES, MEETING MINUTES 6–7 (Apr. 4–5, 2005), https://www.uscourts.gov/sites/default/files/fr_import/CR04-2005-min.pdf [https://perma.cc/7VQU-P53U].

149. THE ADVISORY COMM. ON CRIMINAL RULES, MEETING MINUTES 9 (Oct. 24–25, 2005), https://www.uscourts.gov/sites/default/files/fr_import/CR10-2005-min.pdf [https://perma.cc/BNF2-VHKG]. Rhodes contended that such a disclosure could not occur earlier than trial because "between 93 and 96 percent of federal cases result[] in a plea rather than a trial[, so] it is critical that lay witnesses be exposed only in those cases that actually proceed to trial." *Id.* at 11.

150. *Id.* at 9 (emphasis added).

151. *Id.* at 10.

152. THE ADVISORY COMM. ON CRIMINAL RULES, MEETING MINUTES 9 (April 3–4, 2006), https://www.uscourts.gov/sites/default/files/fr_import/CR04-2006-min.pdf [https://perma.cc/6AR6-G94S].

153. *Id.* at 10.

Attorney General Paul McNulty."[154] The DOJ acknowledged that the manual did not track the Committee's proposal but emphasized that amending the language was a "substantial step."[155] The DOJ made clear it would oppose the proposal if it went any further; this position seemed to reinvigorate the Committee, which voted to send the proposed language (however diluted) to the Standing Committee (for referral to Congress).[156] Deputy Attorney General McNulty strongly opposed the proposal during its presentation to the Standing Committee, which rejected the proposal.[157] The Standing Committee "suggested that the . . . [C]ommittee consider whether to continue studying the . . . proposal."[158] Further time passed; the Federal Judicial Center reported that its study found no evidence of widespread noncompliance with *Brady*—a premise that had no relationship to the motivations of the ACTL Report, which was to ensure that obligations under *Brady* be exceeded to include pretrial disclosures.[159]

In April 2009, Judge Emmet Sullivan, who presided over the trial of a U.S. Senator that involved severe *Brady* violations,[160] wrote to the Committee urging them to reconsider the pretrial codification of *Brady*.[161] Immediately, the DOJ reiterated opposition to any pretrial expansion of the rules, with *Brady* as the centerpiece, noting a change going beyond *Brady*'s doctrinal requirements would be "inconsistent with Supreme Court precedent, would upset the careful congressionally-mandated balance inherent in criminal discovery under the Jencks Act, and would disregard critical interests such as the rights and safety of witnesses and special concerns relating to cases implicating national security."[162] The DOJ now offered to create a position within the DOJ to direct and oversee prosecutorial discovery obligations under *Brady*.[163] In the face of continued resistance from the DOJ, in April of 2011, the subcommittee reported that it had "been unable to agree on any acceptable amendment."[164] The Committee discussed the efforts made by the DOJ to manage prosecutorial discovery obligations, including the appointment of a

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154. THE ADVISORY COMM. ON CRIMINAL RULES, MEETING MINUTES 2 (Sept. 5, 2006), https://www.uscourts.gov/sites/default/files/fr_import/CR09-2006-min.pdf [https://perma.cc/H6NG-HNBZ].

155. *Id.*

156. *Id.* at 7.

157. THE ADVISORY COMM. ON CRIMINAL RULES, MEETING MINUTES 5 (Oct. 1–2, 2007), https://www.uscourts.gov/sites/default/files/fr_import/CR10-2007-min.pdf [https://perma.cc/GX2G-27R6].

158. *Id.*

159. *See* AMERICAN COLLEGE OF TRIAL LAWYERS, *supra* note 138.

160. Anna Stolley Persky, *A Cautionary Tale: The Ted Stevens Prosecution*, WASH. LAW. (Oct. 2009), https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/october-2009-ted-stevens.cfm [https://perma.cc/Z86V-G3XC].

161. THE ADVISORY COMM. ON CRIMINAL RULES, MEETING MINUTES 5 (Oct. 13, 2009), https://www.uscourts.gov/sites/default/files/fr_import/CR10-2009-min.pdf [https://perma.cc/JG5E-C3CF].

162. *Id.* at 6.

163. *Id.*

164. THE ADVISORY COMM. ON CRIMINAL RULES, MEETING MINUTES 11 (Apr. 11–12, 2011), https://www.uscourts.gov/sites/default/files/fr_import/criminal-min-04-2011.pdf [https://perma.cc/7EYY-3AUB].

National Criminal Discovery Coordinator, law enforcement personnel training, electronic management of discovery, and instituting a policy of "[w]hen in doubt, disclose."[165] The Committee voted 6–5 *against* a proposed expansion of pretrial discovery.[166]

The DOJ had effectively used *Brady*—which the DOJ in individual cases routinely and vigorously argues has absolutely *no bearing on pretrial discovery*[167]—to constitute the ceiling for *all* discovery, whether pretrial or trial. The courts, however, were clear that *Brady* left pretrial discovery to legislative regulation. And the Committee's process was legislative in nature. Yet, the DOJ was arguing that *Brady* foreclosed any legislative expansion of pretrial discovery. The minimum discovery required by due process at trial, according to the DOJ, was the maximum discovery required of prosecutors.

Completing the circle, the DOJ's reliance on *Brady* to justify unilateral control over the pretrial period reveals *Brady*'s legitimizing power—that is, *Brady* lent constitutional legitimacy to the dramatic transfer of power over information from the judge to the prosecutor after procedural reform in the 1940s. As legislative reform expanded prosecutorial power still more, the dominant narrative of *Brady*—that it is a landmark case that constrained the prosecutor and gave constitutional heft to the prosecutor's role as minister of justice—has been used as a means to validate this expansion of power. These benefits conferred by *Brady* to prosecutorial interests are arguably substantial.

III. ADDRESSING DUE PROCESS QUESTIONS NOT ADDRESSED BY *BRADY*

Flipping the script on *Brady*—that the doctrine ceded constitutional regulation of the pretrial period to the prosecutor, legitimized case outcomes through narrative overstatement of its burden, and was effectively used to achieve legislative objectives of the DOJ—recasts *Brady* as a potential prosecutorial ally and a threat to adversarial balance. In this reframing, the Court's "restraint" in limiting due process review to the trial moment after the legislature had ceded control over pretrial discovery to the prosecutor can be understood as judicial appeasement to prosecutorial interests.

The reframing of *Brady* as a doctrine that allows a prosecutor to withhold information during the pretrial period invites reassessment of due process norms. ACTL was not alone in raising the alarm about the disparity in information exchange between civil and criminal disputes. The Court's assertion that *Brady* does not govern pretrial proceedings, for example, is now contested by a significant number of federal jurisdictions that, by local rule, require *Brady* material to be disclosed

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165. *Id.* at 11.

166. *Id.* at 15. Instead, the Committee went forward with their attempt to influence more "soft" practices like the Federal Judicial Center bench book and DOJ policy changes. *Id*. at 15–16.

167. *See, e.g.*, Reply Brief for Petitioner, United States v. Ruiz, 536 U.S. 622 (2002) (No. 01-595), 2002 WL 657759 ("Respondent contends that the court of appeals' holding that a criminal defendant has a constitutional right to receive material exculpatory information before pleading guilty is supported by [*Brady*]. But *Brady* and the decisions applying it hold no more than that the government has a duty to disclose exculpatory information when such disclosure is necessary to ensure a fair trial.").

during, and sometimes early in, the pretrial period.[168] As the battle over *Brady*'s timing continues, in some ways the war has been won by prosecutorial interests. As long as the focus remains on *Brady*, then what information due process actually requires in criminal litigation is defined by *Brady*.[169] And *Brady* is a weak taskmaster compared to the pretrial information demands of civil litigation. Meanwhile, the consolidation of prosecutorial power during the pretrial period has become complete. The prosecutor now serves as both a party to the lawsuit and the arbitrator of facts and law.[170] The confluence of "the prosecutor's investigating, charging, convicting, and sentencing powers," coupled with "the 'inherent inequality' between the prosecutor and the defendant," as Bennett Gershman observed, has rendered "the adversary system almost obsolete."[171] David Sklansky portrayed the prosecutor as an intermediary between "law and politics, rules and discretion, courts and police, advocacy and objectivity"—a boundary-blurring position that necessarily consolidates power.[172] The prosecutorial-burden narrative works to deflect concern over this consolidation and helps justify the prosecutorial impulse to insist on self-governance.[173] Thus, as scholarship, the Criminal Committee, and judges continue to raise questions over *Brady*'s timing and scope, alternative due process approaches deserve consideration.

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168. HOOPER ET AL., *supra* note 129, at 12; Daniel McConkie, *The Local Rules Revolution in Criminal Discovery*, 39 CARDOZO L. REV. 59, 105 (2017).

169. Burke, *supra* note 106, at 483 (recognizing the value of sustained scholarly efforts to improve effectiveness and enforcement but concluding that a significant doctrinal shift is required to achieve the due process promise of *Brady*).

170. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2118 (1998) (observing how the prosecutor role had morphed into including the role as arbitrator).

171. Gershman, *supra* note 50, at 395. These circumstances permit prosecutors to engage in coercive tactics to secure pleas. *See* Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 225 (2006).

172. David Alan Sklansky, *Criminology: The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 520 (2016); *see also* Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762, 783 (2016) (contending the dualistic role of the prosecutor is confusing and does not serve the ends of justice).

173. The temptation to prosecutors to consolidate power has been a constant one. Examples abound: In 1931, the presidentially appointed Wickersham Commission wondered if "the prosecutor's office were properly organized, [whether] no public defender would be required," as a prosecutor considers the welfare of the State, and the accused is a member of the State. NAT'L COMM'N ON LAW OBSERVANCE AND ENF'T, REPORT ON PROSECUTION 33 (1931). The prosecutorial charge to represent "the people" rendered the defense attorney superfluous, given that defendant was part of the people. In 1989, for example, the United States Attorney General in a "Memorandum to All Justice Department Litigators" announced that prosecutors would be exempt from the prohibition on contacting persons represented by counsel, alleviating prosecutors of ethical constraints that apply to the rest of the bar. The self-conception of being exceptional was expressed early by Gershman, *supra* note 50, at 403 (citing Memorandum to All Justice Dep't Litigators from Dick Thornburgh, Attorney Gen. (June 8, 1989)).

A. Can the Prosecutor Withhold Pretrial Information?

Brady is not understood to allow prosecutors to withhold pretrial information with constitutional impunity, regardless of the information's value to a criminal defendant. But *Brady* allows that. Most of all criminal cases—ninety-five percent—resolve pretrial, the period in which the Court in *Brady* ceded governance over discovery to the legislature. Due process doctrine constitutionally permits the prosecutor to withhold relevant, material, exculpatory, and inculpatory information during the pretrial phrase, as well as information that bears on the credibility of witnesses or the reliability of documents. Under these constitutional nonconditions, a number of jurisdictions have opted to provide for *no* pretrial disclosures.[174] In these jurisdictions, prosecutors wield unilateral control over the development and distribution of pretrial information. This allowance permits the prosecutor to make representations of fact that are not supported by the State's file, which again, would not constitute a due process violation.

If the perception is that *Brady* imposes a significant burden on the prosecutor, the question might be asked: compared to whom? But this question, under current doctrine, is not permitted. This is the power of *Medina v. California*, a criminal case in which the Court rejected a due process analysis that would invite comparative evaluations of procedural systems *outside of* the criminal arena.[175] In the civil arena, such comparative evaluations are embedded in the doctrinal approach. For example, the Court in *Goldberg v. Kelly* articulated three factors to assess due process, the second of which involves a comparative assessment: (1) the litigant's interest at stake; (2) the fairness of *existing* procedures and probable value of *additional* safeguards; and (3) the governmental interest at stake.[176] This second factor permits a court to consider analogous systems of adjudication that are used to resolve similar disputes.[177] The approach in *Goldberg* was momentarily applied to criminal cases in *Ake v. Oklahoma*, allowing a court to examine features of civil disputes to assist in determining the fairness of criminal procedures.[178] But *Ake* was superseded by

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174. Statutorily, disclosure obligations are triggered by the onset of trial in a number of jurisdictions. *See, e.g.*, GA. CODE ANN. § 17-16-4 (2013); W. VA. R. CRIM. P. 12(b), 16; WIS. STAT. ANN. § 971.23 (West 2017).

175. 505 U.S. 437, 443 (1992).

176. 397 U.S. 254 (1970). A balancing test permits broad discretion, providing opportunity for a court to weigh each factor differently or to omit different considerations within each factor. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (following *Goldberg*, 397 U.S. 254); *see also* Ake v. Oklahoma, 470 U.S. 68, 77 (1985) (criminal case following *Mathews*, 424 U.S. 319). In *In Re Winship*, the "beyond a reasonable doubt" burden was *compared* to the "preponderance" standard applied in civil disputes. 397 U.S. 358, 370–71 (1970).

177. There are identical features between the civil, criminal, and administrative systems. Because of the similarities, these systems can be compared to measure additional safeguards. *See* Turner v. Rogers, 564 U.S. 431 (2011) (looking to criminal indigency determination in civil contempt proceedings); Clancy v. Office of Foreign Assets Control, No. 05-C-580, 2007 U.S. Dist. LEXIS 29232 (E.D. Wisc. Mar. 31, 2007) (looking to civil discovery rules in an administrative hearing).

178. *See Ake*, 470 U.S. 68. Civil rules provide a functional, alternative mode of adjudication for comparison. Meyn, *supra* note 6, at 734. So much so, that rules of civil procedure were first proposed to govern criminal disputes. *Id*. Others acknowledge pretrial civil litigation

Medina, Justice Kennedy contending that criminal law was special, given what he observed to be its comprehensive treatment within the Constitution.[179]

Pretrial civil procedure in particular is analogous to criminal disputes; common-law tradition is an appropriate consideration in due process examinations,[180] and before federal reform in the 1930s, civil and criminal pretrial procedure shared a similar structure.[181] Should a civil to criminal comparison proceed, what would it potentially reveal? The adequacy of criminal procedures to develop and interrogate pretrial information would be tested against civil procedures, which for eighty years have followed a different trajectory.[182] The length of this trajectory has significance to a due process review; entrenched norms can be understood to create minimum expectations of process.[183] As in criminal litigation, the legislative process has defined what pretrial information is exchanged in civil disputes. No civil court has found that the civil pretrial discovery regime is constitutionally required. But the legislature in the civil arena created a different world with which it conceived of an alternative conception of what process is due[184]—thus providing substantial guidance as to the value of alternative procedures that are available to govern the exchange of pretrial information.

What, for example, might transpire if a state legislature amended civil procedure to deprive civil litigants of discovery tools? Corporations' and the plaintiffs' bar would not go gently into the night. Civil litigants, under any reasonable scenario, would claim that pretrial discovery, legislatively granted for over eighty years in every state and federal jurisdiction in the United States, was so entrenched as to be fundamental—citing to the principles of transparency, notice, and deliberation that justified reform in the 1930s—and that its denial would offend due process. And if these civil litigants were correct that these embedded norms do define present notions of minimum due process (after all, wrote Justice O'Connor, due process was

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shares deep DNA with criminal litigation. Lynch, *supra* note 170, at 2120–21 ("[The] essential structure [of] a criminal case is nothing more than an ordinary [civil] lawsuit.").

179. *Medina*, 505 U.S. at 443 ("In our view, the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which . . . are part of the criminal process."). Another variant of Kennedy's approach is taken up by Judge Gerard Lynch, who wrote that any due process consideration should be assessed according to the current system's "own implicit premises, rather than in comparison to an idealized adversarial model." Lynch, *supra* note 170, at 2121. Lynch is correct that no doctrine requires comparison to a procedural ideal; but what about comparison to a similar procedural analogue?

180. *Medina*, 505 U.S. at 445–46 ("[B]ecause the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area.").

181. Meyn, *supra* note 6, at 699.

182. *See* Section I.B.1.

183. *Medina*, 505 U.S. at 446 ("Historical practice is probative of whether a procedural rule can be characterized as fundamental" as well as "settled tradition."); *id.* at 447 (finding the holdings in cases eighty-five years old to be relevant to the Court's due process inquiry); *In re Winship*, 397 U.S. 358, 361 (1970) (finding that the requirement of "guilt of a criminal charge be established by proof beyond a reasonable doubt" is so entrenched in common-law jurisdictions that it creates minimum expectations of due process).

184. *See supra* text accompanying notes 42–47.

"perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society"[185]), why would depriving criminal defendants of these same entitlements comport with due process where cases determine whether an individual should be incarcerated? Why would the lack of discovery in criminal litigation be adequate where discovery rights are essential to civil litigation and where the stakes for litigants are, at the least, commensurate?

Under *Medina*, courts are on firm ground in avoiding the comparison to civil litigation that *Goldberg* would permit. Although *Medina* frees courts from engaging with analogous systems, courts still envision comparisons but resort to imaginary worlds. A common projection is a world governed by *Brady*; the other world is one that provides a defendant unfettered access to *everything*.[186] In *Pennsylvania v. Ritchie*, for example, the Court stated, "[a] defendant's right to discover exculpatory evidence does not include the unsupervised authority to search through the Commonwealth's files."[187] In *Moore v. Illinois*, the Court stated there is "no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case."[188] Courts make these sweeping statements as they ignore what occurs across the hall, where civil litigants exchange information according to a rule-bound process superintended by opposing counsel and ultimately the judge. Other slippery slope scenarios find expression in the criminal arena. Some courts, for example, maintain that transferring the role of supervising *Brady* from the prosecutor to a judge would be "extremely time-consuming" for judges who are "too busy," with little benefit in terms of compliance.[189] This view again ignores the functional, party-driven discovery regime in civil litigation, which is ultimately refereed by a (however busy) trial court.

In a few instances, litigants have asked courts to consider importing rules over the criminal/civil divide. In *United States v. Sierra Pacific Industries*, a civil case, the defendant sought post-conviction relief under *Brady*.[190] The court rejected the attempt, stating that the due process interest of a civil defendant *paled* in comparison to a criminal defendant.[191] Yet, the court's analysis belied its conclusion, finding the civil defendant was protected by existing civil pretrial procedures (that exceeded *Brady*'s requirements): "The *expansive right* to discovery in civil cases and the Federal Rules of Civil Procedure . . . provided [the civil] defendants with

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185. *Medina*, 505 U.S. at 454 (quoting Griffin v. Illinois, 551 U.S. 12, 20–21 (1956) (Frankfurter, J., concurring)).

186. Burke, *supra* note 106, at 486 ("[R]equiring the prosecution to disclose everything that might influence a jury would amount to a constitutionally mandated open file policy, which the Court has repeatedly refused to impose as a component of due process."); *see also* United States v. Agurs, 427 U.S. 97, 109 (1976).

187. 480 U.S. 39, 59 (1987).

188. 408 U.S. 786, 795 (1972).

189. Bibas, *supra* note 106, at 141.

190. 100 F. Supp. 3d 948, 956 (E.D. Cal. 2015).

191. *Id.* at 957 ("The 'requirement of due process . . . in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions.'" (quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935))).

constitutionally adequate process to mount an effective and meaningful defense to this civil action."[192] One is left wondering: if the pretrial civil rules provide a constitutionally adequate procedure to mount an effective defense, is it really possible that the *absence* of such rules in criminal litigation is constitutionally adequate? In *Sierra Pacific*, the court breezily credits the value that an opportunity to develop a pretrial record has to a litigant at trial; but, in the criminal context, courts pretend this obvious connection does not exist and instead imbue trial with a talismanic, error-cleansing, fact-developing status.

How can a constitutionally less-protected civil defendant be entitled to more pretrial information, and the criminal defendant, who is entitled to greater constitutional protection, be entitled to less pretrial information? This paradox is in part given legitimacy by the popular view of *Brady*, which imagines an idealized version of trial: should a criminal defendant elect to advance to trial, he avails himself of the panoply of powerful rights that the Constitution affords (but this is really no different than a trial in a civil case).[193] This persistent fiction (rejected by civil procedure scholars)[194] that trial somehow substitutes for pretrial interrogation of the record permits the *Brady* doctrine's legitimacy. And yet the *Brady* doctrine punches well above its weight, broadcasting a perception of burden that well exceeds its actual requirements of the prosecutor.

The faulty premise that pretrial proceedings do not significantly influence trials was rebutted during the reform to civil procedure, thirty years before the Court decided *Brady*.[195] Reformers to civil procedure viewed the trial as a continuation of pretrial proceedings and believed that adopting a pretrial discovery phase profoundly informed the quality and nature of any subsequent trial. Civil reformers acknowledged that pretrial preparation is essential to fair settlements and fair trials; the pretrial interrogation of claims and defenses is actually the function of the adversarial system. Yet the Court, itself integral to the creation of the civil procedure template, has continued to maintain that, in criminal disputes, trial exists in a vacuum. A due process doctrine that credited what is obvious—pretrial discovery's essential role to an adversary process's operation—would compare the prosecutor's unilateral

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192. *Id.* at 958 (emphasis added).

193. Trial forces the prosecutor to prove the case beyond a reasonable doubt and conveys to the defendant the right to confront witnesses and the right not to testify. As to the higher burden of proof, see Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 293 (2013) (contending juries merely determine who presents the most plausible story). As to a defendant testifying or not testifying, he is damned if he does (experienced prosecutor will destroy on cross-examination) and damned if he does not (jury will draw the impermissible inference he is not testifying because he is guilty).

194. *Id.* at 315–19.

195. *See* Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 80–89 (1989); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 711 (1998); *see also* THE ADVISORY COMM., REPORT OF THE ADVISORY COMMITTEE ON RULES FOR CIVIL PROCEDURE 45–46 (1937), https://www.uscourts.gov/sites/default/files/fr_import/CV04-1937.pdf [https://perma.cc/2CPZ-XLSL].

control over the pretrial record to the due process entitlements (and maybe rights) that are currently granted to civil defendants.

B. Can the Prosecutor Be a Judge in Her Own Case?

A related, narrower due process question emerges: what degree of decision-making power in litigation should one party be permitted to the exclusion of the other party? At common law, the trial court as gatekeeper could require the prosecutor to describe factual allegations to the court's satisfaction. After federal reform to criminal procedure in 1946,[196] the power to determine the sufficiency of the pretrial factual record was transferred from the judiciary to the executive. Importation of notice pleading to criminal disputes removed the trial court's pretrial role and conferred unprecedented control over the pretrial record to the prosecutor, providing significantly less notice, transparency, and deliberation during the pretrial phase than the civil system. As a result, power over the pretrial record, as well as over pretrial dynamics, was transferred from the judge to the prosecutor, from the judiciary to the executive, and from a neutral adjudicator to one party to a dispute.[197]

Brady legitimized this pretrial transfer of power from the judiciary to the executive through its *subsilencio* validation of this procedural design. Professor John Orth observed a fundamental tenant of due process prohibits any law that makes one "[j]udge and party."[198] Did the 1946 federal reform to criminal procedure do just that? The question of whether a person can be a judge in her own case tests, as John Orth writes, "the procedural fairness of any legal system by highlighting one of its most essential features, whether cases are decided by an independent decision maker."[199] Even Judge Gerard Lynch, who views the prosecutor's increasing control over the disposition of criminal cases as an "innovation" that absorbs inquisitorial features to permit system-wide efficiency,[200] wondered whether the arrangement constituted a "perversion of the classic due process model."[201]

The response to this question is that a prosecutor's "minister-of-justice" obligation mitigates due process concerns. In this role, prosecutors are charged with

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196. *See* FEDERAL RULES OF CRIMINAL PROCEDURE, WITH NOTES PREPARED AND PROCEEDINGS (Alexander Holtzoff, ed. 1946).

197. Where a judge does still intervene, it has no application to the determination of witness credibility and other critical issues to litigation. As to presiding over motions to suppress, filing rates are low, rates of success even lower. *See, e.g.*, Peter F. Nardulli, *The Societal Cost of the Exclusionary Rule: An Empirical Assessment*, 1983 AM. B. FOUND. RES. J. 585, 595 (conducting a tristate study (Illinois, Michigan, Pennsylvania) of 7767 felony cases: defendants filed motions to suppress in eleven percent of cases with success in seventy cases).

198. JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 15 (2003).

199. *Id.*

200. Lynch's assessment that the consolidation of prosecutorial power was necessary to attend to the growing docket of criminal cases and to meet a crime wave that came on the tail end of the tough-on-crime hysteria, which would soon give way to collective reassessment. A fair number of scholars now contend that the consolidation of prosecutorial power achieved more prosecutions independent of when the crime rate rose or fell and was thus a key contributor to the crisis of mass incarceration. *See generally* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 206 (2017).

201. Lynch, *supra* note 170, at 2121.

stepping "out of their purely adversarial roles . . . [to] ensure justice is done."[202] Where actors typically answer to a neutral party for allegations of misfeasance, prosecutors answer to self-reflection, sometimes internal review.[203] *Brady* subscribes to this view, implicitly holding that entrusting the distribution of any pretrial information to one party somehow comports with due process. The minister-of-justice role promotes internal prosecutorial review of issues that occur on legal and ethical margins—those exact situations that a neutral party should step in as a referee.[204] The minister-of-justice role is suspiciously embraced by those burdened by it. But what purpose does a judge serve if a "minister of justice" oversees proceedings? To argue that the classic due process model is satisfied if proceedings are overseen by a judge that has a stake in the litigation is to normalize the very circumstances that would require, of an actual judge, recusal.

The procedural design of criminal litigation was not inevitable. The initial draft of federal criminal procedure mirrored the civil-procedure template.[205] Had this version become law, it would have plainly influenced how lawyers, scholars, and courts conceived of due process.[206] But, this version was rejected. As a result, pretrial design provides criminal defendants with rights that are far inferior to civil litigants. This state of litigation became the new normal and in turn shaped conceptions of due process.[207]

CONCLUSION

"No government official in America has as much unreviewable power and discretion as the prosecutor," wrote Stephanos Bibas.[208] *Brady* might be viewed as a building block of that story. *Brady* arguably served to bestow constitutional validation to a national reform effort that afforded pretrial agency to a civil defendant, but not a criminal defendant. The implicit compromise struck in *Brady*—to impose a minor burden on the prosecutor at trial but to shield a prosecutor's use

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202. Bennett L. Gershman, *The Zealous Prosecutor as Minister of Justice*, 48 SAN DIEGO L. REV. 151, 155 (2011).

203. For a thorough treatment of the prosecutor's unreviewed decisions at multiple (and critical) junctures along the litigation timeline, see DANIEL S. MEDWED, PROSECUTION COMPLEX: AMERICA'S RACE TO CONVICT AND ITS IMPACT ON THE INNOCENT (2012).

204. Epps, *supra* note 172, at 846–47.

205. But the possibility of this alternative reality was undermined by a Criminal Committee controlled by prosecutorial interests. *See* Meyn, *supra* note 6 at 708; *supra* text accompanying notes 45–50.

206. If something like *Brady* had still emerged, its role would be understood for what it actually is, a right that provides a post-conviction remedy unique to criminal litigation that guarantees material, exculpatory information is provided to defendant *at the onset of trial*.

207. *See* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 48–49 (2000). One theory of constitutional review is that the Court is not so much a countermajoritarian institution; instead, it tends to divine the majority's true self—as Matthew Lassiter portrays the theory, the Court acts in a way "more democratic than the legislative choices of elected representatives." Matthew D. Lassiter, *Does the Supreme Court Matter? Civil Rights and the Inherent Politicization of Constitutional Law*, 103 MICH. L. REV. 1401, 1405–06 (2005).

208. Bibas, *supra* note 58, at 960.

of pretrial information from constitutional scrutiny—contributed to the expansion of prosecutorial influence. And yet, outcomes are given legitimacy that in part flow from the narrative that Brady imposes a significant burden on the prosecutor. And despite the Court's stating that the doctrine has no bearing on the pretrial moment, the DOJ has effectively wielded *Brady* to defeat legislative proposals to expand pretrial discovery. This Article asks, in addition to the prosecutorial burden narrative, might *Brady* also be fairly represented as a prosecutorial ally.

A consensus is growing that criminal-justice conditions are unacceptable and that blame for these conditions is partially attributable to the prosecutorial role.[209] To view *Brady* as a prosecutorial ally and a threat to adversarial balance invites a reassessment of entrenched due process norms, providing an opportunity to have meaningful discussions on reforming how criminal disputes are resolved.

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209. *See, e.g.*, PFAFF, *supra* note 200, at 206 ("[P]rosecutors have been and remain the engines driving mass incarceration."); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN L. REV. 869, 921 (2009); Alex Kozinski, *Criminal Law 2.0*, 44 GEO L.J. ANN. REV. CRIM. PROC. iii, xiii n.69 (2015) ("[P]rosecutors—more than cops, judges, or legislators—[are] the principal drivers of the increase in the prison population."); Sklansky, *supra* note 172, at 514; Ronald F. Wright, *Reinventing American Prosecution Systems*, 46 CRIME & JUST. 395, 395–96 (2017) (contending that prosecutors have used "power responsibly in many cases . . . . In other contexts, however, prosecutors have produced troubling results in individual cases and noxious trends in the criminal justice system as a whole," and they "have contributed more than their fair share to some remarkable failures in American criminal justice."); Jeffrey Toobin, *The Milwaukee Experiment: What Can One Prosecutor Do About the Mass Incarceration of African-Americans?,* NEW YORKER (May 4, 2015), http://www.newyorker.com/magazine /2015/05/11/the-milwaukee-experiment [https://perma.cc/SUT8-RVNG].