The Psychology of Wrongful Convictions

CLE Presentation by
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I. The Problem

A. Crim professionals assumed accuracy

B. Past 25 yrs: DNA, Innocence Movement, more than 1000 exonerations

C. How could this happen? We have long assumed the accuracy of the system, but that's more hunch / common sense than based on evidence.

D. **Handful of these cases resulted from outright misconduct, such as *Connick v. Thompson***

E. But puzzle: most police, prosecutors, jurors, defense lawyers want to get the right guy

1. Even when there is a bad apple, it also takes a lot of other good people not catching his wrongdoing.

2. So how does it happen?

II. Extreme example: The David Ranta case

A. The Crime:

1. Weinberger robbery
2. Rabbi Werzberger murder, Hasidic community outcry

B. The Criminal: Robber Joseph Astin matches description, but dies

C. The Snitches: pin blame on jobless, drug-addicted Ranta

D. The Eyewitnesses: 4 of 5 fail to identify Ranta in lineup

E. The Interrogation: Sleepless, no notes, rambling confession

F. The Cop: Det. Louis Scarcella

1. No record-keeping: Avoided taking notes, videotaping
2. Eerily similar statements
3. Tainted evidence: Tell Ws whom to pick
4. Suspect witnesses: Inducements to Criminals

G. The Court

1. At trial: Mistrust, but not gatekeeper
2. Habeas: Astin girlfriend, but didn't disturb verdict
3. Conviction Integrity Unit: Ws recanted

III. The Sources of Inaccuracy in Criminal Justice

A. Eyewitness identifications: shaky, tainted (consciously or unconsciously) by cops

B. Confessions: tainted

1. (often) "Private" knowledge

2. Sleep deprivation

3. (often) suggestible Ds (mentally ill, retarded, juveniles)

C. Informants / Snitches: Tainted by Self-Interest, incentives often undisclosed

D. Discovery

1. Files spread across many police / prosecutorial agencies

2. Prosecutorial self-policing ineffective

3. Retrospective test of materiality—must predict pre-trial

E. Plea bargaining

1. Low Information

2. Huge sentencing differentials coercive (in the lay sense)

IV. The Psychology of Inaccuracy

A. First impressions, jumping to conclusions, vs. keeping an open mind

B. Pervasive assumption of guilt (Dershowitz). Needle in haystack

C. Motivated reasoning

1. Public outcry

2. Snitches / cooperators

3. Lawyers, incentives to clear dockets, push pleas

D. Lack of records / notes / videotape; fallibility of memory

E. Inevitability bias

1. Appeal / habeas: harmless error

a) Even worse w/ guilty pleas, where confession & no record

2. Conviction Integrity Unit

F. Lie detection

1. We are all terrible lie detectors, contra Inbau & Reid manual

2. And much of this is a problem of error, not lying

V. Possible Solutions? [expand]

A. Ways to keep an open mind

1. Pursue leads before narrowing down
2. Consider the opposite / devil's advocate
3. Double-blind eyewitness IDs, interrogations
4. Note-taking, videotaping, to build record / reconstruct
5. Protocols for interrogation: non-leading, open-ended, sleep, vulnerable classes

B. Corroboration Requirements

1. Limits on snitches / inducements
2. Documenting Identifications, Levels of Confidence
3. Exclusion of evidence, cautionary instructions, expert Ws

C. Audits

1. Appeal, habeas
2. Conviction Integrity Units
3. Tracking Cops' Performance

D. Avoiding / Counteracting Coercive Pressures

1. Limiting Threats, Penalty Differentials
2. Limiting Lying, Deception

E. Defense Lawyering, Funding, Experts, Investigators

The New York Times

March 20, 2013

Jailed Unjustly in the Death of a Rabbi, Man Nears Freedom

By MICHAEL POWELL and SHARON OTTERMAN

In the wintry darkness 23 years ago on a back street in Williamsburg, Brooklyn, a jewelry thief fleeing a botched robbery panicked and shot a Hasidic rabbi in the head.

Four days later, the rabbi, Chaskel Werzberger, an Auschwitz survivor, died of his wounds. Even in the New York City of 1990, as homicides crested at 2,245, the murder stirred grief and outrage. The "Slain Rabbi" was front-page tabloid news. Mayor David N. Dinkins traveled to Williamsburg's Satmar enclave to sit in mourning and to offer a $10,000 reward.

The new Brooklyn district attorney, Charles J. Hynes, stood shoulder to shoulder with fur-hat-wearing Satmars, watching as they rocked back and forth and wailed as the pinewood coffin was carried out. He vowed to bring the killer to justice.

Forty detectives worked the case, soon led by the swaggering, cigar-chewing Detective Louis Scarcella. Working closely with an influential Satmar rabbi, Detective Scarcella arrested a drug-addicted, unemployed printer named David Ranta. Hasidic Jews surrounded the car that carried the accused man to jail, slapping the roof and chanting, "Death penalty!"

Mr. Ranta was convicted in May 1991 and sentenced to 37.5 years in maximum-security prison, where he remains to this day.

He is almost certainly not guilty.

This week Mr. Hynes, after a long investigation by a unit that he created to look into questionable convictions, plans to ask a state judge to release the prisoner. Mr. Ranta's lawyer, Pierre Sussman, who conducted his own inquiry, said his client has been instructed to pack up his cell.

Mr. Ranta could walk free as early as Thursday. In the decades since a jury convicted him of murder, nearly every piece of evidence in this case has fallen away. A key witness told The New York Times that a detective instructed him to select Mr. Ranta in the lineup. A convicted rapist told the district attorney that he falsely implicated Mr. Ranta in hopes of

cutting a deal for himself. A woman has signed an affidavit saying she too lied about Mr. Ranta's involvement.

Detective Scarcella and his partner, Stephen Chmil, according to investigators and legal documents, broke rule after rule. They kept few written records, coached a witness and took Mr. Ranta's confession under what a judge described as highly dubious circumstances. They allowed two dangerous criminals, an investigator said, to leave jail, smoke crack cocaine and visit with prostitutes in exchange for incriminating Mr. Ranta.

At trial, prosecutors acknowledged the detectives had misbehaved but depicted them as likable scamps. Reached in retirement on Tuesday, Mr. Scarcella defended his work. "I never framed anyone in my life," he said.

No physical evidence ever connected Mr. Ranta to the murder.

He now sits in a cell at a maximum-security prison outside Buffalo. He is a touch shy; his gray hair is fast thinning. His voice still carries the slantwise intonations of working-class south Brooklyn. Asked how he survived, he said he was not sure he had.

"I'd lie there in the cell at night and I think: I'm the only one in the world who knows I'm innocent," he said. "I came in here as a 30-something with kids, a mother who was alive. This case killed my whole life."

A Guilty Verdict

It began with a fumbled robbery on Feb. 8, 1990.

Chaim Weinberger, a courier for Pan American Diamond Corporation, left his apartment in a public housing tower in Williamsburg, pulling a 50-pound suitcase filled with diamonds and precious gems. He had to catch a 7 a.m. flight to the Dominican Republic, where his cargo would be cut into jewelry.

His trips were predictable and easily timed; he worried about robbery. In the lobby, he saw a tall, blond, strikingly handsome guy, "like a lifeguard on the beach," Mr. Weinberger said. They stared at each other.

The blond man walked downstairs.

As Mr. Weinberger hurried beneath towering sycamores to the street, he saw the man trailing him. He tossed the suitcase into the trunk and started his engine. The blond man strode quickly now, covering his face with a handkerchief and pulling out a silver gun.

Mr. Weinberger put the car into reverse and knocked the gunman into a trash heap. He sped away, his door flapping open. He did not stop until he got to the airport, he recalled in an interview.

Tragedy unfolded behind him. The robber, unnerved, spotted Rabbi Werzberger warming up his blue 1985 Oldsmobile Cutlass Supreme before driving to a synagogue. He ran over, fired a shot, pulled out the mortally wounded rabbi and drove off in his car.

This murder tore at the heart of the then-25,000-strong Satmar community. Rabbi Werzberger was their shamas and adviser to the grand rebbe. The Satmar, the intensely devout, politically powerful ultra-Orthodox sect, demanded that the police find his killer. Rabbi Leib Glantz became their point man.

Rabbi Glantz rounded up witnesses, brought them to the precinct and translated from Yiddish as detectives conducted interviews.

Detectives worked furiously, calling in paroled felons and miscreants of many varieties for questioning. An anonymous caller suggested that the police talk to Joseph Astin, an experienced holdup man who was tall and blond, with rugged good looks. But on April 2, Mr. Astin crashed his car in a police chase and died.

In late April, Detective Scarcella went to jail and visited Dmitry Drikman, a mustachioed bull of a man with a perpetual glower. Mr. Drikman was being held for several robberies, and had in the past been convicted of a horrific rape.

Mr. Drikman, in hopes of obtaining a shorter sentence, proved talkative. He gave Detective Scarcella the name of his friend, Alan Bloom.

Mr. Bloom, a crack-cocaine addict, had been convicted of dozens of robberies and faced a potential century in prison. He decided to start talking.

The detectives placed Mr. Bloom and Mr. Drikman in the same section of the jail, so they could continue their conversation. Soon they had their story: Mr. Bloom had had a hand in the robbery, but an acquaintance, David Ranta, a small-time thief and drug user, was the gunman. And Mr. Drikman's girlfriend told detectives she had seen Mr. Ranta and Mr. Bloom planning to cover up the crime.

District Attorney Hynes shook hands with Mr. Bloom shortly before prosecutors gave him immunity from prosecution in the murder case and greatly reduced his sentence for other crimes.

On Aug. 13, Detectives Scarcella and Chmil found Mr. Ranta on 73rd Street in Bensonhurst. They handcuffed him and drove to the 90th Precinct in Williamsburg.

Detective Scarcella testified at Mr. Ranta's trial that, 26 hours later, he sat on a bench in a crowded office and listened as Mr. Ranta, with little or no sleep, gave a long, rambling confession.

The detective said he did not have to ask Mr. Ranta a single question. "He flowed, and I took it all down, verbatim," the detective testified.

Asked why he did not question the suspect, Detective Scarcella was nonchalant.

"That's not my style," he replied.

The case was laden with inconsistencies. Mr. Weinberger had stared the gunman in the face and testified during the trial that Mr. Ranta was "100 percent not" that person. In fact, four of the five witnesses in the first lineup did not identify Mr. Ranta.

In the end, however, the jury pronounced Mr. Ranta guilty.

Before his sentencing, Mr. Ranta addressed the court. He spoke of corrupt police officers and those who testified against him.

"Now you people do what you got to do because I feel this is all a total frame setup," he told the court. "When I come down on my appeal, I hope to God he brings out the truth because a lot of people are going to be ashamed of themselves."

Behind the Scenes

During the trial, Detective Scarcella proved to be an entertaining witness. A son of Bensonhurst, a professed old-school detective, he talked about how to make a suspect talk and where to buy the best pizza (New Haven, he advised). But his description of his investigation angered the judge, Francis X. Egitto.

Asked why he took prisoners out of jail to eat at restaurants and visit felonious friends, Detective Scarcella replied, "I do what I want to do with my prisoners."

"They're not your prisoners," Justice Egitto responded.

The detective testified that while interviewing Mr. Bloom and Mr. Drikman, he never wrote a single note, as required by police procedure. Nor did he show witnesses photographs of Mr. Drikman or Mr. Bloom, although they were murder suspects.

The judge in particular questioned how Detective Scarcella obtained Mr. Ranta's confession, asking why a veteran detective did not take Mr. Ranta to an interview room, where he could have tape-recorded it. Detective Scarcella said he transcribed the 658-word confession by hand.

Mr. Ranta has insisted he confessed to nothing. He passed a polygraph test in which he was asked if he shot the rabbi.

Midway through the trial, the judge spoke to the lawyers of his mistrust of these detectives. They are playing games, he said. They have "taken it upon themselves to be judge, jury and partial executioner."

Yet, when he instructed the jury on what to consider during deliberation, he mentioned none of his concerns.

Four years later, new doubts arose. In 1996, Theresa Astin testified that her husband, Mr. Astin, who had died in that car wreck in April 1990, had murdered the rabbi. She knew details of the killing that only someone close to it would. Mr. Ranta's defense lawyer, Michael Baum, filed a court motion.

Ms. Astin turned out to be a complicated witness.

In the early 1980s, she was the girlfriend of Joe Sullivan, a freelance hit-man known as Mad Dog who killed at least 11 men.

Afterward, she married and settled down in the Gravesend neighborhood with Mr. Astin, a mechanic with a cocaine problem and a tendency to pull armed robberies.

Snarled though her personal life was, Ms. Astin told a compelling tale: Her husband had planned a robbery, and he came home shaking and nearly in tears on the day the rabbi was shot. Later she found him in the bathroom, dismantling a pistol.

"He said, 'I hurt someone, something happened,' " Ms. Astin testified. "He was crying, he was scared."

" 'You're in trouble, Joe. It's like you killed a priest in our religion,' " she warned him. Justice Egitto handled the court hearing. Again he wrote of troubling facts — and refused to toss the verdict.

Mr. Ranta feared he had exhausted every option for appeal. "I figured I was going to die in prison," he recalled.

Case Falls Apart

Every Christmas, Mr. Baum received a Christmas card from Mr. Ranta. “I never had any doubt in my mind he was innocent,” Mr. Baum said in an interview. “I sleep with it every night.”

Sixteen months ago, the district attorney, promoting his newly established Conviction Integrity Unit, gave a talk to the public defenders. Does anyone, he asked, know of cases that should be re-examined?

Mr. Baum raised his hand.

In the Bronx, Pierre Sussman, a defense lawyer hunting for evidence of police misconduct, noticed that Detective Scarcella’s name showed up in several troubled cases. He did a computer search, discovered Mr. Ranta’s name and visited him in prison, where he agreed to take on his case.

Soon the last vestiges of evidence fell away. A man who was 13 at the time of the murder, Menachem Lieberman, testified back then that he had seen Mr. Ranta sitting in a car near the murder site.

Now, reached at his home in Montreal, Mr. Lieberman said the case had nagged at him for years. “Before I entered the” lineup room, he told investigators, “a police detective told me to ‘pick the guy with big nose.’ ”

He picked Mr. Ranta, he said, “because he had the biggest nose.”

And Mr. Drikman’s girlfriend, Elizabeth Cruz, also abandoned her story and apologized. “I made up everything,” she said in an affidavit, in hopes of gaining a deal for her boyfriend.

Mr. Drikman also stated that he fabricated his account, and that detectives and Mr. Bloom “framed” Mr. Ranta.

The case against Mr. Ranta had come undone.

“What’s important to me is that this fellow should not be in prison one day longer,” Mr. Hynes said in a telephone interview on Tuesday.

All that remains is for Mr. Ranta, now 58, to feel the shackles taken off his hands and legs and stand before a State Supreme Court judge.

"I've lived years in a cage, stripped down, humiliated," he said. "I'll be able to touch people again, to make decisions."

He took a great gulp of air. "To be honest, what's ahead scares me."

Plea Bargaining's Role in Wrongful Convictions

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Abstract

Most criminal convictions result from plea bargains. Though many find it hard to believe that innocent defendants plead guilty, a number of documented wrongful convictions resulted from guilty pleas. Police, prosecutors, defense lawyers, and judges all assume that most defendants are guilty. They share self-interests and incentives to dispose of their large caseloads by striking quick plea bargains without necessarily investigating possible contrary evidence of innocence. Various criminal procedural rules and psychological biases and heuristics compound the innocence problem in plea bargaining. Solutions could include more careful review of the evidence at case intake as well as later in the process, as well as structures and incentives to file well-supported charges initially and not to drop charges to tempt possibly innocent defendants to plead.

Plea Bargaining's Role in Wrongful Convictions

Introduction

Lists of wrongful convictions are dominated by convictions after trial. But those lists should not breed complacency about the plea-bargaining system, which disposes of roughly 95% of adjudicated criminal cases (Maguire, tbls. 5.24.2008, 5.46.2006). Though it seems hard to believe, innocent defendants do confess and plead guilty; we have DNA exonerations to prove it (Garrett, 2011). And wrongful convictions produced by plea bargains are far less likely to come to light. That is partly because guilty pleas waive most claims, and often appeals and collateral attacks as well, and partly because trials generate fuller records and so are easier to second-guess. Moreover, the overwhelming majority of cases involve no DNA, similar indisputable forensic evidence, or exposures of law enforcement corruption, so many more injustices are hidden. We have no way of knowing how much of the iceberg is submerged beneath the exposed tip.

One way to approach the problem is to do empirical work analyzing and reasoning inductively from the dozens of wrongful convictions after guilty pleas that scholars have documented (Garrett, 2011). A difficulty with that approach, however, is that we have no way of knowing how representative these few dozen cases are. Instead, I analyze the problem from the other end, using the forces and flaws exposed by the plea-bargaining literature to explain where and how plea bargaining is vulnerable to error.

In a nutshell, the basic problem is that plea bargaining short-circuits the adversarial protections of a criminal pretrial process and trial. In effect, it treats a defendant's willingness to concede guilt as conclusive proof, even though plea discounts and threats can sometimes coerce even the innocent to plead. And it gives free rein to the agency costs, psychological pitfalls, and structural flaws that plague our overworked, underfunded criminal justice system. Plea bargaining lets harried police, prosecutors, defense counsel, and judges jump to conclusions, putting efficiency ahead of accuracy. Solutions must reverse this trend, at least in part, building more vigorous investigation, defense, and careful screening into the system. But given the volume of cases and scarcity of funding, that approach is far easier said than done.

Other chapters in this volume deal with reforms that could improve all cases, including but not limited to those by guilty plea, such as procedures for eyewitness identifications, interrogations, and the like. Chapter 13, on appeals and post-conviction review, tackles after-the-fact review, including the problems caused by plea-bargained appeal waivers, DNA waivers, and retrospective review of ineffective assistance of counsel during bargaining. Other retrospective remedies include conviction integrity units within police and prosecutors' offices, and relaxed limits on withdrawal and reopening of pleas, particularly based on new evidence. By contrast, my focus here is prospective, on features of plea bargaining specifically that lead to wrongful convictions in the first place.

I. Stepping Back: The Plea-Bargaining Mindset, Pressures, and Temptations

Defenders of plea bargaining admit that innocent defendants may plead guilty. But they defend that result as a design feature rather than a bug, a rational way for innocent defendants to avert the risk of a higher punishment after a wrongful conviction at trial (Easterbrook, 1983). That response ignores the callous message sent by endorsing wrongful convictions, and it erroneously deflects attention to flaws elsewhere in the system. Many attributes of the plea bargaining system itself exacerbate the innocence problem.

A. The Mindset.

To understand plea bargaining, one must first see criminal justice the way that busy, jaded insiders do: as an assembly line speeding huge numbers of guilty defendants along to almost inevitable convictions. Harvard law professor and defense attorney Alan Dershowitz (1982, p. xxi) famously characterized criminal justice as a "game" whose key rules begin with:

> Rule I: Almost all criminal defendants are, in fact, guilty.
>
> Rule II: All criminal defense lawyers, prosecutors and judges understand and believe Rule I.

Some observers might quibble with the modifier "[a]lmost all" or note that the grade of offense is sometimes in question, but few would dispute Dershowitz's basic point. Once police have arrested and prosecutors have charged a suspect, a

conviction of some sort is the norm. Fewer than 10% of federal defendants, for instance, have their charges dismissed, and fewer than 1% are acquitted (Maguire, tbl. 5.24.2008). The question is not so much *whether* a defendant is guilty and will be convicted than *what* charges and *how much* of a sentence he will receive. Overwhelmed insiders, aware of those facts, find it hard to keep looking assiduously for innocent needles in haystacks.

B. The Insiders' Incentives.

Next, one must understand criminal justice insiders' own incentives and interests. Most criminal justice professionals want to do justice, but that sense of justice is influenced and colored by various self-interests and outlooks as well.

1. Police. Police officers are evaluated based in large part on their arrest statistics. Their self-interest, therefore, is in making enough arrests and doing just enough investigative work to persuade prosecutors to charge their cases. The word of an eyewitness or two, resemblance to a suspect, a nervous or defensive response to questioning, or a shaky alibi may convince police of a suspect's guilt. That generates a sort of tunnel vision (see Findley & O'Brien, this volume). Once police officers have decided a suspect is guilty, they have little incentive to turn over every stone, particularly because they know most defendants plead guilty and many confess, so there will be little need to prepare for trial.

2. Prosecutors. Prosecutors want to prosecute only guilty suspects, but they have no way of knowing guilt apart from the results of police investigation. Every defendant, whether guilty or innocent, has strong incentives to claim innocence. Guilty and innocent defendants thus pool together, so prosecutors must discount their self-serving claims of innocence. Thus, the main filters for innocence are the pre-charge investigation and the trial (Scott & Stuntz, 1992). But plea bargains bypass the latter check.

Prosecutors are evaluated based primarily on their conviction statistics. They care much more about the certainty of conviction than the severity of punishment (Alschuler, 1968; Bibas, 2004a; Heumann, 1978). They can thus offer very large sentence discounts to buy off the risk of acquittal (odds bargaining) and save the work of going to trial (costs bargaining). They receive no extra pay for putting in the extra work needed to secure a conviction at trial. Moreover, modern criminal codes are broad and overlapping, offering prosecutors a broad menu of options for charging (Stuntz, 2001; 2004). Some of these charges carry heavier sentences than others, particularly where mandatory minimum sentences or sentencing guidelines are in play. And, in many prosecutors' offices, the same prosecutor decides on the charges and the plea offer. Prosecutors thus have every incentive to charge high, to stack up plea-bargaining chips, and then bargain low, to ensure convictions in exchange for reduced punishment. Once they have decided on a suspect's guilt, they have the carrots and sticks needed to induce a plea.

The fear of loss should steer police and prosecutors away from defendants who may well be innocent, but prosecutors' overwhelming power to induce pleas dampens the power of that incentive (Bibas, 2004a). "[I]nstead of allowing juries to air and wrestle with the hard, troubling cases, plea bargaining lets prosecutors protect their reputations and win-loss records by hiding close cases from view" (Bibas, 2004a, p. 2473). For instance, if "prosecutors bargain away most cases involving dubious confessions, they avert public scrutiny of police interrogation tactics. If they buy off credible claims of innocence cheaply, they cover up faulty investigations that mistakenly target innocent suspects" (Bibas, 2004a, p. 2473). Prosecutors presumably believe that their defendants are in fact guilty, or else they would not pursue them. But post-charge tunnel vision may lead them to discount proof problems that might otherwise flag possible innocence, and plea bargaining facilitates that blindness.

3. Defense counsel. Most defense lawyers have multiple incentives to plea bargain as well. First, there is the matter of stingy compensation. Four-fifths of felony defendants are indigent and so represented by appointed defense counsel, paid for by the government (Harlow, 2000). There are three categories of appointed counsel: a) public defenders, who are paid flat salaries; b) appointed private lawyers, who are paid flat fees or low hourly rates subject to low caps; and c) contract attorneys, who receive a fixed payment (often the lowest bid in a competitive auction) in exchange for handling an entire category of cases. In other words, appointed counsel receive few financial rewards for investing more work to

take a case to trial instead of bargaining it away. On the contrary, private appointed attorneys can earn more by pleading a larger volume of cases out than taking a smaller number to trial (Bibas, 2004a). Underfunding also makes it harder to retain experienced, talented counsel, who are often lured to other work by the promise of higher pay for their marketable skills and experience (Bibas, 2004a).

Second, the relationship between defendants and their counsel is plagued by mistrust. Defendants habitually distrust their appointed lawyers, in part because defense lawyers are paid by the government and not their clients (free advice seems worth the money paid for it) and in part because overworked lawyers have little time to spend building rapport or investigating their clients' cases. Defense lawyers may even press their clients to plead guilty right after meeting them, which hardly inspires clients' confidence in their lawyers' willingness to fight the prosecution. To inspire their lawyers to fight harder, many defendants falsely deny their guilt, and defense lawyers come to assume their clients' guilt and distrust most of what they say (Bibas, 2012; Heumann, 1978).

Third, most defense lawyers have few other resources. There is little funding for private investigators, forensic scientists, psychologists, and other professionals who are often needed to mount a vigorous defense. Without these tools, many defense lawyers cannot credibly challenge the prosecution's case or stand up to prosecutors' plea-bargaining offers. Even a defense lawyer who had the time and money to investigate thoroughly would often find it hard to do so, particularly when

the crime happened well before the appointment of counsel. Often, he must depend on the contemporaneous police investigation.

Fourth, many appointed counsel are overworked. Many public defenders juggle hundreds of cases per year. Such workloads far exceed American Bar Association standards, which recommend a maximum of 150 non-capital felony cases per lawyer per year (American Bar Association, Criminal Justice Standards Committee, 1992, § 5-5.3 cmt.). They must plead out case after case to keep moving cases along, without taking the time to dig up exculpatory evidence and possible defenses. And because prosecutors know that these lawyers must plead everything out, their threats to take cases to trial ring hollow and do not force prosecutors to take a second look (Bibas, 2004a).

4. Judges. Like prosecutors and defense counsel, judges have incentives to encourage plea bargaining as well. Even though judges' jobs are generally secure, judicial culture often emphasizes "moving the business" to improve case disposition statistics. In the absence of trials, judges know much less about the defendant's guilt than the parties do, making it easy to rubber-stamp the proposed plea and hard to learn the facts or second-guess guilt. That is especially true because most cases contain no disputes that judges think merit a trial, and most defendants admit guilt at a scripted plea colloquy. And when judges go along with proposed plea bargains, as they usually do, the parties are unlikely to appeal (indeed, they may waive the right to appeal), avoiding the prospect of embarrassing appellate reversals (Heumann, 1978).

The bottom line is that all of the repeat-player professionals in criminal justice have interests in encouraging guilty pleas and face pressures to do so. Collectively, these insiders form a courthouse workgroup, developing norms and habits of disposition that expect most cases to plead out for substantial discounts in exchange for a minimum of fuss or investigation. Though the adversarial system presupposes that defense lawyers, judges, and juries will scrutinize police investigations and evidence, run-of-the-mill cases rarely involve vigorous probing or adversarial testing. In lieu of zero-sum adversarial combat, the parties expect and reward collaboration in moving cases ahead to preordained convictions, which serves each professional's interests and resource constraints.

5. The jury. The missing actor is the jury. The whole point of plea bargaining is to bypass juries, which served as neutral fact-finders and checks on police and prosecutors. In a world of plea bargaining, the defendant's admission of guilt substitutes for the jury's authoritative finding. But given the strong pressures and incentives to plead guilty, one cannot automatically credit a guilty plea as if it were a sincere and contrite admission of guilt. That, however, is what our system of plea bargaining effectively does.

C. Structural Constraints.

Other factors that exacerbate pressures to plead are bail, discovery, plea, sentencing, parole, and clemency rules. Though many defendants charged with minor crimes are released on bail pending trial, some do not have enough money to

make bail or are detained in jail without bail. In such cases, the pretrial detention can approach or even exceed the punishment that a court would impose after trial. Prosecutors may offer to let these defendants plead guilty in exchange for a sentence of time already served. A guilty plea thus means immediate freedom, whereas fighting to vindicate one's innocence necessarily means a longer wait for a trial and potential freedom. Even an innocent defendant may find such a deal, and the prospect of immediate release, irresistible. Moreover, pretrial detention hampers a defendant's ability to track down witnesses, meet with his lawyer, and in general mount his defense (Bibas, 2004a; Bowers 2008).

Discovery rules likewise hobble innocent defendants. Guilty defendants usually know that they are guilty and have a sense of the likely evidence against them. But innocent defendants may have no idea about what evidence the prosecution would use at trial to prove their guilt. While prosecutors must turn over known exculpatory and impeachment evidence, most incriminating witness testimony and statements are immune from disclosure until trial in most states. (Bibas, 2004a). Prosecutors may thus say little about their cases in plea bargaining, or even bluff, as long as they do not lie or misrepresent the facts. And because they would often like to protect their informants' and witnesses' identity and spare them the ordeal and danger of testifying, prosecutors apply more plea bargaining pressure to obviate trial testimony.

Plea rules make matters worse. In order to dispose of stubborn defendants without trial, most jurisdictions are willing to waive the requirement that

defendants who plead guilty must admit guilt. Defendants may plead no contest (neither admitting nor denying guilt) or enter *Alford* pleas (protesting innocence while agreeing to plead guilty and be sentenced as if guilty). Anecdotal evidence suggests that the main users of these pleas are defendants who are guilty but in denial to others or even to themselves. But *Alford* and no-contest pleas may also grease the wheels for innocent defendants to plead guilty to avert possibly heavier sentences after trial (Bibas, 2003).

Sentencing rules also contribute to the innocence problem. Many drug and gun crimes carry mandatory minimum penalties. About the only way around these stiff sentences is to confess and cooperate fully with the police. Admission of guilt is also a substantial factor in, if not a prerequisite to, earning a discount of one-third or more for pleading guilty and accepting responsibility (Bibas, 2004a; *see, e.g.*, U.S. Sentencing Commission, 2012, § 3E1.1). These substantial rewards tempt innocent defendants to admit guilt falsely.

Parole and clemency boards may likewise be unwilling to parole or commute the sentences of inmates who persist in denying their guilt. For guilty defendants, these rules may help to break down denial mechanisms and induce remorse and repentance. But innocent defendants who maintain their innocence look just like guilty defendants who remain stubbornly in denial and so unworthy of leniency. Once an innocent defendant admits guilt, however, his wrongful conviction is even less likely to come to light.

D. Psychological Influences in Plea Bargaining

Various psychological biases and heuristics may contribute to wrongful convictions. At the most general level, both insiders and the public believe that the system works and that police arrest, prosecutors charge, and juries convict only guilty people. They also find it hard to believe that innocent defendants would ever plead guilty. That faith in the system may be exaggerated and may reduce actors' vigilance in preventing, or retrospectively recognizing and correcting, wrongful convictions.

The faith in the adversarial system is exacerbated by the psychology of overconfidence. People are consistently overconfident in their own abilities and accuracy; like the citizens of Lake Wobegon, most think they are better-than-average drivers (Bibas, 2004a). People are also inordinately influenced by first impressions and jump to conclusions. Thus, police and prosecutors' focus on a suspect breeds tunnel vision, leading them to spin other evidence in ways consistent with their initial impressions instead of taking a fresh look at potentially contradictory facts. Even defense lawyers may take seemingly overwhelming evidence for granted. And once a defendant is convicted, the "inevitability bias" makes the actual result seem to have been inevitable all along. That is certainly true of police and prosecutors, who, as public servants dedicated to doing justice, can find it hard to admit that they have unwittingly perpetrated an injustice. Reviewing courts, on appeal or post-conviction habeas corpus challenges, also find it hard to see weaknesses in seemingly inevitable convictions, particularly ones

resulting from guilty pleas with no trial record (Bibas, 2004b; 2006). Of course, as chapter 13 discusses, many claims are waived by the fact of a plea or by an express plea waiver or appeal waiver. But some claims, such as ineffective assistance of counsel, may survive in theory but be hard to prove in practice.

Innocent defendants may plead guilty in part out of risk aversion. Citizens who have committed no crime may be more risk averse than guilty suspects, who are more likely to be risk-seeking types (Bibas, 2004a). And threats of the death penalty or life imprisonment may scare even innocent defendants into pleading guilty.

Certain categories of innocent defendants face particular psychological and social challenges. We know that defendants who are mentally retarded, mentally ill, or juveniles are especially likely to confess falsely (Kassin et al., 2010). Once a defendant has falsely confessed, he faces tremendous pressure to plead guilty; even his own lawyer is unlikely to believe a later recantation and protestation of innocence. These same attributes, as well as difficulty speaking and understanding English and drug or alcohol addiction, can also impair credibly showing one's innocence, understanding a plea offer, and weighing it carefully.

II. Moving Forward: Fixing a Broken System

At this point, many critics throw up their hands and recommend waving a magic wand to abolish plea bargaining. That will not happen. And if it did,

abolition would deluge courthouses and abbreviate trials, re-creating the innocent needle and haystack problem there (Scott & Stuntz, 1992). The second-best solution would be to increase substantially indigent defense funding and change the compensation structure, to reward aggressive representation through and beyond plea bargaining. That too is unlikely. Voters have little appetite for spending more tax dollars to defend criminals in the hopes of sifting out a few innocents, and only a small (but growing) number of courts will order increased funding.

A. Institutional Reforms.

Nevertheless, there are ways to shave off or soften some of the worst features and most troubling incentives plaguing the plea bargaining system today. Reforms should begin with the structures and incentives that shape the key actors' incentives.

1. Police. As earlier chapters of this book discuss, police need to do more to document their evidence during investigations, by for example recording identification procedures, interrogations, and details of work with confidential informants. They also need better information technology and flow of information, to ensure that they share all their information with prosecutors and provide legally required discovery to the defense. Police should not terminate investigations as soon as they have probable cause to arrest one suspect, secure in the belief that the suspect will probably plead out and not require additional evidence of guilt.

2. Prosecutors. Prosecutors should demand more evidence before charging cases; they should first question key witnesses and ask police to explore alibis and alternative culprits. (They cannot do so effectively if police have not documented their investigations and shared their evidence.) Prosecutors' offices should assign experienced prosecutors to make these intake decisions as part of an elite charging and screening unit, as the New Orleans District Attorney's Office once did. Doing so would guard against prosecutors' jumping to conclusions on the second-hand information relayed by police. It would also ensure that the prosecutor who charges a case will not try it or bargain it, removing the self-interested incentives to overcharge to coerce plea bargains (Wright & Miller, 2002).

Once prosecutors decide to file charges, cases take on a forward momentum of their own; prosecutors often strike bargains to deal with troublesome weaknesses in the evidence instead of dismissing entire cases outright. Rigorous screening up front greatly increases the fraction of cases that prosecutors decline to charge in the first place (Wright & Miller, 2002). Many of the screened-out cases are declined because of weak evidence, which indicates that the defendant may well be innocent. Thus, more rigorous screening leads prosecutors to decline cases against potentially innocent defendants that prosecutors would otherwise charge and have to bargain down. The result should be fewer wrongful plea bargains. In addition, the cases that are charged will be based on stronger evidence, so prosecutors will not need to bargain down charges.

Prosecutors can also do more to gather, consider, and disclose possibly exculpatory evidence (called *Brady* material) and impeachment evidence (called *Giglio* material). Internal databases would help to gather such evidence from police and link it across cases by name of witness, informant, officer, or the like. Document retention policies would also help. So would ethical rules, internal guidelines, and training for police and prosecutors on how to recognize, gather, and disclose *Brady* and *Giglio* material in time for discovery and internal plea decisions. (Symposium: New Perspectives on Brady and Other Disclosure Obligations, 2010).

Relatedly, prosecutors could provide more discovery, to give innocent defendants a better idea of why the government erroneously believes in their guilt. In particular, though the constitutional right to disclosure of exculpatory evidence may not kick in until trial, rules and procedures could require or encourage prosecutors to turn it over in plenty of time for plea bargaining (Bibas, 2006). Rules or policies could also authorize greater disclosure of impeachment and incriminating evidence except where witnesses are at risk of intimidation or tampering, which is more of a danger in many violent-crime cases.

Supervisory prosecutors could also review the evidence again before approving plea bargains, to take a second look if any new evidence came to light. That procedure could promote later dismissals when new evidence came to light. Unfortunately, tunnel vision, the inevitability bias, and the like hamper fresh second looks. What matters more is getting the first look right. But when wrongful arrests, charges, and convictions do come to light, police and prosecutors' offices

need conviction integrity processes, to audit what went wrong, and feedback loops, to prevent systematic errors from recurring.

Police and prosecutors' incentives also need to change. Rewarding and promoting police and prosecutors based in part on arrest and conviction statistics encourages promiscuous charging, regardless of cases' weaknesses or the deals struck. At least one prosecutor's office has reframed its focus from the raw conviction rate to the as-charged conviction rate, encouraging prosecutors to file sustainable charges and not to bargain them down (Wright & Miller, 2002). In tandem with the hard screening discussed above, that approach encourages police and prosecutors to pursue only those cases that can be proven at trial beyond a reasonable doubt, not just any case with probable cause to arrest and charge. One could imagine other limits on the size of the discounts that prosecutors may offer, but it is hard to come up with enforceable ways to limit discounts without first limiting initial charging discretion and incentives. (Otherwise, prosecutors can simply bargain before filing formal charges.) One might at least forbid prosecutors to use the death penalty as a terrifying bargaining chip to induce pleas, requiring them to decide up front whether to seek capital punishment or not.

3. Judges. Making judges a meaningful check on possibly wrongful pleas is harder. Judges know little about cases at the time of plea colloquies and receive their information from parties who have strong incentives to support a deal. One could imagine turning plea colloquies into mini-trials. It would, however, be hard to make those mini-trials meaningful without all but abolishing the advantages of plea

bargaining, though Philadelphia's use of bench trials is a possible model (Schulhofer, 1984). At the very least, judges (or rules of criminal procedure) could reject *Alford* and no-contest pleas, where the defendant's unwillingness to admit guilt signals the risk of a wrongful conviction. They could also require somewhat more detailed allocutions from defendants about what they did, to air any discrepancies. While defense lawyers typically script their clients' allocutions, follow-up questions could elicit defendant's own versions of events.

Another prospective judicial reform would be for judges to require prosecutors to disclose their plea offers to the court. If a prosecutor offered a very low sentence but threatened a high one after trial, the court would learn of the large discrepancy and be less willing to impose the threatened sentence after trial. Knowing that, prosecutors would be less willing to offer low sentences in the first place, reducing their ability to counterbalance a large chance of acquittal with a large sentencing differential. (Prosecutors could still use mandatory minimum and maximum sentences or guidelines to tie judges' hands, to an extent.) Defendants facing weak cases would be more likely to persist in seeking acquittal at trial and thus less likely to be charged in the first place. That would disproportionately benefit innocent defendants, by insulating them from extreme odds bargaining.

At bail hearings, judges could also increase their use of electronic ankle bracelets and similar substitutes for money bail. That would reduce pretrial detention of non-dangerous suspects and so alleviate the pressure to plead guilty in exchange for time served.

4. Defense counsel. Assuming a fixed pot of money for indigent defense, states should prefer public defender systems to appointment and contract-attorney systems. Public defenders specialize in criminal work, gaining more experience and expertise. They enjoy economies of scale in employing attorneys and support staff, so offices can support private investigators and the like. Their offices' size allows for greater training and supervision, which can help line defenders to make credible claims of innocence. They can allocate more of their time and money to potentially innocent defendants in their triage. They can also cultivate credibility with judges and prosecutors to convince them to take second looks at potentially innocent defendants. True, public defenders can become jaded by the large volume of cases and false protestations of innocence, but that problem is probably offset by public defenders' greater ideological commitment to fight for their clients (Bibas, 2004). Recent empirical evidence confirms, for example, that public defenders' clients charged with murder are more likely to plead guilty to lesser charges than similarly charged clients of private appointed counsel (Anderson & Heaton, 2012).

B. Psychology

Unfortunately, it is far easier to identify psychological biases and heuristics than to guard against them. Simply telling someone about a bias is inadequate to protect against it, nor does telling him to try harder or offering him more money to get it right (Bibas, 2004a).

What does work is to force a decision-maker to consider the opposite—here, the possibility that the defendant is innocent (Bibas, 2004a). That is what full-blown adversarial trials are meant to do. At trial, defense lawyers make juries confront the inconsistencies and contrary evidence, suggesting that the government got the wrong man. The disappearance of that check may be the most troubling thing about our world of guilty pleas.

In a world without trials, the main decision-maker is not the jury but the prosecutor, who needs to consider whether the police (who work closely with the prosecutor) got it wrong. The charging and screening prosecutor should explore that possibility upon intake. A supervisory prosecutor should do the same before authorizing a trial or plea. Both supervisory and line prosecutors should confront that possibility when defense lawyers point out conflicting evidence. And a closed-cases unit needs to grapple with new evidence of innocence even after conviction.

More radically, one could aspire to change the conviction mindset of partisan police and prosecutors who count the notches on their belts. America could abandon its adversarial system for a more inquisitorial joint search for truth, as in much of continental Europe. A truly nonpartisan mindset, however, would be fundamentally at odds with American legal traditions, structures, and expectations. It would be all but impossible to implement here, at least in criminal cases (Bibas, 2006). Nevertheless, greater supervision by judges and supervisory prosecutors, as suggested above, could take our system at least a few steps toward the inquisitorial model.

III. Conclusion

America's adversarial system is supposed to ensure a defendant's guilt beyond a reasonable doubt, but our plea-bargaining assembly line short-circuits these elaborate safeguards. Plea bargaining is not a carefully planned system for adjudicating factual guilt, but an improvised shortcut that assumes the defendant's guilt. Documented erroneous convictions show that in an unclear fraction of cases, the system fails. Sometimes, criminal justice professionals jump to mistaken conclusions and do not vigorously investigate and challenge the assumption of guilt. Their overwork, underfunding, incentives, self-interests, and tunnel vision contribute to the problem. Solutions need to change professionals' incentives and plea procedures, to counteract the power of tunnel vision, the assumption of guilt, and the pressures to plead. That is far easier said than done. But better discovery, better documentation, and more rigorous screening are important, practical steps in the right direction. Perhaps the momentum of the innocence movement will help these much-needed reforms to spread.

References

Alschuler, A. W. (1968). The Prosecutor's Role in Plea Bargaining. *University of Chicago Law Review*, *36*, 50-112.

American Bar Association, Criminal Justice Standards Committee (1992). *ABA Standards for Criminal Justice: Providing Defense Services*, 3d ed. Washington, DC: Author.

Anderson, J. M. & Heaton, P. (2012). How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes, *Yale Law Journal*, *122*, 154-214.

Bibas, S. (2004a). Plea Bargaining Outside the Shadow of Trial. *Harvard Law Review*, *117*, 2463-2547.

_____ (2004b). The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel. *Utah Law Review*, *2004*, 1-11.

_____ (2006). The Story of *Brady v. Maryland*: From Adversarial Gamesmanship Toward the Search for Innocence? In C. Steiker (Ed.), *Criminal Procedure Stories* (pp. 129-54). New York, NY: Foundation Press.

_____ (2012). *The Machinery of Criminal Justice*. New York, NY: Oxford University Press.

Bowers, J. (2008). Punishing the Innocent. *University of Pennsylvania Law Review*, *156*, 1117-1179.

Dershowitz, A. M. (1982). *The Best Defense*. New York, NY: Random House.

Easterbrook, F. H. (1983). Criminal Procedure as a Market System. *Journal of Legal Studies*, *12*, 289-332.

Garrett, B. L. (2011). *Convicting the Innocent: Where Criminal Prosecutions Go Wrong*. Cambridge, MA: Harvard University Press.

Harlow, C. W. (2000). *Defense Counsel in Criminal Cases*. (Bureau of Justice Statistics, Special Report No. NCJ 179023). Retrieved June 25, 2013 from Bureau of Justice Statistics: http://www.bjs.gov/content/pub/pdf/dccc.pdf.

Heumann, M. (1978). *Plea Bargaining: The Experience of Prosecutors, Judges, and Defense Attorneys*. Chicago, IL: The University of Chicago Press.

Kassin, S. M., Drizin, S., Grisso, T., Gudjonsson, G. H., Leo, R. A., & Redlich, A. D. (2010). Police-Induced Confessions: Risk Factors and Recommendations. *Law and Human Behavior, 34*, 3-38.

Maguire, K. (Ed.). *Sourcebook of Criminal Justice Statistics Online*. Albany, NY: University at Albany, Hindelang Criminal Justice Research Center. Available: http://www.albany.edu/sourcebook/ [June 3, 2013].

Schulhofer, S. J. Is Plea Bargaining Inevitable? *Harvard Law Review*, *97*, 1037-1107.

Scott, R. E., & Stuntz, W. J. (1992). Plea Bargaining as Contract. *Yale Law Journal*, *101*, 1909-1968.

Stuntz, W. J. (2001). The Pathological Politics of Criminal Law. *Michigan Law Review*, *100*, 505-600.

_____ (2004). Plea Bargaining and Criminal Law's Disappearing Shadow. *Harvard Law Review*, *117*, 2548-2569.

Symposium: New Perspectives on Brady and Other Disclosure Obligations: What Really Works? (2010), *Cardozo Law Review, 31*:1943-2256.

U.S. Sentencing Commission (2012). *Guidelines Manual*. Washington, DC: Author.

Wright, R., & Miller, M. (2002). The Screening/Bargaining Tradeoff. *Stanford Law Review*, *55*, 29-118.

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

Stephanos Bibas*

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

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

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

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

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

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

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

The Tradition of Adversarial Criminal Procedure

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

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

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

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

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

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

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

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

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

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

John Brady's Crime

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

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

The Confessions

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

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

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

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

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

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

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

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

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

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

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

Lower Court Proceedings

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

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

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

[15] *Id.* at 100.

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

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

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

[19] *Id.*

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

In the Supreme Court

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

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

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

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

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

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

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

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

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

[26]*Id.*

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

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

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

Life After Death Row

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

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

Brady's *Overbreadth*

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

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

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

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

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

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

The Emphasis on Innocence

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

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

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

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

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

[35] 373 U.S. at 87.

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

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

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

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

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

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

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

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

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

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

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

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

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

Adversarial Barriers to Focusing on Innocence

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

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

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

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

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

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

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

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

Brady's *Weak Enforcement Mechanism*

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

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

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

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

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

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

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

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

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

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

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

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

Empirical Evidence of How Rarely Brady *Works in Practice*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Brady *Is Designed for Trials, Not Plea Bargaining*

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

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

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

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

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

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

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

[64] 373 U.S. at 87.

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

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

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

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

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

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

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

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

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

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

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

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

Why Require Prosecutorial Misdeeds, Not Just Innocence?

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

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[69] *Id.* at 625.

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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