Florida Law Review

Volume 22 | Issue 4 Article 1

May 1970

Prosecutional Disclosure: In Camera, and Beyond

Woodie A. Liles

John C. Patterson

UNIVERSITY OF FLORIDA LAW REVIEW

VOL. XXII SPRING-SUMMER 1970 NO. 4

PROSECUTORIAL DISCLOSURE: *IN CAMERA* AND BEYOND

WOODIE A. LILES* AND JOHN C. PATTERSON, JR.**

Criminal discovery, a long-neglected stepchild of American jurisprudence, has recently begun to receive prominent attention from commentators, courts, and practitioners.[1] Responding to varying pressures and demands to eliminate surprise from criminal proceedings, and in line with a growing movement to rationalize the criminal processes, legislatures and courts have promulgated rules of criminal discovery.[2] The primary concern of this article, however, is the due process clause of the fourteenth amendment as a means for an accused individual to discover prosecutorial evidence or information helpful to his cause.

Beginning in 1935 with *Mooney v. Holohan*,[3] the federal courts,[4] aided by some states' decisions,[5] have developed a body of law relating to discovery under the due process clause. This culminated in *Brady v. Maryland*[6] where the Supreme Court held that "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." Although *Brady* remained relatively dormant for some years, both state and federal courts are now grappling with the many problems inherent in the decision. This article will explore the history of fourteenth amendment discovery and analyze its present and future role in criminal law. Hopefully, the field of criminal discovery will become more than "a morass of unreported trial court rulings, shrouded in intermittent appellate fog."[7]

* B.A. 1950; J.D. 1953, University of Florida; Judge, Second District Court of Appeal (Florida).

** B.A. 1966, Duke University; J.D. 1969, University of Florida.

1. *See, e.g.*, Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth*, 1963 WASH. U.L.Q. 279; Datz, *Discovery in Criminal Procedure*, 16 U. FLA. L. REV. 163 (1963); Garber, *The Growth of Criminal Discovery*, 1 CRIM. L.Q. 3 (1962); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960); Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228 (1964).

2. *E.g.*, Jencks Act, 18 U.S.C §3500 (1964); FED R. CRIM. P. 16; FLA. R. CRIM. P. 1.220. Criminal discovery did not exist at common law. Rex v. Holland, 100 Eng. Rep. 1248 (K.B. 1792).

3. 294 U.S. 103 (1935). *See* text accompanying notes 30-31 *infra*.

4. *See* text accompanying notes 28-57 *infra*.

5. *E.g.*, Mears v. State, 422 P.2d 230 (Nev. 1967); People v. Savvides, 136 N.E.2d 853, 154 N.Y.S.2d 885 (1956); Annot., 7 A.L.R.3d 31 (1966).

6. 373 U.S. 83, 87 (1963).

7. Margolin, *Toward Effective Criminal Discovery in California—A Practitioner's View*,

THE CONSTITUTIONAL FRAMEWORK

Although the due process clause of the fourteenth amendment has been the touchstone for establishing the duty of prosecutorial disclosure and a correlative right of defense discovery, some confusion has been generated by two separate lines of cases dealing with the constitutional issues of fourteenth amendment discovery. The first concerns the law generated by *Jencks v. United States*;[8] the second, problems of discovery of minutes of grand jury proceedings under the Federal Rules of Criminal Procedure. Although policy considerations may overlap, the legal foundations of these two areas and due process disclosure are so dissimilar that attempts to intermingle them would not be appropriate.

Jencks concerned the denial by a federal district court of defendant's request to inspect FBI reports relating to trial testimony given by government witnesses. The United States Supreme Court reversed, refusing to uphold the denial simply because a preliminary foundation of inconsistency between the contents of the reports and the testimony of the witnesses was not laid. The Court reasoned that requiring an accused first to show a conflict between such reports and trial testimony would actually deny him evidence material and relevant to his defense. It held the evidence sought need only appear relvant, competent, and outside of any exclusionary rule.[9]

Considerable congressional furor, based on a belief that such disclosure would endanger national security in cases dealing with subversive organizations such as the Communist Party, followed this decision. The result was the passage of the Jencks Act,[10] which significantly curtailed the operation of *Jencks* in several respects. Discovery allowed under *Jencks* was postponed until the government's witness had testified on direct examinations[11] and the practice of submitting government documents to the trial judge for a determination of relevancy and materiality, disapproved by the Supreme Court, was explicitly provided for in the act.[12] Furthermore, if the Government exercised its option to withhold the reports in the public interest, Congress left the matter of dismissal to the discretion of the trial judge after striking from the record the testimony of the appropriate witness,[13] instead of requiring the criminal action to be dismissed.

When called upon to test the Jencks Act, the Court sidestepped making the matter a constitutional issue under the confrontation clause of the sixth amendment.[14] *Palermo v. United States*[15] held *Jencks* to be an exercise of

---

56 CALIF. L. REV. 1040, 1059 (1968).

8. 353 U.S. 657 (1957).

9. *Id.* at 667.

10. 18 U.S.C. §3500 (1964).

11. *Id.* §3500 (a).

12. *Id.* §3500 (b).

13. *Id.* §3500 (d).

14. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

15. 360 U.S. 343, 345-46 (1959).

the Court's power, in the absence of statutory provision, to prescribe procedures for the administration of justice in the federal courts. Carrying *Palermo* to its logical conclusion, *Scales v. United States*[16] stated "[t]hat the procedure set forth in the statute does not violate the Constitution and that the procedure required by the decision of this Court in *Jencks* was not required by the Constitution was assumed by us in *Palermo*. . . ."[17] As a result, the legislation and litigation spawned by *Jencks* demonstrate only that the Court and Congress have differing views as to how this aspect of federal justice should be administered.

In the federal system, disclosure of grand jury minutes has been held to be governed exclusively by Federal Rule of Criminal Procedure 6(e),[18] which gives a trial judge authority to divulge matters other than deliberations and the vote of a juror when a *particularized* need is shown.[19] In *Dennis v. United States*[20] the Court recognized the " 'long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts' "[21] and stressed that when disclosure is permitted, it is to be done " 'discretely and limitedly.' "[22] However, these policies were tempered when the Court stated:[23]

> In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations.

It was also noted that when the functions of the grand jury are ended, disclosure is proper if the ends of justice demand it.[24]

While these cases involve no constitutional issue and are limited in origin to Federal Rule of Criminal Procedure 6(e), Justice Fortas, writing for the Court in *Dennis,* did call for broadened criminal discovery by tying the policy behind disclosure in this area to that impelling the Jencks Act. "These developments are entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice."[25] Thus, the *Jencks* case, the Jencks Act, and cases interpreting rule 6 (e) are useful in indicating the Court's approach to the area of discovery under the due process clause.

---

16. 367 U.S. 203 (1961).
17. *Id.* at 257-58.
18. Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 398-99 (1959).
19. United States v. Proctor & Gamble Co., 356 U.S. 677, 683 (1958).
20. 384 U.S. 855 (1966). *See also* State v. Williams, 227 So. 2d 253, 256 (2d D.C.A. Fla. 1969).
21. Dennis v. United States, 384 U.S. 855, 869 (1966).
22. *Id.*
23. *Id.* at 873 (footnotes omitted).
24. *Id.* at 870. A provision similar to this is found in FLA. STAT. §905.27 (1967), which was construed in State v. Drayton, 226 So. 2d 469, 474 (2d D.C.A. Fla. 1969), to permit *in camera* inspection of grand jury testimony in certain circumstances.
25. Dennis v. United States, 384 U.S. 855, 870 (1966).

The distinction between rules and statutes governing discovery and the more pervasive "discovery" rights under the fourteenth amendment requires that the term "discovery" be applied to the former and "disclosure" to the latter. As one commentator has stated:[26]

> On the one hand, discovery emphasizes the right of the defense to obtain access to evidence necessary to prepare its own case; on the other, disclosure stresses the duty of the prosecution to make available to the accused the evidence and testimony without which an adequate defense would be virtually impossible.

The difference between the two terms is only one of emphasis, as the correlative of a right of discovery is a duty to disclose, and the correlative of a duty to disclose is a right to discover the matter to which the duty attaches. Moreover, even this difference of emphasis tends to be lost in some recent decisions.[27] Hopefully, however, the use of discovery and disclosure in the above manner will serve to avoid confusing their distinctive backgrounds.

THE DEVELOPMENT OF FOURTEENTH AMENDMENT DISCLOSURE

An assessment of the current state of the law and an attempt to predict its future trends must begin with an examination of the past, stressing the areas of increased awareness that courts have noted in developing a new principle of law from the wellspring of the fourteenth amendment. Only in this manner can *Brady v. Maryland*[28] be seen in its proper perspective. *Brady* marks the maturation of a previously developing rule, and henceforth, legal concern shifts from development to administration.

Justice Douglas remarked in *Brady*[29] that the duty of prosecutorial disclosure under the fourteenth amendment is but an extension of *Mooney v. Holohan*.[30] In *Mooney* defendant alleged his fourteenth amendment rights had been violated in that his conviction was based solely on perjured testimony knowingly used by the prosecuting authorities, and that these authorities deliberately suppressed evidence favorable to him. Although the petition was dismissed for failure to exhaust state remedies, the Court had no difficulty in deciding the substantive issue:[31]

> [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

---

26. Note, *Discovery and Disclosure: Dual Aspects of the Prosecutor's Role in Criminal Procedure*, 34 GEO. WASH. L. REV. 92, 93 (1965).

27. *See, e.g.*, Williams v. Dutton, 400 F.2d 797 (5th Cir. 1968), *cert. denied*, 393 U.S. 1105 (1969).

28. 373 U.S. 83 (1963).

29. *Id.* at 86.

30. 294 U.S. 103 (1935).

31. *Id.* at 112-13.

> court and jury by the presentation of testimony known to be perjured. Such a contrivance . . . is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment.

Any lingering uncertainty concerning the deliberate withholding of evidence refuting the state's evidence was silenced in *Pyle v. Kansas*.[32] In a petition for writ of habeas corpus, petitioner alleged that his imprisonment resulted from perjured testimony knowingly used by the prosecuting authorities and from the deliberate suppression by those same authorities of evidence favorable to him. The allegations were held sufficient to charge a deprivation of rights under the Federal Constitution. This ruling was followed in *United States ex rel. Montgomery v. Ragen*,[33] which held that the presentation of false evidence by the prosecutor and corresponding suppression of evidence favorable to the defendant violated the fourteenth amendment.

The tone for another advance in the development of this area of law was set in the rather peculiar case of *Griffin v. United States*.[34] The prosecutor in that case was aware that a morgue attendant had found an open penknife in the victim's pocket, but did not inform the defense. In remanding the case at an earlier stage,[35] the Supreme Court had stated that if the court of appeals were to declare the controverted evidence admissible, it would have to consider whether it would be too dogmatic for a court to conclude that a jury would not have attached significance to the evidence had it been introduced. The court of appeals held the evidence admissible and agreed that the court could not predict the jury's evaluation of the evidence. The court emphasized "the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense."[36]

Griffin amounted to a departure from prior cases in that it was not at all certain that the unrevealed evidence would exonerate the accused.[37] This principle was reaffirmed by the Third Circuit in *United States ex rel. Almeida v. Baldi*.[38] The prosecution produced evidence tending to prove that Almeida fired the shot that killed a policeman in a felony-murder situation, while suppressing evidence that another had committed the actual slaying. The jury returned a verdict of guilty of first degree murder without a recommendation of mercy. The court concluded that because the suppressed evidence may have induced the jury to return a recommendation of mercy, due process had been denied. In reaching the same conclusion, the Third Circuit stated

---

32. 317 U.S. 213 (1942).
33. 86 F. Supp. 382 (N.D. Ill. 1949).
34. 183 F.2d 990 (D.C. Cir. 1950).
35. Griffin v. United States, 336 U.S. 704 (1949).
36. 183 F.2d 990, 993 (D.C. Cir. 1950).
37. State cases following this trend include Fugate v. State, 169 Neb. 434, 99 N.W.2d 874 (1959); People v. Savvides, 136 N.E.2d 853, 154 N.Y.S.2d 885 (1956); People v. Fisher, 23 Misc. 2d 391, 192 N.Y.S.2d 741 (Ct. Gen. Sess. N.Y. County 1958).
38. 195 F.2d 815 (3d Cir. 1952), *cert. denied*, 345 U.S. 904 (1953).

in *United States ex rel. Thompson v. Dye*,[39] that the applicable principle of law was that "[t]he suppression of evidence may be a denial of due process when it is vital evidence, material to the issues of guilt or penalty."[40] The court concluded that since defendant's lack of sobriety was a central part of the defense theory, prosecutorial knowledge of the arresting officer's statement that the defendant was under the influence of alcohol at the time of arrest was vital to the defense.

Thompson is also significant in representing, along with the advisory language of *Griffin v. United States*,[41] a shift from concern with the reprehensible conduct of prosecuting authorities as a fraud on the courts (evidence in the *Mooney* decision)[42] to the harm occasioned by such conduct to the defendant. Although the holding of *Thompson* was couched in terms of suppression, there was no active attempt to conceal the officer's statement, which indicated the inebriation of the defendant.[43] *People v. Savvides*,[44] a frequently cited New York opinion, dealt with a situation in which a state witness falsely testified that there was no agreement he would receive lenient treatment in return for his testimony. The state permitted this to pass unchallenged and uncorrected. Holding this conduct to have violated the accused's due process rights, the court stated: "That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."[45] Prejudice to the defendant was also noted in *Alcorta v. Texas*,[46] although the Supreme Court cited *Mooney v. Holohan*[47] and *Pyle v. Kansas*[48] in stating the guiding principles for the decision.

This was firmly established in the Court's decision two years later in *Napue v. Illinois*.[49] The principal state witness had testified that he had received no promise of consideration in return for his testimony. The state attorney knew this to be false but did nothing to correct it. Upon certiorari, the Court reversed a lower court judgment denying defendant's petition to set aside the conviction, stating that a conviction obtained through the use of false evidence, known to be false by representatives of the state, must fall under the fourteenth amendment. The same result is obtained when the state, although not soliciting false evidence, allows it to go uncorrected.[50]

---

39. 221 F.2d 763 (3d Cir. 1955), *cert. denied*, 350 U.S. 875 (1955).
40. *Id.* at 765.
41. *See* text accompanying notes 36-38 *supra*.
42. Mooney v. Holohan, 294 U.S. 103, 112-13 (1935).
43. United States *ex rel.* Thompson v. Dye, 221 F.2d 763, 768 (3d Cir. 1955), *cert. denied*, 350 U.S. 875 (1955).
44. 136 N.E.2d 853, 154 N.Y.S.2d 885 (1956).
45. *Id.* at 855, N.Y.S.2d at 887.
46. 355 U.S. 28 (1957).
47. 294 U.S. 103 (1935).
48. 317 U.S. 213 (1942).
49. 360 U.S. 264 (1959).
50. "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes to the credibility of the witness. The

A new concept was inserted into this line of cases when "negligent suppression," or passive nondisclosure, was introduced. In *United States v. Consolidated Laundries Corp.*,[51] defendant appealed a conviction for an alleged Sherman Act violation, arguing that he was denied due process by way of the Government's failure to divulge the contents of a certain government file. No contention was made that the government's suppression was willful. Rather than deciding whether this negligent suppression violated due process, the court called for a new trial on the basis that denial of a new trial would be inconsistent with the correct administration of criminal justice in the federal courts. The Second Circuit Court of Appeals encountered the issue directly in *Kyle v. United States*.[52] In *Kyle,* defendant based his claim on the government's alleged suppression or loss of certain correspondence that had been in its possession before trial but that could not be located until a time subsequent to the trial. On appeal from a denial of the motion without an evidentiary hearing, the court reversed and remanded the case for a hearing on whether the negligent suppression constituted harmless or reversible error.

Application of Kapatos[53] summarizes the pre-*Brady* line of cases, as well as adding a prophetic policy justification for the expansion of the prosecution's duty to disclose "exculpatory" evidence. Petitioning the court for a writ of habeas corpus, the petitioner alleged, *inter alia,* that the prosecution's failure to disclose the existence of witnesses who saw two persons, neither of whom was the petitioner, running from the scene of the crime constituted a denial of due process. The court acknowledged that "knowing use of perjured testimony, failure to correct false testimony, and failure to disclose evidence that would have completely exonerated the accused, are clear examples of conduct constituting a denial of due process,"[54] although not exhausting the situations to which the guarantee of due process extends. The criteria rendering conduct in this area violative of due process were as yet undefined.[55] While cases often arise from a failure to correct false evidence, the court noted the developing emphasis on the state's failure to disclose evidence "that might have had substantial significance for the defense."[56] The policy expounded for this development was:[57]

---

jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of a witness in testifying falsely that a defendant's life or liberty may depend." *Id.* at 269. *See also* Smallwood v. Warden, 205 F. Supp. 325 (D. Md. 1962), holding the motive of the state's attorney to be immaterial as to suppressing or withholding evidence if it is likely to have affected the result of the trial.

51. 291 F.2d 563 (2d Cir. 1961).

52. 297 F.2d 507 (2d Cir. 1961), *cert. denied,* 377 U.S. 909 (1964).

53. 208 F. Supp. 883 (S.D.N.Y. 1962), *approved in* Jackson v. Wainwright, 390 F.2d 288, 298 (5th Cir. 1968).

54. *Id.* at 887.

55. *Id.*

56. *Id.*

57. *Id.* at 888. *See also* Ashley v. Texas, 319 F.2d 80 (5th Cir. 1963), *cert. denied,* 375 U.S. 931 (1963), holding that a district attorney's failure to disclose to the defense the

> The purpose of a trial is as much the acquittal of an innocent person as it is the conviction of a guilty one. The average accused usually does not have the manpower or resources available to the state in its investigation of the crime. Nor does he have access to all the evidence, much of which has usually been removed or obliterated by the time that he learns that he is to be tried for the crime. In view of this disparity between the investigating powers of the state and the defendant, I do not think it imposes too onerous a burden on the state to require it to disclose the existence of a [significant] witness. . . . At the very least, the trial judge should have been made aware of this evidence, and a ruling should have been requested by the prosecutor with respect to his duty in the premises.

Brady AND BEYOND

The Supreme Court gave its sanction to these developments in 1963 in *Brady v. Maryland*.[58] Counsel for one of two codefendants in a murder case had asked prior to trial to examine the extra-judicial statements of the other defendant, but a confession to the actual killing was withheld by the prosecuting authorities. Brady's counsel admitted his client's guilt and asked only that he be spared capital punishment. Both codefendants were found guilty and sentenced to death. The Maryland Court of Appeals held this failure to disclose denied Brady due process and remanded the case for retrial on the question of punishment only. On certiorari, the Court affirmed in an opinion by Justice Douglas. After discussing approvingly prior judicial development of the subject, the Court stated:[59]

> 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.

Further:[60]

> 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. . . . A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps to 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. . . ."

---

existence, known to him, of opinions of a psychiatrist and psychologist engaged by the state that the defendant was legally incompetent, amounted to a denial of due process. This case was described in 77 HARV. L. REV. 1528, 1529 (1964), as "[t]he first court of appeals decision based squarely on an affirmative duty to disclose information supporting possible lines of defense."

58. 373 U.S. 83 (1963).

59. *Id.* at 87.

60. *Id.* at 87-88 (footnotes omitted).

Brady focuses the deprivation of due process squarely upon the defendant, since the quality of the conduct of the prosecution is no longer a consideration, and thus implicitly approves of the cases holding "negligent suppression" or passive disclosure to be a violation of due process. Rather than a radical innovation, this portion of the Court's holding is more in the way of a culmination of prior judicial developments.[61] Underlying a deprivation of due process is an unfair trial to an accused, with the implicit premise that a defendant deprived of sufficient evidence to present an adequate defense is deprived of his right to due process.[62]

Brady marked a subtle shift from the prior cases. Previously, courts had tended to develop this area of law, not by flatly stated principles, but through case-by-case determinations, reflecting the feelings expressed in Judge Hastie's concurring opinion in *United States ex rel. Thompson v. Dye*:[63] "[T]his is an area in which the question of fundamental fairness depends so much upon the facts of the particular case that a precise rule cannot be devised." But *Brady* furnished courts and attorneys with a rule, albeit imprecise, and henceforth this rule, in addition to a court's notions of fundamental fairness, would be the starting point in determining the prosecution's duties of disclosure.

Perhaps inevitably, the *Brady* decision left unanswered many questions concerning its scope and administration. Should it be read as giving a criminal defendant a pretrial right to the disclosure of favorable evidence? Would all abridgements of a defendant's rights under *Brady* constitute reversible error, or would some be considered harmless? Does the admissibility of the evidence limit the duty to disclose, or does *Brady* apply to all relevant evidence? And who is to make the determination of "materiality" and "favorableness" — the prosecution authorities, the trial judge, or the defense? Need the defendant establish some predicate for his "request"? The Supreme Court left these and other issues unanswered in *Giles v. Maryland*,[64] where a "plurality" of three justices[65] found it unnecessary and inappropriate to examine whether the prosecutor's constitutional duty to disclose extends to all evidence

61. *See* text accompanying notes 28-57 *supra*.

62. Note, *The Prosecutor's Constitutional Duty To Reveal Evidence to the Defense*, 74 YALE L.J. 136, 142-43 (1964).

63. 221 F.2d 763, 769 (3d Cir. 1955), *cert. denied*, 350 U.S. 875 (1955).

64. 386 U.S. 66 (1967).

65. Justice Brennan authored the plurality opinion, joined by Chief Justice Warren and Justice Douglas. Justice White concurred in the judgment. However, he differed from the plurality in finding no violation of the rule established in Napue v. Illinois, 360 U.S. 264 (1959), that a conviction must fall under the fourteenth amendment when the prosecution, although not soliciting false evidence, allows it to go uncorrected when it appears, even though the testimony may be relevant only to the credibility of a witness. Justice Fortas concurred on the basis that the issue posed should be resolved in favor of the defendant. Justices Harlan, Black, Clark, and Stewart dissented. In their opinion, the holding of *Brady* was dictum, and such issues should be left for legislative determination. 386 U.S. at 116-19 (1967). Interestingly, Justice White thought the entire due process discussion of *Brady* to be "wholly advisory," Brady v. Maryland, 373 U.S. 83, at 92 (1963) indicating that he would not cast a broad rule of criminal discovery in constitutional form. Thus, five of the nine members of the Court that decided *Brady* have considered its due process holding to be dicta.

admissible and useful to the defense. Only Justice Fortas was willing to decide the principal issue.[66] Thus, the task of exploring the dimensions of *Brady* has remained for the lower federal and state courts. In light of their predictably varied responses, future discussion will be framed in terms of the extent of prosecutorial evidence affected; when rights and duties take effect; and procedures for effecting *Brady*.

Prosecutorial Evidence: The Open File and Other Problems

Under the *Brady* doctrine, evidence within its purview, such as a statement of an accused to the police,[67] cannot be withheld by any state official. To the contrary, the state has the affirmative duty to disclose favorable evidence even though the prosecuting authorities may be completely unmindful of the suppression.[68] On the other hand, the state's duty to disclose evidence favorable to the defense is not unlimited. One restriction was stated in *Link v. United States*,[69] where the court held that withholding evidence useful only for impeaching a witness or attacking his credibility was not a violation of due process under *Brady*. An exception occurs when this evidence is of such inherent significance that its suppression would represent fundamental unfairness.[70] In addition, work product material has been held to be beyond *Brady*'s scope,[71] although such a statement is unnecessarily broad. Since work product is not a constitutional doctrine, any conflict between *Brady* and a work product rule should be resolved in favor of the former.[72]

However, limitations on disclosure are often couched in more general terms. The defendant in *United States v. Jordan*[73] asserted entitlement to obtain from the Government (under Federal Rules of Criminal Procedure 16(b) and *Brady v. Maryland*) all materials that might be useful in the preparation of a defense, including the names and addresses of witnesses whose statements appeared to aid neither the prosecution nor the defense and witnesses who gave no statements at all. The court denied defendant's demand:[74]

---

66. Giles v. Maryland, 386 U.S. 66, 96 (1967).

67. Butler v. Maroney, 319 F.2d 622 (3d Cir. 1963).

68. Barbee v. Warden, 331 F.2d 842, 846 (4th Cir. 1964).

69. 352 F.2d 207, 212 (8th Cir. 1965).

70. *See* Williams v .Dutton, 400 F.2d 797, 800 (5th Cir. 1968), *cert. denied*, 393 U.S. 1105 (1969). *But see* Loraine v. United States, 396 F.2d 335 (9th Cir. 1968), *cert. denied*, 393 U.S. 933 (1968), holding that evidence within the *Brady* rule may be material within its meaning even though the evidence goes only to credibility of a witness. *See also* Coleman v. Maxwell, 273 F. Supp. 275, 280 (S.D. Ohio 1967), *cert. denied*, 393 U.S. 1058 (1969), holding that evidence of impeachment value is not included under *Brady* where it is not material to the guilt of the accused.

71. United States v. Westmoreland, 41 F.R.D. 419 (S.D. Ind. 1967). It is unclear what the court meant by "work product," since it suggested that *Brady* may require inspection of "government-investigated reports germane and pertinent to the case." *Id.* at 420.

72. For an exhaustive treatment of this problem *see* State v. Gillespie, 227 So. 2d 550 (2d D.C.A. Fla. 1969).

73. 399 F.2d 610 (2d Cir. 1968), *cert. denied*, 393 U.S. 1005 (1968).

74. *Id.* at 615. *See also* North American Rockwell Corp. v. N.L.R.B., 389 F.2d 866, 873

> *Brady v. Maryland* does not require the government to disclose the myriad immaterial statements and names and addresses which an extended investigation is bound to produce.

A motion for the production of all favorable or exculpatory evidence in *United States v. Gleason*[75] was considered tantamount to asking for an unqualified order that the Government take everything from its files the defendant may find useful. The court reasoned that *Brady* concerned "suppression of evidence,"[76] a term that denotes exclusive possession and control. Thus, if the defendant could personally obtain favorable or exculpatory material, *Brady* would not require its disclosure by the prosecution if the defendant failed to make the required exertion.[77] This rationale has also been used in a holding that disclosure of evidence in the possession of the prosecution should not be compelled when it is reasonably available under applicable rules of criminal procedure.[78]

A different rationale, reaching an opposite conclusion, was employed in *Levin v. Katzenbach*.[79] Appellant alleged that the Government failed to disclose two pieces of evidence, including a statement of a government witness that, in the context of the case, might have led the jury to entertain a reasonable doubt as to the appellant's guilt. The Government contended that because the statement could have been discovered by the appellant, the government's failure to disclose it did not violate appellant's rights. A majority of the court of appeals did not agree, holding that:[80]

> [A]ppellant's claim for relief based upon a breach of the prosecutor's duty of disclosure challenges the fairness, and therefore the validity, of the proceedings, and relief, either on a motion for a new trial or for habeas corpus, may not depend on whether more able, diligent or

---

(10th Cir. 1968): "*Brady* did not declare that a prosecutor must on demand comb his files for bits and pieces of evidence which conceivably could be favorable for the defense."

75. 265 F. Supp. 880 (S.D.N.Y. 1967).

76. The court's analysis may be criticized in that, although "suppression" has continued in use as a signal word in due process disclosure, cases even before *Brady* considerably diminished the importance of adhering to the strict meaning of the term. *See, e.g.*, Ashley v. Texas, 319 F.2d 80 (5th Cir. 1963), *cert. denied*, 375 U.S. 931 (1963); United States *ex rel.* Thompson v. Dye, 221 F.2d 763 (3d Cir. 1955), *cert. denied*, 350 U.S. 875 (1955).

77. *But see* Ashley v. Texas, 319 F.2d 80 (5th Cir. 1963), *cert. denied*, 375 U.S. 931 (1963), holding that failure of a district attorney to disclose the existence of opinions of a psychiatrist and psychologist that defendant was legally incompetent injected such fundamental unfairness into the trial as to constitute a denial of due process. Judge DeVane, dissenting, pointed out that defense counsel must have known of the examinations of his client; and in fact he engaged his own psychiatrist and still did not assert mental incapacity. *Id.* at 85. Thus, Judge DeVane would refuse to substitute his judgment for that of the defense attorney. *See also* Levin v. Katzenbach, 363 F.2d 287, 292 (D.C. Cir. 1966) (dissenting opinion).

78. State v. Gillespie, 227 So. 2d 550, 555 (2d D.C.A. Fla. 1969); State v. Williams, 227 So. 2d 253, 257 (2d D.C.A. Fla. 1969). *See also* Corbett v. Patterson, 272 F. Supp. 602, 609 (D. Colo. 1967).

79. 363 F.2d 287 (D.C. Cir. 1966), *noted in* 42 N.Y.U.L. REV. 764 (1967).

80. Levin v. Katzenbach, 363 F.2d 287, 291 (D.C. Cir. 1966).

> fortunate counsel might possibly have come upon the evidence on his own. A criminal trial is not a game of wits between opposing counsel, cleverer party, or the one with the greater resources, to be the "winner."

The dissenting opinion[81] by Judge (now Chief Justice) Burger criticized the rule announced by the majority as "a thinly disguised holding that defense counsel gave Appellant ineffective assistance,"[82] which placed the advantage in a criminal trial with the accused. By encouraging slovenly preparation for trial, the majority opinion causes in *fact* what it denounces in *theory* — criminal trials as games of wits.[83]

Although the holding in *Levin* has been cited favorably in subsequent cases,[84] it is doubtful that the Supreme Court would hold the controversial portion of the majority opinion in *Levin* to reach constitutional dimensions. The Court has yet to give any indication of how far *Brady* should reach in this direction. Since four of the eight members of the presently constituted Court, aside from Chief Justice Burger, have indicated their preference for legislation in this area and regard *Brady* as dicta or wholly advisory,[85] *Levin* will probably remain restricted to the District of Columbia Circuit and those jurisdictions that choose to adopt it.

The Duty To Disclose — Time of Commencement

Consideration of the timing of the state's duty to disclose evidence favorable to the defense, and the defendant's correlative right to obtain such evidence, must begin with the proposition that the underlying principle of due process disclosure is fairness.[86] More explicitly:[87]

> The presumed — and ordinarily well founded — superiority of the prosecution's facilities for fact-gathering constitutes the basis for this duty to disclose exculpatory evidence and for the enforcement of it by setting aside convictions secured in part because of its violation.

Thus, for fairness to be achieved in a criminal trial, the state must disclose evidence gleaned by its superior investigatory resources in a manner such that the defense can use it with maximum effectiveness.[88] While such evidence

---

81. *Id.* at 292 (Burger, J., dissenting).

82. *Id.* at 295.

83. *Id.*

84. United States v. Poole, 379 F.2d 645, 649 (7th Cir. 1967); Imbler v. Craven, 298 F. Supp. 795, 809 (C.D. Cal. 1969).

85. *See* note 65 *supra.*

86. *See* State v. Gillespie, 227 So. 2d 550, 553 (2d D.C.A. Fla. 1969).

87. Levin v. Katzenbach, 363 F.2d 287, 294 (D.C. Cir. 1966) (dissenting opinion). The majority opinion would agree on this point. *Id.* at 290. *See also* Application of Kapatos, 208 F. Supp. 883, 888 (S.D.N.Y. 1962); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960); Note, *supra* note 62, at 143.

88. State v. Gillespie, 227 So. 2d 550, 553 (2d D.C.A. Fla. 1969); State v. Drayton, 226 So. 2d 469, 471 (2d D.C.A. Fla. 1969).

often can be effectively used prior to trial with a maximum of legal economy,[89] it may also be used just as effectively during the course of the trial if continuances are granted the defense for full preparation.[90] Fairness, the touchstone for due process disclosure, is not necessarily affected by the moment in which disclosure is obtained. This is the rationale behind the refusal of courts to hold that the *Brady* rule, and its concomitant rights and duties, applies at any particular time.[91]

Aside from the constitutional rationale, allowing a trial judge discretion as to the time of prosecutorial disclosure has positive administrative results. One of the most frequently discussed and widely acknowledged difficulties in the expanding law of criminal discovery or disclosure is that certain elements would use such procedures to suborn perjury, intimidate or eliminate witnesses, and the like.[92] Thus, provision for protective orders is usually made in rules of criminal discovery.[93] The *Brady* principle applies only to evidence favorable to or exculpatory of the defendant and thus it is unlikely that he would desire to affect a change in such evidence through unscrupulous or illegal means. However, conceivably *Brady* evidence could lead to knowledge of prosecutorial evidence that such a defendant would like to so change. Opportunity for such reprehensible practices to occur can be minimized by postponing the prosecution's duty to disclose until after its presentation of the particular piece of evidence to which the duty applies, or if possible until after the presentation of its case.

However, it is questionable whether a trial judge could deny completely a defendant's constitutional right to favorable prosecutorial evidence, even if good cause could be shown that the defense would use such disclosure to subvert the processes of justice. Unlike rules of criminal procedure, which offer statutory rights that the legislature may restrict at will, *constitutional* rights may not be so easily limited. The standard of appellate review to be applied in considering judicial denials of appropriate motions[94] or prosecutorial failure to disclose under *Brady* is pertinent.[95] If a harmless error doctrine may be applied, it follows that the central concern is still with the over-all fairness of the trial. Thus, a refusal by the prosecution to disclose or refusal of a trial judge to order disclosure of *Brady* evidence would not be unconstitutional if it were not prejudicial to the presentation of defendant's case. Under another view, using a *quid pro quo* concept of fairness, a denial of disclosure would not be necessarily unconstitutional if an approach similar

89. *See* A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL 73-75 (May 1969 Tent. Draft).

90. State v. Drayton, 226 So. 2d 469, 473 (2d D.C.A. Fla. 1969).

91. State v. Gillespie, 227 So. 2d 550, 553 (2d D.C.A. Fla. 1969). *Cf.* Cicenia v. Legay, 357 U.S. 504 (1958). *See generally* Annot., 7 A.L.R.3d 8, 31 (1966).

92. *See, e.g.*, Louisell, *The Theory of Criminal Discovery and the Practice of Criminal Law*, 14 VAND. L. REV. 921, 935-36 (1961).

93. *See, e.g.*, Jencks Act, 18 U.S.C. §3500 (1964); FED. R. CRIM. P. 16(e).

94. *See* text accompanying notes 128-152 *infra*.

95. *Id.*

to that of the Jencks Act were used.[96] For example, under this concept, a refusal of the state to reveal a statement favorable to the defense made by one of the state's witnesses would not require dismissal or reversal if the trial court prevented the prosecution from using the witness. But if a more stringent standard of appellate review is to be applied, and all denials of disclosure under *Brady* are to be considered constitutionally impermissible, then prosecutorial and judicial discretion is limited to the time of disclosure.

Administering *Brady*: The Problem of the Predicate

Since *Brady* did not establish a constitutionally protected right to compel prosecutorial disclosure at any specific time, and since a request or motion is not a *sine qua non* to create a duty on the prosecution's part,[97] then the duty to disclose, absent a request, rests solely with the prosecuting authorities until its exercise may be tested on appeal.[98] However, what problems would arise if a defendant were to request prosecutorial disclosure prior to trial, setting forth circumstances that would persuade a trial judge that the prosecution was in the exclusive possession of favorable evidence? Should an order compelling disclosure be immediately issued, or should it be postponed until trial?

The task of resolving these and other problems presented by the *Brady* rule is as much administrative as legal. All that *Brady* requires is that the disclosure occur so that the accused can effectively utilize the evidence. The situation may be complicated by state law,[99] although the thrust of judicial statements that there is no criminal discovery at common law usually means that there is no *right* to such discovery.[100] The decision whether to sanction formal pretrial discovery through appropriate court orders is ultimately for the trial judge.

---

96. 18 U.S.C. §3500 (1964).

97. United States *ex rel.* Meers v. Wilkins, 326 F.2d 135, 137 (2d Cir. 1964). *But see* United States v. Keogh, 391 F.2d 138 (2d Cir. 1968), where the court recanted to a degree. The defendant in *Keogh* alleged that nondisclosure of certain investigative reports of the Government violated his rights under *Brady*. The court replied that the principle announced there would not help the defendant. "We cannot agree with petitioner that where there has not been deliberate suppression . . . the absence of a request is irrelevant. It serves the valuable office of flagging the importance of the evidence for the defense and thus imposes on the prosecutor a duty to make a careful check on his files. This consideration is of peculiar weight in a case . . . of a very long trial with many witnesses and much documentary evidence." *Id.* at 147.

98. For a full examination of a prosecutor's initial duties under *Brady*, *see* State v. Gillespie, 227 So. 2d 550, 556-57 (2d D.C.A. Fla. 1969).

99. State laws prohibiting pretrial inspection or disclosure would not conflict with the Constitution except in the improbable situation where favorable or exculpatory prosecutorial evidence could only be effectively used if revealed prior to trial. *See* State v. Drayton, 226 So. 2d 469, 475 (2d D.C.A. Fla. 1969); Rezneck, *The New Federal Rules of Criminal Procedure*, 54 Geo. L.J. 1276, 1283 & n.28 (1966); *cf.* Carter, *Suppression of Evidence Favorable to an Accused*, 34 F.R.D. 87, 90 (1964).

100. *E.g.*, State v. Drayton, 226 So. 2d 469, 473-74 (2d D.C.A. Fla. 1969).

lized. Therefore, nonexclusive licensing with the running royalty agreement should be chosen if capital gains are not possible. In this way more protection can be retained by the licensor parent company, and the tax can be spread over the life of the patent or of the royalty agreement.[73] There is no deferral in any of these direct alternatives.

The indirect licensing or outright sales approach can be utilized only when a United States company has assets outside of the country in another related corporation that can be transferred to the Spanish entity. In fact, many American corporations now have research departments in England and Germany, which provide a substantial source of technology for related European companies and even the United States parent.[74] This scheme can be used only by those companies that already have at least some form of existing foreign operations.

Acquisitions of Spanish Going Concerns and Joint-Venture Operations

A favorite alternative of many foreign investors is to acquire an existing Spanish company rather than form a new one. The advantages are primarily related to the "going concern" factor, which is especially important in operations outside the home territory. This form of operation smooths the transition into the very different Spanish business environment, especially if Spanish management can be retained.

However, this alternative contains many problems. Spanish financial records are difficult to obtain and do not disclose the true operations situation. Because of the widespread use of multiple sets of business records and weak internal control practices, the past history of a business is frequently unreliable or undeterminable. Thus, value is uncertain, "hidden liabilities" such as taxes and creditors are difficult to guard against, and problems such as an uneconomical labor force are present in varying degrees in most companies that can be acquired.[75] Acquiring assets to avoid these hidden problems is not a workable alternative because the tax cost is prohibitive.[76] In most cases, therefore, stock is acquired by foreign investors.

---

73. *See* text accompanying notes 37-43 *supra*.

74. *See What U.S. Companies Are Doing Abroad—Tapping Talent Overseas*, U.S. NEWS & WORLD REPORT, Feb. 26, 1968, at 60. If the foreign corporation develops patents to be used in the United States, then United States source of income problems arise. *See* §§861-964. For a very good, current discussion of this matter *see Limitations Upon the Use of Shadow Foreign Subsidiaries Tax Act of 1966*, 21 TAX L. REV. 383 (1968). *See also* note 58 *supra* for a discussion of the deferral possibilities of this avenue.

75. Employees cannot be laid off in Spain except for due cause, and even then not "en masse."

76. In Spain there is a 4% transfer tax on the amount of the liabilities transferred. Spanish companies have traditionally carried a very high debt structure. Thus, the cost of transferring the liabilities would be out of the question, and canceling these would be almost always an impractical eventuality. The assets themselves, when transferred, are subject to a transfer tax, capital gains tax, and many other forms of stamp duties, et cetera. The transfer of stock (that is, the purchase by the foreign company of the stock in the Spanish enterprise) is only subject to an approximate tax rate of 2.7% (including transfer

Another consideration is whether to acquire more than a fifty per cent interest in the company. This depends upon the company's policies and objectives, the agreements to be reached, and the possibility of obtaining an authorization from the Spanish Ministry of Government. All of these are of crucial importance to the foreign investor.

Among the practical problems that can arise in conducting a joint venture with Spanish interests is the conflict between local management views and over-all foreign company policies. There should be an understanding from the beginning as to matters such as tax policy. This becomes important in a country such as Spain where tax evasion is very commonplace. The foreign investor cannot convert funds into a foreign currency unless he can prove the payment of Spanish taxes.[77] The use of the Spanish "global method" of taxation as a solution to this problem is often utilized if agreeable to both parties. This system determines the taxpayers' tax base by using an objective approach of allocating the tax burden by industries on factors other than their income. Under this method, "normalization" of the tax situation is made simpler, and the "two-set of books" system can be more readily rationalized by the management of the foreign company.

Loan agreements are also a matter of importance. Spanish credit is very tight and a company with established credit lines becomes a valuable asset. This matter is made even more crucial because present Spanish foreign investment laws provide that a company in which foreign investors own more than twenty-five per cent cannot have a debt structure that exceeds fifty per cent of its equity. This is a very serious limitation in any country, as to almost any type of company. Since this restriction applies only to long-term debts (over eighteen months), revolving loans or long-term loans that are continually extended or renewed can be utilized as a means of avoiding the full impact of these restrictive measures. Foreign banks are prohibited from carrying on banking business in Spain and their influence is greatly limited because foreign companies are not allowed to own more than twenty-five per cent of a Spanish bank. A foreign company with access to established lines of credit through the acquisition of a Spanish company is, therefore, in a very envious position vis-a-vis other foreign companies.

The relationships of the parent foreign company to the Spanish entity should be carefully considered in a Spanish joint venture involving questions of intercompany transactions such as pricing, loans and exports. Additional matters such as marketing policy should be discussed and resolved through the articles of incorporation, bylaws, management contracts and similar agreements. If these difficulties can be solved and a favorable working relationship established, the advantages of Spanish participation in the management can be a very valuable asset.

---

taxes and notary fees), and capital gains will usually not be incurred by the seller unless he held the property for less than a year.

77. Foreign exchange rules are rigidly applied in Spain.

patory materials of any kind, "at least the first pretrial revelation to be required of the Government should be taken *in camera.*"[115]

Decisions questioning whether *in camera* disclosure should be ordered prior to trial due to the practical difficulties involved in such inspection[116] were acknowledged by the court. However, its conclusion that the *in camera* device should be used exclusively in making determinations under *Brady* is questionable on another basis. The court left unchallenged the sufficiency of a motion for disclosure of all favorable evidence without any specificity to set in motion judicial machinery to implement such a request. If the court had denied the motion on the ground that a sufficient predicate had not been established,[117] it could have avoided the excessive judicial labor involved in *in camera* examination of any evidence that could possibly be considered favorable to the defense under *Brady,* while reserving the *in camera* proceeding for situations where the duty to disclose is questionable.

Opinions suggesting a blanket rule postponing disclosure until trial are questionable on the same basis. For example, *United States v. Cobb*[118] and *United States v. Curry,*[119] while acknowledging that the prosecution is under *Brady* to disclose favorable evidence, felt that in light of practical difficulties attending *in camera* examination before trial the decision as to whether the Government possesses such evidence must be left to the good conscience of the prosecuting authorities. This delegation would be subject to the sanction that if disclosure is delayed until trial and the limited time prevents the defense from using it effectively, the Government risks a mistrial. If courts (in contrast to *Cobb* and *Curry*) stress the need of a proper predicate for compelling disclosure under *Brady,* they can avoid excessive application of the sanction of a mistrial by: (1) requiring disclosure directly to the defense when the prosecution makes the disclosure prior to trial on its own initiative, as well as when the defense establishes through a predicate a clear entitlement for disclosure; (2) refusing to compel disclosure where no predicate or an insufficient predicate is given; or (3) reserving the judicial labor inherent in an *in camera* examination prior to trial for situations where it is questionable whether the evidence sought falls within the ambit of *Brady.*[120]

On the other hand, one commentator has urged that the prosecution

---

115. *Id.* at 885.

116. *See, e.g.,* United States v. Manhattan Brush Co., 38 F.R.D. 4 (S.D.N.Y. 1965).

117. *Cf.* State v. Gillespie, 227 So. 2d 550 (2d D.C.A. Fla. 1969); State v. Williams, 227 So. 2d 253 (2d D.C.A. Fla. 1969).

118. 271 F. Supp. 159 (S.D.N.Y. 1967).

119. 278 F. Supp. 508 (N.D. Ill. 1967).

120. The advantages of an *in camera* inspection for determining whether particular evidence of debatable value to the defense must be disclosed under *Brady* are set forth in Comment, 42 N.Y.U.L. REV. 764, 770 (1967): "This procedure would minimize the danger of subsequent reversal since a judicial evaluation of the usefulness of evidence to the defense is a factual determination, and the court's findings would not be disturbed unless 'clearly erroneous.'" *But cf.* Levin v. Clark, 408 F.2d 1209, 1217-18 (1967) (dissenting opinion).

A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL (May 1969 Tent. Draft) envisaged the following as the procedure most appropriate for effectuating *Brady*: "What tends to negate guilt will

should be required before trial to give all relevant evidence to the defense.[121] The rationale for this proposal is that the defense can best test the usefulness of any particular piece of evidence.[122] Full disclosure would only be tempered by some unannounced procedure for protecting the legitimate interests of the prosecutor and of society, such as informer's privilege, work product, protecting witnesses, state secrets and executive privilege.[123] But this proposal is questionable on two levels. First, if adversariness is still to be retained as the model for fairness in our criminal system, full prosecutorial disclosure would appear to weight the balance of advantage in favor of the accused.[124]

---

necessarily be decided in the first instance by the prosecuting attorney simply because it is he who has the material and information. It may be expected that he will make this decision in light of his sense of justice, and also with the assurance that any decision not to disclose will be subject to judicial review. And whatever the constitutional impetus provided by *Brady* and its eventual successors, judges will continue to be anxious, and perhaps even generous, in ensuring that accused persons are protected from shortsightedness as well as overreaching on the part of governmental agents. Accordingly, it may be expected that generally, prosecuting authorities will become accustomed to disclosing all material which is even possibly exculpatory, as a prophylactic against reversible error and in order to save court time arguing about it. It may be noted that one state court has declared that in cases of doubt, the prosecutor should at least disclose the material to the trial judge.

" 'As we see it, the prosecution should disclose to the defense such information as it has that may reasonably be considered admissible and useful to the defense in the sense that it is probably material and exculpatory, and *where there is doubt as to what is admissible and useful for that purpose, the trial court should decide whether or not a duty to disclose exists.*' State v. Giles, 239 Md. 458, 212 A.2d 101, 109 (1965) (emphasis added), also *quoted in* Giles v. Maryland, 386 U.S. 66, 80 (1967) (Brennan's 'plurality' opinion)." *Id.* at 74-75. *See also* State v. Gillespie, 227 So. 2d 550, 555 (2d D.C.A. Fla. 1969).

121. Note, *The Prosecutor's Constitutional Duty To Reveal Evidence to the Defendant*, 74 YALE L.J. 136 (1964). Prosecutorial disclosure is sometimes accomplished voluntarily. *See Symposium, Discovery in Federal Criminal Cases*, 33 F.R.D. 47, 113 (1963) for empirical data regarding discovery practice in the District of Columbia. Factors operative in giving or refusing informal discovery are set forth in text accompanying note 115 *supra*.

122. "Allowing the prosecutor to judge whether or not evidence is helpful without giving it to the defense counsel would be tampering with the adversary process dramatically. The prosecutor's job is to present the state's case, not to determine what theories his opponent can use." Note, *supra* note 121, at 148.

123. *Id.* at 149. However, the *in camera* device may be appropriate here. *See* Comment, 42 N.Y.U.L. REV. 764, 767 (1967).

124. *See* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960), for an exhaustive analysis of the factors weighing both sides of the scale. His conclusion as of 1960 was that the balance of advantage lay with the prosecution. *But see* Levin v. Katzenbach, 363 F.2d 287, 295 (D.C. Cir. 1966) (Burger, J., dissenting): "Although the Government is bound to disclose all exculpatory evidence within its control, defense counsel is under no obligation to reveal evidence which would aid the prosecution. Often, of course, the most crucial facts relating to criminal charges lie in the defendant's control and are constitutionally protected from access by the prosecution. The presumption of innocence, the privilege against self-incrimination and the Government's burden of proof beyond a reasonable doubt are further protections for the defendant . . . ." *See Symposium, Discovery in Federal Criminal Cases*, 33 F.R.D. 47, 109-12 (1963). As to possible extensions of prosecutional discovery *see* Louisell, *Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma*, 53 CALIF L. REV. 89 (1965); Wilder, *Prosecution Discovery and the Privilege Against Self-Incrimination*, 6 AM. CRIM. L.Q. 3 (1967).

This would diminish the capacity of the system to perform equitably, since two generally equal adversaries are necessary for such performance. Moreover, even if the criminal process is thought to be something more than a strictly adversary system, since the duty of the state is both to convict and to see that justice is done,[125] it is at least questionable that the courts rather than legislatures should be the initiators of such extensive departures from law and practice.[126] *Jencks*[127] should serve as a reminder that judicial pronouncements in the area of procedure are not always sacrosanct in the legislative arena.

STANDARDS FOR APPEALS—IS CONSTITUTIONAL ERROR PERMISSIBLE?

Assuming that an appellate court finds a defendant has been denied a constitutionally protected right to obtain prosecutional disclosure, there still remains the dilemma of whether the violation of the defendant's right requires a new trial. Several factors present themselves for the court's attention. The conduct of the prosecuting authorities may be so reprehensible, such as the knowing introduction of perjured testimony unfavorable to the defendant, that the court may feel no need to consider the matter further. On the other hand, the prosecution may have negligently omitted to inform the defense of clearly exculpatory evidence to which he would have been entitled under *Brady*. Again, the court may tend to stop with an examination of this factor alone. However, an increasing number of cases present a blending of several factors, and appellate courts, in attempting to achieve a just result, must therefore sift through these factors in light of often conflicting precedent.

Early cases in the area of prosecutorial disclosure dealt with intentional suppression, such as deliberate concealment of favorable evidence[128] and knowing use of perjured testimony[129] or false evidence[130] to obtain a conviction. Since these cases emphasized conduct constituting fraud on the courts and the processes of justice,[131] there was little need for the courts to go any further for finding cause for a new trial. However, if the courts had desired, the granting of new trials in such cases could have been justified on the

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

126. *See* Giles v. Maryland, 386 U.S. 66, 119 (1967) (dissenting opinion); *cf.* 77 HARV. L. REV. 1528, 1530 (1964).

127. Jencks v. United States, 353 U.S. 657 (1957), discussed in text accompanying notes 9-17 *supra*; *see* 77 HARV. L. REV. 1528, 1530 (1964).

128. *See, e.g.*, Pyle v. Kansas, 317 U.S. 213 (1942).

129. *See, e.g.*, Mooney v. Holohan, 294 U.S. 103 (1935).

130. *Cf.* Napue v. Illinois, 360 U.S. 264 (1959), involving false testimony being produced by a state witness and the state, knowing it to be false, allowing it to go uncorrected. As to the argument that the state court had held the false evidence could not in any likelihood have affected the judgment of the jury, the Court replied that it was not bound, where there was a claim of a denial of rights under the Federal Constitution, by conclusions of lower courts. Rather, it will reexamine the evidentiary basis on which these conclusions are founded. Upon review, the Court found that the use of false evidence by the state "may have had an effect on the outcome of the trial." *Id.* at 272.

131. *See* text accompanying notes 41-44 *supra*.

basis that prejudice to a defendant can be assumed in such cases, and that granting a new trial serves as a sanction to deter further prosecutorial misconduct.

As the cases began to deal less with active suppression of evidence favorable to an accused and began to move into the area of "negligent nondisclosure,"[132] fraud on the processes of justice became less applicable and the harm to the defendant occasioned by the failure to disclose became the court's chief concern.[133] In such situations, a harmless error doctrine seems readily applicable, since a new trial will hardly deter prosecutorial oversight,[134] and evidence of slight or speculative value left undisclosed would hardly seem sufficiently prejudicial to the defense to warrant a new trial. However, this reasoning has not always found favor in the courts.

The first case to reject it, albeit impliedly, was *People v. Savvides*,[135] often cited for its holding that negligent suppression is violative of due process. After holding that the petitioner had been denied his rights under this theory, the court rejected the respondent's contention that a new trial should not be granted since guilt was clearly established and disclosure would not have changed the verdict.[136] *Kyle v. United States*[137] attempted to place the problem in perspective:[138]

> The conclusion we draw from all this is that the standard of how serious the probable effect of an act or omission at a criminal trial must be in order to obtain the reversal or, where other requirements are met, the vacating of a sentence, is in some degree a function of the gravity of the act or omission; the strictness of the application of the harmless error standard seems somewhat to vary, and its reciprocal, the required showing of prejudice, to vary inversely, with the degree to which the conduct of the trial has violated basic concepts of fair play.

---

132. *See* Brady v. Maryland, 373 U.S. 83 (1963); Levin v. Katzenbach, 363 F.2d 287 (D.C. Cir. 1966); People v. Savvides, 136 N.E.2d 853, 154 N.Y.S.2d 885 (1956).

133. *See* text accompanying notes 41-44 *supra*.

134. *See* Griffin v. United States, 183 F.2d 990 (D.C. Cir. 1950), at text accompanying notes 34-36 *supra* for a situation where even the most diligent prosecutor could not have foreseen a duty to disclose the evidence involved.

135. 136 N.E.2d 853, 154 N.Y.S.2d 885 (1956).

136. *Id.* at 854, N.Y.S.2d at 887.

137. 297 F.2d 507 (2d Cir. 1961).

138. *Id.* at 514. The court also cited with approval Note, *The Duty of the Prosecutor To Disclose Exculpatory Evidence*, 60 COLUM. L. REV. 858, 863 (1960), contrasting: "[W]hat is thus believed to be the rule that the knowing use of perjured testimony requires reversal even though prejudice is not affirmatively shown, with 'the area of passive nondisclosure of exculpatory evidence, in which prejudice is the central matter of inquiry and the evidence not disclosed is subjected to a critical examination to determine whether it is reasonably likely that a different result would have been reached had the exculpatory evidence been made available.'" Kyle v. United States, 297 F.2d 507, 513 (2d Cir. 1961).

Kyle was cited approvingly in Application of Kapatos, 208 F. Supp. 883 (S.D.N.Y. 1962). *See* Smallwood v. Warden, 205 F. Supp. 325, 329 (D. Md. 1962), holding the motive of a state's attorney as to suppressing or withholding evidence to be immaterial if it is "vital," *i.e.*, likely to have affected the result of the trial. *See also* Luna v. Beto, 395 F.2d 35, 40 (5th Cir. 1968), *cert. denied*, 394 U.S. 966 (1968).

A retreat from this position was signaled in *Barbee v. Warden.*[139] *Barbee* concerned passive nondisclosure of evidence tending to show that the defendant had not used the weapon, which witnesses identified as the one used in a shooting. The court refused to make a final determination that the jury would have given no weight to the unrevealed evidence. After noting the tendency toward requiring a showing of prejudice in cases of passive nondisclosure while demanding no showing of prejudice for cases of knowing use of false testimony, the court looked to *Fahy v. Connecticut.*[140] In *Fahy,* the United States Supreme Court declined to speculate that an error might have been harmless. Although there may be sufficient properly admitted evidence upon which the defendant could have been convicted, "[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."[141]

The Supreme Court expanded *Fahy* while denying it was doing so in *Chapman v. California.*[142] Although the case did not deal with prosecutorial disclosure, the Court declared that establishing a rule of harmless error in cases involving a deprivation of a federal constitutional right is exclusively a federal matter. Rejecting the proposition that all such constitutional errors must be deemed harmful, the Court added:[143]

> There is little, if any, difference between our statement in *Fahy v. Connecticut* . . . and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we now

139. 331 F.2d 842 (4th Cir. 1964).

140. 375 U.S. 85 (1963).

141. *Id.* at 86-87. The Circuit Court of Appeals for the District of Columbia, in Levin v. Katzenbach, 363 F.2d 287 (D.C. Cir. 1966), held that with negligent suppression, the issue of granting a new trial would turn on "[w]hether this weakening [of the prosecution's case by the undisclosed evidence] might have led the jury to entertain a reasonable doubt about appellant's guilt." *Id.* at 292. The *Fahy* case was not cited. Nor was it cited when the same appellant appeared again before the court in Levin v. Clark, 408 F.2d 1209 (D.C. Cir. 1967). Admitting the standard required speculation, the court *quoted* Griffin v. United States, 183 F.2d 990, 993 (D.C. Cir. 1950), in holding that a reviewing court must consider " 'whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it.' " *Id.* at 1212. This, among other aspects of the court's opinion, provoked a blistering dissent by Judge Burger. A sampling: "To an utterly absurd legal standard of prosecutorial negligence-without-duty, the majority now applies a reviewing standard which is ridiculous and anti-climactical in the extreme." *Id.* at 1217. "The public should be pardoned if it loses confidence in the administration of criminal justice . . . ." *Id.* at 1230.

142. 386 U.S. 18 (1967). Harrington v. California, 395 U.S. 250, 254 (1969), according to the opinion of the Court, reaffirms *Chapman.* According to Justice Brennan, dissenting, joined by Chief Justice Warren and Justice Marshall, *Harrington* overrules *Chapman* by shifting the inquiry from "whether the constitutional error contributed to the conviction to whether the untainted evidence provided 'overwhelming' support for the conviction . . . ." *Id.* at 255. *See* Jones v. State, 227 So. 2d 326 (4th D.C.A. Fla. 1969). *Cf.* Sturgis v. State, No. 2268 (4th D.C.A. Fla., filed March 4, 1970).

143. Chapman v. California, 386 U.S. 18, 24 (1967).

> do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.

Chapman was followed by the Fifth Circuit Court of Appeals in *Jackson v. Wainwright.*[144] In *Jackson* petitioner alleged that the prosecution did not reveal that an eyewitness to the rape of which the defendant was convicted stated that the skin of the person she saw was lighter than the defendant's. The Florida supreme court had earlier denied petitioner a new trial, *inter alia,* on the ground that the eyewitness's statement would not produce a different result.[145] The court of appeals disagreed, citing *Chapman* and stating that it could not assume that had the evidence been made available to the defense, it would not have affected the jury's deliberations.[146]

A retreat from the proposition stated in *Jackson* was sounded in *United States v. Keogh,*[147] although the opinion cited neither *Jackson* nor *Chapman.* Returning to an analysis similar to that employed in *Kyle v. United States,*[148] it was stressed that:[149]

> In seeking a workable solution courts must consider not only the maximizing of protection to convicted defendants but the avoidance of impossible burdens on prosecutors and the need to preserve the finality of convictions rendered after trials as nearly faultless as human frailties will permit.

Further, the court emphasized:[150]

> Deliberate prosecutional misconduct is presumably infrequent; to invalidate convictions in the few cases where this is proved, even on a fairly low showing of materiality, will have a relatively small impact on the desired finality of judgments and will deter conduct undermining the integrity of the judicial system. The request cases also stand on a special footing; the prosecution knows of the defense's interest, and, if it has failed to honor this even in good faith, it has only itself to blame. Failure to appreciate the use to which the defense could place evidence in the prosecution's hands, or forgetfulness that it exists when a development in the trial has given it a new importance, are quite different. Since this must happen to the most scrupulous prosecutors and the issue of deterrence scarcely arises, the problem of the courts and the wider interests of society unite to require a substantially higher probability that disclosure of the evidence to the

144. 390 F.2d 288 (5th Cir. 1968).

145. Jackson v. State, 132 So. 2d 596 (Fla. 1961).

146. Jackson v. Wainwright, 390 F.2d 288, 298 (5th Cir. 1968).

147. 391 F.2d 138 (2d Cir. 1968). Judge Friendly initiated his discussion with the reminder that: "We can hardly be dogmatic on the issues 'whether the prosecutor's constitutional duty to disclose extends to all evidence admissible and useful to the defense, and the degree of prejudice which must be shown to make necessary a new trial,' which in its last encounter with the subject, the Supreme Court explicitly declined to determine."

148. 297 F.2d 507, 513 (2d Cir. 1961).

149. United States v. Keogh, 391 F.2d 138, 146 (2d Cir. 1968).

150. *Id.* at 148.

> defense would have altered the result. To invalidate convictions in such cases because a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict would create unbearable burdens and uncertainties.

Whether courts in the future will follow *Chapman* and *Jackson* or adopt the more flexible position taken by Judge Friendly in *Keogh* is still undecided. As *Keogh* pointed out, the Supreme Court has offered no guidance concerning the standard to be applied for new trials in the still emerging law of negligent nondisclosure. *Jackson's* standard for granting new trials may also be read as limited to cases of affirmative misrepresentation that a certain witness has no knowledge of evidence favorable to the defense.[151] Quite possibly, until the Supreme Court clarifies the matter, the courts' choice of precedent will primarily depend on its general attitude as to the balance of advantage in the criminal process and the efficacy of our present system of appellate review of criminal trials.[152]

CONCLUSION

Although this article has dealt primarily with prosecutorial disclosure, the full perspective necessary for decisions as to its optimum role in criminal law cannot be obtained without considering its twin stepchild — criminal discovery. Together, they represent a new force in procedure that is challenging some of our long-established notions of propriety in the criminal processes. Full discussion of the policy implications of expanding or contracting discovery and disclosure is beyond the scope of this article. However, it may be appropriate to single out some areas that will be of concern to those who must respond to the challenge of new directions in criminal procedure.

Generally, the first inquiry has been whether recent decisions and legislation regarding criminal discovery and disclosure have upset the balance of advantage in favor of an accused, thereby impairing the proper functioning of our adversarial system.[153] Unfortunately, this most difficult question has often been answered without careful analysis.[154]

---

151. *See* Jackson v. Wainwright, 390 F.2d 288, 298 (5th Cir. 1968).

152. *Compare, e.g.*, Judge Burger's dissenting opinion in Levin v. Clark, 408 F.2d 1209, 1215 (D.C. Cir. 1967) *and* Judge Friendly's opinion in United States v. Keogh, 391 F.2d 138 (2d Cir. 1968), *with* that of the majority in Levin v. Clark.

153. *See, e.g.*, Judge Burger's dissenting opinion in Levin v. Clark, 408 F.2d 1209, 1215 (D.C. Cir. 1967); *Symposium, Discovery in Federal Criminal Cases*, 33 F.R.D. 47, 74 (1963).

154. Discovery and disclosure of grand jury minutes exemplifies an area where rhetoric has often prevailed over analysis. *See* Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455 (1965); Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 VA. L. REV. 668 (1962). *But cf.* State *ex rel.* Brown v. Dewell, 123 Fla. 785, 167 So. 687 (1936); State v. Drayton, 226 So. 2d 469 (2d D.C.A. Fla. 1969). Professor Goldstein recognized this analytical problem, *see* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960). *See* Summers, *The Tilted Scales of Criminal Justice: The Plight of the Indigent Defendant*, 5 CRIM. L. BULL. 508 (1969), for an empirical approach to the problem.

The underlying assumption of the adversarial system of criminal law is that a full exploration of a case by two opposing and hopefully equal parties will produce the truth. However, the adversarial system is under increasing attack, and this assumption is openly challenged.[155] If expanding or contracting discovery and disclosure would upset the balance of advantage but would be more likely to produce the truth, should we not accept it?[156] England and Canada have provided for pretrial criminal discovery that goes beyond what is now allowed in our most liberal jurisdictions with little hesitation over a balance of advantage.[157] Finally, our emphasis on finding the truth at trial rather than pretrial may be questioned. Perhaps our concern should shift to pretrial procedures that would better screen those who must face an experience that is at times an ordeal for the state as well as for the accused.[158]

155. *See* M. MAYER, THE LAWYERS (1967); *cf.* Louisell, *The Theory of Criminal Discovery and the Practice of Criminal Law*, 14 VAND. L. REV. 921 (1961). One former United States attorney questioned whether constitutional safeguards now surrounding an accused will permit a criminal trial to be a search for the truth. *Symposium, Discovery in Federal Criminal Cases*, 33 F.R.D. 47, 78-79 (1963).

156. *Cf.* State v. Drayton, 226 So. 2d 469, 475 (2d D.C.A. Fla. 1969).

157. *See* Brower, *Pre-Trial Procedures in Criminal Cases: A Comparative View*, 2 PORTIA L. REV. 1 (1966).

158. *See, e.g.*, Levin v. Clark, 408 F.2d 1209 (D.C. Cir. 1967), hopefully the culmination of nearly a decade of litigation.