Journal of Law and Policy

Volume 31 | Issue 2 Article 4

5-1-2023

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Eli J. Esakoff

DEFENDANTS IN THE DARK: HOW THE JENCKS ACT IS INCOMPATIBLE WITH THE ADVERSARIAL LEGAL SYSTEM

Eli J. Esakoff[*]

> As one reads history . . . one is absolutely sickened, not by the crimes that the wicked have committed, but by the punishments that the good have inflicted; and a community is infinitely more brutalised by the habitual employment of punishment than it is by the occasional occurrence of crime.[1]

The Jencks Act is a McCarthy Era law that prohibits compelling the disclosure of any statement made by a government witness in a federal criminal prosecution until after the witness has testified at trial. Passed in 1957 in response to the Supreme Court's decision in Jencks v. United States*, the Act's life in Congress was "nasty, brutish, and short." In prosecuting its anti-communist "witch hunts" of the era, the government strove to keep hidden as much of its case against those accused as possible. Against this backdrop of the desire for secrecy, the Supreme Court held that a criminal defendant was entitled to the disclosure of statements made by*

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[*] J.D. Candidate, Brooklyn Law School, 2024. B.A., Emory University, 2015. I owe an immeasurable debt of gratitude to my family members for their support, encouragement, and invaluable editorial aid, without which this paper could not be. A special thank you to my parents, Jeremy and Denise Esakoff, for inspiring my career in law and for instilling in me an insatiable interest in truth, philosophy, language, and justice. Thanks to mentors Henry E. Mazurek and Ilana Haramati, with whose criminal defense practice I first encountered the Jencks Act in operation. Thank you also to Brooklyn Law School Professor Alexis Hoag-Fordjour, whose keen insight and expertise in this area of law were a vital resource. Lastly, my appreciation is given to all members of the *Journal of Law and Policy* who helped throughout the writing process.

[1] OSCAR WILDE, THE SOUL OF MAN UNDER SOCIALISM, COMPLETE WORKS OF OSCAR WILDE 1182 (HarperCollins, 5th ed. 2003).

government witnesses so as to allow him to assess their value to his defense. Jencks *caused widespread fear that too much insight into the government's criminal investigations and prosecutions would be given to criminal defendants. Opponents of the decision saw it as pouring gasoline into an inferno already blazing throughout the nation as a result of the perceived threat of communism. In this atmosphere of fear and paranoia, Congress changed the rule announced by the Supreme Court, at the very last minute of a particularly arduous congressional session, without following critical legislative practices, and without the advice of bench or bar. In allowing the government to withhold statements made by its witnesses until after those witnesses have testified at trial, the Jencks Act is inimical to the adversarial system of justice. Criminal jurisprudence in the United States emerged and subsequently evolved with the understanding that the fairest and most effective way of determining truth is to subject the parties' claims to the crucible of an adversarial trial. The foundation of this concept is cross-examination—so indispensable to a fair trial as to be enshrined in the Sixth Amendment's right to confrontation. By design, the Jencks Act frustrates the defendant's ability to conduct cross-examination by allowing the government to withhold statements made by its witnesses.*

Other principal sources of discovery, primarily Federal Rule of Criminal Procedure 16, along with rules derived from Brady v. Maryland *and* Giglio v. United States*, manifest the general consensus that expansive disclosure of evidence promotes fairness in trials. Nothing illustrates this consensus clearer than the far more liberal discovery practices in civil cases. Yet the Jencks Act denies the defendant in a criminal case, where the stakes are often far higher, the opportunity to discover aspects of the government's evidence that are crucial to the case against him. The prejudice to defendants that the Act creates is innate in its very conception and infects every criminal case in the federal courts. This Note therefore argues that the Jencks Act must be repealed. Government witness statements should be included in the government's general pretrial discovery. The justifications behind the Act's passage, and the arguments for narrow discovery in general, cannot sustain the Act's blatant disregard for defendants' right to a fair trial.*

INTRODUCTION

The note demanded "$100 BILLS AND $50 BILLS" and stated that the man was armed.[2] The man then assured the teller that it was "not a joke" and walked out of the bank, cash in hand.[3] In 2019, the man, Greg Cantoni, was convicted in the Eastern District of New York of bank robbery.[4] He appealed to the Second Circuit claiming that the district court had erred in refusing to strike government witness testimony that it was required to strike.[5] The basis for striking the testimony was a statute called the Jencks Act, which requires the government, under certain circumstances, to disclose to the defendant statements made by government witnesses.[6] The Act provides that, following a witness's testimony, and on the defendant's application, the court must order that the witness's prior statements made to authorities be turned over to the defendant.[7] In situations where the government "elects not to comply" with such an order, the Act instructs the court to impose specific sanctions: "[T]he court shall strike from the record the testimony of the witness," unless it determines that a mistrial is warranted.[8] On appeal, Cantoni argued that because the government had failed to comply with an order to timely disclose prior statements made by one of its testifying witnesses, and the district court had refused to strike that witness's testimony, his conviction had to be set aside.[9]

Unfortunately for Cantoni, the statutory sanctions come with a common law caveat: Failure by the government to comply with an order to disclose material and the subsequent failure by the court to

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[2] Kyle Lawson, *Jury Convicts Straw-Hat Bank Bandit, Who Told Staten Island Teller 'This Is Not a Joke'*, SILIVE.COM (Apr. 30, 2019, 3:13 PM), https://www.silive.com/crime/2019/04/jury-convicts-straw-hat-bank-bandit-who-told-staten-island-teller-this-is-not-a-joke.html.

[3] *Id.*

[4] *Id.*

[5] United States v. Cantoni, No. 19-4358-CR, 2022 WL 211211, at *1 (2d Cir. Jan. 25, 2022), *cert. denied*, 142 S. Ct. 2826 (2022).

[6] *See* 18 U.S.C. § 3500.

[7] 18 U.S.C. § 3500(b).

[8] *See* 18 U.S.C. § 3500(d).

[9] *Cantoni*, 2022 WL 211211, at *1, 3.

impose sanctions will be reviewed for harmless error.[10] The Second Circuit reviewed the government's noncompliance at trial and determined that its refusal to turn over witness material did not warrant the statutory sanctions.[11] The court noted that the prosecutor's "failure to disclose the withheld material must be deemed harmless where there is no reasonable probability that, had the evidence been disclosed . . . , the result of the proceeding would have been different,"[12] and found no harm to Cantoni because, "[after] the late disclosure of the [Jencks] material, Cantoni was permitted to recall [the witness] to the stand, mitigating any prejudice caused by the late disclosure."[13]

Application of harmless error review's post facto, no-harm-no-foul analysis of prejudice arising under the Jencks Act highlights just one of the Act's flaws. It allowed the Second Circuit to sidestep the Act's mandate of specified sanctions for the government's refusal to disclose information that it was ordered to disclose.[14] Applying the harmless error doctrine to Jencks Act disputes not only creates "a bypass around the principles espoused in the *Jencks* case,"[15] it is also unworkable because the amount of speculation it requires of the court is neither practical nor reasonable.[16] Although harmless error review involves a degree of speculation by definition,

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[10] *See* Goldberg v. United States, 425 U.S. 94, 111 (1976); *see also* Rosenberg v. United States, 360 U.S. 367 (1959); Clancy v. United States, 365 U.S. 312 (1961).

[11] *Cantoni*, 2022 WL 211211, at *3.

[12] *Id.* (quoting United States v. Nicolapolous, 30 F.3d 381, 383-84 (2d Cir. 1994)).

[13] *Id.*

[14] *See id.*

[15] M.H.K., *The Jencks Right: Judicial and Legislative Modifications, the States and the* Future, 50 VA. L. REV. 535, 541 (1964). Courts did not always apply harmless error review of prejudice to Jencks Act disputes. *See, e.g.*, United States v. Prince, 264 F.2d 850, 852 (3d Cir. 1959) ("It is not the function of the district court or ourselves to determine whether the appellant was prejudiced by failure to make available relevant portions of the prior report of the witness.").

[16] *See, e.g.*, Erckman v. United States, 416 U.S. 909, 913 (1974) (Marshall, J., dissenting, "[o]f course, whenever an appellate court considers whether a Jencks Act error is harmless, it must of necessity move into the usually forbidden territory of speculation about the utility to the defense of the witness' prior statement").

in the context of the Jencks Act, it requires a double layer of conjecture: First, the court must speculate as to what value the withheld material would have had to the defense—i.e., how the defense would have made use of it; then, the court must guess what effect that use would have had at trial. Defense counsel and the defendant, and not the court, are in the position to determine such value.[17] The Supreme Court emphasized this in *Rosenberg v. United States*, explaining that "An appellate court should not confidently guess what defendant's attorney might have found useful for impeachment purposes in withheld documents to which the defense is entitled."[18]

Nevertheless, as construed by the Supreme Court's rulings that harmless error review is appropriate to Jencks Act disputes, the Act is highly effective for the prosecution because it expressly prohibits compelling the government to produce some of its evidence,[19] and it is disadvantageous to the defendant because harmless error review has weakened the sanctions that the Act mandates to ensure that evidence that ought to be disclosed actually is disclosed. Ultimately, however, the problem with the Act is not merely that harmless error review enables the government to ignore the Act's one mandate—the problem is the Act itself.

While the Act permits defense examination of government witness statements, it confines the power to compel their disclosure until *after* the witness has already testified at trial.[20] This restriction renders the Jencks Act antithetical to our adversarial system of justice, because it inhibits access to evidence that is needed for effective representation at trial. The adversarial system values

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[17] Goldberg v. United States, 425 U.S. 94, 111, n.21 (1976) ("Since courts cannot 'speculate whether (Jencks material) could have been utilized effectively' at trial, the harmless-error doctrine must be strictly applied in Jencks Act cases") (citations omitted).

[18] The *Rosenberg* Court appeared to limit application of harmless error review to situations in which "the very same information was possessed by defendant's counsel as would have been available were [the] error not committed . . . ." Rosenberg v. United States, 360 U.S. 367, 371 (1959). *See also* United States v. Bagley, 473 U.S. 667, 683 (1985) (acknowledging "the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken . . . ").

[19] *See* 18 U.S.C. § 3500(a).

[20] *Id.*

confrontation of adverse witnesses above almost all else,[21] and it is so essential to the American legal system that the Sixth Amendment guarantees the right of confrontation.[22] The utility and effect of cross-examination is maximized when defense counsel is fully prepared—i.e., when counsel conducting the examination possesses all relevant information related to the witness.[23] When counsel cannot so prepare, the adversarial system suffers.[24] The Jencks Act allows the government to conceal important evidence relevant to the witness until just before the defense's cross-examination at trial.[25] To this extent, it belies the promise of a fair trial by impairing defense counsel's ability to effectively confront adverse witnesses. Moreover, the Act is unclear and can no longer be sustained by its original justifications. Since its enactment, courts have disagreed about exactly what sanctions are appropriate[26] and when they are appropriately imposed.[27] Further, there are different interpretations

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[21] *See* discussion *infra* Part III.

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

[23] *See* Mike Klinkosum, *Pursuing Discovery in Criminal Cases: Forcing Open the Prosecution's Files*, 13 THE CHAMPION 26, NAT. ASS'N CRIM. DEF. L. (2013).

[24] *See* Toni M. Massaro, *The Dignity Value of Face-to-Face Confrontations*, 40 U. FLA. L. REV. 863, 900 (1988) (stating that "a lawyer cannot conduct meaningful cross-examination without adequate preparation").

[25] *See* 18 U.S.C. § 3500(a).

[26] Despite the Act making no explicit reference to dismissal as a remedy for nondisclosure, "some courts interpret dismissal as a sanction to be considered in addition to striking the witness' testimony or declaring a mistrial." Olan G. Waldrop, Jr., *The Jencks Act*, 20 A.F. L. REV. 93, 102 (1978).

[27] 18 U.S.C. § 3500(d) requires sanctions "[i]f the United States elects not to comply with an order" to disclose. However, jurisdictions disagree about the meaning of the term "elect" in this provision. *Compare* United States v. Perry, 471 F.2d 1057 (D.C. Cir. 1972) (construing the term "elect" broadly, so that even negligent failure to produce material merits sanction) (accord United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971)); *with* United States v. Miranda, 526 F.2d 1319, 1324 (2d Cir. 1975) (stating "whether or not sanctions for nondisclosure should be imposed depends in large measure upon the extent of the Government's culpability for failure to make disclosable material available to the defense . . . ."). *See also* Waldrop, *supra* note 26, at 94 (writing in 1978 that after "twenty years of litigation, wide-spread disagreement still exists as to the scope of the Act and as to how to properly invoke its provisions").

of other key terms in the Act's language.[28] Finally, the disgraceful manner of the Act's passage exemplifies what can go wrong on Capitol Hill when legislation is motivated by blind fear and anger.[29]

The Jencks Act originated in a Supreme Court decision during the McCarthy era in American history.[30] The Court's decision in

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[28] *See* discussion *infra* Part V.C (discussing varying interpretations of the terms "statement" and "in the possession of the United States"). Disagreements still abound.

[29] *See* discussion *infra* Part I.B.

[30] This historical context is significant because the legislative justification for the Act was largely based on shielding government from the eyes of the public and maintaining the secrecy of aspects considered to be confidential. The period in American history known as "McCarthyism" and the "Second Red Scare" was marked by intense paranoia and national "hysteria" over the perceived threat of Communism, particularly within the government. *McCarthyism and the Red Scare*, U. VA. MILLER CTR., https://millercenter.org/the-presidency/educational-resources/age-of-eisenhower/mcarthyism-red-scare (last visited Mar. 14, 2023). At the height of this climate of fear, and with the urging of Senator Joseph McCarthy, the United States government "systematically engaged in the practice of public accusations . . . with little regard for evidence or unfair investigatory methods." Marc G. Pufong, *McCarthyism*, THE FIRST AMEND. ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/1061/mccarthyism. The American Heritage Dictionary defines "McCarthyism" as: (1) "The practice of publicizing accusations of political disloyalty or subversion with insufficient regard to evidence[; (2)] "The use of unfair investigatory or accusatory methods in order to suppress opposition." *The American Heritage Dictionary of the English Language*, HARPERCOLLINS*PUBLISHERS* (last visited Mar. 14, 2023), https://www.ahdictionary.com/word/search.html?q=McCarthyism. The "McCarthy tactics" employed by the government—questionable investigative practices and inadequate evidence—have been described as "witch hunts." *See McCarthyism / The "Red Scare",* DWIGHT D. EISENHOWER PRESIDENTIAL LIBRARY, MUSEUM & BOYHOOD HOME (last visited Mar. 14, 2023), https://www.eisenhowerlibrary.gov/research/online-documents/mccarthyism-red-scare. A natural consequence of this notorious practice was the government's need to keep as much of its case against those accused of communism (or who were suspected of otherwise being anti-government) obscure—the exact situation in *Jencks* that brought the case to the Supreme Court. Moreover, in 1956, FBI Director J. Edgar Hoover initiated a "secret counterintelligence program that initially targeted the U.S. Communist Party . . . " *See FBI Founded,* HISTORY (Jul. 23, 2021) https://www.history.com/this-day-in-history/fbi-founded. The question must be asked whether, if the legal issue in *Jencks* had arisen absent such a cultural fervor, we would have such a correspondingly unfortunate Congressional response as the Jencks Act.

Jencks v. United States[31] to require disclosure of witness statements to the defense caused widespread fear that criminal defendants would be given too much information about the federal government's law enforcement practices and that such deep insight would render law enforcement futile, leading to unbounded crime.[32] Shortly after the case was decided, Congress stepped in to limit government disclosure requirements during criminal prosecutions, lest the public gain access to government secrets, particularly investigative files and techniques.[33] If these fears ever could have justified limiting discovery in criminal cases, they no longer can.

The legislation that resulted is fundamentally unfair to criminal defendants: It widens the gap in power between prosecutor and advocate and contradicts the bedrock principles on which our criminal jurisprudence evolved. This Note argues for a repeal of the Jencks Act. In its place should be a carefully considered disclosure rule that aligns with the foundational goals and principles of our criminal justice system[34]—a rule that is both true to the roots of our adversarial system and reflective of the modern reality of government investigations and prosecutions.

Part I of this Note discusses the case of Clinton Jencks and the Supreme Court decision in his case that led to the Jencks Act. Part II discusses the Jencks Act in relation to other rules governing the government's disclosure obligations in federal criminal cases, particularly *Brady*,[35] *Giglio*,[36] and Rule 16 of the Federal Rules of Criminal Procedure.[37] Part III details a brief history of the American

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[31] Jencks v. United States, 353 U.S. 657 (1957).

[32] *See generally*, 103 CONG. REC. 15915 (1957) (discussing anticipated ill-effects of the *Jencks* holding which "would be harmful to the cause of good government").

[33] *See e.g.*, 103 CONG. REC. 16487 (1957) (stating that "the purpose of the [Jencks] bill is to protect the files of the Government against unwarranted disclosure").

[34] These goals and principles are helpfully demonstrated by other, more openhanded discovery rules and their histories. *See* discussion *infra* Part III.

[35] Brady v. Maryland, 373 U.S. 83 (1963).

[36] Giglio v. United States, 405 U.S. 150 (1972).

[37] FED. R. CRIM. P. 16; Since this Note focuses exclusively on a federal statute and the federal court system, use of the terms "defendant," "case," and "trial" will refer to those in the federal court system.

adversarial criminal justice system contrasted with the English inquisitorial system, so as to identify the philosophies and values underpinning the adversarial system. Part IV responds to three of the most common objections to broadening the scope of discovery in criminal trials. Finally, Part V discusses how the Jencks Act conflicts with the adversarial justice system and the principles on which it relies. The Note concludes that Congress should replace the Act with a rule that provides for pretrial disclosure of government witness material. The Jencks Act so tips the scales of justice against defendants that a rebalancing of our federal criminal procedure is necessary.

I. BORN IN SIN: THE HISTORY OF THE JENCKS ACT

The history of the Jencks Act is traced[38] to the 1957 Supreme Court case *Jencks v. United States*.[39] It is a history marred by confusion, fear, and hostility. First was the unjust treatment of Clinton Jencks—his conviction resulting from perjured testimony was upheld by the Fifth Circuit—until his case reached the Supreme Court.[40] Then there was Congress's hurried and superficial consideration of various bills, culminating in the knee-jerk passage of the Jencks Act.[41] The "disturbing manner in which the Jencks bill was passed" has been described as an "example of Congressional hysteria and irresponsibility."[42]

a. Jencks v. United States

In 1947, Clinton Jencks became an official with the International Union of Mine, Mill & Smelter Workers.[43] Earlier that year,

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[38] 2A CHARLES A. WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. CRIM. § 436 (4th ed. 2022).

[39] Jencks v. United States, 353 U.S. 657 (1957).

[40] Jencks v. United States, 226 F.2d 540 (5th Cir. 1955).

[41] For a comprehensive critique of the legislative history of the Jencks Act, *see* Arthur John Keeffe, *Jinks and Jencks – A Study of Jencks versus United States in Depth*, 7 CATH. U. L. REV. 91 (1958).

[42] *Id at 93.*

[43] Heather E. Williams, *Behind the Headlines, Beyond Jail Jencks Act Materials*, 41-APR ARIZ. ATT'Y 28, 30 (2005).

Congress had passed the Taft-Hartley Act, which required all union officers to avow to the National Labor Relations Board ("NLRB") that they were not and had never been members of the Communist Party.[44] On April 28, 1950, Jencks filed his "Affidavit of Non-Communist Union Officer" with the NLRB.[45] Three years later, he was indicted in federal court for making false statements to a government agency—the NLRB.[46] At trial, the prosecution relied on the testimony of two FBI informants—Harvey Matusow[47] and J.W. Ford.[48] Both men were members of the Communist Party and were paid by the FBI "contemporaneously to make oral or written reports" of Party activities.[49] The government's case did not include any direct evidence (e.g., evidence that Jencks's name appeared on a Party membership roster or that he carried a membership card); it rather consisted wholly of testimony.[50] Both Matusow and Ford testified to having submitted numerous reports to the FBI.[51] The defense sought to compel the government to produce those reports to the extent that they related to Matusow's and Ford's in-court testimony.[52] Among the material requested were "accountings of the money paid [to] these men, background records and their prior statements to FBI agents."[53] The district court denied the request.[54] Without the witnesses' prior statements, Jencks's counsel was

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[44] Dale Mineshema-Lowe, *Taft-Hartley Act of 1947 (1947)*, THE FIRST AMEND. ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/1050/taft-hartley-act-of-1947.

[45] Williams, *supra* note 43, at 30 (2005); *Jencks*, 353 U.S. at 657.

[46] *The Jencks Case*, 15 WASH. & LEE L. REV. 88, 88 (1958).

[47] Matusow, a former communist, became an aide to Senator Joseph McCarthy. Douglas Martin, *Harvey Matusow, 75, an Anti-Communist Informer, Dies*, N.Y. TIMES (Feb. 4, 2002) https://www.nytimes.com/2002/02/04/us/harvey-matusow-75-an-anti-communist-informer-dies.html.

[48] *See* Williams, *supra* note 43, at 31.

[49] Jencks v. United States, 353 U.S. 657, 659 (1957).

[50] *Id.* at 660.

[51] *Id.* at 665.

[52] *Id.*

[53] Williams, *supra* note 43, at 31.

[54] *Jencks*, 353 U.S. at 665.

unable to impeach their testimony, and Jencks was swiftly convicted.[55]

Following Jencks's conviction, Matusow, the government's principal witness, recanted his accusation of Jencks.[56] In 1955, he published the book *False Witness*, in which he admitted to perjuring himself in testifying that certain people were communists.[57] In fact, a chapter entitled "Witness for the Persecution" was devoted entirely to explaining his role in Jencks's conviction.[58]

While his appeal of the conviction was pending, Jencks filed a motion for a new trial on the ground that Matusow's recantation constituted newly discovered evidence.[59] After four days of testimony in March 1955, which included testimony from Matusow on behalf of Jencks, the district court denied his motion.[60] The court evidently was convinced that Matusow's trial testimony was the truth and his recantation the lie.[61] During the hearings, Jencks again sought the disclosure of Matusow's prior statements related to his trial testimony; these requests, too, were denied.[62] In October 1955, the Fifth Circuit affirmed Jencks's conviction as well as the denial of his motion for a new trial.[63] The Supreme Court granted certiorari.[64]

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[55] Williams, *supra* note 43, at 32. The jury took just 22 minutes to convict Jencks. *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Jencks*, 353 U.S. at 665, n.9. Matusow "recanted as deliberately false the testimony given by him at the trial." *Id.*

[60] Williams, *supra* note 43, at 32. *See also Texas Court Hears Matusow This Week*, N.Y. TIMES (Mar. 6, 1955).

[61] *See* Jencks v. United States, 226 F.2d 553, 554–55 (5th Cir. 1955). *See also U.S. Drops Case Against Jencks: Acts Reluctantly to Dismiss Its Suit*, N.Y. TIMES (Jan. 1, 1958), https://www.nytimes.com/1958/01/01/archives/u-s-drops-case-against-jencks-acts-reluctantly-to-dismiss-its-suit.html.

[62] *Jencks*, 353 U.S. at 666, n.10.

[63] Jencks v. United States, 226 F.2d 540 (5th Cir. 1955).

[64] For his part, Matusow was charged by the United States with perjury. However, the charge rested not on his initial false testimony that Jencks was a communist but rather on his later testimony that he had lied. Matusow had once remarked that he "would do anything for money." Williams, *supra* note 43, at 30–32 (citing *Notes Based On Reports to Jencks' Attorneys*, 1952, p. 1, Clinton Jencks

On June 3, 1957, the Supreme Court reversed Jencks's conviction.[65] Recognizing the critical importance "of statements of [a] witness recording the events before time dulls treacherous memory,"[66] Justice Brennan, writing for the majority, held that Jencks was "entitled . . . to inspect[] all reports of Matusow and Ford in [the government's] possession, [whether] written, [or if] orally made, as recorded by the F.B.I."[67] The Court acknowledged that because the defendant is in the best position to evaluate the significance and value of such reports to his defense, particularly for the "purpose of discrediting the Government's witness[,] . . . [justice] requires no less" than permitting the defendant the initial review of them.[68] In other words, witness statements were to be delivered not to the judge for a determination of relevance and value, but directly to the defense.[69]

The Court rejected the prosecutor's argument that such government material should be categorically privileged against disclosure because it often involves matters of national security,

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donated materials, MSS-137 CHICANO RSCH. COLLECTION, ARIZ. STATE UNIV. (1994)). In fact, during Jencks's trial, Matusow was "paid a witness *per diem* [and] earned expert witness fees for his testimony on how the Communist Party operated." *Id.* at 31–32. In his affidavit supporting Jencks's new trial motion, Matusow confessed: "When I learned that it was my testimony that was needed to indict Jencks—mine and mine alone—I was in my glory. This was big league stuff, and I was the star. Without me there was no game." *Id.* at 31. For all of this, he was convicted of perjury—for "lying about lying." *Id.* at 32.

[65] *Jencks*, 353 U.S. at 657. The Supreme Court ordered a new trial; however, the Department of Justice requested that the case be dismissed. *See U.S. Drops Case Against Jencks: Acts Reluctantly to Dismiss Its Suit*, *supra* note 61. "Federal sources . . . made it plain that the real reason behind the motion to dismiss was reluctance of the Justice Department to compel the F.B.I. to open its confidential files to defense attorneys." *Id.* In hearing the motion to dismiss, the judge, who presided over the trial, stated that, "this court thought [Jencks] was guilty then and thinks he is guilty now." *Id.* Further remarking that Matusow was incarcerated in a New York State penitentiary for his perjury conviction, the judge commented, "The defendant [Jencks] should be in the same kind of institution." *Id.*

[66] *Id.* at 667.

[67] *Id.* at 668.

[68] *Id.* at 668–69.

[69] *Id.*

confidentiality, and public interest.[70] For the Court, fairness to a defendant dictated that the government waive such privilege when it brings a prosecution.[71] In rejecting the government's argument, the Court quoted the 1944 Second Circuit decision in *United States v. Andolscheck*, in which Judge Learned Hand distinguished between permissible suppression of government documents in controversies between third parties and impermissible suppression in cases involving criminal prosecution.[72] Judge Hand asserted:

> While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully.[73]

In Justice Brennan's words, it would be "unconscionable to allow [the government] to undertake prosecution [against an accused] and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."[74] He felt so strongly about this that he ruled the prosecution "must be dismissed"

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[70] *Id.* at 669–71. Notably, this argument was not raised in the lower courts. *See id.*

[71] *Id.* at 671.

[72] *Id.* at 671–72.

[73] *Id.* at 671 (quoting United States v. Andolscheck, 142 F.2d 503, 506 (2d Cir. 1944)). Interestingly, Judge Hand had previously expressed opposition to liberal discovery in criminal trials. *See* United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923) ("Why . . . [the accused] should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see.").

[74] *Jencks*, 353 U.S. at 671.

where the government failed to produce this material,[75] i.e., to deny a defendant access to a prior statement made by a witness was reversible error.

The Court's holding that government witness material was to be given directly to the defense, rather than initially to the trial court for a determination of materiality,[76] was contentious. Justice Clark, the sole dissenter in the case, argued that it was far afield of any procedure yet known and indeed had not even been requested by the defense.[77] His blunt and alarmist dissent relied heavily on remarks made in 1950 by then FBI director J. Edgar Hoover.[78] Hoover had relayed fears that disclosure of FBI files could be "misinterpret[ed], . . . quoted out of context, . . . used to thwart truth, distort half-truths, and misinterpret facts"; he cautioned that if such material was "spread upon the record, criminals . . . and others would be forewarned and . . . thus defeat the very purposes for which the FBI was created."[79] On this basis, Justice Clark issued a dire, yet utterly baseless warning:[80]

> Unless Congress changes the rule announced by the Court today, those intelligence agencies of our Government in law enforcement may as well close up shop, for the Court has opened their files to the criminal and thus afforded him a Roman holiday for rummaging through their confidential information as well as vital national secrets.[81]

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[75] *Id.* at 672.

[76] *Id.* at 668–69 (holding "the defense must initially be entitled to see [witness reports] to determine what use may be made of them.").

[77] *Id.* at 680–81 (Clark, J., dissenting) ("This fashions a new rule of evidence which is foreign to our federal jurisprudence. . . . Even the defense attorneys did not have the temerity to ask for such a sweeping decision.").

[78] *Id.* at 682–83.

[79] *Id.* at 683 (Clark, J., dissenting).

[80] The dissent's warning was baseless because nowhere in the majority's opinion can be found even the suggestion of the Court's countenance of whole FBI files being turned over to the defense. To the contrary, the majority opinion clearly imposed materiality and relevance limitations on disclosure. The Court also noted its disapproval of "any broad or blind fishing expedition among documents possessed by the Government." *Id.* at 657, 667, 669.

[81] *Id.* at 682–83.

Baseless or not, Congress evidently took Justice Clark's comments to heart, because the very next day, the first of eleven Jencks bills was introduced in the House,[82] and just three months later, Congress enacted the Jencks Act.

b. The Jencks Act

18 U.S.C. § 3500—the Jencks Act—became law on September 2, 1957.[83] Records documenting the bill's journey through Congress reveal the rushed and flippant treatment the underlying issues received.[84] One aspect was clear—the bill was driven by fear and anger.[85] Law Professor Arthur Keeffe conducted an intensive analysis of the legislative history of the Act just one year after its enactment.[86] He concluded that the "manner of passage was a national disgrace . . . [it was] a bill to pack the Federal Criminal Rules. . . . To pass at the tag end of the session . . . so complicated a bill in such haste and without public hearing was inexcusable."[87] Professor Keeffe reported that although preliminary bills were superficially referred to subcommittees of the House and Senate Judiciary Committees, they did not comport with the traditional

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[82] Palermo v. United States, 360 U.S. 343, 346 (1959) (noting that "the day following [the Jencks] opinion, the House of Representatives was told that the decision in Jencks posed a serious problem of national security[,] . . . and H.R. 7915 . . . was introduced").

[83] Waldrop, *supra* note 26, at 93.

[84] *See generally* Keeffe, *supra* note 41.

[85] *See e.g.,*103 CONG. REC. 16469 (1957) (statement of Senator Byrd) (claiming that "[t]he Nation . . . regrets the actions of a Supreme Court which hands down political-social decisions which undermine our fundamental principles of government [and] . . . which open[] up FBI confidential files . . . ."). The New York Times reported that the reaction to the decision in Jencks v. United States was "unusually violent." Anthony Lewis, *High Court Target of the Jencks Bill*, N.Y. TIMES (Sep. 2, 1957), https://www.nytimes.com/1957/09/02/archives/high-court-target-of-the-jencks-bill-jencks-bill-laid-to-congress.html. Representative Francis Walter remarked that his proposed bill was "written in [the Attorney General's] shop by people who were terrified literally by [the Jencks v. United States] decision." *Hearing on H.R. 7915 Before the H. Comm. on the Judiciary*, 85th Cong. 12 (Jul. 2, 1957).

[86] Keeffe, *supra* note 41.

[87] *Id.* at 113.

procedures of bill passage—that is, there were no "hearings and report . . . [that] normally precede every enactment."[88] These procedures are of such import,[89] and justifiably so expected, that they have been called "the greatest protection the country has against crackpot legislation."[90] *Jencks v. United States* raised significant legal issues that affect all criminal defendants in federal court, and yet, contrary to normal congressional practice, no public hearings were held.[91] Senator Joseph Clark recalled that "no civic agency or any other persons were given an opportunity to testify."[92] Particularly eloquent was Representative Frank Coffin, who voiced his criticism on the House floor:

> In a near frenzy over the prospect of delay or acquittals during the next several months, we set ourselves the task of legislating a rule of court, during the last-minute rush of this session, without having conducted any hearings in depth, without seeking or gaining the reasoned advice of bench and bar. And, allowing only one hour of general debate, we expect to add to the dignity and effectiveness of our system of justice. The debate, short though it was, illuminated that the task we set ourselves was too much . . . This was not the way to proceed if we are to insure continued balance, practicability, and justice in these rules.[93]

Representative Sidney Yates echoed this sentiment, remarking of the bill that would ultimately pass: "It was hasty and far reaching,

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[88] *Id.* at 98.

[89] *See e.g.*, Betsy Palmer, CONG. RSCH. SERV., RL30548, *Hearings in the U.S. Senate: A Guide for Preparation and Procedure*, at *Summary* (2007) (writing that "congressional hearings are the principal formal method by which committees collect and analyze information during the legislative policymaking process"); Daniel Diermeier & Timothy J. Feddersen, *Information and Congressional Hearings*, 44 AM. J. OF POL. SCI. 51, 51 (Jan. 2000) (noting that "the importance of hearings has been acknowledged by Congressional scholars").

[90] Keeffe, *supra* note 41, at 98 (citing Senator Joseph Clark and Representative Sidney Yates).

[91] *Id.*

[92] *Id.* at 95.

[93] 103 CONG. REC. 16,124 (1957).

distorting the Federal Rules of Criminal Procedure without hearings, without the recommendation the Judicial Conference, without due regard to the possible impact the bill might have on orderly court procedure."[94] So impoverished was the legislative backdrop to passing the Act that Professor Keeffe concluded that "certain Congressmen did not [even] know what the *Jencks* case decided and what the bill was about."[95] With great foresight, Representative Coffin predicted: "The legislative cure is likely to prove a wonder drug leaving after effects worse than the ailment it seeks to remedy. . . . In times to come [the people of this country] will look back on this as an ill-advised attempt to pack the rules of our courts."[96]

The only witness testimony presented was that of members of the Department of Justice, "in support of their own bill."[97] Attorney General Herbert Brownell and Deputy Attorney General William Rogers "demanded legislation"[98] in what Senator Clark described as "a scare approach."[99] Scare approach, indeed: Less than one month after the Supreme Court's decision was issued, Brownell prepared for the House Judiciary Committee a statement in which he declared "a grave emergency in federal law enforcement" and implored Congress to pass legislation; "[o]therwise," warned Brownell, "serious harm will be done to federal law enforcement."[100] Brownell

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[94] 103 CONG. REC. 16,737 (1957).

[95] *See* Keeffe, *supra* note 41 at 94, n.10 (quoting remarks from Congressman Smith of Virginia, who mischaracterized the holding of *Jencks* in stating that the Court required "that F.B.I. reports should be produced for the scrutiny of the accused person." Congressman Smith at least had the courtesy to confess, "I am not too familiar with the effect of the bill itself." He was by no means alone.).

[96] 103 CONG. REC. 16,124–25 (1957).

[97] *See* Keeffe, *supra* note 41 at 98. *See also* Lewis, *supra* note 85 (reporting that "[t]he Judiciary committees of House and Senate heard only two Government witnesses before reporting out a bill in which the bar at large was vitally interested. No private attorney or other person was heard.").

[98] *See* Keeffe, *supra* note 41, at 96.

[99] *See* Keeffe, *supra* note 41, at 95.

[100] Att'y Gen. Herbert Brownell, Jr., *Statement for the Committee on the Judiciary, H.R.*, U.S. DEP'T OF JUST. (Jul. 2, 1957), https://www.justice.gov/sites/default/files/ag/legacy/2011/09/12/07-02-1957.pdf. Brownell insisted that without legislation, the decision in *Jencks* provided defendants with "an instructive course in how to evade federal law enforcement

also testified to this effect in person before the subcommittee.[101] The congressional proponents for the Jencks legislation relied heavily on Brownell's statement as well as Justice Clark's fearmongering dissent in the case.[102]

Members of Congress claimed that the "need for legislation" was widespread confusion as to exactly what the Supreme Court's holding in *Jencks* required.[103] Following the Court's decision, a range of interpretations as to what material defendants were entitled to emerged from district courts—interpretations that included "ordering the Government to hand over to the defense its entire case in advance of trial; ordering the production of entire investigative files and grand jury proceedings; and even ordering the release of convicted kidnappers when the Government objected to producing

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officers in the future." *Establishing Procedures for the Production of Government Records in Criminal Cases in United States Courts*: *Hearing Before the Subcomm. On Improvements In The Fed. Crim. Code of the Comm. on The Judiciary*, 85th Cong. 13 (Jun. 28, 1957) (statement of Herbert Brownell, Jr., Att'y Gen. of the United States).

[101] Waldrop, *supra* note 26, at 95. *See also Establishing Procedures for the Production of Government Records in Criminal Cases in United States Courts*, *supra* note 100; *Hearing on H.R. 7915 Before the H. Comm. on the Judiciary*, *supra* note 85 (statement of Herbert Brownell, Jr., Att'y Gen. of the United States).

[102] Keeffe, *supra* note 41, at 96.

[103] *See* 103 CONG. REC. 15,939 (1957); *see also Statement for the Committee on the Judiciary*, *supra* note 100, at 1 (declaring an "immediate need for legislation to clarify the procedure to be followed in applying [the *Jencks* case's] principle."). In an oral statement, Attorney General Brownell emphasized, "I think it is essential to take action immediately." *Hearing on H.R. 7915 Before the H. Comm. on the Judiciary*, *supra* note 101, at 3. However, certain Congressmen opposed legislation to begin with. Representative Lee Metcalf, for instance, counselled against legislation, arguing that any necessary amendments or clarifications to the rule announced in *Jencks v. United States* should originate through the crucible of the common law. On the House floor he argued that the "case for urgency has not been proven. The case for careful deliberation of such a matter as affects basic constitutional liberties is always with us." 103 CONG. REC. 16124 (1957). To Representative Metcalf, "The orderly way is to let the customary and traditional judicial process formulate the body of law around this decision, just as the law has been built around other decisions of the Supreme court and interpretations of procedural matters." *Id.*

its entire FBI file in the case."[104] The Attorney General's "grave emergency" was attributed to these "conflicting interpretations of the Jencks decision."[105] It was this "misinterpretation and misunderstanding of the Supreme Court decision in the *Jencks* case" that prompted Congress to create a clear law.[106]

The stated objectives of the bill were: (1) "to clarify the principle in the opinion handed down by the Supreme Court in [*Jencks v. United States*]"; and (2) "to provide for the orderly implementation of that principle. . . ."[107] It quickly became clear that the first objective was really intended to act as a limit on disclosure—i.e., to make perfectly clear that defendants were entitled only to those portions of a witness's statements that related to the witness's testimony.[108] The defense was not entitled, as the Court in *Jencks* conceded, to "any broad or blind fishing expedition" in the ocean of government files.[109] This necessarily meant that in order to determine the relevance of the statements, the witness would have to testify before any statements were turned over. The congressional debates over the proposed bills, bare though they were, revealed what many legislators feared would result from anticipated government over-disclosure, again echoing Hoover and Justice

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[104] 103 CONG. REC. 15,939 (1957). Neither party was immune to the confusion—to both government lawyers and defense counsel, it was unclear "when the reports should be delivered to the defense, i.e., before, during, or after trial, [and] the extent that the file should be turned over to the defense for purpose of testing credibility and impeaching the witness." 103 CONG. REC. 15937 (1957) (statement of Senator Everett Dirksen).

[105] *See* Waldrop, *supra* note 26; *see also* 103 CONG. REC. 15,936 (1957) (statement of Senator Everett Dirksen).

[106] *See* 103 CONG. REC. 15,915 (1957) (statement of Senator Joseph O'Mahoney) ("Because of the confusion which has arisen with respect to the meaning of the Jencks opinion it is essential that Congress now, by legislation, provide a legislative confirmation of the holding . . . "). *Id.*

[107] 103 CONG. REC. 15,938 (1957). *See also U.S. Drops Case Against Jencks: Acts Reluctantly to Dismiss Its Suit*, *supra* note 61 ("The Supreme Court's decision led Congress to enact a statute aimed to restrict its scope . . . .").

[108] *See, e.g.,* 103 CONG. REC. 15916 (1957) (statement of Senator Joseph O'Mahoney) (arguing that while due process requires that the defense be permitted inspection of witness reports, "it does not mean that the defense should also be permitted to roam at large through the files of the Government whether in the FBI or elsewhere.").

[109] Jencks v. United States, 353 U.S. 657, 667 (1957).

Clark: "the danger of disclosure of FBI files[;] the possible danger of the exposure of the FBI enforcement techniques[; and the] possible disclosure of the confidential sources on which the Federal Bureau of Investigation must rely. . . ."[110] Accordingly, in order to narrow the scope of material that is disclosed to defendants, the Act explicitly restricts compelling the disclosure until after the government witness has testified so as to ensure that the disclosure is closely related to the witness's testimony.[111]

c. The Act's Provisions

The simplicity and brevity of the congressional treatment of the Jencks Act is mirrored by the statute itself—it contains just four provisions and a single definition.[112] The heart of the Act is the first provision, which sets forth the limitation on a defendant's access to government witness material:

> In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena [sic], discovery, or inspection until said witness has testified on direct examination in the trial of the case.[113]

The second provision provides that, once the witness testifies at trial, if the defendant so moves, the court "shall order" the production of any statement by that witness that "relates to the subject matter" of the witness's testimony.[114] The final substantive

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[110] 103 CONG. REC. 15919 (1957) (statement of Senator Everett Dirksen).

[111] 18 U.S.C. § 3500(a).

[112] *See* 18 U.S.C. § 3500.

[113] 18 U.S.C. § 3500(a).

[114] 18 U.S.C. § 3500(b) states: "After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use."

provision sets forth the remedy for the government's failure to abide by an order to disclose: "the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared."[115] Lastly, the Act defines the term "statement."[116]

II. THE ACT IN CONTEXT

The Jencks Act sets forth one of several rules that govern discovery in federal criminal cases. Equally important are Federal Rule of Criminal Procedure 16,[117] *Brady*,[118] and *Giglio*.[119] Examining the Act in relation to these other rules reveals its anomalous nature.

a. Rule 16, Brady*, and* Giglio

Rule 16 of the Federal Rules of Criminal Procedure ("Rule 16") is the primary source of pretrial discovery.[120] It entitles the defendant to copies of "any relevant written or recorded statement"

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[115] 18 U.S.C. § 3500(d) states: "If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared."

[116] 18 U.S.C. § 3500(e) defines "statement" for purposes of the statute to mean: "(1) a written statement made by said witness and signed or otherwise adopted or approved by him; (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or (3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury."

[117] FED. R. CRIM. P. 16.

[118] Brady v. Maryland, 373 U.S. 83 (1963).

[119] Giglio v. United States, 405 U.S. 150 (1972).

[120] *See generally*, 5 WAYNE R. LAFAVE ET AL., CRIM. PROC. § 20.1(c) (4th ed. 2021).

he[121] made to an individual whom he knew to be a government agent, and if he made no physical record, he is entitled to the "substance" of any notes taken by government agents of those statements.[122] The defendant is further entitled to a copy of his criminal record,[123] as well as the results of any physical or mental examination if it would be "material to preparing the defense or [if] the government intends to use [it] . . . at trial."[124] Perhaps most important, the defendant has a right to any "books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if . . . the item is material to preparing the defense; the government intends to use the item in its case-in-chief at trial; or the item was obtained from or belongs to the defendant."[125] Lastly, the government must produce a written summary of any testimony of expert witnesses that the government intends to use at trial.[126] Rule 16, particularly the 'catch-all' provision (E) and the provision covering government expert witnesses, drives toward affording the defendant fairly comprehensive pretrial disclosure.[127] However, the rule contains an express limitation: It "does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made . . . in connection with investigating or prosecuting the case," other than those made in connection with a statement made by the defendant, and it does not authorize the disclosure of statements made by government witnesses.[128]

The *Brady* Rule, first announced by the Supreme Court in *Brady v. Maryland*,[129] requires the government to produce evidence that is favorable to the defense if it is material to culpability or

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[121] For clarity, this Note refers to abstract individuals as "he" or "she." This is not intended to disparage people who are nonbinary or who identify with other pronouns.

[122] FED. R. CRIM. P. 16(a)(1)(A)–(B).

[123] FED. R. CRIM. P. 16(a)(1)(D).

[124] FED. R. CRIM. P. 16(a)(1)(F).

[125] FED. R. CRIM. P. 16(a)(1)(E).

[126] FED. R. CRIM. P. 16(a)(1)(G).

[127] FED. R. CRIM. P. 16.

[128] FED. R. CRIM. P. 16(a)(2).

[129] Brady v. Maryland, 373 U.S. 83 (1963).

sentencing.[130] In *Brady*, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution."[131] In explaining the rationale for removing a requirement of scienter from finding a constitutional violation, the Court analogized the withholding of exculpatory evidence from a defendant to a prosecutor's relying on testimony known to be perjured, and noted the long-recognized prohibition on the latter.[132] In subsequent cases, the Supreme Court refined the *Brady* rule and expanded defendants' rights under it.[133] For instance, *Kyles v. Whitley* removed any obligation on a defendant to request *Brady* material—the "prosecution has an affirmative duty to disclose evidence favorable to the defendant."[134] The Court asserted:

> Unless . . . the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government cannot simply avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result.[135]

Finally, *Giglio v. United States* broadened the *Brady* rule to encompass evidence that could be used to impeach government witnesses.[136]

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[130] *See generally*, U.S. DEP'T OF JUST., Just. Manual § 9–5.000 (updated Jan. 2020).

[131] *Brady*, 373 U.S. at 87.

[132] *Brady*, 373 U.S. at 86 (citing Mooney v. Holohan, 294 U.S. 103 (1935) and Pyle v. Kansas, 317 U.S. 213 (1942)).

[133] *See, e.g.,* United States v. Bagley, 473 U.S. 667 (1985) (rejecting any difference between exculpatory evidence and impeachment evidence for purposes of Brady); United States v. Agurs, 427 U.S. 97, 110 (1976) (noting that in certain situations, "elementary fairness requires" evidence to be disclosed even absent a specific request); Kyles v. Whitley, 514 U.S. 419 (1995).

[134] *Kyles*, 514 U.S. at 431.

[135] *Id.* at 439.

[136] Giglio v. United States, 405 U.S. 150, 154 (1972) (citing Napue v. Illinois, 360 U.S. 264, 259 (1959)) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general [Brady] rule."). In 1985, the Court reaffirmed

However, other cases effectively limited *Brady*, for instance by defining materiality narrowly.[137] In *Weatherford v. Bursey*, the Court stressed that a prosecutor is not obliged to turn over the entirety of his evidence.[138] Her disclosure obligations are limited to favorable evidence that is material to the defense.[139] To determine "materiality," the Supreme Court adopted a "reasonable probability" standard.[140] Evidence is material to the defense "only if there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different."[141] The Supreme Court in *United States v. Bagley* noted that a finding of materiality may be easier or harder depending on the nature of the nondisclosure; for instance, it may be easier in cases where specific requests are neglected, and harder in cases involving a failure to disclose in the absence of a specific request.[142] Where specific evidence is requested, the prosecutor "is put on notice of its value" to the defense, and its nondisclosure will lead the defense to make important pretrial and trial decisions based on the justified assumption that the evidence does not exist.[143] If it is later discovered that the prosecutor was aware that the evidence did exist, the reviewing court must consider "any adverse effect that the prosecutor's failure to respond might have had on the preparation or

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Giglio's holding, explicitly stating that "impeachment evidence . . . falls within the *Brady* rule. Such evidence is 'evidence favorable to an accused.'" United States v. Bagley, 473 U.S. 667, 676 (1985) (quoting Brady v. Maryland, 373 U.S. 83, 87 (1963)).

[137] *See, e.g.,* United States v. Agurs, 427 U.S. 97 (1976); *see also,* United States v. Bagley, 473 U.S. 667, 679 (1985).

[138] Weatherford v. Bursey, 429 U.S. 545, 559 (1977) (stating that "there is no general constitutional right to discovery in a criminal case").

[139] Kristen Schimpff, *Rule 3.8, The Jencks Act, and How the ABA Created a Conflict Between Ethics and the Law on Prosecutorial Disclosure*, 61 AM. U. L. REV. 1729, 1736 (2012).

[140] *See Bagley*, 473 U.S. at 667. The test was first articulated by the Court in Strickland v. Washington 466 U.S. 668 (1984).

[141] "A 'reasonable probability' is a probability sufficient to undermine the confidence in the outcome." *Bagley*, 473 U.S. at 682.

[142] *Id.* at 682–83.

[143] *Id.* at 683.

presentation of the defendant's case."[144] Indeed, the Supreme Court in *United States v. Agurs* stressed that "when the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable."[145] Whatever the reason for nondisclosure—whether prosecutorial neglect or malice—the reviewing court has the difficult job of hypothesizing post-trial the course that the defense and the trial would have taken had the evidence been available to the defense.[146]

Also noteworthy is the lack of any explicit guidance with respect to the timing of disclosure, although the Department of Justice apparently recommends that *Brady* material be produced prior to trial.[147] A final limitation on *Brady* is that in the case of a violation, a new trial may be appropriate only if the withheld evidence was material to the issue of guilt, but not of punishment.[148]

The Jencks Act presents another issue of timing when it overlaps with the *Brady* and *Giglio* doctrines. In situations where the material overlaps, i.e., where exculpatory material, possibly including impeachment material, is included within Jencks Act witness statements, it is not obvious which rule should govern the timing of disclosure.[149] This is a significant oversight by rule makers, considering the very purpose of the Jencks Act is to provide the defense material potentially useful for impeachment. The Court of Appeals for the First Circuit recognized, but did not resolve, this "issue about the interplay between the prejudice prong of

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[144] Adverse effects may include the abandonment of avenues of "independent investigation, defenses, or trial strategies that [the defense] otherwise would have pursued." The Court acknowledged that the pretrial and trial decisions made in reliance on such a misrepresentation would "impair the adversary process." *Id.* at 668.

[145] United States v. Agurs, 427 U.S. 97, 106 (1976).

[146] *Bagley*, 473 U.S. at 683.

[147] Due process requires that "disclosure of exculpatory and impeachment evidence material to guilt or innocence be made in sufficient time to permit the defendant to make effective use of that information at trial." U.S. DEP'T OF JUST., *supra* note 130 (quoting United States v. Coppa, 267 F.3d 132, 142 (2nd Cir. 2001)).

[148] This is so because where evidence that could have influenced the determination of guilt was withheld, the due process of the entire trial is questioned. *Agurs*, 427 U.S. at 106.

[149] Schimpff, *supra* note 139, at 1738.

the *Brady* disclosure requirements and the government's obligations under the Jencks Act . . . to disclose evidence only at certain times."[150] Courts are divided on this issue. Some jurisdictions hold that the Jencks Act controls, and therefore that even the *Brady* material need not be disclosed until during trial.[151] Other jurisdictions conclude that *Brady* material needs to be disclosed pursuant to the *Brady* doctrine—that is to say, disclosed "in time for its effective use at trial"—independent of any overlap with the Jencks Act.[152]

Together, Rule 16, *Brady,* and *Giglio* afford the defendant access to a substantial portion of the evidence and some insight into the government's case against him.[153] As noted above, Rule 16 alone requires the government to turn over much material that it intends to

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[150] United States v. Casas, 356 F.3d 104, 108 (1st Cir. 2004).

[151] *See, e.g.*, United States v. Jones, 612 F.2d 453, 455 (9th Cir. 1979) ("When the defense seeks evidence which qualifies as both Jencks Act and Brady material, the Jencks Act standards control."); United States v. Presser, 844 F.2d 1275, 1283 (6th Cir. 1988) ("If impeachment evidence is within the ambit of the Jencks Act, then the express provisions of the Jencks Act control discovery of that kind of evidence."); United States v. Scott, 524 F.2d 465, 467 (5th Cir. 1975) (holding that prosecutor's failure to disclose a witness's exculpatory statement before trial did not violate *Brady*, because such evidence falls under the ambit of the Jencks Act, and "the rule announced in *Brady* . . . was not intended to override the mandate of the Jencks Act").

[152] *See, e.g.*, United States v. Poindexter, 727 F.Supp. 1470, 1485-86 (D.C. Cir. 1989) (asserting that "*Brady* obligations are not modified merely because they happen to arise in witness statements"); United States v. Jacobs, 650 F.Supp.2d 160, 171 (D. Conn. 2009) ("If the statements made by the co-conspirators are material within the meaning of *Brady* and its progeny, it is not enough that they 'will be provided in accordance with the Jencks Act.'" The government's "*Brady* obligations trump the Jencks Act."); United States v. Rittweger, 524 F.3d 171, 181, n.4 (2nd Cir. 2008) ("Complying with the Jencks Act, of course, does not shield the government from its independent obligation to timely produce exculpatory evidence under *Brady*—a constitutional requirement that trumps the statutory power of 18 U.S.C. § 3500.").

[153] It is imperative to remember, though, that there is neither a constitutional right to general discovery, nor a uniform, specified timeframe for disclosure. *See* Weatherford v. Bursey, 429 U.S. 545, 559 (1977) (stating that "there is no general constitutional right to discovery in a criminal case"); *see also* FED. R. CRIM. P. 16 advisory committee's note to 1993 amendment ("Although no specific timing requirements are included, it is expected that the parties will make their requests and disclosures in a timely fashion.").

use at trial or which may be material to the defense, including summaries of anticipated testimony from its expert witnesses.[154] Justification for such disclosures has roots in the philosophies and moral theories that formed the foundation of our criminal justice system.

III. THE ADVERSARIAL CRIMINAL JUSTICE SYSTEM

The United States has an adversarial system of justice, as opposed to an inquisitorial system, as is found in much of continental Europe,[155] because it was viewed by early Americans as a more fair and effective method of discovering the truth.[156] To understand why, it is useful to examine the evolution of the American adversarial system in juxtaposition to England's inquisitorial system.[157] Comparing the two systems brings the foundational values of the adversarial system to the fore.[158]

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[154] *See* FED. R. CRIM. P. 16.

[155] *See generally* Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 NW. U. PRITZKER SCH. OF L. J. OF CRIM. L. & CRIMINOLOGY 118 (1987).

[156] Evidence scholar John Henry Wigmore, for instance, regarded cross-examination—the defining feature of the adversarial process—as "beyond any doubt the greatest legal engine ever invented for the discovery of truth." *See* David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1644 (2009); *see also* Monroe H. Freedman, *Our Constitutionalized Adversary System*, 1 CHAP. L. REV. 57, 73 (1999) (claiming "the available evidence suggests that the adversary system is the method of dispute resolution that is most effective at determining truth . . . ").

[157] Indeed, some scholars advocate studying the contrast between the two models as a means to inform our treatment of the adversarial model. *See* Sklansky, *supra* note 156, at 1635. "A broad and enduring theme of American jurisprudence treats the Continental, inquisitorial system of criminal procedure as epitomizing what our system is not; avoiding Inquisitorialism has long been thought a core commitment of our legal heritage . . . [it is] an idealized system against which we define our own." *Id.*

[158] Professor Sklansky has acknowledged a "broad consensus that the inquisitorial system can and should serve as a kind of negative polestar for American criminal procedure." *Id.* at 1638.

a. A Brief History of the Adversarial and Inquisitorial Systems

Until the 1730s, English law severely limited the role of attorneys, particularly for the defendant, in criminal cases.[159] For serious crimes, the prosecution, but not the defendant, was permitted a lawyer.[160] However, typically neither party was represented by a lawyer; the victim of a crime represented herself against the accused perpetrator, who represented himself, and the judge actively participated in and directed all aspects of the trial,[161] including, according to then-popular belief, acting as defense counsel.[162] However, the judge's role as defense counsel was limited to "protecting defendants against 'illegal procedure, faulty indictments, and the like'"; judges did not "formulate a defense or act as advocates."[163] Any questioning of witnesses was performed by the judge, and, in his role as prosecutor, the judge also directly questioned the defendant, who had no right to silence.[164]

Law Professor Randolph Jonakait describes such trials as "duels of wit between the defendant and the judge."[165] These practices were justified by the belief that questioning the accused directly was the best method of discovering the truth and that defense counsel would act merely as an obstruction to the very goals of trial.[166] In the early eighteenth century, legal scholar William Hawkins was an important

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[159] Randolph N. Jonakait, *The Rise of the American Adversary System: America Before England*, 14 WIDENER L. REV. 323, 324–25 (2009).

[160] John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 264, 282 (1977–1978).

[161] *See* Jonakait, *supra* note 159.

[162] *See* Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L. J. 77, 83 (1995).

[163] *Id.* at 83, n.24–26; *see also* Langbein, *supra* note 160, at 308.

[164] Jonakait, *supra* note 162, at 85.

[165] *Id.*

[166] *See id.* at 83; *see also* John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 Mich. L. Rev. 1047, 1053 (1993–1994); *see, e.g.,* Moran v. Burbine, 475 U.S. 412, 468 (1986) (Stevens, J., dissenting) (distinguishing the role of lawyers as "a nettlesome obstacle to the pursuit of wrongdoers" in the inquisitorial system, from "an aid to the understanding and protection of constitutional rights," in the accusatorial system).

proponent of this ideology.[167] Hawkins argued that "the defendant needs no counsel . . . because if the defendant is innocent, he will be as effective as any lawyer," while on the other hand, "the very Speech, Gesture and Countenance, and Manner of Defense of those who are Guilty, when they speak for themselves, may often help disclose the Truth, which would not so well be discovered from the artificial Defense of others speaking for them."[168] Thus, the system was designed to encourage defendants to either incriminate themselves or exonerate themselves.

In the 1730s, the role of defense counsel began to expand.[169] Defense lawyers were increasingly permitted, and while "still prohibited from addressing the jury [and] arguing about facts, were allowed to undertake some cross-examination."[170] This revolutionized the trial; until then, trials rarely focused on the guilt or innocence of defendants—instead focusing solely on the appropriate punishment.[171] With the emergence of cross-examination, the emphasis of trial began to shift to testing the strength of the government's evidence.[172] Nevertheless, it was still uncommon for criminal defendants to be represented by counsel until after the 1780s,[173] and the limited role of defense counsel persisted until 1836 when the English Parliament passed the

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[167] *See* Langbein, *supra* note 166, at 1052–53 (noting that the classic justifications for "deliberately denying the defendant assistance of counsel in matters of fact appear[] in the second volume of . . . Hawkins's hugely influential treatise, *Pleas of the Crown*, first published in 1721").

[168] *Id.* at 1053; *see also* Langbein, *supra* note 160, at 308 (quoting Roger North writing in 1742: "Criminals of that Sort, should not have any Assistance in Matters of Fact, but defend upon plain Truth, which they know best, without any Dilatories, Arts or Evasions.").

[169] It is not entirely clear why. One theory suggests that judges began to perceive a detrimental shift in the courtroom balance between defendants and prosecutors. *See* Jonakait, *supra* note 162, at 87, n.45.

[170] Jonakait, *supra* note 159.

[171] Jonakait, *supra* note 162, at 88–9.

[172] *See* John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View From the Ryder Sources*, 50 U. CHI. L. REV. 1, 130 (1983) (noting that the "decision to allow defense counsel to cross-examine prosecution witnesses brought about or facilitated a series of major structural changes in the criminal trial," including "counsel's role [in] testing the prosecution case . . . ").

[173] Jonakait, *supra* note 159, at 326.

Prisoners' Counsel Act,[174] which at last gave defendants the right to a full defense.[175] With full involvement of defense counsel, the trial transformed from a "*de facto* sentencing hearing" into an inquiry designed to determine guilt.[176] This transformation was due in large part to the advent of cross-examination.[177] Cross-examination was "a mechanism that offered the broadest latitude for the development of persuasive proof with a minimum of restrictions,"[178] and, importantly, enabled an accused to present a defense without directly participating in his trial.[179]

American criminal jurisprudence evolved in stark contrast to its English counterpart.[180] Early in American legal history, defense counsel was not merely permitted but was guaranteed.[181] Moreover, as there was representation for the accused, so there was for the accuser—even before the American Revolution, private prosecutions in America had been all but replaced by the office of

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[174] For an analysis of the Prisoners' Counsel Act of 1836, *see* Cerian C. Griffiths, *The Prisoners' Counsel Act 1836: Doctrine, Advocacy and the Criminal Trial*, 4 UNIV. OF PLYMOUTH L. CRIME & HIST. 28 (2014).

[175] Jonakait, *supra* note 159, at 326.

[176] *See* Jonakait, *supra* note 162, at 89–90.

[177] *See, e.g.*, Stephan Landsman, *Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 496, 535–36 (1990) (noting that "[o]ver the course of the [eighteenth] century, counsel most particularly developed the art of interrogating adverse witnesses. . . . Cross-examination had become a sufficiently effective tool that defense counsel appeared to rely on it alone in a number of cases.").

[178] *Id.*

[179] Jonakait, *supra* note 162, at 89.

[180] For a comprehensive argument that the American right to counsel was not brought over from the English courts, but rather was conceived of independently by early American settlers, *see* Jonakait, *supra* note 162.

[181] *See* Jonakait, *supra* note 159, at 327, n.16–17 (2009) ("A number of colonies even before the Revolution permitted defense counsel in ordinary criminal cases[, and] shortly after Independence, twelve of the then thirteen states guaranteed that the accused could be represented by counsel."). *See also* Jonakait, *supra* note 162, at 90 (recounting that the American Sixth Amendment existed prior to the described shifts in the English system); Massaro, *supra* note 24, at 868 (observing that the "notion that an accused should be entitled to confront his or her accusers was widely recognized in American colonies during the early eighteenth century").

public prosecutor.[182] Thus, with counsel playing a prominent role on both sides, the ideological underpinnings of American criminal jurisprudence differed from those of the early English system, which "pitted individual against individual."[183]

One inspiration for the adversarial system in early America was the drive to limit all government power.[184] The adversarial system's replacement of the hierarchical English inquisitorial prosecution with a more judicially balanced three-party contest "was yet another layer in the many-tiered American system of checks-and-balances."[185] The office of public prosecutor sat within the executive branch of government, wholly apart from the judicial branch.[186] The primary focus of trial on the issue guilt was an effect of the settlers' fear of tyrannical jailing. However, as prosecution by the government became more common, the respective roles of the court and the prosecutor were conflated—the notion of courts as a separate entity was strained and confused because, after all, courts were "instruments of the government."[187]

In consequence of the perceived imbalance in contests between the government—understood to be comprised of the prosecutor and the court—and the defendant, additional safeguards against judicial and prosecutorial power emerged, mainly in the form of individual rights.[188] Among these safeguards were the "provisions to

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[182] Jonakait, *supra* note 162, at 99.

[183] *Id.* at 98.

[184] *See id.* at 100.

[185] An inquisitorial jurisprudence, where representation for the parties played little or no role and the judge wielded considerable power, was antithetical to the American ideal of separating powers. *See id.*; *see, e.g.*, Blakely v. Washington, 542 U.S. 296, 313 (2004) (asserting no doubt that "the Framers' paradigm for criminal justice" was not the inquisitorial, "but the common-law ideal of limited state power accomplished by strict division of authority . . . ").

[186] *See, e.g.*, *Guide to Federal Court and Legal Terms*, OFF. OF U.S. ATT'YS DISTR. OF MASS. (last updated Apr. 16, 2021).

[187] *See* Jonakait, *supra* note 162, at 102–3.

[188] *See id.* at 103–4; *see also* William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. UNIV. L. Q. 279, 280 (1963) (clarifying the common misunderstanding that these individual rights were designed simply to make conviction more difficult. "[T]he Framers of the Constitution were not 'soft on criminals.' These safeguards are checks upon

constitutionalize juries, the increasing restrictions placed on a judge's authority to comment on evidence, and the prohibitions placed on appeals of facts."[189] Most important, however, was the increasing prevalence of defense counsel cross-examining adverse witnesses, because this practice "stripped judges of their exclusive control over the presentation and challenging of evidence, and judicial influence over fact-determination lessened."[190] Cross-examination provided defense counsel the ability to control vital aspects of the accused's defense: "Through cross-examination, defense counsel could present his theory of the case, refute an opponent's claims, develop favorable proof, discredit opposing witnesses, and generally advance his client's position before the jury."[191]

b. The Sixth Amendment

These developments in early American jurisprudence demonstrate that a core tenet of the young system was the right of the defendant to cross-examine witnesses. Cross-examination was seen as the most effective method of obtaining reliable evidence.[192] In 1794, a North Carolina court remarked, "It is a rule of the common law, founded on natural justice, that no man shall be prejudiced by evidence which he had not the liberty to cross examine."[193] In the early 1800s, William Blackstone, although English, was a prominent proponent of cross-examination. "The confronting of adverse witnesses," wrote Blackstone,

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government—to guarantee that government shall remain the servant and not the master of us all.").

[189] Jonakait, *supra* note 162, at 104–5.

[190] *See id.* at 105. The growing importance of cross-examination during this time is evidenced further by the growing concern over hearsay. *See* Jonakait, *supra* note 159, at 335. Professor Langbein has written that the "doctrinal basis of the hearsay rule was to promote cross-examination." *Id.* Even today, inquisitorial systems are generally considered to have "weaker exclusionary rules than those of the U.S." Marvin Zalman & Ralph Grunewald, *Reinventing the Trial: The Innocence Revolution and Proposals to Modify the American Criminal Trial*, 3 TEX. A&M L. REV. 189, 217 (2015).

[191] Landsman, *supra* note 177, at 535.

[192] *See* Jonakait, *supra* note 159, at 338. *See also* Sklansky, *supra* note 156.

[193] *Id.* at 339 (quoting State v. Webb, 2 N.C. (1 Hayw.) 103 (N.C. 1794)).

> is another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial. . . . by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness.[194]

The importance of cross-examination did not escape the attention of the Framers.[195]

With ratification in 1791, the Sixth Amendment concretized an important ideal that had emerged in early American criminal jurisprudence: cross-examination was an indispensable element of the American system of law. History tells that the First Congress did not debate "or even question" whether to include the Confrontation Clause in the Bill of Rights.[196] This resulted in a criminal procedure constitutionally guaranteed to permit "the accused [to] truly test and challenge the government's case."[197] Confrontation was, and still is, an essential component of the defendant's ability to do just that.[198] Justice O'Connor once wrote that the Supreme Court has

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[194] Jonakait, *supra* note 162, at 97 n.96.

[195] The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. *See also* Jonakait, *supra* note 159, at 353 n.126 (asserting that this history of the inspirations for the Sixth Amendment is critical to understanding the Framers' intent behind the Bill of Rights).

[196] Massaro, *supra* note 24, at 867; Jacqueline Miller Beckett, *The True Value of the Confrontation Clause: A Study of Child Sex Abuse Trials*, 82 GEO. L. REV. 1605, 1608 (1994) (noting that the "lack of debate proves that confrontation was intended to be a cornerstone of American jurisprudence").

[197] Jonakait, *supra* note 159, at 354 n.130.

[198] *See* Jonakait, *supra* note 162, at 114. Justice Stewart, writing for the Supreme Court in 1970, asserted that "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact (has) a satisfactory basis for evaluating the truth of the prior statement.'" Dutton v. Evans, 400 U.S. 74, 89 (1970) (quoting California v. Green, 399 U.S. 149, 161 (1970)). As recently as 2022, the Supreme Court called the Confrontation Clause "[o]ne of the bedrock constitutional protections afforded to criminal defendants." Hemphill v. New York, 142 S. Ct. 681, 690 (2022).

"recognized . . . that face-to-face confrontation enhances the accuracy of factfinding. . . ."[199] Thus, in contrast to the English inquisitorial system of the time, both representation and confrontation were central to the American adversarial system.[200]

While the prevalence of defense lawyers progressively grew and their role expanded, the practicality of a strong defense was hindered still by the virtual prohibition on discovery in criminal cases in both England and America at the time.[201] In a 1792 case in England, Lord Kenyon, in denying the defendant's request for a report from a body that had investigated him, declared that permitting the request "would subvert the whole system of criminal law."[202] The attitude toward criminal discovery was not much different in the United States.[203] Representative of the then-popular view is that enunciated by a Minnesota Appellate Court in 1912, which wrote: "[I]f the practice be once adopted that an indicted person is entitled to be furnished with some evidence in the possession of the county attorney, where is the line to be drawn?"[204] Yet the more discovery defense counsel has, the more effective can his representation be.

c. Discovery in Criminal Cases

The scope of discovery has consistently elicited debate among legal scholars, particularly in the context of criminal cases.[205] Some believe that the system advantages defendants because of the individual rights it provides them; others believe it favors the prosecution because of the immense power and resources of the federal government.[206] Those in the former camp perceive the

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[199] Maryland v. Craig, 497 U.S. 836, 846 (1990).

[200] *See* Jonakait, *supra* note 162, at 109.

[201] *See generally* Jerry E. Norton, *Discovery in the Criminal Process*, 61 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 11 (1970).

[202] *Id.* at 11–12 (quoting King v. Holland, 4 Durn. & East 691, 100 Eng. Rep. 1248 (K.B. 1792)).

[203] *See id.*

[204] *Id.* at 13 (quoting State *ex rel.* Robertson v. Steele, 135 N.W. 1128, 1129 (Minn. 1912). The opinion cites Kind v. Holland, 4 Durn. & East 691, 100 Eng. Rep. 1248 (K.B. 1792)).

[205] *See id.* at 11.

[206] *Id.*

parties in the adversary process to have roughly equal abilities, so that the constitutional rights afforded the defendant tip the balance in his favor.[207] Thus, according to this view, expanding discovery would unfairly prejudice the prosecution. Those in the latter group view the system as an inherently unbalanced contest "between the state with its immense investigatory resources and an often poor and uneducated defendant."[208] This group reasons that expanding discovery is a fair method of bringing the parties into balance and is consistent with the existing process; i.e., it would require very little to implement.

Discovery was virtually non-existent until the twentieth century.[209] It was generally feared that liberal discovery would result in defendants' perjury and witnesses' reluctance to testify.[210] However, similar fears had arisen at every proposed expansion of civil discovery as well and had never materialized.[211] Then, throughout the latter half of the twentieth century this attitude changed. Rule 16 was adopted in 1946 as a framework for producing discovery.[212] It was revised several times, each revision broadening its scope, until the current version was adopted in 1975.[213] The Supreme Court expressed the increasing approval of discovery in 1966, noting "the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice."[214] It is confounding, in light of

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[207] *Id.*

[208] *Id.*

[209] *Id.* at 12–13.

[210] The Supreme Court of New Jersey famously articulated these concerns in a 1953 murder case. *See,* State v. Tune, 98 A.2d 881, 884 (N.J. 1953) ("[T]he criminal who is aware of the whole case against him will procure perjured testimony in order to set up a false defense[, and] . . . may take steps to bribe or frighten [witnesses] into giving perjured testimony or absenting themselves so that they are unavailable to testify. Moreover, many witnesses . . . will be reluctant to come forward with information during the investigation of the crime.").

[211] *See, e.g., Tune*, 98 A.2d at 894 (Brennan, J., dissenting)

[212] *See* WAYNE R. LAFAVE ET AL., *supra* note 120.

[213] *Id.*

[214] Dennis v. United States, 384 U.S. 855, 870–71 (1966). The Court further acknowledged "the expanding body of materials, judicial and otherwise, favoring disclosure in criminal cases analogous to the civil practice." *Id.*

this realization, why such strong resistance to expansive discovery should continue.

IV. THREE ARGUMENTS AGAINST EXPANDING DISCOVERY IN CRIMINAL CASES

Three particular objections are invariably raised when the issue of expanding discovery in criminal cases is discussed.[215] Those objections concern perjury, witness tampering, and reciprocal discovery obligations.[216] The perjury argument is that a defendant who is privy to enough detail of the case against him will tailor his testimony to counteract the evidence.[217] Similarly, the intimidation argument is that a defendant who knows the identity of a government witness prior to trial will interfere with the witness.[218] The reciprocal discovery argument asserts that because the defendant cannot be compelled to disclose the entirety of his evidence—due to constitutional protections such as the Fifth Amendment's right against self-incrimination—the government ought not be forced to disclose the entirety of its evidence.[219] While there is some appeal to these arguments, none of them offers a persuasive challenge to allowing pretrial discovery of witness statements.

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[215] *See e.g.*, 5 WAYNE R. LAFAVE ET AL., CRIM. PROC. § 20.1(b) (4th ed. 2021); Paul R. Rice, *Criminal Defense Discovery: A Prelude to Justice or an Interlude for Abuse*, 45 MISS. L.J. 887, 896 (1974).

[216] *See, e.g.*, WAYNE R. LAFAVE ET AL., *supra* note 215. Other arguments have been put forward. *See, e.g.,* Brian P. Fox, *An Argument Against Open-File Discovery in Criminal Cases*, 89 NOTRE DAME L. REV. 425, 428 (2013) ("Open-file discovery would cause more harm than good by creating a situation in which prosecutors could overwhelm defense counsel with evidence . . . and frustrate defense counsel's ability to locate and synthesize critical evidence."). However, the three arguments highlighted appear to be the most common and forceful challenges to broad discovery in criminal cases.

[217] *See id.*

[218] *See id.*

[219] *See id.*

a. The Perjury Argument

Opponents of broad discovery in criminal cases argue that pretrial disclosure of government evidence would encourage perjury by the defendant and that indeed, as the amount of discovery rises, with it rises the incidence of perjury.[220] They argue that the more detail of the government's case a defendant was aware of prior to trial, the more easily and effectively he could "tailor his testimony."[221] In many cases, perfectly tailored testimony would effectively nullify the value of government witnesses. While it is true that by the time a defendant testifies, he has already heard the testimony of the government's witnesses, pretrial discovery would provide the defendant "more time to skillfully plan his fabrication."[222] Some opposition to pretrial discovery on perjury grounds makes predictions more dire than the mere potential for increased rates of perjury, claiming that perjury is virtually a certainty. The most famous statement to this effect was made by Chief Justice Vanderbilt of the New Jersey Supreme Court. In *State v. Tune*, Justice Vanderbilt asserted that

> long experience has taught the courts that often discovery will lead not to honest fact-finding, but on the contrary to perjury and the suppression of evidence. Thus, the criminal who is aware of the whole case against him *will often procure perjured testimony* in order to set up a false defense.[223]

In addition to dismissing such claims as a negation of the fundamental principle that every defendant is presumed to be innocent until proven guilty, proponents of broad discovery reject the contention that there exists a link between the amount of

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[220] *See, e.g.*, WAYNE R. LAFAVE ET AL., *supra* note 120; Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228, 228–29 (1964); Edward J. Imwinkelried, *The Worst Surprise of All: No Right to Pretrial Discovery of the Prosecution's Uncharged Misconduct Evidence*, 56 FORDHAM L. REV. 247, 264 (1987); Rice, *supra* note 215.

[221] *See* WAYNE R. LAFAVE ET AL., *supra* note 215.

[222] *Id.*

[223] State v. Tune, 98 A.2d 881, 884 (N.J. 1953) (emphasis added).

disclosed material and defendants' perjury.[224] Justice Brennan famously (and repeatedly) referred to this argument as an "old hobgoblin," and declared that he "cannot be persuaded that [it] supports the case against criminal discovery."[225] Contrary to the empty assertions made by Justice Vanderbilt in *State v. Tune,* argued Justice Brennan, experience has actually taught the courts that the floodgates of perjury do not burst with expanding discovery and that this "fallacy" was "exposed through the extensive and analogous experience in civil causes where liberal discovery has been allowed."[226] In fact, suggested Justice Brennan, the opposite is true: "Liberal discovery, far from abetting, actually deters perjury and fabrication."[227] Indeed, in the civil context, broad discovery is not only permitted, but is justified by the claim that it helps reduce perjury.[228] The widespread perjury feared when various expansions to civil discovery were contemplated[229] never came to pass; "no discernible increase in the incidence of perjury in civil cases . . . occurred."[230] So too, in the criminal context, discovery can

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[224] *See, e.g.*, Rice, *supra* note 215, at 896–99; WAYNE R. LAFAVE ET AL., *supra* note 215.

[225] Brennan, *supra* note 188, at 291. Actually, Justice Brennan may owe credit for this term to Professor of Law Edson Sunderland, who, in 1933, referred to perjury as a "legal hobgoblin." He also called it "one of the great bugaboos of the law." Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 867–68 (1933).

[226] Brennan, *supra* note 188, at 291; *see also Tune*, 92 A.2d at 894 (Brennan, J., dissenting) ("That old hobgoblin perjury, invariably raised with every suggested change in procedure . . . is again disinterred from the grave where I had thought it was forever buried under the overwhelming weight of the complete rebuttal supplied by our experience in civil causes where liberal discovery has been allowed.").

[227] Brennan, *supra* note 188, at 291 (citing William H. Speck, *The Use of Discovery in United States District Courts*, 60 YALE L. J. 1132 (1951)).

[228] *See* F.T.C. v. Sharp, 782 F.Supp. 1445, 1452 (D. Nev. 1991) (noting that "the Federal Rules [of Civil Procedure] contemplate that there be 'full and equal discovery in advance of trial' so as to prevent surprise, prejudice, and perjury"); *accord* Nationwide Life Ins. Co. v. Richards, 541 F.3d 903, 910 (9th Cir. 2008)).

[229] Sunderland, *supra* note 225, at 867 ("Every change in procedure by which the disclosure of truth has been made easier has raised the spectre of perjury to frighten the profession.").

[230] Imwinkelried, *supra* note 220, at 265.

be broadened "without that defeat of justice through perjury foretold by the prophets of doom."[231]

In any event, the potential for perjury must always be balanced against the benefits of broadening discovery—including society's interest in ensuring that the criminal justice system is as fair as possible. The cure to the evils of perjury is not to prohibit discovery at all, "for that will eliminate the true as well as the false";[232] the aim should be to identify perjury where it exists and act accordingly at that time. The mere "possibility that a dishonest accused will misuse such an opportunity" argued Dean Wigmore, "is no reason for committing the injustice of refusing the honest accused a fair means of clearing himself. That argument is outworn; it was the basis (and with equal logic) for the one-time refusal . . . to allow the accused to produce any witnesses at all."[233] The potential for abuse ought not condemn the device.[234]

b. The Witness Intimidation Argument

Opponents of broad discovery also argue that disclosing evidence procured by witnesses would result in defendants tampering with those witnesses, harming the prosecutions and even jeopardizing witnesses' safety. Although the prevalence of witness

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[231] Brennan, *supra* note 188, at 291. Various arguments have been put forth for the proposition that civil and criminal cases are of such different character that discovery in each cannot be compared in this way. However, these arguments are unpersuasive and easily rebutted. *See* WAYNE R. LAFAVE ET AL., *supra* note 120. Justice Brennan also notes the "slanderous suggestion" embedded in the perjury argument, "that the defense bar cannot be trusted." Brennan, *supra* note 188, at 291.

[232] Brennan, *supra* note 188, at 291.

[233] *Id.* (quoting 6 JOHN WIGMORE, EVIDENCE § 1863, at 488 (3d ed. 1940)).

[234] David W. Louisell, *The Theory of Criminal Discovery and the Practice of Criminal Law*, 14 VAND. L. REV. 921, 924 (1961). *See also* Cash v. Super. Ct. In & For Santa Clara Cnty., 346 P.2d 407, 408 (Cal. 1959) (explaining that "although there is a possibility that a defendant may be . . . seeking to acquire advance knowledge of the details of the prosecution's case with a view to shaping his defense accordingly, such a possibility is subordinate in importance to the danger of convicting the innocent . . . ").

tampering is hard to determine,[235] to deny its existence would be a mistake; therefore, it must be considered when evaluating the merits of expanding discovery.[236] The argument against revealing government witnesses to the defense is that it will enable defendants to "disrupt the judicial process with intimidation and threats," and might cause witnesses to be less willing to step forward in criminal investigations."[237] Thus, maintaining the secrecy of witness identities is vital to successful government prosecution.

Notwithstanding the legitimate problem that witness tampering presents where it exists, the potential for it to occur cannot fairly justify the complete withholding of witness statements in all criminal cases. Like perjury, the potential for witness tampering also exists in civil cases. And just as evidence from civil practice has demonstrated that perjury is more phantom than reality, so too has it shown that witness tampering is more myth than fact.[238] This is

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[235] Teresa M. Garvey, *Witness Intimidation: Meeting the Challenge*, AEQUITAS (2013), https://aequitasresource.org/wp-content/uploads/2018/09/Witness-Intimidation-Meeting-the-Challenge.pdf ("Accurate statistics on witness intimidation are hard to come by . . . The studies that have been done have involved samples of victims and witnesses in a single jurisdiction over a discrete period of time."); *see also*, Brendan O'Flaherty & Rajiv Sethi, *Witness Intimidation*, 39 U. CHI. J. LEGAL STUD. 399, 425 (2010) (concluding "[e]mpirical data on witness intimidation are scarce.").

[236] Research is sparce, but a 1988 study showed "astonishing levels" of witness intimidation in courts in the Bronx, New York: "36 percent of victims and witnesses said they had been threatened, [and] 57 percent of those who had not been explicitly threatened feared reprisals." O'Flaherty & Sethi, *supra* note 235, at 400. And there may be reason to suspect witness tampering has increased with the digital age. *See generally,* Margaret O'Malley, *Witness Intimidation in the Digital Age*, *THE* PROSECUTOR (2014), http://ndaa.org/wp-content/uploads/witness-intimidation-part_II.pdf.

[237] Fox, *supra* note 215, at 449. The author astutely observes, however, that the witness's identity will be revealed to the defendant at trial regardless. Where a testifying witness does not fear post-trial reprisal, or even peri-trial harassment, what reason is there to believe she would have so strongly feared such treatment pre-trial, so as to warrant concealing her identity? Such a witness would likely be willing to testify regardless of whether her identity was disclosed to defense counsel before trial.

[238] *See* Rice, *supra* note 215, at 901 ("As with the prediction of perjury, this prediction, with respect to crimes that have been reported, is not supported in fact."); *see also* WAYNE R. LAFAVE ET AL., *supra* note 120 (noting that in 2020, when the ABA adopted its open-file discovery guidelines, it was relying in part

evidenced by the far more open discovery permitted in civil cases. Certain states are demonstrating this fact in the criminal context, too, as some have broadened the pretrial discovery to which defendants are entitled. For instance, New York recently amended its laws to require government disclosure of the names of and contact information for "*any* person who has relevant information regarding the case," with certain exceptions made in particular, narrow cases, and "statements by any person with relevant information, regardless of whether the person will be called as a witness at trial and including witnesses to be called in any pretrial hearing," and these materials must be produced "as soon as practicable, but *no later than 35 days* [*after arraignment*] if the defendant is out of custody."[239] There has been no reported rise in perjury or witness tampering in New York since the discovery procedures were amended to the foregoing. Moreover, opponents of revealing witness identities do not claim that all defendants would interfere with witnesses once identified.

Furthermore, there are effective ways of mitigating against the potential for witness tampering, a determination of the likelihood that it will occur should therefore be made on a case-by-case basis and the scope of disclosure should be informed by that determination. The government should have the burden of overcoming a presumption in favor of disclosure by showing that its witnesses will likely be interfered with. The court can then determine an appropriate compromise between the defendant's

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on data from "[j]urisdictions with liberal discovery provisions," which "had not shown any ill effects stemming from perjury or intimidation. They had not experienced a higher acquittal rate, nor a higher rate of prosecutions for perjury or attempts to tamper with witnesses."). For the A.B.A.'s updated guidelines, *see Fourth Edition (2020) of the ABA Standards for Criminal Justice: Discovery*, A.B.A. (last visited Mar. 27, 2023), https://www.americanbar.org/groups/criminal_justice/standards/discovery-fourth-edition/.

[239] Krystal Rodriguez, *Discovery Reform in New York: Major Legislative Provisions*, DATA COLLABORATIVE FOR JUST., (May 2022), https://www.innovatingjustice.org/sites/default/files/media/document/2022/Discovery_NY_Revised_0622_2.pdf (emphasis in original).

constitutional interest in knowing the full extent of the accusations against him and the safety of witnesses and integrity of the trial.[240]

Courts have various methods of reducing the likelihood of witness tampering that are less drastic than the absolute withholding of witness evidence. A court can issue a protective order controlling dissemination of the material.[241] A protective order can also act as a "scalpel," limiting the information contained in the disclosure.[242] The court could, for instance, order the redaction of identifying information while allowing the disclosure of the witness statements *in substantia*. Having "knowledge of the other details, the defense can take appropriate steps to prepare for trial."[243] This would afford the defense more discovery than it is currently entitled to. Indeed, protective orders are relied upon in civil cases for just this purpose; they "serve the vital function of 'secur[ing] the just, speedy, and inexpensive determination of civil disputes by encouraging full disclosure of all evidence that might conceivably be relevant'."[244] In extreme cases, where the witness is identifiable and her safety or the integrity of the trial are potentially jeopardized, there are many protective police measures available.

There may be no perfect solution to the problem of witness tampering in all cases. A protective order "does not eliminate the possibility of witness intimidation. Balanced against the defense's pressing need for discovery, however, this speculative possibility

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[240] Imwinkelried, *supra* note 220, at 271–72. Judges routinely make such calculations in bail hearings, where they must formulate a compromise between a defendant's liberty and due process interests and the safety of the public. *Id.*

[241] *See* Andrea Kuperman, *Case Law on Entering Protective Orders, Entering Sealing Orders, and Modifying Protective Orders*, COMM. ON R. OF PRAC. & PROC., at 1 (updated Jul. 2010), https://www.uscourts.gov/sites/default/files/caselaw_study_of_discovery_protective_orders_1.pdf (discussing various factors courts consider in issuing protective orders and stating that often "courts must maintain flexibility in analyzing requests for protective orders, . . . [and] the proper factors to consider will vary depending on the circumstances of each individual case."). Courts also have broad discretion to modify existing protective orders. *Id.*

[242] Imwinkelried, *supra* note 220, at 271.

[243] *Id.* at 273.

[244] S.E.C. v. Merrill Scott & Assocs., Ltd., 600 F.3d 1262, 1272 (10th Cir. 2010) (alteration in original) (quoting Martindell v. Int'l Tel. & Tel. Corp., 594 F.2d 291, 295 (2d Cir. 1979)).

supplies an insufficient basis for denying the defense discovery."[245] The best approach is to tailor pretrial discovery related to witnesses to the individual circumstances presented by each defendant in each case, and protective orders are just one means by which courts can effectively do this.[246]

c. The Reciprocal Discovery Argument

The reciprocal discovery argument against liberal government discovery is grounded on the premise that a system of disclosure cannot be fair without mutuality, which is not possible in the criminal setting because of a defendant's constitutional privileges.[247] Admittedly, there is an imbalance between the parties' respective disclosure obligations.[248] The Federal Rules of Criminal Procedure, in addition to requiring evidentiary disclosures by the government, require them of the defendant as well.[249] Rule 16 imposes on the defendant a reciprocal discovery obligation if the defendant obtained discovery from the government.[250] Expressly excluded from this obligation are statements made by defense witnesses or prospective witnesses, and those made by the defendant himself.[251] Additionally, Rule 26.2—which implements the Jencks Act—imposes the disclosure burden on both sides. Thus, after a defense witness has testified, the defense must produce any statements made by that witness that is in its possession if the government moves to obtain them.[252]

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[245] Imwinkelried, *supra* note 220, at 272.

[246] *See id.*; WAYNE R. LAFAVE ET AL., *supra* note 120 ("When the ABA moved to its open file discovery proposal, it did so on the ground that state experience with broad discovery provisions had shown that the protective order alone, without any limitations on categories of discoverable materials, was adequate to guard against misuse.").

[247] Louisell, *supra* note 234, at 924.

[248] *See* Rice, *supra* note 215, at 896.

[249] *See* FED. R. CRIM. P. 16(b); 26.2.

[250] FED. R. CRIM. P. 16(b).

[251] Every person is constitutionally protected against being made a witness against himself by the Fifth Amendment. U.S. CONST. amend. V.

[252] FED. R. CRIM. P. 26.2(a) provides: "[A]fter a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, must order . . . the defendant and the defendant's attorney

Broadening the government's discovery obligation meets the objection that doing so would be unfair to the government because the defendant's reciprocal disclosure obligations are necessarily far lower than the government's.[253] Because of certain protections conferred to the defendant by the Constitution—and absent for the prosecution—discovery can never truly be reciprocal, and yet for discovery to be a fair and effective means of facilitating the revelation of truth, it needs to be a "two-way street."[254] Since the defendant's protections enable "him to maintain the element of surprise at trial,"[255] allowing him even more discovery would merely further disadvantage the prosecution.[256] Justice Vanderbilt, in *State v. Tune*, expressed this concern as well: In denying the defendant access "to the work product of the opposing lawyer," the court found it "clear" that where the more expansive discovery in civil procedure does not permit disclosure of certain material, "there is even more reason for withholding such documents in criminal

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to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony."

[253] By virtue of his constitutional rights. *See* Rice, *supra* note 215, at 903.

[254] WAYNE R. LAFAVE ET AL., *supra* note 215.

[255] Rice, *supra* note 215, at 896 (noting that all defendants in criminal cases are "protected from conviction unless proven guilty beyond a reasonable doubt, cannot be compelled to testify against themselves, and generally must be found guilty by a unanimous jury"); *see also* WAYNE R. LAFAVE ET AL., *supra* note 215.

[256] *See, e.g.*, United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923). Judge Learned Hand wrote: "Under our criminal procedure the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence; he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure, and make his defense, fairly or foully, I have never been able to see. No doubt grand juries err and indictments are calamities to honest men, but we must work with human beings and we can correct such errors only at too large a price. Our dangers do not lie in too little tenderness to the accused. Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream. What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime."

proceedings."[257] Why this is clear, the court does not adequately explain. Nor does Justice Vanderbilt offer a satisfactory explanation for why police department records should be treated similarly to privileged attorney work-product.

The reciprocal discovery objection is a meritless distraction from the goals of trial in the first place. It is a symptom of treating trial as purely sport, and it diverts attention away from the trial as an investigation into the truth.[258] "To deny production on the ground that an imbalance would be created between the advantages of the prosecution and defense would be to lose sight of the purpose of a trial, which is the ascertainment of the truth. . . ."[259] The objection lacks merit because even if an expansion of government disclosure obligations would provide the defendant an advantage—a contentious proposition itself—this would be consistent with the justice system the Framers established. In a criminal prosecution, the burden of persuasion rests with the government. It is the government that must persuade the fact-finder that its accusation is true. To accomplish that goal, it may introduce evidence. If the prosecutor fails to convince the fact-finder that her theory is, beyond all reasonable doubt, true, then the fact-finder must find for the defendant. It is the accuser, the party with the *onus probandi*, that must present the evidence it is relying on to substantiate its accusation. The defendant, in contrast, has no burden of persuasion, and therefore—notwithstanding reciprocal discovery obligations—it makes little sense to require him to produce evidence.[260] If a

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[257] The court continued, "If there is no right to the kind of documents sought here in civil cases, where discovery practice exists, in the absence of injustice or undue hardship, there is certainly more reason for withholding such documents from inspection in criminal causes. Therefore, confessions, investigation reports and statements of witnesses obtained in a criminal prosecution might well be . . . granted protection against inspection by the defense in advance of trial." State v. Tune, 98 A.2d 881, 886 (N.J. 1953) (quoting State v. Bunk, 63 A.2d 842, 845 (Essex Cnty. Ct. N.J. 1949).

[258] *See generally* Brennan, *supra* note 188.

[259] Cash v. Super. Ct. In & For Santa Clara Cnty., 346 P.2d 407, 408 (Cal. 1959).

[260] Note that this is not necessarily the case where a defendant asserts an affirmative defense. *See, e.g.*, Martin v. Ohio, 480 U.S. 228 (1987) (holding that a state law requiring self-defense to be proved by the defendant, rather than its absence to be proved by the prosecution, was constitutionally permissible). "The

prosecutor lacks sufficient evidence to sustain her claim such that she requires evidence in the possession of the defendant, the prosecutor simply cannot bring the case to begin with. Our justice system's foundational principle that a defendant is *innocent until proven guilty* means that it is the affirmative duty of the government to carry its case and equally that it is the defendant's right not to act. The system is designed to test the prosecution's case in order to minimize overzealous prosecuting. The relationship between the prosecuting government and the accused individual is such that it can never be, and should never be, a "two-way street."

V. CRITICISM OF JENCKS

The importance of both cross-examination and discovery in American criminal procedure cannot be overstated.[261] America's jurisprudential history establishes the indispensable nature of confrontation to the adversarial system of justice.[262] Without the opportunity to learn what a witness alleges—and without the attached ability to examine those allegations face-to-face—the system does not work.[263] It warrants reemphasizing, then, that the Jencks Act obstructs access to those very allegations—the

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common-law rule was that affirmative defenses . . . were matters for the defendant to prove. 'This was the rule when the Fifth Amendment was adopted, and it was the American rule when the Fourteenth Amendment was ratified.' . . . [A]ll but two of the States, Ohio and South Carolina, have abandoned the common-law rule and require the prosecution to prove the absence of self-defense when it is properly raised by the defendant." *Id.* at 235–36 (quoting Patterson v. New York, 432 U.S. 197, 203 (1977)). However, this fact does not affect the analysis of what evidence the government should be required to disclose in *its* case. At most, this supports an argument for stronger reciprocal disclosure obligations in certain limited circumstances.

[261] Both Wigmore and Jeremy Bentham regarded cross-examination as the "great . . . contribution of the Anglo-American system of law to improved methods of trial-procedure." Sklansky, *supra* note 156, at 1644.

[262] *See* U.S. CONST. amend. VI.

[263] *See* Landsman, *supra* note 177, at 535 ("The fundamental expectation of an adversarial system is that out of a sharp clash of proofs presented by litigants in a highly structured forensic setting will come the information upon which a neutral and passive decision maker can base a satisfying resolution of the legal dispute.").

statements made by witnesses for the prosecution. In order for our system of justice to live up to the true meaning, intent, and philosophy underpinning the Sixth Amendment's Confrontation Clause,[264] it cannot permit witness statements to be withheld from a defendant until after his trial has begun.

Witness material is a critical component of a prosecutor's case.[265] The Jencks Act functions as a barrier between it and the defendant, thereby conflicting with that fundamental principle of confrontation that the Founders so valued. Compounding the flaw that this barrier represents are other serious flaws. First and foremost, the Act is prejudicial to defendants because it fosters an overly competitive adversarial process that prioritizes winning over discovering the truth, which encourages trial-by-surprise tactics by the government. Moreover, the unfairness inherent in this process is greatly exacerbated in certain contexts, such as plea negotiations. Second, the Act contains provisions that elicit markedly different interpretations in different jurisdictions and permit too much judicial and prosecutorial discretion. Third, the Act fails to serve one of its original purposes by engendering, rather than reducing, confusion and inefficiency in the courts.

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[264] The Confrontation Clause of the Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

[265] *See, e.g.*, NAT'L INST. OF JUST., OFF. OF JUST. PROGRAMS, U.S. DEP'T OF JUST., EYEWITNESS EVIDENCE: A GUIDE FOR L. ENF'T iii (1999) (acknowledging "eyewitnesses frequently play a vital role in uncovering the truth about a crime); *see also How Reliable Are Eyewitnesses?*, CONST. RTS. FOUND., https://www.crf-usa.org/bill-of-rights-in-action/bria-13-3-c-how-reliable- are-eyewitnesses (last visited Mar. 13, 2023) (claiming that witness testimony is a "prominent" feature of our criminal justice system, and "[b]eyond providing a strong basis for arrest, eyewitness testimony has great impact in the courtroom.") *and Victims and Witnesses: Understanding Your Rights and the Federal Court System*, U.S. ATT'YS OFF., DISTR. OF N.J., https://www.justice.gov/usao-nj/victim-witness/handbook (last updated Jan. 19, 2023) (asserting "[t]he federal criminal justice system cannot function without the participation of . . . witnesses.").

a. Trial By Surprise

A primary purpose of discovery is to avoid surprise at trial,[266] and the Jencks Act frustrates that goal. The adversarial system succeeds at uncovering truth when the opposing parties are both aware of the evidence—the party that makes the most compelling argument with respect to that evidence prevails.[267] Adherents of this ideology advocate moving the trial away from a win-at-any-cost cage fight and more toward an open and equal proceeding.[268] Or, as Justice Douglas phrased it, "to make trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[269]

The pretrial phase of a criminal case is dedicated to the gathering of evidence.[270] Both sides seek to "become familiar with the facts of the crime, talk to the witnesses, study the evidence, anticipate problems that could arise during trial, and develop trial strategy."[271] However, the government's ability to accomplish many of these

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[266] *See, e.g.*, 5 WAYNE R. LAFAVE ET AL., CRIM. PROC. § 20.3(m) (4th ed. 2021) ("The major portion of defense discovery focuses on avoiding "trial by surprise" by giving the defense advance notice of the evidence that the prosecutor intends to use at trial"); *see also How Courts Work*, A.B.A. (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/discovery/#:~:text=Discovery%20enables%20the%20parties%20to,time%20to%20obtain%20answering%20evidence ("Discovery . . . is designed to prevent 'trial by ambush,' where one side doesn't learn of the other side's evidence or witnesses until the trial, when there's no time to obtain answering evidence.").

[267] *See, e.g.,* Freedman, *supra* note 156, at 57–8 (explaining "the adversarial system resolves disputes by presenting conflicting views of fact and law to an impartial and passive arbiter, who decides which side wins what."). For this to work, both sides must have the same sets of fact and law with which to work; otherwise, their arguments will simply miss each other.

[268] *See, e.g.*, WAYNE R. LAFAVE ET AL., *supra* note 120 (summarizing positions on both sides of the "discovery debate").

[269] United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958). Justice Brennan referred to trials with limited discovery as "sporting event[s]" rather than a "quest[s] for truth." *See* Brennan, supra note 188.

[270] *Discovery*, OFF. OF THE U.S. ATT'Y, https://www.justice.gov/usao/justice-101/discovery (last visited Mar. 13, 2023).

[271] *Id.*

goals is far greater than the defense's.[272] The prosecutor has "domination of the criminal justice system and . . . [a] virtual monopoly of the fact-finding process," according to Professor Gershman.[273] And "[m]ore than any other party in the criminal justice system, the prosecutor has superior knowledge of the facts that are used to convict the defendant, exclusive control of those facts, and a unique ability to shape the presentation of those facts to the fact-finder."[274] Discovery ameliorates the defendant's handicapped position by allowing the defense to benefit from the government's disproportionate fact-gathering abilities. Yet, the Jencks Act permits the prosecutor to withhold certain crucial evidence—namely, evidence procured by witnesses.[275] A 1988 survey revealed that approximately 77,000 prosecutions are brought each year based on eyewitness testimony.[276] Further studies show that mistaken eyewitness identifications and testimony account for roughly sixty-nine percent of all wrongful convictions in the United

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[272] *See* Norton, *supra* note 201, at 13–14 (arguing that "law enforcement agencies are at a distinct advantage in obtaining evidence"). "First, the law enforcement agency is often at the scene of the crime shortly after its commission. While at the scene, the police have better access to witnesses with fresher recollections. They are authorized to confiscate removable evidence. In addition, the financial and investigatory resources of law enforcement agencies permit an extensive analysis of all relevant evidence. The defendant has the option of hiring a private [i]nvestigator. However, the investigator will probably get to the scene long after the occurrence of the crime and after the police have made their investigation and removed' all relevant physical evidence. The defendant's investigator may have difficulty viewing the scene if it is on private property. Witnesses may be less accessible; their recollections will probably be less precise. Indeed they may choose not to cooperate at all with the defendant's investigator." However, it may all be irrelevant if, as is often the case, the defendant is unable to afford an investigator or is incarcerated pending trial. The defendant is helpless to cope with the uncooperative witness while the prosecutor has numerous means to compel testimony. The uncooperative witness can be subpoenaed to appear before the grand jury and required to testify, again without the presence of the defense. The defense cannot, usually, discover the grand jury minutes." *Id.*

[273] Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 314 (2001).

[274] *Id.* at 314–15.

[275] *See* 18 U.S.C. § 3500 (a).

[276] *How Reliable Are Eyewitnesses?*, *supra* note 265.

States.[277] This would not be the case if defendants had an adequate opportunity to inspect the substance of these witnesses' testimony prior to trial. Moreover, pretrial inspection might help to avoid trial completely if the defendant could show flaws in the witness testimony—a result that should be desired by both sides and the court.[278]

b. The Effect of the Act on Negotiating a Plea

The unfairness created by the Jencks Act's "surprise factor" is exacerbated in the context of plea bargaining. The vast majority of federal criminal defendants plead guilty.[279] The Supreme Court recently recognized America's culture of plea bargaining in *Lafler v. Cooper*, writing that "criminal justice today is for the most part a system of pleas, not a system of trials."[280] Indeed, writes Carissa Hessick, "our's is a system of *pressure* and pleas, not truth and trials."[281] Hessick dedicates an entire chapter in her book, *Punishment Without Trial: Why Plea Bargaining Is A Bad Deal*, to

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[277] *Eyewitness Identification Reform: Mistaken Identifications Are the Leading Factor In Wrongful Convictions*, INNOCENCE PROJECT (last visited Mar. 13, 2023); *see also How Reliable Are Eyewitnesses?*, *supra* note 265 (estimating the figure at around fifty percent).

[278] *See, e.g.*, Rice, *supra* note 215, at 897–98: "[D]isclosure has brought about favorable results which have furthered, rather than defeated, the ends of justice. It has decreased the likelihood of trial . . . because defendants were able to find from knowledge rather than conjecture what the state's case consisted of, thereby removing the element of bluffing and encouraging both sides to bargain for a satisfactory solution."). This is a favorable result for both sides because the prosecutor has an interest in pursuing cases only that he believes will result in conviction, to avoid wasteful expense of both prosecutorial and court resources. Therefore, if a key witness in the government's case is shown to be detrimental to his case, the prosecutor may decide to forgo trial, even if to investigate more.

[279] In 2021, 98.3% of offenders pled guilty, a rate that "has been consistent for more than 20 years." *Fiscal Year 2021: Overview of Federal Criminal Cases*, U.S. SENT'G. COMM'N, at 8 (Apr. 2022); *see also* Missouri v. Frye, 566 U.S. 154, 143 (2012) (discussing the ubiquity of guilty pleas in the federal courts).

[280] Lafler v. Cooper, 566 U.S. 156, 169–70 (2012); *see also* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1033 (2006) (claiming trials are "anomalies, not the norm").

[281] CARISSA BYRNE HESSICK, PUNISHMENT WITHOUT TRIAL: WHY PLEA BARGAINING IS A BAD DEAL 9 (2021) (emphasis added).

describing how "the process is the punishment" and is designed to pressure defendants into pleading guilty.[282] Plea bargaining is so prevalent that it has been called "a defining, if not the defining, feature" of our criminal justice system.[283] It is therefore crucial, when evaluating any proposed modification of the criminal justice process, to analyze its effect on the plea process.

Critics of America's plea bargaining culture denounce what is in their view a system that threatens defendants and punishes those who exercise their constitutional right to a trial.[284] It is no secret that those who reject plea offers and are convicted after trial are more likely to receive harsher sentences than those who plead.[285] Indeed, the government's "offer" to a defendant when plea bargaining is typically the chance to "reduce his exposure to a more lengthy sentence."[286] To some, this is a permissible means of maximizing government and court efficiency; to others it is a coercive infringement on the individual's right to a trial.[287]

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[282] *Id.* at 89.

[283] Lindsey Devers, *Plea and Charge Bargaining: Research Summary*, BUREAU OF JUST. ASSISTANCE, 1 (Jan. 24, 2011), https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf.

[284] *See id.* at 3. Dr. Devers separately notes that defendants who are black are less likely than white defendants to receive plea offers of reduced crimes in the first place—a separate failure of the plea bargain culture. *See id.* at 1–3.

[285] *Id.* at 3. Proponents of this phenomenon claim that the system must offer defendants an incentive to plead to keep the courts from being overwhelmed. *Id.* at 1.

[286] OFF. OF THE U.S. ATTY'S, *Plea Bargaining*, U.S. DEP'T OF JUST., https://www.justice.gov/usao/justice-101/pleabargaining (last visited Mar. 14, 2023); s*ee also* Barkow, *supra* note 280, at 1034 (arguing that "plea bargaining pressures even innocent defendants to plead guilty to avoid the risk of high statutory sentences" and defendants who lose after a trial "receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes").

[287] *See, e.g.*, Tina Wan, *The Unnecessary Evil of Plea Bargaining: An Unconstitutional Conditions Problem and A Not-So-Least Restrictive Alternative*, 17 S. CAL. REV. L. & SOC. JUST. 33, 34 (2007) (arguing that plea bargaining is unconstitutional insofar as it entails the government "condition[ing] a benefit on the recipient giving up a constitutional right . . . [thereby] creat[ing] an impermissible burden on that right"); s*ee also* HESSICK, *supra* note 281 (describing the "trial penalty," i.e., the harsher punishment defendants earn by

In any event, the Jencks Act exacerbates the enormously difficult choice defendants must make. Guilty pleas overwhelmingly occur prior to trial—indeed, plea "deals" are offered expressly to *avoid* trial.[288] The Act forces defendants to choose between exercising their right to trial—understanding that they are risking a more severe sentence if found guilty—or foregoing that right and accepting a plea offer *without knowing the full extent of the evidence against them*. It has long been held that a defendant's plea must be made "voluntar[ily,] . . . knowing[ly], intelligent[ly], and with sufficient awareness of the relevant circumstances and likely consequences."[289] In *United States v. Ruiz*, the Supreme Court acknowledged that "the more information the defendant has, the more aware he is of the likely consequences of a plea, waiver, or decision, and the wiser that decision will likely be."[290] And yet, held the same Court, the government is not required to disclose impeachment evidence to a defendant prior to entering a plea agreement with him.[291] The Supreme Court has also explained that because of the ubiquity and inevitability of plea bargaining, "it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process."[292] Thus, the fact that a defendant could receive the government's witness

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exercising the right to trial rather than pleading guilty). "Studies of plea bargaining routinely find that judges impose longer sentences after trial in order to punish defendants who didn't plead guilty . . . One recent study of the trial penalty found that people who went to trial received sentences that were, on average, three times longer than people who pleaded guilty." *Id.* Others refer to this phenomenon as the "trial tax." *See, e.g.*, Paige A. Nutini, *What Practitioners Should Know About Navigating the Prosecutor's 'Trial Tax'*, A.B.A. (2019), https://www.americanbar.org/groups/litigation/committees/commercial-business/practice/2019/operation-varsity-blues-plea-deals-trial-tax/.

[288] OFF. OF THE U.S. ATT'YS, *supra* note 286.

[289] Brady v. United States, 397 U.S. 742, 748 (1970).

[290] United States v. Ruiz, 536 U.S. 622, 629 (2002); *see* Hannah E. Meyers, *Destroyed by Discovery: How New York State's Discovery Law Destabilizes the Criminal Justice System*, MANHATTAN INST., 1 (Jan. 2023) (arguing that "discovery is fundamental to a fair trial because it is impossible for defendants to make informed plea-bargain decisions if they do not know the strength of the evidence that prosecutors have against them").

[291] *Ruiz*, 536 U.S. at 633.

[292] Missouri v. Frye, 566 U.S. 134, 143–44 (2012).

statements during trial, if he chose to be tried, is not a persuasive reason for withholding them pre-plea. It is shameful that a "defining feature" of our justice system would place defendants in such a position.

c. The Act is Too Susceptible to Interpretation and Discretion

A primary motive behind passing the Jencks Act was to clarify confusion about what precisely was required under the Supreme Court's decision in *Jencks*, so that the government would not divulge more information than the bare minimum necessary.[293] Congress made crystal clear the protections afforded to the government, but in doing so, it left large areas of ambiguity at the expense of defendants. The Act is unclear with respect to several of its key terms, it too easily allows for the circumvention of its mandate, and it creates inefficiency in the courts.

The Jencks Act requires the government to disclose "statement[s]" that are "in [its] possession" that "relate[] to the subject matter" of a government witness's testimony.[294] What exactly does it mean to be in the "possession" of the United States? The answer varies across jurisdictions. Some hold that a statement is not in the possession of the United States if it is in the control of state police.[295] Other jurisdictions do not distinguish between state and federal agents for purposes of Jencks Act evidence.[296] Guidance

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[293] *See* 103 CONG. REC. 15,938 (1957).

[294] 18 U.S.C. § 3500(b).

[295] *See, e.g.*, United States v. Brooks, 79 M.J. 501, 503 (A. Ct. Crim. App. 2019) (holding that a statement is not in the "possession of the United States" when it is made to local police and not part of a joint investigation); United States v. Harris, 368 F.Supp. 697, 709 (E.D. Pa. 1973) (holding that government witness statements which were "in the lawful possession and control" of the local city police department were not subject to Jencks because they were not in the possession of the United States).

[296] *See, e.g.*, United States v. Heath, 580 F.2d 1011, 1018–19 (10th Cir. 1978) ("It seems obvious to us that a witness who is to testify for the government, who has made a statement to state officers, is subject to the [Jencks] Act. It will not do for the district attorney to stand on a technicality and say that he does not have actual possession of it"); Lyles v. United States, 879 A.2d 979, 983 (D.C. 2005) (quoting United States v. Bryant, 439 F.2d 642, 650 (D.C. Cir. 1971)) (holding

from the Department of Justice indicates that it is within the prosecutor's judgment to determine whether outside agencies involved in the proceeding (or involved in a parallel proceeding) are "part of the prosecution team for discovery purposes."[297]

Further criticism has been levied against the "reasonable probability" test for materiality as being unfair and unworkable[298] and that it can discourage prosecutors from disclosing exculpatory evidence in cases where the line is blurry.[299] Law Professor Janet Hoeffel argued that under *Bagley* and *Kyles*, prosecutors have too much discretion in whether to disclose exculpatory information and that several strategic reasons exist for why they may choose to withhold it.[300] Indeed, Professor Hoeffel's analysis of a recent study indicates that suppressing favorable evidence "seems to be the norm."[301] Agreeing, Professor Bennet Gershman adds that "by avoiding any inquiry into the prosecutor's culpability, and focusing entirely on the materiality of the evidence, the Court encourages . . . even ethical prosecutors, to withhold evidence."[302]

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that, for purposes of Jencks, "possession extends beyond the individual prosecutor to the government 'as a whole, including its investigative agencies'.").

[297] *See* Memorandum from David W. Ogden, Deputy Att'y Gen., U.S. DEP'T OF JUST. to Department Prosecutors (Jan. 4, 2010) (on file with the U.S. Dep't of Just.).

[298] *See* Schimpff, *supra* note 139, at 1735 n.29.

[299] *See* Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 PENN ST. L. REV. 1133, 1145 (2005).

[300] These reasons include: (1) the prosecutor is convinced that the defendant is guilty, and the information will be used to "create reasonable doubt where none exists"; (2) *Bagley* and *Kyles* allow the prosecutor to "wait to disclose until he feels a reasonable probability . . . that the information would change the outcome of the case"; (3) if not disclosed, the information may remain unknown, thereby never having the chance to be used at appeal; and (4) studies have shown how extremely rare disciplinary actions are brought against prosecutors for violating the ethical rules requiring disclosure. *Id.* at 1145–47.

[301] *Id.* at 1148.

[302] Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 439 (1992). *See also* Gershman, *supra* note 273, at 313 ("Curiously, despite extensive documentation of erroneous convictions, widespread prosecutorial abuses that contribute to wrongful convictions, and a plethora of academic literature on the ethical responsibilities of prosecutors, there has been little discussion of the prosecutor's legal and ethical duty to truth.").

Before materiality is even assessed, however, the potential discovery needs to qualify as a "statement," which includes only material that "represents a high degree of precision" of the witness's own words.[303] It therefore does not automatically include notes made by interviewing agents.[304] Whether a statement is a sufficiently precise recitation of a witness's own words is frequently a matter of interpretation. Only two triggers exist that automatically qualify it: if the statement is written by the witness or if the witness "signed or otherwise adopted or approved" the writing.[305] This provides a means for the government to avoid turning over witness material at all, because an interviewer "has no duty to create a memorialization that constitutes a 'statement' under the Jencks Act."[306] An interviewer may neglect to ask the witness to furnish a written account,[307] or he may simply take very rough notes or no notes at all of a witness's account[308] in order to escape the eventuality of disclosing the notes to the defense. Even where a court orders certain statements to be disclosed, the government can essentially refuse, because harmless error review dilutes the potency of the Act's sanctions provision.

The Act also adds a layer of inefficiency to trial. Following the letter of the Act results in a trial punctuated by frequent continuances during the government's presentation to allow the defense time to review any disclosed witness statements and prepare its cross-examination.[309] Finally, the circuit split with regard to the timing of disclosure of material consisting of both Jencks and *Brady*

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[303] 6 ISRAEL LAFAVE, ET AL., CRIM. PRO. § 24.3(c) (4th ed.).

[304] *See, e.g.*, Memorandum from Benjamin B. Wagner, U.S. ATT'Y OFF. E.D. CAL., to Criminal Division (Aug. 24, 2012) (on file with the U.S. Dep't of Just.) (noting that an "FBI 302 (report of interview of the witness) is generally not considered to be a statement within the meaning of the Jencks Act" (citations omitted)).

[305] ISRAEL LAFAVE, ET AL., *supra* note 303.

[306] *Id.*

[307] *Id.*

[308] *See id.*

[309] 18 U.S.C. § 3500(c) states that "the court, in its discretion . . . may recess proceedings in the trial for such time as it may determine" to be necessary to review a statement and prepare "for its use in the trial."

information[310] means that, in some jurisdictions, a defendant may not be entitled to exculpatory evidence until well into his trial. Why this is not an infringement on such a defendant's Fifth Amendment Due Process rights remains a mystery.[311]

d. Proposed Discovery Solution

Discovery in criminal cases should be as broad as necessary to bring the parties into balance and reduce the chance of surprise at trial.[312] Due to the immense advantage that the government enjoys at the start of every criminal case,[313] procedural mechanisms must equalize the parties' respective abilities to present their cases effectively. Some of the current discovery rules illustrate this principle.[314] However, for it to be fully realized, the government must be required to disclose witness statements prior to trial. The less the prosecution can bring its case on the back of surprises at

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[310] *See* discussion *supra* Part II.A.

[311] *Brady* and its progeny created a "constitutionally mandated, affirmative duty to disclose exculpatory evidence to the defendant to help ensure the defendant's right to a fair trial under the Fifth and Fourteenth Amendments' Due Process Clauses." *See* Laural L. Hooper, et al., *Treatment of* Brady v. Maryland *in United States District and State Courts' Rules, Orders, and Policies*, FED. JUD. CTR., 1–2 (2004), https://www.fjc.gov/sites/default/files/2012/BradyMat.pdf.

[312] Were the adversary system to "operate perfectly," evidence scholar Edmund Morgan argued, "both parties would have the same opportunities and capacities for investigation, including the resources to finance them, equal facilities for producing all the discoverable materials, equal good or bad fortune with reference to availability of witnesses and preservation of evidence, and equal persuasive skill in the presentation of evidence and argument. The case is rare where there is even approximate equality in these respects . . .". EDMUND MORRIS MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 34 (1956).

[313] *See supra* note 270. Professor Louisell adds: "At least, when one considers the total investigative capacities of the state including access to scientific data and their interpretation, the formal and actual limitations on the self-incrimination principle, and the constitutional capacity of legislatures to require from a defendant advance knowledge of the nature of his defense, there seems to be no intrinsic reason why criminal discovery must inevitably produce too gross an imbalance to be tolerable in an adversary system." Louisell, *supra* note 234, at 925.

[314] *See* discussion *supra* Part II.

trial, the more honest the entire system will become.[315] The more evidence that the prosecutor must turn over to the defense pre-trial, the stronger the evidence must be; and as the transparency of evidence increases, so too will the strength of prosecutions. Such a result is consistent with the history and tradition of our adversarial process, it is a step closer to the intent of the Framers, and it would instill ever more confidence in our criminal justice system.

A rule mandating pretrial government disclosure of witness statements, in fact, need not counteract the main purpose of the Act, which was to prevent the leakage of confidential government information through the government's over-disclosure during discovery. The Jencks Act is not a prohibition on divulging confidential information; it is a safeguard against accidental and unnecessary disclosure of certain information which would be potentially harmful if disclosed. If a witness's testimony touches on confidential information, the Act requires it to be disclosed after she testifies.[316] There is no mention of "privilege" or "confidentiality," or any other such qualifier, in the language of the statute.[317] Thus, a rule requiring pretrial disclosure of statements made by government witnesses can nonetheless satisfy the Jencks Act's aim in protecting from *over* disclosure. Such a rule would require only that the government be able to identify its anticipated witness and the general substance of the witness's anticipated testimony—two elements generally planned before trial.[318] In fact, the prosecutor is often required to provide this information to the court before the

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[315] As Morgan argued, "So long as a party may divert the inquiry from the elements bona fide in dispute, or conceal the real crux of his claim, . . . and thereby take his opponent by surprise, so long will the description of a trial as a battle of wits between contending counsel have a large measure of truth. . . ." MORGAN, *supra* note 312, at 35.

[316] 18 U.S.C. § 3500(b) ("If the entire contents of [the] statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.").

[317] 18 U.S.C. § 3500. The Act provides only one basis for the government to object to a disclosure order: if "any statement ordered to be produced . . . contains matter which does not relate to the subject matter of the testimony of the witness . . . ." 18 U.S.C. § 3500(c). In-camera inspection by the court is specified as the method of evaluating such an objection. *Id.*

[318] In fact, Rule 16 requires essentially this disclosure with respect to the government's expert witnesses. *See* FED. R. CRIM. P. 16.

final pretrial conference.[319] However, where otherwise discoverable material includes information that really ought to be kept confidential—as determined by in-camera review by a judge[320]—compromises between the government's interest in secrecy and the defendant's interest in discovery are available. Thus, the sole issue is one of foreseeability: whether the government can have reasonable expectations as to what its witnesses will testify when questioning them on direct. That it can is not beyond imagination.[321]

However, disclosure of a witness's statement should not be limited in scope by its relevance to the witness's testimony at all. Rather, the entire witness statement should be disclosed to the defense, and the applicable rules of evidence should govern its use at trial. To offset the government's disproportionate investigative power, the defense ought to have an opportunity to learn about the case just what the government has learned from its witness. Where any information provided by a witness does not bear on the issues at trial, the rules of evidence protect against any prejudicial effect it could have at trial.[322] Thus, any pretrial disclosure that was greater in scope than the witness's actual testimony will provide no additional trial value to the defendant who cannot introduce the irrelevant portions of the statements. If the rules of evidence fail,

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[319] *See, e.g.*, *Individual Practices of Chief Judge Laura Taylor Swain*, U.S. DIST. CT., S.D.N.Y. (applicable Nov. 28, 2022), https://www.nysd.uscourts.gov/sites/default/files/practice_documents/LTS%20Swain%20Indiv.%20Rules%20Nov.%202022.pdf (requiring "[n]o later than one week before the Final Pre-Trial Conference . . . Section 3500 materials").

[320] 18 U.S.C. app. 3, § 6(c)(2) ("The United States may, in connection with a motion under paragraph (1), submit to the court an affidavit of the Attorney General certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information. If so requested by the United States, the court shall examine such affidavit in camera and ex parte.").

[321] For example, some judges require such information long before trial. *See e.g.*, *Individual Practices of Chief Judge Laura Taylor Swain*, *supra* note 319 (requiring "Section 3500 material . . . [n]o later than one week before the Final Pre-Trial Conference"); *see also* N.D. Cal. Crim. L.R. 17.1-1(b)(1) (requiring the government to "file a pretrial conference statement addressing . . . [d]isclosure and contemplated use of statements or reports of witnesses under the Jencks Act . . . not less than 7 days prior to the pretrial conference").

[322] *See* FED R. EVID. 401; 402; 403; 613.

other steps can be taken to mitigate whatever harm results: The judge can strike testimony from the record, order the jury to disregard it, or order a mistrial in extreme circumstances, and the aggrieved party can appeal.[323] Since courts are so practiced with harmless error review, these discretionary measures should present little difficulty.

Similarly, other solutions are available in cases that actually implicate the interests of national security or the safety of witnesses. Those portions of statements that contain government information that truly must remain confidential can be redacted, or the court can issue a protective order controlling their dissemination.[324] In cases where the safety of witnesses is a legitimate concern, identifying information can be withheld until trial,[325] or other police measures can be taken. The United States Attorney's Manual, in fact, stresses this point:

> Prosecutors should be aware that they have the option of applying for a protective order if discovery of the private information may create a risk of harm to the victim or witness and the prosecutor may seek a temporary restraining order . . . prohibiting [their] harassment . . . .[326]

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[323] *See* FED. R. EVID. 103. *See also* Paul Bergman, *Admonishing Jurors to Disregard What They Haven't Heard*, 25 LOY. OF LOS ANGELES L. REV. 689 (1992). *See also* Hemphill v. New York, 142 S. Ct. 681, 693 (2022) ("If a court admits evidence before its misleading or unfairly prejudicial nature becomes apparent, it generally retains the authority to withdraw it, strike it, or issue a limiting instruction as appropriate.").

[324] *See* FED. R. CRIM. P. 16(d) (permitting a court to "deny, restrict, or defer discovery inspection, or grant other appropriate relief"); *see also* 18 U.S.C. app. 3, §3 ("Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States."). *See also* Kuperman, *supra* note 241, at 39.

[325] *See* 18 U.S.C. app 3, §4 ("The court, upon a sufficient showing, may authorize the United States to delete specified items of classified information from documents to be made available to the defendant through discovery under the Federal Rules of Criminal Procedure, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove.").

[326] U.S. DEP'T OF JUST., *supra* note 130, at § 9–6.200.

In any event, such circumstances arise in only a portion of criminal cases.[327] Yet the Act disadvantages all defendants indiscriminately—from defendants charged with the most heinous of violent crimes to those charged with minor tax infractions.[328] At the least, the scope of discovery can be determined according to the particular circumstances of the case, allowing pretrial witness discovery where there is no reasonable concern about witness safety or tampering.

Many of the fears that prompted the Jencks Act—and many of the current objections to repealing it—are equally applicable in civil cases, particularly those in which the government is involved.[329] And yet, the discovery rules in the civil setting are far more generous. In his 1955 talk as part of the James S. Carpentier Lectures at Columbia Law School, legal Scholar Edmund Morgan insisted that

> [t]here can be no question that the system ought to enable each litigant in advance to know the exact area of dispute and to have access to all available data, so that he may be aware in just what particulars he and his adversary disagree, that he may investigate and determine the pertinency and value of any material favorable or unfavorable to his contention, and that he may consider the reliability of the persons willing or compellable to testify. Until he knows what state or states of fact the trier may find, he cannot prepare upon the substantive law. Until he knows what evidence is likely to be

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[327] For instance, according to the United States Sentencing Commission, in 2021, firearms offenses represented 14.2% of federal crimes; robbery represented just 2.3%; and other violent crimes fell into an "other" category, which constituted 8.9% of felony offenses. *See Fiscal Year 2021: Overview of Federal Criminal Cases*, *supra* note 279, at 4.

[328] A similar concern was raised during the Senate debates by the drowned-out voice of Senator Javits, who cautioned for a less sweeping bill: "We are about to legislate with regard to all crimes . . . murder . . . counterfeiting, narcotics, immigration, and every other crime against Federal law." Senator Javits pleaded to deaf ears to "never forget the American democratic concept for legislators, and that is, 'there but for the grace of God, stand I.' We must protect the rights of the individual defendant." 103 CONG. REC. 15933 (1957).

[329] *See* discussion *supra* Part IV.

> available for or against him, he cannot prepare to meet or interpose objections . . . So long as a party may divert the inquiry from the elements bona fide in dispute, or conceal the real crux of his claim or defense, and thereby take his opponent by surprise, so long will the description of a trial as a battle of wits between contending counsel[,] . . . a game of chance . . . have a measure of truth.[330]

When mere money is at stake, the parties are entitled to pretrial written interrogatories and depositions of the other party's witnesses under oath.[331] Why, when the stakes are much higher—as high as they can be in some instances—is access to evidence restricted? Is what Morgan claimed about civil cases not applicable also to criminal? Over a century ago, Justice Holmes emphatically declared: "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt."[332] Does this principal not have truth today? Including government witness material in the government's pretrial discovery obligations would be neither impracticable nor unfair. To the contrary, it is demonstrably workable and is inherently more just.[333]

CONCLUSION

The adversarial legal system is praised for its strength at truth-finding.[334] In its infancy, we can see the seedling values of guaranteed counsel and confrontation.[335] These values blossomed into rights so critical to our societal scheme that they were enshrined

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[330] MORGAN, *supra* note 312, at 34–35.

[331] *See generally*, FED. R. CIV. P. 26–37.

[332] United States v. Oppenheimer, 242 U.S. 85, 87 (1916).

[333] Local rules of the United States District Court for the Northern District of Florida, for instance, "request" that the government "make [Jencks] materials and statements available to the other party sufficiently in advance so as to avoid delays or interruptions at trial"). *See* N.D. Fla. Loc. R. 26.2(E)(4) (effective Nov. 24, 2015).

[334] Traynor, *supra* note 220, at 228 (acknowledging "[t]he plea for the adversar[ial] system is that it elicits a reasonable approximation of the truth").

[335] *See* discussion *supra* Part III.

in our Constitution and have become part of our national culture.[336] The "bedrock right" of confrontation, so cherished by the Founders of our nation and critical to the adversarial system, "requires that the reliability and veracity of the evidence against a criminal defendant be tested by cross-examination. . . ."[337] For this test to be meaningful, the examiner must have as much relevant information as possible. The progressive expansion of discovery and the role of counsel throughout the course of American history was driven by similar reasoning—the more difficult the test of evidence, the stronger the evidence must be; the harder the test for the government, the more confident we can be in a guilty verdict. At some point, however, the ideal of the adversarial system became perverted into mere sport. The goals of truth-finding and fairness were supplanted by the political goal of winning at any cost. As a result, the injustice produced by the Jencks Act has been overlooked. It is manifestly prejudicial to criminal defendants while affording no benefit to society; to the contrary, it is a species of "the abuses at which the Confrontation Clause was directed."[338] The Jencks Act must be repealed.

If ours is to be a fair adversarial system, defendants must be apprised of all the evidence against them prior to trial. Access to the entirety of the evidence influences all aspects of their cases, including trial strategy and the decision whether to plead. If our aim is the truth, all relevant facts should be exposed to both parties. The adversarial system is at its best when the adverse parties start at as equal a position as possible. An individual accused, facing the full arsenal of the federal government arrayed against him, starts at a distinct disadvantage. The proposal to mitigate that disadvantage by allowing the accused to know the particulars of the accusation "is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings."[339]

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[336] *Id. See also* Raymond LaMagna, *(Re)Constitutionalizing Confrontation: Reexamining Unavailability and the Value of Live Testimony*, 79 S. CAL. L. REV. 1499, 1499 (2006) (recognizing that "confrontation reflects society's notions of justice and procedural fairness").

[337] Hemphill v. New York, 142 S. Ct. 681, 694 (2022).

[338] Crawford v. Washington, 541 U.S. 36, 68 (2004).

[339] Miranda v. Arizona, 384 U.S. 436, 442 (1966).

The Jencks Act, borne of "Congressional hysteria and irresponsibility,"[340] contributes to a legal system in which defendants are wrongfully convicted based on witness testimony that was withheld from them before trial. It deprives defendants of essential information at "*the* critical point" in their cases.[341] And it hamstrings defense counsels' ability to advocate effectively by concealing important evidence used to accuse their clients. The Act thus deprives defendants of the full promise of the adversarial system. Our society must do more for these criminal defendants who are systematically—and by law—dispossessed of their fundamental right to a fair trial. By imposing compulsory pretrial government disclosure of witness statements, we would be acknowledging that the focus of the criminal trial ought to be truth rather than mere conviction. No longer can the battle cries of perjury, intimidation, and reciprocity from objectors justify the limited discovery allowed to defendants.

Repealing the Act would eliminate the need for courts to engage in the impossible speculation involved in harmless error review. It would create national uniformity in what defendants actually receive before trial, by removing the escape hatches embedded in the Act's ambiguity through which some prosecutors are able to avoid their disclosure obligations entirely. The task of assessing a Jencks violation would no longer be distracted by evaluating the prosecutor's culpability; instead, attention would be focused on what matters—harm to the defendant who did not receive material to which he was entitled. Repealing the Act would further eliminate an unnecessary circuit split that results in some defendants' complete ignorance of evidence that exculpates them of the crimes with which they are charged—a circuit split that, in other words, allows prosecutors to violate their constitutional duty imposed by *Brady*.

The adversarial legal system cannot serve its purpose if defendants are kept in the dark by the withholding of crucial evidence only to have it sprung on them in guerilla style during trial.

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[340] Keeffe, *supra* note 41, at 93.

[341] *See* Missouri v. Frye, 566 U.S. 134, 144 (2012) (emphasis added) (explaining that "the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant").

For too long has "adversarial" been understood too literally, descending our judicial trial to "the level of the gladiatorial."[342] We must finally stand up out of this descent so that we may reach the full height of fairness and justice that our legal system has long striven for. The Jencks Act keeps defendants in the dark; it is past time that we allow them light.

[342] Kyles v. Whitley, 514 U.S. 419, 439 (1995).