Kentucky Law Journal

Volume 94 | Issue 2 Article 2

2005

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Kentucky Law Journal

VOLUME 94 2005–2006 NUMBER 2

ARTICLES

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[The White Queen:] For instance, now, ... there's the King's Messenger. He's in prison now, being punished: and the trial doesn't even begin till next Wednesday: and of course the crime comes last of all.

[Alice:] Suppose he never commits the crime?

[The White Queen:] That would be all the better, wouldn't it?

—*Lewis Carroll*, Through the Looking-Glass[2]

THE due process doctrine of *Brady v. Maryland*[3] is commonly viewed as simply another of our troubled rules of constitutional criminal procedure: well intentioned but utterly bedeviled in its details. The *Brady* doctrine purports to inscribe as constitutional law the seemingly self-evident proposition that a public prosecutor, charged with the fair pursuit of criminal justice, should provide the criminal defendant with any material in the state's possession which tends to exculpate the accused of the state's charges. But *Brady* wears a mask, for it has never actually required the prosecutor to do what is so manifestly the right thing to do. The failure of the rule is hardly a mere matter of detail. The *Brady* rule fails because it is at

1 Professor of Law, New York Law School. This article has benefited from the institutional support of New York Law School, the critical support of a faculty forum, and the particular support of Stephen Ellmann and Stacy Caplow. I would also like to extend many thanks to Lindsay Bender and Tamara Sorokanich for their excellent research assistance in the foreign and international fields.

2 LEWIS CARROLL, THROUGH THE LOOKING-GLASS, AND WHAT ALICE FOUND THERE 89 (Bloomsbury 2001) (1872).

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

bottom grounded in a deeply rooted adversarial pathology unique to the American criminal justice system. It fails because it was never, or at least not for longer than a moment, designed to succeed.

Brady has always benefitted from its iconic status as one of the Warren Court's earliest and most idealistic restatements of the unique and exalted demands placed upon our nation's prosecutors in their pursuit of adversarial criminal justice.[4] The doctrine has become emblematic of the broad notion that our prosecutors must wear two hats in their joint pursuit of the competitive demands of advocacy and the neutral commands of justice.[5] To be sure, many of our nation's prosecutors do just that. But in many respects, particularly with respect to the disclosure of exculpatory material to the defendant, many prosecutors are clearly failing to meet the challenge. This Article will demonstrate that the many failings of our nation's prosecutors, most of them clearly unethical in nature, are not best understood as individualized deviations from an idealized norm of criminal justice. Rather, they are better understood as conditioned responses which emanate from a fundamentally skewed normative order within our criminal justice system.

Starting with the premise of an exceptional constitutional system of criminal justice which provides the criminal defendant in America with an extraordinary array of constitutional privileges and protections, our courts over the years have responded reflexively in creating a reciprocal network of privileges for the American prosecutor, ostensibly designed to level or at least maintain some balance on the adversarial playing field. As a result, the American prosecutor is now presented with fewer demands for transparency and fair play than in almost any other mature legal system, whether civil, common, or international law.[6] In the most recent era, the most no-

4 *See* Scott E. Sundby, Essay, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 McGEORGE L. REV. 643, 643–44 (2002).

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> The U.S. attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

Berger v. United States, 295 U.S. 78, 88 (1935), *overruled on other grounds by* Stirone v. United States, 361 U.S. 212 (1960).

6 *See, e.g.*, United States v. Williams, 504 U.S. 36, 53 (1992) (prosecutor seeking indictment has absolutely no obligation under federal law to reveal to the grand jury even substantially exculpatory evidence); *id.* at 64 n.9 (Stevens, J., dissenting) (protesting the above holding due to the fact that the ABA Standards for Criminal Justice do impose such an ethical obligation); United States v. Valenzuela-Bernal, 458 U.S. 858, 867–69 (1982) (government may deprive defendant of access to witnesses by deporting them, absent "plausible showing" by defendant that the testimony of the uninterviewed witnesses would satisfy the *Brady* standard of mate-

torious example of these endemic tendencies towards sheltering critical information and denying fair access to the criminal defendant is found in the typical refusal of prosecutors to consent to the simple examination of available DNA material in cases where the defendant has earlier been convicted without any forensic testing having taken place and is ultimately exonerated by such evidence.[7] Still, the *Brady* doctrine remains both the iconic and ironic example of this deeply embedded tendency within our legal system to provide informational privileges designed to create exceptional adversarial protection or advantage to the prosecutor. Contrary to common impression,[8] what will be demonstrated here is that the Supreme Court's confused yet deliberate unfolding of the *Brady* doctrine has effectively settled upon the same dictate as that of the White Queen: the trial must come first, and the disclosure of exculpatory evidence must come only after a conviction, if at all.

The *Brady* doctrine is indeed something of a stark anomaly in constitutional criminal procedure. This entire field of procedural rights is typically overseen by the doctrine of "harmless" error in which prosecutorial errors will be excused if they are deemed harmless to the outcome of the case.[9] But the *Brady* doctrine has created something that surpasses even this broad doctrine of prosecutorial excuse. It might better be described as a novel doctrine of harmless conviction, for the Supreme Court has now made it perfectly clear that when a prosecutor operating within our competitive adversarial system fails both deliberately and unethically to dis-

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riality); Roviaro v. United States, 353 U.S. 53, 59–66 (1957) (recognizing qualified "informant's privilege" which permits prosecutor to withhold identity of confidential informant unless defendant can demonstrate a material need for disclosure); Jencks v. United States, 353 U.S. 657, 665–70 (1957) (permitting prosecutor to withhold from the defendant the prior statements of a government witness until after the witness has testified on direct), *superseded by statute by* The Jencks Act, Pub. L. No. 85-269 (codified at 18 U.S.C. § 3500 (2000)) (codifying the holding in *Jencks*), *extended by* FED. R. CRIM. P. 26.2 (extending *Jencks* rule to prior statements of defense witnesses). Perhaps the outer limits of the government's power to deny timely access to critical information was best expressed recently when a court denied a federal prosecutor's exceptional motion to preclude the City of New York from interviewing its own employees regarding a ferry accident for which another of its employees had already been indicted, on the ground that the city intended to share the information gained with counsel for the indicted employee. *See* Robert G. Morvillo & Robert J. Anello, *White-Collar Crime; Government Attempts to Shield Its Witnesses From the Defense*, N.Y.L.J., Feb. 1, 2005, at 3.

7 "In nearly half the sixty-four exonerations, local prosecutors refused to release crime evidence for DNA tests until litigation was threatened or filed." BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED xvi (2000).

8 "It's a cornerstone of all democracies that criminal defendants get access to potentially exculpatory evidence." Editorial, *Missing Witnesses*, N.Y. TIMES, Mar. 6, 2004, at A14.

9 *See, e.g.*, Chapman v. California, 386 U.S. 18, 23–25 (1967); *see also* Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 U. KAN. L. REV. 309 (2002) (criticizing the application of the harmless error doctrine to constitutional criminal procedure).

close exculpatory material to the criminal defendant at the trial court level, it is not in itself even deemed to be error. It becomes error only when a reviewing court concludes that the nondisclosure *of its own accord* has produced a wrongful conviction *at trial.*

Nor is this doctrinal abyss one of limited consequence. It reveals yet another example of how the Supreme Court's adherence to an exceptional and essentially false theory of the adversarial system of justice has produced a due process doctrine of laissez-faire measures that serves only to shield the lowest standards of professional behavior. The Supreme Court has adopted a view of the adversarial system as an essentially self-regulating market for the production of truth that is best left to its own resources.[10] It is now broadly recognized that the Supreme Court's current expression of the Sixth Amendment standard for the effective assistance of defense counsel tolerates an abysmally low level of professional representation.[11] As shall be seen, the Supreme Court's *Brady* doctrine does much the same for our nation's prosecutors. As now constructed, the doctrine does nothing to elevate the constitutional standard for what are otherwise ethically compelled disclosures but rather has lowered that standard to a level of nondisclosure that would not be tolerated of public prosecutors in virtually any other mature system of law, either national or international. The fact that our nation's prosecutors do not routinely fall to the levels tolerated by these minimalist standards spares only the lawyers, not the doctrine itself.

The *Brady* doctrine has nonetheless lived a relatively charmed life in the otherwise caustic community of scholarly critics of our constitutional criminal procedure.[12] The Fourth Amendment, of course, gets no respect,[13] but even the attacks on that amendment have not gone so far as to suggest that the Fourth Amendment has abandoned its avowed constitutional mission and reverted to something quite the opposite, such as a safe haven for police misconduct. This is in fact what has happened to the *Brady* doctrine. *Brady* purports to be a constitutional rule of pretrial discovery by the criminal defendant, but it is not. In its present construction it not only does not affirmatively require any pretrial discovery of exculpatory information, it effectively discourages it. Rather than operating as a substantive doctrine of due process to the defendant, *Brady* now functions more as a surrogate

10 *See infra* note 112 and accompanying text.

11 *See* Strickland v. Washington, 466 U.S. 668, 688 (1984) (holding that the proper standard by which to measure an attorney's effectiveness is "simply reasonableness under prevailing professional norms"); *see also* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

12 *See* Sundby, *supra* note 4, at 643 (referring to *Brady* as one of a small pantheon of Supreme Court cases to have achieved "superhero status").

13 *See, e.g.*, Daniel McKenzie, *What Were They Smoking?: The Supreme Court's Latest Step in a Long, Strange Trip Through the Fourth Amendment:* Kyllo v. United States, 533 U.S. 27 (2001), 93 J. CRIM. L. & CRIMINOLOGY 153 (2002).

doctrine of due compensation to the prosecution. The *Brady* doctrine, at least at the Supreme Court level, has become a rule of adversarial privilege for prosecutorial nondisclosure of the very information it purports to require disclosed.

The principle of transparency in criminal justice, even adversarial criminal justice, has quite recently entered a new era in both foreign and international systems of law. The 1990s are now cast as the "decade of disclosure" with regard to the sudden emergence and almost universal recognition of human rights principles of exculpatory disclosures by the prosecution.[14] The preeminent *Brady* doctrine has therefore been rather abruptly transformed into an ironic outcast in the emerging global regime of criminal justice.

This emergence of a foreign and international law of exculpatory disclosure provides both an opportunity and a challenge to review the *Brady* doctrine in an entirely new context. Until now, the doctrine has typically been considered a sui generis byproduct of the uniquely American constitutional system of adversarial due process. This premise of American exceptionalism has served to shield the doctrine from the ultimate reductions of the typical complaints, found in both the academic literature and the lower court cases, that the doctrine constructed by the Supreme Court fails to declare a rule of disclosure that is either principled or intelligible. Once one accepts the first premise of the adversarial philosophy enunciated and relied upon rather insistently by the Court, namely that due process in our competitive, adversarial system requires an accommodation of certain measured privileges for the prosecutor-as-adversary to countervail the constitutional advantages provided to the criminal defendant, one is consequently restricted in the ability to declare that the various accommodations recognized in the *Brady* case law are simply wrong.[15] Wrong not merely as a matter of construction or detail but wrong as a matter of first principle.

This Article therefore attempts to seize this timely opportunity to develop a baseline critique of the *Brady* doctrine both from within and without.

14 *See generally* JOHN ARNOLD EPP, BUILDING ON THE DECADE OF DISCLOSURE IN CRIMINAL PROCEDURE (2001).

15 For example, two early and quite excellent reviews of the *Brady* doctrine each provided a penetrating critique of the failings of the doctrine itself, followed by a somewhat lame conclusion as to what should be done to redress the problem. *See* Barbara Allen Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133 (1981–82) (suggesting that the solution to the weaknesses of the *Brady* doctrine might be found in the Supreme Court's raising of the Sixth Amendment standard of effective assistance of counsel); Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the* Agurs *Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391 (1984) (suggesting that the most effective, although extraordinarily expensive, solution to the failures of the *Brady* doctrine would be to provide all defendants with a per se right to an in camera review by the trial judge of the entire prosecution file to determine whether there was any exculpatory material to be disclosed).

It will first identify the core doctrinal malignancy that lies at the heart of the Supreme Court's rulings, and it will then demonstrate how the doctrine has now effectively been repudiated by the emerging regimes of human rights law in other adversarial systems, both foreign and international.

Part I will review the abrupt rise and fall of the *Brady* doctrine as a promise of a more equitable and transparent system of justice. This is already an oft-told tale,[16] yet the purpose of this section will be to identify not the many twists, turns, and failures of the case law, but rather the central and durable defect in the doctrine itself: an unmediated and atavistic commitment to an adversarial process in which any pretrial disclosure of evidence to the accused is viewed as a threat to the essential balance and integrity of that process. For several hundred years there was virtually no discovery by the criminal defendant and likewise a deep-seated commitment to keeping things that way. By the late 1950s, things had progressed only to the point where several very limited criminal discovery statutes, most notably Rule 16 of the Federal Rules of Criminal Procedure, had been passed, and a number of appellate courts had recognized that trial courts did have at least some inherent power to order limited discovery in a criminal case. Still, there was no constitutional rule of discovery and no rule at all requiring disclosure of exculpatory material. *Brady v. Maryland*, decided in 1963, was therefore the first Supreme Court ruling in both respects. Despite the transparent beneficence of its holding, the *Brady* rule contravened some of the most deeply grounded instincts of the judicial monitors of the criminal process. At ground level, the case was not well received by either prosecutors or judges. The judicial reaction to its precepts set in almost immediately, particularly at the level of the post-Warren Supreme Court. Not long after *Brady* began percolating new law in the lower courts, the Supreme Court set out on a steady pursuit of retrenchment with regard to the very tolerance of the adversarial process to such constitutionally guaranteed discovery by the criminal defendant.

Part II will reveal how differently the matter of prosecutorial disclosure of exculpatory material has been handled in other nations which, like the United States, rely upon an adversarial system of criminal justice. The discussion here will focus on the extraordinary story of the recent and still unfolding developments in the English "*Brady* law." England discovered somewhat rudely, as was the case much earlier in America, that its public prosecutors could not always be trusted to play fairly and openly in pursuit of a major conviction. The response to this crisis of injustice by both the English courts and Parliament provides a sharp and seemingly provocative contrast to our own high court's inability to raise the floorboards of our criminal justice system. In addition, the Supreme Court of Canada, without the benefit of a national scandal to prod it, has also recently made a major

16 *See, e.g.*, Sundby, *supra* note 4.

and transformative contribution to the law of exculpatory disclosures in that nation.

Part III will then demonstrate how the newly formed and highly regarded international tribunals of criminal justice have likewise created a "*Brady* law" that far surpasses our own. The affair of prosecutorial nondisclosures that created a crisis of confidence in the English criminal justice system, commonly referred to as the "miscarriages of justice" scandal, reverberated throughout Europe and the international community, even though not at all in the American legal theater. At the outset of the 1990s, there was no rule of exculpatory disclosure within the entire corpus of international rules, covenants and protocols. Yet by the end of that decade, there were three new venues of international criminal justice—the International Criminal Tribunal for Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the long-sought International Criminal Court (ICC)—each of which had introduced a rule or article creating an affirmative duty of disclosure of exculpatory material by the prosecution.

Thus, adversarial criminal justice, both foreign and international, has firmly endorsed principles of fairness and transparency that remain explicitly rejected within the Supreme Court's *Brady* doctrine. The doctrine has recently become yet another instance of how the American position "now stands alone" within the rapidly evolving global standards of fundamental justice.[17] Therefore, the concluding call of this article is for the Supreme Court to reposition its *Brady* doctrine to conform both to inherent principles of contemporary due process as well as to recently settled standards of international human rights.

I. The Rise and Fall of *Brady*: The Founding Era of No Discovery

The *Brady* rule, as a constitutional rule of criminal discovery, perhaps never really had much of a chance. It was the odd progeny of a long-standing, deeply entrenched judicial philosophy of adversarial laissez-faire that viewed *all* criminal discovery as a serious threat to the essential, yet delicate, balance of adversaries in the criminal justice system. Even as the courts have become more accustomed to legislatively imposed discovery in criminal cases, the opposition to compelled disclosure of exculpatory material—a highly sensitive subject matter never covered by any of the statutory rules of discovery—has remained virulent within the adversarial culture of the criminal justice system. To fully appreciate the dramatic rise

17 "In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty." Roper v. Simmons, 543 U.S. 551, 577 (2005).

and fall of the *Brady* rule, it is necessary to recollect and reexamine its very reluctant beginnings.

Until well into the last century, there was virtually no discovery by a defendant in a criminal case. There was therefore nothing exceptional about the fact that there was no discovery by the defendant of specifically exculpatory material. The various legislatures had not passed criminal discovery statutes, the courts deemed themselves without inherent power to order discovery in a criminal case, and the very idea of discovery by a criminal defendant was almost universally regarded as a radical threat to the adversarial system of justice. What is remarkable here is not that times have changed and our attitudes and laws regarding criminal discovery have entered a new era, but rather that our laws and attitudes in this singular area of the state's obligation to provide the defendant with exculpatory information appear to have changed so little.

As shall be seen in the discussion of the actual case law, the *Brady* doctrine has been riddled almost from the outset with a seemingly unrequited urge to return to the earlier adversarial paradigm. While the *Brady* doctrine of today has been popularized as a constitutional rule of discovery designed to prevent a defendant from being denied information that might prevent the injustice of a wrongful conviction, the original doctrinal basis for *Brady* had little to do with discovery as such. The underlying doctrine was in fact but a narrow set of rulings designed to admonish only some of the most egregious forms of prosecutorial corruption which, in turn, had very little to do with a mere denial of discovery.

Criminal discovery in the common law era was indeed something of a legal oxymoron. Apart from a few isolated and exceptional cases,[18] there was no criminal discovery, constitutional or otherwise. On the civil side, expanding rules of discovery had been unfolding since the early nineteenth century and had been met with almost universal acceptance.[19] However, the success of the civil discovery movement had little spillover to the criminal side. Criminal discovery was routinely referred to as a separate "problem" and a rather insoluble one at that.[20]

Why was criminal discovery deemed to be such a distinct and intransigent problem? There were various reasons given, but three are worth noting. First of all, unlike civil discovery where there was at least an argument to be made that discovery benefited both sides to the litigation more or

18 *See generally* People *ex rel.* Lemon v. Supreme Court, 156 N.E. 84 (N.Y. 1927) (reviewing the early rule and collecting cases).

19 "[I]t is generally agreed that discovery, as a complement to modern liberal pleading, has improved the operation and administration of our judicial system and has advanced the purposes it was designed to serve." Note, *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 942 (1961).

20 *See, e.g.*, JOINT COMM. ON CONTINUING LEGAL EDUC. OF THE ALI AND THE ABA, THE PROBLEM OF DISCOVERY IN CRIMINAL CASES (1961).

less equally, it was clear that on the criminal side only the defendant would benefit substantially from rules of discovery that provided him with access to the other side's files.[21] Secondly, even if the defendant was considered to have information of interest to the prosecutor, the general understanding at the time was that the Fifth Amendment privilege against self-incrimination would prevent the prosecutor from compelling meaningful discovery from the defendant.[22] Thirdly and most perniciously, there was the rather open mistrust and disdain for the lower-tier practices of the criminal defense bar whose members would, according to the prevailing view, stop at nothing to get their man off:

> Often district attorneys are willing to open up their files for inspection by defendant's counsel, when the latter is considered trustworthy in the sense that he would not be a party to subornation of perjury or an illegally fabricated defense. But they feel that some counsel, especially those who habitually appear for professional criminals, will stop at nothing to get their man discharged, and that discovery will only facilitate such anti-social designs.[23]

The problem with discovery by the criminal defendant was, therefore, that it was deemed to be an essentially unfair adversarial burden to impose upon the inherently disadvantaged public prosecutor. What followed from this recognition of a structural handicap imposed on the prosecutor by the Constitution was a well-settled belief that the matter of discovery by the criminal defendant was a matter most appropriately resolved by the exercise of prosecutorial prerogative. The Supreme Court maintained this posture of deference to prosecutorial discretion until well into the 1950s. In *Leland v. Oregon*, decided in 1952, the Court stated that although it was indeed the "better practice" to grant discovery to the criminal defendant

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> We should first observe that the prosecution in the usual criminal case is well supplied with evidentiary material. It is the state, not the defense, which first exerts force in the gathering of evidence and in bringing it under exclusive control. Moreover, with the improvements in detection apparatus and methods of modern police organization and operation, the state is much better at fact gathering.

Robert L. Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 305 (1959–60).

22 "In considering the problem [of criminal discovery] it must be remembered that in view of the defendant's constitutional and statutory protections against self-incrimination, the State has no right whatsoever to demand an inspection of any of his documents or to take his deposition, or to submit interrogatories to him." State v. Tune, 98 A.2d 881, 884–85 (N.J. 1953). This notion that the Fifth Amendment precluded discovery against the criminal defendant persisted into the most recent era, where it has been gradually abridged. The seminal case is *United States v. Nobles* where the Supreme Court reversed a Ninth Circuit ruling that criminal discovery was "basically a one-way street." United States v. Nobles, 422 U.S. 225, 233 (1975).

23 David W. Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CAL. L. REV. 56, 99 (1961).

of his own written confession, the Court could not compel it.[24] The extreme deference the courts were willing to provide to the executive branch prosecutor was perhaps best reflected in the near-total absence of any judicially imposed sanctions on prosecutors who not only failed to fulfill, but willfully and outrageously violated, their presumed obligations to promote justice.[25]

The received truth within the judicial branch was that our criminal justice system had achieved an essential, yet precarious, balance of opposing forces, and the opposing forces were not of equal merit. Whatever theory of discovery authorized the mutual exchange of information between equally worthy civil litigants, that theory did not apply to the uniquely, and unduly, privileged class of criminal defendants. One of the most widely cited expressions of judicial impatience with demands for greater criminal discovery during this era was made by then-District Court Judge Learned Hand:

> Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see.... Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime.[26]

Sentiments of the sort expressed by Judge Hand remained redolent throughout the judiciary during the pre-*Brady* era, despite the courts' embrace of civil discovery and even the subsequent advent of the country's first criminal discovery statute in 1946 with Rule 16 of the Federal Rules of Criminal Procedure. Yet the declarative expression of the legal foundation to the doctrine of nondiscovery was attributed to then-Chief Judge Cardozo in the 1927 New York case of *People* ex rel. *Lemon v. Supreme Court*.[27] Car-

24 Leland v. Oregon, 343 U.S. 790, 801 (1952).

25 A recent investigative report by the Chicago Tribune reported that out of 381 cases examined where a homicide conviction had been reversed for a *Brady* violation, not one led to any sanction against the errant prosecutors. "With impunity, prosecutors across the country have violated their oaths and the law, committing the worst kinds of deception in the most serious of cases." Ken Armstrong & Maurice Possley, *Trial and Error: How Prosecutors Sacrifice Justice to Win*, CHI. TRIB., Jan. 10, 1999, at C1; *see also* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693 (1987); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001); Note, *The Duty of the Prosecutor to Disclose Exculpatory Evidence*, 60 COLUM. L. REV. 858 (1960).

26 United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923).

27 People *ex rel.* Lemon v. Supreme Court, 156 N.E. 84 (N.Y. 1927).

dozo explained that discovery was unknown in the early common law; the common law courts deemed themselves without inherent power to order such relief.[28] From Cardozo's opinion emerged the settled understanding of the limits of discovery available in criminal cases: the courts had, at best, a very limited discretionary authority to compel discovery; discovery was in any event limited to items of admissible evidence; and the defendant was recognized to possess no inherent right to any discovery, including items of admissible evidence that were critical to the case against him. What movement there was in the area of criminal discovery came primarily, although not entirely,[29] from legislative reform.[30] The courts remained, in general aspect, hostile to discovery by the criminal defendant well into the modern era of discovery.[31]

One of the more telling, and foretelling, discovery cases to be decided in this pre-*Brady* era came from the New Jersey Supreme Court. In *State v. Tune*,[32] the defendant was arrested for murder and signed a fourteen-page confession on the day of his arrest. The trial court ordered the prosecution to provide the defendant with a copy of his confession. The state was permitted to file an interlocutory appeal with the New Jersey Supreme Court and virtually every county prosecutor in New Jersey joined the prosecution's brief. The New Jersey Supreme Court was sharply split over the issue, and a 4–3 majority reversed the trial court's order. The extreme displeasure with a defendant's demand for discovery expressed by Judge Hand some 30 years earlier was apparently still vital with the majority. Chief Justice Vanderbilt wrote the opinion for the court and wasted no time in getting to the fundamental flaws in criminal discovery:

> In criminal proceedings long experience has taught the courts that often discovery will lead not to honest fact-finding, but on the contrary to perjury and the suppression of evidence. Thus the criminal who is aware of the whole case against him will often procure perjured testimony in order to set up a false defense. Another result of full discovery would be that the criminal defendant who is informed of the names of all of the State's witnesses may take steps to bribe or frighten them into giving perjured testimony or into absenting themselves so that they are unavailable to testify. Moreover, many witnesses, if they know that the defendant will have knowledge of their names prior to trial, will be reluctant to come forward with information

28 *See id.* at 84.

29 *See id.* at 84–85 (noting that despite some statutorily mandated discovery, "the remedy of discovery and inspection was framed by courts of equity").

30 FED. R. CRIM. P. 16, enacted in 1946, was the nation's first criminal discovery statute.

31 Julius and Ethel Rosenberg, for example, were denied discovery of the very overt acts and physical items of espionage cited in their capital indictment. *See* United States v. Rosenberg, 10 F.R.D. 521, 523 (S.D.N.Y. 1950).

32 State v. Tune, 98 A.2d 881 (N.J. 1953).

> during the investigation of the crime.... To permit unqualified disclosure of all statements and information in the hands of the State would go far beyond what is required in civil cases; it would defeat the very ends of justice.[33]

The defendant in *Tune* had apparently based his appeal to the court in part on the fact that England, from whom, according to Judge Cardozo, we inherited our doctrine of no discovery, had long since adopted a more liberal approach to discovery in criminal matters. Justice Vanderbilt found this comparison inapposite in part on the basis of certain historical differences with English practice, but more pointedly on the ground that in England "the law-abiding instincts of the population are in marked contrast to the disrespect for law which has long characterized the American frontier and which has not yet disappeared as the criminal statistics indicate in certain segments of the American population."[34] All of these dire musings were prompted by the simple fact that the defendant Tune had been granted permission by the trial court to see a copy of his own signed confession.

There was a stinging dissent in *Tune*. It was written by then-New Jersey Supreme Court Justice William J. Brennan. Brennan's dissent, long since forgotten but no doubt one of the most poignant refutations of the no-discovery doctrine ever put forward, began with a sharp reference to "that old hobgoblin perjury."[35] He then proceeded directly to attack the "anachronistic apprehension" that discovery in criminal cases would subvert the adversarial system of justice.[36] Brennan acknowledged that the playing field of criminal justice was not level, but he described the tilt as one in favor of the prosecution. He noted that it was the state that bore not only all the resources of criminal investigation but all of the de jure advantages as well. "This accused's confession, as indeed is true virtually of all confessions, was the product of *ex parte* discovery in a form which would never be tolerated in a civil cause."[37] Brennan's point here is revelatory, for what he describes is the simple insight that during the pretrial stage of our adversarial system, the American prosecutor has investigative powers and privileges that not only match but in some respects exceed those of the state investigator in an inquisitorial system. He emphasized the basic adversarial unfairness of permitting counsel for the state to develop its case for trial with the aid of a confession obtained from the defendant, while that same material was

33 *Id.* at 884 (citations omitted).

34 *Id.* at 889.

35 *Id.* at 894 (Brennan, J., dissenting). Brennan appears to have taken his hobgoblin metaphor from Professor Sunderland, who referred to "this legal hobgoblin of perjury" in an influential article advocating more liberalized rules of discovery. Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 868 (1932–33).

36 *Tune*, 98 A.2d at 894 (Brennan, J., dissenting).

37 *Id.* at 896.

denied to the defendant's counsel in preparing the defense.[38] Also, given that Tune was being tried for a capital offense, the denial of such rudimentary discovery "shocks my sense of justice."[39] Justice Brennan still saved his most bitter cut for last. He recognized that the deeper insinuation of Judge Hand's perorations on criminal discovery was not only a thinly veiled bias against the criminally accused and their counsel, but even more so an attack upon the essential integrity of the adversarial system of criminal justice as such:

> The implication in the majority's argument is that the accused is guilty so that not only is he not to be heard to complain of the use of the confession by the police as evidence to prove that fact and as a source of leads to make the case against him as ironclad as possible, but also that he has no complaint that his counsel are denied its use to aid them better to develop the whole truth. In other words, the state may eat its cake and have it too. To that degree the majority view sets aside the presumption of innocence and is blind to the superlatively important public interest in the acquittal of the innocent.[40]

To anyone burrowing through the turgid recitations found in the early criminal discovery case law, the sharp insights of Justice Brennan are stunning, if not compelling. He turns upside down the adversarial underpinnings of the no-discovery doctrine. He heralds the modern claim that our adversarial system of justice is not threatened, but rather supported and preserved, by a more transparent prosecution. A decade later, Justice Brennan would find himself in the majority on a different court in ruling for greater prosecutorial disclosure in *Brady*. However, even this success was short lived, for Justice Brennan ended his career on the Supreme Court in much the same manner that he ended his service on the New Jersey court: in sharp dissent over the issue of prosecutorial disclosure. His vision of a more fair and open prosecution has never truly prevailed against the hobgoblins of disclosure. So, despite some genuine movement in the case law of the late 1950s,[41] the situation with regard to criminal discovery had remained much as it had always been: "[t]rial by judicial battle, in which concealment is one of the major weapons, remains the modus operandi of the criminal fact-finding process."[42]

The Supreme Court, as shall be seen below, has never truly vanquished these hobgoblins. Certainly, prior to its opinion in *Brady* the Court had

38 *Id.*

39 *Id.*

40 *Id.* at 897.

41 *See* Fletcher, *supra* note 21.

42 Note, *Pre-Trial Disclosure in Criminal Cases*, 60 YALE L.J. 626, 626 (1951) (citation omitted).

never had occasion to engender any rule making, constitutional or otherwise, with regard to the discoverability of exculpatory material within the prosecutor's files. So who did the high court turn to, in the middle years of the Warren Court era, when it decided to announce for the first time a constitutional rule of discovery for exculpatory material? Tom Mooney.

Mooney was a colorful character of the pre–World War I era whose life story became something of a legend written in law. His case, *Mooney v. Holohan*,[43] managed to wind its way to the high court some nineteen years after he had been convicted of murder in San Francisco and sentenced to hang. Mooney was an itinerant radical labor socialist who traveled the country getting into trouble, but it was in San Francisco that he found his true nemesis, a private company detective named Martin Swanson. Swanson instigated charges against Mooney in 1914 for possession of dynamite related to a protracted and violent strike against Pacific Gas and Electric, but after three jury trials, Mooney was ultimately acquitted. Two years later, during a pro-war march in San Francisco, a bomb went off, killing ten people. Swanson again joined the investigation, and Mooney was indicted for the murders. This time, Mooney was convicted. Following a series of stormy protests by the labor community, Mooney's sentence was commuted to life imprisonment, but the challenges to Mooney's conviction did not subside. In 1931, the National Commission on Law Observance and Law Enforcement, better known as the Wickersham Commission, began issuing a series of reports on the state of American criminal justice.[44] One of its reports reviewed all the claims that had been made regarding Mooney's conviction, and its conclusions have been summarized as follows:

> Subsequent investigation showed that every one of the state's witnesses had lied, with the encouragement of the district attorney and his assistants. The state's chief witness was probably at least ninety miles away at the time of the explosion. The district attorney intentionally suppressed evidence concerning the credibility of every witness. And he suppressed a photograph showing Mooney and his friends on top of a distant building two minutes before the explosion.[45]

The California courts remained adamant about not granting relief to Mooney despite an ongoing series of revelations concerning the foregoing irregularities. Mooney's petition for a writ of habeas corpus, alleging a denial of due process, had been denied by both the district and Ninth Circuit courts on the ground that he had not exhausted his state remedies. When the case at long last arrived at the Supreme Court, the state argued that due

43 Mooney v. Holohan, 294 U.S. 103 (1935).

44 *See* Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136, 136 n.3 (1964).

45 *Id.* at 136.

process did not apply on the facts because: (1) "the acts or omissions of a prosecuting attorney" could never amount to a denial of due process and (2) the defendant had a right only to discovery that constituted "notice" of the charges themselves.[46] The Supreme Court affirmed the denial of the petition on the ground of nonexhaustion, but nonetheless did pause in what was to become critical dicta to refute the substantive claims of the state:

> [Due process] is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.[47]

So even though Mooney lost, the law of due process did gain.[48] *Mooney* spawned a line of cases that found a due process violation where the prosecutor had either suborned or subordinated perjured testimony at trial.[49] However, *Mooney* had not separately addressed the matter of the prosecutor's withholding of exculpatory material, and so neither did the early case law. All of the early cases in the *Mooney* line relied upon a finding of perjury at trial which was known to the trial prosecutor.[50] By the close of the 1950s, only the Third Circuit had managed to decide two cases which extended the *Mooney* doctrine to circumstances where the prosecutor had concealed critical exculpatory material although there was no explicit finding that the prosecutor had knowingly sponsored perjured testimony.[51]

46 *Mooney*, 294 U.S. at 111–12.

47 *Id.* at 112.

48 Mooney continued to lose. The Supreme Court rendered its opinion on January 21, 1935. Mooney immediately sought a writ in the state court and was just as immediately denied. On May 14, 1935, the California District Court of Appeal denied his writ in a rather brazen opinion which declared that, with regard to the doctrine of due process, only the Supreme Court of California could create such a "departure from the established legal doctrine" of the State of California. *In re* Mooney, 45 P.2d 388, 389 (Cal. Ct. App. 1935).

49 The leading cases, all involving similar facts, are Wilde v. Wyoming, 362 U.S. 607 (1960); Napue v. Illinois, 360 U.S. 264 (1959); Alcorta v. Texas, 355 U.S. 28 (1957); and Pyle v. Kansas, 317 U.S. 213 (1942).

50 *See, e.g.*, White v. Ragen, 324 U.S. 760, 764 (1945) ("And we have often pointed out that a conviction, secured by the use of perjured testimony known to be such by the prosecuting attorney, is a denial of due process.")

51 *See* United States *ex rel.* Thompson v. Dye, 221 F.2d 763 (3d Cir. 1955); United States *ex rel.* Almeida v. Baldi, 195 F.2d 815 (3d Cir. 1952).

A. The Special Case of Exculpatory Discovery

The traditional judicial aversion to providing the criminal defendant with pretrial discovery of the prosecution's case against him was based on the theory that the defense would likely misuse the information to illicitly undermine the prosecution's case. Exculpatory material in the prosecutor's file, on the other hand, is information that is by definition not part of the prosecutor's case. It is information that the prosecutor would not otherwise present at trial and would be of use only to the defendant in building a defense to the prosecution's case. It might be assumed therefore that the doctrine of no discovery, which was dedicated to preserving the prosecutor's adversarial privilege of keeping one's cards face down until the moment of play at trial, would have no application to cards that were not in fact part of the prosecutor's trial hand. Indeed, it might even seem self-evident that the prosecutor's privilege to withhold discovery until the moment of trial, in order to promote an uncompromised pursuit of truth, operates to contradict the notion that the prosecutor should have any privilege to permanently withhold relevant and exculpatory evidence not only from the criminal defendant but from the trial court and jury as well.

The signal significance of this self-evident distinction between inculpatory and exculpatory information was never acknowledged within the no-discovery doctrine. Indeed, there was absolutely no recognition within the criminal discovery doctrine that the matter of a prosecutor's failure to disclose evidence favorable to the accused presented a special case of any sort. This failure of the doctrine may be explained in part by the fact that prosecutorial nondisclosure was rarely uncovered by a convicted defendant in the era prior to statutory rules of discovery, freedom of information laws, and the like, and therefore, the issue rarely came before the courts. But there is also a more direct and simple explanation rooted in Justice Brennan's dissent in *Tune*.[52] Consider that if the existence of exculpatory material of any sort was thought by the prosecutor to actually raise a serious doubt as to the guilt of the accused, the case would be unlikely ever to make it to the courtroom. There would be no discovery issue because there would be no case. Thus in virtually all cases where there is an issue of exculpatory material within the knowing possession of the prosecution, the prosecutor has presumptively decided that, despite the "apparently" exculpatory material, the defendant is nonetheless guilty. The prosecutor who finds herself in possession of exculpatory material regarding a case which she nonetheless intends to prosecute to conviction has by circumstance, if not by definition, a strong and quite righteous adversarial incentive to conceal that information.

52 *See supra* notes 35–40 and accompanying text.

Viewed in these terms it becomes apparent why the prosecutor, and by extension the courts, would consider the discovery of exculpatory material by the defense to be an even greater threat than is general discovery, no matter how extensive, with regard to obtaining a deserved conviction. Providing a defendant with discovery of his own confession and similar inculpatory evidence is one thing; it merely provides the presumptively unethical defense bar with a better opportunity to falsify its defense to the charges. Exculpatory material presents a more direct and powerful threat to the prosecution, for here the information is in its native state, prior to disclosure, evidence of a weakness in the prosecution's case against the presumptively guilty defendant. This simple insight lies at the heart of Justice Brennan's dissent in *Tune*. There he pointed out that the hobgoblins of criminal discovery made sense only against a backdrop of a presumption of guilt.[53] The moment one accepts that the defendant might in fact be not guilty of the charges, the external justification for secreting from him access to information that might very well convince a jury of that fact utterly vanishes.

Thus, on the eve of the Supreme Court's consideration of the defendant's petition in *Brady v. Maryland*, there was virtually no law requiring pretrial discovery by the defense of exculpatory material within the state's possession. *Mooney* required prosecutors to refrain from suborning perjury, but there was no affirmative legal obligation, either in the case law or the new criminal discovery statutes, for a prosecutor to provide the defense with any exculpatory material prior to and independent of the trial itself. The hobgoblins of criminal discovery had to some extent been compromised, but otherwise appeared to remain staunchly on guard.

B. The Supreme Court Doctrine: the Logic of the Looking-Glass

The *Brady* doctrine has bedeviled the courts for its entire forty years. It has been reviewed and restated by a succession of high-court justices, and the lower courts have exhibited no clearly independent or even readily discernible point of sail. With each new interpretive turn by the Supreme Court, the academic literature has responded with a collective dissent. The concern of this section is not to replow this field of failures but rather to attempt to identify the central failure of the doctrine in all its iterations. This section will review only the major developments in the Supreme Court cases and only with regard to their bearing on our designated purpose. It will be made evident that the *Brady* doctrine has failed not only with respect to what it should be but even with regard to what it purports to be. *Brady* is not a rule of constitutional discovery designed to entitle a criminal defendant to obtain exculpatory information gathered by the state to be

53 *See supra* note 36 and accompanying text.

used by the defendant in whatever fair manner best serves his defense to the state's charges. Rather, it is quite the opposite. *Brady* is now a rule that both encourages and shields pretrial nondisclosure by the prosecutor. The central failure of the *Brady* doctrine is therefore its unyielding commitment to an idealized regime of prosecutorial privilege, rather than to a modern regime of adversarial transparency and fair play.

1. Brady v. Maryland.—John Brady had as little luck before the Supreme Court as did John Mooney: he lost his appeal even though his case helped to transform the law. Brady and his codefendant Boblit had jointly robbed a man named Brooks and dragged him into some woods where one of the defendants then strangled him to death.[54] The two defendants were tried separately on a capital count of felony-murder. Each of the defendants at trial admitted the robbery but claimed, in apparent hope of avoiding the death penalty, that the other defendant had committed the actual murder. Brady had made a pretrial motion to discover the confessions that his codefendant Boblit had made to the police. The prosecution turned over several such statements but excluded one statement in which Boblit admitted that it was he who had strangled the victim. Brady was tried first, convicted, and sentenced to death.

At Boblit's subsequent trial, where he was also convicted and sentenced to death, the prosecution attempted to introduce the confession in which he admitted strangling the victim. Brady then filed a motion for a new trial on the ground that the earlier failure to disclose Boblit's confession of strangling was a denial of Brady's due process. The Maryland Court of Appeals ultimately agreed with Brady that he had been denied due process but only with regard to his sentencing, not his underlying conviction of felony-murder. The Maryland court ordered that a new jury be empaneled only for the purpose of hearing evidence to reconsider whether Brady should be sentenced to death.[55] Brady then appealed that order directly to the Supreme Court on the ground that due process required a retrial not only on the issue of punishment but on the issue of guilt as well.[56] Given that Brady had testified at his trial and fully admitted his role in the underlying robbery, his appeal to the Supreme Court appeared to raise a relatively narrow, complex, and not entirely compelling issue of state capital procedure.[57]

54 *See* Brady v. State, 154 A.2d 434, 435 (Md. 1959).

55 *See generally* Brady v. State, 174 A.2d 167 (Md. 1961).

56 Brady v. Maryland, 373 U.S. 83, 85 (1963).

57 The essential issue in *Brady* was evidentiary in nature: was the evidence of the codefendant's confession admissible under Maryland law on the issue of either guilt or punishment? This issue was made extremely complex by both state law and the court record itself. Maryland then conducted capital cases in a unified, rather than a bifurcated, trial. Therefore if the evidence was admissible on either ground, it should have been admitted at trial. But Maryland law was completely uncertain as to whether the evidence was in fact admissible on

The Supreme Court denied the appeal and affirmed the Maryland Court of Appeals. But in so doing the Supreme Court, per Justice Douglas, nonetheless took the opportunity to render a purported "holding" that essentially reiterated the state court holding on the underlying denial of due process: "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[58]

The Maryland court had not mentioned *Mooney v. Holohan*, but it did cite both *Almeida* and *Thompson*, the two Third Circuit cases that had extended the *Mooney* doctrine beyond the limits of prosecutorial presentation of perjured testimony.[59] Justice Douglas therefore noted the Supreme Court's holding as "an extension of *Mooney v. Holohan*."[60] The critical turn in *Brady* came with regard to Justice Douglas' description of the interests that were put at risk whenever a prosecutor took it upon himself to withhold relevant and favorable evidence from the accused:

> The principle of *Mooney v. Holohan* is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.... A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile,' to use the words of the [Maryland] Court of Appeals.[61]

This was the passage that appeared to transform the *Mooney* doctrine from a rule of appellate review of factually corrupt trials into a doctrine of adversarial fairness that required disclosure "on demand" to the defense in order to prevent the prosecutor from becoming the sole adversarial "architect" of the trial proceeding. But, even though the opinion sounded in discovery, there was of course no such holding. Three justices wrote separately to repudiate Justice Douglas' intimation of just such a due process

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either ground and the state appellate court had found a due process violation without actually ruling that the evidence would in fact be admissible on retrial on either ground. On top of this, the Maryland Constitution made juries the judges of the law as well as the facts. Therefore the Court also had to wrestle with the question of whether the underlying evidentiary issue was a matter properly for the court or the jury. *See generally id.*

58 *Id.* at 87.

59 *See Brady*, 174 A.2d at 169.

60 *Brady*, 373 U.S. at 86.

61 *Id.* at 87–88.

rule of discovery. Justice White concurred in the result but recognized the implications of Justice Douglas' opinion for the Court. He first noted that "the due process discussion by the Court is wholly advisory," and then registered his firm disagreement with that advice: "I would employ more confining language and would not cast in constitutional form a broad rule of criminal discovery."[62] Justice Harlan, writing for himself and Justice Black, dissented on the ground that there was no basis for any due process discussion by the Court.[63]

Despite the fact that there was no actual holding in *Brady*, and certainly no clear establishment of a rule of pretrial discovery, the case was widely received as though the activist Warren Court had issued such a ruling. Thus the immediate response to *Brady* represented a moment of genuine new discovery within the criminal justice system.

2. Giglio v. United States.—The Warren Court never rendered another substantive opinion to confirm or clarify its "holding" in *Brady*. The only other case to come before it that raised a *Brady* issue was *Giles v. Maryland*,[64] but this case so divided the justices that it was resolved only by getting five of them to agree to remand it to the state court.[65] That Court therefore never delineated what the apparently expanded liberty interests were that the due process doctrine of *Brady* was designed to protect and what the prosecutor's affirmative obligations, if any, were with regard to safeguarding those interests.

The next substantive opinion of the Supreme Court was written by Chief Justice Burger in *Giglio v. United States*.[66] Giglio had been charged with cashing forged money orders with the aid of an accomplice named Taliento, the bank teller who had cashed the money orders. Taliento was arrested first and he was promised by a federal prosecutor that "if he eventually testified as a witness for the Government at the trial of the defendant, JOHN GIGLIO, he would not be prosecuted."[67] A different federal prosecutor presented the case at trial against Giglio where "the Government's case depended almost entirely on Taliento's testimony."[68] Under pressing cross-examination, Taliento denied that he had been promised immunity

62 *Id.* at 92 (White, J., concurring in the judgment).

63 *Id.* at 92 & n.1 (Harlan, J., dissenting).

64 Giles v. Maryland, 386 U.S. 66 (1967).

65 There were three separate opinions by the majority justices. Two of them, by Justices Brennan and Fortas, contained the strongest claims ever to issue from the Supreme Court as to why the due process rule of *Brady* must apply to pretrial discovery. *See id.* at 67 (plurality opinion of Brennan, J.), 96 (Fortas, J., concurring in the judgment).

66 Giglio v. United States, 405 U.S. 150 (1972).

67 *Id.* at 153 n.2.

68 *Id.* at 154.

from the prosecution: "I believe I still could be prosecuted."[69] During his summation, the prosecutor compounded the perjury by telling the jury that Taliento "received no promises that he would not be indicted."[70] Giglio was convicted and Taliento was not prosecuted.

There were therefore a number of troubling aspects to the process that led to Giglio's conviction. The star witness against him had entered into a cooperation agreement with the prosecution that essentially guaranteed that he would not be prosecuted in return for his testimony, and that agreement was never disclosed to the defense, despite vigorous attempts to discover it. That witness then committed perjury by denying the prosecutor's promise. The prosecutor then (perhaps unwittingly) confirmed and relied upon that perjury in his summation to the jury. Furthermore, when called upon to account for their involvement in the foregoing matters, two assistant U.S. attorneys flatly contradicted each other and placed the blame on one another.[71]

The Supreme Court presumably could have addressed the manner in which each of these procedural failings contributed to the due process violation found by the Court. But the Court carefully avoided, to the point of dismissing, all of the apparent failures of the prosecutors. Instead the Court focused entirely on the fact that a witness had presented perjurious testimony at trial and treated the issue as one that was resolved almost entirely by the pre-*Brady* case law.

> As long ago as *Mooney v. Holohan*, this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in *Pyle v. Kansas*. In *Napue v. Illinois*, we said, "(t)he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Thereafter *Brady v. Maryland* held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule.[72]

In this expression of the general rule, *Brady* stands merely for the already settled proposition that where material perjury is presented to the jury, the trial is a violation of due process regardless of any deliberate misconduct by the prosecution. Thus, the *Giglio* opinion uses *Brady* somewhat perversely to render moot the transparent bad faith of one or both of the two federal prosecutors on the case. The opinion not only failed to con-

69 *Id.* at 151.

70 *Id.* at 152.

71 *See generally id.*

72 *Id.* at 153–54 (citations omitted).

sider whether the prosecutors had any affirmative obligation to reveal the rather standard cooperation agreement with the witness prior to trial, but it also rendered irrelevant whether the federal prosecutors on the case had deliberately contrived the deception. The district court judge "did not undertake to resolve the apparent conflict between the two Assistant United States Attorneys" on the nonsensical theory that the original prosecutor did not have the authority to enter into the agreement with the witness and therefore "its disclosure to the jury would not have affected its verdict."[73] The Supreme Court exhibited nearly the same insouciance towards the apparently severe misconduct of at least someone in the prosecutor's office: "We need not concern ourselves with the differing versions of the events as described by the two assistants in their affidavits."[74] Not only was this opinion hardly an affirmation of the new regime of discovery "on demand" to prevent the prosecutor from becoming the sole adversarial "architect" of the trial evidence presented to the jury, it actually appeared to establish an essential understanding that *Brady* was not a paradigm shift in the due process doctrine of exculpatory disclosures. The governing issue remained, as it was in *Mooney* and *Napue*, a failure to disclose exculpatory information to the *jury*, rather than to the defense.

Giglio has generally been regarded as an easy case which simply extended the rule of *Brady* to information that was material to the credibility of a state witness. Yet, upon closer examination, it becomes clear that *Giglio* was in fact the Supreme Court's first of many turns against the new protocols initiated by *Brady*.

3. United States v. Agurs.—By 1976 the lower courts, with little or no guidance from the Supreme Court, had become thoroughly confused regarding the appropriate standard of review for an alleged *Brady* violation. The Supreme Court therefore made its first attempt at settling a rule of law for the *Brady* doctrine in *United States v. Agurs*.[75] The opinion for the Court, by Justice Stevens, did not succeed. It appeared only to compound the confusion of the lower courts and was ultimately rejected by the Court nine years later in *United States v. Bagley*.[76] But the opinion, however unsuccessful, did at least serve for present purposes to reveal the Court's rather obtuse assessment of the critical interests implicated in a *Brady* review.

Linda Agurs had stabbed a man to death after "a brief interlude in an inexpensive motel room."[77] Her defense at trial was that the man had attacked her and that she had stabbed him in self defense with his own knife.

73 *Id.* at 153.

74 *Id.*

75 United States v. Agurs, 427 U.S. 97 (1976).

76 United States v. Bagley, 473 U.S. 667, 681–82 (1985).

77 *Agurs*, 427 U.S. at 98.

She relied primarily on the fact that the man was known to carry two knives on his person and had been on top of her and in possession of the fatal knife when motel employees entered the room and separated the two struggling guests. Agurs was convicted. Several months later, her attorney learned that the prosecutor had failed to turn over to the defense the victim's prior criminal record, which contained two convictions for crimes involving the possession of a knife. The defense attorney had made no prior request for such information from the prosecutor, yet the victim's prior convictions would have been admissible at trial.[78] The circuit court reversed Agurs' conviction on this ground, despite the lack of a pretrial request by the defense attorney.[79] The Supreme Court reversed the circuit court in part on the ground that there was no violation of due process where the defendant had made no "specific request" for the victim's criminal record.[80]

Agurs was an extremely troublesome opinion which endlessly befuddled the lower courts and legal commentators. What is of concern here is not so much its failed attempt at settling the doctrine, but rather the manner in which the Court engaged the interpretive process to disavow the original promise of *Brady*. Justice Stevens opened the analytic section of his opinion with the declaration that the *Brady* rule "arguably" bore an application in "three quite different situations."[81] What was remarkable about this assertion was Stevens' description of the common element shared by these three situations: "Each involves the discovery, *after trial* of information which had been known to the prosecution but unknown to the defense."[82] In other words, *Brady* was not even *intended* to have any application to the pretrial discovery process. Although this was certainly not what Justice Stevens intended to convey by that statement, it did certainly reveal the very limited remedial construct in which the Court assumed *Brady* to apply. It applied only when the prosecutor withheld exculpatory information and then the defense, independently and perhaps fortuitously, made that discovery only "after trial." Strictly speaking, therefore, *Brady* had no application to the prosecutor who withheld exculpatory information prior to trial, and no application to cases that were not finally resolved by trial. This was only the first of several telling suggestions in the opinion that *Brady* was not intended to create *any* affirmative obligations on the prosecutor to disclose information favorable to the accused, but was strictly a rule of appellate review to govern those limited situations where the errant prosecutor himself was "discovered."

78 *Id.* at 100 & n.2.

79 *Id.* at 102.

80 *Id.* at 100 n.17.

81 *Id.* at 103.

82 *Id.* (emphasis added).

This truncated interpretation of the reach of *Brady* was made even more explicit in a later section of the opinion. There is of course no reason why the Due Process Clause(s) relied upon in *Brady* should not apply to failures in the pretrial processing of a criminal case.[83] However, Justice Stevens made clear that *Brady* had no application to the pretrial discovery process otherwise governed by statute:

> We 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. We are dealing with the defendant's right to a fair trial mandated by the Due Process Clause of the Fifth Amendment to the Constitution.[84]

This statement implied that there was no possibility of a violation of *Brady* in the ninety percent or so of criminal cases that never went to trial.[85] The opinion went on to confirm the implication. "But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."[86] Justice Stevens then reinforced this limitation by claiming that creating a constitutional rule of pretrial discovery could not be limited to anything short of "complete discovery."[87] This specter of a complete abrogation of the adversarial system of strictly limited and discretionary disclosure, however exaggerated, was nothing if not a haunting reminder of the hobgoblins of the common law era.

Another aspect of the *Agurs* opinion worth noting is the manner in which it almost totally shifted the burden of disclosure from one adversary to the other. In rejecting the articulation of the standard of materiality that led to the reversal by the circuit court, the opinion asserted that "the constitutional standard of materiality must impose a higher burden on the *defendant*."[88] At the trial court level, when the defendant moved for a new trial upon her discovery of the withheld information, the prosecution took the position that it had no obligation to turn over any exculpatory

83 The Fourteenth Amendment Due Process Clause has of course "incorporated" virtually all of the Bill of Rights whose provisions have varied and extensive application during the pretrial stage of a criminal case. That clause standing alone also has been directly applied to the commands of fundamental fairness to the defendant in the pretrial setting. *See, e.g.*, Ake v. Oklahoma, 470 U.S. 68 (1985) (requiring the state to provide the defendant with pretrial access to a psychiatric expert in order to investigate and prepare an insanity defense).

84 *Agurs*, 427 U.S. at 107.

85 *See* United States v. Ruiz, 536 U.S. 622, 632 (2002) (plea bargaining is used "in a vast number—90% or more—of federal criminal cases").

86 *Agurs*, 427 U.S. at 108.

87 *Id.* at 109.

88 *Id.* at 112.

material to the defense "in the absence of an appropriate request."[89] The district court, although it denied the defendant's motion, soundly rejected the government's argument: "THE COURT: What are you saying? How can you request that which you don't know exists? That is the very essence of *Brady*."[90] This telling observation by the trial court appears not to have greatly influenced Justice Stevens' view of where to assign the burden of *Brady*. He developed a multi-tiered rule in which the critical factor was not the conduct of the prosecutor or the nature of the material withheld but rather whether the defense had made a "general," "specific," or "no" request for the material, and where the defense made either a general or no request for the specific information, the rule of *Brady* did not apply. What applied instead was an apparently novel "duty to volunteer" on the part of the prosecutor.[91] This somewhat oxymoronic duty created a situation where "the prosecutor must decide what, if anything, he should voluntarily submit to defense counsel."[92] This duty, which appeared to have some independent constitutional grounding, could be violated only when the withheld information, standing alone, "creates a reasonable doubt" at the moment of *post-trial* judicial review.[93] The Court furthermore expressed confidence that the "prudent prosecutor" could be relied upon to err on the side of disclosure in doubtful situations.[94] And, to underscore this reassignment of burdens and privileges under the *Brady* rule: "Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor."[95]

4. United States v. Bagley.—The next major development in the *Brady* doctrine came nine years later in *United States v. Bagley*.[96] Here the Court abandoned the multi-tiered materiality standards announced in *Agurs* and replaced them with a single standard: *Brady* was not violated, even where the defendant had made a specific request for the withheld information, unless the defendant could demonstrate "a reasonable probability that, had the evidence been disclosed to the defense, the result of the [trial] proceeding would have been different."[97] *Bagley*, therefore, rejected *Agurs* only to extend the essential movement away from the early promise of *Brady* and towards a legal regime in which the prosecutor was once again entirely

89 *Id.* at 101.
90 *Id.* at 102 (emphasis in original).
91 *Id.* at 106–07.
92 *Id.* at 107.
93 *Id.* at 112.
94 *Id.* at 108.
95 *Id.* at 110.
96 United States v. Bagley, 473 U.S. 667 (1985).
97 *Id.* at 682.

privileged to withhold exculpatory information until the defendant managed to both discover and prove, post trial, that the prosecutor's conduct, standing alone, had probably cost him an acquittal.

The facts alone in *Bagley* are intriguing. They appear on their face to be so compromising as to underscore the extremes to which the Court was prepared to take the *Brady* doctrine. Bagley had been indicted on fifteen counts of possession of both drugs and guns. The investigation had been conducted by two state law enforcement officers who had been working as security guards for the Milwaukee Railroad. The Federal Bureau of Alcohol, Tobacco, and Firearms (ATF) had engaged the two guards to conduct the investigation of Bagley. The two guards had entered into standard form contracts with the ATF that bore the revealing title: "Contract for Purchase of Information and Payment of Lump Sum Therefor."[98] They signed these contracts in the presence of the Special Agent of the ATF in charge of the case. The boilerplate language on the form stated that the two guards were required to testify against the subject of the investigation and would be paid "a sum commensurate with services and information rendered." The contracts contained a blank line titled: "Sum to be Paid to Vendor" which was later filled in with the sum of $300.00.[99] During the course of their investigation of Bagley, the two guards also signed a number of standard ATF investigation affidavits, each of which concluded with the statement that the information provided was made "without any threats or rewards, or promises of reward having been made to me in return for it."[100] Prior to trial, Bagley made a formal discovery request for "any deals, promises or inducements made to witnesses in exchange for their testimony."[101] The assistant U.S. attorney turned over to the defense all of the affidavits denying any promise of reward, but failed to turn over the contracts signed by each of his two witnesses. The prosecutor later claimed that he had no knowledge of the standard form ATF contracts signed by the two witnesses.[102] At trial, both witnesses testified that they had been outfitted with a concealed transmitter to record their various conversations with Bagley but that the tapes had turned out to be inaudible. Therefore, the government's entire case depended upon the testimony and the credibility of the two witnesses. On cross examination, one of the two guards denied that the ATF agents had done anything to pressure him to cooperate with their investigation.[103] Bagley waived a jury trial and was tried before the court. When the defense attorney in his summation attempted to argue to the court that the two

98 *Id.* at 670–71.

99 *Id.* at 671.

100 *Id.* at 670 (citation omitted).

101 *Id.* at 669–70.

102 *Id.* at 671 n.4.

103 *Id.* at 686–91 (Marshall, J., dissenting).

witnesses had "fabricated" their account of Bagley's involvement, the trial judge responded directly:

> Let me say this to you. I would find it hard to believe really that their testimony was fabricated. I think they might have been mistaken. You know, it is possible that they were mistaken. I really did not get the impression at all that either one or both of those men were trying at least in court here to make a case against the defendant.[104]

Bagley was convicted by the court only of the drug charges. He was sentenced on the various counts to a combination of six months imprisonment, five years' probation, and a special parole term. Neither Bagley nor the trial court learned of the prosecutor's withholding of the form contracts until some two-and-a-half years later when his attorney made a request for information pursuant to the Freedom of Information Act[105] and the Privacy Act of 1974.[106] Bagley then filed a motion to vacate his sentence before the district court judge, who referred the matter to a magistrate to conduct an evidentiary hearing. At the hearing, the ATF case agent testified that all the payments made to the two witnesses were for expenses. The magistrate did not credit this particular testimony but then did go on to make some equally remarkable findings. He found that the two witnesses had signed blank contracts which were filled in only after the trial. Therefore, he concluded that "[b]ecause neither witness was promised or expected payment for his testimony, the United States did not withhold, during pretrial discovery, information as to any 'deals, promises or inducements' to these witnesses."[107] The district court, in turn, rejected this latter finding by the magistrate but nonetheless found "beyond a reasonable doubt" that timely disclosure of the withheld information would have had "no effect" on his verdict.[108] This particular claim by the district court was thereupon rejected by the Ninth Circuit, which found the prosecutor's failure to disclose the exculpatory information a violation of both the defendant's due process rights under *Brady* and also his Sixth Amendment right of confrontation under *Davis v. Alaska*.[109]

> Standing alone, the government's failure to produce requested *Brady* information is a serious due process violation. In fact, this failure is "seldom, if ever, excusable." But a failure to disclose requested *Brady* information that the defendant could use to conduct an effective cross-examination is

104 *Id.* at 690 (emphasis omitted).

105 5 U.S.C.A. § 552 (2004).

106 5 U.S.C.A. § 552a (2004).

107 *Bagley*, 473 U.S. at 673.

108 *Id.*

109 *See* Bagley v. Lumpkin, 719 F.2d 1462, 1464 (9th Cir. 1983) (citing Davis v. Alaska, 415 U.S. 308 (1974)), *rev'd*, 473 U.S. 667 (1985).

> even more egregious because it threatens the defendant's right to confront adverse witnesses, and therefore, his right to a fair trial.[110]

The Supreme Court, in turn, rejected the Ninth Circuit's holding, finding that the Sixth Amendment was not at issue on the basis of a somewhat tenuous distinction between active and passive restrictions on cross examination. The Court found that the Sixth Amendment applied only to circumstances where the trial court engaged in a "direct restriction" on cross examination by sustaining an objection to a question posed on cross examination.[111] But that was not the case in *Bagley*. "The constitutional error, if any, in this case was the Government's *failure to assist* the defense by disclosing information that might have been helpful in conducting the cross-examination."[112] The Court, therefore, restricted its own analysis to whether the government's nondisclosure was a violation of *Brady*.

The Supreme Court reversed the Ninth Circuit's due process holding and remanded the case for consideration under its new standard of materiality. A new standard was of course required in order to escape the firm declaration in *Agurs* that "[w]hen the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable."[113] What is most pertinent to the present analysis is the actual reasoning that permitted the Court to conclude that the transparently duplicitous conduct of virtually the entire cast of government actors in this case was ultimately excusable. The Court found once again that the burden placed upon the prosecutor to disclose exculpatory information, even in circumstances where the defendant has filed an express request for the specific information, presented too great a threat to the adversarial system and its attendant privileges:

> The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur. [By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model.] Thus, the prosecutor is not required to deliver his entire file to defense counsel, [An interpretation of *Brady* to create a broad, constitutionally required right of discovery "would entirely alter the character and balance of our present systems of criminal justice."] but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.[114]

110 *Lumpkin*, 719 F.2d at 1464 (internal citations omitted) (quoting United States v. Agurs, 427 U.S. 97, 106 (1976)).

111 *Bagley*, 473 U.S. at 678.

112 *Id.* (emphasis added).

113 United States v. Agurs, 427 U.S. 97, 106 (1976).

114 *Bagley*, 473 U.S. at 675 & nn.6–7 (internal footnotes bracketed) (quoting Giles v. Maryland, 386 U.S. 66, 117 (1967) (Harlan, J., dissenting)).

Taken at face value, this is a rather remarkable claim as to the inherent limitations of our adversary system to accommodate greater transparency and a more equitable and effective search for truth. It asserts that there is a fundamental opposition between the disclosure of exculpatory information and the "primary" status of the adversary system, an opposition which apparently cannot be readily accommodated without threatening the entire "character and balance" of that system. Therefore, privileging the prosecutor to hold cover over information favorable to the accused is essential to preserve "the primary means by which truth is uncovered."[115] Apparently, nondisclosure of truthful information like the signed contracts of the two witnesses best serves the pursuit of truth in our adversary system. *Bagley* has thus arguably become the clearest illustration of how the Supreme Court's reworking of the *Brady* doctrine, and its insistence on developing an increasingly narrow post-trial standard of review for compromises to the integral pretrial interests of both the criminal defendant and integrity of the system, has created a doctrine in which the tail is now wagging the dog.

5. United States v. Ruiz.—The Court's most recent opinion of note in the *Brady* line is *United States v. Ruiz*.[116] The case presented a narrow and utterly unique ruling by the Ninth Circuit Court of Appeals which the Supreme Court reversed on equally narrow grounds. But the case did present something of a frontal challenge to the Court's constrictive "fair trial" theory of the *Brady* doctrine. *Ruiz* involved the issue of whether, and to what extent, the *Brady* rule applied to the vast majority of criminal cases which are not resolved by trial. The Supreme Court had continually insisted that there was no violation of *Brady* outside the context of a demonstrably unfair trial. "For unless the omission deprived the defendant of a fair trial, there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose."[117] However, by the late 1990s, the majority of lower courts had concluded that the due process protections of *Brady* had to apply also, in some manner at least, to a case that ended with a conviction upon a plea of guilty rather than a conviction after trial.[118] But *Ruiz* was the first case considered by the Supreme Court in which the lower court had granted relief under *Brady* to a defendant who had pleaded guilty.

Angela Ruiz was arrested and charged with having imported thirty kilograms of marijuana in her luggage. A prosecutor in the U.S. Attorney's

115 *Id.* at 675.

116 United States v. Ruiz, 536 U.S. 622 (2002).

117 *Agurs*, 427 U.S. at 108.

118 *See* Erica G. Franklin, Note, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery" Waivers*, 51 STAN. L. REV. 567, 573 & n.43 (1999) (collecting cases).

Office for the Southern District of California offered Ruiz a standard plea agreement, referred to as a "fast track" plea bargain, in which she would plead guilty, waiving a jury trial and related rights and, in return, the prosecutor would recommend a significant sentence reduction to the trial court.[119] For the most part, this plea offer took the standard form recognized in all jurisdictions. But the California prosecutor's office had added one additional feature to its standard agreement as a result of an earlier ruling by the Ninth Circuit that when a defendant pleaded guilty, she did not *automatically* waive her right to appeal the conviction on *Brady* grounds.[120] The prosecutor's office had therefore added a clause to its plea agreement that required the defendant to explicitly waive her right to receive the particular type of exculpatory information commonly referred to as "*Giglio* material," meaning information favorable to the defendant for use as impeachment material against a government witness.[121] Federal defenders in California had taken a stand against this provision,[122] and so did Angela Ruiz. Ruiz refused to plead guilty to the "fast track" offer because of its inclusion of this provision. So she pleaded guilty without the benefit of the promised sentence reduction but, at the time of her sentencing, argued to the sentencing court that she should nonetheless get the benefit of the sentence reduction because it was unconstitutional to require her to waive her right to *Giglio* material. The trial judge rejected her argument and sentenced her accordingly. The Ninth Circuit accepted her argument and reversed her sentence. The circuit court ruling was complex, but essential to its holding was the conclusion that "a defendant's right to receive undisclosed *Brady* material cannot be waived through a plea agreement and that any such waiver is invalid."[123] This conclusion was based upon a finding that the due process right guaranteed by *Brady* was one of a limited number of rights deemed not waivable by the defendant because the right affected the very knowing and voluntary character of the waiver itself.[124] Thus, according to the Ninth Circuit, not only did the disclosure requirements of *Brady* apply to the defendant who pleaded guilty without trial, but also that right could not be waived.

The Supreme Court opinion in *Ruiz* appeared to be a unanimous, somewhat perfunctory reversal of a one-of-a-kind ruling by the Ninth Circuit: it held that *Brady* did not require the disclosure of exculpatory impeachment information prior to the formation of an otherwise valid plea agreement. But

119 *Ruiz*, 536 U.S. at 625.

120 *See* Sanchez v. United States, 50 F.3d 1448 (9th Cir. 1995).

121 "[E]xculpatory evidence includes 'evidence affecting' witness 'credibility,' where the witness' 'reliability' is likely 'determinative of guilt or innocence.'" *Ruiz*, 536 U.S. at 628 (quoting Giglio v. United States, 405 U.S. 150, 154 (1972)).

122 *See* Franklin, *supra* note 118, at 568.

123 United States v. Ruiz, 241 F.3d 1157, 1165 (9th Cir. 2001), *rev'd*, 536 U.S. 622 (2002).

124 *See id.*

surely it was more than that. Consider first that the peculiar facts of *Ruiz* only appear to make the opinion a narrow one. Ruiz was appealing on the ground of legal principle only. There were no "facts" in the ordinary sense of undisclosed information having subsequently come to light. But what if such facts had been present? For instance, the Court's holding would presumably have been the same if Ruiz had accepted the fast-track offer and then, subsequent to her plea of guilty, had discovered that the prosecutor had withheld seriously damaging information regarding the credibility of the main witnesses against her. Although the Court's holding was narrow, the reasoning behind it appeared to place it at ominous odds with critical developments in the lower courts that have expanded the scope of *Brady* beyond the trial-specific limitations of the Supreme Court doctrine.[125]

The Court briefly cited three reasons for its holding and the first was certainly not the least important:

> First, impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary* ("knowing," "intelligent," and "sufficient[ly] aware"). Of course, the more information the defendant has, the more aware he is of the likely consequences of a plea, waiver, or decision, and the wiser that decision will likely be. But the Constitution does not require the prosecutor to share all useful information with the defendant.[126]

What this reasoning would suggest is that not only may the defendant waive her right to obtain *Giglio* material prior to a plea of guilty, but even more so that she may not have any actual right to waive. This reasoning would support the view that when the criminal defendant chooses on the basis of her own knowledge of the facts to confess to her crime and offers to plead guilty, the only constitutional concern is that her plea is otherwise "voluntary." In other words, although the opinion for the Court certainly did not take it this far, its reasoning could easily be extended to *all Brady* material. As the Court insisted in *Bagley*, there is no basis in the *Brady* doctrine for distinguished treatment of *Giglio* material.[127] If a defendant voluntarily chooses to inculpate herself and waive her right to a trial, what principle of *fair trial* is served by requiring disclosure of information that is otherwise repudiated by her very admission of guilt? Only Justice Thomas was willing to confront this issue directly and he did exactly that: "The

125 *See, e.g.*, United States v. Snell, 899 F. Supp. 17 (D. Mass. 1995) ("There is no question but that as a general matter, the *Brady* obligation includes the requirement to turn over evidence of impeachment."); *see also* D. MASS. R. 116.2 (disclosure of exculpatory evidence), *available at* http://www.mad.uscourts.gov/LocPubs/combinedo1.pdf.

126 *Ruiz*, 536 U.S. at 629 (quoting Brady v. United States, 397 U.S. 742, 748 (1970)).

127 "This Court has rejected any such distinction between impeachment evidence and exculpatory evidence." United States v. Bagley, 473 U.S. 667, 676 (1985).

principle supporting *Brady* was 'avoidance of an unfair trial to the accused.' That concern is not implicated at the plea stage regardless."[128]

The second reason given by the Court for the holding that it is not necessary to provide a criminal defendant with exculpatory impeachment information prior to a plea of guilty was that such nondisclosure was essentially a form of "misapprehension" somehow attributed to the defendant herself.

> [T]his Court has found that the Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant might labor.[129]

The Court then went on to cite the various misapprehensions it was alluding to, all of which involved either the defendant or her counsel misapprehending: the quality of the evidence; the admissibility of the evidence; the available defenses; the applicable law; and the likely sentences.[130] It is difficult to understand how the failure to provide the defendant with exculpatory impeachment information qualified as a comparable "misapprehension" on her part.

The third reason cited by the Court was perhaps the most portentous. The Court asserted that the very considerations of due process embodied in *Brady* argued in favor of nondisclosure of impeachment information prior to a plea of guilty. These considerations apparently included, and required, a balancing of the defendant's interest in disclosure with the state's interest in nondisclosure.[131] This balancing of interests paradigm, while familiar throughout constitutional criminal procedure, had never before been expressly adopted by the Court in the *Brady* case law. Not surprisingly, the Court found significant, indeed ominous, threats to the interests of both the prosecutor and the system of justice if the prosecutor were required to reveal exculpatory impeachment information prior to a guilty plea. Thus, the Court noted that the Government had "stressed what it considered serious adverse practical implications of the Ninth Circuit's constitutional holding."[132] For one thing, it risked "premature disclosure of Government witness information."[133] Also, "it could lead the Government instead to abandon its heavy reliance upon plea bargaining in a vast number—90%

128 *Ruiz*, 536 U.S. at 634 (Thomas, J., concurring) (quoting Brady v. Maryland, 373 U.S. 83, 87 (1963)).

129 *Id.* at 630.

130 *Id.* at 630–31.

131 *See id.* at 631.

132 *Id.* at 626.

133 *Id.* at 631.

or more—of federal criminal cases."[134] It was not at all clear why requiring the disclosure of exculpatory impeachment information attendant to a plea of guilty was deemed such a dire threat to the legitimate interests of the prosecution. Such a requirement would simply place the prosecution in precisely the same position they are in following a conviction after trial. If, subsequent to the conviction by plea of guilty, the defendant managed to discover that the prosecutor had withheld *material* exculpatory information, then the defendant would be entitled to challenge her conviction. The majority of lower courts had found, prior to *Ruiz*, that the defendant was entitled to *both* types of *Brady* material prior to a plea of guilty and had experienced no adverse consequences with that approach.[135] The Court in *Ruiz*, however, appeared overly concerned with keeping the closet door shut following a plea of guilty, and that concern appeared to reflect all too clearly a muffled fear of the lingering hobgoblins within.

C. Does the Supreme Court Doctrine Really Matter?

Even assuming the validity of the foregoing critique of the *Brady* doctrine, it is fair to question whether the Supreme Court case law really matters. If, despite the gaping loopholes in the doctrine, American prosecutors nonetheless function within an adversarial culture which independently constructs operative conventions of fair play, then perhaps the *Brady* doctrine is best viewed simply as a loosely woven safety net designed to capture only the occasional and larger failures of the practice. But what if that is not the case? What if the *Brady* doctrine itself is in major part responsible for the apparently widespread cynical disregard of disclosure obligations increasingly recognized and reported in the lower court case law? There is no metric by which to measure the virulence, or even the prevalence, of such an ethical malaise, but there is now enough evidence in the case law itself to demonstrate the "materiality" of the doctrine in this respect. A brief look at several recent opinions from the Second Circuit, easily one of the most high profile and highly regarded venues for criminal prosecution, should make the point.

In the case of *In re United States v. Coppa*,[136] the district court, relying upon *Brady*, ordered the government prosecutors to disclose all exculpatory material to the defense prior to trial upon request of the defense, with the exception of any sensitive material the release of which might prove harmful to a government witness. The prosecutors filed an immediate petition for a writ of mandamus to the Second Circuit. The circuit panel ap-

134 *Id.* at 632.

135 "Courts analyzing *Brady* disclosures at the plea stage also have treated impeachment and exculpatory evidence alike...." Franklin, *supra* note 118, at 577.

136 *In re* United States v. Coppa, 267 F.3d 132 (2d Cir. 2001).

peared to welcome the opportunity to issue an interlocutory rebuke of the district court's adventurous ruling. In an extended discussion, the circuit court made it pointedly clear that the district court's reliance upon the initial mandate of *Brady* itself was in the present era entirely misplaced:

> The result of the progression from *Brady* to *Agurs* and *Bagley* is that the nature of the prosecutor's constitutional duty to disclose has shifted.... Although many cases continue to use the phrase "*Brady* material" to mean all exculpatory evidence and the phrase "*Giglio* material" to mean all impeachment evidence, these characterizations no longer have such broad meaning after *Agurs* and *Bagley*.[137]

The circuit court explained the critical difference as one that shifted the locus of the *Brady* rule from the pre-trial to the post-trial setting:

> Although the government's obligations under *Brady* may be thought of as a constitutional duty arising before or during the trial of a defendant, the scope of the government's constitutional duty—and, concomitantly, the scope of a defendant's constitutional right—is ultimately defined retrospectively, by reference to the likely effect that the suppression of particular evidence had on the outcome of the trial.[138]

The court then summarized its position thusly: "An assessment of whether an outcome would have been different if undisclosed evidence had been disclosed is best made after a trial is concluded."[139]

The immediate consequence of a ruling like *Coppa* is obvious: district court judges are on notice that they are not empowered to order fair and timely disclosure, and prosecutors are assured that they have no actual duty to disclose anything prior to trial. The more extended consequences are equally severe, as the Second Circuit itself has realized in subsequent cases. For example, in the more recent case of *United States v. Rivas*,[140] a government cooperating witness perjured himself regarding a meeting and critical conversation he had with the prosecutor immediately prior to trial. In that conversation the witness revealed to the prosecutor that it was he, and not the defendant, who had brought the pertinent package of drugs on board a ship. The witness denied the meeting on the stand and the prosecutor in turn did not disclose to the court either the meeting or the statement. The defense found out about the meeting only after the defendant had been convicted through a court interpreter who was troubled by the apparent perjury and nondisclosure. When confronted by the defense with this nondisclosure, the government prosecutors responded with a letter stating

137 *Id.* at 142.

138 *Id.* at 140.

139 *Id.* at 143.

140 United States v. Rivas, 377 F.3d 195 (2d Cir. 2004).

that they had failed to disclose the statement "for sound tactical reasons" and that exposing the witness's prior statement "at the last minute ... might well have confused him."[141]

The trial court judge actually accepted this rather implausible explanation by the government lawyers, but the Second Circuit was not prepared to go that far. The court began its discussion by saying "we note with some dismay the prosecutor's failure during the trial to correct the falsity of [the witness'] testimony."[142] The court then quickly moved away from the matters of the actual perjury and the prosecutor's apparently brazen duplicity to conclude that the prosecutors' defense of their conduct was "totally unacceptable" and that the defendant was entitled to a new trial.[143]

Surely the most telling example of the adverse cultural impact the *Brady* doctrine is having in jurisdictions like the Second Circuit has come even more recently in a long, scathing opinion by another district court judge which reversed a conviction he found to be based upon "rampant perjury," perhaps "deliberately elicited" by federal prosecutors.[144] In *United States v. D'Angelo*, the defendant was tried for a gang murder before District Court Judge John Gleeson.[145] The government case was based upon the testimony of three accomplice witnesses. At the conclusion of the evidentiary stage, the defendant made a standard motion to dismiss based upon the alleged insufficiency of the evidence. Judge Gleeson reserved decision on that motion because he had already become convinced that the testimony of the three government witnesses was "patently incredible."[146] The jury, however, found the defendant guilty of murder. Judge Gleeson then took up the reserved motion for dismissal. Prompted to conduct a post-trial review of the accomplice testimony, the government shortly conceded that all three of its primary witnesses had indeed committed perjury at trial. "Yet despite this rampant perjury, the government clings to the jury's verdict like it is the only conviction it ever obtained ...."[147]

The judge conducted an extensive review of the evidence and concluded that the trial verdict was a "miscarriage of justice."[148] He granted the motion to dismiss but he also addressed his "concern that perjury was

141 *Id.* at 198.

142 *Id.* at 199.

143 *Id.* at 200.

144 United States v. D'Angelo, No. 02 CR 399(JG), 2004 WL 315237, at *16, *23 (E.D.N.Y. Feb. 18, 2004).

145 Judge Gleeson had previously been the chief of the Criminal Division in the U.S. Attorney's Office in that district, the Eastern District of New York. Disclosure: the author served briefly as a special assistant U.S. attorney while Judge Gleeson was the chief of that office.

146 *D'Angelo*, 2004 WL 315237, at *15.

147 *Id.* at *16.

148 *Id.* at *15.

deliberately elicited."[149] He ultimately concluded that he did not have to resolve that concern because it was not a finding essential to his ruling,[150] but he nonetheless reviewed and denounced the government's arguments proffered in defense of its conduct. He found the government's arguments to be "utterly disingenuous" and "frivolous."[151] Yet the most telling insight of Judge Gleeson's came with regard to his expressed exasperation with the looking-glass logic of the prosecutors, who resolutely maintained that there had been no foul because there had been no "material" harm. "At bottom, the government's position is that the prosecutors in the case still believe D'Angelo is guilty, and therefore the verdict should stand."[152]

II. *BRADY* ABROAD

The status of the *Brady* doctrine as an icon of adversarial fair play rested largely, if not entirely, on the fact that it stood alone. There were no rules of exculpatory disclosure in any other system, either national or international. In the theoretically "transparent" process of the civil law countries, there is no formal issue of disclosure: the judiciary assumes responsibility for conducting a criminal investigation and both sides are deemed to have equal access to the investigative case file, or dossier.[153] But the need for a rule specifically targeting the disclosure of exculpatory information had not been recognized in any of the foreign common law or adversarial systems. That situation has changed abruptly in the past decade. There is now a broad set of "*Brady* rules" in foreign adversarial jurisdictions which have transformed the template for the duty of such disclosures. In this Part, the dramatic and now transformative developments in both England and Canada will be examined. The next Part will review the same developments taking place at the international human-rights level. The most telling point of all these developments is their unqualified rejection of the core principles of the Supreme Court's *Brady* doctrine described above.

A. England

The quintessentially American saga of the corrupt conviction of Tom Mooney, which ultimately provided the impetus for the *Brady* doctrine, recently found its counterpart in England. Her name was Judith Theresa

149 *Id.* at *23.

150 *See id.* at *31 n.27.

151 *Id.* at *23 n.20, *24.

152 *Id.* at *16.

153 "Where, in some European countries, the police are supposed to be investigators for both prosecution and defence, everyone works from the same file." JENNY MCEWAN, EVIDENCE AND THE ADVERSARIAL PROCESS: THE MODERN LAW 285 (2d ed. 1998).

Ward. Like Mooney, Ward proudly (although falsely) popularized herself with the police as an itinerant Irish radical very much at the center of a wave of violent protests, including several murderous bombings popularly attributed to Irish Republican Army (IRA) terrorists. Also like Mooney, Ward was eventually convicted of several murders in a severely compromised prosecution and served an extended sentence in jail, in her case eighteen years, before her conviction was quashed by an appellate court. The 1992 reversal in *R v. Ward*[154] became the iconic moment in a "miscarriages of justice" scandal that had been simmering since the late 1970s. The scandal set off a series of reforms of the law of exculpatory disclosure in England and, as shall be seen in the next Part, several international venues as well. While this story of scandal and reform is both complex and compelling in its own right, it will serve here with a singular purpose: to provide a striking comparative demonstration of the fact that the presence of an essentially adversarial system of criminal justice provides no meaningful justification for the thoroughly compromised rule of prosecutorial disclosure exhibited in the *Brady* doctrine.

England had vanquished its own hobgoblins of adversarial criminal discovery by the defendant roughly a full century before American jurisdictions began to recognize even limited rights of criminal discovery.[155] Prior to the 1970s, when the particular matter of exculpatory disclosure first emerged as a major issue of legal scandal and reform, it had been the long-established practice in English criminal courts for the prosecution to disclose to the defense all of the evidence it intended to proffer at trial.[156] But this discovery practice did not include a routine protocol for disclosure of the material the prosecution did not intend to use at trial, what is now referred to in English legal parlance as "unused" material.[157] Beginning with *R v. Bryant*[158] in 1946, there was a recognition of a presumptive "duty" on the part of the prosecution to disclose either the names or the statements of unused witnesses who might provide exonerating information, but there was no positive or enforceable practice of such disclosure. Why was this so? "The answer seems to be that as a general rule trials were heard in a

154 R v. Ward, (1993) 96 Crim. App. 1 (Eng.).

155 To be sure, the English law of disclosure of the early nineteenth century reflected a presumption against discovery by the criminal defendant similar to its American counterpart. "The principal reason for this was the fear that if accused persons knew the nature of the evidence against them, they would be tempted to tamper with, or falsify, such evidence or intimidate those who would be called to give the evidence." JOHN NIBLETT, DISCLOSURE IN CRIMINAL PROCEEDINGS 32–33 (1997).

156 *Id.* at 34.

157 *See infra* text accompanying note 165.

158 R v. Bryant, (1946) 31 Crim. App. 146 (Eng.).

climate of trust that the prosecution would do what was fair and just and make proper disclosure."[159]

So at the point beginning in the late 1970s when England became suddenly overwhelmed with evidence that the prosecution could not be so trusted, the law there was not unlike the law here: there was a largely hortatory declaration of a duty of exculpatory disclosure that relied heavily upon the individualized discretion of the trial prosecutor, yet there was very little in the way of a positively regulated regime of actual pretrial disclosure. The forthright manner in which the English legal system recognized and responded to its own crisis of prosecutorial nondisclosures therefore provides a particularly telling point of comparison to our own muddled and unsuccessful set of responses in the *Brady* case law.

The point here is certainly not to present the multistage unfolding of the English rule of exculpatory disclosure as either an actual or ideal solution to the problems with the *Brady* doctrine.[160] The argument here does not, and could not, suggest a simple transplant of the English rule to the American constitutional corpus.[161] The development of an English rule of law has been rapid, complex, discontinuous, incomplete, idiosyncratic and, for the moment, still unsatisfactory to many.[162] The point is rather that in an adversarial setting which, despite its many differences, is in its most pertinent aspects very similar to our own, the English have struggled within a turbulent twenty-year period to construct a law of exculpatory disclosure that now surpasses our *Brady* doctrine in almost every respect. The English rule has developed rapidly in a series of overlapping stages involving multiple branches of government and it does not submit readily to any simplified linear tracking. But, it is possible to at least identify the major stages of development while focusing on the extraordinary narrative of the singular contributions of England's judicial counterpart to our own high court.

1. The Discretionary Stage.—The matter of exculpatory disclosure was very much a sleeping issue in England until the late 1970s. In that era, two separate strains on the English criminal justice system developed. The first involved a series of murderous bombings in England committed in 1973 and

159 NIBLETT, *supra* note 155, at 61.

160 Indeed, several members of the present Supreme Court, particularly Justice Scalia, have expressed grave reservations about learning anything meaningful from "the so-called international community." Roper v. Simmons, 543 U.S. 551, 662 (Scalia, J., dissenting). *But see* Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 YALE L. & POL'Y REV. 329 (2004). For a collection of recent cases where the Court has consulted foreign law, see Ruti Teitel, *Comparative Constitutional Law in a Global Age*, 117 HARV. L. REV. 2570, 2571 n.8 (2004) (book review).

161 *See generally* Daniel Berkowitz, et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003); Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335 (1996).

162 *See generally* Joyce Plotnikoff & Richard Woolfson, *'A Fair Balance'? Evaluation of the Operation of Disclosure Law*, Home Office Occasional Paper No. 76 (2001).

1974 which led to the highly controversial investigations and convictions of a number of alleged IRA republicans during the mid 1970s.[163] The second stress upon the English system came with the highly publicized reversals of several convictions of defendants who had been wrongfully convicted in part due to errant nondisclosures by the police and prosecution.[164] Each of these developments pushed the matter of exculpatory disclosure to the forefront of concern with the state of English criminal justice.

Beginning in the early 1970s, there was a series of reform packages and commission reports which called for greater disclosure of information helpful to the defense.[165] By the late 1970s, both the Home Secretary and the Attorney General had committed themselves to satisfying the call for such reform.[166] This led to the adoption in December, 1981 of *The Attorney-General's Guidelines for the Disclosure of "Unused Material" to the Defence.*[167] The *Guidelines* may have been an obvious attempt to preempt legislative reform but they were nonetheless a rather remarkable set of broad self-imposed disclosure obligations that radically transformed the prosecution practice regarding disclosure. It was in the *Guidelines* that the now-prevailing term of art "unused material" was first formalized.[168] The term has since been given a broader interpretation,[169] but in the original *Guidelines* it referred primarily to witness statements in the possession of the police.[170] Yet the disclosure obligations attending this unused material were even in the first instance exceptionally broad and demanding.

The *Guidelines* so transformed the practice of disclosure that they ultimately assumed, albeit for a brief period, the apparent force of law,[171] but there was never any mistaking their essentially discretionary character. Whatever first-instance interpretations were to be made of the various

163 *See* NIBLETT, *supra* note 155, at 17–21.

164 *See id.* at 21–24.

165 *See id.* at 59.

166 *See* DAVID CORKER, DISCLOSURE IN CRIMINAL PROCEEDINGS 27 (1996).

167 74 Crim. App. R 302 (Eng. 1982), *reprinted in* NIBLETT, *supra* note 155, App. 1 [hereinafter *Guidelines*].

168 *Id.*, at § 1.

169 *See, e.g.*, R. v. Keane, 99 Cr. App. R. 1, 5 (Eng. 1994).

170 *Guidelines*, *supra* note 167, at § 1.

171 In a major, although unreported, trial court opinion, the court stated:

> Now, it was initially suggested to me—though I think that there was finally some retreat from this position—that the Attorney-General's Guidelines do not have the force of law. I found a certain unreality in that submission because it seems to me that any defendant must be entitled to approach his trial on the basis that the prosecution will have complied with the Attorney-General's Guidelines and those, accordingly, are the ground rules which govern his trial.

R v. Saunders, TR. T881630 at 7 (Cent. Crim. Ct. Sept. 29, 1989), *quoted in* NIBLETT, *supra* note 155, at 72.

terms and guidelines, they were to be made autonomously by the prosecutor. "The message in the *Guidelines* was clear—prosecuting counsel could be trusted to do what was right and proper."[172]

2. The Judicial Stage.—While the various voluntaristic reforms by the prosecution services were unfolding, the English courts were deciding a series of cases that ultimately superseded the self-regulating measures of the prosecutors. Since the late nineteenth century, English common law had required the prosecution to disclose to the defense prior to trial the evidence it would proffer before the court.[173] But the early common law had not directly addressed what the prosecution's disclosure obligations were with regard to material that it did not intend to introduce at trial. In the first direct ruling on the issue in the 1946 case of *R v. Bryant*, the Court of Appeals assumed that there was such an implied "duty" on the part of the prosecution at least with regard to witnesses whom the prosecution chose not to call at trial.[174]

This common law duty of disclosure was premised on the received understanding that the prosecutor, although an advocate and an adversary, had a primary obligation to inform the court itself of any evidence relevant to the matter *sub judice*. This became explicit in the next case on point decided by the Court of Appeal, almost twenty years after *Bryant*. In *Dallison v. Caffery*,[175] the issue was once again not whether disclosure of witness information provided to the police was required, but rather what form the disclosure should take. In the course of reaffirming, and perhaps extending, the holding of *Bryant*, the Court of Appeal opined:

> It would be highly reprehensible to conceal from the court the evidence which such a witness can give. If the prosecuting counsel or solicitor knows, not of a credible witness, but a witness whom he does not accept as credible, he should tell the defence about him so that they can call him if they wish.[176]

172 NIBLETT, *supra* note 155, at 69.

173
> It is highly improbable that prosecuting counsel in the Crown Court would endeavor to introduce, as part of the case for the prosecution, evidence which had not been disclosed to the defence. In reality, it would be a waste of time even to try as the judge would accede to the inevitable defence application for an adjournment in order that the fresh evidence could be considered.

Id. at 32.

174 R v. Bryant, (1946) 31 Crim. App. 146, 147 (Eng.).

175 Dallison v. Caffery, (1964) 1 Q.B. 348.

176 *Id.* at 369.

The English rule therefore recognized from the outset that the public prosecutor, as the advocate on behalf of the state, had a special obligation *to the state itself* to reveal any information that bore upon the integrity and competency of the judicial proceedings conducted by the state.

When the troubles of the 1970s began to implicate the competency and the integrity of the English criminal justice system, the English courts at first appeared reluctant to join the fray. The IRA bombings took place in 1973 and 1974; the trials took place several years after that; the original appeals were heard, and denied, in the mid 1980s; and the lid did not come off until the cases were referred back to the Court of Appeals in the late 1980s. So in the late 1970s, despite the clamors in the ranks, the courts were still holding the line regarding their traditional laissez-faire approach to prosecutorial disclosure. The assumption appeared to be that the center would hold.

> [T]his possibility of the defence being deprived of relevant exculpatory material by the prosecution was regarded as something chimerical. Lawyers and judges alike were content to assume that such a possibility was in practice obviated by a double safeguard: the impartiality of the police and the honourable practice of prosecuting counsel. Particular reliance was placed on the latter....[177]

The initial disclosure case law of the 1980s therefore involved the straightforward application of the common law principle of "fairness" to the interpretation of the *Guidelines*.[178] Yet even on this simple standard, the courts quickly began to recognize several recurrent failures of fairness in the *Guidelines* and to assert an increasing role for the courts in reviewing the otherwise unfettered discretion of prosecutors.

> In a spate of decisions, the Court of Appeal held that it had a role far greater than that envisaged under the *Guidelines*; first, that of monitoring prosecution decisions as to non-disclosure, and secondly, such monitoring would be carried out based upon what the court regarded as fair, rather than on a narrower basis of whether or not prosecution counsel had properly exercised his discretion in accordance with the relevant sub-paragraph of [the *Guidelines*].[179]

It was at this point, in the late 1980s, that the center finally gave way. While the Court of Appeal was gradually taking the blinds off regarding its scrutiny of a variety of cases that appeared to suggest a systemic failure

177 CORKER, *supra* note 166, at 24.

178 *See, e.g.*, R v. Liverpool Crown Court *ex parte* Roberts, [1986] Eng. Rep. 622 (Q.B.) (duty of disclosure extends to police as agent of prosecution); R v. Paraskeva, (1982) 76 Crim. App. 162 (Eng.) (prosecution has an affirmative duty to disclose prior convictions of prosecution witnesses).

179 *See* CORKER, *supra* note 166, at 32.

of "fair" disclosure by the police and prosecution, several cases stemming from the IRA bombing campaign of the early 1970s were continuing to haunt the English criminal justice system. In the fall of 1973, when the bombing campaign had reached the English Midlands in the form of a series of deadly explosions, the English criminal justice system went into a campaign of its own. Several of the bombings had resulted in quick, suspect, and high-profile prosecutions which ultimately reverberated into a nondisclosure scandal of uncommon proportions for English justice, commonly referred to as the "miscarriages of justice" scandal.[180]

In February of 1974 there was a motorcoach bombing on the M62 motorway which killed twelve people. In the fall of 1974 there were two bombings in Guildford which killed five and injured many, and also another bombing in Birmingham which killed twenty-one people.

Judith Ward was convicted of the M62 bombing. The "Guildford Four" were convicted of the Guildford bombings. The "Maguire Seven" were convicted of supplying the explosives for the Guildford bombings. The "Birmingham Six" were convicted of the Birmingham homicides. All of the defendants received substantial, in some cases life, sentences. The convictions became immediately notorious and were hotly contested, but leave to appeal was quickly denied in each case by the Court of Appeal. Yet the controversy surrounding these politically charged prosecutions only intensified. An extended campaign of extra-judicial review, remarkably reminiscent of the earlier American drive to "free Tom Mooney," ultimately forced each of the cases back into the Court of Appeal for a second and, in the case of the Birmingham Six, a third review.[181] The Court of Appeal indeed acknowledged in the latter case that the ultimate vindication of the defendants would not have occurred but for the outside campaign.

> Matters would therefore have rested with the refusal of leave to appeal in 1976, had it not been for the interest taken in the case by Granada television, the publication of Chris Mullin's book *Error of Judgment* in 1986, and the support of senior churchmen and other influential figures, who continued to believe in the appellant's innocence.[182]

Beginning with the case of the Guildford Four in 1989, all four of the IRA cases were reexamined in light of intervening "fresh evidence" that revealed an extraordinary series of withholdings of exculpatory material.[183]

180 NIBLETT, *supra* note 155, at 16.

181 The Court of Appeal, upon referral by the Home Secretary, reviewed the case of the Birmingham Six in 1988 but again denied the appeal. The Home Secretary then referred the case back to the court in 1990 for a third and successful review. *See* R v. McIlkenny, (1991) 93 Crim. App. 287 (Eng.).

182 *Id.* at 294.

183 *See* R v. Richardson (unreported), *cited in* Quentin Cowdry & Sheila Gunn, *Maguire Seven Framed, Peers Say; Guildford Pub Bombings*, TIMES (London) Oct. 20, 1989 ("Guildford

In each of the trials the defendants had been connected to one of the bombings by evidence of either or both a confession and forensic tests of the defendant's hands or clothing which purportedly proved recent contact with nitroglycerine. The fresh evidence generated outside the legal system revealed that the police had withheld information casting doubt on the reliability of the confessions, and both the forensic experts and the prosecutors had withheld evidence undermining the forensics. In the end, each of the defendants in each of the cases was freed after having served an extended, and in some cases the entire, sentence. Although Judith Ward had been the first to be convicted, she was the last to be freed. By the time the Court of Appeal exposed her story as that of a hapless, mentally infirm young woman who had been shabbily exploited by an opportunistic prosecution, the English authorities had already entered upon the "darkest hours of British criminal justice"[184] as a result of the three earlier reversals. "The results of these cases, and the surrounding publicity, had a devastating effect on the reputation of the legal establishment and severely dented the confidence of the general public in the police and prosecuting authorities."[185]

Yet the scandal of the nondisclosures did not reach its apex until the case of Judith Ward was decided by the Court of Appeal in June 1992. If the three earlier IRA reversals had brought public disrepute upon the system of criminal justice, the *Ward* case produced "something akin to panic within the ranks"[186] of English police and prosecutors. The earlier cases had each found serious fault with the system that created and concealed the injustice of nondisclosure, but they were each careful to fold the finger of blame regarding the individual responsibility for each such miscarriage. Not so the opinion in *Ward*. Lord Justice Glidewell issued an extended and virtually unprecedented judicial acknowledgment of endemic criminal injustice. The opinion became both the capstone to the scandal of the IRA cases and the foundation for the next generation of disclosure law in England, and as shall be seen in the next Part, in the international arena as well.

In September of 1973, a bomb exploded at Euston station. Many people were injured, but there were no fatalities. In February of 1974, a bomb exploded on a coach carrying military personnel and their families on the M62 motorway. Twelve people were killed, including several children. Several weeks later, another bomb exploded at the National Defence College

Four"); R v. Ward, (1993) 96 Crim. App. 1 (Eng.); R v. Maguire, (1992) 94 Crim. App. 133 (Eng.) ("Maguire Seven"); R v. McIlkenny, (1991) 93 Crim. App. 287 (Eng.) ("Birmingham Six").

184 Patrick O'Connor, *Prosecution Disclosure: Principle, Practice and Justice*, *in* JUSTICE IN ERROR 101, 104 (Clive Walker & Keir Starmer eds., 1993).

185 NIBLETT, *supra* note 155, at 17.

186 Plotnikoff & Woolfson, *supra* note 162, at 2 (quoting David Calvert Smith, *The Prosecuting Authority's Role*, Disclosure under the CPIA 1996: British Academy of Forensic Sciences Seminar (Dec. 1, 1999)).

in Buckinghamshire, injuring a number of people. Several days after the Defence College bombing, a twenty-five-year-old woman by the name of Judith Ward was picked up for vagrancy on the streets of Liverpool. She immediately claimed membership in the IRA and entered into a series of interviews and admissions that extended over a period of weeks.[187] She managed to implicate herself in each of the foregoing bombings. Nine months later, in November, 1974, she was convicted of twelve counts of murder and three counts of causing an explosion. The case against her with regard to each of the bombings was based primarily upon her admissions and the same type of forensic evidence used in the other IRA cases to connect her or her belongings to possession of nitroglycerine. She was the only person tried and convicted for each of these bombings. She received a life sentence on each of the twelve counts of murder, and she did not file leave to appeal.

Judith Ward spent the next seventeen years in prison without any review of her conviction. But the integrity, or "safety"[188] of her conviction had been clearly compromised by the ultimate reversals of the convictions in the three other IRA cases. In September, 1991, the attorney general sua sponte referred her conviction for review by the Court of Appeal. The Court itself took fresh evidence from sixteen witnesses over the course of a nine-day hearing. The Court appeared moved, if not indeed overwhelmed, by the manifold disclosures which came to light in this belated post-conviction review. "This was and is a most extraordinary case,"[189] intoned the Court, which thereupon issued an equally extraordinary opinion that resonated throughout Europe, the Commonwealth countries, and international tribunals, even though it was given no sounding in America.

The opinion in *Ward* is not an easy read. It is exceptionally long, recitative, prolix, and circuitous, but it makes its point: Judith Ward was the hapless victim of a criminal justice apparatus that had willfully failed the cause in almost every essential aspect. The opinion portrayed the entire cast of the prosecution—police, prosecutors, forensic experts, psychiatrists—as having succumbed to the adversarial zeal of producing a conviction. The Court found that at virtually every turn of the investigation and prosecution of Judith Ward, the public servants or agencies responsible for preparing her case had failed to disclose critical information that might well have prevented her conviction.

187 One of the more benign ironies of this case is that, in making a series of fanciful claims and confessions to the police, Ward managed to implicate, falsely, a fellow by the name of "Joe Mooney." *Ward*, 96 Crim. App. at 36–37.

188 The standard of appellate review in England requires the Court of Appeal to reverse a conviction when it determines that a conviction is "unsafe." *See* Criminal Appeal Act, 1995, c. 35, § 2(1) (Eng.).

189 *Ward*, 96 Crim. App. at 66.

The *Ward* opinion provides a sharp and telling contrast to typical American court opinions, especially those of the Supreme Court, in its reaction to the revelation of deliberate nondisclosure by public officials. The Supreme Court's *Brady* doctrine has rendered the wilfulness, and even the lawfulness, of such prosecutorial misconduct to be something with which judges "need not concern [them]selves."[190] As previously seen, even in cases where exculpatory evidence is withheld and two federal prosecutors file sworn statements contradicting one another as to who bore responsibility for the failure, the Supreme Court quickly blinks at the accountability issue and moves on to a more vigorous scrutiny of the controlling issue of whether the defendant has sufficiently demonstrated the "materiality" of the nondisclosure misconduct.[191] To the contrary, the English Court of Appeal made attribution and accountability the essential order of its opinion. Despite the then-nascent state of the law of disclosure in England, the Court treated the principles of disclosure as at least self-evident, if not settled, and spent most of its time unpacking the long, twisted tale of Judith Ward's attempts to get herself arrested and the cynical exploitation of those public officials and servants, who were carefully named, who took advantage of her mental disarray to "solve" a notorious domestic offense.

The *Ward* Court began its opinion with an extended recitation of its own de novo factfinding. It even offered an introductory biographic section captioned "Judith Ward's life and activities before September 10, 1973," the date of the first bombing, at the Euston station, for which Ward was convicted. The opinion portrayed the young Ward as a troubled and aspiring victim who repeatedly failed to secure her calamity with the police. In one of her more innocuous run-ins with the police, when she was then twenty-three years old, she reported herself as a highly vulnerable waif of fourteen named "Teresa O'Connell" who appeared to be endlessly dependent upon the kindness of strangers. "It was a graphic story, almost every word of which was fiction."[192] Several months later she surrendered herself for going AWOL from her enlisted military service. She promptly identified herself as a lieutenant in the IRA who had helped "to blow places up and things like that," but the private who interviewed her reported that she "did not take much notice" of Ward's claims.[193] In early 1973, she volunteered to the police a series of claims involving her role in a variety of IRA affairs. The detective who interviewed her wrote it off as "total nonsense."[194] Yet this was the same Judith Ward who was convicted several

190 Giglio v. United States, 405 U.S. 150, 153 (1972).

191 *See supra* text accompanying notes 71–72.

192 *Ward*, 96 Crim. App. at 58.

193 *Id.* at 4.

194 *Id.* at 33.

months thereafter of being a principal terrorist in the midland IRA bombings—based largely upon her own extended admissions.

The jury at Ward's trial did not get to know the Judith Ward depicted in the Court of Appeals opinion because the various police reports in both England and Ireland recounting her compulsion for making self-inculpatory statements were never disclosed. The Court referred to these failures of disclosure as "the most substantial"[195] nondisclosures simply in terms of their number. "The principal relevance of the statements in question lies in their bearing on the appellant's proclivities for attention-seeking, fantasy and the making and withdrawal of untrue confessions."[196] With regard to Ward's positive right to disclosure of her own many statements to the police, the Court referred to this as "merely aspects of the defendant's elementary common law right to a fair trial which depends upon the observance by the prosecution, no less than the court, of the rules of natural justice. No authority is needed for this proposition...."[197] This simple description of the defendant's entitlement to transparently exculpatory information as virtually primordial in character is also in telling contrast to the compromised and complex descriptions of the right in the *Brady* line of cases. Here the Court of Appeal made it perfectly plain that the prosecution-as-adversary is entitled to no privileges of nondisclosure but rather bears an equal public responsibility with the court to ensure the defendant a fair trial.

The *Ward* court went even further in its condemnation of the adversarial practices of the prosecution's forensic experts. Here the Court all but accused three senior forensic experts of engaging in criminal conduct in pursuit of their adversarial zeal to convict Judith Ward. After having first declared the experts retained by the prosecution to be part of the "prosecution" itself for purposes of the right of disclosure,[198] the Court found the failure of the experts to disclose a series of forensic omissions and misrepresentations to itself be an egregious and independent violation of the defendant's right.

> Three senior R.A.R.D.E. [a forensic lab] scientists took the law into their own hands, and concealed from the prosecution, the defence and the court, matters which might have changed the course of the trial. . . . It is in our judgment also a necessary inference that the three senior R.A.R.D.E. forensic scientists acted in concert in withholding material evidence.[199]

Further, rather than attempting to find some manner of excusing or privileging the adversarial partisanship of the forensic scientists, the Court de-

195 *Id.* at 23.
196 *Id.* at 29.
197 *Id.* at 25.
198 *Id.* at 23.
199 *Id.* at 51.

livered an extended analysis and rebuke of those very partisan tendencies.

> For the future it is important to consider why scientists acted as they did.... The very fact that the police seek their assistance may create a relationship between the police and the forensic scientists. And the adversarial character of the proceedings tend to promote this process.... They misled both the prosecution and the defence in order to promote a cause which they had made their own, namely that Miss Ward had been in contact with NG.[200]

The Court of Appeal clearly did not ignore the "adversarial character of the proceedings"[201] but rather used it as the platform for analyzing the real call of English criminal justice regarding unused material. The wide-ranging opinion in *Ward* ultimately settled and transformed the common law of disclosure in several critical respects, all of which are the more remarkable for their utter disdain of the blinking and hedging so common to the *Brady* line of opinions.

There are three major accomplishments of *Ward* worth noting here. The first is the broad characterization of the public officials and agencies who shall bear and share the burden of disclosure. The Court of Appeal did not adopt the American view of the duty of disclosure as a matter of adversarial discovery limited to what the prosecutor actually knew or reasonably should have known under the circumstances. The *Ward* court included all public officials and agencies responsible for some aspect of the investigation and prosecution of a case in its definition of "the prosecution." The court identified four separate categories of public agents who were directly responsible for the disclosure of information material to the defense: (1) the three separate police forces that worked on the case, (2) the entire staff of the prosecution office, (3) the prosecution psychiatrists;,and (4) the prosecution forensic scientists.[202] The court then devoted a separate section to each of the four groups, in which each was found to have failed its individual and positive responsibilities for disclosure. The court therefore made it clear throughout its opinion that the duty of disclosure was triggered not just by the adversarial responsibilities and demands of discovery but rather by the more fundamental imperatives of public accountability.

The court also settled upon a standard of materiality that surpasses its American counterpart in both principle and scope. It will be recalled that the *Brady* standard of materiality is limited to evidence which, at the point of post-trial review, "probably would have resulted in acquittal."[203] The

200 *Id.* at 51–52.

201 *Id.* at 51.

202 *Id.* at 23.

203 United States v. Agurs, 427 U.S. 97, 111 (1976).

Brady standard is therefore not so much a standard of material evidence as it is a standard of material, or reversible, error. The *Ward* court approached the issue as one driven by the simple principle of fairness to the accused at the point of indictment. It therefore carefully distinguished between material evidence and material error, and made it plain that the duty of *disclosure* had a principled application only to the former.

> The obligation to disclose only arises in relation to evidence which is or may be material in relation to the issues which are expected to arise, or which unexpectedly do arise, in the course of the trial. If the evidence is or may be material in this sense, then its non-disclosure is likely to constitute a material irregularity.[204]

The Court of Appeal then proceeded to make clear that it was entirely inappropriate for a prosecutor to measure the duty to disclose material evidence by the likelihood that nondisclosure will ultimately constitute a material error. One Mr. Langdale presented the appeal for the government, and at several points he conceded the nondisclosure of material evidence but argued that the error itself was not material. The court conceded the distinction but went on to caution against confusing the principle with the exception.

> We would emphasize, however, that the scope for the application of Mr. Langdale's proposition is limited to matters which, at the end of the day, can be seen to have been of no real significance. The possibility that this view will ultimately be taken of any particular piece of disclosable evidence should be wholly excluded from the minds of the prosecution when the question of disclosure is being considered. Non-disclosure is a potent source of injustice and even with the benefit of hindsight, it will often be difficult to say whether or not an undisclosed item of evidence might have shifted the balance or opened up a new line of defense.[205]

This is of course in sharp contrast to the reasoning of the Supreme Court in *Ruiz* where the Court insisted that only with "the benefit of hindsight" could the measure of materiality be taken. The *Ward* court appeared so intent on cementing this understanding of the duty of disclosure as a prospective, *pretrial* obligation of the prosecution that it returned to it on several occasions.

> "Material evidence" means evidence which tends either to weaken the prosecution case or to strengthen the defence case.[206]
>
> ....

204 *Ward*, 96 Crim. App. at 22.

205 *Id.*

206 *Id.* at 56.

> We would emphasize that "all relevant evidence of help to the accused" is not limited to evidence which will obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution have gathered, and from which the prosecution have made their own selection of evidence to be led. [207]
>
> ....
>
> It extends to anything which may arguably assist the defence. [208]

In its analysis of the failure to disclose scientific evidence to the defense, the *Ward* court provided a compelling illustration of the inherently prospective quality of material evidence.

> It is necessary to consider the impact of the legal rules governing the disclosure by the prosecution of material scientific evidence. An incident of a defendant's right to a fair trial is a right to timely disclosure by the prosecution of all material matters which affect the scientific case relied on by the prosecution, that is, whether such matters strengthen or weaken the prosecution case or assist the defence case. This duty exists whether or not a specific request for disclosure of details of scientific evidence is made by the defence. Moreover, this duty is continuous: it applies not only in the pre-trial period but also throughout the trial. The materiality of evidence on the scientific side of a case may sometimes be overlooked before a trial. If the significance of the evidence becomes clear during the trial there must be an immediate disclosure to the defence. [209]

The third major accomplishment of *Ward* was to bring to a close the traditional privilege of prosecutorial discretion in matters of disclosure. Once again the court found a review of the "adversarial character of the proceedings" [210] to provide good reason to remove rather than to sustain the privilege. The court found the self-regulating posture of the prosecution to be incompatible with the "positive" [211] duty of disclosure now being imposed upon it. The court also found the manifold failures of disclosure in this very case to be ample evidence of the dissonance between the duty and the discretion of the prosecution. In reference to the argument regarding the positive nature of this duty made by one Mr. Mansfield, counsel for the defense, the court responded as follows:

> Mr. Mansfield's position was simple and readily comprehensible. He submitted that there was such a duty, and that it admitted of no qualification or exception. Moreover, he contended that it would be incompatible with a

207 *Id.* at 25.
208 *Id.* at 52.
209 *Id.* at 50–51.
210 *Id.* at 51.
211 *Id.* at 1.

> defendant's absolute right to a fair trial to allow the prosecution, who occupy an adversarial position in criminal proceedings, to be judge in their own cause on the asserted claim to immunity.... We are fully persuaded by Mr. Mansfield's reasoning on this point. It seems to us that he was right to remind us that when the prosecution acted as judge in their own cause on the issue of public interest immunity in this case they committed a significant number of errors which affected the fairness of the proceedings. These considerations therefore powerfully reinforce the view that it would be wrong to allow the prosecution to withhold material documents without giving any notice of that fact to the defence.[212]

This passage certainly reflects a superior understanding of the essential checks and balances that both distinguish and safeguard the competitive enterprise of an adversarial system, for here the Court of Appeals recognizes that the inherent tendencies of such a system, in which the market of information is not an open one, contradict an unregulated privilege in the hands of law enforcement officials.[213] No mechanism to check or balance the competitive advantages of secrecy held by the prosecution can be made operable without a triggering mechanism that is itself dependent upon a certain measure of disclosure. The *Ward* opinion therefore repudiates the laissez-faire tradition of the *Brady* doctrine in a most fundamental sense. It forcefully articulates a recognition that fundamental fairness is a preemptive state responsibility and not a negotiable characteristic of the competitive exercise. In turn, it provides a compelling account of the need to set a principled check on the ability of the prosecution to abuse this power rather than to rely upon the market of criminal justice to "balance"[214] the privileges of the defendant with those of the prosecution.

Ward was certainly a "watershed,"[215] "landmark"[216] decision in English law. It contained a series of both factual findings and legal conclusions which firmly stamped the evolving judicial response to the scandals of nondisclosure. It was in the ordinary course followed by a handful of cases which served both to affirm and to modify the broad holdings of *Ward*.[217]

212 *Id.* at 57.

213 In a subsequent case, the Court of Appeal stated this point even more succinctly: "[I]n our adversarial system, in which the police and prosecution control the investigatory process, an accused's right to fair disclosure is an inseparable part of his right to a fair trial." R v. Brown, [1995] 1 Crim. App. 191, 198 (Eng.).

214 *Ward*, 96 Crim. App. at 22.

215 NIBLETT, *supra* note 155, at 3.

216 CORKER, *supra* note 166, at 36.

217 *See, e.g.*, R v. Blackledge, [1996] 1 Crim. App. 326 (Eng.) (reverses conviction based upon plea of guilty where material information not provided to defendant prior to plea); R v. Brown, [1995] 1 Crim. App. 191 (Eng.) (*Ward* does not require pretrial disclosure of prior convictions of defense witnesses); R v. Keane, [1994] 99 Crim. App. 1 (Eng.) (providing very broad restatement of standard of materiality); R v. Davis, Johnson and Rowe, [1993] 97 Crim. App.

The case law sponsored an ambitious solution that extended well beyond the simple *Brady* paradigm regarding the disclosure of explicitly exculpatory material. The English Court of Appeal adopted a "general principle of open justice"[218] which required the government to disclose whatever information it possessed that was "material" in the sense that it could be deemed:

> (1) to be relevant or possibly relevant to an issue in the case;
> (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use;
> (3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2).[219]

Yet it is also true that the high-water status of *Ward* was relatively short lived. However solidly grounded it was in notions of due process and fundamental fairness, in English law *Ward* had the status of only a common-law opinion. The English doctrine of Parliamentary supremacy provided that that body was entitled to have the next, if not the last, word on the matter. So, the matter of disclosure quickly became embroiled in the then broader activist ambitions of the Conservative government to redraw some of the more established ground rules of English criminal justice.

3. The Legislative Stage.—The scandals of nondisclosure had seriously compromised the state of English criminal justice, and the widely heralded opinion in *Ward* served in large measure to underscore the damage. *Ward* was quickly followed by a period of nearly unrestricted "open file" discovery throughout England in which "defense lawyers sometimes bombard[ed] the prosecution with requests for thousands of documents with little regard to their relevance."[220] The Court of Appeal itself shortly called upon the government to conduct a thorough legislative review of the discovery dilemma given that "the ideal solution might be a statutory statement of the duties of the Crown regarding disclosure of relevant information."[221] The Conservative government wasted no time with an extended review. In 1995, the Home Office prepared a white paper entitled *Disclosure: A Consultation Document*, which listed seven principal problems with the recently developed common law of disclosure.[222] The following year

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110 (Eng.) (ex parte application to conceal sensitive material requires notice to defense).

218 *Keane*, 99 Crim. App. at 1.

219 *Id.* at 6.

220 *Brown*, 1 Crim. App. at 202.

221 *Id.*

222 Cm 2864, London: HMSO, 1995, *cited in* NIBLETT, *supra* note 155, at 221

the government introduced and Parliament passed the Criminal Procedure and Investigations Act of 1996 (CPIA 1996).[223]

The CPIA 1996 is a remarkable piece of legislation that has invited enormous controversy and reaction among the unallied partisans of criminal justice in England.[224] It has abruptly introduced into the English criminal justice system the already adopted concept in America of "reciprocal" discovery. There is no question that the statute was designed to reverse the compromise to the prosecution's status and autonomy affected by the recent spate of Court of Appeal rulings. "The CPIA 1996 features the return of unfettered prosecution discretion in the primary disclosure stage, a change aimed directly at the decision in *Ward*."[225] Yet, in the end, this extraordinary Conservative reaction to the progressive rulings of the courts serves only to underscore the essential failings of the American *Brady* doctrine. As reactionary as the statute may be, it nonetheless recognizes and affirms an essential principle of disclosure that is still denied by our Supreme Court. "While the CPIA 1996 has imposed many restrictions on disclosure to the defence, it does not purport to alter the important principle that primary disclosure should be given as early in the proceedings as practicable."[226]

It would therefore appear that throughout the tumultuous period of the IRA scandals and the contentious folding and refolding of a new national regime of disclosure law, it has never occurred to any of the multiple parties involved in England to suggest that the adversarial system itself mandated a prosecutorial privilege to withhold exculpatory material subject only to the perchance ability of the defendant, subsequent to his conviction at trial, to demonstrate a likelihood that pretrial disclosure of the withheld information would have altered the verdict at his trial. The entire body of case law, the various governmental studies and reports, the prosecution's own self-governing guidelines, as well as the CPIA 1996 all emphatically repudiate such an empty standard.

4. Convergence: The Human Rights Stage.—England has already entered upon its next stage in the development of a national law of prosecutorial disclosure. Two years after enacting the CPIA 1996, England passed the Human Rights Act (HRA 1998),[227] which went into effect in October of 2000. The essential command of the HRA 1998 is to require English judges

223 Criminal Procedure and Investigations Act, 1996, c. 25, § 27 (Eng.).

224 *See generally* Plotnikoff & Woolfson, *supra* note 162; SIR ROBIN AULD, REVIEW OF THE CRIMINAL COURTS OF ENGLAND AND WALES 28, 53 (2001), *available at* http://www.criminal-courts-review.org.uk/auldconts.htm; JOHN ARNOLD EPP, BUILDING ON THE DECADE OF DISCLOSURE IN CRIMINAL PROCEDURE (2001).

225 EPP, *supra* note 14, at 258.

226 *Id.* at 262.

227 Human Rights Act, 1998, c. 42 (Eng.).

to make every effort to interpret English law to be consistent with the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[228] Article 6 of the ECHR is the basis for the European fair-trial convention of "equality of arms." The case law of the European Court of Human Rights has already established that the principle requires timely pretrial disclosure to the defendant of all exculpatory material.[229] Therefore, English law will likely continue on its path towards greater convergence with the equitable principles of fair disclosure already established in European and, as will be developed in the next Part, international law.

B. Canada

During the same period in the early 1990s when the tempest of nondisclosure was raging in England, the Canadian Supreme Court quietly made its own independent, yet compelling, contribution to the emerging law of prosecutorial disclosure. Indeed, the exceptionally lucid and principled discussion found in the leading Canadian case of *R v. Stinchcombe*[230] has become required reading for courts and commentators alike, and it has also been adopted more recently by the English House of Lords.[231]

The Canadian legal system has traditionally been patterned on the English common law adversarial system, but the Canadian criminal justice system reflects a greater influence of the European civil law tradition. Thus, whereas the tradition in England for over 100 years has been to provide the defense with pretrial discovery of all evidence to be proffered at trial (the "used" material), Canada had virtually no tradition of formal discovery by the defense. Rather, the Canadian approach was to require the prosecutor in the first instance, as an obligation to the court itself, to provide the tribunal with all evidence, both inculpatory and exculpatory, material to the charge.[232] The defense was thereby presumed to be a secondary beneficiary of this primary, governmental obligation. The cases indeed required the prosecution itself to present all exculpatory material at trial.[233] Therefore, until the very eve of the new era prompted by the nondisclosure scandals in England, the only reform issue percolating in Canadian law was whether to create an obligation on the prosecution to provide the defense with direct notice of the inculpatory evidence it intended to proffer at trial.

228 *Id.* at § 3.

229 The seminal case is *Jespers v. Belgium*, App. No. 8403/78, 5 Eur. H.R. Rep. 305, 307 (1982). *See also* Rowe v. United Kingdom, App. No. 28901/95, 30 Eur. Ct. H.R. 1, 2 (2000); Edwards v. United Kingdom, App. No. 13071/87, 15 Eur. Ct. H.R. 417, 426 (1993).

230 R v. Stinchcombe, [1991] 3 S.C.R. 326.

231 *See* R v. Mills, [1998] A.C. 382 (H.L.) (appeal taken from Eng.).

232 *See* R v. Cook, [1997] 1 S.C.R. 1113.

233 *See* Lemay v. R, [1952] 1 S.C.R. 232, 240–41.

The Canadian criminal justice system has undergone a significant series of independent changes in the modern era. The creation of a prosecutorial service, independent of the police, occurred in most of the Canadian provinces prior to the 1986 creation of the Crown Prosecutions Services (CPS) in England. This alone generated greater attention to the professional ethics of the prosecutor as such, independent of the investigative practices of the police. In 1985, Canada passed its own national bill of rights, which provided the Canadian Supreme Court with powers of judicial review not unlike those of our own Supreme Court.[234] These changes reflected a broader, more fundamental concern in Canada with the nature of the modern prosecutorial role in a traditionally adversarial system. In the early 1970s, the Law Reform Commission of Canada, after conducting a broad survey of Canadian prosecutors, sounded an early warning that "prosecutors cannot be expected to ignore the adversary nature of their role in exercising their discretionary power as to whether or not to grant discovery."[235]

The development of a new national protocol for prosecutorial disclosure therefore arose independently of the scandals in England yet ultimately merged with the common law resolution expressed in *Ward*.

> Briefly, the modern common law has concluded that the accused's right to disclosure is an inseparable part of his right to a fair trial. Fair disclosure includes early disclosure by the prosecution of its case and any unused information that may assist the defence case or lead to new lines of inquiry.[236]

In Canada this common law evolution has now taken the next step in recognizing the right to disclosure as not only an inseparable part of a fair trial but also a freestanding right independent of trial.

There were no major scandals in Canada, yet there have been a handful of recent cases involving nondisclosures and wrongful convictions.[237] In the very first of these cases to receive the attention of the Canadian Supreme Court, the Court struck a resounding blow against the hobgoblins of the premodern era of adversarial nondisclosure.

In *R v. Stinchcombe*,[238] the defendant was a lawyer charged with the serious yet mundane crimes of theft, fraud, and breach of trust involving financial instruments he had held in trust for his client. At a preliminary inquiry in the case, the Crown had taken testimony from the defendant's former secretary which was "apparently favourable" to the defendant.[239] The tes-

234 Canadian Bill of Rights, R.S.C., app. III, § 2 (1985).

235 LAW REFORM COMM'N OF CANADA, WORKING PAPER NO. 4, CRIMINAL PROCEDURE: DISCOVERY, para. 45 (1974), *reprinted in* LAW REFORM COMM'N OF CANADA, STUDY REPORT: DISCOVERY IN CRIMINAL CASES (1974).

236 EPP, *supra* note 14, at 33.

237 *See id.* at 43 nn.105–08.

238 R v. Stinchcombe, [1991] 3 S.C.R. 326.

239 *Id.* at 326.

timony itself was not a matter of record in the proceeding. Subsequent to that inquiry, the police had also taken two statements from the secretary, once prior to and once during the actual trial. The former secretary refused to speak to the defense prior to trial. The defense made a request for disclosure following each of the two statements but was denied. It was not until the third day of trial that the defense learned that the prosecution did not intend to call the secretary at trial on the ground that her testimony "was not worthy of credit."[240] The defendant therefore made a demand to the court for the pretrial disclosure of the secretary's statements. Both the trial and intermediate appellate court upheld the nondisclosure on the broad ground that "under the circumstances" the prosecution had no obligation to call the witness and the defendant had no recognized right to compel such disclosure.[241]

The Supreme Court began its analysis of the disclosure issue with the understated recognition that the law in Canada up to that point was "not settled.... No case in this court has made a comprehensive examination of the subject."[242] The Court, per Justice Sopinka, made quick note of the fact that "[p]roduction and discovery were foreign to the adversary process of adjudication in its earlier history,"[243] and then just as quickly repudiated that history. "It is difficult to justify the position which clings to the notion that the Crown has no legal duty to disclose all relevant information. The arguments against the existence of such a duty are groundless while those in favour are, in my view, overwhelming."[244]

It was at this point in the opinion that Justice Sopinka made the simple observation that has now become the most cited passage in the burgeoning annals of the jurisprudence of disclosure: "I would add that the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done."[245]

The Court was not unaware of the traditional arguments against disclosure in an adversarial system. It responded to the well-traveled hobgoblin that prosecutorial disclosure would provide the defense with an undue advantage to tailor its defense to the prosecution's evidence with the observation that in the modern era of adversarial justice disclosure itself had become a normative process.[246] "The principle has been accepted that the search for truth is advanced rather than retarded by disclosure of all rel-

240 *Id.* at 330.
241 *Id.* at 331.
242 *Id.* at 331–32.
243 *Id.* at 332.
244 *Id.* at 333.
245 *Id.*
246 *Id.* at 335.

evant material."[247] The Court described this historical trend as a "wholly natural evolution of the law in favour of disclosure."[248]

Stinchcombe designated a broad national standard of disclosure for Canadian prosecutors. There was a general rule of "disclosure of all relevant information" whenever there was a "reasonable possibility" that a failure to disclose would impair the defendant's ability to make a "full answer and defence."[249] This primary concern with the functionality of disclosure also led the Court to set a strict standard for the timing of such disclosures. Disclosure serves its mission only when it occurs prior to the point at which the defendant is required to make informed decisions regarding his answer to the charges. Therefore, "initial disclosure should occur before the accused is called upon to elect the mode of trial or to plead. These are crucial steps which the accused must take which affect his or her rights in a fundamental way."[250]

The significance of this timely disclosure provision is rather profound for our purposes, because it reveals the Canadian Supreme Court's recognition that it is the *entire* criminal justice process and not just the trial process alone that must be fair. The *Brady* doctrine expressly excludes from its purview any nondisclosure by the prosecutor, however willful or unethical, unless it affects the outcome of an actual trial. It therefore limits the due process requirement of fair disclosure to a mere handful of criminal cases. The *Stinchcombe* court, however, requires the prosecutor to maintain a fair and ethical standard throughout the criminal process in all cases, regardless of whether the defendant chooses to plead guilty or otherwise independently manages to uncover the nondisclosure by the prosecutor.

There is one passage in *Stinchcombe* that alone poignantly highlights the striking contrast between the respective approaches to disclosure of the Canadian and the American Supreme Courts. As will be recalled, the *Brady* rule as developed by the Supreme Court posits that the only value regarding prosecutorial disclosure cognizant within our due process matrix is that of a factually fair *result* at trial.[251] If there is no trial or if there is a guilty verdict at trial which the defendant cannot retroactively demonstrate to be probably incorrect, then there has been no constitutional violation even where the prosecutor has willfully, even unethically, failed to disclose clearly exculpatory information. The *Brady* rule therefore posits that it is *only* in the post-trial setting where the courts can properly perform the trial-based analysis required to determine due process. "An assessment of whether an

247 *Id.*

248 *Id.* at 338.

249 *Id.* at 340.

250 *Id.* at 342.

251 "[S]trictly speaking, there is never a real '*Brady* violation' unless the [Government's] nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict." Strickler v. Greene, 527 U.S. 263, 281 (1999).

outcome would have been different if undisclosed evidence had been disclosed is best made after a trial is concluded."[252]

The Canadian Supreme Court in *Stinchcombe* flatly rejected this inverted, looking-glass logic of the *Brady* doctrine. The statements of the secretary that had been withheld by the prosecutor were never revealed and were not part of the record before the high court. Therefore, the Canadian prosecutor attempted to produce the statements before the Supreme Court in order to demonstrate what American prosecutors are routinely permitted to demonstrate even in a most protracted post-trial setting, namely, that the withheld evidence would not have altered the outcome of the case. The Canadian Supreme Court found this approach so inappropriate that it did not even permit the prosecution to produce the statements.

> During argument before this court, an application was made by the Crown to adduce the statements and the tape as fresh evidence. This application was rejected. The principal basis for the rejection was that at this stage it would be impossible to determine whether statements would have been material to the defence if produced at trial.[253]

It is therefore clear that the high courts in both England and Canada, the two mature adversarial systems most closely resembling our own, have each, under vastly different circumstances, arrived at the same conclusion regarding the essential logic of the Supreme Court's *Brady* doctrine: it not only fails to recognize but affirmatively contravenes the principles of natural or fundamental justice required of a modern system of adversarial criminal justice. As shall be seen in the next Part, the modern systems of international criminal justice agree.

III. INTERNATIONAL *BRADY*

The 1990s have become the decade of disclosure for international criminal justice as well. Since Nuremberg, the template for international criminal justice has been adversarial; there are no common law juries, but there is always an independent office of the prosecution. "It is generally recognized that the adversarial system is more suitable when it comes to offering protection to the rights of the accused."[254] The assumption has been that, with regard to any tribunal convened to prosecute crimes against international law, there would be an independent prosecutor to present the charges and the defendant would in turn be provided with a set of adversarial rights to

252 *In re* United States v. Coppa, 267 F.3d 132, 143 (2d Cir. 2001).

253 *Stinchcombe*, 3 S.C.R. at 331.

254 SALVATORE ZAPPALA, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS 16 (2003).

guarantee him an "equality of arms"[255] with the prosecutor. This principle of adversarial equality has over time led to the development in international law of a widely adopted list of basic rights, located principally in Article 14 of the International Covenant on Civil and Political Rights (ICCPR)[256] and Article 6 of the European Convention on Human Rights and Fundamental Freedoms (ECHR).[257]

Yet neither Article 14 nor Article 6, nor any of the many derivative international human rights protocols, contains a positive right of exculpatory disclosure.[258] Also, until recently there had been no independent tribunal of original jurisdiction convened since Nuremberg and Tokyo to prosecute crimes against international law. The early 1990s witnessed the creation of two such tribunals to prosecute war crimes arising from hostilities in Yugoslavia and Rwanda, as well as the creation of the International Criminal Court (ICC). These three newly created international criminal venues have dramatically expanded and transformed the arena of international criminal prosecutions. Each has relied directly upon the principle of equality of arms to create a specific rule requiring early and extensive disclosure of exculpatory material. Thus within several years of the heralded English Court of Appeal opinion in *Ward*, these three tribunals have each adopted a rule of prosecutorial disclosure that has put the *Brady* rule sharply at odds with present standards of international human rights and criminal justice.

The equality-of-arms principle has served as an analogue to our principle of due process to extrapolate the specific guarantees of the broader right to a fair trial. It has thus led to the principled development of an affirmative right of disclosure derived from the original declaration of a right to a fair trial contained in Article 10 of the Universal Declaration of Human Rights.[259] This incremental, yet principled, progression has been best captured by the European Court of Human Rights in a recent case in which it reviewed certain of the disclosure provisions of England's CPIA 1996:

255 "The principle of 'equality of arms' should ensure that the machinery of state, with its investigative and prosecutorial strength and resources, does not prevent an accused from learning any relevant information which may assist in establishing innocence." NIBLETT, *supra* note 155, at 265.

256 International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966).

257 Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. T.S. No. 5.

258 "[O]ne should note that the defendants in both Nuremberg and Tokyo had no possibility of obtaining exculpatory evidence from the Prosecutor." ZAPPALA, *supra* note 254, at 20.

259 "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810 (Dec. 10, 1948).

> It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. In addition [ECHR] Article 6(1) requires that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused.[260]

A. The Two War Crimes Tribunals

The early 1990s witnessed war crime atrocities in Yugoslavia and then Rwanda. The United Nations Security Council responded by creating the first two international war crimes tribunals since Nuremberg and Tokyo. The International Criminal Tribunal for Yugoslavia (ICTY) was created in May of 1993[261] and the International Criminal Tribunal for Rwanda (ICTR) followed in November, 1994.[262] The statute creating each tribunal left to the judges presiding over the respective tribunal the task of creating a detailed set of rules of evidence and procedure.[263] The ICTY created the first set of Rules of Procedure and Evidence in February of 1994,[264] which were later adopted virtually in toto by the ICTR in June of 1995. The original rules of both tribunals therefore contained the same rule, Rule 68, specifically requiring the disclosure of exculpatory material. "The Prosecutor shall, as soon as practicable, disclose to the defence the existence of material known to the Prosecutor which in any way tends to suggest the innocence or mitigate the guilt of the accused or may affect the credibility of prosecution evidence."[265]

A formative body of case law has already developed pursuant to Rule 68, almost all of it decided by trial court panels of the ICTY. Discovery generally and of exculpatory material in particular has been a prominent defense strategy in a number of the ICTY cases. Disclosure of exculpatory material appears not yet to have surfaced as a matter of concern in the less developed case law of the ICTR.

There have been two general aspects to the early Rule 68 case law of the ICTY. The first has been to separate and identify the unique role of the Rule 68 right of disclosure within the context of a broad set of discovery

260 Rowe v. United Kingdom, 30 Eur. Ct. H.R. 1, 2 (2000).

261 *See* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

262 *See* S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

263 *See* S.C. Res. 827, *supra* note 261, art. 15; S.C. Res. 955, *supra* note 262, art. 14.

264 *See* Rules of Procedure and Evidence for the International Criminal Tribunal for the Former Yugoslavia, *available at* http://www.un.org/icty/basic/rpe/IT32_rev36.htm.

265 *Id.* at R. 68(i).

rules and the second has been to identify the actual contours of the right itself. Adversarial justice in the international setting, directed largely by the principle of equality of arms, places a high premium on transparency. Rules 66 and 67 of the two tribunals provide for very broad initial discovery by the defense, and then rather broad reciprocal discovery by the prosecution. In order to avoid the reciprocal discovery provisions of the general discovery rules, the defense in many of the ICTY cases has bypassed Rule 66 in favor of making a broad, open-ended motion for discovery of exculpatory material pursuant to Rule 68. This has led to the first aspect of the case law developments which attempted to prevent this bypass strategy by imposing an initial prima facie burden of entitlement upon the defense in order to support a Rule 68 motion. Interestingly, the ICTY panels have employed the equality-of-arms principle itself to defeat the bypass strategy.

> [B]y expressly restricting itself to Rule 68 of the Rules, the Defence, while requesting such broad access to Prosecution documentation, is avoiding the reciprocal obligation which it would have pursuant to Rules 66 and 67 of the Rules. Acceding to its request without limitations would consequently disturb the balance of the trial, particularly since such a disclosure would manifestly occur beyond the strict requirements of Rule 68 which requires the disclosure of exculpatory "evidence" and not all or an entire section of the Prosecutor's documentation.[266]

This in itself is a notable development in the initial case law of a tribunal struggling on many fronts to create a standardized protocol of adversarial justice in a setting of extreme urgency and complexity. The tribunal appears to have rather deftly and expeditiously retired the hobgoblin of "open file" defense discovery that continues to haunt the Supreme Court's development of the *Brady* doctrine. The Supreme Court has routinely raised the specter of ungovernable discovery by the criminal defendant as a ground for its crabbed approach to the disclosure of strictly exculpatory material.[267] Yet the tribunal has expressed little difficulty in separating the two. It therefore has been able to formulate a very broad rule of affirmative disclosure regarding the discovery of exculpatory material while at the same time maintaining the adversarial balance intended by the rules of general discovery.

The ICTY case law has therefore constructed a set of limitations on Rule 68 motion practice which appear designed primarily to prevent misuse of the rule rather than to restrict what is in fact affirmatively required of prosecutors with regard to exculpatory material. The trial court panels

266 Prosecutor v. Blaskic, Case No. IT-95-14, Decision on the Defence Motion for Sanctions for Prosecutor's Repeated Violations of Rule 68 of the Rules of Procedure and Evidence, ¶ 20 (Apr. 29, 1998).

267 *See supra* text accompanying note 96.

in their Rule 68 decisions acknowledge their formal "consideration" of the prosecutor's initial affirmative obligation to search for and disclose any information that falls within the tribunal's broad purview of exculpatory material.[268] Once the prosecutor has affirmed compliance with that obligation, the courts do not permit the defendant to engage in a "fishing expedition" by way of broad demands for disclosure pursuant to Rule 68.[269] In order to overcome the prosecutor's initial declaration of compliance with the rule, the defendant is required to make a prima facie showing that the prosecutor is indeed in possession of material which qualifies as exculpatory under the rule.[270] Where the prosecutor has complied with her pretrial obligation to disclose but exculpatory material has nonetheless come to her attention in a post-trial setting, the courts have adopted what is an essentially harmless error standard of review.[271]

Yet even in this formative stage of constructing a Rule 68 jurisprudence, the ICTY has managed to issue a series of declarative rulings that implicitly yet clearly reject and surpass the limitations of the Supreme Court's jurisprudence in the *Brady* doctrine. The tribunal easily recognized that a request by the defendant had absolutely no bearing on the prosecution's affirmative duty to disclose exculpatory material,[272] thereby repudiating the Supreme Court's ultimately failed attempt in *Agurs* to create a multi-tiered system of disclosure which was critically dependent upon the nature and timing of a request for disclosure by the defendant.[273] The ICTY courts have also made it perfectly clear that a right of disclosure is only meaningful if it accomplishes the fundamental purpose of disclosure: to provide the defendant with a fair opportunity to prepare and present his initial defense to the charges. The tribunal's unqualified, and virtually unchallenged, imperative regarding the timeliness of disclosure is therefore in itself an essential repudiation of the looking-glass logic of the *Brady* doctrine.

> The Trial Chamber strongly believes that if a rule is created and intended to have some value, especially if it creates a right, then the remedy must be

268 One of the early amendments to Rule 68 replaced the word "evidence" with that of "material" to conform to the early case law which held that the rule was not limited to exculpatory information that was admissible as evidence. *See* Prosecutor v. Krnojelac, Case No. IT-97-25, Decision on Motion by Prosecution to Modify Order for Compliance with Rule 68, ¶ 11 (Nov. 1, 1999).

269 Prosecutor v. Brdjanin, Case No. IT-99-36, Decision on Motion by Momir Talic for Disclosure of Evidence, ¶ 7 (June 27, 2000).

270 *See* Prosecutor v. Delalic, Case No. IT-96-21, Decision on the Request of the Accused Hazim Delic Pursuant to Rule 68 for Exculpatory Information, ¶ 13 (June 24, 1997).

271 *See* Prosecutor v. Tadic, Case No. IT-94-1, Decision on Motion for Review, ¶ 20 (July 30, 2002).

272 *See* Prosecutor v. Blaskic, Case No. IT-95-14-PT, Decision on the Production of Discovery Materials, ¶ 47 (Jan. 27, 1997).

273 *See supra* text accompanying note 91.

> an effective one. The principle of a fair trial has the following implications with respect to the meaning of Rule 68. *First*, the principle of a fair trial requires that disclosure of exculpatory material be made in sufficient time. Thus, if the Prosecution has the statement of a person which contains exculpatory evidence and does not intend itself to call that person as a witness, disclosure as soon as practicably possible is a must to ensure that the Defence has an opportunity to subpoena that witness or to use that exculpatory material during the cross–examination of witnesses whom the Prosecution intends to call.[274]

The ICTY case law has also implicitly rejected the Supreme Court's insistence in the *Brady* doctrine that the principle of exculpatory disclosure applies narrowly and exclusively to its impact on the trial proceeding itself. The tribunal has treated it as self-evident that the entire prosecution and not just the trial itself must satisfy the standards of fairness.[275] Therefore, the cases have held that information which would not itself be admissible at trial is subject to Rule 68 disclosure.[276] They have also held that even information which was not available to the prosecution at trial but surfaced only during the pendency of an appeal is subject to the fair trial principle of Rule 68.[277] The tribunal, as part of its ongoing efforts to separate general discovery from exculpatory disclosure, has also explicitly set a higher standard for the very form and detail of disclosure required in the case of exculpatory material.[278]

274 Prosecutor v. Brdjanin, Case No. IT-99-36, Decision on Motion for Relief from Rule 68 Violations by the Prosecutor and for Sanctions to be Imposed Pursuant to Rule 68bis and Motion for Adjournment while Matters Affecting Justice and a Fair Trial can be Resolved, ¶ 26 (Oct. 30, 2002).

275 "When one looks at the jurisprudence of the ICTY and ICTR one notices that the Chambers are generally aware of their obligation to ensure the fairness of the trial as a whole." Goran Sluiter, *International Criminal Proceedings and the Protection of Human Rights*, 37 NEW ENG. L. REV. 935, 943 (2003).

276 "The expression 'evidence' is intended to include any material which may put the accused on notice that material exists which may assist him in his defence, and it is not limited to material which is itself admissible in evidence." Prosecutor v. Krnojelac, Case No. IT-97-25, Decision on Motion by Prosecution to Modify Order for Compliance with Rule 68, ¶ 11 (Nov. 1, 1999).

277 "[T]he Appeals Chamber also believes that the Prosecution is under a *legal* obligation to continually disclose exculpatory evidence under Rule 68 in proceedings before the Appeals Chamber. The application of Rule 68 is not confined to the trial process." Prosecutor v. Blaskic, Case. No. IT-95-14, Decision on the Appellant's Motions for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, ¶ 32 (Sept. 26, 2000).

278 *See* Prosecutor v. Blaskic, Case. No. IT-95-14, Decision on the Defence Motion for Reconsideration of the Ruling to Exclude from Evidence Authentic and Exculpatory Documentary Evidence, ¶ 15 (Jan. 30, 1998).

B. The International Criminal Court

The International Criminal Court (ICC), established by the Rome Statute of 1998,[279] is the first permanent court of international criminal justice. It represents the fulfillment of an ambition of the international community that began shortly after the First World War and has persisted in fits and starts ever since.[280] It would be difficult to overstate the significance of the court, both immediate and extended, to the development of a universal protocol of criminal justice. "Nor can the exemplary role of international courts be gainsaid; their treatment of the accused provides a model to domestic justice systems throughout the world in the respect of fundamental human rights."[281] The creation of the ICC has produced a merger of the longstanding conventions of human rights with the operational practice of a court of first instance. It is a seminal development of first magnitude. "The Rome Statute takes the form of an international treaty, but has the status of a constitution."[282]

The early drafts of the Rome Treaty, written in the immediate post-*Ward* era, included the first appearance in international law of a rule of exculpatory disclosure. The initial draft of the statute, issued in May of 1993, did not contain such a rule.[283] However, several months later the first revision of the draft did contain a rule combining the disclosure of exculpatory material with that of general discovery by the defendant: "[a]ll incriminating evidence on which the prosecution intends to rely and all exculpatory evidence available to the prosecution prior to the commencement of the trial shall be made available to the defence as soon as possible and in reasonable time to prepare for the defence."[284]

A year later, in July 1994, there was another major reworking of the draft statute. At this point the rule of exculpatory disclosure was separated from the rule of general discovery and given its own independent listing. "Exculpatory evidence that becomes available to the Procuracy prior to the conclusion of the trial shall be made available to the defence. In case of

279 Rome Statute of the International Criminal Court art. 1, July 17, 1998, 37 I.L.M. 999 [hereinafter Rome Statute].

280 *See* M. CHERIF BASSIOUNI, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 3 (1998).

281 William A. Schabas, *Article 67: Rights of the Accused*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 846 (Otto Triffterer ed., 1999).

282 Leila Nadya Sadat, *The Legacy of the ICTY: The International Criminal Court*, 37 NEW ENG. L. REV. 1073, 1077 (2003).

283 *See* U.N. Int'l Law Comm'n, *Draft Statute for an International Criminal Court, Eleventh Report of the Draft Code of Crimes against the Peace and Security of Mankind*, U.N. Doc. A/CN.4/449 (March 25, 1993) (*prepared by* Doudou Thiam).

284 U.N. Int'l Law Comm'n, *Report of the Working Group on a Draft Statute for an International Criminal Court*, art. 44, ¶ 3, July 16, 1993, 33 I.L.M. 253, 281 (1993).

doubt as to the application of this paragraph or as to the admissibility of the evidence, the Trial Chamber shall decide."[285]

As will be recalled, shortly after the first appearance of this rule in the drafts of the Rome Statute, the ICTY in early 1994 adopted its own Rule 68. Thereafter the experience of the tribunal with Rule 68 was reflected in the evolving revisions to the ICC rule. Finally, the rule emerged as Section 2 of Article 67: Rights of the Accused.

> In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.[286]

Thus it is that international law, following the disclosure scandals in England and the extended litigation at the ICTY, now has a constitutional law of exculpatory disclosure that will, over time, likely become the exemplar of the standard for fair and equitable disclosure not only in the international arena but also in national jurisdictions both common law and civil.

IV. Conclusion

The *Brady* doctrine, as developed by the Supreme Court, has never lived up to its billing. It begins with the right idea—fundamental fairness requires state disclosure of exculpatory information to the criminal defendant—but then immediately cabins and compromises that idea. The only consistent and compelling explanation for the unprincipled reductions of the doctrine is an unreconstructed fear of the hobgoblins of an earlier era regarding the dangers of disclosure to overly zealous defense counsel. *Brady* is now best understood as a rule of prosecutorial privilege rather than a rule of disclosure. The doctrine at present is an ill-supported house of cards which will likely not even be able to sustain itself against the mounting challenges developing within the lower courts as a result of increasing revelations of prosecutorial foul play and abuse regarding such nondisclosures. But there is now a new dimension of criticism and pressure to reform which has developed outside our legal system. The "decade of disclosure"[287] in foreign and international law has resulted in a *Brady* doctrine which now stands very much alone in the world community regarding the essential commands of

285 U.N. Int'l Law Comm'n, *Report of the Commission to the General Assembly on the Work of its Forty-Sixth Session*, art. 41(2), U.N. Doc. A/49/10 (May 2–July 22, 1994), *reprinted in* [1994] 2(2) Y.B. Int'l L. Comm'n 56, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2).

286 Rome Statute, *supra* note 279, art. 67, ¶ 2.

287 *See* Epp, *supra* note 14.

human rights and fundamental fairness. The Supreme Court should simply abandon the looking-glass logic behind its frustrated attempts to limit the doctrine to the post-trial setting and recognize instead that due process must begin when the process itself begins.