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BRADY'S SHADOW

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Scholars have spent sixty years documenting Brady v. Maryland's failures—its materiality standard that licenses suppression of exculpatory evidence, its abandonment of defendants who plead guilty, its toothless enforcement. Yet these same critics celebrate Brady's supposed grand promise, treating the decision's incarnate presence as the betrayal of an ideal rather than recognizing the promise itself as a mirage. This Article contends that our profession's faith in Brady—even faith expressed through demands for reform—perpetuates the very dysfunction it critiques. Brady operates not merely as failed doctrine but as a trap and a shadow: the trap springs when its mythology seduces reformers into endless doctrinal tinkering; the shadow falls when this failed doctrine systematically darkens alternative paths toward meaningful discovery.

Through a wide-ranging investigation spanning statutory law, constitutional doctrine, and multiple sites of professional formation, this Article maps Brady's shadow for the first time. Nationwide

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surveys of both statutory and ethical disclosure rules reveal how readily courts grind down facially broad mandates into Brady facsimiles. Original doctrinal analysis traces Brady's contamination of Sixth Amendment ineffective assistance law and the ways it has stifled jurisprudential development for multiple enumerated constitutional rights and for state constitutional provisions that might otherwise have flourished as independent sources of disclosure obligations. Examination of leading casebooks and bar preparation resources indicates that Brady dominates professional consciousness and relegates alternatives to obscurity. And, drawing on existing scholarship while recasting its implications, the Article demonstrates how in-vogue administrative reforms aiming to improve disclosure practices—Brady trainings, discovery policies, disclosure checklists, and so forth—often serve to further tighten Brady's stranglehold on prosecutors' sense of their professional identity. Synthesizing these diverse threads points to a larger pattern: Brady's shadow systematically warps statutory interpretation, stunts constitutional development, misdirects professional formation, and legitimates the very information asymmetries Brady purported to rectify.

Shadows recede when light finds new angles; the Article thus concludes on a brighter, prescriptive note. Precise drafting can partially inoculate disclosure rules against constitutional contagion. Disciplined interpretation can honor each legal source's distinctive text, purpose, and interpretive conventions rather than defaulting to Brady's cramped framework. The paths forward—sketched here only in broad strokes, with an invitation to further research—lead toward discovery systems where generous disclosure, rather than Brady's low bar, becomes the norm. Whether through legal education that decenters Brady, prosecutorial culture built on transparency rather than bare constitutional compliance, legislation embracing open-file discovery or importing investigative tools from civil procedure, or scholarship that builds alternatives previously left underexplored due to Brady's magnetic attraction, escape routes multiply once we learn to see them. For six decades reformers have labored to perfect a doctrine designed to entrench, not dismantle, prosecutorial information control. Only when we stop mistaking a trap for a promise can we liberate American criminal discovery from Brady's shadow and advance toward the transparent, equitable system that Brady tantalizingly dangled yet systematically suppressed.

2026]	Brady's <i>Shadow</i>	1431
INTRODUCTION.....		1431
I. <i>BRADY'S TRAP</i>		1438
<i>A. Failure</i>		1439
<i>B. Mystification</i>		1446
II. <i>BRADY'S SHADOW</i>		1452
<i>A. Statutory Disclosure Law</i>		1453
1. <i>Statutory Exculpatory Evidence Mandates</i>		1454
2. <i>Open-File Discovery: A Cautionary Tale</i>		1457
3. <i>Prosecutorial Lobbying</i>		1460
<i>B. Constitutional Degradation</i>		1462
1. <i>Borrowing</i>		1463
2. <i>Neglect</i>		1465
3. <i>Lockstepping</i>		1467
<i>C. Professional Formation</i>		1469
1. <i>Legal Education</i>		1469
2. <i>Licensure</i>		1473
3. <i>Ethics Standards</i>		1475
4. <i>Internal Prosecutorial Administration</i>		1477
III. REIMAGINING CRIMINAL DISCOVERY OUTSIDE <i>BRADY'S</i>		
<i>SHADOW</i>		1479
<i>A. Statutory Drafting and Judicial Interpretation</i>		1481
<i>B. Broadened Conceptual Horizons and Reform Ambitions</i>		1486
CONCLUSION		1493

INTRODUCTION

“[T]he 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.”¹ With these words, *Brady v. Maryland* became what is widely heralded as the “canonical” case governing prosecutorial disclosure.² Over sixty years later, *Brady* wields extraordinary symbolic authority. Scholars hail it as one of the Warren

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

² William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 Harv. L. Rev. 780, 789–90, 790 n.52 (2006) (“The canonical case [on prosecutorial disclosure] is *Brady v. Maryland* . . .”). See generally Colin Starger, *Expanding Stare Decisis: The Role of Precedent in the Unfolding Dialectic of Brady v. Maryland*, 46 Loy. L.A. L. Rev. 77, 87, 96 (2012) (arguing that *Brady* is a “super-precedent” due in part to its “canonical formulation”).

Court's most iconic decisions: a "potentially revolutionary"³ guarantee of fair play and upstanding prosecutorial conduct that one leading casebook describes as a "shot heard 'round the world.'" ⁴ The numbers alone point to *Brady*'s towering influence: cited nearly five times as often as *Brown v. Board of Education*,⁵ its frequency of invocation in judicial opinions rivals that of *Miranda v. Arizona*.⁶ Even the fiercest critics of the trajectory that *Brady* jurisprudence has followed since its titular decision venerate the original landmark's supposed "grand promise" as a preface to the lament soon to follow that *Brady*'s supposed promise has given way to a "grim reality."⁷ This juxtaposition—celebrating *Brady*'s transformative potential while cataloging its actual deficits—has become so routine as to constitute an obligatory trope in *Brady* reform discourse.⁸

Despite the reverence *Brady* commands, scholars deliver an unsparing verdict on its real-world performance. One prominent commentator aptly (if half-jokingly) diagnosed *Brady*'s "[b]unch of [f]laws,"⁹ distilling into plain terms what volumes of scholarship elaborate. The materiality standard epitomizes *Brady*'s dysfunction: prosecutors must divine what evidence might become outcome-determinative at some future trial—a speculative, bias-prone exercise that invites evidence

³ Stephanos Bibas, *Brady v. Maryland: From Adversarial Gamesmanship Toward the Search for Innocence?*, in *Criminal Procedure Stories* 129, 129 (Carol S. Steiker ed., 2006) ("*Brady* marked a potentially revolutionary shift from traditionally unfettered adversarial combat toward a more inquisitorial, innocence-focused system."). But see *id.* at 154 (concluding that *Brady*'s "important symbol" proved "in some ways a hollow one").

⁴ Joshua Dressler, George C. Thomas III & Daniel S. Medwed, *Criminal Procedure: Principles, Policies, and Perspectives* 956 (8th ed. 2023).

⁵ 347 U.S. 483 (1954).

⁶ 384 U.S. 436 (1966); Brandon L. Garrett, Adam M. Gershowitz & Jennifer Teitcher, *The Brady Database*, 114 J. Crim. L. & Criminology 185, 189 n.14 (2024) (finding over 132,000 citations to *Brady*).

⁷ Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. Tex. L. Rev. 685, 686, 709 (2006); see also *id.* at 727–28 (painting a "stark" contrast between *Brady*'s ideals and its failed actualization, and calling for the restoration of "the promise of *Brady*").

⁸ I count myself among the prime offenders. See Justin Murray, *Prejudice-Based Rights in Criminal Procedure*, 168 U. Pa. L. Rev. 277, 280 (2020) (calling *Brady* a "grand symbol[] of our collective commitment to fairness" that has "utterly failed in practice to make good on [this] promise[]"). My one consolation is that I stand in good company. For additional examples and analysis of this commonplace rhetorical maneuver in *Brady* reform discussions, see *infra* notes 62–65 and accompanying text.

⁹ Daniel S. Medwed, *Brady's Bunch of Flaws*, 67 Wash. & Lee L. Rev. 1533 (2010).

suppression.¹⁰ *Brady* imposes no meaningful protection at the plea stage, which, in a system where adjudication overwhelmingly takes place through pleas, means *Brady* affords no meaningful protection at all.¹¹ Its inapplicability to incriminating information arbitrarily excludes most information the government possesses—information the defense needs to see in order to mount a thorough investigation.¹² Enforcement is lethargic.¹³ These interlocking failures (among others yet to be mentioned) point to an underlying design flaw: *Brady* deputizes prosecutors as gatekeepers of their own disclosure obligations, demanding self-policing from adversaries who are determined to convict. Thus, a strong scholarly consensus has emerged that condemns *Brady*'s doctrinal specifications and implementation for abandoning the decision's founding ideals. This condemnation, however, betrays its own blindness: the scholarly imagination mourns *Brady*'s lost promise rather than recognizing the promise itself as an illusion.

¹⁰ For a small sampling of the voluminous critical commentary regarding the materiality standard, see, for example, Brandon L. Garrett & Adam M. Gershowitz, *The Brady Materiality Standard*, 78 Stan. L. Rev. 303, 303 (2026); Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 Colum. L. Rev. 79, 106–07, 124–25 (1988); Christopher Deal, *Note, Brady Materiality Before Trial: The Scope of the Duty to Disclose and the Right to a Trial by Jury*, 82 N.Y.U. L. Rev. 1780 (2007); see also *infra* notes 45–46, 50 and accompanying text.

¹¹ See, e.g., Kathleen Ridolfi, Tiffany M. Joslyn & Todd H. Fries, *Nat'l Ass'n of Crim. Def. Laws., Material Indifference: How Courts Are Impeding Fair Disclosure in Criminal Cases* 24–28 (2014); Corinna Barrett Lain, *Accuracy Where It Matters: Brady v. Maryland in the Plea Bargaining Context*, 80 Wash. U. L.Q. 1, 49 (2002); see also *infra* notes 48, 51–52 and accompanying text; cf. Miriam H. Baer, *Timing Brady*, 115 Colum. L. Rev. 1, 1–2 (2015) (critiquing the *Brady* doctrine's inattention to timing and suggesting modest reforms requiring prosecutors to provide partial but early disclosures).

¹² See, e.g., Bibas, *supra* note 3, at 146–48; Daniel S. McConkie, *Structuring Pre-Plea Criminal Discovery*, 107 J. Crim. L. & Criminology 1, 13–19 (2017); Ion Meyn, *Discovery and Darkness: The Information Deficit in Criminal Disputes*, 79 Brook. L. Rev. 1091, 1102–03 (2014); see also *infra* note 53 and accompanying text (discussing additional sources analyzing *Brady*'s limits in reaching only exculpatory and not inculpatory evidence).

¹³ See, e.g., Shima Baradaran Baughman, *Subconstitutional Checks*, 92 Notre Dame L. Rev. 1071, 1096–99 (2017); Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 Harv. L. Rev. 2049, 2087–89 (2016); Brian M. Murray, Jon B. Gould & Paul Heaton, *Qualifying Prosecutorial Immunity Through Brady Claims*, 107 Iowa L. Rev. 1107, 1116–26 (2022); Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. Rev. 693, 696–97 (1987); see also *infra* note 55 and accompanying text (observing that reversal, civil liability, and professional discipline each independently fail to adequately redress and deter *Brady* violations).

If *Brady* has come to enjoy, as one scholar describes it, “a special place in the constellation of Supreme Court decisions protecting a criminal defendant’s right to a fair trial,”¹⁴ then this Article’s aim is to tear it from that pedestal. *Brady* has not merely failed as constitutional doctrine (though it has). It operates as both a trap and a shadow, constraining reform possibilities across the legal landscape. The trap springs from the seductive mythology just described: *Brady*’s false promise has beguiled successive generations of scholars and reformers into renovating a structurally unsound doctrine rather than building genuine alternatives to the prosecutor’s informational monopoly.

Yet *Brady*’s pernicious influence reaches further still. This Article names and theorizes what I call *Brady*’s shadow—the doctrine’s unappreciated power to colonize domains far beyond its home in constitutional due process. Through converging investigative methods, the Article constructs the first comprehensive account of *Brady*’s reach. Surveys of disclosure rules across all fifty states and the territories show how readily courts grind down facially broader statutory and ethical disclosure mandates into mere codifications of existing *Brady* law. Doctrinal analysis traces how concepts drawn from *Brady* cases degrade seemingly unrelated areas of both state and federal constitutional law. Examination of legal education and bar preparation materials demonstrates that *Brady* looms large in prosecutors’ professional formation. Evidence culled from existing scholarship shows that well-meaning prosecutorial training programs at times convert *Brady*’s minimal constitutional baseline into a normative default, and also that prosecutors at times weaponize *Brady* to defeat legal reform measures in the political arena. Only by assembling these disparate strands of proof does the full pattern emerge: *Brady*’s shadow systematically—not always, but with vexing regularity—distorts statutory interpretation, stunts constitutional development, misdirects professional formation, and legitimates the very informational asymmetries it purported to rectify. Mapping this shadow helps explain why decades of incremental reform efforts have so often fallen short. It also illuminates paths forward that *Brady*’s dominance has long obscured.

The Article’s first Part dissects the mechanics of what it terms *Brady*’s trap. It begins by surveying decades of scholarship documenting *Brady*’s failure: the hopelessly unworkable materiality standard, the

¹⁴ Gershman, *supra* note 7, at 685.

absence of pretrial disclosure duties, the systematic underenforcement, and more. But this catalog of dysfunction merely sets the stage. The deeper puzzle is this: Why does the legal profession remain entranced by a doctrine whose failures are so manifest? Part of the answer, as Part I elaborates, lies in *Brady*'s paradoxical appeal to adverse stakeholders, strange bedfellows. For those content with current arrangements, it provides deceptive reassurance that constitutional safeguards already protect defendants adequately. For reformers, it perpetuates the false hope that better enforcement or modest adjustments might finally deliver the fairness *Brady* promised but has yet to deliver. *Brady* thus serves to cement the prosecutor's monopoly over information and evidence while staging just enough due process theater to deflect demands for structural reform.¹⁵

Part II, the Article's empirical and analytical backbone, traces *Brady*'s shadow through many different domains of legal practice and thought. The investigation opens by exploring *Brady*'s impact on statutory disclosure law, beginning with statutes requiring prosecutors to disclose exculpatory evidence to the defense. A nationwide survey of these provisions highlights the doctrine's long reach. Ten states explicitly drafted their rules to mirror *Brady*, while courts in twelve others imported *Brady*'s restrictions into statutes whose texts seemingly demand broader disclosure. Even ambitious open-file reforms can succumb to *Brady*'s influence. As discussed below, Texas's Michael Morton Act sought to revolutionize criminal discovery in the state, presumptively opening prosecutors' entire files to the defense. Yet because drafters included the word "material" in defining what the prosecutor had to disclose, courts spent over half a decade forcing this potentially transformative statute back into *Brady*'s constricting mold. And *Brady*'s influence extends beyond legislative drafting choices and judicial interpretation into the political arena. When lawmakers propose

¹⁵ While cutting against the grain of mainstream *Brady* scholarship, the argument developed in Part I builds on work by Eugene Cerruti, Ion Meyn, and Scott Sundby, who have each made the case in various ways that *Brady* does not just fail as a constitutional doctrine but has also legitimated criminal adjudication's informational inequities. See *infra* notes 59–61 and accompanying text. More generally, the Article contributes to a remarkably underdeveloped body of scholarship that brings to bear ideas and methods from critical legal theory on larger-than-life Warren Court icons such as *Miranda v. Arizona*, see Louis Michael Seidman, *Brown and Miranda*, 80 Calif. L. Rev. 673 (1992), and *Gideon v. Wainwright*, see Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 Yale L.J. 2176 (2013).

expanded disclosure requirements, prosecutors at times beat back these measures by brandishing their *Brady* compliance as evidence that the system already protects defendants adequately.

Brady also degrades constitutional development—and not just in the domain of federal due process where *Brady* originated. Ineffective assistance of counsel doctrine mechanically incorporated *Brady*'s materiality test in *Strickland v. Washington*,¹⁶ giving birth to *Strickland*'s infamous prejudice prong that kicks relief out of reach for countless defendants represented by underperforming lawyers in unfair proceedings. The Confrontation and Compulsory Process Clauses—enumerated rights with independent textual foundations serving ends different from those of general due process protections—atrophy unused as discovery mechanisms, casualties of the judiciary's faith that *Brady* says all the Constitution has to say about prosecutorial secrecy. State courts compound this abdication: tasked with interpreting fifty different state constitutions that might have generated innovative and promising experiments in disclosure law, they instead have by and large chosen to march in lockstep behind *Brady*'s tattered banner.

Professional formation completes the picture, showing how *Brady* shapes legal consciousness from law school onward. Several market-leading casebooks (though not all) enshrine *Brady* as the centerpiece of criminal discovery, probing its intricacies while treating alternative discovery frameworks as afterthoughts. The bar exam reinforces this hierarchy, focusing entirely on constitutional disclosure doctrine to the exclusion of other mechanisms. Ethics standards—another ingredient in shaping professional identities—likewise bear *Brady*'s imprint: this Article's second national survey shows that the high courts of six states have construed broadly worded ethical mandates to achieve little more than ratifying *Brady*'s meager demands. And within prosecutors' offices, many well-intentioned bureaucratic reforms—disclosure policies, trainings, and other administrative techniques aimed at fostering *Brady* compliance—often have the effect of further tightening *Brady*'s grip.

From law schools to courtrooms, from statutes to constitutional doctrine, *Brady*'s influence proves both pervasive and pernicious. Through these mutually reinforcing mechanisms, *Brady* persistently bends American criminal discovery toward its own impoverished model,

¹⁶ 466 U.S. 668 (1984).

transforming defective constitutional floors into the normative standards that too often govern legal practice.

Seeing *Brady*'s shadow for what it is reveals paths forward, as Part III details. For legislators, one clear prescription is surprisingly straightforward, yet no less effective for its simplicity: eschew *Brady*'s vocabulary, especially “material,” when drafting disclosure rules. Judges, too, can help dampen *Brady*'s outsized influence by practicing interpretive fidelity, construing each rule—whether it be a statute, an ethics standard, or a constitutional provision distinct from federal due process—according to its own text, purpose, and conventional interpretive modalities rather than transplanting *Brady* concepts born of judicial anxieties that are at their peak when it comes to unenumerated due process rights. More broadly, Part III begins to envision legal education that decenters *Brady*, prosecutorial administration that aspires to something more than technical compliance with the Constitution, and academic research and reform efforts that explore the myriad possibilities that *Brady*'s dominance has left fallow.

This Article's critique should not be read as denigrating the work scholars are currently pursuing within *Brady*'s conceptual boundaries,¹⁷ nor as inviting courts to overrule *Brady* or further slash *Brady*'s already feeble protections. There is plenty of vital research afoot that explores, among other things, adapting *Brady* to the digital age,¹⁸ ensuring *Brady* information flows reliably from police agencies to prosecutors,¹⁹ designing internal bureaucratic reforms to bolster *Brady* compliance,²⁰

¹⁷ Some of my own past scholarship, in fact, has called for various *Brady* reforms; I continue to believe these reforms would achieve some good. See Murray, *supra* note 8, at 318–27; Justin Murray, Policing Procedural Error in the Lower Criminal Courts, 89 Fordham L. Rev. 1411, 1464–66 (2021).

¹⁸ See, e.g., Andrew Guthrie Ferguson, Big Data Prosecution and *Brady*, 67 UCLA L. Rev. 180 (2020); Brian Chen, Note, Big Data and *Brady* Disclosures, 99 N.Y.U. L. Rev. 1754 (2024).

¹⁹ See, e.g., Jonathan Abel, *Brady*'s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team, 67 Stan. L. Rev. 743 (2015); Stanley Z. Fisher, The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England, 68 Fordham L. Rev. 1379 (2000).

²⁰ See, e.g., Lissa Griffin & Daisy Mason, The Prosecutor in the Mirror: Conviction Integrity Units and *Brady* Claims, 55 Loy. L.A. L. Rev. 1005 (2022); Rachel Moran, *Brady* Lists, 107 Minn. L. Rev. 657 (2022); Barry Scheck, Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them, 31 Cardozo L. Rev. 2215 (2010); Ellen Yaroshefsky, Foreword: New Perspectives on *Brady* and Other Disclosure Obligations: What Really Works?, 31 Cardozo L. Rev. 1943 (2010).

enhancing judicial oversight of the disclosure process,²¹ and tracing empirical patterns in *Brady* litigation and prosecutorial administration.²² Especially where political or institutional realities preclude deeper structural change, incremental improvements within *Brady*'s parameters are sorely needed. But we should not mistake necessity for virtue. The legal profession has poured extraordinary intellectual resources into refining a doctrine that was never built to succeed. After tracing the damage *Brady* has caused across numerous domains, the pattern becomes undeniable: a doctrine that promises procedural fairness instead reinforces prosecutorial control over information. Ultimately, my hope here is not just to render *Brady*'s trap and shadow legible but, more than that, to highlight escape routes that have so far eluded our grasp.

I. *BRADY*'S TRAP

Brady is a trap. But unlike so many ordinary failures in the law that eventually provoke abandonment or transformation, *Brady* lives on through mystification—it has become the dominant organizing framework through which the legal profession conceives of criminal discovery. This Part reveals how the trap ensnares even those who recognize much of what is wrong with *Brady*.

Section I.A assembles the overwhelming evidence of *Brady*'s failure: its scope excludes most of the information defendants need to investigate facts and assess their options; its materiality threshold virtually precludes appellate relief while licensing pretrial suppression of evidence; its timing rules leave defendants to fend for themselves at the plea negotiation phase, the site where criminal adjudication actually takes place; and its enforcement mechanisms amount to empty threats.

²¹ See, e.g., Darryl K. Brown, The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication, 93 Calif. L. Rev. 1585, 1632–42 (2005); Daniel S. McConkie, The Local Rules Revolution in Criminal Discovery, 39 Cardozo L. Rev. 59 (2017); see also *infra* notes 246, 264 (collecting additional sources advocating greater judicial supervision of the *Brady* disclosure process).

²² See Ridolfi et al., *supra* note 11; Garrett & Gershowitz, *supra* note 10; Garrett et al., *supra* note 6; Jon B. Gould, Samantha L. Senn, Belén Lowrey-Kinberg & Linda Phiri, Mapping the Path of *Brady* Violations: Typologies, Causes & Consequences in Erroneous Conviction Cases, 71 Syracuse L. Rev. 1061 (2021); Samantha Luna & Allison D. Redlich, The Decision to Provide Discovery: An Examination of Policies and Guilty Pleas, 17 J. Experimental Criminology 305 (2021); Jennifer Mason McAward, Understanding *Brady* Violations, 78 Vand. L. Rev. 875 (2025); Murray et al., *supra* note 13, at 1135–44.

This litany of failures should inspire wholesale reconsideration. Section I.B explores why it has not. The legal profession treats *Brady* not as one approach to discovery among many—and a desiccated one at that—but as a normative bedrock. Consequently, we exhaust ourselves refining its contours while accepting prosecutorial information control as given. Even *Brady*'s critics have been beguiled: scholars unflinchingly diagnose the doctrine's pathologies only to propose reforms that preserve its fundamental structural commitment to prosecutorial gatekeeping. *Brady* keeps reformers forever enthralled by the prospect that better enforcement or modest adjustments will finally deliver the fairness that constitutional jurisprudence tantalizingly dangles yet in the end withholds. Our persistent inability to imagine a radically different framework for discovery outside this restrictive paradigm creates the preconditions for *Brady*'s shadow to blanket the landscape of American criminal adjudication—the story later told in Part II.

A. Failure

By the time the Supreme Court decided *Brady* in 1963, criminal procedure remained anchored to fact-finding practices that civil litigation had long since abandoned. For centuries, both areas of law had deprived the parties of meaningful opportunities for pretrial discovery, leaving them to face a “pretrial lacuna” where they “looked toward the trial horizon in darkness.”²³ The 1938 Federal Rules of Civil Procedure, alongside comparable state law innovations, transformed civil adjudication by introducing pretrial discovery mechanisms that aimed to air all relevant facts to the maximum feasible extent and place parties on a more equal footing in presenting and contesting evidence.²⁴ As Ion Meyn's research demonstrates, criminal procedure confronted the same choice during this period—indeed, the original draft of the Federal Rules of Criminal Procedure explicitly drew on the civil model as a

²³ Ion Meyn, *Why Civil and Criminal Procedure Are So Different: A Forgotten History*, 86 *Fordham L. Rev.* 697, 703 (2017).

²⁴ See, e.g., Russell M. Gold, Carissa Byrne Hessick & F. Andrew Hessick, *Civilizing Criminal Settlements*, 97 *B.U. L. Rev.* 1607, 1633–35 (2017); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 *B.C. L. Rev.* 691, 691–92 (1998).

template for reform.²⁵ Lawmakers, however, largely preserved the status quo when it came to criminal procedure, maintaining the prosecutor's near-total monopoly over information developed through the government's investigation out of concern that criminal defendants—who might jeopardize witnesses or fabricate alibis in some instances—could not be entrusted with facts.²⁶ Even so, the demand for reform was intensifying. Prominent judges criticized the growing civil-criminal divide, scholars proposed sweeping discovery reforms that borrowed from civil practice, and policymakers debated various proposals for expanding disclosure requirements for the prosecution.²⁷ *Brady* thus came before the Court at the very moment when the prosecutor's lopsided access to information needed normative validation.

The constitutional issue in *Brady* arose from the death penalty prosecution of John Brady, who admitted having participated in a robbery that brought about the victim's murder but argued it was his confederate, Charles Boblit, who had perpetrated the killing.²⁸ Brady's lawyer demanded to see all statements Boblit had made to the police. Prosecutors dutifully produced four of Boblit's statements, those blaming Brady for the murder. But they buried the fifth—the one where Boblit confessed he himself had strangled the victim with a shirt, just as Brady claimed.²⁹ This seemingly calculated suppression of potentially life-saving evidence impelled the lower courts to grant Brady a new capital sentencing trial (though not a new trial as to his liability for murder), and the Supreme Court upheld that ruling.³⁰ From this sordid

²⁵ Meyn, *supra* note 23, at 698, 708–12 (citing Hearing Before the Advisory Committee on Rules of Criminal Procedure, United States Supreme Court (Sep. 8, 1941)).

²⁶ See *id.* at 713, 717, 720–24. For further discussion of the mid-century breakup between civil and criminal procedure in the field of discovery, see, for example, 5 Wayne R. LaFave, Jerold H. Israel, Nancy J. King & Orin S. Kerr, *Criminal Procedure* § 20.1(c) (4th ed. 2015); 2 Charles Alan Wright & Peter J. Henning, *Federal Practice and Procedure* § 251 (4th ed. 2009).

²⁷ See, e.g., Robert L. Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 *Stan. L. Rev.* 293 (1960); Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 *Yale L.J.* 1149, 1180–97 (1960); David W. Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 *Calif. L. Rev.* 56, 74–81 (1961); Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 *N.Y.U. L. Rev.* 228, 243–48 (1964); *State v. Tune*, 98 A.2d 881, 894–98 (N.J. 1953) (Brennan, J., dissenting).

²⁸ *Brady v. Maryland*, 373 U.S. 83, 84 (1963). *Brady*'s backstory is well told by Thomas L. Dybdahl, *When Innocence Is Not Enough: Hidden Evidence and the Failed Promise of the Brady Rule 3–18* (2023); Richard Hammer, *Between Life and Death* (1969).

²⁹ *Brady*, 373 U.S. at 84; Dybdahl, *supra* note 28, at 9–10.

³⁰ *Brady*, 373 U.S. at 90.

tale of a hidden confession emerged what scholars now venerate as the “canonical”³¹ formulation of the *Brady* rule: “[T]he 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.”³² Rather than construct a careful doctrinal edifice for this new rule, the Court welded together two arguably incompatible foundations: precedents condemning prosecutors who knowingly use perjured testimony—cases that turned entirely on “the good faith or bad faith of the prosecution”³³—and gauzy invocations of the prosecutor’s duty to seek justice rather than convictions.³⁴

The legal profession persistently turns to *Brady*’s rhetoric about prosecutorial duty for reassurance that defendants receive fair treatment when prosecutors act ethically within *Brady*’s framework.³⁵ Yet warning signs appeared immediately that *Brady* could not fulfill such aspirations. Though *Brady* nodded toward reimagining prosecutors as servants of justice rather than partisans, the Justices never articulated or agreed upon a coherent theory of why prosecutors should transcend adversarial combat or how far they must go in aiding the defense.³⁶ When later cases sought even modest expansions of *Brady*’s obligation, the Supreme Court and lower courts alike tended to reflexively invoke the adversarial system’s sanctity, insisting *Brady* existed only to prevent “miscarriage[s] of justice,” not to “displace the adversary system,”³⁷ and

³¹ Murray, *supra* note 8, at 286 n.39 (referencing “the canonical formulation of *Brady*’s holding”); Starger, *supra* note 2, at 87–96 (arguing in detail that *Brady* constitutes a “super-precedent” due in part to this “canonical formulation”); see also Stuntz, *supra* note 2, at 789–90, 790 n.52 (“The canonical case [on prosecutorial disclosure] is *Brady v. Maryland* . . .”).

³² *Brady*, 373 U.S. at 87.

³³ *Id.* The Court characterized its holding as “an extension” of cases descended from *Mooney v. Holohan*, 294 U.S. 103 (1935) (per curiam)—cases about deliberate misconduct involving failure to correct testimony a prosecutor knows to be false. *Brady*, 373 U.S. at 86–87.

³⁴ See *Brady*, 373 U.S. at 87–88, 87 n.2.

³⁵ See *infra* Section I.B.

³⁶ Several scholars have rightly diagnosed this unresolved conflict—that between the American system’s deeply rooted traditions of adversarial lawyering and *Brady*’s perceived (though in my view, not actual) threat to those traditions—as a key explanation for *Brady*’s failure. See Bibas, *supra* note 3, *passim*; Janet C. Hoeffel, Prosecutorial Discretion at the Core: The Good Prosecutor Meets *Brady*, 109 Penn. St. L. Rev. 1133, 1135–36 (2005); Louis M. Seidman, The Trial and Execution of Bruno Richard Hauptmann: Still Another Case That “Will Not Die,” 66 Geo. L.J. 1, 41 (1977).

³⁷ E.g., *United States v. Bagley*, 473 U.S. 667, 675 (1985).

catastrophizing that a broad rendering of *Brady*'s holding threatened to "entirely alter the character and balance of our present systems of criminal justice."³⁸ Moreover, the original opinion rested on incompatible premises the Court never endeavored to reconcile. It declared prosecutorial intent irrelevant—asserting the rule applies "irrespective of . . . good faith or bad faith" and suggesting the only relevant consideration is whether the defendant received a fair process³⁹—while simultaneously rooting the disclosure duty in prosecutors' special ethical obligations and analogizing it to the duty to correct perjured testimony, thereby placing prosecutors' good or bad faith at the very heart of the Court's *Brady* jurisprudence.⁴⁰ This built-in contradiction gave future courts a convenient escape hatch. They could select whichever of these conflicting rationales justified their preferred outcome—which, all too often, was the outcome that would further constrict *Brady*'s already limited reach.⁴¹

The Court's post-*Brady* decisions have followed a steady pattern of doctrinal contraction. Yes, the Court eliminated the requirement (if it ever was a bona fide requirement, not just dictum) that defendants must request evidence to invoke *Brady*,⁴² and expanded the government's *Brady* obligations beyond individual prosecutors to bind the entire prosecution team including the police.⁴³ Yet these modest expansions shrink to insignificance against the towering obstacles the Court simultaneously erected. Consider the materiality standard: evidence qualifies as "material" only if there is a "reasonable probability" its disclosure would change the trial's outcome⁴⁴—a standard appellate courts routinely cite to deny relief even when prosecutors suppress

³⁸ E.g., *Giles v. Maryland*, 386 U.S. 66, 117 (1967) (Harlan, J., dissenting).

³⁹ *Brady*, 373 U.S. at 87.

⁴⁰ See *supra* notes 33–34 and accompanying text.

⁴¹ Other commentators have likewise identified this "inherent contradiction" as central to *Brady*'s dysfunction. Seidman, *supra* note 36, at 32; accord Barbara Allen Babcock, Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel, 34 Stan. L. Rev. 1133, 1154 (1982); Bibas, *supra* note 3, at 151–54; Peter J. Henning, Prosecutorial Misconduct and Constitutional Remedies, 77 Wash. U. L.Q. 713, 760–66 (1999).

⁴² See *United States v. Agurs*, 427 U.S. 97, 106–07 (1976); *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.).

⁴³ See *Kyles v. Whitley*, 514 U.S. 419, 437–38 (1995). Despite *Kyles*, hard questions remain concerning which arms of the government form part of the prosecution team—and how much of the information known to various government officials is imputable to the prosecutor. See, e.g., Abel, *supra* note 19, at 745–50.

⁴⁴ *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.); accord *id.* at 685 (White, J., concurring in part and concurring in the judgment).

plainly exculpatory evidence.⁴⁵ And the Court's opinions suggest (though the point remains contested)⁴⁶ that materiality is not merely a rule meant for use by appellate courts to preserve the finality of convictions but that prosecutors, too, may screen for materiality when deciding what to disclose pretrial—perversely authorizing the very adversaries *Brady* supposedly constrains to determine whether evidence favoring their opponents merits disclosure. Even more consequentially, *United States v. Ruiz*⁴⁷ broadly condoned prosecutorial suppression when defendants plead guilty, permitting prosecutors to withhold either all exculpatory evidence (if *Ruiz* is read for all it's worth) or at least impeachment and affirmative-defense evidence (if the decision is construed more narrowly).⁴⁸ With over ninety-five percent of felony convictions secured through pleas,⁴⁹ *Ruiz* blunted *Brady*'s impact at the very stage that determines criminal justice outcomes for the vast majority of defendants.

For over half a century, scholars have cleared forests filling law journals with criticism of *Brady*'s myriad failings. The materiality doctrine draws the heaviest fire, as it invites prosecutors to withhold evidence based on their inevitably slanted assessment of its importance, at which point courts compound the problem by deferring to these

⁴⁵ See Ridolfi et al., *supra* note 11, at xi, 14; Garrett et al., *supra* note 6, at 228–31; Garrett & Gershowitz, *supra* note 10, at 351–53.

⁴⁶ Compare Janet C. Hoeffel & Stephen I. Singer, Activating a *Brady* Pretrial Duty to Disclose Favorable Information: From the Mouths of Supreme Court Justices to Practice, 38 N.Y.U. Rev. L. & Soc. Change 467, 480–86 (2014) (arguing that materiality limitations should apply only to appellate and post-conviction review, not pretrial), with Michael Serota, Stare Decisis and the *Brady* Doctrine, 5 Harv. L. & Pol'y Rev. 415, 425–31 (2011) (arguing that materiality limitations apply across the board).

⁴⁷ 536 U.S. 622, 628–33 (2002).

⁴⁸ Lower courts are fractured over *Ruiz*'s reach. Compare *In re Miranda*, 182 P.3d 513, 542–43 (Cal. 2008) (holding that *Ruiz* does not broadly limit *Brady* except for impeachment evidence), with *United States v. Conroy*, 567 F.3d 174, 179 (5th Cir. 2009) (*per curiam*) (rejecting the argument that *Ruiz*'s scope is limited to impeachment evidence). Most scholars favor a generous application of *Brady* at the plea stage, see, for example, Lain, *supra* note 11, at 5, and giving *Ruiz* a narrow interpretation, see, for example, Colin Miller, The Right to Evidence of Innocence Before Pleading Guilty, 53 U.C. Davis L. Rev. 271, 294–97 (2019). But see R. Michael Cassidy, Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures, 64 Vand. L. Rev. 1429, 1462 (2011) (explaining that expanding pre-plea impeachment disclosures would be “ineffectual”); John G. Douglass, Fatal Attraction? The Uneasy Courtship of *Brady* and Plea Bargaining, 50 Emory L.J. 437, 441–45 (2001).

⁴⁹ See Jenia I. Turner, Plea Bargaining, in 3 Reforming Criminal Justice 73, 73 & n.2 (Erik Luna ed., 2017).

tainted judgments when suppression comes to light.⁵⁰ A large body of literature also assails *Brady*'s timing-related deficiencies. The doctrine establishes no firm disclosure deadline, requiring only that delays not affect the verdict—a test courts almost never find met, even when prosecutors ambush defendants with disclosures mid-trial⁵¹—while *Ruiz*, as noted earlier, guts *Brady*'s relevance at the plea stage in a system that resolves nearly all cases through negotiated guilty pleas.⁵²

The litany of *Brady*'s failures extends well beyond materiality and timing. Scholars highlight its crabbed scope: *Brady* reaches only exculpatory evidence, leaving defendants blind to the inculpatory information they need to investigate effectively and assess their options.⁵³ Critics further highlight how *Brady* naively presumes the prosecutor's file will contain whatever exculpatory information may exist without demanding that police look for it through an impartial and diligent investigation, thereby rewarding investigative tunnel vision that

⁵⁰ In addition to the sources cited *supra* note 10, see, for example, Alafair S. Burke, Revisiting Prosecutorial Disclosure, 84 Ind. L.J. 481, 484–85 (2009); Keith A. Findley & Michael S. Scott, The Multiple Dimensions of Tunnel Vision in Criminal Cases, 2006 Wis. L. Rev. 291, 351–53; Bennett L. Gershman, Litigating *Brady v. Maryland*: Games Prosecutors Play, 57 Case W. Rsv. L. Rev. 531, 538–42, 548–64 (2007); Medwed, *supra* note 9, at 1541–44, 1555–57; Murray, *supra* note 8, at 310–12.

⁵¹ See, e.g., *United States v. Cadet*, 727 F.2d 1453, 1467 (9th Cir. 1984); *United States v. Burke*, 571 F.3d 1048, 1054 (10th Cir. 2009); *United States v. Starusko*, 729 F.2d 256, 262 (3d Cir. 1984). For critical analysis of this case law, see Ridolfi et al., *supra* note 11, at 24–28; Baer, *supra* note 11, at 6; Medwed, *supra* note 9, at 1547–49.

⁵² In addition to the sources cited *supra* note 11, see, for example, Carissa Byrne Hessick, Punishment Without Trial: Why Plea Bargaining Is a Bad Deal 54–57 (2021); Daniel S. Medwed, Prosecution Complex: America's Race to Convict and Its Impact on the Innocent 58–59, 63–64 (2012); Cynthia Alkon, The Right to Defense Discovery in Plea Bargaining Fifty Years After *Brady v. Maryland*, 38 N.Y.U. Rev. L. & Soc. Change 407, 411–15 (2014); Gershman, *supra* note 50, at 560–62; Jason Kreag, Prosecutorial Analytics, 94 Wash. U. L. Rev. 771, 802–04 (2017); Kevin C. McMunigal, Guilty Pleas, *Brady* Disclosure, and Wrongful Convictions, 57 Case W. Rsv. L. Rev. 651, 662–69 (2007); Alexandra Natapoff, Deregulating Guilt: The Information Culture of the Criminal System, 30 Cardozo L. Rev. 965, 1016–21 (2008).

⁵³ In addition to the sources cited *supra* note 12, see, for example, Máximo Langer, Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure, 33 Am. J. Crim. L. 223, 274 (2006); Jennifer E. Laurin, Quasi-Inquisitorialism: Accounting for Deference in Pretrial Criminal Procedure, 90 Notre Dame L. Rev. 783, 794–95 (2014). Courts cannot even agree whether *Brady* reaches inadmissible evidence that might generate admissible leads. See Blaise Niosi, Note, Architects of Justice: The Prosecutor's Role and Resolving Whether Inadmissible Evidence Is Material Under the *Brady* Rule, 83 Fordham L. Rev. 1499, 1520–33 (2014).

produces files conveniently bereft of discoverable material.⁵⁴ On the implementation front, there is broad consensus that *Brady* lacks any meaningful enforcement mechanism. Because it depends entirely on prosecutorial self-policing, most suppressed evidence remains forever hidden—defendants cannot hunt for evidence they have no reason to think exists. Even when violations surface by pure chance, accountability remains elusive: appellate courts rarely reverse, absolute immunity shields prosecutors from lawsuits, and the prospect of professional discipline for wayward prosecutors is close to nonexistent.⁵⁵

The accumulated weight of scholarly assessment points to an inescapable verdict: *Brady* has failed. Reformist criminal procedure scholarship has painstakingly inventoried its shortcomings—what Daniel Medwed aptly brands *Brady*'s “[b]unch of [f]laws”⁵⁶ and Bennett Gershman presents as the “grim reality” of *Brady*'s lost promise.⁵⁷ Yet even this voluminous academic literature leaves unchallenged *Brady*'s central premises, seeking to repair what it assumes was once sound (or could be made sound through faithful adherence). But what if *Brady* was never truly broken—what if it was built this way?⁵⁸ A smaller cohort of

⁵⁴ See, e.g., Jerome H. Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society* 133 (1966); Fisher, *supra* note 19, at 1383–85; Adam M. Gershowitz, *Accidental Brady Violations*, 12 *Tex. A&M L. Rev.* 533, 562–70, 576–79 (2025); Medwed, *supra* note 9, at 1558–60; Alexandra Natapoff, *Misdemeanor Declination: A Theory of Internal Separation of Powers*, 102 *Tex. L. Rev.* 937, 956 (2024); Note, *Toward a Constitutional Right to an Adequate Police Investigation: A Step Beyond Brady*, 53 *N.Y.U. L. Rev.* 835, 837–42 (1978).

⁵⁵ See, e.g., Bibas, *supra* note 3, at 142–44; Garrett et al., *supra* note 6, at 239–40; David Keenan, Deborah Jane Cooper, David Lebowitz & Tamar Lerer, *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 *Yale L.J. Online* 203, *passim* (2011); Jason Kreag, *Essay, Disclosing Prosecutorial Misconduct*, 72 *Vand. L. Rev.* 297, 308–20 (2019); Jennifer E. Laurin, *Rights Translation and Remedial Disequilibrium in Constitutional Criminal Procedure*, 110 *Colum. L. Rev.* 1002, 1016–34 (2010); see also sources cited *supra* note 13 (discussing the deficient remedies and implementation obstacles that bedevil *Brady*).

⁵⁶ Medwed, *supra* note 9.

⁵⁷ Gershman, *supra* note 7, at 686.

⁵⁸ See generally Paul Butler, *The System Is Working the Way It Is Supposed To: The Limits of Criminal Justice Reform*, 104 *Geo. L.J.* 1419, 1456 (2016) (arguing that many of the harms mainstream reformers classify as criminal justice system failures are actually examples of the system “working the way it is supposed to” when the system’s functions are seen for what they are). It may well be that *Brady* is a failure according to my normative metrics (and the metrics used by other critics of the doctrine) but not necessarily according to the ideological priorities of the doctrine’s authors.

scholars has begun to make precisely this case. Ion Meyn argues that *Brady* “legitimized case outcomes” while “ced[ing] constitutional regulation of the pretrial period to the prosecutor”;⁵⁹ Eugene Cerruti recasts it “as a rule of prosecutorial privilege rather than a rule of disclosure”;⁶⁰ Scott Sundby debunks *Brady*’s “mystique” as a “mirage” that “obscur[es] a clear-eyed evaluation” of criminal discovery’s inadequacies.⁶¹ These scholars recognize what mainstream reform scholarship has overlooked: *Brady* succeeds precisely by failing. It perpetuates prosecutorial information control while appearing to challenge it. Here lies the doctrine’s most insidious triumph: even those who see with open eyes the utter failure to actualize the ideals that *Brady* case law professes to advance dedicate their efforts and ingenuity toward yet another round of doctrinal tinkering, as if the problem were insufficient effort rather than the enterprise itself. This state of affairs—the legal profession exhausting itself scrambling to refine a doctrine that is designed to disappoint—is the subject of the next Section.

B. Mystification

Despite overwhelming evidence of its systematic failure, the legal profession has enshrined *Brady* in a mythology of its own making—venerating not the pinched doctrine that sixty years of case law has actually produced, but an imagined ideal of prosecutorial fairness that exists nowhere outside the profession’s collective imagination. As happens with myths, reverence for *Brady* is animated by faith in the unseen: that *Brady*’s true meaning or promise somehow transcends its disappointing incarnation in actual court decisions and implementation practices.⁶² The mystification runs so deep that even *Brady*’s critics

⁵⁹ Ion Meyn, Flipping the Script on *Brady*, 95 Ind. L.J. 883, 913 (2020).

⁶⁰ Eugene Cerruti, *Through the Looking-Glass at the Brady Doctrine: Some New Reflections on White Queens, Hobgoblins, and Due Process*, 94 Ky. L.J. 211, 274 (2005); cf. Dybdahl, *supra* note 28, at 213 (reviewing the *Brady* decision and the doctrine’s subsequent career and concluding that “[i]t’s past time to declare *Brady* dead”).

⁶¹ Scott E. Sundby, Essay, Fallen Superheroes and Constitutional Mirages: The Tale of *Brady v. Maryland*, 33 McGeorge L. Rev. 643, 645 (2002).

⁶² See, e.g., Hadar Aviram, Legally Blind: Hyperadversarialism, *Brady* Violations, and the Prosecutorial Organizational Culture, 87 St. John’s L. Rev. 1, 17 (2013) (“[T]he power of *Brady* is in its profound challenge of the adversarial ‘contest’ model. The rule makes an important statement about the duties the prosecution owes to the defendant and to the interest of justice.”); Michael J. Benza, Commentary: *Brady, Brady*, Wherefore Art Thou *Brady*?, 57 Case W. Rsv. L. Rev. 567, 567 (2007) (fantasizing—in the most literal possible sense, with a titular Shakespeare reference and a *Star Wars*-inspired opening hook—that “[a]

reinforce it. Rather than recognizing the decision as consecrating prosecutorial control over evidence, they frame their critiques as elegies for a noble principle betrayed, a promise broken.⁶³ (I confess to having

long time ago, in a social and political climate far, far away, the Supreme Court of the United States made a promise to the People[:] . . . that prosecutors would place fairness and procedure over obtaining convictions"); John H. Blume & Christopher Seeds, Reliability Matters: Reassociating *Bagley* Materiality, *Strickland* Prejudice, and Cumulative Harmless Error, 95 J. Crim. L. & Criminology 1153, 1153 (2005) (asserting that *Brady* and the right to effective counsel "have developed into the principal safeguards of fair trials, fundamental to the protection of defendants' constitutional rights and arguably defendants' strongest insurance of a reliable verdict"); Daniel J. Capra, Access to Exculpatory Evidence: Avoiding the *Agurs* Problems of Prosecutorial Discretion and Retrospective Review, 53 Fordham L. Rev. 391, 392, 448 (1984) (characterizing *Brady* as "a major step forward in equalizing access to exculpatory evidence" and lauding it as a "first-class right[]"); Douglass, *supra* note 48, at 437–38 ("*Brady* is the first principle of disclosure in criminal cases: a constitutional rule that turns prosecutors from poker players into stewards of an honest system."); Jason Kreag, The Jury's *Brady* Right, 98 B.U. L. Rev. 345, 355 (2018) (referring to *Berger v. United States*, 295 U.S. 78 (1935) in arguing that "[t]he duties that *Brady* places on prosecutors are an attempt to actualize *Berger's* lofty ideals."); Starger, *supra* note 2, at 145 (arguing *Brady* has achieved the stature of a "super-precedent"); Stuntz, *supra* note 2, at 789–90, 790 n.52 ("The canonical case [on prosecutorial disclosure] is *Brady v. Maryland* . . ."); Editorial, Beyond the Brady Rule, N.Y. Times (May 18, 2013), <https://www.nytimes.com/2013/05/19/opinion/sunday/beyond-the-brady-rule.html> ("Fifty years ago, in the landmark case *Brady v. Maryland*, the Supreme Court laid down a fundamental principle about the duty of prosecutors—to seek justice in fair trials, not merely to win convictions by any means."); see also *supra* notes 2–4 and accompanying text (citing further sources hailing *Brady's* symbolic commitments).

⁶³ In addition to the illustrations provided *supra* notes 7–8 and accompanying text, see, for example, Benza, *supra* note 62, at 567 ("[*Brady's*] promise was . . . [t]o ensure that criminal trials were both fair and just The problem has come, however, in giving fruit to that promise."); Alex Kozinski, Preface, Criminal Law 2.0, 44 Geo. L.J. Ann. Rev. Crim. Proc. iii, at viii, xxxiii (2015) (extolling *Brady* as "the ultimate guarantor of fairness in our criminal justice system" while lamenting an "epidemic of *Brady* violations abroad in the land" (quoting *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, C.J., dissenting from denial of rehearing en banc))); David A. Lord, Creating Architects of Justice: A Gift from Modern Ethics to *Brady* on Its 60th Anniversary, 36 Geo. J. Legal Ethics 469, 472 (2023) (bemoaning the "stark contrast between the aims of the [*Brady*] opinion and public perception of criminal justice" and framing the question ahead as, "How can we build on the cornerstone of *Brady* to create the edifice of a criminal justice system that holds the confidence of the public?"); Medwed, *supra* note 9, at 1566 ("The initial promise of the *Brady* doctrine has not been realized."); Alexandra Natapoff, *Gideon* Skepticism, 70 Wash. & Lee L. Rev. 1049, 1077 (2013) (characterizing *Brady* as "the spiritual counterweight to the adversarial model in which each side dukes it out as hard as they can" while recognizing that "[i]n practice, the *Brady* rule has not worked this way"); Kate Weisburd, Prosecutors Hide, Defendants Seek: The Erosion of *Brady* Through the Defendant Due Diligence Rule, 60 UCLA L. Rev. 138, 145, 180 (2012) (stating that "[t]he *Brady* decision reflects the Court's commitment to the truth-seeking purpose of criminal trials and to ensuring that defendants have equal access to exculpatory evidence" and then

sung in this chorus myself.)⁶⁴ The durability of this faith is not incidental to *Brady*'s trap—it is the trap's triggering mechanism, ensuring that generations of reformers direct their energies toward resurrecting a promise that time and again has proven illusory.⁶⁵

The Supreme Court sowed the seeds of *Brady*'s mythology through judicial pronouncements that presented the Court's modest disclosure rule as a constitutional landmark. As discussed earlier, the original *Brady* opinion wrapped its holding in sweeping rhetoric, "canonical" in tone, about the duty of the prosecutor to ensure that justice is done.⁶⁶ Later decisions further amplified this theme, extolling "the special role played by the American prosecutor in the search for truth"⁶⁷ and presenting *Brady* as the embodiment of the prosecutor's role as a "servant of the law" whose "overriding interest [is] that 'justice shall be done.'"⁶⁸ Just as importantly, judges seeking to strictly limit *Brady*'s scope simultaneously (and perhaps unwittingly) magnified the decision's talismanic significance. An influential dissenting opinion by Justice Harlan (later echoed in an opinion for the majority) asserted that the *Brady* rule threatened to "entirely alter the character and balance of our present systems of criminal justice";⁶⁹ majority opinions in the influential *Agurs* and *Bagley* cases conjured nightmares that prosecutors would somehow be forced to open their entire files to the defense if

critiquing a later doctrinal development that "helps explain why . . . *Brady* has become an empty promise"); Andrew Smith, Note, *Brady* Obligations, Criminal Sanctions, and Solutions in a New Era of Scrutiny, 61 Vand. L. Rev. 1935, 1972 (2008) ("The Supreme Court's promise of fair process in *Brady* remains largely unfulfilled.").

⁶⁴ See *supra* note 8.

⁶⁵ This Section's exploration of *Brady*'s mystifying function is informed by critical legal scholarship exploring how legal doctrine and mainstream law reform projects can legitimate existing power arrangements while appearing to challenge them. See, e.g., Alan D. Freeman, Truth and Mystification in Legal Scholarship, 90 Yale L.J. 1229, 1230 (1981); Mark G. Kelman, Trashing, 36 Stan. L. Rev. 293, 293 (1984). The analysis offered here also builds on work by Cerruti, *supra* note 60, Meyn, *supra* note 59, and Sundby, *supra* note 61, who contend, as I do, that the *Brady* doctrine is not merely a weak safeguard but, worse than that, a misdirection that lends legitimacy to criminal discovery's power imbalances.

⁶⁶ For instances of scholarship, including my own, that characterizes the *Brady* case (or the case's formulation of its holding) as canonical, see *supra* note 31 and accompanying text.

⁶⁷ *Strickler v. Greene*, 527 U.S. 263, 281 (1999).

⁶⁸ *United States v. Agurs*, 427 U.S. 97, 111 (1976) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)). In a similar vein, see, for example, *Kyles v. Whitley*, 514 U.S. 419, 439 (1995); *United States v. Bagley*, 473 U.S. 667, 675 & n.6 (1985).

⁶⁹ *Giles v. Maryland*, 386 U.S. 66, 117 (1967) (Harlan, J., dissenting); see *Bagley*, 473 U.S. at 675 n.7 (quoting Justice Harlan's warning).

Brady were read generously;⁷⁰ one lower court opinion even colorfully suggested that, if judges did not take care to cabin *Brady*'s scope, "[t]ruth, justice, and the American way" might just be imperiled.⁷¹ These dire predictions are difficult to take seriously: *Brady*'s scant demands left little more than a dent in the prosecutor's stranglehold on access to information.⁷² Even so, the alarm sounded by conservative *Brady* skeptics served to reinforce the shared assumption that the decision bore the potential to transform the basic structure of adversarial criminal adjudication.

Although the Supreme Court's grandiosity likely baited the trap, rhetoric alone cannot explain *Brady*'s incorporation into the legal profession's constitutional canon.⁷³ Courts routinely issue overblown pronouncements about legal principles that leave no lasting mark on the profession's consciousness. What, then, created the preconditions for *Brady* to join the selective pantheon of Warren Court decisions—alongside such larger-than-life precedents as *Gideon v. Wainwright*⁷⁴ (decided, not coincidentally, the same term as *Brady*) and *Miranda v. Arizona*⁷⁵—that have come to represent lofty ideals far transcending the limited and exception-laden legal rules they actually produced?⁷⁶ Why did *this* ruling, and not so many others, provide such fertile soil for myth-making?

While any explanation must remain somewhat conjectural, several converging historical forces help account for *Brady*'s remarkable cultural resonance within the legal profession. The 1960s criminal justice system confronted acute legitimacy challenges on multiple fronts: civil rights advocates were systematically exposing how criminal

⁷⁰ See *Agurs*, 427 U.S. at 109; *Bagley*, 473 U.S. at 675 & n.7; *id.* at 680 (opinion of Blackmun, J.).

⁷¹ *United States v. Brown*, 628 F.2d 471, 473 (5th Cir. 1980).

⁷² *Brady*'s profound limitations as a constitutional doctrine are canvassed *supra* Section I.A.

⁷³ For discussions of the constitutional law canon and how it gets constructed—why some cases are included while others are left out—see generally, for example, J.M. Balkin & Sanford Levinson, *Commentary, The Canons of Constitutional Law*, 111 Harv. L. Rev. 963, 970–81 (1998).

⁷⁴ 372 U.S. 335 (1963).

⁷⁵ 384 U.S. 436 (1966).

⁷⁶ For critical accounts of the mythologies surrounding *Gideon* and *Miranda*, see Butler, *supra* note 15; Seidman, *supra* note 15. For a canvass of other scholarship assessing a variety of “liberal adjudicated victories of the Warren and Burger Courts” from a critical vantage point, see Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 Yale L.J. 1394, 1398–1400 (2009).

procedure disadvantaged Black people, while Cold War competition with authoritarian regimes made procedural inequities not merely domestically embarrassing, but geopolitically damaging to America's democratic credibility.⁷⁷ Criminal discovery reflected these broader tensions, as the chasm between civil and criminal procedure became increasingly hard to defend. As noted earlier, civil litigants enjoyed muscular investigative tools following the 1938 Federal Rules revolution—when depositions, interrogatories, and document discovery transformed the pretrial civil process—while criminal defendants remained dependent on prosecutorial discretion for access to even basic information about the charges against them.⁷⁸ *Brady* provided a solution to these mounting pressures, but a paradoxical one. As Meyn demonstrates, it appeared to redress prosecutorial information control while actually cementing it, promising transformation while ensuring continuity.⁷⁹ The decision's enduring mystique likely stems in part, too, from its capacity to serve contradictory constituencies simultaneously: prosecutors could invoke *Brady*'s constitutional promise to argue that existing safeguards already assured procedural fairness, rendering further reforms unnecessary, whereas defense attorneys and reform advocates could appeal to *Brady*'s mythology to demand liberal disclosure and constitutional refinement pressing toward an idealized vision of prosecutorial fairness.⁸⁰ Each stakeholder could find in *Brady* something that it needed—sword, shield, or excuse for inaction—while ultimately serving to legitimate the prosecutor's asymmetric access to facts.

Six decades later, *Brady*'s myth persists unabated. This durability demands that we entertain an alternative explanation: perhaps the myth endures not through false consciousness but because it captures something essential about the prosecutor's proper role in dispensing

⁷⁷ See A. Kenneth Pye, *The Warren Court and Criminal Procedure*, 67 Mich. L. Rev. 249, 256 (1968) ("The Court's concern with criminal procedure can be understood only in the context of the struggle for civil rights."); cf. *Gideon*, 372 U.S. at 344 (defending expansion of the constitutional right to counsel partly by comparing American standards of justice against the assumedly lesser standards of "some [other] countries," presumably referring to the then-Soviet states).

⁷⁸ See Meyn, *supra* note 23, at 720–24; see also *supra* notes 24–26 and accompanying text (discussing diverging paths of civil and criminal procedure and citing sources).

⁷⁹ Meyn, *supra* note 59, at 913–14.

⁸⁰ For analysis of how prosecutors strategically deploy *Brady* in the legislative arena to defeat reform, see *infra* Subsection II.A.3.

justice—the principle that state power creates special obligations toward the accused. Those invested in an idealized conception of *Brady* would likely say that the doctrine's core vision remains sound and perhaps even achievable—that sixty years of failure simply means we have not tried hard enough. Perhaps the solution lies not in abandoning *Brady* but in redoubling our commitment to the ideals it has come to represent.

I am unconvinced. The principle that prosecutorial power entails special obligations toward the accused is sound—but nothing about that principle requires *Brady* as its vehicle. The question is not whether prosecutors owe such obligations but whether a doctrine built on prosecutorial self-policing and selective disclosure is the right instrument for effectuating those obligations. The doctrinal record offers little basis for optimism. Apart from *Ruiz*—which, as noted earlier,⁸¹ sapped *Brady*'s efficacy at the plea stage, where most cases get resolved—*Brady* doctrine has ossified completely since the Supreme Court settled on its suffocating test for materiality in the 1970s and 1980s.⁸² The Court's decisions over the intervening decades—from *Kyles v. Whitley*⁸³ and *Strickler v. Greene*⁸⁴ in the 1990s to the relatively recent *Wearry v. Cain*⁸⁵ and *Turner v. United States*⁸⁶ decisions—have featured small-bore debates over particularistic questions of how to apply long-settled legal rules (usually the materiality standard) to this or that set of facts. Not a single Justice in any of these cases questioned whether the rules themselves needed a fresh look.⁸⁷ Nor are the prospects bright that the Court, now composed of a conservative supermajority, will soon see the light and heed the call of the countless scholars and reform advocates striving to breathe fresh life into *Brady*.⁸⁸

⁸¹ See *supra* notes 47–49, 52 and accompanying text.

⁸² For discussion of how the Court's materiality framework emerged in *Agurs* and *Bagley*, see *infra* notes 144–52 and accompanying text.

⁸³ 514 U.S. 419, 454 (1995).

⁸⁴ 527 U.S. 263, 282, 290 (1999).

⁸⁵ 577 U.S. 385, 392 (2016) (*per curiam*).

⁸⁶ 582 U.S. 313, 324–25 (2017).

⁸⁷ See, e.g., *id.* at 331 (Kagan, J., dissenting) (“I note that the majority and I . . . agree on the legal standard by which to assess the materiality of undisclosed evidence . . .”). It is revealing that the most heated dispute in both *Kyles* and *Wearry* concerned whether the Court should bother expending scarce institutional resources to adjudicate fact-bound disputes over how to apply *Brady*'s by-then familiar materiality standard. See *Kyles*, 514 U.S. at 456–60 (Scalia, J., dissenting); *Wearry*, 577 U.S. at 401–03 (Alito, J., dissenting).

⁸⁸ See generally Daniel Epps, Foreword: Criminal Procedure in Winter, 51 Loy. L.A. L. Rev. 379, 411 (2018) (“The future that looms threatens to be a period of darkness for constitutional criminal procedure . . .”).

Brady's manifold deficiencies could perhaps be tolerated if they were securely quarantined within the boundaries of constitutional criminal procedure—if, that is, *Brady* simply failed on its own terms without corrupting other avenues for securing defense access to evidence. But *Brady* has resisted containment. The main argument of this Article, which I pursue in the next Part, is that the mystique that surrounds *Brady* has produced a “gravitational force”⁸⁹—or, to use this Article's titular metaphor, a shadow—that systematically draws potentially promising alternatives into its orbit and then smothers their ambitions. Part I has shown that *Brady*'s seductive promise is a trap; Part II documents how this trap has ensnared not just would-be reformers of the *Brady* doctrine but a whole host of other strategies for assuring that information flows to the defense—from statutory reforms and ethics rules to prosecutorial training and more.

II. *BRADY*'S SHADOW

Brady's failure as a constitutional doctrine is just the beginning of the problem. This Part demonstrates that *Brady* casts a long shadow reaching across statutory law, other domains of constitutional jurisprudence, and professional formation, corrupting each domain it touches.

First, statutory discovery law suffers as courts layer materiality restrictions atop statutes whose texts appear to call for broader disclosure; judges undermine open-file laws by incorporating ill-fitting constitutional concepts; and prosecutors defeat proposed legal reforms by insisting their *Brady* compliance suffices to guarantee procedural fairness.

Second, *Brady* impedes constitutional development well beyond the due process jurisprudence from which it came—ineffective assistance doctrine borrowed *Brady*'s forgiving materiality standard wholesale; courts treat *Brady* as exhausting the Constitution's capacity to protect disclosure rights rather than cultivating enumerated guarantees that might have done so much more; and state constitutional interpretation mechanically replicates federal precedent.

Third, from classroom to courtroom, *Brady* lies at the heart of how law students and lawyers are taught to conceptualize prosecutorial

⁸⁹ Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. Pa. L. Rev. 703, 706 (2016) (“[F]ederal law exerts a widespread gravitational pull on state actors.”).

disclosure. Future prosecutors encounter it as the dominant framework in many casebooks and as the primary focus for professional certification exams, while ethics standards and internal bureaucratic measures often further reinforce *Brady*'s centrality.

Only by assembling these disparate strands of evidence does *Brady*'s true sway become apparent, revealing not a securely quarantined doctrinal mistake, but an expansive shadow darkening the prospects for reform across a wide range of different laws and institutions that shape American criminal discovery practice.

A. Statutory Disclosure Law

"There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one" ⁹⁰ For decades the Supreme Court has intoned this principle, insisting that due process "has little to say regarding the amount of discovery which the parties must be afforded." ⁹¹ Constitutional doctrine's parsimony makes statutory disclosure law, not *Brady*, the chief repository of defendants' discovery rights. Many reformers and scholars have therefore invested their hopes—and for good reason—in statutes and court rules (collectively "statutes" for brevity, despite some imprecision) promising more generous disclosure: early disclosure, broadened disclosure, even, for some, open-file discovery. ⁹²

Yet *Brady*'s conceptual grip proves remarkably tenacious, at times bending salutary statutory reform efforts toward its own restrictive template. This Section begins with a nationwide examination of statutory exculpatory evidence provisions—the statutory category closest to *Brady* and thus a natural testing ground for observing *Brady*'s

⁹⁰ *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

⁹¹ *Id.* (quoting *Wardius v. Oregon*, 412 U.S. 470, 474 (1973)); accord *Gray v. Netherland*, 518 U.S. 152, 168 (1996); *Kaley v. United States*, 571 U.S. 320, 335 (2014); *Pennsylvania v. Ritchie*, 480 U.S. 39, 59–60 (1987); *United States v. Ruiz*, 536 U.S. 622, 629 (2002).

⁹² See, e.g., McConkie, *supra* note 21, at 104–05, 111–14, 117–20; Medwed, *supra* note 9, at 1557–60, 1566; Janet Moore, *Democracy and Criminal Discovery Reform After Connick and Garcetti*, 77 *Brook. L. Rev.* 1329, 1371–73, 1383–84 (2012); Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 *Wis. L. Rev.* 541, 594–605; Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 *Wash. & Lee L. Rev.* 285, 372–73, 380–81 (2016); *Beyond the Brady Rule*, *supra* note 62.

gravitational pull on nonconstitutional law.⁹³ The survey shows how drafters encode exculpatory evidence statutes with *Brady*'s restrictions—sometimes deliberately, at times inadvertently—while courts too often impose those restrictions even upon statutes whose texts seem to promise more. The Section then takes a closer look at Texas's Michael Morton Act. One of this century's most heralded discovery reforms, designed to guarantee open-file discovery, the law was hobbled for the better part of a decade by poor drafting and judicial decisions importing *Brady* concepts before the state's high court finally intervened—offering future reformers a cautionary tale about the danger *Brady* can present even for ambitious open-file reforms. The Section concludes by highlighting how prosecutors deploy *Brady* compliance as an argument against statutory reform, persuading legislators that constitutional minimums already furnish adequate protection.

1. Statutory Exculpatory Evidence Mandates

State criminal discovery systems span a broad spectrum—from jurisdictions that guarantee defendants next to nothing before trial, withholding even the names of prosecution witnesses, to those mandating extensive disclosure from the government's files, with numerous gradations in between.⁹⁴ Within these varying statutory regimes, rules requiring disclosure of exculpatory and, for some of these provisions, mitigating evidence or information offer a sensible starting point for assessing constitutional doctrine's influence on nonconstitutional disclosure law since they share *Brady*'s focus on evidence that favors the defense. (Going forward I will call these rules simply “exculpatory evidence” statutes, again prioritizing economy of expression over complete precision.)⁹⁵ Present in thirty-seven states and

⁹³ *Brady*'s influence on other forms of discovery legislation—witness lists, document production, depositions—goes unexamined here and, admittedly, is likely to be somewhat less pronounced.

⁹⁴ For surveys of criminal discovery rules that typologize state systems in varying ways, see LaFave et al., *supra* note 26, § 20.2(b); Darryl K. Brown, *Discovery, in Reforming Criminal Justice*, *supra* note 49, at 147, 153–58; Turner & Redlich, *supra* note 92, app. B; Tina M. Zottoli et al., *State of the States: A Survey of Statutory Law, Regulations and Court Rules Pertaining to Guilty Pleas Across the United States*, 37 *Behav. Sci. L.* 388, 397–402, 412–13 (2019).

⁹⁵ “Exculpatory evidence” is an imprecise, sometimes even inaccurate label in two main respects. First, some of the statutes cover not just exculpatory evidence but also mitigating evidence that may be of use at sentencing, too. Second, some cover not just evidence, a

territories, these statutes typically mandate disclosure of evidence that “tends to negate the guilt of the accused,”⁹⁶ though verbal formulae vary.⁹⁷ If properly insulated from *Brady*’s influence, statutes of this type could supply robust guarantees of early, pre-plea disclosure of evidence benefiting the defense without materiality filters—meaningful safeguards *Brady* has failed to provide. To gauge *Brady*’s influence across this substantial body of law, I conducted a nationwide legal survey in two phases: first, noting whether statutory text or official commentary embraces, rejects, or remains ambiguous regarding *Brady*’s materiality doctrine—the doctrine that perversely allows prosecutors to withhold favorable evidence they deem too weak to sway a jury;⁹⁸ second, for ambiguous statutes, examining whether courts imported this doctrine through interpretation.

The first phase of the survey demonstrates that *Brady* profoundly informs the design of these exculpatory evidence mandates even before judicial interpretation enters the picture. *Brady*’s influence emerges starkly in the statutory drafting process. Of the thirty-seven states and territories that have such rules, only three outright reject *Brady*’s materiality standard through clear textual commands or authoritative commentaries.⁹⁹ Twelve states’ rules embrace it just as unambiguously, whether by expressly incorporating a materiality limitation or by indicating that the scope of disclosure required by the rule is coextensive

category cabined by rules of admissibility, but any information, whether or not admissible, of an exculpatory (and/or mitigating) character. See sources *infra* notes 97, 99–101.

⁹⁶ See, e.g., Colo. R. Crim. P. 16(I)(a)(2) (covering information “which tends to negate the guilt of the accused . . . or would tend to reduce the punishment”); Haw. R. Penal P. 16(b)(1)(vii) (covering information “which tends to negate the guilt of the defendant . . . or would tend to reduce the defendant’s punishment”); Idaho Crim. R. 16(a) (covering information “that tends to negate the guilt of the accused . . . or that would tend to reduce the punishment”).

⁹⁷ See, e.g., Colo. R. Crim. P. 16(I)(a)(2); Mass. R. Crim. P. 14(b)(2)(B); Pa. R. Crim. P. 573(B)(1)(a).

⁹⁸ For discussion of the materiality doctrine and criticisms directed against it, see *supra* notes 10, 44–46, 50 and accompanying text.

⁹⁹ The three are Massachusetts, New York, and West Virginia. See Mass. R. Crim. P. 14(b)(2)(B) & reporter’s notes (2025) (noting that the rule “specifically does not use the term ‘material’ to avoid confusion” about whether the rule’s mandate is circumscribed by *Brady*’s materiality limitations); N.Y. Crim. Proc. Law § 245.20(1)(k) (McKinney 2026) (“Information under this subdivision shall be disclosed . . . irrespective of whether the prosecutor credits the information.”); W. Va. Trial Ct. R. 32.02(a) (prosecutors should turn over favorable evidence “on the issue of the defendant’s guilt or punishment without regard to materiality”). West Virginia’s rule is only applicable to criminal cases in circuit court proceedings under W. Va. Trial Ct. R. 32.01.

with *Brady*.¹⁰⁰ The remaining twenty-two states and territories drafted ambiguous provisions—omitting any materiality requirement yet failing to expressly exclude it,¹⁰¹ thereby inviting the judicial narrowing documented below.¹⁰² Whether through lack of foresight or misguided deference to constitutional backstops, these drafters rendered their laws susceptible to *Brady*'s malign influence.

Courts routinely succumb to that influence, as I discovered in the second phase of the survey. In nine of the twenty-two states and territories with ambiguous provisions, appellate courts grafted *Brady*'s materiality restriction onto statutory text that appears on its face to have a broader sweep¹⁰³—treating the statutes as mere codifications of constitutional requirements, deeming them “coextensive”¹⁰⁴ with *Brady*, or reading them “against the backdrop of *Brady* jurisprudence.”¹⁰⁵ Nothing in the statutory language supports this reading. Phrases like “tends to negate guilt” most naturally encompass all favorable evidence, not just evidence potent enough to singlehandedly swing a verdict

¹⁰⁰ See Fla. R. Crim. P. 3.220(b)(4); La. Code Crim. Proc. Ann. art. 723(B) (2025); Me. R. Unified Crim. P. 16(a)(2)(D) & advisory committee's note to former rule 16 (1978); Mo. R. Crim. P. 25.03(g); N.H. R. Crim. P. 12(a)(2)(B); N.M. R. Crim. P. 5-501(A)(6); Ohio Crim. R. 16(B)(5); Okla. Stat. Ann. tit. 22, § 2002(A)(2) (West 2026); Or. Rev. Stat. § 135.815(1)(g), (2)(b) (2025); Pa. R. Crim. P. 573(B)(1)(a); Utah R. Crim. P. 16(a)(1)(F) (2023); Vt. R. Crim. P. 16(b)(2) (2026) & reporter's notes (1973).

¹⁰¹ See Alaska R. Crim. P. 16(b)(3); Ariz. R. Crim. P. 15.1(b)(8); Ark. R. Crim. P. 17.1(d); Cal. Penal Code § 1054.1(e) (West 2026); Colo. R. Crim. P. 16(I)(a)(2); Conn. Gen. Stat. § 54-86c(a) (2025); Comm'n on Off. Legal Publ'ns, Connecticut Practice Book § 40-11(b) (2026 ed., rev. 1998); Del. Super. Ct. Crim. R. 16(a)(3); 8 Guam Code Ann. § 70.10(a)(7) (2023); Haw. R. Penal P. 16(b)(1)(vii); Idaho Crim. R. 16(a); 725 Ill. Comp. Stat. 5/114-13(b) (2026); Ill. Sup. Ct. R. 412(c); Ind. R. Crim. P. 2.5(B)(3); Md. R. 4-263(d)(5); Mich. Ct. R. 6.201(B)(1) (2025); Minn. R. Crim. P. 9.01, subdiv. 1(6); Miss. R. Crim. P. 17.2(6); Mont. Code Ann. § 46-15-322(1)(e) (2025); N.J. Ct. R. 3:13-3(a); P.R. Laws Ann. tit. 34A, app. II, § 95(b) (2025); Tex. Code Crim. Proc. Ann. art. 39.14(h) (West 2025); Wash. Super. Ct. Crim. R. 4.7(a)(3); Wis. Stat. § 971.23(1)(h) (2024).

¹⁰² See *infra* notes 103–08 and accompanying text.

¹⁰³ See *People v. Bueno*, 2018 CO 4, ¶¶ 28–29; *State v. Shannon*, 563 A.2d 646, 650–53, 650 n.6 (Conn. 1989); *Birano v. State*, 426 P.3d 387, 406 & n.34 (Haw. 2018); *People v. Ryan*, 783 N.E.2d 187, 191 (Ill. App. Ct. 2003); *Johnson v. State*, 139 A.3d 1039, 1065 (Md. Ct. Spec. App. 2016); *State v. Williams*, 593 N.W.2d 227, 235 (Minn. 1999); *State v. Villanueva*, 2021 MT 277, ¶ 9 & n.1, 406 Mont. 149, 497 P.3d 586; *State v. Simons*, 731 P.2d 797, 801 & n.2 (Idaho Ct. App. 1987); *People v. Mateo*, 2017 Guam 22 ¶¶ 14–15.

¹⁰⁴ *Bueno*, ¶ 35.

¹⁰⁵ *Id.* ¶ 28; see also *Ryan*, 783 N.E.2d at 191 (“Rule 412(c) is coextensive with the protections of *Brady* . . .”).

toward the defense.¹⁰⁶ Just four state courts have recognized this point, interpreting their textually ambiguous laws to break from *Brady*.¹⁰⁷ The remaining nine states and territories have not yet resolved this question, leaving the scope of their statutes uncertain. The overall pattern—where *Brady*-restrictive interpretations dominate by a margin of more than two to one in states and territories with textually ambiguous rules—demonstrates how thoroughly *Brady* doctrine can encroach upon domains that should be occupied by legislatures and rule makers. One lesson for reformers is apparent. As elaborated in Part III, reformers need to draft discovery rules with great care to ensure their handiwork is not conscripted into service by the very paradigm of materiality filtering by prosecutors that they seek to avoid.¹⁰⁸

2. *Open-File Discovery: A Cautionary Tale*

The preceding Subsection examined only exculpatory evidence provisions—those that most closely resemble *Brady*. This focus necessarily leaves unexamined whether *Brady*'s influence reaches reforms addressed to different kinds of evidence and information. Open-file laws eschew prosecutorial gatekeeping: scholars and reform advocates champion them precisely because, among other benefits, they minimize opportunities for prosecutors to withhold evidence based on their own conflict-laden judgments about which defense facts might prove persuasive enough to win over a jury.¹⁰⁹ Yet even open-file reforms designed to bypass *Brady* entirely may fall prey to constitutional law's contagion if legislative drafters are insensitive to this danger and courts interpret their handiwork against the backdrop of familiar *Brady* principles.

¹⁰⁶ See *Watkins v. State*, 619 S.W.3d 265, 277 (Tex. Crim. App. 2021); *People v. Cordova*, 358 P.3d 518, 534 (Cal. 2015); *City of Seattle v. Lange*, 491 P.3d 156, 162 (Wash. Ct. App. 2021); *State v. Jessen*, 633 P.2d 410, 413 (Ariz. 1981).

¹⁰⁷ See *supra* note 106.

¹⁰⁸ See *infra* notes 220–31 and accompanying text.

¹⁰⁹ See, e.g., Samuel R. Gross, Maurice J. Possley, Kaitlin Jackson Roll & Klara Huber Stephens, *Nat'l Registry of Exonerations, Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement* 145–46 (2020); Burke, *supra* note 50, at 511–19; Garrett et al., *supra* note 6, at 242–43; Kozinski, *supra* note 63, at xxvi–xxvii; Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 *Geo. Mason L. Rev.* 257, 306–18 (2008).

Texas's experience under its reformed discovery laws is instructive.¹¹⁰ Enacted after it came to light that prosecutors had concealed critical evidence and thus caused the wrongful imprisonment of an innocent man named Michael Morton, the statute bearing Morton's name aimed to achieve "a watershed change"¹¹¹ by "revamp[ing] [the state's discovery laws] completely"¹¹² and establishing "disclosure [as] the rule and non-disclosure the exception."¹¹³ The Senate Committee Report explicitly endorsed "open file discovery," condemned *Brady's* framework as "vague and open to interpretation," and declared that "[e]very defendant should have access to all the evidence relevant to his guilt or innocence."¹¹⁴ Article 39.14(a) of the state's criminal procedure code anchored this reform—serving as "the primary statutory vehicle for pretrial discovery"¹¹⁵—by mandating disclosure of materials "that constitute or contain evidence *material to* any matter involved in the action."¹¹⁶ However, within two years after the statute went into effect in 2014, courts had subverted lawmakers' ambitions. A 2016 appellate decision imported *Brady's* materiality doctrine wholesale, limiting disclosure to evidence either "indispensable to the State's case" or creating "a reasonable probability" of affecting case outcomes.¹¹⁷ This interpretation spread rapidly through Texas's courts,¹¹⁸ reducing the open-file mandate envisioned by the legislature to

¹¹⁰ Michael Morton's wrongful imprisonment and eventual exoneration provided the impetus for the Act. For background on Morton's story, see generally *An Unreal Dream: The Michael Morton Story*, Netflix (Blue Bandana Productions 2013); Bennett L. Gershman, *Prosecution Stories* 144–48 (2017).

¹¹¹ Riley E. Clifton, Comment, A Material Change to *Brady*: Rethinking *Brady v. Maryland*, Materiality, and Criminal Discovery, 110 J. Crim. L. & Criminology 307, 342 (2020).

¹¹² *State v. Heath*, 696 S.W.3d 677, 691–92 (Tex. Crim. App. 2024).

¹¹³ *Watkins v. State*, 619 S.W.3d 265, 277 (Tex. Crim. App. 2021).

¹¹⁴ S. Comm. on Crim. Just., Bill Analysis, S.B. 1611, 83d Leg., R.S., at 1 (Tex. 2013).

¹¹⁵ 42 George E. Dix & John M. Schmolesky, *Texas Practice, Criminal Practice and Procedure* § 27:58 (3d ed. rev. 2025) (internal quotation marks omitted).

¹¹⁶ Tex. Code Crim. Proc. Ann. art. 39.14(a) (West 2025) (emphasis added). This provision's breadth distinguishes it from Article 39.14(h), analyzed above, see *supra* notes 101, 106 and accompanying text, which is restricted to "exculpatory, impeachment, or mitigating" evidence without any reference to materiality.

¹¹⁷ *In re Hawk*, No. 05-16-00462-CV, 2016 WL 3085673, at *2–3 (Tex. App. May 31, 2016).

¹¹⁸ See, e.g., *Branum v. State*, 535 S.W.3d 217, 224–25 (Tex. App. 2017); *Carrera v. State*, 554 S.W.3d 800, 802 (Tex. App. 2018); *In re State*, 659 S.W.3d 1, 13 (Tex. App. 2020); *Meza v. State*, No. 07-15-00418-CR, 2016 WL 5786949, at *2–3 (Tex. App. Sep. 29, 2016); *Young v. State*, 591 S.W.3d 579, 598 (Tex. App. 2019).

what judges characterized—echoing their earlier descriptions of the pre-reform statute—as affording merely “[l]imited statutory discovery” against a backdrop of presumptive nondisclosure.¹¹⁹

Forty years of accumulated precedent drove this cramped interpretation. Ever since the U.S. Supreme Court crystallized its test for materiality in the 1976 *Agurs* case,¹²⁰ Texas courts had consistently applied *Brady*’s framework to the state’s pre-reform discovery statute.¹²¹ Once the legislature passed the Michael Morton Act, courts still considered themselves bound to follow this longstanding body of case law when reading the new legislation—even though this plainly thwarted the statute’s objectives. Some courts openly acknowledged their dilemma: “If we were writing on a clean slate,” one admitted, the statute would mandate broad disclosure consistent with the legislature’s intent, but “well-established precedent” meant “[w]e do not write on a clean slate.”¹²² As a result, *Brady*’s materiality rule—restricting legally required disclosures to evidence with potentially outcome-determinative significance—remained “the linchpin” of legal analysis under Article 39.14(a) for over half a decade.¹²³ Only in 2021 did the Texas Court of Criminal Appeals restore the statute’s intended scope, defining “material” to simply mean relevance in the ordinary legal sense.¹²⁴ The inclusion of a single term (“material to”) in the statute’s text thus derailed comprehensive discovery reform for a time, as courts reflexively overlaid decades of constitutional precedent onto statutory language never intended to bear it. Texas’s experience reveals that liberating discovery reform from *Brady*’s grip may require not just bold

¹¹⁹ *Nelson v. State*, No. 01-17-00746-CR, 2018 WL 6495171, at *13 (Tex. App. Dec. 11, 2018).

¹²⁰ For discussion of *Agurs*’s significance in the development of materiality standards for *Brady*, see *infra* notes 144–46 and accompanying text.

¹²¹ See *Quinones v. State*, 592 S.W.2d 933, 941 (Tex. Crim. App. 1980) (en banc); *Clifton*, *supra* note 111, at 339.

¹²² *Carrera*, 554 S.W.3d at 801–02.

¹²³ *Hallman v. State*, 603 S.W.3d 178, 192 (Tex. App. 2020) (“[M]ateriality . . . remains the linchpin of both Article 39.14(a) and *Brady*.”), *vacated*, 620 S.W.3d 931 (Tex. Crim. App. 2021).

¹²⁴ See *Watkins v. State*, 619 S.W.3d 265, 273–90 (Tex. Crim. App. 2021). Meanwhile, the scope of another Texas statute that grants subpoena power to the defense for “material” witnesses is stranded in limbo, with courts unsure whether *Watkins* freed it from *Brady*’s influence. See *In re El Paso Cnty. Pub. Def.*, No. 08-19-00296-CR, 2021 WL 3260629, at *10 (Tex. App. July 30, 2021) (discussing Tex. Code Crim. Proc. Ann. art. 24.03(a) (West 2021)).

legislative vision but also draftsmanship that preempts the *Brady*-centric interpretive habits that have become ingrained in judicial practices.¹²⁵

3. Prosecutorial Lobbying

Brady distorts statutory discovery law not only through careless drafting and judicial misinterpretation but also in the arena of legislative politics, where prosecutors brandish constitutional doctrine to sink nonconstitutional reform efforts. Although scholars have examined prosecutorial lobbying capabilities in various contexts—and have mostly found that prosecutors’ sway in the legislative process is formidable¹²⁶—prosecutors’ participation in state legislative discovery debates has gone largely unexamined. Research on the federal system partially patches this gap, revealing how the Department of Justice’s (“DOJ”) resistance to reform has helped preserve one of America’s most restrictive disclosure regimes.¹²⁷ This scholarship identifies *Brady* as one of the DOJ’s principal rhetorical weapons in these campaigns.¹²⁸

The DOJ’s strategy crystallized during 2003 debates over potential amendments to the Federal Rules of Criminal Procedure. The Advisory Committee on Criminal Rules was weighing proposed changes that would require pretrial *Brady* disclosures without materiality limitations¹²⁹—a tepid measure compared with certain state-level reforms calling for open-file discovery (such as the Michael Morton Act

¹²⁵ The Article revisits the implications of this analysis for legislative drafting *infra* Section III.A.

¹²⁶ See, e.g., Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 728 (2005); Carissa Byrne Hessick, Ronald F. Wright & Jessica Pishko, *The Prosecutor Lobby*, 80 Wash. & Lee L. Rev. 143, 150 (2023) (providing empirical data that “tell[s] a complicated story of partial success for the prosecutor lobby”); Zoë Robinson & Stephen Rushin, *The Law Enforcement Lobby*, 107 Minn. L. Rev. 1965, 2003–05 (2023). But see Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. Rev. 171, 206–08 (2019) (doubting the extent of prosecutors’ influence on the lawmaking process).

¹²⁷ Nationwide surveys consistently identify federal law as belonging to the narrowest group of discovery systems. See LaFave et al., *supra* note 26, § 20.2(b); Brown, *supra* note 94, at 155; Turner & Redlich, *supra* note 92, at 303.

¹²⁸ Scholarship in this vein, from which I draw liberally in this Subsection, includes Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 Mercer L. Rev. 639, 645–60 (2013); Meyn, *supra* note 59, at 908–13; see also *United States v. Jones*, 620 F. Supp. 2d 163, 171–73 (D. Mass. 2009) (providing examples of the DOJ resisting expansion of discovery disclosure obligations).

¹²⁹ See Am. Coll. of Trial Laws., *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 Am. Crim. L. Rev. 93, 114 (2004).

discussed previously),¹³⁰ but a substantial improvement over the low bar set by federal discovery's stingy baseline.¹³¹ The DOJ marshaled two arguments in response that are relevant to our discussion. It showcased its purportedly comprehensive internal *Brady* programs as evidence that statutory mandates were unnecessary.¹³² And, more audaciously, it claimed the amendments would disturb the equilibrium the Supreme Court had supposedly achieved in its *Brady* decisions.¹³³ The DOJ's contentions misleadingly presented the Court's *Brady* cases as setting discovery policy for the nation rather than simply marking the outer bounds of the Constitution's threadbare safeguards. The very precedents the DOJ cited to argue that nonconstitutional rule reforms would disrupt a balance purportedly set by *Brady* doctrine in fact undermined that argument, expressly acknowledging that other lawmakers remain free to exceed *Brady*'s minimal protections.¹³⁴ Even so, the DOJ prevailed: the Advisory Committee rejected the proposed amendments, and federal defendants were left without the protections they would have received from amendments to the federal criminal procedure rules.¹³⁵

The pattern recurred following the failed prosecution of Senator Ted Stevens. After pervasive *Brady* violations in the Senator's trial prompted Congress to entertain legislative reforms to federal criminal

¹³⁰ The Michael Morton Act is discussed *supra* Subsection II.A.2.

¹³¹ For general discussion of the narrowness of discovery in the federal system, see *supra* note 127 and accompanying text.

¹³² See Meyn, *supra* note 59, at 910–12.

¹³³ See Advisory Committee on Criminal Rules, Meeting Minutes 9 (Oct. 24–25, 2005), https://www.uscourts.gov/sites/default/files/fr_import/CR10-2005-min.pdf [<https://perma.cc/BNF2-VHKG>]; cf. Advisory Committee on Criminal Rules, Meeting Minutes 6 (Oct. 13, 2009), https://www.uscourts.gov/sites/default/files/fr_import/CR10-2009-min.pdf [<https://perma.cc/JG5E-C3CF>] (objecting to a similar proposal several years later by arguing that expanded disclosure would be “inconsistent with Supreme Court [*Brady*] precedent,” among other reasons) (quoted in Meyn, *supra* note 59, at 912).

¹³⁴ See *Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009) (“Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations.”); *United States v. Agurs*, 427 U.S. 97, 109 (1976) (distinguishing the *Brady* question presented in the case from “[w]hether or not procedural rules authorizing . . . broad discovery might be desirable” and holding only that “the Constitution surely does not demand that much”). The significance of these and other similar passages is explored further *infra* notes 232–37 and accompanying text.

¹³⁵ See Meyn, *supra* note 59, at 913.

discovery,¹³⁶ the DOJ reran its playbook. Department representatives characterized constitutional *Brady* doctrine as “a careful reconcili[ng]” of competing interests and denounced the proposed legislation for “radically alter[ing] the . . . balance between ensuring the protection of a defendant’s constitutional rights and [countervailing interests].”¹³⁷ In reality, the proposals simply mandated pretrial disclosure without materiality filtering—incremental improvements, to be sure, but hardly revolutionary.¹³⁸ Yet the DOJ again came out on top: the bill expired without a vote.¹³⁹ Federal discovery remains decidedly ungenerous—a testament to federal prosecutors’ agility in wielding *Brady* as a weapon to beat back calls for reform.

B. Constitutional Degradation

Constitutional doctrine rarely rests inert in the silo where it was initially formed: when the Supreme Court fashions a constitutional rule to govern one area of law, that rule’s logic and limitations will likely find ways of migrating elsewhere, for good or for ill.¹⁴⁰ And so it is with *Brady*. Through the familiar practice of constitutional borrowing,¹⁴¹ the Supreme Court made *Brady*’s materiality standard part of ineffective

¹³⁶ See Fairness in Disclosure of Evidence Act of 2012, S. 2197, 112th Cong. (2012). For an autopsy of the Stevens fiasco, see generally Bennett L. Gershman, *Subverting Brady v. Maryland and Denying a Fair Trial: Studying the Schuelke Report*, 64 Mercer L. Rev. 683 (2013).

¹³⁷ Ensuring That Federal Prosecutors Meet Discovery Obligations: Hearing on S. 2197 Before the S. Comm. on the Judiciary, 112th Cong. 4–8 (2012) (statement of James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Just.) (quoted in Green, *supra* note 128, at 655).

¹³⁸ See Green, *supra* note 128, at 652.

¹³⁹ See S. 2197 (112th): Fairness in Disclosure of Evidence Act of 2012, GovTrack, <https://www.govtrack.us/congress/bills/112/s2197> [<https://perma.cc/LQ89-DMNX>] (last visited June 2, 2026).

¹⁴⁰ See generally Michael Coenen, *Combining Constitutional Clauses*, 164 U. Pa. L. Rev. 1067 (2016) (examining how the Supreme Court sometimes relies on multiple constitutional clauses in conjunction to justify judicial outcomes); Jennifer E. Laurin, *Essay, Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 Colum. L. Rev. 670 (2011) (exploring how concepts originating in qualified immunity doctrine came to shape exclusionary rule doctrine); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 Colum. L. Rev. 857 (1999) (examining the interplay of rights and remedies doctrines in constitutional law); Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 Mich. L. Rev. 459 (2010) (analyzing how rules created in one domain of constitutional law get borrowed in other, seemingly unrelated areas).

¹⁴¹ For a definition, see Tebbe & Tsai, *supra* note 140, at 463 (“A person engages in borrowing [by] . . . draw[ing] on one domain of constitutional knowledge in order to interpret, bolster, or otherwise illuminate another domain.”).

assistance of counsel doctrine, producing a race to the bottom: prosecutors get away with burying evidence while passive defense representation is tolerated, each dereliction absolved by the same permissive legal test. Beyond borrowing lies a quieter form of corruption—what I call constitutional neglect, for lack of a recognizable category in the existing constitutional theory literature. Courts treat *Brady* as if it occupies the field of constitutionally grounded disclosure obligations, leaving enumerated Sixth Amendment guarantees—the Confrontation and Compulsory Process Clauses, with their independent textual foundations and potentially more muscular commands—to atrophy as sources of discovery rights. State courts, meanwhile, mechanically replicate federal *Brady* precedent when interpreting their own constitutions rather than crafting independent disclosure protections. *Brady* thus degrades the broader constitutional architecture for securing defendants' access to evidence, its deficiencies migrating through doctrinal borrowing and constitutional neglect to diminish alternative frameworks that might otherwise have offered more.

1. *Borrowing*

The doctrinal exchanges between *Brady* and *Strickland v. Washington*,¹⁴² the landmark ineffective assistance case, represent constitutional borrowing of the very worst kind. Though scholars by and large celebrate borrowing since they believe it fosters rule-of-law values,¹⁴³ the *Brady-Strickland* story showcases its capacity for mischief. The saga begins with *Agurs*,¹⁴⁴ where the Supreme Court confronted whether prosecutors must disclose exculpatory evidence under *Brady* if the defendant had not lodged a specific request for the evidence.¹⁴⁵ Anxious about imposing broad disclosure duties for no-request cases, the Court fashioned a materiality test for such cases that was deliberately designed to function as a constitutional kill switch:

¹⁴² 466 U.S. 668 (1984).

¹⁴³ See generally Laurin, *supra* note 140, at 676 (noting that “much of the academic attention paid to doctrinal borrowing has been positive” and referencing examples). But see *id.* (“This Essay’s account of the strategic deployment of borrowing to narrow constitutional remedial doctrine . . . offers a rare look at the darker side of these processes.”); Leah Litman, Remedial Convergence and Collapse, 106 Calif. L. Rev. 1477, 1528 (2018) (developing similar critiques). This Article joins Laurin’s and Litman’s work in “offer[ing] a rare look at the darker side” of doctrinal borrowing and convergence. Laurin, *supra* note 140, at 676.

¹⁴⁴ 427 U.S. 97 (1976).

¹⁴⁵ See *id.* at 106.

evidence was material only if it “creates a reasonable doubt that did not otherwise exist.”¹⁴⁶

Eight years later, in *Strickland*, the Court set out to formulate a doctrinal test for ineffective assistance.¹⁴⁷ Rather than craft a standard tailored to the Sixth Amendment’s distinctive concerns, the Court simply appropriated *Agurs*’s formidable materiality standard, restyling it as requiring a “reasonable probability” of a different outcome.¹⁴⁸ No serious justification accompanied this transplant from freestanding due process law to enumerated Sixth Amendment protections,¹⁴⁹ nor from the subject matter of prosecutorial obligations to defense attorney performance. Ever since, *Strickland*’s punishing prejudice standard has doomed countless ineffective assistance claims, lowering the bar for incompetent defense representation in much the same way *Brady*’s materiality rule tightly circumscribed prosecutors’ constitutional disclosure obligations.¹⁵⁰ And then, just one year after *Strickland*, the Court’s decision in *Bagley* completed the circle of doctrinal borrowing. In that case, the Court revisited *Agurs*’s tiered framework, which had imposed its toughest standard on no-request cases while treating specific-request cases somewhat more leniently.¹⁵¹ *Bagley* bulldozed

¹⁴⁶ Id. at 112. For discussion of *Agurs*’s complex multi-tiered materiality framework, see Babcock, *supra* note 41, at 1148–49; Michael E. Rusin, Comment, The Prosecutor’s Duty of Disclose: From *Brady* to *Agurs* and Beyond, 69 J. Crim. L. & Criminology 197, 202 (1978).

¹⁴⁷ See *Strickland*, 466 U.S. at 671.

¹⁴⁸ Id. at 694. See also id. (“[T]he appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution . . . and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness.” (first citing *Agurs*, 427 U.S. at 104, 112–13; and then citing *United States v. Valenzuela-Bernal*, 458 U.S. 858, 872–74 (1982))). *Strickland*’s reference to *Valenzuela-Bernal* somewhat complicates the story told here—but not very much. Indeed, *Valenzuela-Bernal* itself reveals *Brady*’s expanding influence, as it relies partly on *Agurs* and *Brady* in crafting its own materiality standard. See *Valenzuela-Bernal*, 458 U.S. at 867, 868, 874 n.10 (first citing *Agurs*, 427 U.S. at 104, 109, 112–13; and then citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)).

¹⁴⁹ On the heightened level of protection the Supreme Court often (though not in *Strickland*) bestows for enumerated rights like the Sixth Amendment, see *infra* note 154 and accompanying text.

¹⁵⁰ The academic scholarship attacking *Strickland*’s prejudice prong is oceanic, rivaling even the gigantic body of work that finds fault with *Brady*’s materiality rules. For a small sample, see, for example, Stephen B. Bright & Sia M. Sanneh, Essay, Fifty Years of Defiance and Resistance After *Gideon v. Wainwright*, 122 Yale L.J. 2150, 2170 (2013); Marc L. Miller, *Wise Masters*, 51 Stan. L. Rev. 1751, 1786–87 (1999) (book review).

¹⁵¹ More precisely, *Agurs* grouped together no-request cases and cases where the defendant merely lodged a “general” request (such as the classic request for “any and all *Brady* information”), applying the same deliberately ungenerous materiality standard to

these distinctions, extrapolating *Strickland*'s reasonable-probability test—itself borrowed from *Agurs*'s most restrictive tier—to all *Brady* claims regardless of whether defendants had requested the evidence.¹⁵²

For those uninitiated in the Byzantine complexities that afflict this area of law, it may not be easy to follow each of the plot's twists and turns. But the story's main arc is straightforward enough: *Brady*'s worst impulses (from *Agurs*) infected ineffective assistance law, which then boomeranged back (in *Bagley*) to contaminate the rest of *Brady*—including the parts of *Brady* that had once offered defendants marginally better odds of securing relief. This reciprocal borrowing undermines basic principles of adversarial fairness. Prosecutorial disclosure and effective defense representation are interconnected components of criminal adjudication's overall balance—weakening one necessitates strengthening the other, or else defendants' access to information and their ability to test and assess the government's case would be fatally compromised.¹⁵³ But the Court instead chose to weaken both doctrines, treating the most restrictive ingredient of each as a precedent to justify eroding the other.

2. *Neglect*

To coin a term, *constitutional neglect* occurs when courts leave potentially expansive constitutional provisions to collect dust rather than cultivating their doctrinal possibilities. Such judicial abdication takes on special significance for enumerated rights—those explicit textual guarantees that courts claim to protect more zealously than judge-made implications drawn from due process.¹⁵⁴ In “what might loosely be

both—and distinguished this group from specific-request cases, where defendants benefited from a somewhat more favorable standard. See Rusin, *supra* note 146, at 200–03.

¹⁵² See *United States v. Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.); accord *id.* at 685 (White, J., concurring in part and concurring in the judgment).

¹⁵³ See *id.* at 694–95 (Marshall, J., dissenting); Babcock, *supra* note 41, at 1163–74. Further worsening this two-front assault on the capacity of accused persons to gather information and defend themselves, many lower courts embrace a so-called due diligence rule that shuts off even *Brady*'s marginal protections where courts find that a reasonably diligent defense attorney could have uncovered the suppressed evidence through their own efforts. See, e.g., Thea Johnson, What You Should Have Known Can Hurt You: Knowledge, Access, and *Brady* in the Balance, 28 *Geo. J. Legal Ethics* 1, 3–4 (2015); Weisburd, *supra* note 63, at 157–58.

¹⁵⁴ See, e.g., John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 75–77 (1980); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); W. Va. State

called the area of constitutionally guaranteed access to evidence,”¹⁵⁵ the Sixth Amendment’s Confrontation and Compulsory Process Clauses demonstrate how neglect can strangle constitutional potential in the cradle. Here were provisions with independent textual foundations that might have transcended *Brady*’s stunted framework. By the 1970s, pioneering scholars and courts had begun sketching blueprints: Compulsory Process might supply defendants with rights to learn about witnesses who could be subpoenaed to deliver favorable testimony, while Confrontation could perhaps demand disclosure sufficient to transform cross-examination from kabuki theater into genuine adversarial testing.¹⁵⁶ Instead, the Supreme Court torched these blueprints before anyone could build anything from them.

*Pennsylvania v. Ritchie*¹⁵⁷ stands as the main culprit in this chapter of our story. When the defendant in this case invoked both of the Sixth Amendment provisions we are discussing to access confidential government files, the Court rejected both claims. The argument premised on compulsory process garnered only this stupefying tautology: because courts had “traditionally” evaluated discovery claims through *Brady*’s due process lens, tradition justified staying the course.¹⁵⁸ No grappling with text, no probing of distinct constitutional purposes, no recognition that different provisions might harbor different meanings—just institutional momentum masquerading as constitutional interpretation. *Ritchie*’s confrontation analysis at least engaged with the claim’s substance, though the Court’s disposition inflicted comparable

Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943); Peter Westen, *The Compulsory Process Clause*, 73 Mich. L. Rev. 71, 127–31 (1974).

¹⁵⁵ *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982).

¹⁵⁶ The leading work was and remains an article by Peter Westen who made the case that the Compulsory Process Clause “entitles a defendant to discover the existence of potential witnesses” and might have supplied “a sounder conceptual basis” than due process for some of the discovery rights within *Brady*’s domain. Westen, *supra* note 154, at 120–21. For confrontation-based theories, see, for example, *Bagley v. Lumpkin*, 719 F.2d 1462, 1464 (9th Cir. 1983) (invoking *Davis v. Alaska*, 415 U.S. 308 (1974), a Confrontation Clause case, to augment the court’s *Brady* analysis), *rev’d sub nom.* *United States v. Bagley*, 473 U.S. 667 (1985). A small band of commentators continue excavating some of the possibilities. See Jean Montoya, *A Theory of Compulsory Process Clause Discovery Rights*, 70 Ind. L.J. 845, 888 (1995); William Ortman, *Essay, Confrontation in the Age of Plea Bargaining*, 121 Colum. L. Rev. 451 (2021); Erin O’Neill, *Note, Safeguarding the Opportunity for Effective Cross-Examination: The Confrontation Clause and Pretrial Disclosures*, 58 Am. Crim. L. Rev. 461 (2021).

¹⁵⁷ 480 U.S. 39 (1987).

¹⁵⁸ *Id.* at 56.

damage. Justice Powell proclaimed confrontation purely a “trial” right, guaranteeing merely “an opportunity for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent, the defense might wish.”¹⁵⁹ This Solomonic separation—severing the formal right to cross-examine from any concern with its effective exercise—drains confrontation of meaning by allowing prosecutors to conceal the very materials that would make a substantive cross-examination feasible.¹⁶⁰ *Ritchie* thus condemned the Sixth Amendment’s enumerated guarantees to wither in *Brady*’s shadow.

3. *Lockstepping*

State constitutional law might have offered off-ramps from the failures of *Brady* doctrine, as state courts retain full authority to interpret their constitutions to safeguard rights more lavishly than federal law. Justice Brennan famously exhorted state judges to “step into the breach” when federal protections recede—a rallying cry that has echoed through decades of constitutional law scholarship,¹⁶¹ including in the constitutional criminal procedure subfield.¹⁶² With respect to prosecutorial disclosure rights, however, the theoretical independence of state constitutional interpretation has not meaningfully materialized.

¹⁵⁹ Id. at 53 (opinion of Powell, J.) (internal quotation marks omitted) (emphasis omitted) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam)).

¹⁶⁰ Id. at 61–62 (Blackmun, J., concurring in part and concurring in the judgment); see, e.g., id. at 66–72 (Brennan, J., dissenting); Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 Colum. L. Rev. 1369, 1395 (1991). For discussion of post-*Ritchie* lower court case law addressing whether—despite *Ritchie*—the Confrontation Clause might confer pretrial discovery rights in limited circumstances, see O’Neill, *supra* note 156, at 473–79.

¹⁶¹ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 503 (1977); Linda Greenhouse, *William Brennan, 91, Dies: Gave Court Liberal Vision*, N.Y. Times, July 25, 1997, at B6 (“The article became one of the most frequently cited law review articles in history, and the results were apparent in a rapidly growing number of state supreme court rulings that relied on state constitutions to expand individual rights.”).

¹⁶² See, e.g., Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. Crim. L. & Criminology 63, 66 (1996); Ben A. McJunkin, *Grants Pass and the Pathology of the Criminal Law*, 102 Wash. U. L. Rev. 1583, 1588–90 (2025); Kathryn E. Miller, *The Antisubordination Eighth Amendment*, 112 Calif. L. Rev. 2065, 2131 (2024).

State courts march in lockstep with federal *Brady* doctrine with vexing regularity.¹⁶³ Some explicitly call their state constitutional protections coextensive with federal doctrine,¹⁶⁴ while others simply apply *Brady* without ever pausing to consider alternatives.¹⁶⁵ The rebels, such as they are, barely disturb the basic pattern. *People v. Vilardi*,¹⁶⁶ celebrated by some as the vanguard of state constitutional independence in this field, managed only to preserve *Agurs*'s slightly less stringent materiality test for specific-request cases—rejecting *Bagley*'s one-size-fits-all approach.¹⁶⁷ The few states that followed *Vilardi*'s lead mostly limit their defiance to this hairsplitting distinction between materiality standards¹⁶⁸—one that seems unlikely to make much practical difference on the ground.¹⁶⁹ Room surely exists for the states to chart bolder courses than they have chosen up to this point. For now, however, state constitutional law remains thoroughly blanketed by *Brady*'s shadow, closing off yet another potential refuge.

¹⁶³ Lockstepping is a common occurrence in state constitutional interpretation—and a widely criticized one. See generally Robert F. Williams, *The Law of American State Constitutions* 194 (2009) (examining the history of state constitution-making and the relationship between state and federal constitutional rights); Michael Milov-Cordoba & Alicia L. Bannon, Foreword: The Promise and Limits of State Constitutions, 99 N.Y.U. L. Rev. 1915, 1918 (2024).

¹⁶⁴ See, e.g., *Gray v. Dep't of Just.*, 275 F. App'x 679, 681 (9th Cir. 2008) (addressing Montana law); *State v. See*, 877 S.E.2d 715, 720–21 (N.C. Ct. App. 2022); *State v. Wittenbarger*, 880 P.2d 517, 520 (Wash. 1994); *State v. Youngblood*, 650 S.E.2d 119, 127–28 (W. Va. 2007).

¹⁶⁵ See, e.g., *State v. Shipps*, 656 N.W.2d 622, 631 (Neb. 2003) (applying only federal *Brady* standards, without providing any reason, even though the defendant had alleged violations of both state and federal constitutions).

¹⁶⁶ 555 N.E.2d 915, 919–20 (N.Y. 1990).

¹⁶⁷ See *id.* at 917–21.

¹⁶⁸ See *Commonwealth v. Gallarelli*, 502 N.E.2d 516, 519 & n.5 (Mass. 1987); *State v. Marshall*, 586 A.2d 85, 191–92 (N.J. 1991); *Roberts v. State*, 881 P.2d 1, 8 (Nev. 1994); *State v. Brisson*, 619 A.2d 1099, 1102–03 (R.I. 1993). The only court I have found that goes further than *Vilardi* as a matter of state constitutional interpretation is New Hampshire's high court, which eliminated *Brady*'s materiality requirement entirely (rather than just lowering the threshold for materiality in the small subset of cases involving specific requests). See *State v. Laurie*, 653 A.2d 549, 551–52 (N.H. 1995).

¹⁶⁹ See *Strickler v. Greene*, 527 U.S. 263, 300 (1999) (Souter, J., concurring in part and dissenting in part) (“[W]hile ‘reasonable possibility’ or ‘reasonable likelihood[]’ . . . and ‘reasonable probability’ express distinct levels of confidence concerning the hypothetical effects of errors on decisionmakers’ reasoning, the differences among the standards are slight.”).

C. Professional Formation

How prosecutors learn to think about disclosure—from their first criminal procedure class through on-the-job training—shapes whether they will view defense access to evidence as a basic element of justice or an impediment to conviction. Reformers seeking to combat evidence suppression target all major stages of professional development: classrooms that cultivate transparency as a core value,¹⁷⁰ licensure that tests practical mastery over rote memorization,¹⁷¹ ethics standards that demand more than bare constitutional compliance,¹⁷² and administrative practices within prosecutors' offices that foster commitment to openness rather than adversarial struggle.¹⁷³ Yet *Brady* saturates all four domains of professional formation, ensuring many prosecutors will enter practice conceptualizing their obligations within its ungenerous paradigm.

1. Legal Education

Examining how law school casebooks present prosecutorial disclosure highlights *Brady*'s dominance from the very beginning of a lawyer's professional formation. My survey of nine market-leading texts—five criminal procedure casebooks and four professional

¹⁷⁰ See, e.g., Aviram, *supra* note 62, at 43–45; Lara A. Bazelon, Hard Lessons: The Role of Law Schools in Addressing Prosecutorial Misconduct, 16 Berkeley J. Crim. L. 391, 415–18 (2011); Adam M. Gershowitz, The Challenge of Convincing Ethical Prosecutors That Their Profession Has a *Brady* Problem, 16 Ohio St. J. Crim. L. 307, 322 (2019); Ellen S. Podgor, The Ethics and Professionalism of Prosecutors in Discretionary Decisions, 68 Fordham L. Rev. 1511, 1532–33 (2000).

¹⁷¹ See Aviram, *supra* note 62, at 44–45.

¹⁷² See, e.g., Fisher, *supra* note 19, at 1413–31; Bruce A. Green & Ellen Yaroshefsky, Should Criminal Justice Reformers Care About Prosecutorial Ethics Rules?, 58 Duq. L. Rev. 249, 272–77 (2020); Erica Hashimoto, Toward Ethical Plea Bargaining, 30 Cardozo L. Rev. 949, 957–63 (2008); Keenan et al., *supra* note 55, at 240–45; Christina Parajon, Comment, Discovery Audits: Model Rule 3.8(d) and the Prosecutor's Duty to Disclose, 119 Yale L.J. 1339, 1342, 1346–50 (2010).

¹⁷³ See, e.g., Alafair S. Burke, Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science, 47 Wm. & Mary L. Rev. 1587, 1616–26 (2006); Gershowitz, *supra* note 54, at 544–45, 582–89; Tracey L. Meares, Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives, 64 Fordham L. Rev. 851, 907–10 (1995); Scheck, *supra* note 20, at 2225–27, 2247–48; Yaroshefsky, *supra* note 20, at 1951, 1955–56. See generally Stephanos Bibas, Prosecutorial Regulation Versus Prosecutorial Accountability, 157 U. Pa. L. Rev. 959 (2009) (suggesting various reforms to the internal structure and management of prosecutors' offices); sources cited *infra* notes 214, 256 (citing additional sources advocating internal bureaucratic reforms within prosecutors' offices to foster *Brady* compliance).

responsibility books that collectively train many American law students¹⁷⁴—revealed a telling pattern. In fairness to the authors of these casebooks, criminal procedure casebooks and criminal procedure instruction generally emphasize constitutional doctrine across the board, not just for discovery—and bar exam priorities, space constraints, and ingrained pedagogical emphases reinforce that orientation. But even accounting for these forces, the survey uncovered a notable asymmetry in how discovery is presented. While there are exemplary texts that meaningfully integrate statutory requirements, ethics standards, and administrative practices into their discovery discussions,¹⁷⁵ too many center *Brady* as the field’s organizing framework.¹⁷⁶ Several simultaneously inflate *Brady*’s protective reach while scattering its most significant limitations—especially its near-total irrelevance at the plea stage where criminal justice actually unfolds—across separate chapters in ways that obscure their importance.¹⁷⁷

The problem begins with emphasis. In casebook after casebook, constitutional disclosure doctrine dominates: one text devotes roughly¹⁷⁸

¹⁷⁴ Joanne Butler, a representative from Aspen Publishing, assisted in identifying the market-leading books in each field: five for criminal procedure and four for professional responsibility. See E-mail from Joanne Butler, Managing Ed., Aspen Publ’g, to author (Feb. 5, 2025, at 13:10 ET) (on file with author). I reviewed only four books for professional responsibility since, according to Butler, there are only four that are widely used. See E-mail from Joanne Butler, *supra*, to author (Feb. 5, 2025, at 13:33 ET) (on file with author). For criminal procedure, the leading texts are: Ronald Jay Allen, Joseph L. Hoffmann, Debra A. Livingston, Andrew D. Leipold & Tracey L. Meares, *Criminal Procedure: Adjudication and the Right to Counsel* (4th ed. 2025); Erwin Chemerinsky & Laurie L. Levenson, *Criminal Procedure: Adjudication* (4th ed. 2022); Dressler et al., *supra* note 4; Nancy J. King, Orin S. Kerr & Eve Brensike Primus, *Modern Criminal Procedure* (16th ed. 2023); Marc L. Miller, Ronald F. Wright, Jenia I. Turner & Kay L. Levine, *Criminal Procedures: Prosecution and Adjudication* (7th ed. 2023). For professional responsibility, the main texts are: Stephen Gillers, *Regulation of Lawyers: Problems of Law and Ethics* (13th ed. 2024); Renee Knake Jefferson et al., *Professional Responsibility: A Contemporary Approach* (5th ed. 2023); Lisa G. Lerman, Philip G. Schrag & Robert Rubinson, *Ethical Problems in the Practice of Law* (6th ed. 2023); Mortimer D. Schwartz, Richard C. Wydick, Rex R. Perschbacher & Debra Lyn Bassett, *Problems in Legal Ethics* (14th ed. 2024).

¹⁷⁵ The exemplary features of some of these casebooks are discussed *infra* notes 180, 182, 184, 187 and accompanying text.

¹⁷⁶ See *infra* notes 178–90 and accompanying text.

¹⁷⁷ See *infra* notes 181–90 and accompanying text.

¹⁷⁸ Though superficially straightforward, the task at hand—comparing how many pages each casebook devotes to constitutional doctrine compared with alternative prosecution disclosure frameworks—presented some modest methodological hurdles. Word constraints prevent me from fully discussing the challenges here. But both the author and the *Virginia Law Review* have on file a description of how I navigated these obstacles.

twenty-four pages to *Brady* and its progeny while compressing everything else—statutory mandates, court rules, bureaucratic policies, and other disclosure frameworks—into just four pages.¹⁷⁹ Others display comparable asymmetries, granting *Brady* roughly double the space afforded to all nonconstitutional frameworks combined.¹⁸⁰ Students absorb an unmistakable hierarchy: constitutional doctrine reigns supreme while other mechanisms that may afford broader protections garner only cursory attention.

Most of the casebooks then compound this misplaced emphasis on constitutional doctrine over alternatives by obscuring *Brady*'s near-total irrelevance to plea negotiations. Several texts bury *Ruiz* (which, as discussed previously, limits *Brady*'s pretrial force)¹⁸¹ in scattered fragments: a paragraph here (after pages upon pages scrutinizing materiality standards), a note there relegated to separate chapters on plea bargaining rather than the book's main chapter on discovery.¹⁸² Tellingly, one book's introductory passage catalogues the "important questions" students should ponder about prosecutorial disclosure, then excludes timing from this inventory—conveying to students (surely

¹⁷⁹ See Chemerinsky & Levenson, *supra* note 174, at 95–98, 101–24, 159.

¹⁸⁰ See Allen et al., *supra* note 174, at 1175–1204, 1210–11, 1219–20 (roughly twenty-two pages for constitutional doctrine versus ten for alternatives); Dressler et al., *supra* note 4, at 948–74, 1031–33 (roughly twenty-one pages versus ten); King et al., *supra* note 174, at 1015–25, 1035–38, 1045–61, 1085–89 (roughly eighteen pages versus eleven). As for the fifth leading criminal procedure book I reviewed, it was not possible to neatly sort coverage of discovery into silos labeled "constitutional" or "alternatives" because the book so thoroughly blends discussion of constitutional and nonconstitutional frameworks in service of its overarching emphasis on the practical implementation and outcomes of discovery systems. Miller et al., *supra* note 174, at 231–53, 256–58, 262, 307–08.

¹⁸¹ For discussion of *Ruiz*, see *supra* notes 47–49, 52 and accompanying text.

¹⁸² For each book's coverage of *Ruiz*, see Allen et al., *supra* note 174, at 1199–1204 (roughly five pages); Chemerinsky & Levenson, *supra* note 174, at 123–24, 159 (roughly two pages overall, much of it in the plea procedure chapter rather than the discovery chapter); Dressler et al., *supra* note 4, at 974, 1132–34 (roughly three pages overall, with only one short note on *Ruiz* included in the discovery chapter); King et al., *supra* note 174, at 1055–56, 1085–87 (roughly five pages overall, mostly comprised of an edited version of the *Ruiz* case found in the chapter on guilty plea procedure); Miller et al., *supra* note 174, at 239, 307–08 (roughly two pages overall, evenly divided between the discovery and plea procedure chapters). I am not particularly concerned about the coverage of *Ruiz* in King et al., *supra* note 174, since the authors helpfully highlight the importance of disclosure's timing when discussing nonconstitutional rules and, in fact, anchor the chapter's entire coverage of discovery around this very issue, see *id.* at 1015, nor about the coverage in Miller et al., *supra* note 174, since the very opening paragraphs introducing *Brady* instruct students to "[p]ay particular attention . . . to the nature of the temporal requirement—that material information need be shared only *before trial*." *Id.* at 232.

inadvertently) that understanding *when Brady* applies lacks significance relative to other matters.¹⁸³ Students trained on such materials risk entering practice unaware of the vacuum of constitutional protections afflicting the ninety-five percent of cases resolved through pleas.

Moreover, some of the casebooks—though not most—introduce *Brady* in ways that mistakenly invest it with revolutionary significance as a procedural safeguard for defendants. One text declares, in its opening passage about *Brady*, that the case created “a broad rule of constitutional criminal discovery” and even goes so far as to hail the decision as a “shot heard round the world”¹⁸⁴—a description that may be apt for the likes of *Brown v. Board of Education*,¹⁸⁵ but hardly one befitting *Brady*. Another presents *Brady* as a “historic case” and elsewhere refers to *Brady* and one of its offshoots as “seminal cases.”¹⁸⁶ In light of the near-universal academic consensus that *Brady* has failed to bring about a generous system of prosecutorial information disclosure, these assertions about *Brady*’s supposedly historic significance likely represent wishful thinking or normative aspiration rather than sober assessments of the decision’s actual impact on criminal practice.

Professional responsibility courses necessarily provide limited coverage, with prosecutorial disclosure comprising one subsection among dozens of ethics rules. Such constraints make it crucial to select

¹⁸³ The Chemerinsky and Levenson text frames its coverage of *Brady* this way:

Important questions arise in examining a prosecutor’s duty under *Brady*. Why is there such a problem with prosecutors complying with their discovery obligations? Why does the prosecution have an obligation to help the defense by providing exculpatory evidence if we have an adversarial system? Shouldn’t each side have the responsibility of finding the evidence it needs to win the case? The Supreme Court answered this question in its historic case of *Brady v. Maryland*.

Chemerinsky & Levenson, *supra* note 174, at 102.

¹⁸⁴ Dressler et al., *supra* note 4, at 956 (internal quotation marks omitted). The full context of the latter quote detracts somewhat from its initially sweeping assertion of *Brady*’s significance. But not much. See *id.* (“The Court’s first constitutional discovery case was a ‘shot heard ‘round the world,’ if the world is limited to lawyers who try criminal cases, and particularly if limited to the defense bar.”). King et al. admirably frame *Brady* in precisely the opposite way, highlighting at the outset of discovery coverage that “[p]retrial discovery by the defense has been treated by the Supreme Court as largely a matter to be determined by state legislative or judicial policy.” King et al., *supra* note 174, at 1017. Miller et al. note that “[c]onstitutional obligations are only the floor of discovery obligations.” Miller et al., *supra* note 174, at 232.

¹⁸⁵ 347 U.S. 483 (1954).

¹⁸⁶ See Chemerinsky & Levenson, *supra* note 174, at 96, 101–02.

the right priorities. Yet two of the four leading professional responsibility texts devote much of their limited space in ways that reinforce *Brady*-centrism rather than counterbalance it—though the remaining two, in fairness, perform far better on the metrics of concern here.¹⁸⁷ One book devotes roughly eight pages to *Brady*—with only one page addressing *Ruiz*'s crucial limitations—but only five to Model Rule of Professional Conduct (“MRPC”) 3.8(d),¹⁸⁸ the professional standard one might reasonably expect a professional responsibility course to place at the center of its disclosure coverage.¹⁸⁹ Another breezes through both constitutional and ethical disclosure obligations in roughly a single page, ignores *Ruiz* completely when introducing constitutional requirements, and presents an incomplete picture of the law concerning the relationship between MRPC 3.8(d) and *Brady* obligations.¹⁹⁰

2. Licensure

The bar exam and the MPRE¹⁹¹—the gateway examinations to legal practice—further reinforce the profession's narrow conception of disclosure obligations. To analyze testing priorities for attorney licensure exams, I sought access to test preparation materials from Barbri and Themis, which both companies generously provided after the National Conference of Bar Examiners (“NCBE”) declined to provide access to its question bank as it sought to keep questions confidential for potential use on future exams.¹⁹² These materials show how licensing

¹⁸⁷ In my judgment, Gillers, *supra* note 174, at 396–403, and Lerman et al., *supra* note 174, at 719–23, achieve all that can reasonably be expected of a professional responsibility casebook when it comes to coverage of the relevant ethics rule and *Brady*.

¹⁸⁸ Model Rules of Pro. Conduct r. 3.8(d) (A.B.A. 2025).

¹⁸⁹ See Jefferson et al., *supra* note 174, at 542–55.

¹⁹⁰ See Schwartz et al., *supra* note 174, at 301–02. Schwartz and his coauthors introduce MRPC 3.8(d) by asking precisely the right question: “Does the ethics rule set a more rigorous standard than the Due Process Clause sets?” *Id.* at 302. But the text then veers off course by stating, “[t]he answer given in ABA Formal Op. 09-454 (2009) is a resounding Yes,” and proceeding to summarize “four respects” in which “[t]he ethics standard is more rigorous.” *Id.* While accurate as a summary of the ABA's own view of the matter, the full story is far more complex, as six state supreme courts have interpreted their jurisdictions' versions of MRPC 3.8(d) as being merely coextensive with *Brady* along several dimensions the casebook addresses. See *infra* Subsection II.C.3.

¹⁹¹ “MPRE” refers to the Multistate Professional Responsibility Exam.

¹⁹² See E-mail from Samuel Farkas, Vice President, Instruction & Online Educ., Barbri, to author (June 17, 2025, at 19:00 ET) (on file with author); E-mail from Sophie Dye, Dir., Legal Educ. & Innovation, Themis Bar Rev., to author (May 8, 2025, at 14:25 ET) (on file with author).

requirements reinforce *Brady*'s primacy. Test takers memorize *Brady*'s materiality doctrine in detail but encounter no statutory mandates, court rules, or office policies—other key frameworks governing disclosure practices.¹⁹³ Moreover, Barbri's criminal procedure materials, though exhaustive in their coverage for most topics, make no mention of the fact that *Ruiz* largely strips away *Brady*'s protections at the plea stage.¹⁹⁴ The MPRE tests MRPC 3.8(d) instead of *Brady*—a welcome shift in focus—yet this small corrective does little to offset the systematic *Brady*-centrism that dominates students' and attorneys' other formative experiences. What little coverage the MPRE does provide is superficial (if the bar prep companies' materials are a reliable guide), suggesting, simplistically, that MRPC 3.8(d) exceeds *Brady*'s demands,¹⁹⁵ failing to acknowledge that there are major jurisdictional divides on this very issue.¹⁹⁶ And the prep materials—like the ABA Model Rules themselves—wrap their discussions of MRPC 3.8 in rhetoric valorizing the criminal prosecutor as a “minister of justice,” breeding status quo complacency that entrenches *Brady*'s inadequate framework.¹⁹⁷ These testing regimes may serve the NCBE's institutional imperatives,¹⁹⁸ but

¹⁹³ See Barbri, Criminal Procedure 739–40 (2025) (on file with author); Themis Bar Rev., Criminal Procedure 36 (2025) (on file with author).

¹⁹⁴ See Barbri, *supra* note 193, at 739–40. Themis's materials, by contrast, correctly recognize that, in light of *Ruiz*, *Brady* “does not extend to disclosure of impeachment evidence prior to a plea bargain agreement.” Themis Bar Rev., *supra* note 193, at 36 & 59 n.242; see also *id.* at 40 & 60 n.279 (revisiting *Ruiz* under the outline's “guilty pleas” section).

¹⁹⁵ See Barbri, Outline for Professional Responsibility—MPRE 2025–2026, at 162 (2025) (on file with author) (providing side-by-side summaries of MRPC 3.8(d) and the *Brady* rule, including the materiality limitation in the *Brady* summary while omitting that limitation when summarizing the ethics rule); Themis Bar Rev., Multistate Professional Responsibility Exam (MPRE) 89 (2024) (on file with author).

¹⁹⁶ This split of authority is discussed *infra* Subsection II.C.3.

¹⁹⁷ See Barbri, *supra* note 193, at 161–62; Themis Bar Rev., *supra* note 193, at 88; Model Rules of Pro. Conduct r. 3.8(d) cmt. 1 (A.B.A. 2025) (“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.”).

¹⁹⁸ If one accepts the premise that licensing examinations should limit their coverage to a (largely fictionalized) uniform body of law that applies nationwide, it may make sense to omit coverage of nonconstitutional discovery mechanisms that vary considerably across jurisdictions. But for those who already are skeptical of that premise, this Article's assessment of *Brady*-centrism on the bar lends additional support to broader critiques of the bar exam that others have articulated for many years. See, e.g., Andrea A. Curcio, A Better Bar: Why and How the Existing Bar Exam Should Change, 81 Neb. L. Rev. 363, 369–72 (2002); William C. Kidder, The Bar Examination and the Dream Deferred: A Critical Analysis of the MBE, Social Closure, and Racial and Ethnic Stratification, 29 Law & Soc. Inquiry 547, 580–81 (2004).

their effect is to form lawyers versed in how to apply *Brady* in the few cases that go to trial but unfamiliar with the disclosure frameworks that might provide more meaningful pretrial discovery rights.

3. Ethics Standards

Ethics standards are yet another site where *Brady*'s shadow misdirects the profession's understanding of prosecutorial disclosure obligations. Every jurisdiction has adopted some version of MRPC 3.8(d), which requires prosecutors to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused."¹⁹⁹ The parallel to our earlier discussion of statutory exculpatory evidence mandates is evident: like those disclosure statutes, MRPC 3.8(d) employs the broad "tends to negate . . . guilt" language while conspicuously omitting any materiality threshold.²⁰⁰ Among the roughly quarter of jurisdictions to consider the question, a majority—along with the ABA itself—recognize that MRPC 3.8(d) imposes obligations beyond *Brady*.²⁰¹ Yet the high courts of six states have declared the rule "coextensive" (a polite term for redundant) with *Brady*, transplanting *Brady*'s materiality restrictions and, in some

¹⁹⁹ Model Rules of Pro. Conduct r. 3.8(d) (A.B.A. 2025); see CPR Pol'y Implementation Comm., A.B.A., Variations of the ABA Model Rules of Professional Conduct (2024), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc-3-8.pdf [<https://perma.cc/U2HH-N4C8>] (compiling state variations of MRPC 3.8(d) adopted nationwide). MRPC 3.8(d) provides less protection than *Brady* in one critical respect: it compels disclosure only of information within the personal knowledge of the prosecutor, whereas *Brady* case law in some circumstances aggregates facts known to other government actors and imputes knowledge of those facts to the prosecutor. See Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor 150 (2007). This limitation aside, the best reading of the rule contemplates broader and earlier disclosure than *Brady*. See A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 09-454, at 2–6 (2009); Hashimoto, *supra* note 172, at 960–61. But see Cassidy, *supra* note 48, at 1452–65 (criticizing the ABA's reading of the rule and arguing the rule's scope conforms more closely to *Brady*'s parameters).

²⁰⁰ See *supra* notes 95–101 and accompanying text.

²⁰¹ See *In re Kline*, 113 A.3d 202, 213 (D.C. 2015); *In re Feland*, 2012 ND 174, ¶ 14, 820 N.W.2d 672, 678; *Shultz v. Comm'n for Law. Discipline of the State Bar of Tex.*, No. 55649, 2015 WL 9855916, at *1 (Tex. Bd. Disciplinary App. 2015); N.Y.C. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2016-3, at 2 (2016), https://www.nycbar.org/wp-content/uploads/2023/05/20073140-2016-3_Prosecutors_Ethical_Obligations_PROFETH_8.22.16.pdf [<https://perma.cc/7VED-LX72>]; Va. State Bar Standing Comm. on Legal Ethics, Legal Ethics Op. 1862, at 2 (2012), <https://vsb.org/common/Uploaded%20files/LEOs/1862.pdf> [<https://perma.cc/EY4J-6ZM4>].

instances, its timing limitations onto text that supports neither.²⁰² While this pattern is less pronounced than for the statutory rules examined earlier—where we saw that twelve of twenty-five states with ambiguous statutes imported *Brady*'s restrictions²⁰³—the fact that six state supreme courts impose these limitations remains disconcerting.²⁰⁴

Even in jurisdictions that endorse the more expansive understanding of MRPC 3.8(d), the message is not necessarily getting through. Available interview data suggests that most prosecutors remain unaware that MRPC 3.8(d) demands anything beyond *Brady* compliance—if they know about the rule at all.²⁰⁵ This widespread ignorance likely persists, at least in part, because the profession has abandoned meaningful enforcement of its own standards. Bar authorities almost never sanction prosecutors for violating MRPC 3.8(d)—or any other rule for that matter²⁰⁶—reserving discipline for only the most egregious cases of misconduct.²⁰⁷ The majority of courts considering this issue distinguish

²⁰² See *In re Att'y C*, 47 P.3d 1167, 1170 (Colo. 2002); *In re Seastrunk*, 2017-0178, p. 18 (La. 10/18/17), 236 So. 3d 509, 519 (per curiam); *Disciplinary Couns. v. Kellogg-Martin*, 124 Ohio St. 3d 415, 2010-Ohio-282, 923 N.E.2d 125, at ¶¶ 21–22 (per curiam); *State ex rel. Okla. Bar Ass'n v. Ward*, 2015 OK 48, ¶ 32, 353 P.3d 509, 520–21; *In re Pet. to Stay the Effectiveness of Formal Ethics Op.* 2017-F-163, 582 S.W.3d 200, 202 (Tenn. 2019); *In re Riek*, 2013 WI 81, 350 Wis. 2d 684, ¶¶ 34–35, 834 N.W.2d 384 (per curiam).

²⁰³ See *supra* notes 103–05 and accompanying text.

²⁰⁴ The main justification offered by these courts in defense of their position is revealing: having two standards—one constitutional, the other ethical—would somehow “confus[e]” prosecutors with “inconsistent obligations.” E.g., *In re Att'y C*, 47 P.3d at 1170–71; *In re Seastrunk*, 236 So. 3d at 519. But simply disclosing all favorable evidence in a timely fashion—without screening for materiality—satisfies both the broader ethical duty and the narrower constitutional floor and, indeed, is far simpler to administer than a materiality analysis. The greater subsumes the lesser—what is so confusing about that? The makeweight tenor of the courts’ reasoning seemingly exposes what truly drives these decisions: the profession is so steeped in *Brady*’s paradigm that any broader obligation feels unfamiliar, even threatening.

²⁰⁵ This interview data—along with other evidence regarding what prosecutors are and are not learning about disclosure from their professional formation—is discussed *infra* Subsection II.C.4.

²⁰⁶ See, e.g., Davis, *supra* note 199, at 143, 145; Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 Tex. L. Rev. 629, 670–73 (1972); Bidish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 Lewis & Clark L. Rev. 573, 590–91, 610–12 (2017); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. Rev. 721, 755 (2001); Matt Ferner, *Prosecutors Are Almost Never Disciplined for Misconduct*, Huff. Post (Feb. 11, 2016, at 16:16 ET), http://www.huffingtonpost.com/entry/prosecutor-misconduct-justice-us_56bce00fe4b0c3c55050748a [https://perma.cc/88XM-S5Q5].

²⁰⁷ See Jodi Nafzger, *Leveling Felony Charges at Prosecutors for Withholding Evidence*, 66 Drake L. Rev. 307, 338–48 (2018); Rosen, *supra* note 13, at 720–30 (describing the only

prosecutors' broader ethical obligations under MRPC 3.8(d) from their de minimis constitutional obligations, as discussed above.²⁰⁸ *Brady* nevertheless remains the default framework for disclosure of exculpatory information in many prosecutors' offices.

4. Internal Prosecutorial Administration

Internal policy guidance, training programs, and other techniques of prosecutorial administration could help counteract the *Brady*-centric professional formation many prosecutors will have received during law school and bar preparation.²⁰⁹ But the available evidence suggests this potential corrective often fails to materialize. While systematic research on prosecutorial office practices remains difficult to conduct, the existing literature paints a concerning picture. Many offices lack formal disclosure policies or training programs, leaving prosecutors to navigate complex obligations using only the fragmentary understanding absorbed from casebooks, bar exams, and trial-and-error on the job.²¹⁰ Where administrative guidance exists in these offices, it often amounts to sporadic mentoring, perfunctory new-hire orientations not subsequently reinforced,²¹¹ or—worse—the kind of active miseducation exemplified in *Connick v. Thompson*,²¹² where Justice Ginsburg's dissent quoted a witness expert who memorably characterized *Brady* supervision in New Orleans as “the blind leading the blind.”²¹³ Far from counteracting

nine cases at the time of publication where a prosecutor was subject to potential misconduct sanctions for *Brady* violations); cf. Kevin C. McMunigal, The (Lack of) Enforcement of Prosecutor Disclosure Rules, 38 Hofstra L. Rev. 847, 857, 860 (2010) (discussing recent cases that show “continuing resistance to enforcement of prosecutors’ ethical disclosure duties” in some jurisdictions while also, in other jurisdictions, pointing to increased “willingness to enforce their equivalents to Model Rule 3.8(d)”).

²⁰⁸ See supra note 201 and accompanying text.

²⁰⁹ Cf. supra note 173 (citing literature favoring internal bureaucratic reforms to improve prosecutorial disclosure practices).

²¹⁰ See, e.g., Gershowitz, supra note 54, at 544 (“It is difficult to know . . . how much training prosecutors actually receive. . . . Unfortunately, there is reason to believe that, on balance, most prosecutors receive minimal training about their *Brady* obligations.”); Ellen S. Podgor, Criminal Discovery of *Jencks* Witness Statements: Timing Makes a Difference, 15 Ga. St. U. L. Rev. 651, 688 (1999) (finding sixty percent of criminal defense attorneys in a district surveyed believed the U.S. Attorneys’ offices in the areas where they practiced lacked formal *Jencks* disclosure policies).

²¹¹ See Gershowitz, supra note 54, at 544–45.

²¹² See 563 U.S. 51, 79–80 (2011) (Ginsburg, J., dissenting).

²¹³ Id. at 97 (quoting id. joint app. at 270); see also Gershman, supra note 110, at 153–57 (describing the misconduct by prosecutors in *Connick* caused by their willful ignorance of

earlier miseducation, this administrative void allows *Brady*'s miserly yet dominant framework to calcify unchallenged.

Even offices that develop policies and training programs on disclosure—or other well-meaning interventions that many scholars favor such as equipping line prosecutors with “*Brady* checklists” and making “*Brady* audits” part of an institution’s routine²¹⁴—risk further cementing *Brady*'s dominance if they are not designed with caution. What few studies there are examining how prosecutors are trained on disclosure reveal constitutional doctrine crowding out other obligations: disclosure training often revolves around legal duties—and sometimes just constitutional duties under *Brady*—while deemphasizing ethical mandates.²¹⁵ Even programs that instruct prosecutors on *Brady* alongside other disclosure obligations may still inadvertently cause prosecutors to become less forthcoming, not more generous, in their disclosure practices. The only empirical study of disclosure training’s

their *Brady* obligations). Relatedly, Gershman’s chapter on *Brady* reports the results of a survey of New York domestic violence prosecutors suggesting that many of these prosecutors profoundly misunderstood the scope of their *Brady* obligations and would have suppressed potentially exculpatory or impeaching statements made by a hypothetical victim that, in Gershman’s judgment, are plainly subject to disclosure. *Id.* at 142–43.

²¹⁴ For a sample of the growing body of scholarship advocating these and other administrative reforms, see, for example, Rachel E. Barkow, Organizational Guidelines for the Prosecutor’s Office, 31 *Cardozo L. Rev.* 2089, 2109–11 (2010); Symposium, New Perspectives on *Brady* and Other Disclosure Obligations: Report of the Working Groups on Best Practices, 31 *Cardozo L. Rev.* 1961, 1974–77 (2010); Gershowitz, *supra* note 54, at 584–89; Parajon, *supra* note 172, at 1346–50; see *supra* notes 20, 173.

²¹⁵ See, e.g., Anthony R. Guttman, Pleading for Pre-Bargain Disclosure in State Legal Ethics, 100 *Denv. L. Rev.* 3, 11–18, 12 n.53 (2022) (reporting numerous revealing interview responses including, to pick one of many, a Texas prosecutor’s observation that “[t]here are multiple trainings on discovery, but this training really focuses on disclosure in the context of *Brady* and *Giglio*” (internal quotation marks omitted)); Ellen Yaroshefsky & Bruce A. Green, Prosecutors’ Ethics in Context: Influences on Prosecutorial Disclosure, in *Lawyers in Practice: Ethical Decision Making in Context* 269, 274 (Leslie C. Levin & Lynn Mather eds., 2012) (“Prosecutors recognize the *Brady* line of cases and relevant state statutes and rules as sources of disclosure obligations, but are not generally aware of the relevant professional conduct rule or of the possibility that it establishes obligations beyond those of other law.”); Green, *supra* note 128, at 653 (criticizing DOJ’s policy guidance on disclosure for demanding less of federal prosecutors than MRPC 3.8(d)); cf. *Tex. Appleseed & Tex. Def. Serv., Towards More Transparent Justice: The Michael Morton Act’s First Year* 22–23 (2015) (finding that Texas prosecutors’ efforts to educate police about government discovery obligations after the legislature enacted a new open-file discovery law concentrated on *Brady* compliance instead of statutory mandates); Jon B. Gould, The Innocence Commission: Preventing Wrongful Convictions and Restoring the Criminal Justice System 186 (2008) (reporting survey results showing that “half the [Virginia prosecutors’] offices that responded . . . provide the minimum required by law”).

behavioral effects found that teaching study participants about *Ruiz* (a major *Brady* case discussed earlier)²¹⁶ prompted them to withhold significantly more evidence than participants not informed about *Ruiz*.²¹⁷ This *Brady*-induced stinginess persisted even among participants who received training on their jurisdiction's open-file laws, with disclosure plummeting from thirty-five items (for participants trained on the open-file law but not *Ruiz*) to twenty-four items (for participants trained on both the open-file law and *Ruiz*).²¹⁸ The finding suggests that certain facets of *Brady* doctrine, once internalized, can undercut compliance with even explicit and sweeping statutory mandates favoring transparency.²¹⁹ Thus, whether through neglect or misplaced constitutional emphasis, prosecutorial administration too often fails to improve upon, and at times actively reinforces, *Brady*'s confining vision of disclosure.

III. REIMAGINING CRIMINAL DISCOVERY OUTSIDE *BRADY*'S SHADOW

With *Brady*'s dual pathology now clearly in view—the trap of its seductive mythology and the shadow that dims prospects for nonconstitutional reform—it is fair to ask: What next? The Article's first two Parts revealed how a constitutional doctrine that promised procedural fairness became its antithesis. *Brady* does not merely fail to secure defense access to exculpatory evidence; it legitimates the very prosecutorial monopolies it purported to check while impeding more promising alternatives from taking root. This perverse equilibrium endures through mutually reinforcing dysfunction: scholars burnish a doctrine structurally unable to deliver; courts conscript statutes into *Brady*'s service against their plain meaning; and the profession conflates constitutional minimums with professional aspirations. Yet within this diagnosis lies the cure. If *Brady*'s influence flows from contestable professional habits, then deliberate intervention can break its hold.

This Part charts paths leading outside *Brady*'s shadow—not through another round of tinkering with due process doctrine, but through

²¹⁶ *Ruiz* is discussed supra notes 47–49, 52 and accompanying text.

²¹⁷ See Luna & Redlich, supra note 22, at 305, 308–10, 315.

²¹⁸ Id. at 315.

²¹⁹ For discussion of the study's major findings as well as its limitations, see id. at 314–18; see also Hoeftel, supra note 36, at 1151 (expressing doubts about the value of *Brady*-centric education and training because “[e]ven if a prosecutor knows the rules, he knows that the rules work in his favor”).

strategies that attack its influence head-on. Section III.A offers immediately actionable reforms for legislators and judges. The Section builds on two key findings from Part II: first, that the precise terminology used in drafting disclosure rules makes those rules either susceptible or resistant to *Brady*'s influence to a degree many might find surprising; and second, that courts needlessly impose *Brady*'s limiting framework on a startling range of legal and ethical rules that do not, on their face, appear intended to merely replicate *Brady* doctrine. These patterns suggest both technical and conceptual reforms: drafting protocols that deliberately steer clear of *Brady*'s lexicon, and interpretive methodologies that preserve the distinct functions and aspirations of statutes, professional ethics rules, and constitutional mandates.

Section III.B envisions deeper transformation through coordinated action across the legal ecosystem. When criminal procedure courses teach discovery pluralistically and not with a myopic constitutional focus, future prosecutors, while still in law school, can start developing commitments to transparency that exceed ill-conceived constitutional standards. But administrative reform need not await pedagogical transformation: prosecutors committed to transparency could immediately work toward building systems where disclosure flows as naturally as filing charges—where protocols, metrics, and norms make information-sharing routine and *Brady* violations unthinkable because disclosure so thoroughly exceeds its modest demands. Beyond prosecutorial self-regulation lies legal change: open-file statutes that deny prosecutors their traditional gatekeeping powers, deposition rights that give defendants investigative tools comparable to those prosecutors have always enjoyed, judicial oversight that transforms discovery from partisan combat into supervised fact-finding. The legal academy, too, must pivot from striving to publish the thousandth article advocating tweaks to *Brady* law toward research that could make a real difference—empirical studies examining which discovery reforms work best according to various metrics, comparative analyses of state experiments, implementation guides for jurisdictions ready to change, and more. Through this all-hands-on-deck shift in priorities, American criminal discovery might finally achieve what *Brady* cannot: a system where truth-seeking eclipses adversarial gamesmanship.

A. Statutory Drafting and Judicial Interpretation

Part II documented a corrosive dynamic: *Brady* colonizes legal territories far beyond its constitutional homeland, transforming rules meant to exceed its limitations into mere echoes of its inadequacy. Courts reflexively graft materiality requirements onto statutes drafted without them, strip ethics rules of their aspirational force by declaring them mere *Brady* restatements, and treat one narrow due process holding as if it exhausted the Constitution's thinking about prosecutorial disclosure—to mention just three of Part II's many illustrations. These are not random judicial errors but result from an ingrained habit of mind—a well-trained incapacity to imagine disclosure obligations exceeding *Brady*'s parsimonious bounds. The consequences are profound. Legislatures draft broad disclosure mandates only to watch courts whittle them down to constitutional dimensions. Professional ethics authorities promulgate standards meant to embody norms of transparency and fair play only to see them conflated with *Brady*'s limiting paradigm. State judges echo federal precedent when their own constitutions could be read to invite bolder experiments. Breaking these cycles requires precision where there has been carelessness, interpretive discipline where there has been reflex. This Section provides both: strategies for drafting *Brady*-proof disclosure rules and interpretive frameworks that preserve each legal regime's distinctive purposes rather than collapsing this variety into *Brady*-centric homogeneity.

The precise language used when drafting disclosure rules matters more than I had imagined when first embarking on this research. Recent statutory reforms in Texas and New York—both lauded for embracing open-file discovery²²⁰—offer an instructive contrast. Texas's law, as noted earlier, sought openness by presumptively mandating disclosure of all information reduced to writing that was “material to any matter involved in the action.”²²¹ That single modifier—“material to”—produced a great deal of mischief. For years, it prompted courts to restrict disclosure to outcome-determinative information, until Texas's high court finally restored the statute's reformist vision by orchestrating

²²⁰ For discussion of Texas's reforms, see *supra* Subsection II.A.2. For an overview of New York's reforms, see Ethan Lowens, Resource Attacks on the Criminal Legal System, 47 N.Y.U. Rev. L. & Soc. Change 479, 514–18 (2025).

²²¹ Tex. Code Crim. Proc. Ann. art. 39.14(a) (West 2025); see *supra* notes 113–16 and accompanying text.

its divorce from constitutional doctrine.²²² New York’s legislature, on the other hand, chose its words more shrewdly in its 2019 discovery overhaul. The law’s core mandate requires disclosure of items or information that “relate to the subject matter of the case”²²³—unmistakably sweeping in anything and everything bearing even marginal legal relevance, thereby leaving little room for materiality limitations from *Brady* jurisprudence to seep through the cracks.²²⁴ Prosecutors across the state have tried mightily to slice through this statutory language by urging courts to borrow *Brady*’s materiality doctrine, but precision has proven a sturdy shield.²²⁵ When legislators speak clearly, courts find it harder to mishear.

While avoiding restrictive terminology closely associated with *Brady*—especially “material to”²²⁶—is an essential first step, merely omitting such language is not always enough. MRPC 3.8(d) nowhere mentions materiality—it simply requires disclosure of evidence that “tends to negate . . . guilt.”²²⁷ Yet six states’ high courts have declared it

²²² See *supra* notes 117–24 and accompanying text.

²²³ See N.Y. Crim. Proc. Law § 245.20(1)(k) (McKinney 2026).

²²⁴ The statute also contains an exculpatory-evidence provision commanding disclosure of “[a]ll evidence and information . . . that tends to . . . negate the defendant’s guilt . . . [or] impeach the credibility of a testifying prosecution witness,” and specifying that “[i]nformation under this subdivision shall be disclosed . . . irrespective of whether the prosecutor credits the information.” *Id.*

²²⁵ For just a sliver of the voluminous New York case law reiterating that the new state law does not incorporate materiality limitations, often rejecting arguments made by prosecutors suggesting that it does, see, for example, *People v. Edwards*, 160 N.Y.S.3d 532, 539 (Crim. Ct. 2021); *People v. Goggins*, 173 N.Y.S.3d 901, 903–04 (Crim. Ct. 2022); *People v. Hamizane*, 194 N.Y.S.3d 666, 668–69 (App. Term 2023); *People v. Pennant*, 156 N.Y.S.3d 690, 693 (Dist. Ct. 2021).

²²⁶ Courts readily associate “material to” with “material either to guilt or to punishment” from the original formulation of *Brady*’s rule. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). To be sure, inclusion of “material to” does not inevitably guarantee that a rule will be assimilated into *Brady*’s framework. See *Watkins v. State*, 619 S.W.3d 265, 278–79 (Tex. Crim. App. 2021). Some rules, including portions of the main federal criminal discovery rule, use “material to preparing the defense” in defining the scope of disclosure required, e.g., Fed. R. Crim. P. 16(a)(1)(E)(i), 16(a)(1)(F)(iii), and this formulation appears to possess some mild antibodies against *Brady*. Even so, reliance on that formulation does not wholly dispel *Brady*’s shadow. See Robert M. Cary, Craig D. Singer & Simon A. Latcovich, *Federal Criminal Discovery* 95 (2011) (“Courts sometimes equate the Rule 16(a)(1)(E) materiality standard with the *Brady* rule, which also has a materiality component. Other courts have disagreed, and rightly so.” (footnotes omitted)). In light of these uncertainties, why run the risk?

²²⁷ Model Rules of Pro. Conduct r. 3.8(d) (A.B.A. 2025).

coextensive with *Brady*,²²⁸ their reasoning so strained as to suggest that unreflective constitutional borrowing drives these decisions, not careful analysis.²²⁹ The judicial rewriting of statutory rules is even more alarming: of the twenty-five states with ambiguously worded exculpatory-evidence disclosure provisions (most of which closely resemble the text of MRPC 3.8(d)), courts in nine have imported *Brady*'s materiality restrictions despite no textual hook supporting such a maneuver.²³⁰ Against such determined judicial adherence to *Brady*'s failed template, reformers need more aggressive prophylaxis—penciling in language such as “without regard to materiality” should do the trick, though there are plenty of other options that would serve just as well. Under the circumstances, this is not paranoid or overly technical: such provisions are justified by hard-won wisdom after decades of watching courts hollow out rules that appear to have a more generous sweep. Massachusetts, New York, and West Virginia have already deployed such language successfully, proving that explicit repudiation of *Brady* can work.²³¹

As for interpretation, courts that transpose restrictive *Brady* concepts into rules framed more expansively commit a basic jurisprudential error. It is commonplace in constitutional law generally, not just in *Brady* doctrine, to see courts articulate non-invasive standards to preserve policymakers' prerogatives and avoid constitutionalizing contestable value judgments.²³² *Brady*'s parsimony reflects these institutional constraints—not any judicial wisdom about discovery policy. The

²²⁸ See supra note 202 and accompanying text.

²²⁹ The accusation leveled here is admittedly sharp. It is also entirely warranted. See supra note 204 (criticizing these courts' diaphanous reasoning).

²³⁰ See supra notes 103–05 and accompanying text.

²³¹ See Mass. R. Crim. P. 14 & reporter's notes on the addition of rule 14(b)(2)(B) (2025) (requiring disclosure of “items and information . . . without regard to whether they are material [under *Brady*]”); N.Y. Crim. Proc. Law § 245.20(1)(k) (McKinney 2026) (requiring disclosure of information tending to negate guilt “irrespective of whether the prosecutor credits the information”); W. Va. Trial Ct. R. 32.02(a) (requiring disclosure “without regard to materiality”).

²³² See, e.g., *S.A. Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 31 (1973); *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997). See generally Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 16–18 (1962) (discussing the counter-majoritarian difficulty of judicial review); Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part Three: The Lesson of *Lochner**, 76 N.Y.U. L. Rev. 1383, 1386–87 (2001).

Supreme Court has acknowledged as much repeatedly.²³³ *Agurs* segregated the constitutional question before it from the separate question “[w]hether or not procedural rules authorizing . . . broad discovery might be desirable,” holding only that “the Constitution surely does not demand that much.”²³⁴ *Cone v. Bell*²³⁵ explicitly stated that “[a]lthough the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor’s ethical or statutory obligations”—and then cited MRPC 3.8(d) as an example.²³⁶ The perversity here is striking: lower courts declare MRPC 3.8(d) identical to *Brady*²³⁷ when landmark *Brady* decisions themselves cite that rule to illustrate how professional standards exceed *Brady*’s modest impositions.

In a surprising twist, therefore, a premise drawn from *Brady* case law—that a prosecutor’s duty to disclose “may arise more broadly under a prosecutor’s ethical or statutory obligations” than under *Brady*²³⁸—can help to liberate other disclosure regimes from *Brady*’s shadow.²³⁹ When

²³³ Perhaps not quite as clear as it should have been, judging from the subsequent course of events. See *infra* notes 276–77 and accompanying text (suggesting ways for the Supreme Court to play a constructive role—by clearing the way so other lawmakers can take the lead).

²³⁴ *United States v. Agurs*, 427 U.S. 97, 109 (1976); cf. *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (“[T]he Constitution does not require the prosecutor to share all useful information with the defendant.”); *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (“There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one . . .”).

²³⁵ 556 U.S. 449 (2009).

²³⁶ *Id.* at 470 n.15 (first citing *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); and then citing Model Rules of Pro. Conduct r. 3.8(d) (A.B.A. 2025)). The passage from *Kyles* that *Cone* references here similarly distinguishes the task of constitutional interpretation, on one hand, from other legitimate modes of rulemaking that may generate broader discovery mandates, on the other:

We have never held that the Constitution demands an open file policy (however such a policy might work out in practice), and the rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate.

Kyles, 514 U.S. at 437 (first citing ABA Standards for Criminal Justice: Prosecution Function and Defense Function 3-3.11(a) (3d ed. 1993); and then citing Model Rules of Pro. Conduct r. 3.8(d) (A.B.A. 1984)).

²³⁷ See *supra* Subsection II.C.3.

²³⁸ *Cone*, 556 U.S. at 470 n.15.

²³⁹ For much the same reason, *Brady*’s modesty provides rhetorical ammunition when prosecutors resist reform. Prosecutors cannot credibly claim, as DOJ has done repeatedly,

interpreting state disclosure laws, courts should employ their jurisdiction's standard interpretive methods, which typically begin with the text.²⁴⁰ The absence of "material" or similar limiting terms associated with *Brady* doctrine should carry substantial weight.²⁴¹ Beyond textual analysis, traditional interpretive tools—legislative purpose, statutory structure, interpretive canons—deserve priority over borrowed constitutional concepts never meant to be used as templates for legislation.²⁴² Ethics rules likewise merit independent analysis appropriate to their distinctive aspirational functions.²⁴³ State constitutions need not mirror federal precedent when their text, history, or other accepted interpretive modalities suggest broader protections.²⁴⁴ Even within the domain of federal constitutional law, the Confrontation and Compulsory Process Clauses might become sources for novel disclosure rights if courts stopped deferring to *Brady* and due process as comprehensively occupying this terrain.²⁴⁵ Different legal (and ethical) authorities exist for different reasons; collapsing them into *Brady*'s framework defeats the purposes each was meant to serve. Courts that resist the reflexive impulse to draw legal and ethical disclosure

see *supra* Subsection II.A.3, that constitutional doctrine forecloses nonconstitutional rule reform when that very doctrine acknowledges its own limitations. Whether testifying before legislators, commenting on court rules, or shaping public discourse, reform advocates can quote the Supreme Court's own decisions, see *supra* notes 234–38 and accompanying text, against those who would freeze discovery law at the constitutional floor.

²⁴⁰ See generally Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 *Yale L.J.* 1750, 1844 (2010) ("[A] very preliminary canvass of state supreme court rulings on legislative history use indicates that the majority of state courts may now routinely apply the basic modified textualist rule: first step, text only; if ambiguity is found, then second step, legislative history.").

²⁴¹ See, e.g., *In re Feland*, 2012 ND 174, ¶ 14, 820 N.W.2d 672, 678 ("[T]he plain language of Rule 3.8(d) does not impose a materiality element similar to that applied under *Brady* . . ."); *Schultz v. Comm'n for Law. Discipline of the State Bar of Tex.*, No. 55649, 2015 WL 9855916, at *1 (Tex. Bd. Disciplinary App. 2015) (same); *City of Seattle v. Lange*, 491 P.3d 156, 162 (Wash. Ct. App. 2021) (same, but in the context of interpreting an exculpatory evidence disclosure statute).

²⁴² See generally Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 *Geo. L.J.* 341, 350–51 (2010) (demonstrating that states generally embrace, and many have even codified, principles of statutory interpretation beyond textualism).

²⁴³ See generally Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 *Notre Dame L. Rev.* 223, 225–39 (1993) (discussing dissensus and a range of different theories regarding the legitimate purposes of lawyer ethics codes).

²⁴⁴ See *supra* Subsection II.B.3.

²⁴⁵ See *supra* Subsection II.B.2.

obligations into *Brady*'s orbit can help break the doctrine's interpretive stranglehold and foster a more diverse and impactful array of discovery practices.

B. Broadened Conceptual Horizons and Reform Ambitions

Beyond statutory drafting and judicial interpretation lies a still deeper challenge: transforming how the law and the legal profession conceive of criminal discovery and of the prosecutor's role as information gatekeeper. This Article's main conceptual contribution—highlighting *Brady*'s pervasive influence far beyond its home in due process jurisprudence—highlights pathways for reform that might otherwise remain hidden from view. Where Section III.A addressed strategies for better drafting and interpretation of legal and ethical disclosure obligations, this Section explores how legal education, internal prosecutorial administration, law reform, and scholarship might discover new horizons once freed from *Brady*'s conceptual confines. Different teachers, prosecutors, scholars, and reformers prioritize different approaches—some might emphasize revitalizing professional formation through improved pedagogical strategies, while others concentrate on changing institutional practices internally within prosecutors' offices or externally through legal reforms and other accountability measures.²⁴⁶ Yet *Brady*'s shadow compromises all these diverse programs—truncating what educators teach, shaping the texts legislators draft, and furnishing deficient models for internal administrative reform.²⁴⁷ Once these reform constituencies recognize *Brady* as their common antagonist, each can break through the conceptual constraints that have

²⁴⁶ For a sampling of relevant literature emphasizing several of these varied perspectives on reform, see *supra* notes 170–71 and accompanying text (discussing scholarship favoring pedagogical interventions); *supra* notes 20, 173, 214 and accompanying text (discussing scholarship favoring internal administrative reforms); *supra* notes 92, 109 and accompanying text (discussing scholarship advocating legislative reforms). Scholarship centering reform through the judiciary includes, for example, Adam M. Gershowitz, *The Race to the Top to Reduce Prosecutorial Misconduct*, 89 *Fordham L. Rev.* 1179 (2021); Cynthia E. Jones, *Here Comes the Judge: A Model for Judicial Oversight and Regulation of the Brady Disclosure Duty*, 46 *Hofstra L. Rev.* 87 (2017); Jason Kreag, *The Brady Colloquy*, 67 *Stan. L. Rev. Online* 47 (2014); Elizabeth Napier Dewar, Note, *A Fair Trial Remedy for Brady Violations*, 115 *Yale L.J.* 1450 (2006); see also sources cited *supra* note 21 and *infra* note 264 (exploring reform strategies concentrating on the courts).

²⁴⁷ See *supra* Part II.

impeded their reform projects and pursue initiatives liberated from *Brady*'s cramped framework.

As documented in Part II, legal education frequently positions *Brady* as the centerpiece of criminal discovery instruction—though notable exceptions show that superior pedagogical approaches lie within reach.²⁴⁸ Too many criminal procedure courses present *Brady* as a foundational guarantee of fairness while neglecting both its near-irrelevance to plea negotiations and the fundamental flaw in any framework that delegates to adversaries the power to determine what information opponents are entitled to see.²⁴⁹ Professional responsibility courses sometimes devote more attention to *Brady* doctrine than to prosecutorial ethics rules—a notable imbalance for a class designed to explore professional standards and aspirational conduct, not to rehash constitutional rules covered elsewhere in the curriculum.²⁵⁰ These pedagogical choices risk producing lawyers—and future lawmakers—whose understanding of and vision for discovery stays locked within *Brady*'s parameters. Reimagined criminal procedure curricula might begin with the civil/criminal discovery divide, pressing students to reflect on why defendants who may be facing imprisonment or execution are given weaker investigative tools than corporations disputing contractual performance. Statutory discovery mandates and ethics standards might take precedence, with *Brady* presented as one potentially applicable rule among many²⁵¹—and perhaps, in tune with this Article's suggestion, as a malevolent force requiring vigilant resistance lest it sabotage more generous disclosure devices.²⁵² And students must come away from their studies appreciating that, in our

²⁴⁸ See *supra* Subsection II.C.1.

²⁴⁹ See *supra* notes 181–86 and accompanying text.

²⁵⁰ See *supra* notes 187–90 and accompanying text.

²⁵¹ For helpful models for criminal procedure instruction, see King et al., *supra* note 174, at 1015–25, 1035–38, 1045–61, 1085–89, and Miller et al., *supra* note 174, at 231–41, 242–53, 256–58, 262, 307–08, whose praiseworthy features are highlighted *supra* notes 180, 182, 184. For exemplary texts on the professional responsibility side of the curriculum, see Gillers, *supra* note 174, at 396–403, and Lerman et al., *supra* note 174, at 719–23.

²⁵² Bar testing of prosecutorial disclosure could perhaps be improved around the margins—most obviously by drawing closer attention to how *Ruiz* cuts off *Brady*'s limited protections at the plea negotiation phase. See *supra* Subsection II.C.2 (criticizing existing bar coverage). I think, though, that the bar exam's inherently limiting focus on rules that have (real or imagined) uniform nationwide application make it an unsuitable vessel for exposing future lawyers to criminal discovery frameworks beyond *Brady*'s. See *supra* note 198. This makes it all the more urgent for law school coursework and other sites of professional formation to do better in this field.

“system of pleas,”²⁵³ fairness depends upon expansive *pre-plea* disclosure—an unassailable proposition that, once internalized, should impel students to seek out ways to transcend the scant protections afforded by *Brady*’s trial-centric framework.²⁵⁴ Pedagogical shifts such as these would help cultivate lawyers who consider openness, not concealment, the proper normative baseline for prosecutorial conduct.

Those pursuing internal administrative reforms to improve disclosure practices will also find, in this Article’s critical analysis of *Brady*, fruitful new directions for their efforts. Prosecutors committed to fair process might implement policies requiring presumptive²⁵⁵ and early disclosure of all potentially useful materials—police reports, witness statements, forensic results, investigative notes, and more—guided by norms of transparency that surpass not just *Brady* but potentially statutory and ethical mandates as well. Training programs could instill openness as a defining professional virtue, and offices might consider rewarding prosecutors partly for how they score on this metric instead of unduly emphasizing conviction rates and combativeness.²⁵⁶ Information-sharing protocols might improve upon the “*Brady* checklists” favored by many reformers by establishing systematic processes for identifying any information within the possession of the government—including information known to the police that might not be properly transmitted to prosecutors—that may be valuable to the defense’s investigation.²⁵⁷

²⁵³ *Missouri v. Frye*, 566 U.S. 134, 143–44 (2012) (quoting *Lafler v. Cooper*, 566 U.S. 156, 170 (2012)).

²⁵⁴ For discussion and critique of *Brady*’s limited pre-plea application, see *supra* notes 47–48, 52 and accompanying text.

²⁵⁵ This qualifier acknowledges that even the most generous disclosure systems accommodate exceptional circumstances involving genuine and particularized concerns of various kinds—witness security being the paramount example. See generally LaFave et al., *supra* note 26, § 20.3(l) (observing that all jurisdictions provide for protective orders or allow discovery to be denied or restricted in exceptional circumstances).

²⁵⁶ Scholarship widely recognizes bureaucratic performance metrics as a key factor shaping prosecutors’ incentives and behavior, whether for good or ill. See, e.g., Lauren-Brooke Eisen & Miriam Aroni Krinsky, *The Necessity of Performance Measures for Prosecutors*, in *The Oxford Handbook of Prosecutors and Prosecution* 228 (Ronald F. Wright, Kay L. Levine & Russell M. Gold eds., 2021); Bibas, *supra* note 173, at 1007–15; Meares, *supra* note 173, at 873–79; Eric Rasmusen, Manu Raghav & Mark Ramseyer, *Convictions Versus Conviction Rates: The Prosecutor’s Choice*, 11 *Am. L. & Econ. Rev.* 47, 75–76 (2009).

²⁵⁷ For literature on existing proposals for *Brady* checklists (which I am suggesting prosecutors might consider revamping to include other kinds of evidence beyond *Brady*’s purview), see *supra* note 214.

Innovative offices might develop nonpunitive error tracking systems, administrative auditing and peer review mechanisms, and transparency benchmarks surpassing legal (or at least constitutional) requirements.²⁵⁸ While voluntary reforms on their own will not, in my view, transform criminal discovery,²⁵⁹ administrative changes rooted in a thoroughgoing commitment to information sharing could yield substantial improvements—particularly if combined with external accountability mechanisms.

Ambitious legal reforms redistribute control over criminal discovery through enforceable rules—rules whose full potential will materialize only when reformers abandon preoccupation with *Brady* and concentrate instead on disrupting the paradigm of prosecutorial information control that *Brady* exemplifies. Open-file statutes, in particular, promise to strip prosecutors of much of their traditional gatekeeping powers.²⁶⁰ Yet as we saw earlier, even open-file legislation can be undermined (as happened for years in Texas) by drafting errors that render it susceptible to infiltration by constitutional doctrine.²⁶¹ By contrast, thoughtfully constructed open-file systems (like New York's) address the basic flaw in prosecutor-controlled discovery: they replace prosecutorial discretion with presumptive transparency, denying prosecutors the power to decide unilaterally what information defendants need.²⁶² Building on this foundation, pre-plea disclosure mandates would address the fact that defendants cannot rationally evaluate plea offers without meaningful access to government evidence.²⁶³ Neutral magistrates could increasingly take on responsibility for supervising criminal discovery,

²⁵⁸ For scholarship discussing many of these administrative tools, typically as means for enhancing *Brady* compliance, see sources cited *supra* notes 173, 214.

²⁵⁹ One well-documented drawback of relying on voluntary prosecutorial practices is that prosecutors may reward compliant defense attorneys with generous disclosure while punishing zealous advocates—effectively deterring vigorous representation. See, e.g., Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 *Yale L.J.* 1179, 1224–29 (1975); Jackson B. Battle, *Comment, In Search of the Adversary System—The Cooperative Practices of Private Criminal Defense Attorneys*, 50 *Tex. L. Rev.* 60, 67–80 (1971).

²⁶⁰ For scholarship advocating open-file discovery, see generally sources cited *supra* notes 92, 109 and accompanying text; *infra* notes 269–70 and accompanying text.

²⁶¹ See *supra* Subsection II.A.2.

²⁶² See *supra* notes 223–25 and accompanying text (discussing New York's open-file law and its implementation by courts).

²⁶³ See, e.g., Jeffrey Bellin, *Plea Bargaining's Uncertainty Problem*, 101 *Tex. L. Rev.* 539, 575–76 (2023); McConkie, *supra* note 12, at 46–51, 55–60; Eleanor J. Ostrow, *Comment, The Case for Preplea Disclosure*, 90 *Yale L.J.* 1581, 1581–82 (1981); see also *supra* notes 48, 52 (collecting scholarship favoring broadened pre-plea disclosure).

counterbalancing the overzealous pursuit of partisan advantage by prosecutors in the disclosure process.²⁶⁴ Most ambitiously, reformers might agitate for importing civil litigation's investigative toolkit into criminal adjudication.²⁶⁵ Scholars have made an especially persuasive case for criminal depositions, which would give defendants the critical ability to question witnesses under oath in the pretrial phase—a power prosecutors already exercise through grand jury proceedings, prosecutor's subpoenas, and similar testimonial perpetuation devices.²⁶⁶ This asymmetry—whereby prosecutors command formal mechanisms to extract and preserve testimony while defense attorneys entreat witnesses (often to no avail) to share what they know voluntarily—epitomizes the arbitrary constraints enfeebling defense investigation. Deposition rights could help to somewhat rebalance the scales.

Not everyone favors expanded criminal discovery, of course, and this Article makes no pretense of resolving the deep, normative disagreements that caused twentieth-century rule drafters to place civil and criminal procedure on such different paths.²⁶⁷ In particular, detractors cite witness intimidation, cost burdens, alibi fabrication, and the supposed unfairness of opening the government's file to inspection while permitting the defendant to retreat behind Fifth Amendment protections.²⁶⁸ Those holding such views will surely find limited appeal

²⁶⁴ See generally Jones, *supra* note 246; Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 *Tex. L. Rev.* 325, 380–81 (2016); Jessica A. Roth, *The “New” District Court Activism in Criminal Justice Reform*, 72 *N.Y.U. Ann. Surv. Am. L.* 187, 219–28 (2018). See generally Judith Resnik, *Managerial Judges*, 96 *Harv. L. Rev.* 374 (1982) (arguing that judges have increasingly assumed managerial functions in civil litigation). For additional scholarship exploring reform strategies concentrating on the courts, see *supra* notes 21, 246.

²⁶⁵ A growing body of criminal procedure scholarship looks to civil procedure for potential reform models. See, e.g., Chesa Boudin & Eric S. Fish, *Towards Pretrial Criminal Adjudication*, 66 *B.C. L. Rev.* 1135, 1151–53 (2025); Gold et al., *supra* note 24; Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 *Yale L. & Pol'y Rev.* 1, 2 (2006); Meyn, *supra* note 12, at 1108–40; David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 *Geo. L.J.* 683 (2006).

²⁶⁶ See, e.g., Medwed, *supra* note 52, at 49–50; Boudin & Fish, *supra* note 265, at 1177–84; Gold et al., *supra* note 24, at 1647–48; Ortman, *supra* note 156, at 485–92; cf. Brown, *supra* note 21, at 1638–40 (arguing for depositions conducted by judges as opposed to the defense).

²⁶⁷ This history is briefly discussed *supra* notes 24–26 and accompanying text.

²⁶⁸ For a summary of the major arguments, see generally LaFave et al., *supra* note 26, § 20.1(b). For critical analysis of the objections to broadened discovery, see, for example,

in many of the proposals outlined above. Yet even skeptics would perhaps welcome some redirection of energy within policy debates and academic research from the endless parsing of *Brady*'s intricacies toward designing disclosure laws and institutional practices that better address the objections they assert. When and how should protective orders be deployed to assure the safety of witnesses? Are there particular types of cases that should be exempted from certain discovery devices to assure privacy? How can broader discovery systems be structured to reduce the burdens and inefficiencies that have sparked such outcry in places like New York? Rather than rehashing well-trod constitutional debates, attention could be steered toward exploring whether thoughtful implementation can ameliorate concerns such as these while still preserving discovery's truth-seeking function.

For those who are persuaded that broader criminal discovery serves justice—and to be clear, ample evidence already points in this direction²⁶⁹—the research imperative grows even stronger. Despite numerous scholars' avowed support for open-file discovery and early disclosure,²⁷⁰ rigorous academic examinations of these reforms' optimal design, implementation challenges, and effectiveness remain frustratingly rare considering the importance of such research.²⁷¹ This

William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash. U. L.Q. 279, 288–95; Goldstein, *supra* note 27, at 1193–97; Louisell, *supra* note 27, at 57–59; Meyn, *supra* note 12, at 1120–38; Traynor, *supra* note 27, at 249.

²⁶⁹ See generally Brown, *supra* note 94, at 162 (reviewing trends in discovery law and policy nationwide and concluding that “the arguments against broad criminal disclosure requirements seem to be definitively settled by the collective experience of the majority of states”); accord Turner & Redlich, *supra* note 92, at 372–85. But see Miriam H. Baer, Response, *Some Skepticism about Criminal Discovery Empiricism*, 73 Wash. & Lee L. Rev. Online 347 (2016) (registering doubts about this emergent consensus).

²⁷⁰ For a small listing of various scholarly endorsements of open-file discovery, see *supra* notes 92, 109, 269.

²⁷¹ Major contributions to the fledgling academic literature on open-file discovery include Baer, *supra* note 11, at 49–57; Ben Grunwald, *The Fragile Promise of Open-File Discovery*, 49 Conn. L. Rev. 771 (2017); Luna & Redlich, *supra* note 22; Samantha Luna & Allison D. Redlich, *Unintelligent Decision-Making? The Impact of Discovery on Defendant Plea Decisions*, 1 Wrongful Conviction L. Rev. 314 (2020); Moore, *supra* note 92, at 1371–86; Mosteller, *supra* note 109, at 262–63, 306–18; Gabrielle A. Roubanian, Janne E. Gaub, Marthinus C. Koen & James J. Willis, *Prosecutorial Perceptions of Discovery Reform on a Local Level*, 14 J. Qualitative Crim. Just. & Criminology 195 (2025); Dan Svirsky, *The Cost of Strict Discovery: A Comparison of Manhattan and Brooklyn Criminal Cases*, 38 N.Y.U. Rev. L. & Soc. Change 523 (2014); Jenia I. Turner, Ronald F. Wright & Michael Braun, *Neglected Discovery*, 73 Duke L.J. 1173 (2024); Turner & Redlich, *supra* note 92. This might at first blush seem like a voluminous body of scholarship. But in light of the

scholarly vacuum surely reflects *Brady*'s intellectual magnetism, which seduces academics into believing that one more article probing the hidden depths of constitutional doctrine might finally unlock the doctrine's latent potential. Meanwhile, strategies for strengthening defense investigative capacity receive scant attention—beyond the politically fraught (though academically rich) terrain of indigent defense funding and institutional design.²⁷² Recent research identifies critical connections between disclosure reforms and defense resources: even with expanded access, overwhelmed defenders often cannot exploit the information made available to them.²⁷³ The connection between defense capacity and information utilization underscores the need for integrated research exploring how defendants can effectively make use of disclosed materials. Such inquiries demand sustained research programs examining criminal discovery holistically, not as footnotes or asides in a field of scholarship fundamentally centered on *Brady*.

Having explored promising possibilities ranging from pedagogical transformation and prosecutorial culture change to structural legal reforms and redirected scholarship—all while conspicuously putting to one side the usual calls for modifying due process doctrine—what recommendations might I put forward for *Brady* itself? Though I agree with many of the proposals others have made for improving *Brady* (and, in other work, have suggested a few myself),²⁷⁴ joining that project here would hardly be in the spirit of this Article. But one suggestion does seem fairly implicit in this Article's canvassing of *Brady*'s shadow: the Supreme Court should get out of the way. The Court should state, often and unequivocally, that *Brady* establishes a constitutional minimum for

importance of the subject matter and the numerous unanswered questions that would benefit from further research—and bearing in mind there are hundreds of published articles concentrating on *Brady*—open-file (or simply broadened) discovery laws plainly warrant greater attention from researchers than they have so far received.

²⁷² For summaries of relevant scholarship and systemic problems in indigent defense, see, for example, James M. Anderson, Maya Buenaventura & Paul Heaton, *The Effects of Holistic Defense on Criminal Justice Outcomes*, 132 Harv. L. Rev. 819 (2019); Eve Brensike Primus, *Defense Counsel and Public Defense*, in 3 *Reforming Criminal Justice*, supra note 49, at 121; Eve Brensike Primus, *The Problematic Structure of Indigent Defense Delivery*, 122 Mich. L. Rev. 207 (2023); Ronald Wright & Jenny Roberts, *Expanded Criminal Defense Lawyering*, 6 Ann. Rev. Criminology 241 (2023).

²⁷³ One recent article found that in several Texas counties with digital open-file discovery systems, defense attorneys failed to access the discovery portal at all in a significant fraction of felony cases, suggesting that even when information is made available, overwhelmed defenders cannot use it effectively. See Turner et al., supra note 271, at 1189–98.

²⁷⁴ See supra note 8.

prosecutorial disclosure, nothing more.²⁷⁵ The Court has, in fairness, already gestured in this direction in decisions like *Agurs* and *Kyles*—which, as discussed in the previous Section,²⁷⁶ acknowledge that *Brady* creates constitutional floors rather than ceilings. But equivocal hints buried in lengthy opinions (sometimes in easily missed footnotes) have not sufficed to stave off confusion. The Court should make crystal clear that *Brady* sets constitutional baselines, not discovery policy—that the Court's institutional constraints as a constitutional court account for the narrow approach reflected in *Brady* doctrine, whereas other governmental actors face no such constraints and remain free to pursue far more generous disclosure regimes. I recognize that judicial pronouncements alone cannot reverse decades of reflexive *Brady* mimesis. But emphatic recognition by the Court that *Brady* was never meant to obstruct ambitious discovery reforms that transcend constitutional requirements would eliminate one impediment to progress—an impediment for which the Court itself bears responsibility. True progress will come—if it comes—not from perfecting this moribund doctrine but from constructing discovery systems so expansive that constitutional backstops fade into irrelevance, where practice so thoroughly surpasses its meager demands that *Brady*'s shadow at last recedes.

CONCLUSION

This Article has a paradoxical quality. It contends that we have invested far too much in *Brady*—in legal scholarship, in professional formation, in legislative drafting, in judicial opinions, and elsewhere. The Article painstakingly details how *Brady*'s shadow constricts our collective imagination about what criminal discovery could and should be.²⁷⁷ And yet here we are, at the conclusion of yet another law review article about *Brady*, contributing to an already overextended scholarly literature. What gives?

This Article's contributions, I submit, lie not in cataloging *Brady*'s deficiencies yet again but in making visible the mechanisms that

²⁷⁵ See generally Thomas B. Bennett, *State Rejection of Federal Law*, 97 *Notre Dame L. Rev.* 761, 819 (2022) (“[I]f federal courts see value in leaving significant room for state law to stand alongside federal law, they would be wise to include explicit statements to that effect in judicial opinions.”).

²⁷⁶ See *supra* notes 234–37 and accompanying text.

²⁷⁷ See *supra* Parts I–II.

perpetuate its influence—as well as the off-ramps those mechanisms imply. Rather than fine-tuning doctrine that has disappointed for sixty years, this Article’s mission is to recast *Brady* as both a trap and a shadow—promising procedural fairness through constitutional reform while closing off more fruitful paths. Mapping *Brady*’s influence across domains normally studied in isolation uncovers striking patterns. To name just three of the many threads of evidence we have reviewed: scholars critique due process-based reforms while conducting almost no systematic research on urgently needed alternatives such as open-file discovery for which they profess support;²⁷⁸ legal education presents *Brady* compliance as a core pillar of professional ethics rather than the bare minimum required to avoid perpetrating a “miscarriage of justice”;²⁷⁹ and courts graft *Brady*’s limitations onto statutes drafted without them.²⁸⁰ These examples, sampled from the Article’s larger catalog of *Brady*’s mischievous influences, expose the hidden mechanisms through which *Brady* perpetuates its own dominance—and thereby unearth pressure points where strategic intervention might help break its grip.

Recognizing *Brady*’s shadow as an enemy of progress in this field proves remarkably generative. Legislators who recognize how *Brady*-inflected language invites judicial narrowing can draft statutes that resist such erosion.²⁸¹ Judges interpreting disclosure obligations—whether in statutes, court rules, ethics codes, or constitutional provisions—can respect each source’s distinctive goals and methodologies rather than importing *Brady*’s framework unthinkingly.²⁸² Educators can design curricula that establish transparency, not grudging legal compliance, as a guiding normative benchmark for prosecutors.²⁸³ Scholars can closely study a variety of alternative disclosure frameworks, whether those frameworks emphasize fresh approaches to professional formation, internal prosecutorial administration, or legal reform, to see what makes them succeed or fail—instead of once again “tak[ing] the *Brady* doctrine

²⁷⁸ See *supra* Section I.B.

²⁷⁹ *United States v. Bagley*, 473 U.S. 667, 675 (1985) (“The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur.”); see *supra* Subsection II.C.1.

²⁸⁰ See *supra* Subsections II.A.1–II.A.2.

²⁸¹ See *supra* notes 220–31 and accompanying text.

²⁸² See *supra* notes 232–45 and accompanying text.

²⁸³ See *supra* notes 248–52 and accompanying text.

out and giv[ing] it another sound beating.”²⁸⁴ Each domain offers its own opportunities for breaking free from *Brady*’s constraints. The Article’s ambition, ultimately, is not merely escaping from *Brady*’s influence but pressing for disclosure so open and expansive that constitutional backstops become a moot point.

The present moment offers a rare opportunity to take up this agenda. The 2020 racial reckoning unmasked criminal justice’s structural failures with devastating clarity, fueling critiques of prosecutorial power that had already been gathering force.²⁸⁵ Reform prosecutors now lead some of the most prominent district attorneys’ offices across the country, pledging transparency over concealment and accountability over impunity.²⁸⁶ Legal actors and members of the public alike increasingly recognize that prosecutorial misconduct and information hoarding drive wrongful convictions, compound racial injustice, and erode public trust.²⁸⁷ These converging pressures open space to reimagine criminal discovery without *Brady*’s constraints. But seizing this opportunity demands recognizing how thoroughly *Brady* has captured and constrained our conception of what criminal discovery can be. Seeing this shadow clearly may enable us to venture beyond it.

²⁸⁴ Hoeffel & Singer, *supra* note 46, at 467 (“On this fiftieth anniversary of *Brady v. Maryland*, it is fitting that criminal procedure scholars take the *Brady* doctrine out and give it another sound beating.” (footnote omitted)). For discussion of fruitful avenues for future criminal discovery research, see sources cited *supra* notes 273–75 and accompanying text.

²⁸⁵ See, e.g., Kim Taylor-Thompson & Anthony C. Thompson, Introduction: Reckoning in the Moment, *in* *Progressive Prosecution: Race and Reform in Criminal Justice* 1, 1–7 (Kim Taylor-Thompson & Anthony C. Thompson eds., 2022); Shaila Dewan, The Lessons Liberal Prosecutors Are Drawing from San Francisco’s Backlash, *N.Y. Times* (June 15, 2022), <https://www.nytimes.com/2022/06/13/us/justice-reform-boudin-recall-san-francisco.html>.

²⁸⁶ See Justin Murray, Prosecutorial Reform and the Myth of Individualized Enforcement, 102 *Wash. U. L. Rev.* 1435, 1452–53 (2025). For discussions of the political forces propelling this shift and the reformers’ professed goals, see, for example, Benjamin Levin, Essay, Imagining the Progressive Prosecutor, 105 *Minn. L. Rev.* 1415, 1422–24 (2021); David Alan Sklansky, The Changing Political Landscape for Elected Prosecutors, 14 *Ohio St. J. Crim. L.* 647, 647–49, 669–70 (2017). But see Rachel E. Barkow, Can Prosecutors End Mass Incarceration?, 119 *Mich. L. Rev.* 1365, 1375–85 (2021) (book review) (cautioning that backlash is brewing against reform prosecutors).

²⁸⁷ See, e.g., Emily Bazelon, *Charged: The New Movement to Transform American Prosecution and End Mass Incarceration* 81–85 (2019); Bruce Green & Ellen Yaroshefsky, Prosecutorial Accountability 2.0, 92 *Notre Dame L. Rev.* 51, 85–100 (2016); I. India Thusi, The Pathological Whiteness of Prosecution, 110 *Calif. L. Rev.* 795, 811–15 (2022).