Always Be Disclosing: The Prosecutor's Constitutional Duty to Divulge Inadmissible Evidence

Brian D. Ginsberg

United States Court of Appals, Third Circuit

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ALWAYS BE DISCLOSING*: THE PROSECUTOR’S CONSTITUTIONAL DUTY TO DIVULGE INAdMISSIBLE EVIDENCE

Brian D. Ginsberg*

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† “Always be closing. Always be closing!” GLENGARRY GLEN ROSS (New Line Cinema 1992) (Blake, played by actor Alec Baldwin, beginning his profanity-laced pep-talk to a cadre of down-on-their-luck real estate salesmen) (emphasis in original).

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I. INTRODUCTION

Premiere Properties, a small Chicago real estate agency, is holding an interesting employee sales contest. The month's top seller gets a Cadillac; the runner-up gets a set of steak knives; and everyone else gets fired. All the salesmen are on edge, but none more so than Dave. He conspires with colleague George to get revenge on the firm and get rich in the process. The plan: Steal Premiere's proprietary leads (informational cards identifying prospective high-volume buyers) and sell them to a competitor.

Dave keeps a low profile, but all week at the office George boasts that he has finally found a way to stick it to the company. On the eve of the heist, however, George gets cold feet and abandons the plan. Dave quickly recruits another co-worker, Shelley, to take George's place. The next day, with Dave acting as a lookout, Shelley hides in the office and waits for everyone to leave. He then breaks into the firm's safe and absconds with the leads.

The next morning, a police detective interviews the Premiere salesmen. They say they suspect George because of his very public desire to get even with the company. But John, the office manager, knows the truth. On his way out of

1 The facts of this introductory hypothetical are drawn from Glengarry Glen Ross, a movie based on David Mamet's classic play of the same name about disgruntled real estate salesmen. GLENGARRY GLEN ROSS (New Line Cinema 1992).

2 Id.

3 Id.

4 In the film, Dave, not George, does the workplace boasting. Id.

5 George's actual level of involvement was likely not quite this high.

6 It is not clear from the script how exactly Dave and Shelley divided up their roles. GLENGARRY GLEN ROSS, supra note 1.

7 Id.
the office the night of the robbery, he saw Shelley sneaking around with burglary tools in-hand. John does not want to get directly involved with the investigation, so rather than speak with the detective, he writes a statement explaining what he saw and slips it under the precinct door. The detective receives John's statement but never investigates Shelley. Shortly after he delivers the statement, John is hit by a bus and killed.

George is arrested. Discovery comes and goes, and the prosecution does not disclose John's statement. The case goes to trial, and the jury convicts on the basis of George's workplace braggadocio.

After the verdict, the statement comes to light. The defense team searches Shelley's desk and finds the burglary tools in a secret compartment. On direct appeal, George's counsel argues that the prosecution's tactics violated the federal constitutional discovery doctrine of Brady v. Maryland, which holds that a new trial is required if the prosecution (1) "suppress[es]" evidence that is (2) "favorable" to the defendant and (3) "material" to his guilt or punishment. Evidence is "material" to guilt or punishment if there is a "reasonable probability" that, had the evidence been disclosed to the defense before trial, the defendant would have been acquitted or would have received a lighter sentence.

The court agrees that favorable evidence was suppressed but holds that the statement is not material. The court does find that there was a reasonable probability that, had the statement been disclosed, George's counsel would have used it to uncover the admissible physical evidence (the burglary tools) and, in turn, used that evidence to procure an acquittal. Nevertheless, the court holds that the statement is per se immaterial because it would not have been admissible at trial.

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8 Evidently, Dave was a sub-par lookout.
11 It is important to keep in mind that "suppression" in the Brady context does not require a malicious intent to conceal. It is a term of art that refers to the prosecution's simple failure to disclose. Brady, 373 U.S. at 87.
12 Assume that Illinois (which has no evidence code, but rather operates through common-law decisions) largely follows the Federal Rules of Evidence when it comes to hearsay. Indeed, this appears to be the case. HANDBOOK OF ILLINOIS EVIDENCE §§ 801-804 (7th ed. 2001).

John did not make the statement on the witness stand. Therefore, the statement is hearsay unless it is exempted by Federal Rule of Evidence 801(d). It is not a prior witness statement under Rule 801(d)(1) because John, now dead, cannot be a trial witness. It is not a statement by a party-opponent under Rule 801(d)(2)(B) because the statement is John's, not the detective's, and the detective has not adopted it. No other exemptions are relevant. Therefore, the statement is hearsay.

The detective can testify, but no recognized hearsay exception lets the defense team introduce the statement through him. It is not a present-sense impression under Rule 803(1) because it was not made immediately following the robbery. It is not a statement of a then-existing condition under Rule 803(3) because that exception does not cover statements of belief about past events. It is not a recorded recollection under Rule 803(5) because there is no indication that the detective ever had any more knowledge of the statement than he does now. It is not a qualifying
Many lower courts purport to find an admissibility requirement in the Supreme Court’s Brady jurisprudence. Despite its popularity with the courts, this “requirement” has received little in the way of detailed analysis in judicial opinions and scholarly literature. The “rule” is frequently invoked but rarely explored. This Article attempts to reverse that trend.

Part II of the Article introduces the Supreme Court’s Brady line of cases as background. Part III analyzes arguments for the existence of an admissibility requirement and attempts to demonstrate that they simply are not consistent with the text of and principles behind relevant Supreme Court holdings.

public record under Rule 803(8)(C) because it was not made by the police pursuant to an investigation John submitted it voluntarily. No other exceptions in Rules 803 or 804 are relevant. Therefore, the statement is inadmissible hearsay.

The statement could be introduced not for its truth but simply to show that the police were on notice of another suspect but failed to investigate. Assume for the purposes of this hypothetical that the statement would not be material if offered for this purpose.


But, some courts have (properly, as this Article argues) rejected an admissibility requirement. See, e.g., United States v. Gil, 297 F.3d 93, 104 (2d Cir. 2002); Bradley v. Nagle, 212 F.3d 559, 567 (11th Cir. 2000) (finding no Brady violation but explaining that lack of admissibility is not a bar).

14 One of the few thorough judicial discussions of a purported admissibility requirement is given by the Southern District of Indiana in Watkins v. Miller, 92 F. Supp. 2d 824, 844-46 (S.D. Ind. 2000) (Hamilton, J.). In the scholarly literature, no more than a handful of articles analyzing Brady have spent more than a subsection on admissibility. See Bennett L. Gershman, Prosecutorial Ethics Symposium: Reflections on Brady v. Maryland, 47 S. TEX. L. REV. 685, 700-04 (2006). Only one appears to have focused on that topic, but it concerns itself more with reconciling divergent views of circuit courts than critically examining Supreme Court precedent. Gregory S. Seador, Note, A Search for Truth or a Game of Strategy? The Circuit Split over the Prosecution’s Obligation to Disclose Inadmissible Exculpatory Information to the Accused, 51 SYRACUSE L. REV. 139 (2001).
Part IV examines precisely how an admissibility requirement disallows certain compelling Brady claims, thereby facilitating a malicious prosecutorial strategy, and works in conjunction with Supreme Court certiorari practices to foreclose avenues of federal appellate review of Brady decisions. Part V attempts to demonstrate that economic arguments denying the feasibility and cost-effectiveness of operating without an admissibility requirement are premature and perhaps incorrect.

Part VI considers a regime containing an admissibility requirement and discusses the consequences of whether the requirement is found to be constitutionally compelled or merely prudential. The Article concludes by recommending a solution that captures the chief benefits of an admissibility requirement while eliminating certain of its undesirable effects.

II. THE U.S. SUPREME COURT’S BRADY JURISPRUDENCE

A. Materiality Generally

In the seminal case, defendant Brady conspired with Boblit to rob Brooks and steal his car. Brady and Boblit waited outside Brooks’s house one day and prepared to ambush him on his way home from work. Brooks pulled into the driveway, got out of his car, and was promptly knocked unconscious with a blow to the head. The pair then stole Brooks’s wallet and used Brooks’s car to transport him to a distant wooded area. Once there, one of the men strangled Brooks to death with a shirt. Each man’s participation constituted felony-murder, but it was possible that the person who did not strangle Brooks would be spared the death penalty.

Police arrested Brady and Boblit. Brady made several statements, and in each one he confessed to being present at the scene of the crime but denied strangling Brooks. Boblit also gave several statements to the police, and in one of them he admitted to being the strangler. Brady was tried first. Before trial in Maryland state court, Brady’s lawyer moved for discovery of all of Boblit’s

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16 Id.
17 Id.
18 Id.
19 Id.
20 Brady, 373 U.S. at 85.
22 Id.
23 373 U.S. at 84.
24 Id.
statements, but the government withheld the statement wherein Boblit admitted he was the killer.25

At trial, Brady testified that he was present when Brooks was killed but that he did not strangle him.26 Brady did not call Boblit as a witness, nor did he call the police to ask them about their investigation.27 Brady was convicted and sentenced to death.28 The jury’s verdict was affirmed on direct appeal.29

After Brady’s conviction became final, his counsel got word of the exculpatory statement and moved for a new trial on the basis of this newly discovered evidence.30 The trial court denied the motion, and the Court of Appeals (Maryland’s highest court) affirmed.31 Brady then filed for state post-conviction relief.32 The trial court denied relief, but the Maryland Court of Appeals granted a new trial on the issue of punishment only.33 On certiorari, the Supreme Court affirmed, fashioning a due process-based discovery doctrine: “[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”34

In Giglio v. United States, Giglio conspired with a bank teller to cash phony money orders purportedly endorsed by other bank customers.35 The teller provided Giglio with copies of their signatures.36 Giglio then redeemed the money by submitting the bogus orders back to the teller to enter them into the bank’s system.37 The teller, who was the only eyewitness linking Giglio to the crime, confessed this conspiracy to the FBI.38

Giglio was arrested, but the teller avoided prosecution by agreeing to testify for the government in exchange for immunity.39 Before trial, Giglio’s attorney moved to discover all deals made with government witnesses.40 The

25 Id.
26 Id.
28 373 U.S. at 84.
29 Id.
30 Id.
31 Id.
32 Id. at 84-85.
33 Id. at 85.
34 Id. at 87.
35 405 U.S. 150, 150 (1972).
36 Id. at 151.
37 Id.
38 Id.
39 Id. at 152.
40 Id.
prosecution did not disclose the agreement with the teller. The government’s case depended almost entirely upon the teller, so Giglio tried vigorously to discredit him. On cross-examination, the teller represented that he never entered into any immunity agreement, and the prosecutor echoed this in his closing argument. The government’s strategy prevailed; Giglio was convicted.

While the direct appeal was pending, the immunity agreement came to light. Giglio moved for a new trial on the basis of the agreement, and his motion was denied by the district court and this denial affirmed by the Second Circuit. The Supreme Court reversed, holding that evidence impeaching a prosecution witness can form the basis of a Brady claim “when the reliability of [that] witness may well be determinative of guilt or innocence.” The Court went on to explain that such evidence is material if it “in any reasonable likelihood” could have affected the judgment of the jury. Thus, Giglio extended Brady to cover impeachment evidence, at least with respect to the guilt phase. It also offered the Court’s first elaboration of the materiality standard.

That standard was complicated by the next principal case, United States v. Agurs. Agurs, a prostitute, checked into a hotel with Sewell, her client. Sewell left the room to use the bathroom and, upon returning, found Agurs rifling through his clothes. When Sewell attempted to stop her, she stabbed him with a hunting knife he had put with his clothes before he left the room. At trial on charges of second-degree murder, Agurs asserted self-defense based on the fact that Sewell carried a large hunting knife and therefore was a violent person. The prosecution countered with an autopsy report demonstrating that Sewell had been stabbed repeatedly in the chest, arms, and hands, and that some of these wounds indicated that Sewell was not the aggressor. Further, the prosecution showed that Agurs had no cuts or bruises at the time of her arrest the morning after the incident.

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41 Id.
42 Id. at 151-52, 154-55.
43 Id. at 151-52.
44 Id. at 150.
45 Id. at 150-51.
46 Id. at 153, 155.
47 Id. at 154.
48 Id.
50 Id. at 99.
51 Id.
52 Id.
53 Id.
54 Id.
55 Id. at 102.
Agurs was convicted.\textsuperscript{56} While direct appeal was pending, Agurs’s attorney discovered that Sewell had a criminal record, containing convictions for several violent crimes, which would bolster Agurs’s claim of self-defense.\textsuperscript{57} The district court denied a motion for a new trial, but the District of Columbia Circuit reversed.\textsuperscript{58} The Supreme Court reversed the appellate decision, and in so doing established a tripartite classification of \textit{Brady} claims.\textsuperscript{59}

In the first category were cases where the undisclosed evidence indicated that the prosecution at least negligently used perjured testimony.\textsuperscript{60} In such a case, a new trial must be ordered "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."\textsuperscript{61} In the second category were cases where the prosecution did not at least negligently use perjured testimony, but where the defense made a specific request for a particular piece of evidence.\textsuperscript{62} The Court did not specify the corresponding materiality standard, but held that "the failure to make any response [to such request] is seldom, if ever, excusable."\textsuperscript{63} In the third category were cases where the prosecution did not at least negligently use perjured testimony, but where the defense did not make a specific request.\textsuperscript{64} The Court held that undisclosed evidence is material in such a situation if it "creates a reasonable doubt that did not otherwise exist" in light of the entire record.\textsuperscript{65}

The facts of \textit{Agurs} fit into the third category.\textsuperscript{66} The Court held that Sewell’s criminal record was immaterial under this standard due to the strength of the government’s inculpatory physical evidence and the fact that the undisclosed evidence would merely offer a different route to prove a fact Agurs had already proved by other means.\textsuperscript{67} The Court also emphasized that materiality in this context deals with the presentation of the defendant’s case rather than the defendant’s ability to prepare for trial.\textsuperscript{68}

\textsuperscript{56} \textit{Id.} at 100.
\textsuperscript{57} \textit{Id.} at 100-01.
\textsuperscript{58} \textit{Id.} at 101-02.
\textsuperscript{59} \textit{Id.} at 103.
\textsuperscript{60} \textit{Id.}
\textsuperscript{61} \textit{Id.}
\textsuperscript{62} \textit{Id.} at 104.
\textsuperscript{63} \textit{Id.} at 106.
\textsuperscript{64} \textit{Id.} at 107.
\textsuperscript{65} \textit{Id.} at 112.
\textsuperscript{66} \textit{Id.} at 107.
\textsuperscript{67} \textit{Id.} at 113-14.
\textsuperscript{68} \textit{Id.} at 113 n.20.
This tripartite framework was undone in United States v. Bagley, a federal narcotics prosecution. Bagley was arrested for unlawful possession and delivery of a controlled substance. Before his bench trial, Bagley moved to discover any deals made with government witnesses. The prosecution turned over nothing of the sort.

At trial, two undercover agents served as the government's "principal witnesses." Having posed as Bagley's coworkers at the Milwaukee Railroad, they testified that on multiple occasions they visited Bagley's home in a social capacity and he provided them with valium. They recorded these meetings with concealed transmitters, but the quality of the recordings was too poor for the tapes to be used at trial. Bagley took the stand and admitted the deliveries, but he argued that they did not violate the federal statute at issue, partly because he had a lawful valium prescription. Bagley's testimony proved unsuccessful; he was found guilty on the narcotics charges.

Several years after trial, a Freedom of Information Act request turned up compensation agreements between the government and the two undercover agents. Bagley filed a motion for a new trial on the theory that, had he known about the deals, he would have denied the deliveries (contrary to his actual trial strategy) and attempted to impeach the agents. The district court denied the motion, but was reversed on appeal.

A majority of the Supreme Court (via two separate opinions) took the opportunity to reformulate the materiality standard, holding that (at least outside the negligent-perjury context) it does not vary with the specificity of the request. In particular, 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." Justices Blackmun and O'Connor ex-

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69 473 U.S. 667 (1985). Bagley was also prosecuted on firearms charges, but discussion of that portion of the case is not relevant for the purposes of this background chronology of the development of the materiality standard.
70 Id. at 685-86 (Marshall, J., dissenting).
71 Id. at 669-70.
72 Id. at 670.
73 Id.
74 Id. at 686 (Marshall, J., dissenting).
75 Id.
76 Transcript of Oral Argument at 31, Bagley, 473 U.S. 667 (No. 84-48).
77 Bagley, 473 U.S. at 671.
78 Id.
79 Transcript of Oral Argument at 33-34, Bagley, 473 U.S. 667 (No. 84-48).
80 473 U.S. at 673.
81 Id. at 682 (opinion of Blackmun & O'Connor, JJ.); id. at 685 (opinion of White, J., Burger, C.J. & Rehnquist, J. concurring).
82 Id. at 682 (opinion of Blackmun & O'Connor, JJ.).
plained that "a 'reasonable probability' [is] a probability sufficient to undermine confidence in the outcome."\(^{83}\) The Court reversed Bagley's conviction and remanded the case to the Ninth Circuit to apply this new standard.\(^{84}\)

The Bagley materiality standard was endorsed (with a slight twist) in Kyles v. Whitley.\(^{85}\) There, Kyles was arrested on charges that he shot and killed a woman, Dye, in a Schwegmann's grocery store parking lot while Dye was loading groceries into her car.\(^{86}\) Before trial, Kyles's attorney made a request for discovery of all exculpatory evidence, and the government disclosed nothing.\(^{87}\)

At trial in Louisiana state court, the prosecution relied principally on four eyewitnesses who testified that they saw a black man fitting Kyles's description struggle with a woman matching Dye's description, shoot her, and then drive off in her Ford LTD.\(^{88}\) Thanks to Beanie, an acquaintance of Kyles's who acted as an informant, the prosecution also offered a Schwegmann's receipt, a woman's purse, and a gun identified as the murder weapon that was found in Kyles's home.\(^{89}\) Kyles defended by claiming that the eyewitnesses were mistaken and that Beanie was framing him.\(^{90}\) The jury hung, but Kyles was found guilty in his second trial, where the prosecution and defense both advanced theories substantially similar to those used in the first.\(^{91}\)

During state collateral proceedings, Kyles's attorney learned that the prosecution failed to disclose prior inconsistent statements of two of the eyewitnesses, as well as a police inventory of the Schwegmann's lot conducted immediately after the shooting which revealed that Kyles's car—which the prosecution claimed he left there before speeding off in Dye's LTD—was not parked there.\(^{92}\) Also, the prosecution suppressed several mutually inconsistent statements made by Beanie that, taken together, tended to cast Beanie in a very suspicious light. The statements also supported Kyles's claim that he was framed and suggested that the police investigation was less than meticulous.\(^{93}\)

The district court denied habeas and was affirmed by the Fifth Circuit, but the Supreme Court reversed.\(^{94}\) The Kyles Court quoted the Bagley materiality standard, but truncated the Bagley Court's opinion by holding that evidence is material "if there is a reasonable probability that, had the evidence been dis-

\(^{83}\) Id.
\(^{84}\) Id. at 684.
\(^{86}\) Id. at 423, 427.
\(^{87}\) Id. at 428.
\(^{88}\) Id. at 427, 429.
\(^{89}\) Id. at 428.
\(^{90}\) Id. at 429.
\(^{91}\) Id. at 429-31.
\(^{92}\) Id. at 428-29, 431.
\(^{93}\) Id. at 428-29.
\(^{94}\) Id. at 431, 454.
closed to the defense, the result of the proceeding would have been different," in contrast to the Bagley formulation which used the phrase "only if."\textsuperscript{95} The Kyles Court then adopted the Bagley opinion filed by Justices Blackmun and O'Connor by holding that a reasonable probability exists if the evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the outcome of the trial."\textsuperscript{96} Further, the Court clarified that while a "reasonable probability" means a probability higher than mere chance, it does not mean a probability greater than 50 percent.\textsuperscript{97}

The Court explained that the suppressed evidence was material because, had the evidence been disclosed, Kyles could have refuted the prosecution's theory that he left his car in the parking lot.\textsuperscript{98} Also, Kyles could have called Beanie as an adverse witness and probed the inconsistency of his several statements, tending to show that the circumstances surrounding Beanie's tips were not on-the-level.\textsuperscript{99} Additionally, Kyles could have used Beanie's statement to examine police officers assigned to the case in order to demonstrate the haphazard nature of the investigation.\textsuperscript{100}

The Kyles standard ("if" rather than "only if") was reaffirmed in the Court's three most recent materiality cases. In Strickler v. Greene, the Court used the Kyles standard to deny a Brady claim based on suppressed evidence impeaching an eyewitness to an abduction when there was a large amount of uncontested physical evidence also linking the habeas petitioner to the crime.\textsuperscript{101} In Banks v. Dretke, the Court used the Kyles standard to grant habeas relief on the basis of an undisclosed deal with a key prosecution witness in a case light on physical evidence.\textsuperscript{102} Finally, in Youngblood v. West Virginia, the Court reversed a denial of a motion for a new trial where the lower court failed to realize that the motion implicated Brady, and remanded to that court to evaluate materiality using the Kyles standard.\textsuperscript{103}

B. Admissibility in Particular

Wood v. Bartholomew is the only time the Supreme Court expressly addressed the role of admissibility in the materiality inquiry.\textsuperscript{104} In that case, which came on the heels of Kyles, Dwayne Bartholomew shot and killed a Laundromat

\textsuperscript{95} Id. at 433 (emphasis added); Bagley, 473 U.S. at 682.
\textsuperscript{96} Kyles, 514 U.S. at 435.
\textsuperscript{97} Id. at 434-37.
\textsuperscript{98} Id. at 450-51.
\textsuperscript{99} Id. at 445-46.
\textsuperscript{100} Id. at 446-48.
\textsuperscript{101} 527 U.S. 263 (1999).
\textsuperscript{102} 540 U.S. 668 (2004).
\textsuperscript{103} 126 S. Ct. 2188 (2006).
\textsuperscript{104} 516 U.S. 1 (1995).
If the prosecution could prove premeditation, it could convict Dwayne of aggravated first-degree murder rather than ordinary first-degree murder.\(^\text{106}\)

At trial in Washington state court, the prosecution called Dwayne’s brother, Rodney, and Rodney’s girlfriend, Tracy, as witnesses.\(^\text{107}\) Rodney and Tracy each testified that Dwayne told them he was going to rob the store and leave no witnesses.\(^\text{108}\) Furthermore, they each testified that they were not present with Dwayne in the Laundromat and did not assist Dwayne with the crime.\(^\text{109}\)

Dwayne argued at trial that his gun went off accidentally while he was taking money out of the cash register.\(^\text{110}\) He attempted to discredit Rodney and Tracy by arguing that they lied about the extent of Rodney’s participation in the crime.\(^\text{111}\) In particular, Dwayne tried to show that Rodney was the one who convinced the night manager to let them into the store in the first place.\(^\text{112}\) The argument failed; Dwayne was convicted of aggravated first-degree murder.\(^\text{113}\)

After Dwayne’s conviction became final, his counsel learned of the results of polygraph examinations given to Tracy and Rodney before trial.\(^\text{114}\) The results tended to show that Rodney had indeed participated in the crime, and therefore that his testimony was false.\(^\text{115}\) However, the polygraph evidence was inadmissible under Washington law.\(^\text{116}\) The district court denied habeas relief, but the Ninth Circuit reversed.\(^\text{117}\) Without briefing or oral argument, the Supreme Court, in a Per Curiam opinion with four dissenters, used the *Kyles* standard (with a slight but potentially important variation analyzed in Part III.C below) to hold that the polygraph evidence was immaterial.\(^\text{119}\)

In its discussion of materiality, the Court made several curious points. First, it stated that, because the polygraph results were inadmissible, they were “not ‘evidence’ at all.”\(^\text{120}\) Therefore, the Court reasoned, the results could have

\(^{105}\) Id. at 2.  
\(^{106}\) Id. at 3.  
\(^{107}\) Id.  
\(^{108}\) Id.  
\(^{109}\) Id.  
\(^{110}\) Id. at 4.  
\(^{111}\) Id. at 3-4.  
\(^{112}\) Id. at 4.  
\(^{113}\) Id. at 4-5.  
\(^{114}\) Id. at 4.  
\(^{115}\) Id. at 5.  
\(^{116}\) Id.  
\(^{117}\) Id.  
\(^{118}\) E-mail from Timothy K. Ford, habeas counsel for petitioner Dwayne Bartholomew, to Brian D. Ginsberg (Oct. 19, 2006, 16:53:00 EST) (on file with author).  
\(^{119}\) 516 U.S. at 5, 8.  
\(^{120}\) Id. at 6.
had no "direct" effect on the trial outcome.\textsuperscript{121} It also noted that the Ninth Circuit's conclusion that the results could have led the defense to depose Rodney (who was not in fact deposed before trial), which in turn would have led Rodney to confess the extent of his participation, was "judgment based on mere speculation, in violation of the [materiality] standards we have established."\textsuperscript{122}

This chronology of the \textit{Brady} materiality standard provides the background necessary to identify and assess arguments for the proposition that the Court's decisions require admissibility.

\section*{III. Deriving an Admissibility Requirement from Supreme Court Precedent}

Lower courts have often held that the materiality prong of the \textit{Brady} inquiry restricts \textit{Brady} claims to "admissible" evidence.\textsuperscript{123} This Part collects arguments (not all of which have actually been used by courts or litigants) in favor of that proposition and attempts to demonstrate that none of them stands up to scrutiny.

But before analyzing the actual arguments, it is necessary to determine exactly what "admissible" means in this context. The answer, perhaps surprisingly, is not obvious. In answering this question, it will be useful to differentiate between inadmissible evidence that would otherwise (but for its inadmissibility) be material, on the one hand, and evidence that would not be material regardless of admissibility, on the other. Call the former evidence "material-in-fact" inadmissible evidence. Therefore, if an admissibility requirement does exist, evidence must be both (1) material-in-fact and (2) admissible in order to be "material" for \textit{Brady} purposes.

\subsection*{A. If an Admissibility Requirement Does Exist, What Does It Entail?}

\subsubsection*{1. Backward-Looking vs. Forward-Looking}

The \textit{Brady} discovery doctrine is troublesome in application partly because it requires a prosecutor, before trial, to assess the expected impact of pieces of evidence in the context of the defense's entire case, which is necessarily unknowable until after trial.\textsuperscript{124} This \textit{ex ante}/\textit{ex post} asymmetry complicates the idea of "admissibility" for \textit{Brady} purposes. It makes answering the question,

\begin{thebibliography}{99}
\bibitem{121} Id.
\bibitem{122} Id.
\bibitem{123} See supra note 13.
\end{thebibliography}
“What does it mean to say that evidence ‘would have been admissible at trial’?" nontrivial.

It could be that a piece of evidence is “admissible” only if it would have been admitted at some point during the course of the actual trial as the trial unfolded. Call this “backward-looking” admissibility, since under such a definition, evidence is “admissible” for Brady purposes only if it could have been cleanly inserted into the original proceedings as they actually occurred. If, for example, a new witness or theory of the case would have been required to make the evidence admissible, then such evidence is not “admissible.”

Alternatively, it could be that a piece of evidence is “admissible” if, supposing that the defense had the evidence before trial, the defense could have crafted some strategy and witness lineup under which the evidence would have been admitted. Call this “forward-looking” admissibility, because it measures admissibility from the standpoint of pre-trial preparation rather than post-trial hindsight. Note that if a piece of evidence is “backward-looking” admissible, it is also “forward-looking” admissible. The converse is not necessarily true.

Brady itself suggests that the broader definition, “forward-looking” admissibility, is the appropriate one. There, the Maryland Court of Appeals’s opinion (which the U.S. Supreme Court affirmed) held that Boblit’s undisclosed confession was material to the level of Brady’s punishment. But, that court also held that the confession would not have been admissible in the trial as it actually unfolded. Brady needed to have called either Boblit (to cross-examine him about the confession) or the investigating officer (to show that the police investigation negligently relied on inconsistent statements) as witnesses—which Brady did not do—in order to introduce the confession. That is, the Brady Court deemed “material” evidence that was not backward-looking admissible. Thus, if admissibility is required, it is admissibility in the more expansive “forward-looking” sense.

The Court’s approach to materiality in general strengthens this conclusion. Ever since Bagley, the Court has (with one exception analyzed later in this Article) said that the requisite “reasonable probability” of an acquittal or sen-

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125 To see this, suppose that the evidence could have been neatly inserted into the trial proceedings as they actually unfolded. Then the hypothetical course of trial called for by forward-looking admissibility is simply the actual course of trial.

126 Even if the defense could have crafted some trial strategy under which the evidence would have been admitted, the evidence might not have been neatly insertible using the trial strategy actually employed.

127 Brady, 174 A.2d at 171.

128 Id. at 170-71.

129 Id.

130 Bagley bolsters this conclusion, because the Supreme Court there acknowledged (by remanding to the Ninth Circuit rather than finding no Brady violation) that evidence that would have caused the petitioner to revise his entire theory of the case may be material (and therefore admissible, if one assumes that materiality requires admissibility). See supra Part I.
tence reduction is measured at the time the evidence is disclosed "to the defense," rather than "to the jury" or "to the factfinder."\textsuperscript{131} Even in the one outlier case, the Court never affirmatively indicates that the relevant disclosure is disclosure to anyone other than the defense team.\textsuperscript{132} That is, a court determines materiality of the evidence based on what the defense would have done with it (a forward-looking inquiry) rather than simply how the jury would have appraised it had it been inserted neatly into the trial proceedings (a backward-looking inquiry). It would be strange, then, to use a backward-looking approach to evaluate admissibility, because the materiality inquiry as a whole is expressed in decidedly forward-looking language.

2. Admissible for What Purpose?

A piece of evidence may be admissible for one use and inadmissible for another. However, it is possible that only one use makes the evidence material-in-fact. For example, John's statement implicating Shelley is inadmissible hearsay when offered for its truth.\textsuperscript{133} But, that same statement is arguably admissible when used not for its truth but proving that the police were on notice of a suspect other than George yet negligently failed to investigate.

This prompts the question whether, to be considered "admissible" for \textit{Brady} purposes, evidence must be admissible (using the forward-looking definition) for the particular use for which it is material-in-fact. Suppose that John's statement is not material-in-fact if offered to prove police negligence. In the context of the introductory hypothetical, then, the question becomes whether, to be considered "admissible" for \textit{Brady} purposes, the statement must be admissible to prove the truth of the matter asserted. It should be noted that this inquiry is independent of the forward-looking/backward-looking distinction made immediately above.

The Supreme Court opinions offer little guidance on this point, because in all relevant cases the evidence was either (a) admissible for the use for which the evidence was material-in-fact,\textsuperscript{134} (b) inadmissible for any use,\textsuperscript{135} or (c) immaterial-in-fact for any use.\textsuperscript{136} Raising this question as sharply as possible requires evidence that is admissible for a use other than that for which it is material-in-fact.

\textsuperscript{131} \textit{Youngblood}, 126 S. Ct. at 2190; \textit{Banks}, 540 U.S. at 703; \textit{Strickler}, 527 U.S. at 280; \textit{Kyles}, 514 U.S. at 433; \textit{Bagley}, 473 U.S. at 682 (1985) (Blackmun & O'Connor, JJ.); \textit{Id.} at 685 (Burger, C.J., White & Rehnquist, JJ.).

\textsuperscript{132} \textit{Bartholomew}, 516 U.S. at 5 (simply mentioning “disclosure” rather than disclosure to any particular person or entity).

\textsuperscript{133} See supra Part I, note 12 and accompanying text.

\textsuperscript{134} See \textit{Banks}, 540 U.S. at 668; \textit{Kyles}, 514 U.S. at 419; \textit{Bagley}, 473 U.S. at 667; \textit{Giglio}, 405 U.S. at 150.

\textsuperscript{135} See \textit{Bartholomew}, 516 U.S. at 1.

\textsuperscript{136} See \textit{Agurs}, 427 U.S. at 97; \textit{Bartholomew}, 516 U.S. at 1; \textit{Strickler}, 527 U.S. at 263.
To allow a claim where the evidence at issue is admissible only for a use other than the use for which it is material-in-fact, however, seems to betray the requirement’s underlying rationale. The basic idea of an admissibility requirement breaks down if no nexus is demanded between the purpose for which the evidence is admissible and the purpose for which it is material-in-fact.

It is not necessary, for the arguments that follow, to press this issue further. It suffices to assume that, if an admissibility requirement exists, it mandates admissibility for the use that makes the evidence material-in-fact.

Summing up, if an admissibility requirement exists, the materiality prong of the Brady test must take substantially the following form: Evidence is material if (1) it is material-in-fact when used for some purpose, and (2) the defense could have created some strategy and assembled some witness list making the evidence admissible for that purpose.

B. Has the Court Adopted an Admissibility Requirement?

The remainder of this section evaluates arguments that could be made (though only some of them actually have been made) for the proposition that Supreme Court precedent dictates an admissibility requirement. The goal of the remainder of this section is to demonstrate that Supreme Court precedent contemplates that inadmissible evidence may form the basis for a Brady claim.

1. Brady: The Maryland Court of Appeals’s “Ruling on the Admissibility” of Boblit’s Confession

The Brady Court ruled that Boblit’s undisclosed confession was immaterial to guilt, noting that the Maryland Court of Appeals held that “[i]f Boblit’s withheld confession had been before the jury, nothing in it could have reduced the appellant Brady’s offense below murder in the first degree.”\(^\text{137}\) The Court then offered its interpretation of that passage: “We read that statement as a ruling on the admissibility of the confession on the issue of innocence or guilt,” meaning that Boblit’s confession was inadmissible with respect to guilt.\(^\text{138}\) A lack of admissibility, the argument concludes, implies a lack of materiality.\(^\text{139}\)

That the Maryland Court of Appeals’s statement was indeed a ruling on admissibility is far from clear. And even if the statement was a ruling on admissibility, the implications of that ruling hinge upon the particular basis for finding the confession inadmissible.

It is perfectly plausible that the statement was a ruling on evidentiary weight rather than admissibility. The Court noted that, at trial, Brady admitted participating in the murder. Further, in his closing argument, “Brady’s counsel

\(^{137}\) Brady, 174 A.2d at 171.
\(^{138}\) Brady, 373 U.S. at 90.
\(^{139}\) For an example of a court using this argument, see United States v. McPartlin, 595 F.2d 1321, 1333 n.10 (7th Cir. 1979) (dictum).
conceded that Brady was guilty of murder in the first degree" because of his participation in the crime.\textsuperscript{140} Thus, as the opening paragraphs of the Court's own opinion indicate, the confession would not have done Brady any good on guilt simply because it—like all the other evidence in the case—indicated that Brady was present at the crime scene and therefore sufficed to prove Brady guilty of felony-murder.\textsuperscript{141} "Nothing in [the confession]" helped Brady on the guilt issue, then, because the confession, though admissible, did not weigh heavily in favor of his innocence.

But suppose for the sake of argument that the Maryland Court of Appeals's statement was a ruling on admissibility. Does it necessarily follow that 
\textit{Brady} established an admissibility requirement? Answering this question requires examining why the Maryland Court of Appeals held the confession inadmissible on guilt.

All indications given by the Maryland Court of Appeals and the U.S. Supreme Court indicate that the basis for finding the confession inadmissible on guilt must have been relevance.\textsuperscript{142} The undisclosed confession was not relevant to proving Brady's innocence because the confession, although it cast doubt on Brady's being the strangler and therefore upon the propriety of a death sentence versus life imprisonment, implicated Brady in enough conduct to warrant a first-degree murder conviction.\textsuperscript{143} Indeed, the government in its brief to the Supreme Court conceded that the confession was irrelevant to Brady's guilt. The government argued that Boblit's suppressed confession is "solely relevant...to the question of punishment,"\textsuperscript{144} and later reiterated that "punishment . . . is the only issue to which the withheld statement was relevant."\textsuperscript{145}

After this analysis, it would be disingenuous to say that Brady's confession was immaterial to guilt because it was inadmissible. Rather, the confession was immaterial to guilt because it was irrelevant to proving Brady's innocence. That such irrelevance meant the confession was also inadmissible is a collateral consequence generated by state evidence law.

\textsuperscript{140} 373 U.S. at 84.

\textsuperscript{141} \textit{Id.} at 83.

\textsuperscript{142} \textit{Brady}, 174 A.2d at 168-69 ("On this appeal, Brady concedes that '[a]t his trial the appellant [Brady] admitted participation in the robbery in the course of which the homicide occurred.'"); \textit{Id.} at 169 ("As we held on the original appeals of Boblit and Brady, the killing was clearly . . . murder in the first degree."); \textit{Brady}, 373 U.S. at 84 ("At his trial, Brady took the stand and admitted his participation in the crime . . . .").

\textsuperscript{143} \textit{Brady}, 373 U.S. at 85.

\textsuperscript{144} Brief of Respondent at 8, \textit{Brady}, 373 U.S. 83 (Doc. No. 490) (emphasis added).

\textsuperscript{145} \textit{Id.} at 10 (emphasis added).
2. Kyles: Comparison with American Bar Association Disclosure Guidelines

The Kyles Court, in its exegesis on the materiality standard, explained that "the rule in Bagley (and, hence, in Brady) requires less of the prosecution than the American Bar Association Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate." 146 In a parenthetical reference, the Court then quoted the relevant ABA Standard in effect at the time:

A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused. 147

For the phrase "evidence or information" not to be redundant, the argument proceeds, "evidence" must refer only to admissible evidence, and inadmissible evidence must be included in "information." Because Brady requires less disclosure than the ABA Standard, the argument concludes, Brady must not require the disclosure of inadmissible evidence (mere "information"). 148

This conclusion is plausible, but it is not inevitable and likely not what the Court had in mind. Brady may be weaker than the ABA Standard because it requires the disclosure only of admissible evidence, as the argument asserts. But, it may also be weaker for the independent reason that it requires disclosure only of evidence that is material-in-fact, and not evidence which merely "tends" to negate guilt or punishment—evidence which the ABA Standard encompasses. 149 The strength of the two discovery rules can be compared and contrasted on two dimensions, not just one, and Brady may be considered weaker because it is weaker on the second dimension.

Other language in the Court's opinion confirms that it indeed focused on the second rationale. The Court lays a foundation for contrasting Brady with the ABA Standard by stating first that "the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense." 150 It then explains that, unlike Brady, the ABA Standard does not have a very demanding weight-of-evidence threshold that must be met

146 Kyles, 514 U.S. at 437.
147 Id. (quoting ABA STANDARDS OF CRIMINAL JUSTICE § 3-3.11(a) (3d ed. 1993)). This standard is substantially similar to current standard 11-2.1(a)(viii).
148 A LEXIS search did not uncover any court decisions (reported or unreported) invoking this argument.
149 Kyles, 514 U.S. at 437.
150 Id. at 436-37 (emphasis added).
before triggering mandatory disclosure. The ABA Standard, the Court explains, calls for disclosure of evidence "tending to exculpate or mitigate."151

The Court thus appears to differentiate Brady and the ABA Standard based not upon the type of evidence encompassed by each (according to the argument introduced at the beginning of this section, admissible versus inadmissible), but rather upon the weight-of-evidence threshold that must be reached under each test before disclosure is required (the demanding reasonable-probability standard versus the tendency-to-mitigate standard). One can, without even considering the dimension of admissibility, say that Brady requires less disclosure than the ABA Standard because "materiality" is a more demanding trigger than mere "tendency." The Kyles Court's comparison of Brady with the ABA Standard, then, does not necessarily indicate that Brady encompasses only admissible evidence.

3. The Bartholomew Arguments

Lower courts have found in the Bartholomew opinion a fountainhead of rationales to cite for the proposition that inadmissible evidence can never be material.152

a. "Not 'Evidence' at All"

In enumerating the elements of a constitutional discovery violation, Brady and its progeny all speak of material "evidence."153 Therefore, the argument asserts, since inadmissible evidence is "not 'evidence' at all,"154 it cannot form the basis of a Brady claim.155

The Court cites no authority for the proposition that "inadmissible evidence" is a contradiction in terms.156 This semantic argument is further undercut by the fact that both before and after Bartholomew, the Supreme Court has decoupled the question "What is evidence?" from the question "What is admissi-

151 Id. at 437 (emphasis added).
152 See supra note 13.
153 Bagley, 473 U.S. at 682 (Blackmun & O'Connor, JJ.); Id. at 685 (Burger, C.J., White & Rehnquist, JJ.); Agurs, 427 U.S. at 103-04, 107; Giglio, 405 U.S. at 154; Brady, 373 U.S. at 87. All cases since Bartholomew have also referred to "evidence" as the raw material of Brady claims. Youngblood, 126 S. Ct. at 2190; Banks, 540 U.S. at 668; Strickler, 527 U.S. at 280; Kyles, 514 U.S. at 433.

It should be noted, however, that the Strickler Court does refer to "suppressed information" (rather than "evidence") once in the opinion. 540 U.S. at 703 (emphasis added). However, admissibility was not an issue in that case, so it is doubtful that the Court's usage of "information" was intended to affirmatively approve the use of inadmissible evidence in a Brady claim.

154 Bartholomew, 516 U.S. at 6.
156 Bartholomew, 516 U.S. at 6.
ble?" in the context of polygraph results—the very type of evidence at issue in *Bartholomew*. That is, it has indicated that polygraph results can be "evidence" yet at the same time be "inadmissible." It has done this by characterizing polygraph results as "inadmissible evidence," "evidence which is not admissible," or the equivalent, both before and after *Bartholomew*. For example, in *Lankford v. Idaho*, the pre-*Bartholomew* Court observes that "[polygraph] evidence is inadmissible in Idaho in an ordinary case..."157 And in *United States v. Scheffer*, the post-*Bartholomew* Court notes that "[u]ntil quite recently, federal and state courts were uniform in categorically ruling polygraph evidence inadmissible under the [Frye] test..."158 Interestingly, the *Scheffer* majority included the same five Justices who constituted the majority in *Bartholomew*.159

That the Supreme Court treats the questions "What is evidence?" and "What is admissible?" separately is also illuminated by examining the Federal Rules of Evidence. The Court proposed the Federal Rules of Evidence in the first instance and has the delegated power to propose amendments.160 These amendments take effect unless Congress objects.161 Many of the original proposed rules refer to concepts such as "inadmissible evidence." For example, the Court in Proposed Rule 103(c) wrote that jury cases should be conducted "so as to prevent inadmissible evidence from being suggested to the jury..."162 Further, in Proposed Rule 402, the Court wrote that "[e]vidence which is not relevant is not admissible."163 And for one more example, the Court in Proposed Rule 609 wrote that, for impeachment purposes, the pendency of an appeal from a conviction "does not render evidence of [that] conviction inadmissible."164

159 Id. (emphasis added). See also *Schriro v. Summerlin*, 542 U.S. 348, 355 (2004) (characterizing habeas petitioner's assertion that juries are better factfinders than courts as based in part on juries' "protection from exposure to inadmissible evidence") (not concerning polygraph results) (same five-Justice majority as in *Bartholomew*).
Neither the Court nor Congress has ever sought to amend this language.\(^\text{165}\) The aforementioned rules are, of course, just examples of a larger trend.\(^\text{166}\)

Like the Federal Rules of Evidence, the Federal Rules of Criminal Procedure were first proposed by the Supreme Court.\(^\text{167}\) The Court may propose amendments, and those amendments take effect unless Congress objects.\(^\text{168}\) Also like the Federal Rules of Evidence, the Federal Rules of Criminal Procedure countenance the separation of the questions “What is evidence?” and “What is admissible?” For example, the Court proposed (and Congress never rejected) an amendment to Rule 12.1(f) to provide that “[e]vidence” of a defendant’s intent to rely on an alibi defense “is not ... admissible” against the defendant if he later withdraws any notice of this intent.\(^\text{169}\)

Second, it is not clear that the Bartholomew Court concludes that polygraph results are immaterial because they are “not ‘evidence’ at all.” Indeed, after calling the results “not ‘evidence,’” the Court does not end its analysis, but rather inserts another link in the chain of reasoning: “Disclosure of the polygraph results, then, could have had no direct effect on the outcome of trial ... .”\(^\text{170}\) That is, the Court’s characterization of the polygraph results as “not ‘evidence’ at all” may not have been intended to be, in itself, an argument supporting immateriality. Rather, it is one step toward the conclusion of “no direct effect.” This argument is addressed immediately below.

b. “No Direct Effect”

The Court stated that disclosure of the polygraph results “could have had no direct effect on the outcome of trial.”\(^\text{171}\) This implies that a “direct ef-

\(^{165}\) See supra notes 162-164.


\(^{168}\) 28 U.S.C. § 2074(a).


\(^{170}\) Bartholomew, 516 U.S. at 6 (emphasis added).

\(^{171}\) Id. at 6.
fect” is necessary to prove materiality. Because inadmissible evidence can have only an indirect effect, the argument concludes, it can never be material.

The rest of the Bartholomew opinion undercuts this argument. Immediately after observing that the polygraph results could not have directly affected the trial, the Court notes how the Ninth Circuit opinion tried to “get around this problem” by finding an indirect effect. Namely, the Ninth Circuit concluded that the polygraph results would have caused the defense to suspect Rodney and depose him accordingly, thereby obtaining evidence of his participation in the crime. The Court rejected the Ninth Circuit’s attempt not because indirect effects are never material, but because this particular indirect effect “is based on mere speculation.” That is, indirect effects may be material; this one, however, according to the Court, simply was not.

The State of Washington’s petition for certiorari helps explain why the Court may have used this “direct effect” language. In a footnote, the State argues for an admissibility requirement to deal with the pragmatic concern that “the court cannot directly gauge the effect the information may have had on the trial.” Thus, rather than actually creating an admissibility requirement, the Court appears simply to be acknowledging the State’s contention (that no direct effect exists on the given facts) before beginning an analysis of potential indirect effect.

Furthermore, in that same footnote in its petition for certiorari, the State argues that operating without an admissibility requirement “inevitably encourages speculation” with respect to the materiality-in-fact of the suppressed evidence at issue. Therefore, it is possible that the “no direct effect” argument analyzed in this section is not an argument in itself, but merely a smaller part of a larger argument involving the purportedly speculative nature of the materiality-in-fact inquiry with respect to inadmissible evidence. This argument is analyzed directly below.

c. “Mere Speculation”

The Court held that the Ninth Circuit’s explanation of the effect the polygraph results would have had on the trial was “mere speculation.” In every case, the argument goes, there can be only “speculation”—never a “reasonable

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172 For an example of a court using this argument, see Penick v. Fillion, 144 F. Supp. 2d 145, 158 (E.D.N.Y. 2000).
173 Bartholomew, 516 U.S. at 6.
174 Id.
175 Petition for Writ of Certiorari at 20 n.7, Bartholomew, 516 U.S. 1 (No. 94-1419) (emphasis added).
176 Id.
177 Bartholomew, 516 U.S. at 6.
probability”—that, had inadmissible evidence been disclosed to the defense, the defendant would have been acquitted or received a lighter sentence.178

Here, the claim does not involve a reformulation of the legal materiality standard. Instead, it purports to state a matter of fact. The claim is that inadmissible evidence never in practice rises to the level of material-in-fact.

As the introductory hypothetical demonstrates, this simply is not true. John’s statement casting suspicion on Shelley was inadmissible yet material-in-fact.179 Moreover, the Court’s detailed analysis of the facts and trial strategies in the actual case belie any suggestion that it held inadmissible evidence to be per se speculative.180 After all, if inadmissible evidence were per se speculative, such analysis would be unnecessary. Proponents of this argument would have a stronger case if the Court had demonstrated how evaluating the effect of inadmissible evidence on a trial outcome always involves “mere speculation,” but the Court did not take this route. The analysis was confined to the Ninth Circuit’s evaluation of the effect of inadmissible evidence in this particular case.

It is certainly true that proving materiality-in-fact for inadmissible evidence is inherently more difficult than proving it for admissible evidence. This is because the inquiry for inadmissible evidence requires an extra step. The overall question in each case is the same: Would disclosure of evidence have let to acquittal?181 But, with inadmissible evidence, that overall question has a latent sub-question: Would disclosure lead to admissible evidence?182 It is that admissible evidence which then leads to acquittal.

With admissible evidence, on the other hand, this first step does not require any extra effort.183 The initial evidence disclosed is (by assumption) admissible. But the Court did not endeavor to prove that the more demanding showing required for inadmissible evidence is never possible.

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178 For an example of a court using this argument, see Madsen v. Dormire, 137 F.3d 602, 604 (8th Cir. 1998).

179 See supra Part I.

180 Bartholomew, 516 U.S. at 6-9 (analyzing potential changes to scope of Rodney’s cross-examination, as well as weight of other untainted evidence).

181 The guilt phase will be considered for concreteness.

182 This admissible evidence need not be a tangible document or physical thing. It can be witness testimony produced by questions that the attorney would not have asked had he not learned of the initial inadmissible evidence. The point is that the jury must at some point have heard something new, otherwise they will simply convict once again.

183 This is easy to see mathematically. Call the probability that the initial disclosure of evidence will lead to admissible evidence \( P_1 \), and call the probability that the admissible evidence leads to acquittal \( P_2 \). Call the “reasonable probability” \( R \). Proving materiality requires \( P_1 \times P_2 \geq R \). However, when the initial evidence is admissible, \( P_1 = 1 \) automatically. Therefore, all that is required is \( P_2 \geq R \), a less complicated and less demanding showing.
d. Disclosure to the Factfinder or to the Defense?

The Bartholomew opinion recited the prevailing materiality standard as follows: "[E]vidence is ‘material’ under Brady, and the failure to disclose it justifies setting aside a conviction, only where there exists a ‘reasonable probability’ that had the evidence been disclosed the result at trial would have been different." 184 The Court did not indicate that the relevant disclosure is disclosure to the defense. Therefore, the argument holds, it must have intended to require disclosure to the jury, which in turn requires admissibility. 185

Even if this argument was true immediately after Bartholomew, the inference falls apart when considering subsequent cases. In each Brady case after Bartholomew, the Court explained that the relevant disclosure was indeed disclosure to the defense. 186 Moreover, the Bartholomew Court expressly purported to follow Kyles (though it failed as a textual matter), which specified that disclosure to the defense was the appropriate baseline. 187

C. The Textual Shift from Bagley to Kyles: A Stronger Rejection of Admissibility?

The above analysis attempted to demonstrate that the Court's opinions in its Brady line of cases contemplate that constitutional criminal discovery encompasses inadmissible evidence. But, has the Court given any indications stronger than the inferences drawn above that admissibility is not required?

An affirmative answer to this question might be suggested by observing the shift in the Court's wording of the materiality standard from Bagley and beyond. A majority of the Justices in Bagley held that evidence is material "only if" the requisite reasonable probability exists. 188 This formulation in terms of necessity, rather than sufficiency, suggests that materiality might require more than materiality-in-fact. Yet, the Kyles opinion, though purporting to follow Bagley, omits the "only" in its recitation of the materiality standard and retains just the "if," giving rise to the inference that materiality-in-fact—without more—suffices to show materiality. 189 That is, factors other than materiality-in-fact—such as admissibility—do not enter the inquiry.

184 Bartholomew, 516 U.S. at 5.
185 A LEXIS search did not uncover any court decisions (reported or unreported) invoking this argument.
186 Youngblood, 126 S. Ct. at 2190 ("[H]ad the evidence been disclosed to the defense . . . ."); Banks, 540 U.S. at 703 ("[H]ad the suppressed information been disclosed to the defense."); Strickler, 527 U.S. at 280 ("[H]ad the evidence been disclosed to the defense . . . .").
187 514 U.S. at 433.
188 Bagley, 473 U.S. at 682 (Blackmun & O'Connor, JJ.); Id. at 685 (Burger, C.J., White & Rehnquist, JJ.).
189 Kyles, 514 U.S. at 433 ("[F]avorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence
The *Bartholomew* Court reverts to an "only if" standard, but it purports to follow *Kyles*. All of the Court's post-*Bartholomew* *Brady* cases use the "if" formulation rather than the "only if" formulation. Therefore, the argument concludes, the Court has affirmatively rejected an admissibility requirement by holding that materiality-in-fact is all that is required to prove materiality.

This argument, though linguistically appealing, seems jurisprudentially inconclusive. This is in large part because one can never be sure whether post-*Kyles* Courts cite *Kyles* because they think the *Kyles* opinion faithfully incorporates the *Bagley* necessity test (as it expressly claims to do) or because they think it departs from *Bagley* and uses a sufficiency test (as its actual recitation of the standard ends up doing). Further, at least one of the Court's post-*Bartholomew* decisions appears to equivocate by reciting the *Kyles* "if" standard but in a subsequent breath using "only if"-type language, explaining what a *Brady* petitioner "must" do. Therefore, this necessity-versus-sufficiency analysis seems to be a non-starter. But, this does not undermine the rest of the conclusions drawn in Part III.B.

**IV. SOME CONSEQUENCES OF AN ADMISSIBILITY REQUIREMENT: COGNIZABILITY AND FEDERAL APPELLATE REVIEW**

It appears that the Supreme Court has not established an admissibility requirement for evidence forming the basis of a *Brady* claim. Yet, it has not rejected such a requirement as expressly as it could have. It will be valuable, then, to evaluate the functional consequences of an admissibility requirement, using normative and policy considerations as a guide. Some of these consequences are analyzed below.

**A. *Brady* Claims that Are and Are Not Eliminated**

A threshold issue in evaluating the merits of an admissibility requirement is determining whether, in practice, the requirement would change the current *Brady* landscape. That is, if material-in-fact evidence is always (or almost always) admissible, the admissibility requirement would not serve to disallow any (or at least many) *Brady* claims that are currently allowed. The added hurdle would have no real gatekeeper effect. As the introductory hypothetical shows, however, this is not the case.

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been disclosed to the defense, the result of the proceeding would have been different."" (emphasis added) (quoting *Bagley*, 473 U.S. at 668)).

*Bartholomew*, 516 U.S. at 5 (citing *Kyles*, 514 U.S. at 419).

*Youngblood*, 126 S. Ct. at 2190; *Banks*, 540 U.S. at 703; *Strickler*, 527 U.S. at 280.

A LEXIS search did not uncover any court decisions (reported or unreported) invoking this argument.

*Strickler*, 527 U.S. at 289 (petitioner "must convince [a court]" that evidence meets the "reasonable probability" standard).
1. A Compelling Claim Prevented

Re-examining the introductory hypothetical lets one construct the strongest case against an admissibility requirement. First, the prosecution must have suppressed inadmissible evidence that is material-in-fact because there is a reasonable probability that, had the inadmissible evidence been disclosed to the defense, the defense would have used it to discover admissible evidence to put before the factfinder and procure an acquittal. In the introductory hypothetical, John’s statement is the predicate inadmissible evidence, and Shelley’s burglary tools are the ultimate admissible evidence.

Second, the defense will have done the investigative legwork and uncovered the admissible evidence—rather than simply asserting a strong probability that it will uncover the admissible evidence. This happened in the introductory hypothetical when the defense discovered the burglary tools in Shelley’s desk.

Third, the defense will have proved that it would have taken those same investigative steps and discovered the same material-in-fact admissible evidence had the disclosure happened before trial. Suppose (as seems likely), for the purposes of this discussion, that George’s counsel could have proved that John’s statement would have led him to the burglary tools.

One further condition is needed to make the claim maximally sympathetic. Suppose that John made a different statement. Suppose he wrote: “I had a motivational speaker come into the office today.” This statement comes to light, and George is able to prove (somehow) that this statement would have caused him to recall a time during the speaker’s talk when Shelley was blinking his eyes in a strange cadence, which in turn would have suggested that maybe Shelley has something to hide, which in turn would have caused George to search Shelley’s desk, which would have produced the burglary tools.

This new statement is material-in-fact. It passes the “reasonable probability” test, because (by hypothesis) the numerical probability that disclosure to the defense would lead to an acquittal is high enough. The adjective “reasonable” does not require that a “reasonable person” would have made the same logical leaps that George made. The Brady obligation measures materiality from the point of “disclos[ure] to the defense,” rather than “to a reasonable de-

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194 See supra Part I.

195 This “discovery” is not limited to physical evidence. The new evidence can take the form of testimony, given in response to new questions, that was not elicited during trial. The point is that some type of new evidence must be shown to the jury at some point; otherwise the jury would (presumably) vote once again to convict.

196 In contrast, the materiality standard used in the federal securities laws embraces the reasonable-person requirement. See TSC Indus. v. Northway, 426 U.S. 438, 449 (1976) (“An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.”) (emphasis added).
fense team” or the equivalent.197 The adjective “reasonable” relates only to the numerical probability of acquittal.198

It is likely that, in practice, a court would refuse to believe that George would have made those logical leaps and therefore would hold that materiality-in-fact had not been established. But, strictly speaking, without an admissibility requirement, such a statement would give rise to a Brady claim. One might think that such a claim is not very sympathetic due to the far-flung objectively unreasonable inferences the petitioner must assert he would make. Therefore, a maximally sympathetic Brady claim requires that a reasonable person must have been able to use the inadmissible evidence to discover the admissible evidence.199

As indicated by the introductory hypothetical, Brady claims satisfying all of these conditions do exist. An admissibility requirement would make them noncognizable.

2. An Unreasonable Claim Prevented—But Is There a Better Way?

The “motivational speaker” revision of the introductory hypothetical presents a Brady claim that is objectively unreasonable but that is nevertheless cognizable if materiality-in-fact is the sole inquiry of the materiality prong. An admissibility requirement would block such a claim. Suppose one agrees that this is the right outcome. Nevertheless, the benefits of using an admissibility requirement to eliminate these unreasonable, unsympathetic claims may not exceed the cost generated when such a requirement eliminates compelling claims like the original introductory hypothetical.

Is there a finer mechanism that preserves the compelling claims yet still blocks the unreasonable ones? The answer is quite clearly “Yes.” This filtration can be accomplished by applying a judicial gloss to Brady requiring a rea-

197 See, e.g., Youngblood, 126 S. Ct. at 2190 (emphasis added).
198 This is made clear by Justice Souter’s recommendation to use the phrase “significant possibility” instead of “reasonable probability” in the Brady test. Strickler, 527 U.S. at 298-301 (Souter, J., concurring).
199 It is worth noting that the Court’s holding that evidence is material if it “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the outcome of the trial,” Kyles, 514 U.S. at 434, does not necessarily eliminate the materiality of the “motivational speaker” hypothetical by injecting the sort of reasonable-person requirement that would make this claim fatal. This is because the wording of the test is perfectly consistent with the following interpretation of it: Courts are to ask whether a reasonable factfinder would view the case in a different light taking the petitioner’s subjective inferences as given.

Of course, the language in Kyles is also consistent with a traditional reasonable-person requirement. But, if such a reasonable-person requirement is already built into the Brady test, then the reasons for adopting an admissibility requirement are less compelling still. To the extent it serves to impose a reasonable-person requirement, an admissibility requirement would be redundant.
sonable person in the defendant's position to have been able to uncover the admissible evidence. It is certainly true that a "reasonable person" standard will be harder to administer than the (comparatively bright-line) standard of admissibility. But, courts routinely administer the "reasonable person" standard in a wide variety of contexts. There is no reason to believe that a "reasonable person" requirement would be less workable here.\footnote{Alternatively, a court could eschew reasonable-person analysis and use inadmissibility to establish a presumption of immateriality rebuttable by the petitioner's proof of materiality-in-fact.}

3. A Malicious Prosecutorial Strategy Facilitated

Recall again the introductory hypothetical.\footnote{See supra Part I.} John's eyewitness statement is inadmissible hearsay.\footnote{See supra note 12.} George's Brady claim predicated on this statement is therefore blocked.\footnote{See supra Part I and accompanying notes.}

John's death was not suspicious. But suppose that John was not hit by a bus. Suppose instead that a conniving member of the prosecution team arranged for John to be awarded a free trip to a foreign country where he could not be compelled by process to testify in an American court. Suppose further that the trip just happened to coincide with the time of trial. In a regime with an admissibility requirement, George's Brady claim will be blocked once again.\footnote{Watkins, 92 F. Supp. 2d at 845 ("[If admissibility were required, p]rosecutors could conceal the existence of known eyewitnesses, . . . Unless such a witness testifies at trial . . . the verbatim statement or affidavit would be inadmissible hearsay.").}

Though this observation is not intended to suggest a negative view of prosecutors as a group, the fact remains that Brady violations are inherently hard to police precisely because prosecutors have so much control over what items in their case file see the light of day.\footnote{See, e.g., Bennett L. Gershman, Prosecutorial Ethics Symposium: Reflections on Brady v. Maryland, 47 S. Tex. L. Rev. 685, 687-88 (2006) ("[The Brady obligation is] virtually unenforceable when violations are hidden. Because Brady applies to evidence known only to the prosecutor and unknown to the defense, disclosure of this evidence depends almost exclusively on the diligence, integrity, and good faith of the prosecutor."); Kevin C. McMunigal, Disclosure and Accuracy in the Guilty Plea Process, 40 Hastings L.J. 957, 962 n.22 (1989) ("Brady violations are hard to detect. Unless the defendant somehow fortuitously learns of the exculpatory information and the prosecution's possession of it, a Brady violation will never come to light.").} Therefore, the concern that a prosecutor might actually employ the devious strategy identified here is not unfounded.\footnote{Indeed, such a suggestion was recently entertained by a federal district court. Watkins, 92 F. Supp. 2d at 844-46.}
B. Effect on U.S. Supreme Court Review and Habeas Review

An admissibility requirement not only eliminates Brady claims with compelling factual predicates and facilitates underhanded prosecutorial behavior, but it may eliminate two avenues of federal appellate review of the suppression, favorability, and materiality-in-fact elements. The law on these elements is unsettled, and its development would suffer to the extent it is insulated from federal review.

The first avenue of review narrowed by an admissibility requirement is U.S. Supreme Court review of Brady claims coming from state high courts on direct review. Realizing why this is so requires a brief examination of the Supreme Court’s appellate jurisdiction and certiorari practices with respect to state high-court decisions. The scope of the Court’s appellate review of state high-court decisions is usually confined to questions of federal law. 207 That is, state high-court judgments on issues of state law are almost always the last word on those issues. 208 Also, the Court will not grant certiorari on a case where its ruling would be strictly advisory, in the sense that it would not be sufficient to reverse the judgment of the court below. 209

Now, suppose that a Brady claim comes to a state’s highest court. That court can rule for the prisoner or for the State. In a regime with an admissibility requirement, ruling for the prisoner requires finding that evidence was (1) suppressed, (2) favorable, (3) material-in-fact, and (4) admissible. The absence of any of these elements results in a ruling for the State.

Suppose the state high court finds a Brady violation, and the State petitions for certiorari. The Supreme Court must accept the state high court’s judgment of admissibility because it is a matter of state evidence law. 210 But, the Court can reject the state high court’s judgment on the federal issues (suppression, favorability, and materiality-in-fact), because these are matters of federal constitutional law. 211 Because rejecting the state court’s determination on any federal element would turn the victory for the prisoner into a victory for the State, the Court may well grant certiorari.

Alternatively, suppose that the state high court finds no Brady violation. If the state high court found that the evidence was admissible but found that fewer than all of the federal elements were satisfied, the Supreme Court may grant certiorari and re-examine each of the federal elements. This is because the State’s victory, in such a situation, stands or falls on federal issues. But, if the

207 Murdock v. City of Memphis, 87 U.S. 590, 630 (1875) (concluding that the Supreme Court will ordinarily not review “questions not of a federal character” present in state high-court case).

208 Id.

209 Herb v. Pitcairn, 324 U.S. 117, 126 (1945) (“We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.”)

210 Murdock, 87 U.S. at 630.

211 Id.
state court found the evidence inadmissible (or did not reach admissibility), certiorari would be inappropriate because even a total reversal on the federal issues originally decided in the State’s favor would not reverse the judgment. In the absence of an admissibility requirement, this obstacle would not exist; all judgments finding no Brady violation would be reviewable on certiorari.

The same considerations apply to federal district court habeas review of state proceedings. This is because habeas courts only consider issues of federal law and generally employ the same type of reviewability protocols as the Supreme Court. The following table summarizes the scenarios described above.

212 It is true that the adequate-and-independent-state-ground doctrine is not implicated here. Rather than being independent to the decision of materiality, the state-law ruling on admissibility is antecedent to it. It is also true that the Supreme Court has granted certiorari to review state-court judgments on federal rights involving antecedent state-law issues. Richard H. Fallon et al., Hart and Wechsler’s The Federal Courts and the Federal System 493 (5th ed. 2003). But, the purpose of that review is, arguably, confined to the protection of the subsequent federal right against malicious manipulation by state courts. See Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 42 (1944). It is not assumed for the purposes of this Article that there is any reason to suspect state courts of this practice.

Moreover, such review has almost always occurred when the antecedent issue involves a state-created right (such as property), rather than a state-law issue not touching on any sort of entitlement. Fallon et al. at 528-36. Indeed, Herbert Wechsler stated that Supreme Court review of state-court judgments on state law is necessary when that state law is “logically antecedent” to the application of federal law. If a federal law protects property rights, for example, determining the meaning of “property” under state law is logically antecedent to examining whether the federal law has been violated. Herbert Wechsler, Appellate Jurisdiction of the Supreme Court: Reflections on the Law and Logistics of Direct Review, 34 Wash. & Lee L. Rev. 1043, 1054, 1052 (1977) (identifying only antecedent state-law rights and entitlements as permitting Supreme Court review). But, because inadmissible evidence may be material-in-fact as an empirical matter, it is not the case that a state-law admissibility determination is logically antecedent to the application of the federal materiality-in-fact standard. It is artificially made antecedent by a court choosing to graft such a requirement onto its Brady analysis.

Some commentators have gone so far as to suggest that Supreme Court review of a state-court judgment on state law is “unusual” as a general matter, even if the state-law issue is antecedent to a federal-law issue. See Ernest A. Young, Institutional Settlement in a Globalizing Judicial System, 54 Duke L.J. 1143, 1193 n.210 (2005) (explaining that Supreme Court review of an antecedent state-law issue is “unusual” for the same reasons that Supreme Court review of an adequate and independent state-law issue would be).


Of course, a habeas court does not “review” a state judgment in the same way that the Supreme Court does. “Review” here simply means examining state trial and post-trial proceedings. In the habeas context, the relevant ruling on admissibility would likely come during the course of state post-trial proceedings.
Review of *Brady* Cases in an Admissibility Regime
Given the State High Court’s Grounds for Judgment

**Did the State High Court Hold that All of the Federal Elements Were Satisfied?**

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<th>Did Not Reach</th>
<th>No</th>
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This narrowing of review is entirely one-sided in favor of the State. Judgments finding a *Brady* violation (against the State) are always reviewable, but judgments finding no violation (in favor of the State) are reviewable only when the state court finds the evidence admissible. To the extent that a more robust *Brady* jurisprudence is desirable, an admissibility requirement is undesirable because it significantly impedes federal-court development of the suppression, favorability, and materiality-in-fact elements.

**V. THE FEASIBILITY, COSTS, AND BENEFITS OF CASE-BY-CASE MATERIALITY-IN-FACT DETERMINATION**

It is of course true that an admissibility requirement would eliminate a great deal of case-by-case materiality-in-fact analysis and therefore dispose of a chunk of *Brady* claims that would otherwise involve factually complex litigation over whether a defendant would have used inadmissible evidence to discover...
admissible evidence. A proponent of an admissibility requirement might argue that this artificial streamlining is necessary because courts cannot possibly develop a principled body of law to aide their judgments in this realm.

This argument can be answered briefly, however, by pointing to the doctrine of inevitable discovery. In cases implicating that doctrine, courts routinely make counterfactual judgments about the discovery of evidence.\footnote{See Nix v. Williams, 467 U.S. 431, 444 (1984) (holding that evidence illegally obtained not excluded if prosecution can demonstrate that it would have discovered that evidence via legal means).} There, the question is whether, given a piece of illegally discovered evidence, the police would have inevitably discovered the evidence by legal means (thus allowing it to be used substantively against a defendant at trial).\footnote{Id.} In the \textit{Brady} context, the relevant analogous question is whether, given a proffered (in the maximally sympathetic case) or hypothesized (in an ordinary case) piece of admissible evidence, the defense team would have discovered it by following leads generated by a piece of inadmissible evidence. The inquiries are nearly functionally identical; each demands that a court evaluate a person's ability to follow leads generated by one piece of evidence in order to eventually discover another piece of evidence. It is hard to imagine that courts called upon to resolve this question in the inevitable discovery context would be unable to do so in the \textit{Brady} context.

The proponent might concede that courts have this ability but nevertheless insist that an admissibility requirement is desirable as a cost-saving mechanism because it would eliminate the need for the sort of complex factual determinations explained immediately above. Importantly, the proponent would add that an admissibility requirement would achieve the same end result (in terms of accuracy) as case-by-case litigation in nearly all cases. It would make litigation less costly but not less accurate. While it is impossible to refute this empirical argument without empirical evidence, it is nevertheless possible to weaken it.

First, this argument ignores the possibility that the very existence of the requirement will cause prosecutors to conceal evidence with greater frequency than before (because with the requirement, but not without it, this strategy would block a \textit{Brady} claim under certain circumstances).\footnote{See supra Part IV.A.3.} Therefore, it is not clear that accuracy would indeed be maintained. Second, and more significant, this argument implicitly assumes that the benefits of allowing a compelling \textit{Brady} claim of the sort described by the introductory hypothetical do not outweigh the cost savings of a per se rule (whatever they may be).\footnote{See supra Parts I, IV.A.1.} It is not at all obvious that this is true, in part because the introductory hypothetical was constructed to be capable of repetition and not to be unique and fanciful.\footnote{Id.}
benefits of not imposing an admissibility requirement may recur more frequently than the costs, and it seems premature to argue that the aggregate of all such costs exceeds the aggregate of all such benefits.219

VI. THE CHARACTER OF AN ADMISSIBILITY REQUIREMENT: CONSTITUTIONAL OR PRUDENTIAL?

Suppose the Court does decide to recognize an admissibility requirement. Is this requirement compelled by the Constitution, as the classical components—suppression, favorability, and materiality-in-fact—are?220 Or, is it prudential?

The distinction between the constitutional and prudential aspects of a given doctrine is a familiar one in the law of standing in civil cases. In this domain, the Court has identified several constitutional requirements a litigant must meet in order to have his case heard and has distinguished these mandatory minima from conditions Congress can legislatively override.221 The constitutional/prudential divide has received far less attention in other realms.

If there is an admissibility requirement, it likely is constitutional rather than prudential. While the Supreme Court’s analysis of admissibility has been less than transparent,222 it has always fallen under the materiality umbrella. For example, the Bartholomew Court uses the lack of admissibility of polygraph evidence as a stepping stone to a finding of immateriality.223 Circuit and district courts confronting the issue place the admissibility requirement under the materiality heading with near-unanimity.224

The Brady Court made very clear that materiality is a constitutional requirement.225 Therefore, if admissibility is part of materiality, any admissibility requirement must also be constitutionally compelled. The constitutional nature of such a requirement means that Congress cannot override the requirement in particular cases. A constitutional amendment, and only a constitutional amendment, can accomplish this task.

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219 Simply put, it may be premature to endorse any such empirical, cost-benefit argument without careful study of that specific issue. An economic analysis of a purported admissibility requirement would be necessary to help evaluate such a claim.

220 Brady, 373 U.S. at 87 ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.") (emphasis added).

221 See generally Warth v. Seldin, 422 U.S. 490, 498-99 (1975) (distinguishing constitutionally compelled standing requirements from judicially created prudential requirements).

222 See supra Part III.

223 Bartholomew, 516 U.S. at 5-6, 8-9.

224 See supra note 13.

225 Brady, 373 U.S. at 87.
On the other hand, if the admissibility requirement were prudential, Congress could carve out exceptions.\textsuperscript{226} For example, Congress could legislatively introduce a reasonable-person standard. It could eliminate the admissibility requirement in all cases where the inadmissible evidence would have led a reasonable person in the defendant’s position to discover the material-in-fact admissible evidence. This would preserve compelling claims (like the introductory hypothetical) and eliminate objectively unreasonable ones (like the revised “motivational speaker” hypothetical).

Characterizing the admissibility requirement as prudential also gives Congress the flexibility to develop exceptions as the courts gain experience with the doctrine. For example, Congress may over time observe that inadmissible material-in-fact evidence shows up repeatedly in one subject-matter category of cases. It can then use this experience to statutorily override a prudential admissibility requirement in this category if it wishes.

**VII. CONCLUSION**

Though many lower courts have held otherwise, it appears that the Supreme Court has contemplated that inadmissible evidence may form the predicate for a *Brady* claim. But, the Court has not affirmatively rejected an admissibility requirement as clearly as it could have. Therefore, a normative judgment must be made: What role should admissibility play in the context of *Brady* discovery?

Requiring admissibility eliminates certain claims through no fault of the prisoner’s own. For example, returning to the introductory hypothetical, the only reason George’s *Brady* claim was denied was because John happened to be the victim of a fatal bus accident.\textsuperscript{227} As a corollary, prosecutorial abuse is facilitated, since the government could affirmatively “hide” a witness in order to turn a statement admissible for its truth into inadmissible hearsay.\textsuperscript{228} And though *Brady* claims involving the use of objectively unreasonable inferences to discover admissible evidence via leads generated by inadmissible evidence would be eliminated by an admissibility requirement, they could also be dealt with just as effectively by means which do not disallow the compelling, sympathetic claim identified above. In particular, they could be curtailed by requiring that a reasonable person in the defendant’s position could have made those same inferences.\textsuperscript{229}


\textsuperscript{227} See supra Parts I, IV.A.1.

\textsuperscript{228} See supra Part IV.A.3.

\textsuperscript{229} See supra Part IV.A.2. This problem could also be solved by using lack of admissibility as a presumption of immateriality, which could be rebutted by a showing of materiality-in-fact. See supra note 200.
Additionally, requiring admissibility cuts off two major sources of federal review of the suppression, favorability, and materiality-in-fact elements: Supreme Court direct review from a state high court (important for its precedential value) and habeas review by a district court (important because of the frequency with which such forum is the venue for Brady claims). This occurs when the underlying criminal trial takes place in state court and therefore makes admissibility an issue of state evidence law. The presence of a state-law issue works in conjunction with the Supreme Court’s certiorari practices (and, hence, with federal district courts’ habeas review strictures) to deny the opportunity for further review when the state court’s determination of that state-law issue is dispositive.230

Further, economic arguments for the superiority of an admissibility requirement over case-by-case materiality-in-fact determination are premature and possibly incorrect.231

It seems desirable, then, not to make materiality determinations turn on the labels “admissible” and “inadmissible.” Admittedly, these labels are not irrelevant. For example, as noted earlier, it may be very hard to convince a court that the defense team actually would have pursued certain leads generated by a piece of inadmissible evidence in certain ways to arrive at some piece of admissible material-in-fact evidence.232 The defense surely has a greater likelihood of prevailing if it needs to prove only how the ultimate admissible evidence would change the factfinder’s view and can avoid the additional hurdle of proving how it would have discovered the admissible evidence in the first place.233

But, it is the operation of principles behind these labels that actually animates the Brady analysis. The relevance of the inadmissible evidence and the attenuation of the investigative leads it generates are what the purported admissibility requirement seeks to evaluate. However, this per se categorical approach goes overboard. Courts are perfectly competent in making counterfactual judgments regarding discovery of evidence and do so frequently, for example in cases involving the doctrine of inevitable discovery.234 There does not appear to be any compelling reason why case-by-case analysis, coupled with a reasonable-person requirement of the type explained above, cannot—and there are several good reasons identified earlier why it can and should—serve this function.

230 See supra Part IV.B.
231 See supra Part V.
232 See Bartholomew, 516 U.S. at 6-7 (providing a discussion of proving indirect effect).
233 For a mathematical explanation of why this showing is theoretically more difficult, see supra note 183.
234 See supra Part V.