Washington University Law Review

Volume 68
Issue 1 *Symposium on Criminal Discovery*

1990

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WHAT WAS DISCOVERED IN THE QUEST FOR TRUTH?

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Justice William J. Brennan, Jr. carries more responsibility and deserves more credit than any other person or group for the enhanced discovery available to criminal defendants in 1989. His 1963 Tyrrell Williams Lecture, *The Criminal Prosecution: Sporting Event or Quest for Truth?*,[1] established the argument that pushed discovery into the criminal justice system. Borrowing from Glanville Williams' description of the criminal trial as "in the nature of a game or sporting contest" and not "a serious inquiry aiming to distinguish between guilt and innocence,"[2] he attacked arguments opposing discovery by implying that they furthered the "sporting event," while discovery furthered the "quest for truth."

Justice Brennan entitles his twenty-six year reprise at the Tyrrell Williams forum: *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*.[3] He characterizes the results of his 1963 suggestions and predictions about criminal discovery as "mixed," emphasizing that "[l]aw's evolution is never done, and for every improvement made there is another reform that is overdue."[4]

Criminal discovery has outstripped Justice Brennan's claim of "mixed" results. His description of the twenty-five year transformation as merely "rapid"[5] is too modest. From the picture in 1963, which he accurately describes as "quite a bleak one,"[6] discovery is, today, *de rigueur* in criminal cases.[7] There is little to suggest a general reduction of

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1. 1963 WASH. U.L.Q. 279.
2. *Id.*
3. 68 WASH. U.L.Q. 1 (1990).
4. *Id.*
5. *Id.* at 4.
6. *Id.*
7. Counsel's absolute inattention to discovery is one of the few failings that might support an ineffective assistance claim. Though the standard for effective assistance seems so low as to be nonexistent, there is some suggestion that the failure to do any discovery at all *might* support an ineffec-

criminal case discovery in the future.[8]

I agree, however, with Justice Brennan's assessment that the results of the "quest for truth" have been mixed. There has been an unintended and unexpected negative result from a quarter-century of questing for criminal justice truth. We have discovered the wrong truth—a discovery that both reflects and forecasts a serious misunderstanding about our criminal justice system. Criminal justice system truth is not "truth" in the "what *really* happened" sense. It is, rather, a "truth" that recognizes the likelihood of error and dictates its direction. If the "truth" arising from the imperfect world of criminal trial re-creation is wrong, it is to be wrong in favor of the criminal defendant—wrong in favor of liberty. Justice Brennan finds this definition of criminal justice "truth" in the system's allocation and sizing of the burden of proof:

> There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden . . . of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.[9]

Criminal justice truth, as defined by the burden of proof, was part and parcel of due process for Justice Harlan. It is "bottomed," he said, "on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."[10]

Justice Brennan's understanding of criminal justice "truth" and Justice Harlan's understanding of the role of that "truth" in defining constitutionally required due process could not, today, command a majority in the Supreme Court of the United States. The current majority believes that due process and criminal justice "truth" are properly served when the guilty are convicted. Its criminal justice "truth" is the truth of "what *really* happened." It decides cases and discusses doctrine as if it believes that the criminal trial process actually isolates and identifies a "truth"

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tive assistance claim. While the Supreme Court did not find a failure of effective assistance in Strickland v. Washington, 466 U.S. 668 (1984), it did, per Justice O'Connor, say: "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691.

8. Justice Brennan cites the ABA Standards for Criminal Justice calling for "full and free discovery" as the ideal to which Federal Rule 16 and the various state rules should aspire. 68 WASH. U.L.Q. at 4. Although the Standards bind no one, they generally reflect the attitude of the bench and bar, if not at the time of promulgation, soon thereafter.

9. Speiser v. Randall, 357 U.S. 513, 525-26 (1958).

10. *In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

that a lawyer can know, a jury can discover, and an appellate court can assume.

Harris v. New York[11] and *Nix v. Whiteside*[12] bring into sharp relief the current majority's more consequential view of knowable truth, as contrasted with the traditional, system-defined view that criminal justice truth is certainty in the defendant's favor. Though he is no longer on the Court, former Chief Justice Burger captures in both opinions the tone of the current majority's belief that the system produces palpable truth. In *Harris*, the question was whether an unconstitutionally obtained confession could be used for impeachment. The Court stated, without pause, that a criminal defendant's right to testify does not "include the right to commit perjury."[13] In *Whiteside*, the question was whether a lawyer's threat to impeach a client's proposed testimony amounted to ineffective assistance. The Court decided that the lawyer's threat, based on the lawyer's belief that the proposed testimony was untrue, did not prejudice the defendant, even though it changed his testimony.[14]

As it turns out, the confession with which Harris was impeached was a false statement concocted by the police officer for the sole purpose of discrediting Harris' denial. As luck would have it, Whiteside's actual testimony was the second and incomplete version of events, related to his lawyer under circumstances in which Whiteside was distrustful of the lawyer. The truthful proposed testimony, which he only related to his lawyer just before he was to testify, was never given. Does it matter that both of the above recitations are true—or false?[15]

The Court's *Harris* pronouncement that there is no right to testify falsely is, of course, legal nonsense. All witnesses who have the right to testify have the right to lie. That is why we cross-examine them and why, when we catch them, we try to convict them of perjury. That is why neither lawyer nor court has the power to place a credibility filter between the witness and the factfinder.[16] But that is not the issue here. Instead, the issue is the Court's belief that it had sufficient clairvoyance to know that Harris was going to lie and that Whiteside's lawyer was

11. 401 U.S. 222 (1971).

12. 475 U.S. 157 (1986).

13. 401 U.S. at 225.

14. 475 U.S. at 171.

15. The author has made up the "facts" in this paragraph. The court did not have any better basis for its conclusions than the author. Both had only a trial transcript.

16. Goldberg, *Heaven Help the Lawyer for a Civil Liar*, 2 GEO. J. LEGAL ETHICS 885 & nn.97-107 (1989).

sufficiently prescient to be able to discern the real truth. The Court decided both cases as if it knew that the representations in the immediately preceding paragraph were not true. Its assumption that the system produces "real truth"—discoverable by the lawyer and by the appellate court—is essential to the Court's pronouncements and decisions.

It is a very short distance from speaking as if the system can find "real truth" to concluding that "real truth" is the *raison d'etre* for the criminal justice system. The current Court's "truth," as an achievable end of the system, has supplanted the Brennan-Harlan "truth," as a justified end of the system.

Consider the Court's harmless error decisions, counsel decisions, and decisions interpreting due process. During the last two decades, the Court has regularly decided these cases using a standard that in one way or another amounts to: "So long as we are persuaded that the defendant was guilty, we will not worry about the error, or the representation, or the process avoided." Whatever may be attractive or unattractive about these results as a matter of constitutional jurisprudence, all require the Court to develop a certainty about whether the defendant was *really* guilty.

The harmless error test from *Chapman v. California*[17] reads as if it were consistent with the Brennan-Harlan view of truth—a determination of "what happened" that, when wrong, is wrong in the defendant's favor. The *Chapman* rule holds that an error can be considered harmless only if the government can persuade the Court beyond a reasonable doubt that the error "did not contribute to the verdict."[18] The Court, however, has not administered the rule as if the Court were making a judgment about whether the error influenced the jury verdict. It has, rather, administered the rule as if the Court were determining whether the defendant was guilty. As a result, the Court was able to say beyond a reasonable doubt in one Florida case, *Milton v. Wainwright*,[19] that a defendant's confession did not influence a jury,[20] and in another, *Schneble v. Florida*,[21] that the defendant's confession was so influential that a codefendant's implication of the defendant did not influence the jury.[22] Leaving

17. 386 U.S. 18 (1967).
18. *Id.* at 24.
19. 407 U.S. 371 (1972).
20. *Id.* at 377.
21. 405 U.S. 427 (1972).
22. *Id.* at 431.

aside the obvious question—if the evidence was so clearly inadmissible and unimportant, why did anyone offer it or admit it in the first place?—it is difficult to imagine how a lawyer who has ever seen a trial could believe beyond a reasonable doubt that a jury would not be influenced by a defendant's confession or by a codefendant's accusing finger. In *Milton*, five of the lawyers on the bench were persuaded that the defendant's confession did not influence the jury; four were not.[23] Yet earlier that term, in *Schneble*, six of the lawyers on the bench—five of whom would say beyond a reasonable doubt, in *Milton*, that a confession would not influence a jury—decided that the defendant's confession had so much influence on the jury that the codefendant's confession implicating the defendant did not influence the jury—beyond a reasonable doubt.[24] The reasonable explanation for the two results is that the defendants were guilty—which they were, and that the Court knew it—which it did. The Court's "truth" was truth of what *really* happened. It was not the criminal justice "truth" that finds facts in a manner calculated to ensure liberty for the innocent.

It is fair to ask: So what if the Court has focused on "the *real* truth," rather than a "truth" determined with a thumb on the scale? "The basic purpose of a trial," Justice Stewart reminds us, "is the determination of truth."[25] Despite critiques offered by centuries of commentators—from Bentham to Brennan—complaining that the adversary system is a "sporting event" instead of a "quest for truth,"[26] we maintain a general belief that Justice Stewart's observation is correct and that the system works. Professor Babcock expresses that belief and offers an illuminating resolution of the apparent conflict between truth and sport in her thoughtful analysis of discovery and counsel in the criminal justice system: "[T]he concepts of fair play in sport and due process in criminal trials are in fact united. We have taken the notion of fair play from its native habitat in the world of games and sports and applied it directly to

23. 407 U.S. at 378.

24. 405 U.S. at 431.

25. Tehan v. United States *ex rel* Shott, 382 U.S. 406, 416 (1966).

26. J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE (1949), and Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV 1031 (1975) are two of the best known "friendly" critiques of the adversary system. Though Frank did not find the adversary system so wanting that it ought to be replaced, his chapter, "The 'Fight' Theory v. The 'Truth' Theory," has influenced a generation of critics who believe the adversary process and truth finding to be incompatible.

our legal procedures."[27]

Ironically, the adversary system resolution of truth and sport, through application of the "notion of fair play . . . directly to our legal procedures," threatens the Brennan-Harlan view of the criminal justice system. Concentration in the current Court on the twin notions that the adversary system aims for the truth and fair play leads to the truth have combined to define the criminal justice system as a search for the real and certain truth, rather than a search for the truth of which we can be really certain. The result has been less process due to criminal defendants—particularly guilty ones.

Nowhere has the Court's search for "*real* truth" had a greater impact than in criminal discovery. The Court has used Justice Brennan's "quest for truth" to stand his result on its head, simultaneously diminishing defense discovery and the defendant's fifth amendment-due process shield against being the agent of his own conviction.

Two months after Justice Brennan's first Tyrrell Williams Lecture, the Supreme Court decided its first major criminal discovery case. The Court's opinion by Justice Douglas in *Brady v. Maryland*,[28] rejected the "sporting event" approach to criminal trials and suggested that failure of discovery raised grave doubt about the truth of the trial result. It tied the need for truth to the process due to a criminal defendant:

> [s]uppression by the prosecution of evidence favorable to an accused upon request violates due process . . . .
>
> The principle . . . is . . . avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair . . . .[29]

Brady was both the beginning and the zenith of the Court's attempt to provide the defendant discovery of the prosecution's case "to enhance the truth-finding process so as to minimize the danger that an innocent defendant will be convicted."[30]

Agurs v. United States,[31] decided only six years after *Brady*, began the erosion of the defense discovery Justice Brennan and others believed was aimed at ensuring that innocent defendants avoid conviction. Linda

27. Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1135 (1982).

28. 373 U.S. 83 (1963). The opinion was announced by Justice Brennan.

29. *Id.* at 87.

30. Brennan, *The Criminal Prosecution: Sporting Event or Quest for the Truth? A Progress Report*, 68 WASH. U.L.Q. 1 (1990).

31. 427 U.S. 97 (1976).

Agurs was being tried for the murder of a man who, only after her screams brought help, was discovered on top of her, wounded but trying to turn his own knife blade into her body. Agurs' lawyer asked the prosecution for any *Brady* material. The prosecutor did not disclose the file information that the deceased had two felony convictions, one for assault and one for carrying a deadly weapon—a knife.[32] After her conviction, Agurs contended that the prosecutor's failure to turn over the information about the victim's convictions for violent crimes—convictions that would have been admissible and relevant to her claim of self-defense, whether or not she knew of the convictions—denied her a fair trial under *Brady*.[33]

The court of appeals reversed Agurs' conviction, holding "that the prosecutor has a constitutional obligation to disclose any information that might affect the jury's verdict."[34] In a fit of incredible irony, the Supreme Court decided that the appellate court's statement "approaches the 'sporting theory of justice' which the Court expressly rejected in *Brady*,"[35] because "[i]f everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice."[36] The "might influence a jury" standard disparaged by the Court was created by Justice Stevens, not by the appellate court being reversed. The appellate court decided the case under a strict *Brady* formulation, quoting directly from the *Brady* holding. It did not require disclosure of "everything that might influence a jury," rather only information that might "*affect* the jury's *verdict*."[37]

The reader is left to speculate why complete discovery of the prosecutor's information would approach "the sporting theory of justice"—a phrase the Court must have known would be read as just the opposite of a quest for the truth. There was not even a hint of the *State v. Tune*[38] litany about discovery creating unreasonable advantages for defendants to which Justice Brennan responded in his first Tyrrell Williams lecture.[39] The Court's extended discussion of "materiality"[40] suggests that

32. *Id.* at 101.
33. *Id.* at 100 & n.3.
34. *Id.* at 108.
35. *Id.*
36. *Id.* at 109.
37. *Id.* (emphasis added).
38. 13 N.J. 203, 98 A.2d 881 (1953).
39. 1963 WASH. U.L.Q. 279, 288-93.

the Court might have been concerned about forcing the prosecutor to decide at the government's peril what would influence a jury. In a subsequent discovery case, *United States v. Bagley*,[41] Justice Stevens implies that *Agurs* turned on the defendant's general request for information and the resulting lack of notice to a prosecutor that the defendant did not have the specific evidence in question or that the defendant had any need for it. That seems, however, an unlikely foundation for reducing the import of *Brady*. If the prosecutor's choice whether to disclose a piece of information, not the information itself, is the problem, the prosecutor can avoid the dilemma by giving the information. If the Court was concerned about difficult prosecutorial decisions with respect to the usefulness to the defense of particular information, *Agurs* was the wrong case in which to do the worrying. No prosecutor would have to guess in a self-defense case whether the defense would like to know if the victim had convictions suggesting a propensity for violence.

Professor Babcock speculates that the Court really was making, rather than avoiding, a sporting event based decision that the prosecution ought not have to give the defense something that the defense has not earned.[42] Her suggestion is not particularly flattering if understood as suggesting the Court was hypocritical in placing the sporting event label on the proponents of full discovery. It may be the more reasonable of the various explanations for the *Agurs* result, however, and not nearly so unflattering as might first appear.

The Court distinguished Agurs' general request for information from *Brady* and imposed a lesser prosecutorial obligation to disclose information when the defendant or the lawyer does not know enough to make a specific request. Unfortunately, if a "quest for truth" in the Brennan-Harlan criminal justice formulation is the issue, the difference demands the opposite result. The innocent defendant, who does not know enough to ask the right question, or the defendant represented by a real estate lawyer, who does not know a crime from a rhyme,[43] is the one most

40. *Agurs*, 427 U.S. at 108-14.

41. 473 U.S. 667 (1985).

42. Babcock sees the Court's message in *Agurs* thus: "Stop reversing criminal convictions in cases where the prosecution team has merely failed to give unearned aid to the defense team. Reverse only when the prosecutor has played the game unfairly." Babcock, *supra* note 27, at 1152.

43. Professor Babcock's explication and justification of the contest theory of truth finding lead her to conclude that decisions like *Agurs*, based upon fair play in the sporting sense, could only be justified if the Court would maintain a high standard for the assistance of counsel necessary under the sixth amendment. *See* Babcock, *supra* note 27, at 1171-74.

likely to be convicted wrongly by the Court's discovery rules. The general nature of the request, which factually distinguishes *Agurs* from *Brady*, has nothing to do with the substantive value of the information to the defendant, except to suggest that the less knowledgable defendant might need it more.

One proposition is clear, regardless of the explanation for the *Agurs* result: "Quest for truth," in order to avoid convicting an innocent defendant, was of no immediate concern to the Court. Although the Court had no apparent interest in the Brennan-Harlan formulation of "truth," it had something in mind when it decried a procedure that struck it as approaching the "sporting theory of justice." If one accepts Professor Babcock's persuasive analysis that the *Agurs* Court was vindicating adversary-system principles of the disciplined contest, the result for criminal discovery is replacement of the Brennan-Harlan criminal justice defined "truth" with a "what *really* happened truth"—the truth by which we justify the adversary system in general.

The Court has discovered the wrong truth while it has increased discovery. The difference between the truth that justifies the adversary system and the truth for which the criminal justice system is designed is well illuminated by the Supreme Court decisions inventing and refining prosecution discovery in criminal cases.

The Court first approved prosecution discovery in *Williams v. Florida*.[44] It could find nothing in the privilege against self-incrimination, or in the due process requirement that the government bear the entire burden of proving criminal activity, that would invalidate Florida's statute compelling the defendant to give notice of alibi and witness information to the prosecution. Justice White rebuffed the defendant's due process argument against government discovery by using the game/truth dichotomy:

> [A] trial . . . is not yet a poker game . . . . We find ample room in that system, at least as far as "due process" is concerned, for the instant Florida rule, which is designed to enhance the search for truth in the criminal trial by insuring both the defendant and the State ample opportunity to investigate . . . .[45]

The adversary system truth, in the Court's view, was sufficiently important that it eclipsed any criminal justice system procedures that were not even handed—even if the procedures were born in the Constitution. The

44. 399 U.S. 78 (1970).

45. *Id.* at 82.

Court's approval of procedures for finding the "what *really* happened truth" was, in the dissenting Justice Black's view, a "radical and dangerous departure." His may be the last eloquent description of a fast fading American criminal justice system designed to find a particular kind of truth:

> It is no answer to this argument to suggest . . . "poker game" or "sporting contest," for that tactical advantage to the defendant is inherent in the type of trial required by our Bill of Rights. The Framers were well aware of the awesome investigative and prosecutorial powers of government and it was in order to limit those powers that they spelled out in detail in the Constitution the procedure to be followed in criminal trials. . . . All of these rights are designed to shield the defendant against state power. . . . Throughout the process the defendant has a fundamental right to remain silent, in effect challenging the State at every point to: "Prove it!"
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> . . . .
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> A criminal trial is in part a search for truth. But it is also a system designed to protect "freedom" by insuring that no one is criminally punished unless the State has first succeeded in the admittedly difficult task of convincing a jury that the defendant is guilty. That task is made more difficult by the Bill of Rights . . . . The Framers decided that the benefits . . . were well worth any loss in "efficiency" that resulted. Their decision constitutes the final word on the subject . . . .[46]

The final word, of course, did not belong to the Framers, but to the Court. Justice Black's further, unhappy observation, that the Court's "test of constitutionality is the test of 'fairness,' "[47] has proved prophetic. In *Wardius v. Oregon*,[48] the Court relied on due process to strike down a notice-of-alibi statute that would have provided the Oregon prosecutor with the same information that the Court allowed the Florida prosecutor to obtain. The Oregon statute's failure to provide "reciprocal discovery rights" caused the different result.

The prosecutorial discovery cases demonstrate the Court's conversion of due process in criminal cases from a series of rights and procedures designed to aid a quest for a truth with a bias, into a quest for the truth of "what *really* happened"—a truth the Court is convinced results from a classic adversary process of evenhanded confrontation between lawyers.

The consequences for the administration of criminal justice are significant beyond the irony of the discovery cases, in which the quest for truth

46. *Id.* at 111-14 (Black, J., dissenting).
47. *Id.* at 115.
48. 412 U.S. 470 (1973).

diminished the ability of a defendant, who could not otherwise obtain the information, to discover facts and increased the ability of the government, which has almost unlimited investigatory power, to discover defense strategy. Now, when lawyers, legislators, and judges think about fairness in the criminal justice system, they think of evenhanded treatment. This thought process leads down a very slippery slope—from the equal chance to obtain information from the opponent, to an equal chance to insist on having the defendant examined, to an equal chance to call witnesses, to an equal chance to comment on the failure to call witnesses, to an equal chance to explain what happened to the jury, to an equal chance to insist that the other side explain what happened, and on and on.

The foregoing reasonably could be dismissed as senseless paranoia were it not for the strength with which the signal has gone out that the hallmark of the criminal process is fairness as defined by procedural evenhandedness. It is a particularly dangerous signal because it incorporates an adversarial idea to which we all aspire in civil litigation. Consider the trial judge whose ruling prohibiting Donald Perry from speaking to his lawyer during a trial recess was upheld in *Perry v. Leeke*.[49] Because the ruling was upheld, some risk exists that the judge and others will believe that both his ruling and his reason were appropriate. The trial judge explained that he was overruling a defense objection because "he felt compelled to act as he did to ensure . . . 'fairness to the state.' "[50] He believed it was his task to see that the trial "remain[ed] fair to all parties."[51] Dissenting from the Court's approval of the trial judge's action, Justice Marshall, joined by Justice Brennan observed: "Needless to say, the due process concerns . . . are designed to ensure a fair trial for the defendant, not the State."[52] It was not "needless to say"; it was too late, or too many votes ago, to say.

What was discovered in the quest for truth was an unreasonable passion for procedural evenhandedness, exemplified by criminal discovery. The Supreme Court apparently has forgotten the environment that caused the Framers to fear arbitrary government, to try limiting the extraordinary power of the government to investigate and accumulate evidence, to try to reverse the real presumption of guilt with which every

49. 109 S.Ct. 594 (1989).
50. *Id.* at 609 (Marshall, J., dissenting).
51. *Id.* at 609 n.9.
52. *Id.* at 609 (Marshall, J., dissenting).

defendant enters a courtroom, and to adjust, procedurally and in a decisionmaking way, the terrible imbalance between the government and the defendant—usually an individual with no power, no education, no means, and no understanding.

Unlike the Framers of our Constitution, the Court has not been exposed to enough of the too-often hidden exercises of arbitrary government power of the kind recently chronicled in *The Thin Blue Line*.[53] The Court has been too long gone from the everyday oppression of a criminal justice system that grinds harshly on the guilty and the innocent in equal measure. It has lost any sense of the need for a criminal justice truth-telling system designed as a check against both accidental and malicious miscarriages of justice that deny liberty. But then, haven't we all?

53. For a frightening reminder of prosecutorial authority run amok, see Gershman, *The Thin Blue Line: Art or Trial in the Fact-Finding Process?*, 9 PACE L. REV. 275 (1989).