Discovery From the Trenches: The Future of Brady

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ABSTRACT

The so-called “due diligence” rule, which excuses prosecutors’ compliance with Brady v. Maryland if the defense could have obtained the exculpatory evidence on its own, is only a symptom of the greater problem ailing the American criminal justice system. The real problem is that prosecutors and defense counsel generally do a terrible job collaborating because of the basic nature of our adversarial system. To make Brady effective, not only must the due diligence rule be reconsidered, but both sides must be willing to cooperate in the truth-seeking mission of criminal trials.

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The author thanks the editors and staff of the UCLA Law Review, as well as the sponsors of the UCLA Law Review Scholar Forum. Special thanks to Professor Kate Weisburd for her provocative and thoughtful article on the due diligence rule. Her due diligence has helped to bring to the forefront one of the ongoing challenges of using the Brady v. Maryland standard to govern constitutional discovery requirements.
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INTRODUCTION

Ninth Circuit Judge Harry Pregerson has it right.¹ No matter what the case law may suggest, there is a right and a wrong way to conduct discovery. The wrong way is to cling to the notion that the adversarial system should guide how prosecutors and defense lawyers approach their discovery duties. The right way is to open a dialogue so that both sides can work cooperatively to ensure a fair trial.²

In her thoughtful article, Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule,³ Professor Kate Weisburd illuminates a serious concern in our current approach to criminal discovery. However, the so-called due diligence rule, which denies a defendant a claim that he did not receive due process if the evidence prosecutors failed to produce was independently available to the defense, is but one concern about how discovery is handled. Sadly, it represents more than a game of “hide and seek.”⁴ It represents a criminal justice system stuck in an adversarial model, even when constitutional standards require that prosecutors go outside their adversarial role to ensure that defendants receive a fair trial.

In this response to Professor Weisburd’s article, I hope to accomplish three things. First, I would like to offer a perspective regarding Brady that might explain why courts tend to embrace the due diligence rule. Second, I try to suggest why American prosecutors have a difficult time transitioning from their adversarial roles to stewards of due process. Finally, I offer a new approach to discovery. It requires that both prosecutors and defense lawyers stop playing hide and seek. If both sides are committed to a fair trial, we must shift from the adversarial system of discovery to a more collaborative effort.

¹ This Article is dedicated to and inspired by the Honorable Harry Pregerson of the U.S. Court of Appeals for the Ninth Circuit. As chair of the Ninth Circuit Standing Committee on Federal Public Defenders, Judge Pregerson called for a series of conferences that would bring together federal prosecutors and defense counsel to resolve ongoing discovery disputes. Working collaboratively and under the guidance of Judge Pregerson, the lawyers at those conferences have created new models for handling discovery. To date, there have been three conferences bringing together U.S. Attorneys and Federal Public Defenders for the Ninth Circuit: June 2010, August 2010, and August 2011. Reports of those conferences are on file with Tina Brier, Assistant Circuit Executive at the U.S. Court of Appeals for the Ninth Circuit.


³ Kate Weisburd, Prosecutors Hide, Defendants Seek: The Erosion of Brady Through the Defendant Due Diligence Rule, 60 UCLA L. REV. 138 (2012).

⁴ Id. at 143; see also Bennett L. Gershmann, Litigating Brady v. Maryland: Games Prosecutors Play, 57 CASE W. RES. L. REV. 531, 557 (2007).
I. **BRADY: IT NEVER WAS WHAT YOU THOUGHT**

Many people think of the *Brady* rule as a discovery rule that requires prosecutors to turn over all exculpatory evidence to the defense before trial. Close, but not true. The U.S. Supreme Court has never tagged *Brady* as creating such a broad rule. Rather, in *Brady v. Maryland* and its progeny, the Supreme Court established an approach to analyze a case retrospectively to determine whether a defendant received a fair enough trial under general due process standards. A thoughtful prosecutor will heed the Court’s ruling and use the *Brady* standard to guide pretrial discovery, but *Brady* itself set a standard for when the failure to disclose evidence warrants a new trial.

A *Brady* violation occurs when (1) evidence is favorable to the accused because it is exculpatory or impeaches a government witness; (2) the prosecution fails to disclose such evidence, either intentionally or inadvertently; and (3) the defendant is prejudiced because the undisclosed evidence is material. Evidence is material if there is a reasonable probability that its disclosure would have changed the outcome of the proceedings. An essential aspect of *Brady* has always been the determination of whether the undisclosed evidence really would have made a significant difference in the case.

It is because *Brady* carries this prejudice requirement that some courts have developed the so-called due diligence rule. The due diligence rule is an offshoot of a more reasonable concept that if the defendant had the exculpatory evidence at

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8. *See* Irwin H. Schwartz, *Beyond Brady: Using Model Rule 3.8(d) in Federal Court for Discovery of Exculpatory Information,* CHAMPION, Mar. 2010, at 34, 34 (“*Brady* is applied retrospectively. [T]here is never a real *Brady* violation unless nondisclosure was so serious that a post-trial review leads judges to conclude that it undermined their confidence in the verdict.” (alteration in original) (quoting Strickler v. Greene, 527 U.S. 263, 281–82 (1999) (some internal quotation marks omitted))).
11. Commentators have long been concerned about *Brady’s* undue emphasis on whether the suppressed evidence would have changed the outcome of the case. *See* Victor Bass, Comment, *Brady v. Maryland and the Prosecutor’s Duty to Disclose,* 40 U. CHI. L. REV. 112, 131 (1972) (“Under the present *Brady* rule framework, whether evidence must be disclosed depends, not on its value to the defense insofar as this can be ascertained, but on whether an appellate court will conclude that the evidence might well have altered the verdict.”).
12. For a list of courts and cases, see Weisburd, *supra* note 3, at 153–54 & nn.80–82.
the time of trial, even if it came from a source other than the prosecution, it makes little sense to demand the retrial of the case.\textsuperscript{13} Much like the Supreme Court’s approach in \textit{Strickland v. Washington}\textsuperscript{14} for handling challenges to defense counsel’s behavior, the Court did not establish \textit{Brady} as a mechanism by which to grade or second-guess prosecutors’ behavior. Rather, it is a rule for courts to determine whether a fundamental injustice has likely occurred.

Professor Weisburd might be right that structuring the rule in this way offers the opportunity to prosecutors who are so inclined to “game” the system.\textsuperscript{15} Indeed, a prosecutor could choose not to reveal evidence in hopes that if the violation is discovered, the prosecutor could claim that the defense had alternative means of obtaining the information and thus that her choice could not have prejudiced the defendant. However, it is unclear how often this actually occurs. Instead, it is also plausible that prosecutors, not understanding the proposed defense case as well as their adversaries, do not identify what will turn out to be key exculpatory evidence.\textsuperscript{16} These prosecutors are then left to argue, after the fact, that there was no

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\item[13.] \textit{See, e.g.}, United States v. Erickson, 561 F.3d 1150, 1165 (10th Cir. 2009) (finding no \textit{Brady} violation when the defendant already possessed evidence that the government failed to disclose); United States v. Valera, 845 F.2d 923, 928 (11th Cir. 1988) (finding no \textit{Brady} violation where the government failed to disclose documents already obtained by the defendant in another case).
\item[14.] 466 U.S. 668, 687–98 (1984). In \textit{Strickland}, the U.S. Supreme Court held that to reverse a conviction because of ineffective assistance of counsel, the defendant must show that counsel made specific errors and that those errors prejudiced the defendant. Justice O’Connor made clear in her opinion, however, that a court need not determine whether counsel’s performance was deficient if there is no showing of prejudice. “The object of an ineffectiveness claim is not to grade counsel’s performance.” \textit{Id.} at 697.
\item[15.] Weisburd, \textit{supra} note 3, at 158–59.
\item[16.] Consider, for example, the simple case of a defendant who is charged with possessing narcotics. Prosecutors learn during their investigation that the defendant’s roommate was not at home when officers searched the defendant’s apartment. The landlord mentions that the roommate was in Mexico on vacation. Prosecutors do not disclose to the defendant the roommate’s trip to Mexico. Unbeknownst to the prosecutor, the defense plans to argue that the drugs found in the apartment were that of the roommate and that he made regular runs to Mexico for his drugs. Even a prosecutor acting in good faith may fail to believe that such information needed to be disclosed to the defendant.

Likewise, consider the case of Michael Morton, who was charged with bludgeoning his wife to death. Prosecutors did not disclose that neighbors described a man in a green van parked behind the Morton’s house. Defense lawyers might have seen that as a clue to successfully locating a third-party suspect, but it is plausible that the prosecutor did not realize the significance of the information at the time discovery was provided. \textit{See} Norman L. Reimer, \textit{Discovery Reform: The Time for Action Is at Hand}, CHAMPION, Mar. 2012, at 7, 7–8.

The reality is that even good prosecutors are hampered in their assessment of the exculpatory value of evidence because they tend to operate with “tunnel vision,” evaluating evidence in light of their belief that the defendant is guilty. \textit{See} Christopher Deal, Note, \textit{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, 1803 (2007). With this limitation, \textit{Brady} becomes an “outcome-oriented pretrial guessing game [that] is unfair, impractical, and—most importantly—unsatisfying as an interpretation of the constitutional guarantee of due process.” \textit{Id.} at 1784.
violation because not only did the defense know what would help their case, but the defense also had alternative or better access to that information. In these cases, the due diligence rule becomes a safety valve for the courts. Reluctant to grade prosecutors’ performances, judges can find that the undisclosed evidence was unlikely to be material because if it had been, the defense would have done a better job of obtaining access to it.

One of the reasons that judges are quick to embrace the due diligence rule is that it comports with general notions of how the American adversarial system works. In an adversarial system, both sides zealously present their cause and, in the end, justice theoretically will prevail.17 Brady has always been the exception to that rule.18 It represents the odd position that a prosecutor has in the American criminal justice system. As Justice Southerland famously said in Berger v. United States,19

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.20

While judges understand that prosecutors have a special position in the criminal justice system, they are still reluctant to require prosecutors to assume the job of defense counsel.21 Therefore, if defense counsel knows or should know of evidence favorable to the defendant, judges may be inclined to hold that she should exercise due diligence in ensuring that her client receives a fair trial.22 From the court’s perspective, the goal is to make sure exculpatory evidence is available to be

17. See Keith A. Findley, Adversarial Inquisitions: Rethinking the Search for the Truth, 56 N.Y.L. Sch. L. Rev. 911, 914 (2011/2012) (“The adversary system operates on the fundamental belief that the best way to ascertain the truth is to permit adversaries to do their best to prove their competing version of the facts.”).
18. Bass, supra note 11, at 134 (“Any duty to disclose information is, of course, a departure from the prosecutor’s traditional adversary role, and any expansion of that duty would require a further departure.”).
20. Id. at 88.
21. Consider, for example, the case of United States v. Pelullo, 399 F.3d 197 (3d Cir. 2005). In that case, the court noted that the defense knew far better which documents would assist defendant’s claims given that the defendant had spent a career engineering the documentation for his fraudulent transactions. By comparison, “no prosecutor could possibly keep track of the array of documents generated during the course of the many investigations of defendant.” Id. at 211 n.12.
22. See, e.g., id. at 209–16 (holding that since the defendant had superior knowledge of the documents that were available, he, not the prosecutor, should have identified the Brady material).
presented at trial should the defense choose to do so. The goal is not to ask what might have been the fastest or most efficient way to get that evidence into the court.

In her article, Professor Weisburd does an excellent job of describing the corrosive effects of a due diligence rule. She explains that the due diligence rule dilutes prosecutors’ duties and sense of responsibility for disclosing exculpatory evidence.23 The due diligence rule also leads courts to believe that defense counsel can rely on their clients to help them identify and access evidence that, in reality, is often not readily accessible.24

However, Professor Weisburd is also undoubtedly correct when she claims that prosecutors are not particularly good predictors of what evidence will help the defense or how and when defense counsel can access this evidence.25 She states that prosecutors are not trained to think like defense lawyers and, without access to the defense strategy, are bound to make improper assumptions about both.26 Unfortunately, our adversarial system maximizes the opportunities for prosecutors to make such mistakes as defense lawyers are reluctant to share their strategies with prosecutors and prosecutors are inclined to discount defense strategies and disbelieve representations by defendants regarding their innocence.27

Finally, Professor Weisburd is on firm ground when she points out that exculpatory facts are not necessarily equal to exculpatory records and that defense counsel do not necessarily have equal resources to obtain exculpatory evidence, even if they become aware of it.28 She correctly notes that in quality and admissibility, the prosecutors’ records might be better because witnesses are more likely to cooperate with government investigators.29 The test for materiality under Brady, however, does not require that prosecutors disclose the best evidence to the defense. It only requires that the prosecution disclose enough favorable evidence to afford the defendant a fair trial.30 As a corollary, the due diligence rule embraces a belief that the defense need only be given fair access to exculpatory evidence, not that the evidence provided be the best evidence or all evidence on the issue.

The due diligence rule has garnered so much traction because courts are reluctant to use Brady to overturn verdicts. The materiality requirement under Brady

24. Id. at 167–78.
25. Id. at 164.
26. Id. (citing Deal, supra note 16 (demonstrating why prosecutors are ill equipped to evaluate materiality for Brady disclosures)).
27. Id. at 164.
28. Id. at 175–76.
29. Id. at 177.
30. See, e.g., Gilday v. Callahan, 59 F.3d 257, 272 (1st Cir. 1995) (finding no Brady violation because the suppressed evidence shed no new light on the alleged crime).
Brady and Discovery Reforms

directs the lower courts constantly to ask the following question: “What difference did withholding the evidence make?” It is a small step from courts asking that question to asking, “If this evidence really was going to make such a difference, why didn’t the defense make a greater effort to obtain it?” Brady’s focus on materiality lends itself to courts probing the record and the actions of counsel to determine whether the requested evidence likely would have made a difference or whether the posttrial Brady claim is just the defense’s attempt at a second bite of the apple.

II. Prosecutors and Defense Lawyers Are Stuck in the Adversarial Process

Americans are fighters. We fight crime. We fight for our rights. We fight injustice. From its inception, the American criminal justice system was designed as an adversarial system—a fight between the prosecution and defense. An “adversarial system conceives of criminal procedure as a dispute between prosecution and defense before a passive umpire.”31 By contrast, “the inquisitorial system conceives criminal procedure as an official investigation carried out by officials of the state in order to determine the truth.”32

Under the purest model of an adversarial system, each side would find its own evidence, present that evidence, and dispute the other side’s evidence. In fact, much of what prosecutors do falls within this model. Prosecutors bring charges, present witnesses, cross-examine defense witnesses, and argue against positions taken by the defense. While prosecutors and defense lawyers act as adversaries in the American criminal justice system, it has never been a purely adversarial model. The reason for this is evident. The Bill of Rights provides protection to defendants against the powers of government, especially within the adversarial process. Many of the protections identified in the Bill of Rights are quite specific, such as the right to confront witnesses, the right to a public trial, the right to counsel, the privilege against self-incrimination, and the right to a speedy trial.33 Thus, a pure adversarial model would conflict with the system we have fashioned that recognizes that defendants need additional protections against the government’s powers.34

32. Id.
33. U.S. CONST. amends. V–VI.
34. By contrast, the right to due process has always been viewed as broader and more elastic to incorporate other rights not specifically articulated in the amendments. Due process, which was once used to support the right to counsel, see Betts v. Brady, 316 U.S. 455 (1942), now supports a right to complain when an adversary (namely, the government) does not disclose material, exculpatory evidence that
Prosecutors are expected to act within an adversarial model, except when it comes to discovery. *Brady* redirects prosecutors toward a more inquisitorial model.35 Under the inquisitorial model of criminal justice, prosecutors and defense lawyers both work for the judge to determine the truth.36 The adversarial roles of prosecutors and defense lawyers are dampened in favor of a cohesive system of lawyers, judges, and investigators charged with discovering the facts of the case and coming to an appropriate resolution. More countries around the world embrace some form of the inquisitorial model than they do the adversarial model, including the nations of Europe.37 The inquisitorial model leads to more collaboration and exchange of information because both sides are working for and under the auspices of the decisionmaker.

A pure inquisitorial approach is not nearly a perfect model.38 In fact, many countries with inquisitorial models are beginning to take on aspects of the adversarial model.39 In an inquisitorial system, it is too easy for defense lawyers to become overly reliant on the prosecutor and court to obtain the evidence for them because, unlike the American system, the only pretrial discovery is that done by the court or by prosecutors at the court’s direction.40

would have ensured the defendant a fair trial. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment, irrespective of the good faith or bad faith of the prosecution.”).

35. Although this Article embraces some aspects of the inquisitorial model, it does not advocate the wholesale adoption of that system, even for discovery. It is important that the American system continue to encourage and support independent investigation by the defense. Defense counsel must continue to have an incentive to pursue zealously all leads that may help them defend their clients. An inquisitorial model that denies the defense the opportunity to conduct investigation and ties them to the court’s official investigation can severely undercut these efforts. See Findley, supra note 17, at 933. Nonetheless, consideration of some aspects of the inquisitorial model can open the door to new means for increased cooperation between defense counsel and prosecutors during discovery. At this point, a change in the culture of discovery is needed and aspects of the inquisitorial model offer such an alternative. See Langer, supra note 31, at 20 n.71.


38. For example, even in an inquisitorial model, law enforcement can exclude pertinent information from the case dossier provided to the court. This is particularly problematic given that the defense may not be able to conduct its own investigation. Ultimately, the responsibility is on the factfinder to ensure that investigative efforts are fair and complete. See Robert P. Mosteller, Failures of the American Adversarial System to Protect the Innocent and Conceptual Advantages in the Inquisitorial Design for Investigative Fairness, 36 N.C. J. INT’L L. & COM. REG. 319, 353–54 (2011).

39. Id.

40. As Professor Findley has noted, Simply assigning investigative responsibility to a neutral magistrate does not ensure a vigorous and unbiased search for the truth. . . . The strength of the adversary process is that it creates adversarial role players who actively challenge the State’s
Nonetheless, if fused with current pretrial discovery practices in America, the inquisitorial model may offer practices in which Brady requirements would be a better fit. An inquisitorial system fosters an atmosphere of greater communication and collaboration. Like it or not, prosecutors and defense lawyers are forced to work with each other because they both work in principle for the inquisitorial decisionmaker—the judge.\textsuperscript{41} It is not so much out of role for prosecutors to share evidence with the defense. Brady requires that prosecutors deviate from the adversarial model when it comes to the handling of exculpatory evidence and act, at least for some purposes, as if they operate in an inquisitorial model. At some level, the due diligence rule reflects a push back against this effort. While prosecutors may be required to provide evidence to the defense if failure to do so will corrupt the court proceedings, defense lawyers are expected to stay in role by exercising due diligence to discover their own exculpatory evidence.

III. \textbf{“WHAT WE GOT HERE IS FAILURE TO COMMUNICATE”}\textsuperscript{42}: REFORM DISCOVERY, AND THE DUE DILIGENCE PROBLEM WILL TAKE CARE OF ITSELF

While Professor Weisburd makes a compelling case for not allowing courts to invoke the due diligence “rule”\textsuperscript{43} just because the defense could have hypothetically obtained evidence, her proposal treats only a symptom rather than the underlying problem with discovery in our current criminal justice system. The biggest problem is a lack of cooperation in the discovery process. While this is not true in every courthouse, prosecutors and defense counsel approach discovery in the same adversarial manner that they approach other aspects of their jobs. They are willing to “play by the rules,” but are quick to attack if they perceive that the other side is manipulating those rules.\textsuperscript{44} The adversarial model tends to lead the parties to act

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\item[41.] Id.
\item[42.] COOL HAND LUKE (Jalem Productions 1967).
\item[43.] As she notes, the Supreme Court has never stated such a rule. Weisburd, supra note 3, at 147. Rather, the due diligence rule appears to be a corollary from the Brady standard that in order for a due process violation to have occurred, the evidence must not have been available to the defense and it must have been material.
\item[44.] The aggressive use of pretrial discovery motions has been part of the impetus for the Department of Justice (DOJ) to reexamine its discovery protocols. Andrew Goldsmith, DOJ’s National Criminal Discovery Coordinator, explained that he wanted to create a discovery system that was based on the
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with suspicion, distrust, and reluctance to help. What we need, however, is an open process where lawyers on both sides are working toward a common goal.

In criticizing current practices, Professor Weisburd argues that one of the key problems with the due diligence rule is that it does not recognize that defendants are often not in a better position to identify facts relevant to their defense. Because this is the case, she argues prosecutors should not be excused from their Brady obligations merely because the defendant could have shared with counsel underlying facts that are also reflected in the prosecution’s withheld exculpatory evidence. The defense lawyer is seen as the “guiding hand” to effective representation of the defendant.

To really make Brady work, the prosecutor also needs the guiding hand of defense counsel. It is defense counsel who has a better idea of what material in the prosecutor’s possession, or securable by the prosecutor, would help the defense’s case. Rather than waiting to see if the prosecutor guesses correctly, it is far better to have the defense work collaboratively with the prosecutor to obtain the evidence. Not only can defense counsel help identify materials that are currently in the prosecution’s file that may be exculpatory, but defense counsel can also educate the prosecutor about what materials she should be looking for as she prepares for trial.

Collaborative discovery between prosecutors and defense lawyers has advantages even over so-called open-file policies, which purportedly provide the defense access to everything in the prosecutor’s files. While touted as a fairer system of discovery, open-file policies have their problems. First, when the policy is not truly open file because prosecutors intentionally or unintentionally do not include records from law enforcement files, defendants can be lulled into a false sense that they are actually getting access to all exculpatory evidence. Second, even when prosecutors provide an open file to the defense, the open file may end up being a

“spirit of cooperation, collegiality, and collaboration.” Eric Topor, Joint Federal Criminal E-discovery Protocol Places Cooperation Above Motion Filings, BNA INC. DIGITAL DISCOVERY & E-EVIDENCE, Mar. 1, 2012, at 1. Specifically, he noted that lawyers “shouldn’t be running to the court and filing motions unless [they have] made a good faith effort to resolve the issues with your adversary.” Id. at 1, 1–2 (internal quotation marks omitted).

45. Weisburd, supra note 3, at 167–75.
46. Id.
47. As recognized as early as Powell v. Alabama, 287 U.S. 45, 69 (1932), most defendants are not in a position to represent themselves and need the “guiding hand” of a lawyer to identify what evidence will assist in their defense. Similarly, prosecutors may understand their own case very well, but often need the guiding hand of the defense to see why the defendant is being unfairly prosecuted.
“discovery dump.”49 One way to hide critical evidence is to give the defense so much evidence to look for that discovering the exculpatory evidence is like finding a needle in a haystack.

To avoid these practices, prosecutors and defense lawyers will have to find a way to communicate and embrace discovery practices more like those used in the inquisitorial system. As one considers the details of such a process, it is worth anticipating the objections that are likely to be raised. First, it is not easy for prosecutors and defense lawyers to trust each other during the discovery process. This became evident to me during retreats organized by the U.S. Court of Appeals for the Ninth Circuit to repair the relationship between U.S. Attorneys and Federal Public Defenders.50 When the retreats began, the level of distrust and animosity was palpable. Defense lawyers bitterly complained of *Brady* violations and prosecutors were equally passionate in complaining that defense lawyers played a game of “gotcha” when prosecutors failed to disclose evidence that defense counsel had not initially asked for but later claimed to be exculpatory.

Efforts to find a collaborative response to discovery issues were initially met with suspicion and skepticism. Defense counsel complained that they could not and should not be forced to guide prosecutors more in discovery because *Brady* did not require that they do so. They also asserted that the attorney–client privilege limited what they could divulge to the prosecutor. In return, prosecutors complained that they had enough to do to prepare for trial and that they should not have to do defense counsel’s work. Each side withdrew to its own corner of the adversarial system’s boxing ring.

Yet, as the lawyers talked to each other and started to establish more understanding and trusting relationships, this dynamic changed. Defense lawyers still could not reveal their client’s communications. But they could suggest areas of concern to better direct prosecutors to the type of discovery that would be helpful in the case. Prosecutors in turn, came to trust that defense counsel were not using *Brady* merely to distract the government from trial preparation and agreed to make


50. *See supra note 2.* To address continuing tension between prosecutors and defense counsel, Ninth Circuit judges directed each district to have its U.S. Attorney and Federal Public Defender attend the two-day retreat. The initial retreat was held at Flathead Lake in Big Fork, Montana, to remove the lawyers from their daily environs and routines and create a relaxed atmosphere of camaraderie. Additionally, the attendees were assigned to groups where they were forced to discuss their differences and propose solutions, including to contested discovery practices. The airing of problems has led to improved communications between the offices and new, cooperative efforts in discovery practices.
the extra effort to help locate additional evidence from investigators and local authorities that might be helpful for the defense. What quickly became clear is that the greatest obstacle to providing the defense the evidence they would need for trial was not the formal rules of discovery or *Brady*. The greatest hurdle to overcome was the culture of distrust and gamesmanship. Both sides had to stop thinking of themselves as adversaries during a portion of the process that, if *Brady* is going to work, needs to function more like the inquisitorial system.

Certainly, it is not necessary to have formal retreats to obtain this result. What is required, however, is a willingness to work collaboratively to ensure the defendant a fair trial. In the pretrial stages (including discovery), both prosecutors and defense counsel must abandon the adversarial posturing displayed during trials and find a way to communicate and work together.

Additionally, there are certain logistical challenges in moving to a system of collaborative discovery. Parties may very well disagree about what evidence is potentially exculpatory and the defense may be reluctant to reveal their strategy to obtain such evidence. However, discovery referees or ombudsmen are no strangers to the civil discovery system, and some state courts already use special masters to handle discovery matters in criminal cases. One of the benefits of using third-party referees is that they can facilitate discovery procedures while maintaining the confidentiality of the parties’ strategies. While these services generate additional costs, these costs must be considered in light of the costs of postconviction proceedings and retrials if it is determined that the defendant has not received the discovery necessary for a fair trial. Likewise, defense counsel already ask judges periodically to approve the disclosure of sensitive information—for example, the identity of informants. This is usually done on an ex parte basis. A middle person in the discovery process would play the role of the judge in the inquisitorial system—coordinating the discovery for the case and ensuring that all the interests, particularly the defendant’s due process rights, are respected. Currently, judges have precious little time to become involved in discovery disputes and even less time to serve as a facilitator for discovery exchange. A middle person, such as a magistrate judge, may be able to devote more time to actively facilitating discovery.

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51. See, e.g., People v. Superior Court, 23 P.3d 563 (Cal. 2001) (recognizing judge’s inherent authority to appoint a special master to assist in reviewing discovery).


53. See, e.g., Baron-Evans, supra note 5, at 24 (explaining role of magistrate judges in securing discovery).
Changing the nature of the discovery process would necessarily cure much of the problem with the due diligence rule. The discovery coordinator or referee would be a constant reminder to prosecutors that they should not rely on the due diligence of other parties, but that they have independent duties to help the court in finding all of the evidence material to the case. At the same time, defense lawyers would also be called on to exercise due diligence to exhaust all sources of discovery, including those provided by public records, the defendant, other defense counsel, or by way of competent investigation.54

Ironically, technology may lead the way to more collaborative discovery, but not in the way that people might think. When people think of technological advances, they may assume that a computer will do the work that people once needed to do. In the discovery context, however, the collaborative efforts by people in the e-discovery area may provide the model for better discovery practices even when computer records are not at issue. Specifically, the protocols developed in recent years for meet-and-confer conferences in handling electronic discovery during which the parties must openly discuss their discovery needs and obligations, as well as work on strategies to obtain the necessary information, can also provide a model for shared discovery responsibilities.56

54. Defense lawyers currently have an ethical duty to conduct such investigation. Standard 4-4.1 of the ABA Criminal Justice Standards provides the following:
   (a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.
   (b) Defense counsel should not seek to acquire possession of physical evidence personally or through use of an investigator where defense counsel's sole purpose is to obstruct access to such evidence.

55. E-discovery or "ESI" (electronically stored information) refers to the sharing of electronic files that contain pertinent evidence about a case. In 2012, the DOJ adopted new protocols for ESI discovery. The focus of the new protocols is on “cooperation, collegiality, and collaboration.” Topor, supra note 44, at 1.

56. See id.
Courts that embrace the due diligence rule do so because they are reluctant to grant a new trial when either side could have obtained the information that was not presented at trial. If the goal is to ensure that such information is obtained, then we need a process by which the defense either shares enough information with the prosecution or a third party so that prosecutors know what to look for and share, and by which prosecutors understand that their job is to respond to the requests of the defense.

In a reconfigured discovery process, prosecutors and defense lawyers need not fear that they are abandoning their roles as zealous advocates merely because the discovery phase is not as adversarial as the trial phase of a case. The inquisitorial model will actually force lawyers to exercise due diligence in providing and requesting exculpatory information. If ombudsmen are used, there will be external pressures to cooperate in the discovery process. However, even if there is not a third-party supervising the process, an understanding that prosecutors and defense lawyers must better communicate and cooperate to ensure effective Brady discovery is likely to have a salutary impact on discovery practices.

CONCLUSION

The due diligence exception to the Brady rule is a symptom of an underlying problem in the American criminal justice system. The general problem is that we have become so wedded to the adversarial system that we tend to forget that the goal of due process is not only to ensure that we obtain a verdict that might not be tainted, but a verdict that represents the most effective testing of the evidence available. Brady requires prosecutors and defense counsel to make those adjustments.\(^\text{57}\) Prosecutors must understand their role requires assisting the defense in their discovery efforts, and defense lawyers must embrace a collaborative model in which they become the guiding hand for discovery.

Both sides have much to gain by transitioning to this new approach. For prosecutors, there are at least two benefits. Primarily, they will be more effective in meeting their constitutional obligation. As Professor Weisburd argues, prosecutors are poor substitutes for defense lawyers in guessing what evidence might be helpful for the defense. Because prosecutors believe in their cases, they tend to discount potentially exculpatory evidence because they can anticipate how such evidence might be rebutted in the courtroom. The fact that the evidence can potentially be rebutted, however, does not exempt prosecutors from disclosing it in

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\[^{57}\text{As one author proposed, the prosecutor and defense attorney would be tasked “to work together, as joint inquisitors—adversarial inquisitors, in a sense—to search for the truth and develop the evidence in the case.”}^\text{Findley, supra note 17, at 936.}\]
the first place. Second, prosecutors who work collaboratively with the defense are less likely to be subject to postconviction challenges and allegations of prosecutorial misconduct. Thus, putting in the work on the front end helps avoid endless and troublesome challenges following a conviction.

For the defense, a collaborative approach, such as that used in the inquisitorial system, also has significant benefits. First, and most importantly, defense counsel may be able to obtain more exculpatory information. Just the process of preparing to discuss discovery with prosecutors will more likely lead defense counsel to review both what types of evidence might help their case and what sources are available for that information. Second, if there are open discussions with the prosecutor as to what information the defense is trying to obtain, and why its own sources have not been productive, defense counsel by definition will have exercised due diligence in obtaining the information.

The court also benefits from this collaborative approach because it will likely reduce postconviction claims that a trial was unfair because of the failure to disclose or obtain exculpatory evidence. It will be easier to measure whether defense counsel has acted ineffectively or whether prosecutors have violated their constitutional obligations because the collaborative procedures themselves can be used to verify the efforts of counsel.

Finally, and most importantly, the gamesmanship that marks both sides’ conduct in an adversarial system is less likely to affect the discovery phase of a case. Both sides are free to be as adversarial as they like during the actual presentation of the evidence, but evidence itself does not belong to either side. A brief shift to the inquisitorial model during discovery will actually enhance counsel’s adversarial role during the trial, as each side seeks to convince the trier of fact about the importance of the evidence presented.

One of the greatest complaints about the American criminal justice system is that it seeks to hide, rather than find, the truth. In criminal cases, there is far too much at stake for either side to play that game. We are moving into an era where

58. It is a dangerous game that both sides can play during discovery. On the prosecution side, prosecutors may not disclose potentially exculpatory evidence because they do not believe that their misconduct will be discovered and, if it is, they can argue the evidence was not material. On the defense side, defendants may not investigate potentially exculpatory evidence of which they are aware because they believe that a more effective strategy will be to charge prosecutors with misconduct for failing to disclose Brady evidence. In an effort to discredit their opponents, lawyers can lose sight that they both should be pursuing the best evidence available to assist the trier of fact in reaching its verdict.

59. See United States v. Peter Kiewit Sons’ Co., 655 F. Supp. 73, 77 (D. Colo. 1986) (reasoning that because litigation is a quest for the truth, both sides of a criminal trial should have equal opportunity to investigate witnesses and evidence).

60. See C. Ronald Huff, Wrongful Convictions in the United States, in WRONGFUL CONVICTION, supra note 40, at 59, 65; Franklin Strier, Making Jury Trials More Truthful, 30 U.C. DAVIS L. REV. 95, 97
more collaborative efforts are possible. We have the technology to work collaboratively and a better understanding of other judicial systems where this is done. It is time to seize on that opportunity. We should all be diligent in pursuing justice.

(1996); see also Mosteller, supra note 38, at 353 (arguing that the “undeniable implication” of recent research is that a nonadversarial design of the basic task of investigation “produces superior accuracy”).