Journal of Criminal Law and Criminology

Volume 110
Issue 2 *Spring*

Article 5

Spring 2020

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0091-4169/20/11002-0307
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY Vol. 110, No. 2

Printed in U.S.A.

A MATERIAL CHANGE TO *BRADY*: RETHINKING *BRADY V. MARYLAND*, MATERIALITY, AND CRIMINAL DISCOVERY

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How we think about the trial process, and the assumptions and beliefs we bring to bear on that process, shape how litigation is structured. This Comment demonstrates why materiality, and the theory of juridical proof informing that standard of materiality, must be redefined for Brady v. Maryland *doctrine and criminal process. First, the Comment delineates the theory of explanationism—the revolutionary paradigm shift unfolding in the theory of legal proof. Explanationism conceptualizes juridical proof as a process in which the factfinder weighs the competing explanations offered by the parties against the evidence and the applicable burden of proof. Applying explanationism to criminal process demonstrates that explanationism not only is the more accurate account of juridical proof, but also better frames the criminal discovery process and ensures due process of law. The next section applies explanationism to* Brady *doctrine to show that the Supreme Court has tip-toed towards a more explanatory view of* Brady v. Maryland *but also faltered and lapsed back into a probabilistic inquiry at critical junctures. As a result, the efficacy of* Brady *is diminished where it is undermined by probabilistic theory or language. As a result, the doctrine should embrace explanationism more wholly. Under explanationism, materiality is determined by assessing whether the suppressed evidence could have been used by the defendant to influence the factfinder when presenting her case. To illustrate this argument and its importance in real-world outcomes, this Comment takes state and federal courts of Texas as a*

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case study. In Texas, probabilistic definitions of materiality have thwarted both Brady *doctrine and legislative criminal discovery reform. The case study demonstrates the material consequences for not rethinking materiality. Changing our understanding of materiality is critical to protecting the right to due process of law in our courthouses and state legislatures.*

INTRODUCTION

"One does not show a *Brady* violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."

- Justice David H. Souter[1]

How we think about juridical proof and the trial process, and the assumptions and beliefs we bring to bear on that process, shape how litigation is structured. For most of common law's history, a probabilistic understanding of juridical proof has dominated; we have viewed trials as a

[1] Kyles v. Whitley, 514 U.S. 419, 435 (1995).

process by which factfinders determine the likelihood that each individual element of a claim is met and decide on an outcome accordingly.[2] However, this theory has proven largely insufficient, particularly because it does not account for how factfinders actually reason and come to verdicts.[3] Instead, explanationism—the theory that factfinders decide cases by weighing the parties' competing explanations against each other and the applicable standard of proof—is the best current understanding of juridical proof.[4] But because probabilistic thinking has implicitly guided American jurisprudence for decades, many evidentiary issues and assumptions must be examined anew.[5]

It is especially important to reexamine *Brady v. Maryland* for its role in a criminal defendant's right to evidence held by the State and its pervasive influence on the American approach to criminal discovery.[6] Since *Brady*,

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[2] *See* 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 388 (1827) ("If there be one business that belongs to a jury more particularly than another, it is, one should think, the judging of the probability of evidence . . . ."); Ronald J. Allen & Michael S. Pardo, *Relative Plausibility and Its Critics*, 23 INT'L J. OF EVIDENCE & PROOF 5, 6 (2019); Stephen E. Feinberg & Mark J. Schervish, *The Relevance of Bayesian Inference for the Presentation of Statistical Evidence and for Legal Decisionmaking*, 66 B.U. L. REV. 771, 772 (1986) (writing to "advocate the use of the Bayesian method as the normative approach to general legal principles, an approach that should stem, we claim, from probabilistic considerations"); Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 292 (2013) ("The law of evidence rests primarily on theories of knowledge that purport to give an account of accuracy in other-than-narrative terms. Versions of probability analysis pervade the rules of evidence themselves . . . ."); Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738, 746–47 (2012) (conceiving of the burden of proof in probabilistic terms).

[3] Other limitations include probabilism's inability to explain litigants' behavior, and its challenges in articulating the standard for proof beyond a reasonable doubt. *See generally* Allen & Pardo, *supra* note 2.

[4] *See generally* Ronald J. Allen & Michael S. Pardo, *Clarifying Relative Plausibility: A Rejoinder*, 23 INT'L J. EVIDENCE & PROOF 205 (2019); Sean P. Sullivan, *Challenges for Comparative Fact-Finding*, 23 INT'L J. EVIDENCE & PROOF 100 (2019) ("So much recent work points in the same direction—that persuasion is the product of purely comparative assessments of factual propositions—that those unable to perceive this shift could only be those who refuse to see."); Michele Taruffo, *Some Remarks About Relative Plausibility*, 23 INT'L J. EVIDENCE & PROOF 128 (2019) (agreeing with the central tenants of the theory but noting normative issues).

[5] *See infra* Section I. Because probabilistic thinking underlies most common law and statutory conceptions of evidence, but probabilistic thinking is disconnected from how jurors reason and trials function, a revisiting of these doctrines is necessary for the normative goals of the legal system to be carried out.

[6] *See infra* note 163; *see also* Brady v. Maryland, 373 U.S. 83, 87 (1963); Daniel S. Medwed, Brady*'s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1536 (2010) ("As a matter of federal constitutional law, prosecutors are not even compelled to furnish the defendant with

evidence in criminal cases has been evaluated in terms of materiality—to give a criminal defendant due process of law, all "favorable" evidence possessed by the prosecutor that is "material to guilt or punishment" must be disclosed to the defendant.[7] As *Brady* doctrine has evolved, materiality has come to serve both as a threshold standard and as a necessary element to prove harm.[8] Evidence is assessed for its materiality to the case at the point of disclosure, and on appeal or collateral review withheld evidence must be sufficiently *material*—such that its suppression caused enough harm to result in a cognizable *Brady* claim.[9] Criminal defendants are not entitled (at least, constitutionally) to any evidence that is not material.[10] As a corollary, courts find no harm to a criminal defendant when evidence that is not "material" goes undisclosed.[11]

Brady doctrine, like other evidentiary concepts, has been infused with probabilistic thinking.[12] Even in recent conceptualizations of *Brady*, probabilistic thinking continues to inform materiality, as "evidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have

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the names of prosecution witnesses prior to trial, much less disclose all of the police investigative information.").

[7] *Brady*, 373 U.S. at 87. Defining materiality is an enterprise the Court has struggled with for the past fifty years.

[8] *See infra* Section II; Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 422–27 (2010) (discussing how materiality serves two key functions: the prosecutor determines what evidence must be turned over by assessing its materiality, and the materiality of withheld evidence must be proven to successfully show a *Brady* violation).

[9] *See infra* Section II for a more robust discussion; *see also* Jones, *supra* note 8, at 422–27 (explaining how qualifying evidence can be both exculpatory evidence and impeachment evidence); Stephanos Bibas, *The Story of* Brady v. Maryland: *From Adversarial Gamesmanship Toward The Search for Innocence?*, 77 FACULTY SCHOLARSHIP AT PENN LAW 1, 12 (2005), https://scholarship.law.upenn.edu/faculty_scholarship/77/ [https://perma.cc/E9SH-6TW3] (explaining that *Brady* actions are vital as a vehicle for enforcing rights because "the only enforcement mechanism is retrospective.").

[10] *See, e.g.*, United States v. Agurs, 427 U.S. 97, 104 (1976) ("A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.").

[11] United States v. Bagley, 473 U.S. 667, 678 (1985) (holding that "a constitutional error occurs, and the conviction must be reversed, only if the evidence is material").

[12] Banks v. Dretke, 540 U.S. 668, 699 (2004) ("In short, [the defendant] must show a 'reasonable probability of a different result.'") (citing *Bagley*, 473 U.S. at 678); *Bagley*, 473 U.S. at 682.

been different."[13] However, as this Comment argues, a closer examination of *Brady* doctrine and its evolution shows that there has been a "two steps forward, one step back" movement towards the embrace of a more explanatory account of materiality, without the Supreme Court ever saying so.[14] The development of an explanatory lens to assess materiality must be realized more fully because a more accurate definition of what evidence is "material" is critical to fulfilling the promise of *Brady* and the right to due process of law.[15] When a defendant is prevented from presenting her explanation to the jury, she is denied a fair trial and due process of law.[16] And although *Brady* doctrine has evolved substantially, particularly since *Kyles v. Whitley*,[17] there remain substantial shortcomings and the need for a more explanatory account of materiality.[18] The materiality standard has substantially restricted the prosecutorial disclosure duty[19] by tightly limiting what must be disclosed and setting an inaccurately high bar for what evidence is sufficiently material to merit any remedy.[20]

This Comment argues that the theory of explanationism demonstrates the need for legislatures and courts, both state and federal, to reconsider how

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[13] Turner v. United States, 137 S. Ct. 1885, 1893 (2017) (quoting Cone v. Bell, 556 U.S. 449, 469–470 (2009)).

[14] *See infra* Section II.

[15] *See infra* Section II.

[16] *See infra* Section II; *see also Brady*, 373 U.S. at 86.

[17] 514 U.S. 419 (1995).

[18] *See infra* Section II.

[19] *See* Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639, 645–46 (2013) (explaining that while some lower courts read *Brady* and its progeny to suggest that all favorable evidence should be disclosed, but a conviction is only to be overturned if the evidence is material, most lower courts and the Department of Justice read the opinions to hold that favorable evidence can be withheld as long as it is not material).

[20] There are, of course, other issues with *Brady* doctrine. For a discussion of these shortcomings, see, e.g., United States v. Ruiz, 536 U.S. 622, 633 (2002) ("[T]he Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant."); Jonathan Abel, Brady*'s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743, 807–808 (2015); Bibas, *supra* note 9, at 129; Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, WIS. L. REV. 399, 425 n.134 (2006) (noting that the suppression of material evidence is a significant cause of wrongful convictions, and that "suppression [] of exculpatory evidence was found in 43 percent of the exonerations where prosecutorial misconduct was a factor leading to the wrongful conviction"); Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in Prosecutorial Decision Making*, 74 MO. L. REV. 999 (2009); Jenia I. Turner, *Plea Bargaining*, 3 REFORMING CRIM. JUST. 73, 77 (2017).

they determine what evidence is "material" to criminal discovery.[21] Not only is this undertaking important theoretically, but the real-world consequences are also substantial. The American adversarial system is predicated on requiring the State to meet its burden to ensure due process of law and the accuracy of verdicts.[22] If that system is not structured to accomplish those goals, the entire system becomes irrational.[23] Theoretical and empirical studies of juridical proof have shown that the probabilistic assumptions that underlie *Brady* law and many of our criminal discovery statutes do not align with how the proof process is actually structured and operates in practice.[24] This disjunction between what is deemed material by law and what is material to a defense in reality undermines a defendant's right to a fair trial—a right that Americans have jealously guarded since 1791.[25]

This Comment first proceeds by delineating explanationism as a theory, its advantages over the probabilistic conception of juridical proof, and the role explanationism can play in better conceptualizing the trial process. The

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[21] I acknowledge that broadening the definition of materiality would be infeasible without also reconsidering the remedy for a *Brady* violation, as a violation results in a new trial. *See Brady*, 373 U.S. at 90–91. This Comment focuses purely on fashioning an accurate definition of materiality, leaving the question of remedy and the proper allocation of review between district and appellate courts—as well as state and federal—open for future inquiry.

[22] *In re* Winship, 397 U.S. 358, 362 (1970) ("Mr. Justice Frankfurter stated that '[i]t is the duty of the Government to establish guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'' In a similar vein, the Court said in *Brinegar v. United States* that '[g]uilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.'") (citations omitted); Michael S. Pardo, *Juridical Proof, Evidence, and Pragmatic Meaning: Toward Evidentiary Holism*, 95 NW. U. L. REV. 399 (2000) ("The trial has developed into a condition of a decent society, and we cannot overemphasize its importance. Given the trial's importance and its goal of accurate fact-finding, it follows that a primary focus of the legal community should be an inquiry into the nature of accurate fact-finding."); Theodore Waldman, *Origins of the Legal Doctrine of Reasonable Doubt*, 20 J. HIST. IDEAS 299, 313 (tracing the doctrine of proof beyond a reasonable doubt to Aristotle).

[23] *See generally* Ronald J. Allen, *Reasoning and its Foundation: Some Responses*, 1 INT'L J. EVIDENCE & PROOF 343 (1997) ("At the core of a society dedicated to civil peace through the rule of law must be found rational decision making. Rational decision making—deliberate, disinterested, informed, open-minded—forms the bedrock of a just society, and without it the phrase 'rule of law' loses its meaning entirely.").

[24] *See infra* Sections I, II.

[25] U.S. CONST. amend. VI.

next section applies explanationism to *Brady* doctrine to show that the Court has tip-toed towards a more explanatory view of *Brady* but also faltered and lapsed back into probabilistic inquiry at critical junctures. As a result, this Comment argues, *Brady* doctrine is diminished in efficacy where it is undermined by probabilistic language and theory, and *Brady* doctrine should embrace explanationism more wholly. To illustrate this argument and its importance in real-world outcomes, this Comment takes state and federal courts in Texas as a case study.[26] In Texas, probabilistic definitions of materiality have thwarted both *Brady* and legislative criminal discovery reform. The case study demonstrates the material consequences of not rethinking materiality. Changing our conception of materiality is critical to protecting the right to a fair trial in courthouses and state legislatures.

I. EXPLANATIONISM: EXPLAINING TRIALS

A. PROBABILISM AND ITS LIMITATIONS

The litigation process is structured, at its core, by theories of juridical proof. From the specifics of the Federal Rules of Evidence to the overarching burdens of proof, our entire trial system is laden with assumptions and beliefs about how human minds draw inferences and how best to determine truth.[27] These assumptions inform how legal procedure is crafted in an attempt to regulate that inferential process.[28] Because these assumptions structure our rules, and our rules then structure how we decide real-world outcomes, it is pivotal to be clear and accurate about how we conceptualize trials. Failure to do so can inadvertently sabotage the values which our justice system was built to uphold—even those as essential as just outcomes and equality before the law. In criminal cases, when evidentiary issues are decided using faulty assumptions, our criminal convictions are cast into doubt.

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[26] While examples abound among the circuits, *see infra* note 164, the Fifth Circuit and Texas have been chosen for their pivotal role in the development of *Brady* law and the state's recent discovery reforms, respectively.

[27] Pardo, *supra* note 22, at 410 ("The theorizing of juridical proof and evidence cuts to the heart of our entire legal system, with implications that intertwine with our very concept of a just society under the Rule of Law."); Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491, 1498 (2001) ("The rules of evidence . . . structure the epistemic process by which jurors arrive at beliefs about disputed matters of fact at trials.").

[28] Michael S. Pardo, *Pleadings, Proof, and Judgment: A Unified Theory of Civil Litigation*, 51 B.C. L. REV. 1451, 1454 (2010) ("Understanding how the procedural devices relate to the proof process is integral to understanding the standards for each procedural device in light of the underlying normative goals and procedural values . . . .").

For most of Anglo-American history, it has largely been assumed that juridical proof should be thought about within a probabilistic framework.[29] But scholarly attention to the subject[30] has made it increasingly clear that a probabilistic account of juridical proof is not only inaccurate, but also misleading.[31] At first blush, probabilism appears to fold naturally into our goal for the legal system—to reconstruct how the world was at the time in question and to decide under those conditions whether or not to impose liability. In reality, the theory's limitations render it more harmful than helpful.[32] In comparison, the explanatory account[33] of juridical proof provides an overarching explanation of how factfinders reason with evidence and ultimately arrive at conclusions.[34] In doing so, the explanatory framework better aligns with human cognitive processes and the policy goals driving evidentiary doctrine.[35]

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[29] *See supra* note 2 and accompanying text; *see also* Ronald J. Allen, *The Nature of Juridical Proof: Probability as a Tool in Plausible Reasoning*, 21 INT'L J. OF EVIDENCE & PROOF 133, 134 (2017) ("One of the crowning achievements of Enlightenment thought, the Constitution of the United States of America, uses probability language in its Fourth Amendment, adopted in 1791 essentially as part of the political bargain to adopt the Constitution itself in 1789, which reads that 'no warrants shall issue but upon probable cause.'"); Pardo, *supra* note 22, at 411 ("In recent years, most of the literature discussing fact-finding has focused on the use of mathematical probability theories as analytical tools to resolve legal problems of relevancy and evidence."); Waldman, *supra* note 22 at 311 (discussing how the first modern treatment of evidence, by Baron Gilbert in the late seventeenth and early eighteenth century, analyzed "[w]hat is the evidence that ought to be offered to the Jury and by what rules of Probability ought it to be weighed and considered").

[30] *See generally* Allen & Pardo, *supra* note 2; Allen & Pardo, *supra* note 4; Pardo, *supra* note 22, at 400 ("Two recent developments raise these concerns for our understanding of legal evidence. First, empirical work in psychology suggests that jurors reason holistically in the form of narratives. The second attack on the conventional view comes from within its own ranks, in the analytical evidence scholarship of Ronald Allen.").

[31] For the seminal work on the topic, see Allen & Pardo, *supra* note 2. For the purposes of this inquiry, I summarize Professors Allen and Pardo's assessment of the competing conceptualizations of juridical proof, as well as why the strengths of explanationism make this theory the best current conception of juridical proof. I acknowledge the debate is ongoing and hope that this inquiry into materiality provides more evidence of the utility of the explanatory account.

[32] *See generally* Pardo, *supra* note 21.

[33] This is also referred to as explanationism and relative plausibility.

[34] I do not argue that probabilistic thinking is no longer a dominant epistemology in evidence, but that explanationism provides a more powerful lens and has been gaining traction in the legal field since developed by Professor Allen. For more information about the contours of the current debate, see generally Allen & Pardo, *supra* note 4.

[35] Pardo, *supra* note 22, at 416 ("Experimental psychology provides compelling evidence that relative plausibility, not Bayesianism, provides the overarching explanatory model of the proof process. Specifically, the findings of Pennington and Hastie support the notion that the

Lacking a scientific process by which to divine truth, the legal system instead employs procedural tools to arrive at conclusions. These "decision rules" are what the legal system refers to as "burdens of proof": a preponderance of the evidence, clear and convincing evidence, and beyond a reasonable doubt.[36] The applicable burden of proof establishes the burden of persuasion.[37] The burden of persuasion is the threshold a plaintiff must meet to win her case, and the threshold below which the system will not impose a judgment against a defendant.[38] These standards are established with policy goals operating in the background—to obtain accurate results, tempered by pre-established allocations of the risk of error between the parties.[39] In criminal cases, the burden of proof beyond a reasonable doubt allocates the risk of error away from the criminal defendant, placing the burden instead on the State.[40] This allocation reflects the longstanding belief that a false positive—the erroneous condemnation of a criminal defendant—is far worse than a false negative.[41]

How, then, does a party meet her burden of proof? The probabilistic account of evidence views the standards of proof as probabilities between zero and one, where certain falsity is zero and certain truth is one.[42] The preponderance of the evidence standard would require a probability greater than 0.5 that each element of a claim is met, while the beyond a reasonable doubt standard would require the prosecution to prove the probability of each element to some high probability, around 0.9 or greater.[43] The theory looks at how probable each individual element is, finding that the element is not proven when the probability of its satisfaction merely meets or falls beneath

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elemental reasoning required by a Bayesian model and the conventional view conflict with the reasoning processes of legal fact finders.").

[36] Ronald J. Allen & Alex Stein, *Evidence, Probability, and the Burden of Proof*, 55 ARIZ. L. REV. 557, 558 (2013).

[37] Allen & Pardo, *supra* note 2, at 9.

[38] *Id.* at 9–10.

[39] *Id.* at 10.

[40] *Id.*

[41] *Id.* at 17. A false negative is the failure to convict a guilty person, while a false positive is the wrongful conviction of an innocent person. The standard of beyond a reasonable doubt is meant to prioritize the prevention of false positives. *See In re* Winship, 397 U.S. 358, 372 (1970).

[42] Allen & Pardo, *supra* note 2, at 11.

[43] *Id.*

the requisite threshold.[44] To win her case, a plaintiff must prove that the likelihood of each element exceeds the burden of persuasion.[45]

While this theory seems at first compelling,[46] it is largely inadequate. Through their scholarship, Professors Ronald Allen and Michael Pardo identify many of the insufficiencies of the probabilistic framework, including the "conjunction problem" and the difficulty of assigning numbers to probabilities in the absence of empirical data.[47] Most significant for the purposes of this Comment, probabilism does not fit with how jurors or judges reason.[48] Cognitive evaluation shows that when factfinders decide outcomes, they assess evidence holistically; reasoning is not done in an element-by-element fashion.[49] Factfinders think in terms of story and explanation, creating narrative structures to evaluate evidence and cases in an integrated fashion.[50] In fact, jury instructions requiring assessment by the individual

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[44] *Id.*

[45] *Id.* at 9.

[46] The theory appears to provide clarity and precision to vague legal standards, give a formal framework, and to intuitively mirror our policy judgments regarding risk of error. *Id.* at 10–14; *see also* Pardo, *supra* note 22, at 413–14 (citing PROBABILITY AND INFERENCE IN THE LAW OF EVIDENCE: THE USES AND LIMITS OF BAYESIANISM (Peter Tillers & Eric D. Green eds., 1988)).

[47] Allen & Pardo, *supra* note 2, at 14.

[48] And in the absence of another method by which to search for truth, factfinders are tasked with the duty to determine outcomes.

[49] *Id.* at 17–18. *See generally* Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991); Dan Simon, *Thin Empirics*, 23 INT'L J. EVIDENCE & PROOF 82, 85 (2019) ("In other words, the cognitive process boils down to transforming states of conflict-laden complexity into states of coherence, a process that can be captured by the framework of *coherence-based* reasoning. The lopsided representations in states of coherence are what provide the network with its stability and, crucially, they enable fact-finders to reach discrete judgments with sufficient resolve and confidence. Indeed, high levels of confidence in the chosen decision, despite the difficulty of the task and the equibalance of the options, are one of the central and persistent findings in this line of research.").

[50] Shari Seidman Diamond et al., *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1597 (2012) (studying jury deliberations and finding, among other issues, "structural errors arising from the piecemeal construction of jury instructions"); Deanna Kuhn et al., *How Well Do Jurors Reason*?, 5 PSYCHOL. SCI. 289, 293 (1994) (conducting studies on juror reasoning, and finding that "[t]he present results are consistent with Pennington and Hastie's (1993) claim that story construction is a central component of juror decision making. At the same time, the results indicate significant individual variation in the manner in which people approach the juror task . . . In addition, the variation has implications for task outcome."); Pennington & Hastie, *supra* note 49, at 519–520 (studying the cognitive processes employed by jurors, and finding that jurors construct stories to evaluate cases: "[i]n this research, two key results were established that were necessary conditions for pursuit of the Story Model as a viable theory of

elements have been shown to confuse jurors.[51] The individual legal elements may guide the substance of the law, but an individualized assessment of each element in isolation is not how factfinders reason.[52] Scholars and legislators often think about factfinders' cognitive processes in terms of probability,[53] but this view is inaccurate.[54]

The other significant issue with the probabilistic conception is the theory's failure to adopt a comparative framework. The likelihood of an element being proven is not assessed in a vacuum but rather in a comparative context. One party's ability to compellingly prove her case *inherently depends* on how compelling her opponent is.[55] For example, say a defendant is on trial for possession of drugs with intent to distribute in a school zone. If the prosecutor presents evidence that the defendant was arrested with the statutorily prescribed quantity of drugs in her jacket pocket on the school yard, and the defendant refused to testify and puts on no other evidence, surely it seems likely that the prosecutor has shown that the elements of the crime are met. But just as surely, if the defendant testifies that when she was arrested, her significant other asked her to hold onto his jacket while he went into the school to pick up his younger sibling, the satisfaction of certain

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decision making in the juror context. First, the evidence structures constructed by jurors had story structure (not other plausible structures) and verdict structures looked like feature lists. Second, jurors who chose different verdicts had constructed different stories. Thus, decisions covaried with story structures, but not with verdict representations or story classification processes.").

[51] Joel Lieberman & Bruce Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL. PUB. POL'Y & L., 589, 593–94 (1997) (discussing a study of jurors in which "only 39% of the elements contained in the instructions were understood," but "54% of the instructions were understood" when examined holistically).

[52] Pardo, *supra* note 22, at 402 ("Empirical research confirms that fact finders process evidence holistically in the form of theories or stories. Professors Bennett and Feldman advance the notion that evidence evaluation involves a choice between competing narratives. Professors Pennington and Hastie offer 'a scientific description of the mind of the juror,' which provides compelling empirical evidence to support this proposition . . . Pennington and Hastie posit the Story Model to explain the cognitive processes of jurors. The Story Model postulates that jurors impose a narrative story organization on trial information and that the story a juror constructs determines that juror's ultimate decision at trial. Trial advocacy scholarship and the courts both embrace this view.") (citations omitted).

[53] Pennington & Hastie, *supra* note 49, at 519–20 ("Probably the most unified descriptions of the juror's thought processes are mathematical models based on . . . variants of traditional probability theory, and other algebraic models.").

[54] I do not argue that statistical probability does not have a role within trials; instead I argue that probability is not the right lens for the overarching theory. *See, e.g.*, Allen, *supra* note 29, at 134.

[55] Allen & Pardo, *supra* note 2, at 13–15, 18.

elements of the crime becomes substantially less probable. In all cases, there is an inherently comparative aspect, requiring the factfinder not only to look at each party's case in isolation, but also to weigh both parties' cases against each other.

Finally, in conventional probabilistic thinking, unknown facts are skewed towards the defendant. Even when a civil plaintiff proves her case to a probability of 0.4 and the defendant to 0.2, the plaintiff still loses, despite having a much more likely case.[56] This is not equality before the law. A non-decision is still a decision impacting the substantive rights of the parties involved. Where there are unknowns, the unknowns should not favor one side over the other. Rather than requiring the plaintiff to reach some magic probability, explanationism asks jurors to evaluate the parties' cases against each other so that unknowns do not favor either side *a priori*.[57]

B. EXPLANATIONISM EXPLAINS JURIDICAL PROOF

Explanationism, or relative plausibility, is the alternative to a probabilistic account of proof.[58] Under an explanatory account of juridical proof, the factfinder does not calculate the probability that each element of a cause of action is satisfied.[59] Instead, the factfinder weighs the parties' explanations of the evidence and comparatively reasons to decide whether the plaintiff's or prosecutor's explanations can satisfy the requisite burden of proof.[60] In a standard civil case, this would be demonstration by a

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[56] *Id.* at 14.

[57] *Id.* ("Dividing or ignoring the unknown (which amounts to the same thing), on the other hand, is consistent with both stated goals regarding accuracy and the risk of error.").

[58] *See generally id.*; Amalia Amaya, *The Explanationist Revolution in Evidence Law*, 23 INT'L J. EVIDENCE & PROOF 60, 61 (2019) ("Indeed, a fundamental change is involved in the shift from probabilism to explanationism. The change, as I will argue later, in conceptual structure, values and tools is so deep as to be appropriately described, as Allen and Pardo claim, as analogous to a scientific revolution."); Taruffo, *supra* note 4, at 131 ("In other words: the trier of fact has to determine, on the basis of the available evidence, if a narrative has been duly proven (according with the applicable standards of proof). If the evidence does not offer any sufficient proof for any of the narratives, then the case will be decided applying the rules concerning the burden of proof.").

[59] Allen & Pardo, *supra* note 2, at 12, 15–16.

[60] *Id.* 17–18. While the theory of explanationism has only been developed in the past few decades, the idea of "weighing the evidence" is rooted in a long history. John Leubsdorf, *The Surprising History of the Preponderance Standard of Civil Proof*, 67 FLA. L. REV. 1569, 1594 (2015) ("Speaking of the 'preponderance of the evidence' or the 'balance of probabilities' relies on an ancient metaphor comparing the process of judgment to weighing on a set of scales. The Egyptians depicted the weighing of a dead person's heart to determine its worthiness, and Homer and Virgil described the divine use of scales when a hero's fate was,

preponderance of the evidence—a selection of the plaintiff's explanation as superior to that of the defendant.[61] In a criminal case, the prosecution must prove guilt beyond a reasonable doubt.[62] To satisfy her burden of proof, the prosecution must advance a compelling explanation of guilt, such that the defendant is unable to offer any plausible explanation of innocence; if the defendant is able to articulate a plausible explanation of her innocence, even if less plausible than that of the prosecution, the case results in acquittal.[63]

Under explanationism, factfinders weigh the parties' competing explanations against each other and against the burden of proof.[64] To obtain a verdict, a plaintiff or prosecutor must offer an explanation that not only better explains the evidence and events of the case,[65] but also contains the claim's legal elements; if not, the defense's explanation prevails.[66] And conversely, where an affirmative defense is advanced, the defendant's

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literally, in the balance . . . [B]y the Renaissance, the scales of justice were an iconographical commonplace, as they have remained.").

[61] Allen & Pardo, *supra* note 2, at 18–19; Leubsdorf, *supra* note 60, at 1612–19 (discussing the evolution of the preponderance of the evidence standard).

[62] *In re* Winship, 397 U.S. 358, 361 (1970) ("The requirement that guilt of a criminal charge be established by *proof* beyond a reasonable doubt dates at least from our early years as a Nation.").

[63] Allen & Pardo, *supra* note 2, at 29. As Professors Allen and Pardo address, scholars point out that the defendant has no obligation to present any case at all and may "stand mute." *Id.* at 22. While this is formalistically true, in practice a defendant cannot expect to do so and win, under any theory. *Id.*

[64] *Id.* at 15–16; Amaya, *supra* note 58, at 62 ("The explanationist turn in evidence law may be profitably described as a Hacking-type of revolution in which a new inferential method, i.e. explanatory inference, has brought in a new approach to the kind of knowledge that we may achieve in the context of legal fact-finding (explanatory knowledge), a novel language (abductive logic rather than probability calculus) and a distinctive approach to the establishment of the truth-value of novel candidates for truth (e.g. explanations instead of probability statements)."); Pardo, *supra* note 22, at 415–22; Sullivan, *supra* note 4, at 101 ("At every level of research, from the flightily formal to the grittily empirical, an unyielding shift in understanding is taking place: moving progressively away from absolutist or propositional concepts of what it means to find a fact, and progressively toward comparative definitions of facts as the most plausible (least rejected) alternative among the possibilities in consideration.").

[65] Allen & Stein, *supra* note 36, at 568 ("To win the plausibility contest, evidence that a party relies upon must unfold a narrative that makes sense to a natural reasoner: a layperson. There is no algorithm for 'plausibility;' the variables that inform judgments of plausibility are all the things that convince people that some story may be true, including coherence, consistency, coverage of the evidence, completeness, causal articulation, simplicity, and consilience (understood as the breadth of the explanation).").

[66] Allen & Pardo, *supra* note 2, at 16.

explanation must embrace the claim's elements to be successful.[67] In a criminal case, not only must the prosecutor's explanation be better than that of the defense, but the prosecutor must also prove that there is *no plausible alternative* explanation for the crime other than the defendant's guilt.[68] Such a requirement maps onto the requirement that guilt be proven beyond a reasonable doubt. Thus, the parties are incentivized to give the best explanation they can under the time, evidentiary, and resource constraints of the litigation—recognizing that factfinders evaluate their claims using their natural cognitive reasoning.[69]

As Professors Allen and Pardo explain, the explanatory account is more accurate and conceptually clear than a probability-based account of proof.[70] The theory avoids the need to assign abstract probabilities to isolated legal elements and splits evenly the weight of the unknown evidence between the parties.[71] Explanationism is derived from how people reason with evidence and properly frames litigation as a comparative exercise. Factfinders look to the competing narratives offered by the parties, considering the evidence as well as its gaps and incoherence, and evaluate the parties' explanations against the applicable burden of proof.[72] In this way, explanationism takes evidentiary assessment out of a theoretical vacuum and grounds it in reality. Relative plausibility also maps onto our legal system's rules. The rules of evidence are generally constructed to give parties the ability to admit the majority of the evidence which they seek to admit, giving litigants a wide latitude to construct their narratives.[73]

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[67] *Id.* at 18 ("An explanation is selected based on the explanatory threshold, and that explanation is assessed in order to determine whether it includes the elements or not.").

[68] *Id.* at 16.

[69] *Id.* at 18–19. This is not to suggest that a party cannot plead in the alternative or present multiple theories of liability (or innocence); to the contrary, explanationism simply holds that the parties will strategically choose their best explanation(s). "This may involve one story, a disjunctive explanation composed of two (or more) possibilities, or the entire range of possibilities that support their case." *Id.* at 25. The only limitations, under explanationism, will be the party's own strategic choices that it makes based on the evidence available, admissibility, the underlying substantive law, and what she believes will be most persuasive.

[70] *Id.* at 15–19.

[71] *Id.* at 17.

[72] *See generally id.*

[73] Allen & Leiter, *supra* note 27, at 1535–36 ("Apart from the constitutional exclusionary rules whose purpose is to vindicate rights, there are only two general exclusionary rules: relevancy and hearsay. Relevancy exclusions do keep information from juries, but only that information that no person could reasonably rely upon or whose 'danger of unfair prejudice, confusion of the issues, or misleading the jury' substantially outweighs its probative value . . . . The hearsay rule keeps only the rankest and least reliable form of evidence from

Despite the advantages of the explanatory account, the legal system is slow to change, and probabilism bubbles beneath the surface. For decades, probabilistic thinking has undermined the promise that the Supreme Court made in *Brady v. Maryland*.[74] Explanationism shows the need for a different account of materiality among courts and legislators. The probabilistic framework currently undergirding *Brady*, by misconstruing juridical proof, undermines American criminal process.

II. EXPLANATIONISM EXPLAINS *BRADY V. MARYLAND*

In 1963, the Supreme Court decided *Brady v. Maryland*, and in a sweeping five-page majority declared, "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[75] In the aftermath, defendant John Leo Brady was granted a new hearing, and his death sentence was ultimately commuted to life imprisonment.[76] For the past fifty years, it has been a bedrock of constitutional criminal process that *Brady* requires prosecutors to turn over to criminal defendants evidence that "tends to negate their guilt or reduce their punishment."[77] In other words, *Brady* mandates limited discovery instead of trial by ambush.[78]

With a defendant's right to exculpatory evidence unequivocally established, the battle shifted to the doctrine's framework and standards.[79] Subsequent cases slowly but surely led the way to modern *Brady* doctrine.[80]

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the factfinder, which is quite consistent with the relative plausibility theory and its veritistic implications.") (citations omitted); Allen & Stein, *supra* note 36, at 569.

[74] *See infra* Section II.

[75] 373 U.S. 83, 87–88 (1963).

[76] Emily Langer, *E. Clinton Bamberger Jr., Lawyer Who Won 'Brady Rule' for Criminal Defendants, Dies at 90*, WASH. POST (Feb. 18, 2017), https://www.washingtonpost.com/national/e-clinton-bamberger-jr-lawyer-who-won-brady-rule-for-criminal-defendants-dies-at-90/2017/02/17/97eb75dc-f461-11e6-8d72-263470bf0401story.html [https://perma.cc/PPZ4-C7UA].

[77] Bibas, *supra* note 9, at 1.

[78] The persistent refusal to grant criminal discovery and the gamesmanship in the adversary system dates back to the 18th century. Jerry E. Norton, *Discovery in the Criminal Process*, 61 J. CRIM. L. & CRIMINOLOGY 11 (1970).

[79] Jannice E. Joseph, *The New Russian Roulette:* Brady *Revisited*, 17 CAP. DEF. J. 33, 35 (2004).

[80] Strickler v. Greene, 527 U.S. 263, 280–81 (1999) ("We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, and that the duty encompasses impeachment evidence as well as exculpatory evidence . . . . Moreover, the rule encompasses evidence 'known only to police investigators and not to the

Each development of *Brady* merits a dedicated inquiry, but for this Comment one issue stands above the rest: in order for the suppression of evidence to constitute a *Brady* violation, the evidence must be *material*.[81] As will be demonstrated, the standard for determining what evidence qualifies as material has been undermined by probabilism, thereby increasing room for error and the violation of defendants' rights.

Initially, the Court premised its materiality decisions almost exclusively on probabilistic logic.[82] As the doctrine evolved, the Court began hinting that lower courts needed to shift to a more explanatory account of materiality, without overruling the probabilistic holdings.[83] In the process, the Court at times contradicted itself, marching two steps forward and one step back.[84]

A. EARLY *BRADY* AND PROBABILISM

In *United States v. Bagley*, the Court observed that impeachment evidence, "if disclosed and used effectively . . . may make the difference between conviction and acquittal."[85] In doing so, it endorsed a holistic assessment of the evidence, parenthetically noting that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend."[86] The Court implicitly recognized that a defendant's explanation at trial, to be complete, needed more details of the story, and that the loss of such details could be the difference between guilt and acquittal.[87]

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prosecutor' . . . therefore, the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.") (citations omitted).

[81] United States v. Bagley, 473 U.S. 667, 674 (1985).

[82] *Id*. at 682; Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987) ("[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.") (citations omitted).

[83] *See, e.g.*, Banks v. Dretke, 540 U.S. 668, 681–88 (2004); Kyles v. Whitley, 514 U.S. 419, 435 (1995).

[84] Smith v. Cain, 565 U.S. 73, 75 (2012) ("We have explained that 'evidence is material within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.' A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence . . . .'") (citations omitted).

[85] *Bagley*, 473 U.S. at 676 (citations omitted). Such language shows acknowledgement of the holistic nature of evidence.

[86] *Id*.

[87] *See also* Old Chief v. United States, 519 U.S. 172, 187 (1997) ("Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains

Material evidence did not need to be exonerating evidence, but instead had to include important story-telling context.[88] A small difference could change the entire outcome of a case.

Despite the importance of "subtle factors," the Court crafted a test for materiality that hinged on probability.[89] Justice Blackmun emphasized that "[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[90] For the first time, proving materiality required a showing that the evidence would have changed the *outcome of the trial*.[91] Yet Justice Blackmun simultaneously admonished courts to look at the totality of the circumstances and remember "the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response."[92] Given the complex narrative structures humans use to determine facts,[93] this requirement seems to require a court to do the impossible.

In his dissent, Justice Marshall immediately noted the problems with this standard, arguing for an approach that closely resembles the modern explanatory perspective.[94] Justice Marshall noted that "the existence of any small piece of evidence favorable to the defense may, in a particular case, create just the doubt that prevents the jury from returning a verdict of guilty. The private whys and wherefores of jury deliberations pose an impenetrable barrier to our ability to know just which piece of information might make, or might have made, a difference."[95] Like the explanatory account, Justice Marshall's dissent acknowledged the holistic nature of evidentiary evaluation and the complications of human cognition. Justice Marshall argued that a deprivation of information from the defense was a deprivation from the trier of fact, undermining the reliability of verdicts.[96] As the explanatory account holds, guilt is found by comparing each party's account, something which cannot be done when the defense is missing components of its explanation.

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momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict.").

88 *See infra* Section I.

89 *Bagley*, 473 U.S. at 682 (Marshall, J., dissenting).

90 *Id.*

91 *Id.*

92 *Id.* at 683.

93 *See supra* note 48.

94 *See Bagley*, 473 U.S. at 685 (Marshall, J., dissenting).

95 *Id.* at 693.

96 *Id.*

As a second matter, the dissent emphasized that the majority's materiality test asks the prosecution to divine—before the trial ever occurs—what evidence *could* impact the outcome.[97] Justice Marshall found such a request almost impossible, particularly given that the prosecutor has no way of knowing the defendant's case.[98] The prosecutor is required to zealously serve victims and the community, and this diminishes her ability to see evidence from the perspective of the defense and increases the likelihood that she will dismiss or overlook favorable evidence.[99] The State meets its burden by developing its explanation of the case for the trier of fact,[100] so the prosecutor cannot make the case of the defendant any more than the defendant can make the case of the State.

The *Bagley* debates highlight the superiority of explanationism. For a judge assessing a *Brady* violation or a prosecutor determining what evidence to turn over, it is unrealistic to pretend to know how some counterfactual trial might unfold. Each individual juror's reasoning process is highly variable, and those variations directly impact outcomes.[101] Individual variation is compounded when one factfinder sits on a jury with other factfinders who contribute their different backgrounds, prior assumptions, knowledge, and perceptions to the group's reasoning dynamics.[102] Any individual can employ highly variable cognitive processing on a case-by-case basis, so there

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[97] *Id.* at 699–700 (Marshall, J., dissenting) ("[The materiality standard] defines the right not by reference to the possible usefulness of the particular evidence in preparing and presenting the case, but retrospectively, by reference to the likely effect the evidence will have on the outcome of the trial . . . Although this looks like a post-trial standard of review, it is not. Instead, the Court relies on this review standard to define the contours of the defendant's constitutional right to certain material prior to trial . . . pursuant to a pretrial standard that virtually defies definition.").

[98] *See generally* O'Brien, *supra* note 20.

[99] *Bagley*, 473 U.S. at 700–03 (Marshall, J., dissenting).

[100] Allen & Pardo, *supra* note 2, at 16.

[101] Kuhn et al., *supra* note 50, at 295. Conducting a study on juror reasoning and verdict outcomes, the researchers found that the reasoning capabilities of a juror influence the verdict, but a juror's verdict cannot be predicted by reasoning power alone; additionally, the reasoning applied by an individual can vary on a case-by-case basis. *Id.*

[102] Brian H. Bornstein & Edie Green, *Jury Decision Making: Implications For and From Psychology*, 20 CURRENT DIRECTIONS IN PSYCHOL. SCI. 63, 64–65 (2011) ("Why do jurors who hear identical pieces of (albeit conflicting) evidence construct different stories? They do so primarily because they filter the evidence through their own experiences, expectations, values, and beliefs. And, like all decision makers, jurors tend to seek out and remember information that is consistent with their verdict preference and scrutinize and reject information that is inconsistent with that preference. These initial preferences can come from general legal attitudes, preexisting cognitive schemas about the law, pretrial publicity, opening statements, or early trial evidence.").

is no way to predict how an entire jury may have reasoned differently.[103] Relative plausibility shows why we cannot look back *ex post* and decide with any confidence how a trial could have changed in light of new evidence;[104] we must redefine materiality to give access to that evidence up front.

B. *BRADY* SHIFTS TOWARDS EXPLANATIONISM

Kyles v. Whitley was a substantial step towards a more explanatory view of the materiality standard.[105] In addition to holding that a prosecutor has a duty to learn of favorable evidence obtained by police and other government workers,[106] the Court recast materiality in key ways. First and foremost, Justice David Souter stipulated that a "reasonable probability" of a different result did not require a different verdict, as the phrase suggests, but instead required a showing that the suppression of the evidence undermined confidence in the outcome.[107] Materiality was not to be treated as a sufficiency of the evidence test.[108] The Court also reframed the inquiry to hold that a defendant shows a *Brad*y violation "by showing that the favorable evidence could reasonably be taken to put the whole case in such a different

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[103] Allen & Pardo, *supra* note 2, at 19 ("Evaluating explanations will depend on the details of individual cases, at the retail and not the wholesale level, as it were, as well as on the background knowledge of the decision maker.").

[104] Ronald J. Allen, *Factual Ambiguity and a Theory of Evidence*, 88 NW. U. L. REV. 604, 627 (1993) ("The proffered data become evidence if they influence a fact finder. Whether they do is determined by the sum total of that person's experiences at the moment of decision, experiences which will by that time include the advocates' efforts to enlighten the fact finder about the implications of the material produced at trial and all the other observations generated by the trial.").

[105] 514 U.S. 419 (1995). In 1997, two years after its *Kyles* decision, the Court decided *Old Chief v. United States* and based its ruling on the significance of narrative to the trial process. 519 U.S. 172, 187 (1997) ("In sum, the accepted rule that the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away rests on good sense. A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it. People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best.").

[106] *Kyles*, 514 U.S. at 437.

[107] *Id.* at 434.

[108] *Id.* ("The second aspect of *Bagley* materiality bearing emphasis here is that it is not a sufficiency of evidence test.").

light as to undermine confidence in the verdict."[109] Finally, the suppressed evidence had to be viewed collectively, "not item-by-item."[110]

Kyles represents a high-water mark for *Brady* doctrine. With this case, the Court embraces what is very close to an explanatory account of evidence, emphasizing that materiality must be decided by evaluating whether the evidence could put the case in a different light.[111] The holding rejects the requirement that a court look at the probability of a change in outcome, opting instead for evaluation of the accuracy of the trial as a whole.[112] *Kyles* also rejects the probabilistic assessment of each piece of evidence in isolation, embracing a standard of materiality that requires greater disclosure in order to allow each side to put forth its explanation—holding the State to its burden and ensuring due process of law.[113]

If *Kyles* was a high-water mark, *Strickler v. Greene* was a reversion back to probabilities—if not in outcome, then at least in language. In *Strickler*, the Court reaffirmed its commitment to looking at whether the suppressed material could put the case in a different light, but held that the "petitioner has not shown that there is a reasonable probability that his conviction or sentence would have been different had these materials been disclosed."[114] As in *Bagley*, the dissent again called for a different definition of materiality.[115]

The majority writer for *Kyles* now writing in dissent, Justice Souter argued that the probabilistic language used by the Court in *Strickler* would confuse lower courts, by suggesting that *Brady* requires showing a change in outcome was "more likely than not."[116] Justice Souter traced *Brady*'s

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[109] *Id.* at 419.

[110] *Id.* at 436. And, the prosecution must "make disclosure when the point of 'reasonable probability' is reached." *Id.* at 420.

[111] *Id.* at 435.

[112] *Id.* at 421 ("On habeas review, we follow the established rule that the state's obligation under *Brady v. Maryland*, to disclose evidence favorable to the defense, turns on the *cumulative effect of all such evidence* suppressed by the government . . . .") (emphasis added).

[113] Allen, *supra* note 104, at 627–28 ("Evidence is not a set of things, as the conventional theory would have it; it is instead the process by which fact finders come to conclusions about the past . . . a disinterested fact finder reconstructs the past based on all the observational inputs available at the moment of judging.").

[114] Strickler v. Greene, 527 U.S. 263, 296 (1999).

[115] *Id.* at 296–97 (Souter, J., dissenting).

[116] *Id.* at 298 (Souter, J., dissenting). As Justice Souter explained, "Despite our repeated explanation of the shorthand formulation in these words, the continued use of the term 'probability' raises an unjustifiable risk of misleading courts into treating it as akin to the more demanding standard, 'more likely than not.' While any short phrases for what the cases are getting at will be 'inevitably imprecise,' I think 'significant possibility' would do better at

evolution[117] to show that the standard's "circuitous path" was never meant to suggest a change in outcome must be "more likely than not" and argued that the probabilistic language should be omitted to reflect that the standard is something of a "reasonable possibility."[118] Justice Souter's dissent, while not embracing an explanatory definition of materiality, admonished the majority for using probabilistic language and focused instead on whether suppression of the evidence undermined the conviction's reliability.[119]

C. DO AS I DO, NOT AS I SAY

Banks v. Dretke was the next stepping stone. Since *Kyles*, the Fifth Circuit had continued to resist the more holistic analysis that the Supreme Court had set out.[120] In its review, the Supreme Court engaged in a substantial examination of how the suppressed evidence—a key witness's informant status—not only could have changed the jurors' evaluation of the evidence, but also affected how the defense could have gone about its strategy differently.[121] In doing so, Justice Ruth Bader Ginsburg, writing for the majority, acknowledged the interrelated and interdependent nature of the evidence, paying particular attention to how the informant's testimony related to other aspects of the State's explanation advanced at trial.[122] In an

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capturing the degree to which the undisclosed evidence would place the actual result in question, sufficient to warrant overturning a conviction or sentence." *Id.* (internal citations omitted).

[117] *Id.* ("*Brady* itself did not explain what it meant by 'material' (perhaps assuming the term would be given its usual meaning in the law of evidence).").

[118] *Id.* at 298–302.

[119] *Id.* at 300–01 ("[T]he touchstone of the enquiry must remain whether the evidentiary suppression 'undermines our confidence' that the factfinder would have reached the same result.").

[120] Banks v. Cockrell, 48 F. App'x 104 (5th Cir. 2002), *rev'd sub nom* Banks v. Dretke, 540 U.S. 668 (2004).

[121] *Banks*, 540 U.S. at 692–704.

[122] *See, e.g.*, *id.* at 672 ("Farr was paid for a critical role in the scenario that led to Banks's indictment. Farr's declaration, presented to the federal habeas court, asserts that Farr, not Banks, initiated the proposal to obtain a gun to facilitate robberies. Had Farr not instigated, upon Deputy Huff's request, the Dallas excursion to fetch Banks's gun, the prosecution would have had slim, if any, evidence that Banks planned to continue committing violent acts. Farr's admission of his instigating role, moreover, would have dampened the prosecution's zeal in urging the jury to consider Banks's acquisition of a gun to commit robbery or his 'planned violence.' Because Banks had no criminal record, Farr's testimony about Banks's propensity to violence was crucial to the prosecution. Without that testimony, the State could not have underscored to the jury that Banks would use the gun fetched in Dallas to 'take care' of trouble arising during robberies. The stress placed by the prosecution on this part of Farr's testimony, uncorroborated by any other witness, belies the State's suggestion that Farr's testimony was

explanatory fashion, the majority looked at how the suppressed evidence related to the other evidence as well as the overall strategy and story.[123] This is not to say that the Court altered the language of the materiality test.[124] But in action, the majority employed explanationism by looking not only at how the suppressed evidence could have fit with the defense's explanation advanced at trial, but also how the evidence could have changed the defense's strategy and how the evidence's absence strengthened the prosecution's case.[125]

D. MODERN *BRADY*, A HODGEPODGE OF BOTH THEORIES

Current cases continue to conflate explanatory evaluation and probabilistic language. *Smith v. Cain* reiterated the probabilistic test—evaluating for a "reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different"—but defining a reasonable probability in more explanatory terms, as enough likelihood to "undermine confidence in the outcome of the trial."[126] Despite speaking in probabilistic terms, the Court noted that "[w]e have observed that evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict,"[127] stressing the need to look at the evidence as a whole. *Wearry v. Cain* framed the test in a more explanatory fashion, requiring lower courts to look for "any reasonable likelihood [the suppressed evidence] could have affected the judgment of the jury" and whether the suppression of that evidence "undermine[s] confidence" in the conviction.[128] And in *Turner v. United*

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adequately corroborated. The prosecution's penalty-phase summation, moreover, left no doubt about the importance the State attached to Farr's testimony.").

[123] *Id.* at 698–703.

[124] *Id.* at 703 ("On the record before us, one could not plausibly deny the existence of the requisite 'reasonable probability of a different result' had the suppressed information been disclosed to the defense.").

[125] *See id.* at 698–703.

[126] Smith v. Cain, 565 U.S. 73, 75–76 (2012).

[127] *Id.* at 76.

[128] 136 U.S. 1002, 1006 (2016) (citations omitted). The Court approvingly cited a line in *United States v. Agurs*: "[I]f the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Id.* (citing United States v. Agurs, 427 U.S. 97, 113 (1976)). The majority also reiterated that evidence is to be looked at cumulatively. *Id.* at 1007. Interestingly, the dissent employed a more probabilistic framework. *Id.* at 1008 (Alito, J., dissenting) ("The failure to turn over exculpatory information violates due process only 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'") (citations omitted).

States, the Court again carefully looked at the entire record and how the suppressed evidence related.[129] These recent cases, with *Turner* coming down in 2017, are *Brady*'s current articulation.

What does this mean for materiality, then? First, a trace of the doctrine shows that while probabilistic articulations of the test for materiality remain good law, since 1995, the Court has insisted that lower courts look carefully at the entire evidentiary record.[130] In doing so, the Court requires the reviewing judge to gauge whether the suppressed evidence could put the case in "a different light"[131] and how the parties' explanations and strategy could have changed—rather than whether the evidence would result in a definite change in outcome. Second, the case law addresses the issue of accuracy; the standard is often formulated as a question of whether there is concern that confidence in the conviction has been undermined.[132] There is no doubt that *Brady* jurisprudence forbids a court from looking at each piece of evidence alone.[133] These developments reflect a dramatic shift, but one that has not been fully realized. *Brady* language continues to maintain an inquiry into probability, while the Court simultaneously requires a searching look at the evidence and its relationship to the greater explanations advanced.[134]

E. A MATERIALLY DIFFERENT CONCEPTION OF EVIDENCE

Explanationism shows that materiality should be accorded its understood meaning at the time *Brady* was decided.[135] Not to be conflated

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[129] *See generally* Turner v. United States, 137 S. Ct. 1885 (2017).

[130] *See generally Banks*, 540 U.S. at 668; Kyles v. Whitley, 514 U.S. 419 (1995).

[131] Cone v. Bell, 556 U.S. 449, 476 (2009) (remanding "with instructions to give full consideration to the merits of Cone's *Brady* claim").

[132] *Id.* at 462 (examining whether the suppressed evidence would "undermine confidence in the verdict").

[133] *See supra* Section II(B).

[134] Smith v. Cain, 565 U.S. 73, 76 (2012) ("Again, the State's argument offers a reason that the jury *could* have disbelieved Boatner's undisclosed statements, but gives us no confidence that it *would* have done so.")

[135] Strickler v. Greene, 527 U.S. 263, 298 (1999) (Souter, J., dissenting) ("*Brady* itself did not explain what it meant by 'material' (perhaps assuming the term would be given its usual meaning in the law of evidence."); Weinstock v. United States, 231 F.2d 699, 701–02 (D.C. Cir. 1956) ("'Material' when used in respect to evidence is often confused with 'relevant,' but the two terms have wholly different meanings. To be 'relevant' means to relate to the issue. To be 'material' means to have probative weight, i.e., reasonably likely to influence the tribunal in making a determination required to be made. A statement may be relevant but not material. Professor Wigmore depicts with some acerbity the difference between relevancy and materiality, 'the inaccuracy of our usage' of the terms, and 'the harmfulness of this inveterate error.' Materiality, he maintains, is a matter of substantive law and does not involve the law

with relevancy, materiality encapsulates the underlying elements of the claim to ask whether evidence has a "tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made."[136] Under the explanatory account, material evidence is evidence that a defendant could use in constructing her story or theory of the case to influence the factfinders. Just as factfinders reason by evaluating competing explanations of the evidence,[137] materiality asks whether the evidence in question could be used to influence the factfinder in making assessments required to be made.[138] The issue centers on whether the defendant's ability to construct her case was impaired, not the potential changes in outcome. This definition is consistent with both how parties construct cases and how juries decide cases. Cases are decided based on the explanations built around the available evidence, so a denial of access to evidence is a denial of access to meaningful participation in the trial.[139] As Justice Marshall said in *Bagley*: "Formulation of this right [to *Brady* evidence], and imposition of this duty, are the essence of due process of law. It is the State that tries a man, and it is the State that must insure that the trial is fair."[140]

Because *Brady* materiality remains grounded in probabilism, it is problematic. Jurors and judges do not think about each piece of evidence in

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of evidence. He does not include 'materiality' in the topics treated in his volumes on Evidence. The term 'material' is used in many fields of law; for example, insurance law, bankruptcy, agency, motions for new trial upon the ground of newly discovered evidence, and in respect to perjury. In respect to materiality in perjury Blackstone said, 'for if it only be in some trifling collateral circumstance, to which no regard is paid, it is not penal.' The meaning of the word appears to be consistent in these various fields. The test is whether the false statement has a natural tendency to influence, or was capable of influencing, the decision of the tribunal in making a determination required to be made. Materiality must be judged by the facts and circumstances in the particular case. The color of an accused's hair may be totally immaterial in one case, but in other circumstances the color of his hair may be not only material but decisively so.") (citations omitted).

136 *Weinstock*, 231 F.2d at 702.

137 *See infra* Section I.

138 *Weinstock*, 231 F.2d at 701–02.

139 *See generally* Allen & Pardo, *supra* note 2. Of course, the rules of evidence will continue to require compromises when it comes to admissibility, but this is a separate issue from initial disclosure and materiality.

140 United States v. Bagley, 473 U.S. 667, 695–96 (1985) (Marshall, J., dissenting) ("[T]he *Brady* decision, the reasoning that underlay it, and the fundamental interest in a fair trial, combine to give the criminal defendant the right to receive from the prosecutor, and the prosecutor the affirmative duty to turn over to the defendant, *all* information known to the government that might reasonably be considered favorable to the defendant's case.")

isolation; they construct narratives.[141] The defense attorney constructs an entire complex narrative for trial based on all the evidence at her disposal, so there is no way for the prosecutor to assess the materiality of evidence without making the defense's case herself.[142] Omitting any piece of evidence could change how the rest of the evidence is processed and fits together, changing the resulting narratives that can be constructed and resulting in an outcome that could put the "whole case in such a different light."[143] And taking evidence from the defense diminishes its ability to craft its explanation, which in effect reduces the State's burden. Because trials are a process by which factfinders select the explanation that better matches with the evidence and satisfies the burden of proof, the loss of evidence on the part of the defendant is an affront to the accuracy of trials and due process of law.[144] The right to due process must encapsulate the right of a defendant to fully make her case. Knowing what we know about human cognition,[145] anything less seems unconstitutional under *Brady*.

The explanatory account explains why asking a factfinder to quantify the likelihood of various elements being met in isolation "requires frequently unavailable information to implement (or must rely instead on subjective beliefs)."[146] Far from being an objective evaluation, assessments of the probability of a given event most typically result in highly subjective judgments that are untethered to anything beyond the factfinder's own belief structures.[147] Applying such a subjective approach to the element of

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[141] Allen & Pardo, *supra* note 2, at 17–18 ("That jurors typically attempt to construct narratives to fit evidence dovetails with the explanatory account of standards of proof. This more holistic account of evidence evaluation is inconsistent with probabilistic accounts that posit item-by-item processing of evidence in terms of probabilities, leading to a probabilistic conclusion for each element.").

[142] Robert Hochman, Brady v. Maryland *and the Search for Truth in Criminal Trials*, 63 U. CHI. L. REV. 1673, 1689–90 (1996).

[143] Kyles v. Whitley, 514 U.S. 419, 435 (1995).

[144] Allen & Pardo, *supra* note 2, at 12 n.43 ("Evidence at trial is contingent. What any offer of evidence means depends on all the evidence in the case.").

[145] Shari Seidman Diamond et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201, 212 (2006) ("The deliberations of these 50 cases revealed that jurors actively engaged in debate as they discussed the evidence and arrived at their verdicts. Consistent with the widely accepted 'story model,' the jurors attempted to construct plausible accounts of the events that led to the plaintiff's suit. They evaluated competing accounts and considered alternative explanations for outcomes.").

[146] Allen & Pardo, *supra* note 2, at 17. As a result, a probabilistic *Brady* inquiry either asks a judge to do the impossible and find non-existent statistics, or assess materiality from her own subjective beliefs and biases.

[147] Bruno de Finetti, *Probabilism: A Critical Essay of the Theory of Probability and the Value of Science*, 31 ERKENNTIS 169, 174 (1989) ("[H]owever an individual evaluates the

materiality—asking judges to essentially guess at the probability that the outcome of the trial could change—results in almost complete subjectivity and irrationality.[148] The explanatory account highlights that "[w]hen favorable evidence is in the hands of the prosecutor but not disclosed, the result may well be that the defendant is deprived of a fair chance before the trier of fact, and the trier of fact is deprived of the ingredients necessary to a fair decision"[149]—directly challenging what we value about the adversary process. If the adversary process is intended to hold the State to its burden and achieve certain policy goals,[150] a probabilistic standard of *Brady* materiality actually diminishes the doctrine's effectiveness. The probability language in *Brady* materiality sets a very high bar—asking for evidence akin to the smoking gun, DNA evidence, the transcript of the alternate suspect who confessed—when many cases are won and lost on details.[151] Recent studies support this proposition: "[e]mpirical evidence confirms that most *Brady* and *Giglio* claims involve not smoking guns but ambiguous evidence, which prosecutors can easily overlook."[152]

A party that cannot present her explanation cannot participate fully in her trial, and a defendant is denied a fair trial and due process of law in the absence of that opportunity.[153] As the explanatory account teaches,[154] an accurate materiality standard is pivotal to a fair trial. Under the explanatory

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probability of a particular event, no experience can prove him right, or wrong; nor in general, could any conceivable criterion give any objective sense to the distinction one would like to draw, here, between right and wrong."); *see also* Allen & Pardo, *supra* note 2, at 12.

[148] Allen & Pardo, *supra* note 2, at 11–13.

[149] United States v. Bagley, 473 U.S. 667, 694 (1985) (Marshall, J., dissenting).

[150] *See* Allen & Pardo, *supra* note 2, 9–10, 17.

[151] Medwed, *supra* note 6, at 1543–44 ("One study by Bill Moushey of the *Pittsburgh Post-Gazette* waded through 1,500 cases and determined that prosecutors routinely withheld favorable evidence. Despite this high rate of nondisclosure, appellate courts found reversible error in only a handful of cases where the mistakes were so glaring, the conduct so heinous, that judges had no other recourse.").

[152] Bibas, *supra* note 9, at 14 (reviewing 448 *Brady* and *Giglio* claims which succeeded or were remanded between 1959 and 2004, and finding that "only about one-fourteenth of the successful or remanded cases fall into the most compelling categories [of suppressed evidence]: identification evidence or strong forensic evidence"); O'Brien, *supra* note 20, at 999 (applying "the lessons of cognitive science to identify the ways in which prosecutors' distinctive institutional environment may undermine not just their willingness to play fair but also their ability to do so").

[153] U.S. CONST. amend XIV, § 1; Brady v. Maryland, 373 U.S. 83, 87–88 (1963) ("A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant.").

[154] Allen & Pardo, *supra* note 2, at 33.

account, *Brady* works to ensure that the defense has access to the evidence it needs to fully develop its explanation and therefore to have due process of law.

III. THE TEXAS STORY

This Comment has shown that an explanatory account of evidence more accurately reflects how factfinders reason and thus demands that legislatures and courts reconceptualize what it means for evidence to be material.[155] Explanationism shows why the current standard does not work—deciding after the fact what evidence could have changed the outcome of a case is difficult when parties create and jurors evaluate cases using a holistic reasoning process that incorporates the evidence.[156] Furthermore, the complexities of human thinking show that a court can very rarely, if ever, discern how a juror might reason differently.[157] Similarly, it would be almost impossible to know how a defendant would have constructed her case differently had evidence not been suppressed. In the past twenty-five years, the Supreme Court has moved towards an explanatory definition of materiality by evaluating evidence holistically and relationally.[158] However, the Court has also maintained probabilistic underpinnings and language in its definition of materiality, negatively impacting defendants' right to due process of law.[159]

The rest of this Comment is devoted to Texas and its discovery act as a case study to illustrate the importance of the theory underpinning our practice. Frustratingly, both federal and state courts continue to adhere to probabilistic conceptions of materiality at the expense of *Brady*'s promise of a fair trial.[160] For this reason, materiality must be redefined even if Congress or state legislatures undergo criminal discovery reform. To illustrate this point, the Morton Act of Texas serves as an especially important case study.[161] The Texas experience highlights both the interaction between the

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155 *See supra* Section II.

156 Allen & Pardo, *supra* note 4, at 208 ("The primary message of relative plausibility is that from beginning to end the legal system pushes the parties to provide competing explanations, and these explanations structure the decision that is subsequently made (even if the decision is based on an explanation not advanced by the parties).").

157 *See* Kuhn et al., *supra* note 50, at 295.

158 Kyles v. Whitley, 514 U.S. 419, 435 (1995).

159 *See supra* Section II(E).

160 *See infra* Section IV.

161 *Id.*

legislature and the courts in enacting reform as well as the importance of the assumptions that the judiciary brings to bear on the trial process.

Brady jurisprudence remains marred by the precedent of piecemeal analysis and probabilistic evaluation, but Congress and the states are free to adopt more robust criminal discovery.[162] Yet beyond its constitutional command, the *Brady* conception of materiality has profoundly impacted discovery statutes. Rule 16 of the Federal Rules of Criminal Procedure and many states require the disclosure of criminal discovery in *Brady* terms, using materiality and *Brady* language to assess what must be disclosed.[163] While discovery statutes need not consider materiality, state legislatures and courts have also traditionally adopted this evidentiary view.[164]

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[162] *See, e.g.*, *Kyles*, 514 U.S. at 437 ("We have never held that the Constitution demands an open file policy (however such a policy might work out in practice), and the rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate."); Green, *supra* note 19, at 639 (evaluating Congressional legislation efforts to expand criminal discovery beyond the requirements of *Brady*); Beth Schwartzapfel, *Defendants Kept in the Dark About Evidence, Until It's Too Late*, N.Y. TIMES (Aug. 7, 2017), https://www.nytimes.com/2017/08/07/nyregion/defendants-kept-in-the-dark-about-evidence-until-its-too-late.html [https://perma.cc/BMF2-2WXM] (discussing state and ABA efforts to expand criminal discovery). Many commenters, however, find that neither *Brady* nor statutes are adequately addressing criminal discovery issues. Jones, *supra* note 8, at 423 ("Despite the nationwide epidemic of *Brady* violations and the magnitude of injustice that results from such misconduct, the criminal justice system has not developed effective reforms to provide a remedy for defendants or appropriately sanction prosecutors for concealing evidence favorable to the defense.").

[163] FED. R. CRIM. P. 16; LAURAL L. HOOPER ET AL., TREATMENT OF *BRADY V. MARYLAND* MATERIAL IN UNITED STATES DISTRICT AND STATE COURTS' RULES, ORDERS, AND POLICIES, FED. JUD. CENTER (2004), https://www.uscourts.gov/sites/default/files/bradymat_1.pdf [https://perma.cc/N5KY-J3JR]. Rule 16 of the Federal Rules of Criminal Procedure mandates the disclosure of the defendant's statements and prior records. It also requires the prosecution to grant discovery of documents and objects possessed by the government if "(i) the item is *material* to preparing the defense; (ii) the government intends to use the item in its case-in-chief at trial; or (iii) the item was obtained from or belongs to the defendant." FED. R. CRIM. P. 16(a)(1)(E)(i)-(iii) (emphasis added). Similarly, reports of examinations and tests must "be *material* to preparing the defense" or the government must "intend[] to use the item in its case-in-chief at trial" before their disclosure will be compelled. *Id.* at 16(a)(1)(F)(iii) (emphasis added). This focus on materiality has, in turn, seeped into state statutes. Emily Dyer et al., *Statewide Rules of Criminal Procedure: A 50 State Review*, 1 NEV. L.J. FORUM 1, 7 (2017) ("Although the ALI and other institutions have created model rules, nearly half the states used the FRCP to model their own rules.").

[164] *See infra* Section IV. This Comment takes Texas as its primary example of this issue. However, many states would equally serve to illustrate. *See, e.g.*, Darryl K. Brown, *Discovery in State Criminal Justice*, 3 REFORMING CRIM. JUST. 147–56 (2017).

A. FEDERAL MATERIALITY

Beyond the limitations of the Court's holdings in and of themselves, an equally significant issue has been lower courts' resistance to the evolution of *Brady*—and their manipulation of the materiality standard. Despite the Supreme Court's holdings, some federal and state courts remain reluctant to adopt a more robust assessment of materiality.[165] In these cases, we see adherence to a crabbed analysis which does not give the holistic evaluation called for by the Supreme Court.[166] Understanding the nature of the problem requires examining the relationship between the Fifth Circuit and the evolution of the materiality standard under *Brady*. To some degree, the modern standard applied today evolved from a conversation between the Fifth Circuit and the Supreme Court.

Kyles came to the Supreme Court from a Fifth Circuit defendant's appeal.[167] The Fifth Circuit claimed at the outset of its opinion that it would "examine the evidence presented at trial and how the extra materials would have fit," but really it evaluated the suppressed evidence separately and without considering its relationship to the rest of the evidence.[168] In fact, the

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[165] Haskell v. Superintendent Greene SCI, 866 F.3d 139, 148 (3d Cir. 2017) ("Once a petitioner demonstrates 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,' the inquiry is over . . . .") (citations omitted); United States v. Shields, No. 15–cr–00200–REB, 2017 WL 3085513, at *5 (D. Colo. July 20, 2017) ("The criterion of materiality is met only if there is a 'reasonable probability' that the outcome of a trial would have been different had the evidence been disclosed to the defense.") (citations omitted); Pennsylvania v. Natividad, 200 A.3d 11, 32–33 (Pa. 2019) (finding that "[t]here is no dispute the Commonwealth failed to disclose these materials to the defense prior to trial, and some of them were plainly exculpatory on their face, as they identified an alternate suspect who allegedly claimed responsibility for the murder," yet holding that "the Commonwealth's evidence against appellant was so overwhelming there is no reasonable probability that if the Commonwealth had turned over the relevant evidence the result of the trial would have been different"); *Ex parte* Carty, 543 S.W.3d 149, 177 (Tex. Crim. App. 2018) ("Exculpatory evidence is that which may justify, excuse, or clear the defendant from alleged guilt. None of the witnesses stated that Carty was not involved in the murder. While the withheld witness statements may have contained inconsistencies that could have been brought out at trial to impeach those witnesses, none of those statements contained information justifying, excusing, or clearing Carty from the alleged guilt, or eliminating her as a party to this offense.").

[166] *See supra* notes 164–165. This is not to say that all courts take this limited view of materiality; *see, e.g.*, Tempest v. State, 141 A.3d 677, 687 (R.I. 2016) ("Contrary to what the dissent suggests, whether the defense would have actually used the statements is not relevant to our analysis—the bottom line is that it should have been defense counsel's choice to make.").

[167] *Kyles*, 514 U.S. at 422.

[168] Kyles v. Whitley, 5 F.3d 806, 811–12 (5th Cir. 1993), *rev'd*, 514 U.S. 419 (1995).

court even analyzed different components of a single transcript separately, separating whole documents into piecemeal evidence.[169] On review, the Supreme Court held that

> [a]lthough the [Fifth Circuit] majority's *Brady* discussion concludes with the statement that the court was not persuaded of the reasonable probability that Kyles would have obtained a favorable verdict if the jury had been 'exposed to any or all of the undisclosed materials,' the opinion also contains repeated references dismissing particular items of evidence as immaterial and so suggesting that cumulative materiality was not the touchstone.[170]

The Court stressed that the sum of the suppressed evidence could allow the jury to decide differently, and so "confidence that the verdict would have been unaffected cannot survive."[171]

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[169] The Fifth Circuit analyzed the evidence in an individualized fashion, in such a way as to suggest that no amount of evidence could have changed the outcome of trial. All of the evidence in the list to follow was dismissed as insufficient.

1. Use of the police transcript to show a prosecution informant had framed the defendant: "Even without these documents, Kyles made a credible case that Beanie could have planted this evidence."
2. Use of the police transcript to show the informant had been at the scene: "These notes refer to Beanie's presence at Kyles' apartment for Sunday dinner. Corroborating Beanie's presence, however, adds little credibility to an assertion that Beanie smuggled evidence in and hid it about the apartment on that occasion."
3. Use of the police transcript to show a second motive for the prosecution informant: "Beanie's request for the money on the transcript would have been cumulative, at best."
4. Use of the police transcript to show the informant had purchased the stolen car: "Ultimately, this evidence is at best cumulative on a factual point not rebutted by the State. The nondisclosure of this much of the transcript was insignificant."
5. Use of the police transcript to impeach the credibility of the informant: "This is but one problem. More importantly, evidence that Beanie lacked credibility would have had little impact on this case."
6. Use of written statements to impeach a second witness: "Smallwood never made a statement calling his ability to recognize the gunman into question, and we are not persuaded that use of this material by the defense would have undermined the force of his identification, particularly in light of its corroboration by others."
7. Use of a license plate printout to show cars at the scene: "The evidence of guilt was otherwise so overwhelming that the rebuttal of the photograph would have made no difference." *Id.* at 811–18.

[170] *Kyles*, 514 U.S. at 440 (providing examples of Fifth Circuit language, in which the court dismissed and qualified each individual piece of evidence as insignificant, in isolation).

[171] *Id.* at 454. And, without this evidence, the defendant was unable to meaningfully advance his explanation.

This materiality conversation continued ten years later in *Banks v. Dretke*.[172] The Fifth Circuit held that a key witness's paid informant status, the pending charges against him, and his role in the indictment of the defendant were immaterial to the defendant's conviction.[173] In finding that the witness's "testimony was corroborated by other witnesses and the information's impeachment value would have been cumulative," the Fifth Circuit overturned the relief the district court had granted.[174] In doing so, the majority did not incorporate any of the holistic examination called for by *Kyles*.[175] The Supreme Court overturned the Fifth Circuit, reiterating its commitment to looking at whether the evidence could put the case in a different light.[176] The Court looked at the critical role which the paid informant played in the case from arrest, to indictment, to penalty phase.[177] The Court highlighted in particular how the paid informant's testimony was critical to the narrative that the State presented in the penalty phase of the trial.[178] Defendant Banks' legal battle continued for thirty-two years before he was saved from the death penalty.[179]

Like *Kyles* and *Banks*, *Wearry v. Cain*[180] was also an appeal from misapplication of *Brady* doctrine in the Fifth Circuit. These cases highlight the Fifth Circuit's repeated resistance to viewing materiality more broadly and accurately. They also show how probabilistic definitions of materiality undercut a defendant's access to evidence; a probabilistic view of the doctrine separates out each piece of evidence and views it in isolation, discounting the holistic reasoning process of the factfinder.[181] This insistence on probabilistic thinking in the Fifth Circuit has arguably been pivotal in the

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[172] Banks v. Cockrell, 48 F. App'x 104, 112 (5th Cir. 2002), *rev'd sub nom.* Banks v. Dretke, 540 U.S. 668 (2004).

[173] *Id.* at 112–16.

[174] *Id.* at 137.

[175] *See generally id.*

[176] *Banks*, 540 U.S. at 698–99.

[177] *Id.* at 697–702.

[178] *Id.* at 699–703.

[179] Brandi Grissom, *Death Row Inmate's Sentence Reduced to Life*, TX. TRIB. (Aug. 2, 2012), https://www.texastribune.org/2012/08/02/death-row-inmates-sentence-reduced-life/ [https://perma.cc/LT9V-BEY3].

[180] 136 U.S. 1002, 1006 (2016).

[181] *Cf.* Allen & Pardo, *supra* note 2, at 16 ("A number of general criteria affect the strength or quality of an explanation. These criteria include considerations such as consistency, coherence, fit with background knowledge, simplicity, absence of gaps, and the number of unlikely assumptions that need to be made.").

development of *Brady* doctrine, but courts still persist in their crabbed and limited view of materiality.

B. STATE MATERIALITY

The problem is by no means limited to federal courts. Turning our focus to the states and our case study of Texas, even after *Kyles* and *Banks*, Texas state courts still evade the materiality analysis mandated by the Supreme Court by blending materiality with prejudice and only parenthetically noting the correct standard.[182] The Texas test cites to *Strickler* (the probabilistic opinion between *Kyles* and *Banks*), *Bagley* (a pre-*Kyles* case decided in 1985), and formulations of the standard written by Texas courts that do not engage in holistic analysis, inquire whether evidence changes the narrative at trial, or apply any of the developments in *Brady* law since the 1980s.[183] This refusal to use the more recent and explanatory analysis of the Supreme Court is persistent.[184] Indeed, Texas courts will often misstate the law:

> The court of criminal appeals has held that to find reversible error under *Brady*, an appellant must show that . . . the evidence is material, that is, it presents *a reasonable probability that had the evidence been disclosed, the outcome of the proceeding would have been different*. We analyze an alleged *Brady* violation in light of all the other evidence adduced at trial.[185]

The problems caused by a clubbed view of materiality have also seeped into statutory criminal discovery. Prior to amendment in 2013,[186] the Texas criminal discovery statute, Article 39.14(a) of the Texas Code of Criminal Procedure, only allowed defendants (under certain, limited circumstances) to produce or inspect "evidence *material to any* matter involved in the action" and "in the possession, custody, or control of the state."[187] And state courts

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[182] *Ex parte* Reed, 271 S.W.3d 698, 726–27 (Tex. Crim. App. 2008). *But see Banks*, 540 U.S. at 703, ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.") (quoting Kyles v. Whitley, 514 U.S. 419, 434 (1995)).

[183] *Reed*, 271 S.W.3d at 726–27.

[184] *See, e.g.*, Gill v. State, No. 01-09-01012-CR, 2010 WL 4910210, at *4 (Tex. App. Dec. 2, 2010) (quoting Hampton v. State, 86 S.W.3d 603, 612 (Tex. Crim. App. 2002) (quoting United States v. Agurs, 427 U.S. 97, 109–10 (1976))); Lempar v. State, 191 S.W.3d 230, 241 (Tex. App. 2005) (citing *Ex parte* Richardson, 70 S.W.3d 865, 870 n.22 (Tex. Crim. App. 2002)).

[185] Pitman v. State, 372 S.W.3d 261, 264 (Tex. App. 2012) (citations omitted).

[186] This statute's amendment will be discussed at length in the following section. For now, I limit my discussion to state court interpretations of the statute prior to its amendment in 2013.

[187] Ehrke v. State, 459 S.W.3d 606, 611 (Tex. Crim. App. 2015).

had, in turn, held that "[e]vidence is material if its omission would create '*a reasonable doubt that did not otherwise exist*.'"[188] In formulating this standard for materiality, Texas courts reverted materiality back to 1976, citing to *United States v. Agurs*.[189] In this move, the state courts of Texas actually entitled a defendant to less statutory discovery than she is owed under the constitutional minimum required by current *Brady* jurisprudence.[190]

Texan interpretations of the discovery statute look for the creation of doubt, a burden never meant to be imposed upon the materiality standard.[191] This standard does not consider the need to ensure due process of law, the search for accuracy, or how the suppressed evidence could change the narrative presented at trial.[192] Instead, Texas courts consistently define materiality by citing to the Texas Court of Criminal Appeals' *Quinones v. State* decision, which in turn cited to *Agurs* and held that the defendant's burden for proving materiality surpasses the harmless error standard and is only met "if the omitted evidence creates a reasonable doubt that did not otherwise exist."[193] The dissent pointed out that there was no evidence that the legislature intended such a limited reading of materiality, and rather intended to expand upon the Supreme Court's constitutional minimum, but

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[188] *Id.* at 611 (citing *Agurs*, 427 U.S. at 112) (emphasis added). The Texas Court of Criminal Appeals has remained steadfast in its commitment to the 1976 *Brady* standard, which it adopted more than thirty years ago. Quinones v. State, 592 S.W.2d 933, 941 (Tex. Crim. App. 1980), *abrogated on other grounds by* Ehrke v. State, 459 S.W.3d 606 (Tex. Crim. App. 2015) ("More recently in *Stone v. State* and *Frank v. State*, this Court has expressly chosen to define 'materiality' under Texas law in the due process terms employed by the Supreme Court in *United States v. Agurs*, one of the more recent elaborations on the disclosure requirements of *Brady v. Maryland*.").

[189] *Quinones*, 592 S.W.2d at 941.

[190] *Compare Ehrke*, 459 S.W.2d at 611 ("Evidence is material if its omission would create a reasonable doubt that did not otherwise exist.") (citations omitted) *with* Banks v. Dretke, 540 U.S. 668, 698 (2004) ("[T]he materiality standard for *Brady* claims is met when the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.") (citations omitted).

[191] Kyles v. Whitley, 514 U.S. 419, 434 (1995).

[192] Branum v. State, 535 S.W.3d 217, 224–28 (Tex. App. 2017) (evaluating the impact of each piece of suppressed evidence in isolation).

[193] *Quinones*, 592 S.W.2d at 941–42 (citing *Agurs*, 427 U.S. at 112).

to no avail.[194] And as *Brady* doctrine has evolved in the years since *Agurs*, Texas has not updated its standard.[195]

While *Agurs* has not been overturned, there is no debating that materiality analysis has dramatically evolved since 1976, and it is disingenuous for Texas courts to pretend otherwise.[196] Under Texas's formulation of materiality, the state criminal discovery statute gives defendants less access to discovery than is constitutionally required, let alone a level of discovery sufficient to ensure accurate truth-finding.[197]

IV. THE "MORTON ACT" AS A CASE STUDY

How courts define materiality matters a great deal for the litigants in our courts, and courts need to shed their prior assumptions about materiality to protect due process of law. Redefining materiality is essential even where legislatures step in with reform,[198] as the "Michael Morton Act" of Texas so aptly demonstrates. While legislatures can serve a key role in discovery reform,[199] judicial reform remains integral.

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[194] *Id.* at 947–48 (Robert, J., dissenting) ("It should be abundantly clear from even a cursory reading of Article 39.14 that the Legislature intended no such restrictive definition and that Article 39.14 was not meant to be a mere codification of *Brady v. Maryland*. Materiality in the context of Article 39.14 should be accorded its commonly understood legal meaning . . . '[t]o be 'material' means to have probative weight: i. e., reasonably likely to influence the tribunal in making a determination required to be made.'") (citations omitted).

[195] *See, e.g.*, *Ehrke*, 459 S.W.3d at 606.

[196] *See, e.g.*, Dickens v. Court of Appeals for the Second Supreme Jud. Dist. of Tex., 727 S.W.2d 542, 559–60 (Tex. Crim. App. 1987) (Clinton, J., dissenting) ("As demonstrated in the margin, the stark reality is that this Court has taken a simple job of fulfilling statutory requirements for obtaining discovery—practically like procedure on the civil side—and turned it into a requirement that in its constitutional sense 'materiality' to the defense of an accused must be shown when discovery is refused. Unlike a broad scope of discovery in civil cases, in a criminal prosecution, as the majority opinion emphasizes, 'the *right* to discovery is limited to exculpatory or mitigating evidence.'") (citations omitted).

[197] As noted above, Texas courts also define materiality under *Brady* in a limited way—reading out *Kyles*, *Banks*, and most of the language used by the Supreme Court now. See *infra* Section III(B). This conception of materiality ignores the impact any piece of evidence could have on how a party constructs her story, the arguments she makes at trial, or the cognitive reasoning the jury undertakes.

[198] TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2017).

[199] A survey of the states shows that while many states require a minimal to intermediate level of discovery, there has been a movement towards broader and more open file discovery. THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW 8 (2007) (finding that "one-third of the states (including California, Florida, New Jersey, Illinois, Michigan, and Pennsylvania) have implemented discovery rules modeled on the ABA standards," which do not call for an assessment of materiality); *see also* Brown, *supra* note 164; DISCOVERY REFORM LEGISLATIVE VICTORIES, NATIONAL ASSOCIATION OF CRIMINAL

A. THE MORTON ACT, ART. 39.14 OF THE CODE OF CRIMINAL PROCEDURE OF TEXAS

Michael Morton was released from prison on October 14, 2011, after spending twenty-five years in prison for the murder of his wife—a crime he did not commit.[200] During Morton's trial, prosecutors withheld evidence of his son's eyewitness account that his father was not the killer, neighborhood reports of a man in a green van seen lurking around the Morton's home, and evidence of his wife's credit card being used after her death.[201] With this evidence withheld, Morton was convicted.

While no single cause can bring about reform alone, Morton's persistent advocacy after his exoneration—so no other innocent defendant would suffer his fate—was instrumental.[202] Faced with a series of high-profile wrongful convictions like Morton's and a judiciary exhibiting a bulldogged refusal to give defendants access to evidence, the Texas legislature entered the conversation by introducing Senate Bill 1611, the "Michael Morton Act."[203] The Morton Act was drafted through the efforts of all stakeholders, including prosecutors and defense attorneys, and passed with bipartisan, unanimous support.[204] The legislature's passage of Senate Bill 1611 made major changes to Article 39.14 of the Code of Criminal Procedure of Texas, the state's criminal discovery provision, which had remained untouched since 1965.[205]

Explaining the bill and its purpose, the Senate Committee Report stated that SB 1611 "requires prosecutors to turn over to the defense *any relevant evidence* that may help the defendant, including witness lists."[206] Before

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DEFENSE LAWYERS, https://www.nacdl.org/criminaldefense.aspx?id=31324 [https://perma.cc/9VUV-22UP] (discussing the legislative broadening of criminal discovery in New York, Virginia, California, Texas, Louisiana, Ohio, and North Carolina); Green, *supra* note 19 (assessing federal efforts at legislative reform to broaden criminal discovery).

[200] The Innocence Project, *Michael Morton*, THE INNOCENCE PROJECT, https://www.innocenceproject.org/cases/michael-morton/ [https://perma.cc/DJD4-A7FV].

[201] *Id.*

[202] Jessica A. Caird, *Significant Changes to the Texas Criminal Discovery Statute*, 51 HOUS. LAW. 10, 10 (2014); Brandi Grissom, *Morton Act, Prosecutor Accountability Bill Head to Governor*, TEX. TRIB. (May 14, 2013), https://www.texastribune.org/2013/05/14/house-approves-morton-act-sanctions-prosecutors/ [https://perma.cc/RU6C-P57F].

[203] *See generally* Grissom, *supra* note 202.

[204] *See generally* TEX. APPLESEED & TEX. DEF. SERV., TOWARDS MORE TRANSPARENT JUSTICE: THE MICHAEL MORTON ACT'S FIRST YEAR (2015); Grissom, *supra* note 202.

[205] TEX. APPLESEED & TEX. DEF. SERV., *supra* note 204, at 1.

[206] S. COMM. ON CRIM. JUST., BILL ANALYSIS, TEX. S.B. 1611, 83d Leg., R.S. 1 (2013), https://capitol.texas.gov/tlodocs/83R/analysis/pdf/SB01611S.pdf [https://perma.cc/5NZF-266D] [hereinafter COMMITTEE REPORT] (emphasis added) ("Criminal discovery—the exchange

detailing the bill's new provisions, the report addressed the key reasons for the bill and for reform: the need for fair trials and efficiency in the judicial system, the necessity that defendants be able to make informed decisions to plead, the obligation to uphold the constitutional right to present a full defense, and the goal to "lessen[] the likelihood of an overturned verdict on appeal."[207] The Senate Report emphasized that open file discovery "saves thousands of dollars in appeals, incarceration, and potential compensation for wrongful convictions," as well as establishes uniformity, so that a defendant's chance at a fair trial would not vary by where in the state she was tried.[208] Most importantly, the Bill's drafters declared that "[e]very defendant should have access to all the evidence relevant to his guilt or innocence, with adequate time to examine it."[209] In passing SB 1611, the legislature adopted a new model and values for discovery—essentially embracing an explanatory account of juridical proof.

The Morton Act was a watershed change. Pre-Morton Act, all discovery was left to the courts' discretion, and until 2005 "a motion of the defendant showing good cause" was required before a court would grant the defendant access to a limited category of *material* evidence.[210] Moreover, abuse-of-discretion standards insulated both prosecutors and trial judges that declined to grant discovery from appellate censure and reversals.[211]

The 2013 Morton Act substantially amended the first section of Article 39.14 and added twelve additional sections.[212] Because the first section of Article 39.14 sets out the majority of what is discoverable and the key procedures for discovery, these changes were the most significant.[213] The legislature eliminated the requirement that a defendant show cause to obtain

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of relevant information between prosecutors and the defense prior to trial—is both necessary for a fair and just criminal justice system, and also required as part of a defendant's constitutional right to a full defense.").

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] Caird, *supra* note 202, at 10–11. The prior versions of Article 39.14 were easy for prosecutors to circumvent. Gerald S. Reamey, *The Truth Might Set You Free: How the Michael Morton Act Could Fundamentally Change Texas Criminal Discovery, Or Not*, 84 TEX. TECH L. REV. 893, 902 (2015) ("[A]rticle 39.14 never functioned as a true discovery statute, but only as a kind of safety net to prevent the worst kinds of unfairness to the accused.").

[211] Reamey, *supra* note 210, at 902–03.

[212] Caird, *supra* note 202, at 10.

[213] COMMITTEE REPORT, *supra* note 206, at 1. I focus on the most substantial change—the amendment to the first section.

discovery and required broad access to evidence given a "timely request from the defendant."[214] Production allowed for the actual duplication of evidence and included police reports and witness statements for the first time.[215] The statute also required that "the State [] provide copies of designated documents, papers, written or recorded statements of the defendant, books, accounts, letters, photographs, objects or tangible things not otherwise privileged that contain material evidence and are in the possession of the State or any person under contract with the State."[216]

Open file discovery legislation like the Morton Act gives the defense access to all information that is, or should be known to the prosecution, law enforcement, and other agencies working for the prosecution, with the exception of any privileged material.[217] And prosecutors can still seek a protective order to withhold sensitive information from defense counsel.[218] By granting the defendant access to any unprivileged evidence, and therefore giving her counsel the full opportunity to present a complete explanation of the case to the factfinders, open file discovery helps to hold the State to its burden.[219] And the benefits are not limited to due process: "the nondisclosure of information beneficial to criminal defendants causes wrongful convictions, wasteful litigation, and uncertainty in criminal adjudications."[220] In terms of judicial economy, open file discovery limits, if not eradicates, the necessity for extensive post-conviction *Brady* claims.[221]

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[214] *Id.* at 2.

[215] *Id.*

[216] *Id.*

[217] THE JUSTICE PROJECT, *supra* note 199, at 2.

[218] Joy, *supra* note 20, at 425.

[219] *See supra* Sections I, II.

[220] Janet Moore, *Democracy and Criminal Discovery Reform After* Connick *and* Garcetti, 77 BROOK. L. REV. 1329, 1371 (2012). It is estimated that some form of prosecutorial misconduct contributes to more than half of all wrongful convictions. *% Exonerations by Contributing Factor*, THE NATIONAL REGISTRY OF EXONERATIONS (Oct. 23, 2019), https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx [https://perma.cc/PXJ9-FNDL].

[221] This is not to say that there is not opposition to open file discovery or criticism. For a summary on the competing arguments, see Brown, *supra* note 199.

B. A MATERIAL LIMITATION ON REFORM

Despite the landslide and bipartisan nature of the reform,[222] the Morton Act has not been able to deliver fully on its promise of open file discovery.[223] Texas courts have shown that old precedent dies hard, and without a material rethinking of juridical proof, reform cannot truly be realized.

Given the purpose of the act explicitly stated by the legislature—that "[e]very defendant should have access to all the evidence relevant to his guilt or innocence, with adequate time to examine it"[224]—and the explicit designation of the Morton Act as one of open file discovery, discovery disputes should require only one straightforward question: was the defendant given broad access, or did the prosecution fail to disclose evidence the statute makes available to the defendant?

But Texas courts often gut the changes made to Article 39.14.[225] While the revisions were substantial, portions of the language from the prior act were left in place.[226] Notably, this included the requirement to produce "designated . . . evidence *material to any matter* involved in the action."[227] In ruling on discovery issues, the Texas Court of Appeals held:

> If we were writing on a clean slate to interpret what evidence is "material to any matter," we would be inclined to construe this phrase, at a minimum, to include any evidence the State intends to use as an exhibit to prove its case to the factfinder. We do not write on a clean slate. The phrase at issue, "that constitute or contain evidence material to any matter," was present in Article 39.14 before it was amended by the Michael Morton Act. The phrase was not modified or defined by the Legislature when it passed the amendments to Article 39.14. What is "material" had been subject to substantial judicial interpretation prior to the debate and passage of the Michael Morton Act. Thus, applying well-established precedent from the Court of Criminal Appeals, by which this Court is bound, we are constrained to hold that the definition or standard we must use to determine whether the objectionable evidence was material is the same after the passage of the Michael Morton Act as it was before passage, *regardless of what the Legislature may have thought they were accomplishing*.[228]

The point is worth repeating—the Court of Appeals held that, regardless of what the legislature thought it was accomplishing, a prosecutor is only

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[222] TEX. APPLESEED AND TEX. DEF. SERV., *supra* note 204, at ii ("This legislation received bipartisan support in both chambers and was drafted in consultation with stakeholders who work in nearly every division of the criminal justice system.").

[223] *See generally* Reamey, *supra* note 210.

[224] COMMITTEE REPORT, *supra* note 206, at 1.

[225] Watkins v. State, 554 S.W.3d 819, 824 (Tex. App. 2018).

[226] Caird, *supra* note 202, at 10–11.

[227] TEX. CRIM. PROC. CODE ANN. § 39.14 (West 2017).

[228] *Watkins*, 554 S.W.3d at 824.

required to turn over what is material.[229] And to make the blow all the more severe, courts employ an antiquated definition of materiality—indeed, one that has been in use since 1980.[230] The court's interpretation limits defendants to evidence which would, with reasonable probability, change the outcome of trial.[231] This definition of materiality is not only counter to the legislature's desire, but also runs counter to the entire explanatory account.

Even with passage of the Morton Act, Texas courts consistently hold that "[e]vidence must be indispensable to the State's case or must provide a reasonable probability that its production would result in a different outcome to be considered material and subject to mandatory disclosure under Article 39.14(a)."[232] In fact, courts even conflate the Morton Act with *Brady* itself: "[b]oth the statute and *Brady* require that the data be 'material' before it is discoverable. And, like the definition of 'material' in a *Brady* setting, materiality for purposes of Article 39.14(a) means that 'there is a reasonable probability that had the evidence been disclosed, the outcome of the trial

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[229] The court did so knowing that it was disregarding the intent of the legislature in amending the statute. *Id.* at 824 n.1 ("While we generally agree that a sea change in criminal discovery was anticipated, and probably intended as a result of the passage of the amendments, the legislature's writings do not always accomplish what was intended and further amendment is thus required. The legislature did not change a term in the existing statute that had already been interpreted by the State's highest court in criminal matters. As we explained in our opinion, we do not write on a clean slate . . . Accordingly, we decline the invitation of the Amicus Curiae to revisit our analysis and holding of the meaning of 'material' as used in article 39.14.").

[230] *Id.* at 822 ("Therefore, we hold that in order to establish that requested evidence is material, it is necessary that a defendant must provide more than a possibility that it would help the defense or affect the trial. Materiality for purposes of Article 39.14(a) means that 'there is a reasonable probability that had the evidence been disclosed, *the outcome of the trial would have been different*.'") (emphasis added) (citations omitted).

[231] *Id.*

[232] Carrera v. State, S.W.3d 554, at *2 (Tex. App. 2018) (citations omitted); Branum v. State, 535 S.W.3d 217, 224 (Tex. App. 2017) ("To establish that requested evidence is material, a defendant must provide more than a possibility that it would help the defense or affect the trial."). A review of prosecutorial briefs shows that many prosecutors are pushing for this interpretation. *See, e.g.*, State's Response and Objection at 3, State v. Oliver, (Tex. Dist. Ct., Aug. 2., 2018), No. F17-18595-V, 2018 WL 4185923 ("To be considered material and to be subject to mandatory disclosure under Article 39.14(a), a defendant must show a reasonable probability that production of the evidence would result in a difference in the outcome of the proceeding . . . Defendant has not shown materiality here, nor has he attempted to do so. Furthermore, the State does not believe that production of the evidence would alter the outcome of the proceeding or that the information is subject to discovery under Article 39.14 . . . That a request 'could' reveal significant information is nothing more than a mere possibility, which is insufficient for purposes of mandatory disclosure under Article 39.14(a).")

would have been different.'"[233] To be sure, there has been at least one case, in dicta, interpreting the Morton Act in line with an open file regime,[234] but this case was not published and is non-binding. Further, prosecutors in Texas have actually alleged wrongful termination for their compliance with *Brady* and the Morton Act.[235]

The courts of Texas interpret the new discovery regulation using conceptions of materiality that predate the Morton Act and modern *Brady* doctrine by thirty years. More importantly, this interpretation actively disregards the intention of the Texas legislature, showing that statutory change alone can be ineffective in bringing about discovery reform.[236] Juridical theories and assumptions about the trial process and what role evidence has in arriving at truth and accuracy are vital to real-world outcomes.[237]

Because the concept of materiality is so laden with definitions and limitations that do not serve the purposes of accurate factfinding, it may be advisable to abandon the term altogether.[238] Materiality must be given its originally understood definition—having the "tendency to influence, or []

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[233] Whitney v. State, No. 05-17-00417-CR, 2018 WL 3583358, at *3 (Tex. App. July 26, 2018); Moody v. State, 551 S.W.3d 167, 171 (Tex. App. 2017) ("[P]assage of the Michael Morton Act in 2014 amended article 39.14(a) . . . Appellant does not provide argument or authority to explain *why article 39.14(a) would impose any greater duty of preservation on the State* than has previously been imposed under *Youngblood* and other jurisprudence, that is, that the State may destroy potentially favorable evidence as long as it does not do so in bad faith, i.e., at a time when its potential for exoneration was apparent.") (emphasis added); Meza v. State, No. 07-15-00418-CR, 2016 WL 5786949 at *2 (Tex. App. Sep. 29, 2016) (citation omitted).

[234] Hart v. State, 2016 WL 4533419, at *5 (Tex. App. Aug. 30, 2016) ("The Act creates a general, continuous duty of the State to disclose before, during, or after trial any discovery evidence tending to negate the guilt of the defendant or reduce the punishment the defendant could receive.").

[235] *See generally* Hillman v. Nueces Cty., No. 17-0588, 2019 WL 1231341, at *1 (Tex. Mar. 15, 2019).

[236] Without judicial enforcement, the Act loses its meaning. If applied with a correct interpretation of materiality, the Act can make a big difference; of the change, Travis County District Attorney Rosemary Lehmberg said, "We've got to have every scrap of evidence. It's the way things should be, but we have been surprised at how dramatic the increase in the workload has been." Esther Robards-Forbes, *Michael Morton Act boosts transparency — and workload, attorneys say*, STATESMAN (Aug. 11, 2014), https://www.statesman.com/news/20140811/michael-morton-act-boosts-transparency--and-workload-attorneys-say [https://perma.cc/5A2W-Z2R6].

[237] See *infra* Section II, III.

[238] *See* Strickler v. Greene, 527 U.S. 263, 298 (1999) (Souter, J., dissenting). Since we have given materiality such a broken and twisted definition, it seems wise to define it anew—or scrap it.

capable of influencing, the decision of the tribunal in making a determination required to be made."[239] The interpretations of the Morton Act demonstrate the long-standing commitment many lawyers—prosecutors and judges alike—have to inaccurate definitions of materiality.[240] For the Morton Act to realize its full potential, it will be necessary for the Criminal Court of Appeals to rule on the materiality issue in line with the purposes of the legislature.[241] The Morton Act endeavored to move towards a more explanatory account of the evidence but has been held back by materiality definitions underpinned by probabilism.

CONCLUSION

While there has been a movement towards an explanatory conception of juridical proof, that movement is only beginning to take root. If factfinders are expected to hand down confident verdicts, then the trial processes and evidentiary standards we employ must reflect how humans reason and make decisions. Explanatory concepts provide the best current model for how trials function, and in turn, show how *Brady*, criminal discovery, and pervading ideas about the materiality of evidence are pivotal to the success of our legal system. Remember that trials are processes in which factfinders weigh the competing explanations of what happened against the evidence presented at trial and the burden of proof; depriving a party of information she could use in presenting her case, then, is an affront to due process of law. If we are to maintain our commitment to due process of law and hold the State to its burden, criminal discovery must be expanded to give each party full opportunity to develop her own account of the evidence.

Both the Supreme Court and lower courts need to abandon probabilistic language in their materiality inquiry. Although the Supreme Court has moved towards an explanatory account of evidence and has pushed lower courts to examine how suppressed evidence relates to the case as a whole and the parties' strategies, the Court has relapsed into probabilism at critical

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[239] Weinstock v. United States, 231 F.2d 699, 702–03 (D.C. 1956); *see also* COMMITTEE REPORT, *supra* note 206, at 1 (describing how the Morton Act gives a defendant access to "the evidence relevant to his guilt or innocence").

[240] State v. Escobedo, No. 13-16-00684-CR, 2018 WL 6627321, at *7 (Tex. App. Dec. 19, 2018) (equating the Morton Act with a *Brady* assessment and holding that "there is not a reasonable probability that but for the failure to produce the undisclosed information . . . the jury would not have convicted [the defendant]."); Nelson v. State, 2018 WL 6495171 at *13 (Tex. App. Dec. 11, 2018) ("Limited statutory discovery is available pursuant to . . . article 39.14 . . . Article 39.14 does not require the State to comply with general tools of discovery used in civil cases, such as the requests for admissions and requests for production of documents that appellants served here.").

[241] Or for the legislature to amend its work.

junctures. Those lapses into probabilism diminish the burden placed on the State, because the defendant cannot fully present her case. This constitutes a violation of due process of law. The materiality of evidence is not a question of whether the outcome of the trial would have changed, but instead whether the evidence could be used to influence the factfinder in reaching a verdict. Withholding this evidence from the defendant diminishes the State's burden, increases the burden for the defense, and casts doubt over whether a conviction has been found beyond a reasonable doubt.

The Texas story shows that so long as probabilism remains part of the materiality test, judges and prosecutors have the means to skirt modern and more accurate materiality standards. Moreover, the Texas experience also shows that changing how we define materiality is imperative even where legislative reform is successful. In the meantime, the states seeking to reform their criminal discovery would be best served by either removing materiality language from discovery statutes or defining materiality very specifically—particularly in recognition of the widespread judicial adherence to an incorrect conception of materiality. The Morton Act shows a commitment to creating fair trials, but its shortfalls show what the next crux of reform must be.

For the United States to retain its commitment to rule of law and due process, it must materially rethink criminal discovery.