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Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining

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FATAL ATTRACTION? THE UNEASY COURTSHIP OF *BRADY* AND PLEA BARGAINING

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Let me not to the marriage of true minds admit impediments.[1]

INTRODUCTION

At first glance, *Brady v. Maryland*[2] and plea bargaining seem a perfect match. After all, *Brady* is the first principle of disclosure in criminal cases: a

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[1] WILLIAM SHAKESPEARE, *Sonnet 116*, *in* THE RIVERSIDE SHAKESPEARE 1770 (G. Blakemore Evans ed., 1997).

[2] 373 U.S. 83 (1963). In *Brady*, the Court overturned a death penalty verdict in a murder case in which the prosecutor had failed to disclose an extrajudicial statement in which Brady's accomplice had admitted the actual killing. In a passage that has become the foundation for Due Process doctrine on disclosure by prosecutors, the Court held that, "[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." *Id.* at 87. For most applications, the key words in the *Brady* opinion are "favorable" and "material." *Brady* does not compel disclosure of a prosecutor's inculpatory

constitutional rule that turns prosecutors from poker players into stewards of an honest system.[3] Plea bargains resolve the vast majority of cases in that system.[4] Despite an unenthusiastic reception from academics,[5] plea bargaining has emerged from the shadows to gain explicit judicial endorsement as an

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evidence, only the evidence "favorable" to the accused. 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." United States v. Bagley, 473 U.S. 667, 682 (1985).

[3] In the eyes of many, *Brady* marked the birth of discovery in criminal cases. The Court's 1963 opinion came in an age in which the very notion of discovery in criminal cases was subject to vigorous debate. *See* William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth? A Progress Report*, 68 WASH. U. L.Q. 1, 4 (1990) ("Brennan, *Progress Report*") ("When I gave this lecture in 1963 the prevailing view was still that there were good reasons not to allow discovery in criminal cases."). For some of the flavor of that early debate, compare William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279 (1963) ("Brennan, *Sporting Event*"), with *State v. Tune*, 98 A.2d 881 (N.J. 1953).

[4] In *Brady v. United States*, 397 U.S. 742, 752 n.10 (1970), the Supreme Court noted that 90 to 95% of all criminal convictions, and about 70 to 85% of felony convictions were by guilty plea. *Id.* The Court's observations still hold true. In recent years, about 92% of convictions in federal cases have come by guilty plea. *See* U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 448 (1996). In 1996, for example, out of a total of 52,270 defendants convicted, 48,196 (or 92%) were convicted by guilty plea. *See id.* The percentage has remained relatively consistent since at least 1945. *See id.*

[5] Many academics have opposed plea bargaining on the grounds that it is unfairly coercive of defendants, both the innocent and the guilty alike. *See, e.g.*, Kenneth Kipnis, *Plea Bargaining: A Critic's Rejoinder*, 13 LAW & SOC'Y REV. 555 (1979); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978). The most prominent academic critics of plea bargaining argue that the practice is inaccurate in separating the guilty from the innocent, that it allows for unfair, informal dispositions in the absence of meaningful investigation or neutral fact finding, and that its unfairness is visited most severely upon poor and unsophisticated defendants. *See, e.g.*, Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652 (1981); John Kaplan, *American Merchandising and the Guilty Plea: Replacing the Bazaar with the Department Store*, 5 AM. J. CRIM. L. 215 (1977); Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733 (1980); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984); Stephen J. Schulhofer, *Plea Bargaining As Disaster*, 101 YALE L.J. 1979 (1992) ("Schulhofer, *Plea Bargaining As Disaster*").

On the other side of the debate, Judge Frank Easterbrook of the Seventh Circuit has defended plea bargaining as an efficient process for resolving criminal cases through choices based upon mutual advantage, arguing that the flaws in plea bargaining simply reflect flaws in the process of adjudication through trial. *See* Frank H. Easterbrook, *Criminal Procedure As a Market System*, 12 J. LEGAL STUD. 289, 308-22 (1983). Professors Robert Scott and William Stuntz have offered a detailed proposal both defending, and seeking to regulate, plea bargaining as a matter of contract law. Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 YALE L.J. 1909 (1992) ("Scott & Stuntz, *Plea Bargaining As Contract*); Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 YALE L.J. 2011 (1992) ("Scott & Stuntz, *Imperfect Bargains*").

Ironically, while academics criticize plea bargaining as unfair to defendants, the public generally views plea bargaining as a system that treats defendants too leniently. Scott & Stuntz, *Plea Bargaining As Contract*, *supra*, at 1909 n.4 (citing Stanley A. Cohen & Anthony N. Doob, *Public Attitudes to Plea Bargaining*, 32 CRIM. L.Q. 85, 97 (1989-90)).

acceptable method[6]—some would argue the preferred method—of dispensing American justice.[7] Thus, the marriage of *Brady*'s rule of disclosure to the process of plea bargaining seems like a natural, almost inevitable event. If due process forbids a prosecutor to sit silent through trial without disclosing exculpatory information to the defense, then surely she[8] cannot induce the defendant to forego his right to trial by withholding the same information. *Brady* allows a convicted defendant to overturn a jury's guilty verdict when he discovers, after-the-fact, that a prosecutor has withheld critical, exculpatory evidence. Shouldn't the same principle invalidate a guilty plea?[9]

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[6] In *Santobello v. New York*, 404 U.S. 257 (1971), the Court defended plea bargaining, principally on grounds of efficiency:

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities. Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Id. at 260-61. The previous year, in *Brady v. United States*, 397 U.S. 742 (1970), the Court had justified plea-bargaining on the grounds that the practice offers choices—a "mutuality of advantage"—that both prosecution and defense may prefer to the burdens and uncertainties of trial. *See id.* at 752.

Santobello marks the beginning of the Court's explicit embrace of plea bargaining. It was not until that opinion that "lingering doubts about the legitimacy of the practice were finally dispelled." Blackledge v. Allison, 431 U.S. 63, 76 (1977). *See generally* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 40 (1979).

[7] *See* Frank H. Easterbrook, *Plea Bargaining As Compromise*, 101 YALE L.J. 1969 (1992) ("[P]lea bargaining [is] at least as effective as trial at separating the guilty from the innocent. To the extent there is a difference, negotiation between sophisticated persons unencumbered by the rules of evidence is superior."). *Id.* at 1972.

[8] Throughout this paper, I will use the female pronoun to refer to prosecutors and the male pronoun in reference to defendants or defense counsel. The use of this gender-related convention has no significance other than as a tool for making sentences clearer and shorter.

[9] *Banks v. United States*, 920 F. Supp. 688 (E.D. Va. 1996), offers an example of the manner in which *Brady* claims arise and are litigated following a guilty plea. There, the defendant was convicted upon a plea of guilty to attempted possession of heroin. At the time he entered his plea, the defendant knew that the evidence at trial would include tape-recorded conversations with Gary Weathers, an alleged co-conspirator turned government informant. Several years after his guilty plea, Banks and his codefendants learned that government agents had allowed Weathers, who was in custody, conjugal visits with his wife and a girlfriend in government offices. Banks then filed a motion under 28 U.S.C. § 2255 to vacate his conviction on the grounds that the government violated *Brady* by failing to disclose evidence that would potentially impeach Weathers. Following an evidentiary hearing at which Banks's defense counsel testified regarding the importance of Weathers's anticipated testimony to Banks's decision to plead guilty, the court granted the motion. The court

Given the preeminence of *Brady* and the frequency of plea bargains, one might expect that their union would have been solidified long before now.[10] But concluding the courtship has not proved so simple. Four federal courts of appeals have endorsed the marriage, holding that prosecutors have a constitutional obligation to reveal material, exculpatory evidence to defendants before a guilty plea.[11] Most recently, however, the Fifth Circuit has dissented, arguing that *Brady* is a trial right and that a defendant who pleads guilty waives that right, just as he waives his right to a jury trial and his right to confront witnesses.[12] Despite the obvious significance of this debate, the

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first held that Banks's *Brady* claim was not waived by his guilty plea, and further held that the withheld evidence was "material" because there was a "reasonable probability that but for the failure to disclose the *Brady/Giglio* evidence, the defendant would have refused to plead and would have opted for trial." *Id.* at 691-93.

[10] As a practical matter, questions of disclosure arise during many—perhaps most—plea negotiations. Given the frequency with which the problem arises, it is "striking," as one commentator has noted, that no clear rules exist to define a prosecutor's obligation to disclose exculpatory information in plea bargaining. Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 958 (1989). Neither *Brady* nor any subsequent Supreme Court opinion has addressed the question. Perhaps more surprising, even apart from questions of constitutional doctrine, neither the rules of ethics nor the internal policies of most prosecutors' offices offer much guidance on the issue. Rule 3.8(d) of the Model Rules of Professional Conduct states that a prosecutor shall "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." MODEL RULES OF PROF'L CONDUCT R. 3.8(d) ("Model Rules"). However, neither the Rule nor the accompanying commentary makes reference to plea bargaining. In large measure, the ambiguity of the Rule reflects the more general lack of ethical standards governing disclosure by lawyers during negotiation. *See* McMunigal, *supra*, at 1023-25 (noting the absence of any "firm professional consensus regarding the standard of openness that should govern lawyers' dealings" in negotiation). The Department of Justice has no published policy regarding disclosure and plea bargaining. The United States Attorneys' Manual contains detailed provisions on plea agreements, but fails to address whether the prosecutor's *Brady* obligations must be fulfilled before negotiating a plea. *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL §§ 9-27.330-27.750 (Sept. 1997).

[11] *See* United States v. Avellino, 136 F. 3d 249, 254-62 (2d Cir. 1998); Sanchez v. United States, 50 F.3d 1448 (9th Cir. 1995); United States v. Wright, 43 F.3d 491, 495-96 (10th Cir. 1994); White v. United States, 858 F.2d 416, 422 (8th Cir. 1988); Miller v. Angliker, 848 F.2d 1312, 1319-20 (2d Cir. 1988). Similarly, the Sixth Circuit allowed a defendant to reach the merits of a post-plea *Brady* claim, even while remarking, "[T]here is no authority within our knowledge holding that suppression of Brady material prior to trial amounts to a deprivation of due process." Campbell v. Marshall, 769 F.2d 314, 322 (6th Cir. 1985).

[12] Matthew v. Johnson, 201 F.3d 353 (5th Cir. 2000). In *Matthew*, the Fifth Circuit did not rule directly that a guilty plea foreclosed any subsequent challenge based on *Brady v. Maryland*. Instead, under *Teague v. Lane*, 489 U.S. 288 (1989), the Fifth Circuit held that it was precluded from addressing Matthew's *Brady* claim because the application of *Brady* to a guilty plea would, at best, constitute a "new constitutional rule of criminal procedure" not cognizable on habeas corpus review. *See Matthew*, 201 F.3d at 353. The court's opinion, however, leaves little doubt regarding its view that *Brady* is a trial right rather than a rule which "seeks to protect a defendant's own decision making regarding the costs and benefits of pleading and of going to trial." *Id.* at 362. Further, the Fifth Circuit noted, the opinions of other federal circuits which hold that a

Supreme Court has never granted certiorari in a post-guilty-plea *Brady* challenge, nor directly addressed the issue even in dictum.[13]

Scholars have devoted surprisingly little attention to the issue, perhaps because the academic debate has focused so single-mindedly on justifying or condemning plea bargaining as an institution, rather than on appropriate means to regulate its practice.[14] As a consequence, in the vast literature on plea bargaining, the problem of prosecutorial disclosure has been recognized far more often than it has been analyzed.[15] A handful of articles have argued that rules compelling disclosure would enhance the accuracy[16] and fairness of plea bargaining. Those scholars suggest that pre-plea disclosure under a *Brady*-like rule would neutralize coercive tactics, equalize bargaining power, reduce bluffing by prosecutors, and insure meaningful consent by defendants who enter plea agreements.[17] So far, there is little academic counterweight to those

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guilty plea is not voluntary and intelligent in the face of an antecedent *Brady* violation are "at odds with Supreme Court opinions" on the finality of guilty pleas. *Id.* at 367.

[13] *See* United States v. McCleary, 112 F.3d 511 (4th Cir. 1997) (unpublished) ("[T]he Supreme Court has never applied Brady, or its progeny, to a guilty plea."); McMunigal, *supra* note 10, at 962 ("Since all of the cases in which the Supreme Court has applied and developed the *Brady* doctrine involved convictions obtained by means of a trial, the Supreme Court has never confronted the issue directly and has never adverted to it in dicta.").

[14] *See* Scott & Stuntz, *Imperfect Bargains*, *supra* note 5, at 2014 (suggesting that it is time for academics to focus on reforms to plea bargaining and to "abandon the all-or-nothing debate that has so preoccupied us all").

[15] *See* McMunigal, *supra* note 10, at 958 ("The frequency with which leading scholars in criminal procedure and ethics raise the question of prosecutorial disclosure in the guilty plea process indicates the issue's provocative nature. Yet few have attempted to analyze or answer the question of disclosure of *Brady* material in the guilty plea process."). References to disclosure issues are scattered throughout the extensive literature that is more generally aimed at justifying or condemning plea bargaining. *See, e.g.*, Schulhofer, *Plea Bargaining As Disaster*, *supra* note 5, at 1998 (noting that expanded discovery would "directly address the flaws of plea bargaining," though perhaps not effectively given other limitations on effective representation of defendants); Scott & Stuntz, *Plea Bargaining As Contract*, *supra* note 5, at 1936 & 1936 n.100 (noting how constraints on criminal discovery limit the defendant's access to information useful in assessing a plea bargain); Mark Tushnet & Jennifer Jaff, *Critical Legal Studies and Criminal Procedure*, 35 CATH. U. L. REV. 361, 371 (1986) (criticizing plea agreements based on asymmetrical knowledge of prosecutors and defendants). But few scholars have treated problems of disclosure in detail. *See infra* note 17.

[16] "Accuracy," in relation to plea bargaining, means the ability of the bargaining process to separate the guilty from the innocent. The problem of "inaccurate" pleas has received considerable attention from critics of plea bargaining, who argue that the incentives of a plea bargain can induce the innocent, as well as the guilty, to accept the safe result of a predictably lower sentence rather than the risk of trial and a higher sentence. *See, e.g.*, McMunigal, *supra* note 10, at 985-90.

[17] *See* Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2040-42 (2000) (arguing that *Brady* disclosure insures the voluntariness of guilty pleas, promotes factual accuracy and encourages meaningful consent); McMunigal, *supra* note 10, at 968-97 (arguing that *Brady* disclosure would enhance the accuracy of plea bargaining as a means of separating the guilty from the innocent); Eleanor J. Ostrow, *The Case for Preplea*

arguments. Like most courts, scholars seem content to let the union of *Brady* and plea bargaining take its apparently natural course.

This Article offers a more skeptical view: a word of caution about the potential marriage of *Brady* and plea bargaining. I do not suggest that disclosure in plea bargaining is a bad idea. To the contrary, I agree that justice is better served by fully informed pleas and that prosecutors should put fairness ahead of the thrill of victory.[18] I simply do not think that judicial efforts to mold *Brady* into a rule of pre-plea disclosure will help to achieve those objectives.

The initial problem is *Brady* itself. As a rule to promote informed guilty pleas, *Brady* faces serious limitations from the start. In the context of a trial, *Brady* is not a rule requiring disclosure of all—or even most—information helpful to a defendant.[19] *Brady* requires disclosure only of information that is both "favorable" to the defense and "material" to guilt or punishment.[20] For advocates of broad discovery in criminal cases, the Court's narrow view of "materiality" under *Brady* has been one of the largest disappointments of the last quarter century.[21] Because *Brady* does not insure that defendants are well-

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Disclosure, 90 YALE L.J. 1581 (1981) (arguing that mandatory pre-plea disclosure increases the likelihood of meaningful consent by defendants, reduces bluffing and equalizes bargaining power in a system marked by unequal access to information); Stephen L. Friedman, Note, *Preplea Discovery: Guilty Pleas and the Likelihood of Conviction at Trial*, 119 U. PA. L. REV. 527, 531 (1971) (noting that pre-plea *Brady* disclosure protects against coerced pleas by innocent defendants); Note, *The Prosecutor's Duty to Disclose to Defendants Pleading Guilty*, 99 HARV. L. REV. 1004, 1012-14 (1986) (arguing that *Brady* combats inaccurate pleas by equalizing bargaining power between prosecution and defense).

[18] I would go a step farther and argue that, perhaps even more important than better informed guilty pleas, a principal benefit of full disclosure in plea bargaining is that it requires the prosecutor to be more circumspect in bringing criminal charges in the first place. A prosecutor who knows she will have to lay out the details of her case before she can dispose of it is likely to be more careful in assembling and assessing those details than one who expects to "bluff" a quick plea based on limited information.

[19] *Brady*, of course, has no application to inculpatory evidence: the evidence that the government will rely upon to prove guilt beyond a reasonable doubt. Even when it comes to "favorable" evidence, disclosure under *Brady*'s standard of "materiality" is more limited than that required of prosecutors by rules of ethics. Unlike *Brady*, which applies only to favorable "evidence," the Model Rules require disclosure of "evidence" and "information," thus encompassing a wider variety of material which might assist trial preparation or lead to the discovery of other helpful evidence. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8(d). Moreover, the ethical rule requires disclosure of all information that "tends to negate the guilt of the accused or mitigates the offense." *Id.* The prosecutor's ethical obligation, therefore, extends well beyond the narrow class of exculpatory evidence that a reviewing court may find "material" under *Brady*.

[20] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[21] *See* Brennan, *Progress Report*, *supra* note 3, at 8-9; Steven H. Goldberg, *What Was Discovered in the Quest for Truth?*, 68 WASH. U. L.Q. 51, 56 (1990); Lee Sarokin & William E. Zuckermann, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie This Presumption*, 43 RUTGERS L. REV. 1089, 1103-05 (1991).

informed at trial, we fool ourselves if we expect the same approach to produce well-informed guilty pleas.

Of course, even a limited rule of disclosure may be better than none. But the problem is more complicated than that. Courts and scholars who so readily attach *Brady* to plea bargaining have failed to account for *Brady*'s fundamental weakness: the *Brady* doctrine suffers from a severe case of "bad timing." *Brady* governs disclosure before a trial or plea; but courts almost always enforce *Brady* after-the-fact, when a defendant tries to overturn a conviction obtained without full disclosure by the prosecutor.[22] In other words, *Brady* is a prospective rule, enforced only retrospectively.

Brady's "bad timing" accounts in large measure for the rule's limited reach in cases that go to trial. A guilty plea only magnifies that problem. Of necessity, courts faced with motions to withdraw guilty pleas based on *Brady* violations face an unpleasant choice between disclosure, on the one hand, and the finality of guilty pleas on the other.[23] In the end, neither choice is satisfactory.[24] On the one hand, it is impossible to ignore the guilty plea itself. An open-court confession of guilt should matter.[25] On the other hand, a rule that validates pleas obtained by official deception is troubling, even where an obviously guilty defendant seeks to take back an obviously accurate guilty

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[22] Except in those few cases in which prosecutors submit potential *Brady* material for pre-trial *in camera* review, *Brady* issues arise after conviction when the defendant belatedly discovers that some piece of exculpatory evidence has been withheld by the government. *See* United States v. Cuthbertson, 651 F.2d 189, 199 (3rd Cir. 1981) (Seitz, C.J., concurring) ("In the ordinary *Brady* case, it is only after a judgment of conviction that a court reviews the failure of the prosecution to disclose material the defendant argues should have been admitted into evidence.").

[23] "An analysis of the small body of law dealing with the validity of guilty pleas preceded by *Brady* violations reveals a judicial attempt to resolve questions presented by the overlap of two areas of the law: the prosecutorial duty to disclose and the waiver of constitutional rights by a guilty plea." Lee Sheppard, Comment, *Disclosure to the Guilty Pleading Defendant:* Brady v. Maryland *and the* Brady *Trilogy*, 72 J. CRIM. LAW & CRIMINOLOGY 165, 167 (1981). At heart, it is this choice between finality and disclosure that has split the federal circuits in their decisions applying, or refusing to apply, *Brady* following a guilty plea. *See supra* notes 11, 12 and accompanying text.

[24] The core problem in any post-plea *Brady* challenge is that the criminal justice system suffers a black eye no matter which result we choose. Public confidence in the administration of justice may suffer when prosecutors are allowed to induce guilty pleas—even of guilty defendants—by holding back exculpatory information. But it is also true that the integrity of the system is threatened when we allow defendants, who have already confessed their guilt in open court, to "take it back" and "try their luck" with a fact finder who knows nothing of their confession. On balance, of course, we may be more comfortable with a system that tolerates disreputable behavior by defendants than one which endorses fraud by prosecutors.

[25] The Supreme Court has noted that "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." Menna v. New York, 423 U.S. 61, 62 n.2 (1975) (per curiam).

plea.[26] The result of this unpleasant choice, in most courts, has been to develop an illusory rule of disclosure, while protecting finality as a matter of substance. With the Fifth Circuit as a notable exception,[27] the majority of courts now seem willing to entertain post-plea *Brady* challenges[28] despite government arguments that the guilty plea waives such claims.[29] The same courts, however, seem equally anxious to deny post-plea *Brady* claims on their merits, finding that the previously undisclosed evidence, when viewed in retrospect, was not "material" to the plea.[30]

Part of the problem, of course, is that *Brady*'s retrospective standards are weak in all cases, whether defendants plead or go to trial. But the guilty plea makes matters worse. Courts change *Brady* in an effort to apply it to guilty pleas, with unsatisfying results. When *Brady* challenges arise after trial, courts assess the "materiality" of evidence by asking whether nondisclosure tainted the outcome of trial.[31] After a guilty plea, by contrast, courts consider whether pre-plea nondisclosure tainted the defendant's decision to plead guilty.[32] This mutant post-plea *Brady*, I suggest, is at best a faint shadow of the post-trial *Brady* standard. One of its problems is obvious. A trial at least creates a record of the government's case. That is the mark against which a reviewing

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[26] Though the courts have paid it surprisingly little attention, there is another, even more important, reason to be concerned with disclosure at the plea bargaining stage. Rare as the phenomenon may be, we cannot ignore the possibility that the inducements of a plea bargain may lead some innocent defendants to plead guilty, especially where the prosecutor's nondisclosures may have made the government's case appear more formidable than it really is. *See* McMunigal, *supra* note 10, at 985-89.

[27] *See* Matthew v. Johnson, 201 F.3d 353 (5th Cir. 2000).

[28] *See supra* note 11. In addition to the five federal circuits that have entertained post-plea *Brady* claims on their merits, an increasing number of lower courts have moved beyond waiver arguments to reach such claims. *See infra* note 117.

[29] I make no attempt here to resolve the complex doctrinal debate over guilty pleas as waivers of constitutional rights. Others have considered those issues in significant detail in the context of *Brady* claims. *See* Blank, *supra* note 17 (arguing that guilty pleas do not waive claims of antecedent *Brady* violations and that such claims are not waivable even by explicit provisions in a plea agreement); Sheppard, *supra* note 23 (arguing that a guilty plea does not waive *Brady* claims and that a more generous standard of materiality should apply where guilty pleas are induced by withholding of exculpatory evidence). For comprehensive treatment of the doctrine of criminal waiver outside of the context of *Brady* claims, see Stephen A. Saltzburg, *Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty*, 76 MICH. L. REV. 1265 (1978); William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761 (1989); Michael E. Tigar, *Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1 (1970).

[30] Of the increasing number of reported post-plea *Brady* opinions, only a small handful have resulted in decisions favorable to the defendant. *See infra* note 184.

[31] Nondisclosure is material if it is sufficient to "undermine confidence in the outcome" of trial. United States v. Bagley, 473 U.S. 667, 682 (1985) (citing Strickland v. Washington, 466 U.S. 668, 694 (1984)).

[32] *See, e.g.*, Sanchez v. United States, 50 F.3d 1448, 1454 (9th Cir. 1995) (withholding of favorable evidence is material where "there is a reasonable probability that but for the failure to disclose the *Brady* material, the defendant would have refused to plead and would have gone to trial").

court measures the "materiality" of evidence withheld by the prosecutor. A guilty plea seldom offers that kind of road map, leaving a reviewing court to reconstruct, or merely to hypothesize, the factors that led the defendant to choose a plea bargain in the first place.

The problem is more than procedural. After a guilty plea, the *Brady* calculus changes as a matter of substance, in at least two important ways. First, a court cannot realistically assess the impact of missing "*Brady* material" on a defendant's decision to plead guilty without taking into account the benefits of the plea bargain itself.[33] The reason is simple: an especially "good deal" will lead a rational defendant to plead guilty despite a weak case against him. As a result, defendants who enter pleas to especially favorable deals may be those who receive the least protection in post-plea *Brady* challenges. Ironically, those are the cases in which—in the eyes of most critics—plea bargaining poses the greatest dangers of coercing guilty pleas from defendants who are factually innocent.[34] Second, a court cannot assess the impact of *Brady* material on a guilty plea without knowing what else the defendant knew about the government's case at the time of the plea. A defendant who pleads guilty with no knowledge of the identity or likely testimony of a government witness, for example, would be hard pressed to claim that undisclosed impeachment evidence regarding that witness was "material" to his plea. In some cases, then, defendants who plead guilty knowing the least about the government's evidence will also get the least protection from *Brady*.[35]

In short, despite a similar starting point, applying *Brady* after a plea bargain is not the same as applying it after a trial, and the differences can be troubling. Post-plea *Brady* involves more variables, more hypothetical inquiries, a more skeptical decisionmaker, and less solid information on which to base a decision. And post-plea *Brady* may offer the least protection to those who need it the most. On balance, then, I conclude that courts, prosecutors, and even—perhaps especially—criminal defendants would be better off if we left *Brady* to its original purpose of assuring a fair trial, rather than torturing it to fit the world of plea bargaining.

Part I of this Article discusses the natural attraction between *Brady*—a rule requiring disclosure of evidence favorable to a defendant—and plea bargaining—a practice where such information is at a premium for defendants.

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[33] *See infra* text accompanying notes 210-17.
[34] *See infra* text accompanying notes 261-69.
[35] *See infra* text accompanying notes 202-09.

Part II describes how an increasing number of courts have adapted *Brady* to fit in the world of a plea bargain, in the process changing *Brady*'s point of reference from the jury's verdict to the defendant's tactical decision to plead guilty. Part III argues that this change in focus narrows *Brady*'s substantive coverage and renders the rule practically unenforceable following most guilty pleas. Part IV then assesses the value of that diluted version of *Brady* in relation to the principal goals that rules of disclosure should serve in plea bargaining: the goals of insuring accuracy in guilty pleas and informed choices in bargaining. *Brady* serves neither goal very well and, ironically, may even stand in the way of disclosure in cases where it is most needed. Finally, Part V considers the potential impact of "*Brady* waivers," explicit provisions in plea agreements that purport to waive *Brady* disclosure as a condition of the agreement.[36] The waiver process itself may offer more meaningful protection for defendants than a doctrine allowing after-the-fact challenges based on claims of before-the-plea *Brady* violations.

In my view, the unresolved debate over finality and disclosure—the debate that has split the federal circuits—is largely an exercise in futility. I do not believe that the accuracy or fairness of plea bargaining gains anything even if *Brady* survives a guilty plea. When we allow post-plea *Brady* challenges, we sacrifice finality to little effect; defendants receive only an illusion of protection in the exchange. We would do better to look for other approaches that do not pit the defendant's interest in disclosure against the finality of a guilty plea. If we are serious about informing defendants during plea bargaining, then we should address the problem of disclosure when it matters most: before the plea.

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[36] *Brady* waivers are the focus of an ongoing controversy in the Ninth Circuit. In *Sanchez*, the Ninth Circuit ruled that a defendant may challenge a guilty plea on the grounds that it was induced by nondisclosure of *Brady* material. 50 F.3d at 1453. Prosecutors responded by inserting explicit "*Brady* waivers" into standard form plea agreements. The validity of such waivers remains the subject of an active debate between United States Attorneys and Federal Public Defenders in the California. *See* Blank, *supra* note 17, at 2042-45; Larry Kupers & John T. Philipsborn, *Feature: Mephistophelian Deals: The Newest in Standard Plea Agreements*, CHAMPION, August 1999, at 18; Erica G. Franklin, Note, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery" Waivers*, 51 STAN. L. REV. 567, 573-75 (1999). That California debate—along with the recently developed split in federal circuits over post-plea *Brady* challenges—seems likely to spark a more wide-ranging, and long overdue debate over disclosure in plea bargaining generally.

I. THE URGE TO MERGE: PLEA BARGAINING AND RULES GOVERNING DISCLOSURE

A. *The Value of Information in Plea Bargaining*

Most models of plea bargaining assume—accurately, I suspect—that defense attorneys recommend and defendants enter into plea bargains because they believe the result obtained in the bargain, a reduced sentence, is preferable to the result that would follow a trial, conviction, and a higher sentence.[37] The prosecutor offers sentencing concessions principally because a guilty plea saves her the time, effort, and expense of trial. The plea bargain, in effect, allows the defendant to share in those "cost savings."[38] Thus, even where both the prosecution and defense are convinced that conviction is assured at trial—a situation that probably describes the majority of plea bargains—there is an incentive to bargain.[39] Moreover, in cases in which conviction is virtually certain, there is often a standardized "price" for most bargains, a price which represents a rough estimate of the costs saved by avoiding trial.[40]

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[37] *See* Ostrow, *supra* note 17, at 1582; Schulhofer, *Plea Bargaining As Disaster*, *supra* note 5, at 1980; Scott & Stuntz, *Plea Bargaining As Contract*, *supra* note 5, at 1909.

[38] "For a large number of plea bargains . . . there is no mystery about what drives the bargain. Criminal trials are costly for defendants, and even more so for prosecutors. These costs can be saved, and the gains split between the parties, by reaching a bargain early in the criminal process." Scott & Stuntz, *Plea Bargaining As Contract*, *supra* note 5, at 1935.

[39] *See* MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES AND DEFENSE ATTORNEYS 60-61 (1977). Professor Heumann's book offers an invaluable first-hand account of plea bargaining as described by its participants. According to Heumann, most experienced defense counsel estimate that, of the approximately ninety percent of their clients who are factually guilty, only a few have legal grounds to dispute the state's case. *Id.* Most cases, from the defense point of view, are "born dead." *Id.* The high rate of guilty pleas, Heumann suggests, has little to do with the pressures of case volume. *Id.* at 157. Rather, he argues, it is the natural result of a system that processes a high percentage of defendants who are factually guilty and who perceive there is some reward at sentencing for a guilty plea. *Id.* Of course, critics of plea bargaining might challenge the view that so many cases are legally indefensible. Critics have argued that defense attorneys too often, and too easily, reach that conclusion because they lack the information, the resources, and sometimes the incentives to pursue potential avenues of defense. *See, e.g.*, Schulhofer, *Plea Bargaining As Disaster*, *supra* note 5, at 1988-91.

[40] Gerard E. Lynch, *Our Administrative System of Justice*, 66 FORDHAM L. REV. 2117, 2130 (1998).

> Many, perhaps most, cases are processed pursuant to fairly standard rules . . . [t]he rules are more like those of the supermarket than like those of the flea market: there is a fixed price tag on the case, and you will get no farther 'bargaining' with the prosecutor than you will by making a counteroffer on the price of a can of beans at the grocery.

Id. The Federal Sentencing Guidelines actually quantify the sentencing benefit attributable to such cost savings, allowing a one-level decrease in the offense level to certain defendants for "timely notifying authorities of [their] intention to enter a plea of guilty, thereby permitting the government to avoid preparing

If that basic model fit all plea agreements, then much of the debate over the practice would be moot. In many cases, of course, the dynamics of plea bargaining are more complex. The complexity arises because no one knows for sure what will happen at trial.[41] So our model of plea bargaining must account for an additional factor: likelihood of conviction. A defendant's decision to plead guilty, and the terms of the bargain, will depend to some degree on an assessment of the risks of conviction.[42] If a rational defendant could know for certain that his trial would result in acquittal, he would (almost)[43] never plead guilty. On the other hand, a defendant who feels conviction at trial is extremely likely would be sensible to plead guilty in exchange for even a small sentencing concession. For those many cases in between, the defendant and his counsel must decide whether the sentencing benefits offered in the bargain are sufficient to justify foregoing the possibility—or sometimes even the probability—of an acquittal.[44] The

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for trial and permitting the court to allocate its resources efficiently." U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(b)(2) (2000).

[41] One plea-bargaining study suggests that, when presented with the facts of a relatively "strong" case, attorneys are quite consistent in their evaluation of the likely outcome at trial. WILLIAM F. MCDONALD, PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES 79-80 (1985). As the facts of a case become weaker, however, there is a wide disparity in attorneys' estimates of the likelihood of conviction. *See id.*

[42] *See* MCDONALD, *supra* note 41, at 75-76; HERBERT S. MILLER ET AL., PLEA BARGAINING IN THE UNITED STATES xvi-xviii, 81 (1978). Studies of plea bargaining routinely conclude that "strength of case" is among the primary factors determining (1) the nature of the bargain offered by a prosecutor and (2) defense counsel's willingness to recommend a plea of guilty. *See id.*

[43] Oddly enough, there are cases in which a plea bargain can be attractive to a defendant who is almost certain to be acquitted at trial. An often-cited example is that of the "time-served" plea agreement. Imagine a defendant charged with felony larceny, who faces two years in prison upon conviction, who has been held in pretrial detention for thirty days awaiting trial, and whose trial will not take place for another thirty days. Imagine that the prosecutor offers a plea to a misdemeanor with an agreed upon sentence of "time served," i.e. thirty days, with plea and sentencing to take place the following day. If that defendant rejects the offer, he faces another thirty days in jail before trial and some risk, albeit a slim one, of a felony conviction and years in prison. If he accepts the offer, he will be released from jail the next day. For many defendants, especially those with less concern about the record of conviction, such an offer will be too good to refuse even if the prosecution's evidence is slim. For a similar example, see McMunigal, *supra* note 10, at 987.

[44] Professor Schulhofer describes the typical plea-bargaining calculus from defendant's perspective: "[T]he defendant, who seeks to minimize punishment, will be better off accepting a plea offer if the contemplated punishment is lower than the anticipated posttrial sentence, discounted by the possibility of acquittal." Schulhofer, *Plea Bargaining As Disaster*, *supra* note 5, at 1980.

Such models, of course, are no more than they purport to be: models. Actual cases can present a much more varied set of factors that enter into the plea bargaining calculus. In many cases, for example, the most important question may not be whether defendant is likely to be convicted, but of what offense, or what grade of offense, he is most likely to be convicted. In sentencing guidelines jurisdictions, the bargaining calculus must also take into account the likelihood that the evidence presented at trial, or that provided to the probation officer and the court in connection with a guilty plea, will result in specific findings relating to offense characteristics that may have a major impact at sentencing.

prosecutor must make a similar risk assessment.[45] The model suggests, and experience confirms, that she will offer greater sentencing concessions in those cases where conviction is less likely, and fewer concessions where she is more confident of conviction.[46]

If plea bargains turn on such risk assessments, then information regarding the likelihood of conviction is obviously important to both parties to the plea negotiation.[47] Scholars of negotiation theory agree that access to and control over information creates a bargaining advantage.[48] Anyone who has ever purchased a used car has tested that theory first hand. The same principle applies in many plea bargains. A defendant will "pay" less, or choose not to buy at all, if he can learn enough to see that the prosecution's case is a lemon.[49]

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[45] Professors Scott and Stuntz describe the calculus from the prosecutor's perspective. The prosecutor's plea offer, they suggest, typically is "based upon the prosecutor's estimate of the strength of the case at the time of bargaining plus the expected savings in transaction costs from shifting prosecutorial efforts to pleas rather than trials." Scott & Stuntz, *Plea Bargaining As Contract*, *supra* note 5, at 1948.

[46] *See* MILLER ET AL., *supra* note 42, at xxii ("Most prosecutors appear willing to plea bargain in [weak cases], offering 'sweet deals' in very weak cases."). This characteristic of the bargaining process—the tendency of prosecutor's to offer the best "deals" in the weakest cases—is at the heart of much of the academic criticism of plea bargaining. Because weak cases presumably are those in which guilt is most questionable, then the best deals are offered to those defendants most likely to be innocent. The result, as many critics have argued, is that plea bargaining is a highly inaccurate means of separating the innocent from the guilty. In fact, they argue, it exerts its greatest pressures on the innocent. *See, e.g.*, Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 60 (1968); McMunigal, *supra* note 10, at 990. Professors Scott and Stuntz, while recognizing this "innocence problem," argue that the plight of innocent defendants would be even worse if we abolished plea bargaining. As long as trials are less than perfect means for determining guilt, then some innocent defendants who would have received lower sentences through bargaining will be (inaccurately) convicted and serve longer sentences. *See* Scott & Stuntz, *Plea Bargaining As Contract*, *supra* note 5, at 1949-51; Scott & Stuntz, *A Reply: Imperfect Bargaining, Imperfect Trials, and Innocent Defendants*, *supra* note 5, at 2013-14.

[47] *See* MILLER ET AL., *supra* note 42, at xvii ("In general the ability of a prosecutor to make a rational decision stems from the information available at the decision making point."); Ostrow, *supra* note 17, at 1583-90 (discussing defendant's need for, and limited access to, information necessary for an accurate assessment of the prosecution's case).

[48] *See* ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION 406-08 (1990) (noting the value of information regardless of whether one's bargaining strategy is "adversarial" or "problem-solving").

[49] This model, of course, is a generalization that does not purport to cover every bargain. Some prosecutors, for example, simply refuse to offer "discounts" for weak cases. They may make a single plea proposal based on their view of an appropriate sentence. In some measure, the Federal Sentencing Guidelines aim to funnel bargaining into this mold. The Guidelines offer no "discounts" based on the strength of the government's evidence, although a variety of tactics can circumvent that limitation in many cases. For example, prosecutors and defense counsel can and do bargain over the charge itself ("charge bargaining"), or the applicability of various sentence-enhancing or sentence-reducing factors ("guideline factor bargaining"). *See* Stephen J. Schulhofer & Ilene H. Nagel, *Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months*, 27 AM. CRIM. L. REV. 231, 271-82 (1989). In any event, a policy forbidding "discounts" for weak cases does not eliminate the defendant's desire for information regarding the likelihood of conviction

Unlike the car buyer, however, he cannot walk down the street and purchase from another seller. Faced with a take-it-or-leave-it offer, and no opportunity to look under the hood, he may buy when a better informed customer would not, or he may pass up a genuine bargain.[50] In negotiation, information often is the key to bargaining power. Plea negotiation is no exception to that rule.

B. Defendant's Information Deficit

When a criminal charge is filed, however, the parties seldom have equal access to the kind of information useful in assessing the likelihood of conviction at trial.[51] The defendant, of course, typically possesses at least one piece of information that the prosecutor does not. He knows whether he committed the crime.[52] Ironically, that piece of information is of comparatively little value to him in the bargaining process.[53] Except where the traditional model gives way to other considerations—as in cases where the prosecutor offers sentencing concessions in exchange for information or testimony[54]—a guilty defendant seldom gains a negotiating advantage from a

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at trial. The defendant will still weigh the risks of conviction in deciding whether to accept the prosecutor's offer.

[50] Though the literature on plea bargaining deals at length with defendants who may be bluffed or coerced into pleading guilty, there is scarcely a mention of those who, because of incomplete information, make unwise choices in going to trial. But the issue does arise occasionally. In *United States v. Kidding*, 560 F.2d 1303 (7th Cir. 1977), a defendant convicted at trial argued that his due process rights were violated because, had the government more fully disclosed inculpatory evidence, he would have pleaded guilty and received a lighter sentence. The Seventh Circuit was not impressed with the claim. *Id.* at 1313-14.

[51] *See* John G. Douglass, *Balancing Hearsay and Criminal Discovery*, 68 FORDHAM L. REV. 2097, 2146-50 (comparing the opportunities of prosecution and defense to acquire information relating to criminal charges); Ostrow, *supra* note 17, at 1583-90 (discussing the "information imbalance" between prosecution and defense).

[52] Even this "advantage" may not exist in some cases. As Professor McMunigal points out, there are a variety of cases where the defendant may not be sure whether he is guilty of the crime. McMunigal, *supra* note 10, at 970-82. While most defendants will be fully aware of their own conduct and mental state, they may not know for certain whether their actions caused the harm that may constitute an element of the crime, or whether they acted under circumstances defined in a criminal statute. And some defendants, because of intoxication or mental disease, may have only a limited understanding of their own conduct. *See id.*

[53] "The defendant has no credible way to disclose actual innocence, but he can and normally will disclose *evidence* of innocence. Innocence *by itself* (that is, apart from its link to particular evidence) can have only a small impact on the odds of conviction." Schulhofer, *Plea Bargaining As Disaster*, *supra* note 5, at 1984.

[54] In the process of plea bargaining, the potential "cooperator" may have an incentive to disclose his own guilt—at least partially—to the prosecutor. Often it is his own participation in the crime that makes the cooperator a potentially helpful government witness. Typically, prosecutors will insist on an offer of proof—or "proffer"—from the potential cooperator before reaching any agreement. *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.620(2) (1997). A defendant whose proffered testimony conflicts with other evidence known to the government will have a difficult time striking a favorable deal. Candor, therefore, may be to his advantage even where it means disclosing his own culpability. Plea bargains

forthright admission of guilt. As for the innocent defendant, the prosecutor will assign little or no value to his claims of innocence because—to put it bluntly—she hears too many such claims that are false.[55] She may find independent evidence of innocence highly persuasive, but the defendant's uncorroborated protests of innocence mean little. Her risk assessment already assumes that the defendant will deny guilt at trial.

A guilty defendant often can make some well-educated guesses about the prosecution's case because he was a player in the original drama that will be reenacted at trial. At least until the prosecution provides discovery, however, even a guilty defendant cannot know for certain whether his fingerprints were identifiable, whether the victim picked him in a photo spread, or whether the witnesses have clear memories of the crime. He may not know which witnesses have come forward, which are unwilling to testify, which have disappeared, or which have lied. In other words, the guilty defendant may know quite well what he did; but he may not know how well he got caught. An innocent defendant, of course, suffers an even greater information deficit. At the time a charge is filed, he often knows only what the police or prosecutors have been willing to share during an investigation, which normally is very little.[56]

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involving defendants who promise to cooperate and to testify against others raise a variety of problems of their own, most of which relate to the accuracy of the resulting testimony. *See generally* United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998) ("*Singleton I*"), *rev'd* 165 F.3d 1297 (1999) (en banc) ("*Singleton II*"). For the few brief days before it was summarily vacated by the en banc Tenth Circuit, *Singleton I* outlawed the practice of offering incentives—in the form of sentencing leniency—to defendants in exchange for their testimony against others.

[55] *See* Scott & Stuntz, *Plea Bargaining As Contract*, *supra* note 5, at 1942-47. Professors Scott and Stuntz aptly describe the predicament of most prosecutors, who have brought charges they believe to be accurate, and who are faced with a defendant who continues to protest his innocence: "In the absence of reliable signals that they can afford to take seriously, prosecutors have no viable option other than to ignore claims of innocence." *Id.* at 1946. The problem is not a matter of callousness on the part of prosecutors. It arises because all defendants, innocent and guilty alike, have the same incentive to claim innocence during bargaining. Indeed, the problem is exacerbated because the prosecutor typically hears the claim through the medium of the defense attorney, who often has not heard the truth from his own client. *See id.* at 1945 n.126 (citing HEUMANN, *supra* note 39, at 59-60). Professor Heumann interviewed one defense attorney who summarized the problem like this: "[T]he first year you practice law you believe everything your client tells you. The second year you practice, you believe everything that the other side tells you. The third year you don't know who's telling the truth. Most people tend not to believe their clients that much, justifiably." HEUMANN, *supra* note 39, at 59.

[56] As a general rule, defendants have no right to be informed of the progress, or even the existence, of a criminal investigation. Police and prosecutors often choose to conduct their investigations without the knowledge of potential defendants in order to avoid destruction of evidence, witness tampering, and escape of their targets. "Quiet" investigations also allow for the option of undercover tactics, monitored phone calls, and wiretaps. Even where investigations have become more overt—through interviews, search warrants, or even

By contrast, the prosecutor already possesses most information critical to the plea bargaining risk assessment by the time an indictment is filed. She has access to the fruits of a police investigation, the only substantial investigation of the crime that has occurred or is likely to occur.[57] In more complex cases, she has probably participated in that investigation, often over a period of months, and will have questioned the principal witnesses at length in her office or before a grand jury.[58] Even as the case progresses toward trial, the prosecutor retains a significant information advantage. Most evidence in most criminal cases is presented by the prosecutor.[59] The parties' plea-bargaining risk assessment, therefore, turns primarily on an evaluation of that evidence. By definition, the prosecutor will know more about her own case than will the defense because, from within the universe of available evidence, the prosecutor chooses what that case will be.

C. Pretrial Discovery and Plea Bargaining

For defendants considering a plea bargain, the rules of pretrial discovery offer only partial relief from this information deficit. Limitations on both the subject matter and the timing of discovery can leave a defendant in the dark when he faces the decision whether to accept the terms of a plea agreement. Unlike the rules of civil discovery, criminal discovery rules are not designed to

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arrests—prosecutors often guard the identity of their sources and decline to disclose details of their case until after a charge has been filed. In some instances, the law may even prohibit them from releasing the fruits of an investigation. *See* FED. R. CRIM. P. 6(e) (relating to grand jury secrecy). For an analysis of the intricacies of Rule 6(e), see Daniel C. Richman, *Grand Jury Secrecy: Plugging the Leaks in an Empty Bucket*, 36 AM. CRIM. L. REV. 339 (1999).

[57] Any significant investigation on behalf of the defendant is the exception rather than the rule. Most criminal defense counsel are court-appointed. Many lack the time or resources to pursue detailed factual investigation of most cases. One study of court-appointed counsel in New York found that appointed attorneys visited the crime scene in only 12% of homicide cases and only 4% of other felony cases. *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 42 (1997) (citing Michael McConville & Chester L. Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581, 762 (1986-1987)). Counsel interviewed witnesses in only 21% of homicide cases and only 4% of other felony cases. *See id.*

[58] *See* H. Richard Uviller, *The Neutral Prosecutor: The Obligation of Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1705-06 (2000).

[59] *See* Scott & Stuntz, *Plea Bargaining As Contract*, *supra* note 5, at 1941 n.110. The prosecutor must bear the burden of proof at trial. While some defense witnesses are called in most cases, it is not uncommon for the defendant to present no evidence at all, and simply to rely on arguments that the prosecution has failed to prove its case beyond a reasonable doubt. Moreover, the case will never get to a jury if the prosecutor's evidence is insufficient to survive a motion for judgment of acquittal. And in the plea bargaining risk assessment, any case that will be submitted to the jury is a case where defendant knows he will face a significant risk of conviction. For a risk averse defendant, the uncertainty surrounding jury verdicts is a powerful inducement to plead guilty.

inform a defendant fully of the case against him.[60] No constitutional principle provides defendants a comprehensive right to learn the government's case before trial.[61] *Brady* itself applies only to "evidence favorable to an accused."[62] In most cases, therefore, *Brady* provides only a small portion of the information critical to defendant's risk assessment.[63] *Brady* may suggest some "melting" around the edges of the government's case, but it will not expose the iceberg that the defendant may face at trial.

In federal courts, Rule 16 of the Federal Rules of Criminal Procedure provides some measure of relief, requiring disclosure of scientific test results and of all documents and tangible objects which the government will offer in evidence or "which are material to the preparation of the defendant's defense."[64] Still, Rule 16 leaves major gaps. For one thing, it exempts police reports,[65] often the items most valuable to defense counsel seeking an efficient means to learn the government's case.[66] Further, Rule 16 and similar state provisions exempt prosecution witness statements from pretrial discovery.[67]

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[60] *See* Douglass, *supra* note 51, at 2142-46 (contrasting civil and criminal discovery procedures); Sarokin & Zuckermann, *supra* note 21, at 1089 ("It is an astonishing anomaly that in federal courts virtually unrestricted discovery is granted in civil cases, whereas discovery is severely limited in criminal matters."); Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1129-32 (1998) (contrasting civil settlement models which assume information generally available to both parties with the criminal plea bargaining setting where information typically is not accessible to both parties).

[61] *See* Weatherford v. Bursey, 429 U.S. 545, 559 (1977).

[62] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[63] *See* Matthew v. Johnson, 201 F.3d 353, 369 (5th Cir. 2000) ("*Brady* information would provide only part of the picture. Without all of the state's inculpatory evidence, the defendant could not realistically assess the state's case against him.").

[64] FED. R. CRIM. P. 16(a)(1)(C).

[65] FED. R. CRIM. P. 16(a)(2). Rule 16(a)(2) provides:

> [T]his rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or any other government agent investigating or prosecuting the case. Nor does the rule authorize the discovery or inspection of statements made by government witnesses or prospective government witnesses . . . .

Id.

[66] Prosecutors, by contrast, typically receive police reports early in the case, often before charges are filed, and use them in making charging decisions and in preparing for trial.

[67] FED. R. CRIM. P. 16(a)(2). Restrictions on pretrial discovery of the identity and prior statements of government witnesses have been the subject of intense debate. Commentators have attacked the limitations, arguing that they leave defendants with little opportunity to investigate the most critical aspects of the government's case or to prepare for cross-examination of government witnesses. *See, e.g.*, Brennan, *Progress Report*, *supra* note 3, at 6, 13-14; Sarokin & Zuckermann, *supra* note 21, at 1095-1100. In 1974, the debate led to a proposed amendment to Rule 16 that would have required the government to identify its witnesses before trial. *See* FED. R. CRIM. P. 16 advisory committee's note to 1974 amendments. The Justice Department vigorously opposed the amendment, citing concerns over witness tampering and intimidation. For a summary of the Justice Department's position, see Brennan, *Progress Report, supra* note 3, at 6; Edward S. G. Dennis,

Under the Jencks Act, witness statements in federal cases are protected from disclosure until the government witness actually testifies at trial.[68] Indeed, in federal courts and in roughly half the states, no rule grants defendants a right to know in advance of trial even the names of the witnesses who will testify against them.[69]

The timing of pretrial discovery—or, more precisely, the unregulated sequencing of discovery and plea discussions—further contributes to the information deficit that confronts defendants considering a proposed plea agreement. *Brady* is not a rule of fixed time limits.[70] *Brady* disclosures may occur early or late in the pretrial process, or even after trial has begun. It is quite typical, for example, for prosecutors to delay disclosure of *Brady* material relating to the impeachment of government witnesses—so-called "*Giglio* material"[71]—until the eve of trial.[72] Especially in complex cases, some

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Jr., *The Discovery Process in Criminal Prosecutions: Toward Fair Trials and Just Verdicts*, 68 WASH. U. L.Q. 63, 65-69 (1990). Congress ultimately struck the provision from the 1974 amendments. H.R. REP. No. 94-414, at 12 (1975), *reprinted in* 1975 U.S.C.C.A.N. 713, 716.

[68] The Jencks Act provides:

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

18 U.S.C. § 3500(a) (1994).

As a practical matter, prosecutors often disclose witness statements earlier than the Jencks Act requires, partly out of a sense of fairness and partly out of a desire to expedite defendant's decision to plead guilty. *See* Douglass, *supra* note 51, at 2140; Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553, 554 (1999).

[69] *See* Cary Clennon, *Pre-Trial Discovery of Witness Lists: A Modest Proposal to Improve the Administration of Criminal Justice in the Superior Court of the District of Columbia*, 38 CATH. U. L. REV. 641, 659 (1989) (noting that twenty-eight states require pretrial disclosure of government witness lists). In federal courts, only defendants facing the death penalty are entitled to a list of government witnesses before trial. *See* 18 U.S.C. § 3432 (1994).

[70] The Supreme Court "has never pinpointed the time at which the disclosure [under *Brady*] must be made." United States v. Beckford, 962 F. Supp. 780, 785 (E.D. Va. 1997) (quoting United States v. Anderson, 481 F.2d 685 (4th Cir. 1973)). The lower courts have taken a pragmatic approach, holding that no due process violation occurs as long as the evidence is disclosed in time for its effective use at trial. *See* United States v. Smith Grading and Paving, Inc., 760 F.2d 527, 531 (4th Cir. 1985); United States v. Pollack, 534 F.2d 964, 973 (D.C. Cir. 1976).

Brady itself called for disclosure of exculpatory evidence "upon demand." Brady v. Maryland, 373 U.S. 83, 87 (1963). The significance of the "demand," however, has been largely eliminated by subsequent decisions. *See* Kyles v. Whitley, 514 U.S. 419, 433 (1995) (citing United States v. Agurs, 427 U.S. 97 (1976), for the proposition that the defendant's failure to request favorable evidence does not free government of all obligation to disclose).

[71] In *Giglio v. United States*, the Court held that nondisclosure of evidence affecting the credibility of a government witness falls within the *Brady* rule. 405 U.S. 150 (1972). As a result, broad categories of

courts may enter pretrial orders specifying the timing and sequence of some categories of discovery.[73] But such orders are probably the exception rather than the rule. Few if any courts have rules regulating the timing of plea bargaining discussions, or the sequence of guilty pleas in relation to the discovery process. At present, there is little authority that would permit defendants to demand an advantageous sequence.[74] For practical purposes, there is no such thing as a "Motion for Pre-Plea Discovery."

The sequencing of plea and discovery is really a matter controlled by the bargaining process itself. Either party may bargain, or refuse to bargain, based on the information available at any given point. As a result, defendants plead guilty at varying stages in the discovery process. Some plead after all discovery is complete, but many plead after little or no formal discovery.[75]

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impeachment evidence—witnesses' prior inconsistent statements, their criminal records, prior dishonest acts, and any inducements that may motivate a witness to testify favorably to the government—are subject to disclosure. Today, most *Brady* litigation addresses nondisclosure of "*Giglio* material," rather than evidence that directly negates the guilt of the defendant. *Strickler v. Greene* is a good example. 527 U.S. 263 (1999). There the Court considered, and ultimately denied, a *Brady* claim that stemmed from the prosecutor's failure to disclose a detective's notes and a witness's letters showing that a principal prosecution witness had been inconsistent and uncertain in her accounts of key events, in contrast to her more polished, confident trial testimony. *See id.* at 273-75.

[72] Concerns for witness safety generally account for the government's position that witness-related disclosure should be delayed until the eve of trial in many cases. Where the exculpatory evidence consists of prior inconsistent statements by a government witness, there is a potential conflict between the Jencks Act, which prohibits compelled disclosure of witness statements before trial, 18 U.S.C. § 3500(a) (1994), and the due process requirement that evidence be disclosed in time for defendant to make effective use of the information disclosed. The federal circuits have split in their efforts to resolve that conflict. Several circuits have held that the Jencks Act controls the timing of such disclosures and, accordingly, that the government cannot be compelled to disclose even exculpatory witness statements before trial. *See* United States v. Presser, 844 F.2d 1275, 1283 (6th Cir. 1988); United States v. Jones, 612 F.2d 453, 455 (9th Cir. 1979); United States v. Scott, 524 F.2d 465, 467-68 (5th Cir. 1975). At least two circuits have concluded that *Brady*'s constitutional rule trumps the Jencks Act, requiring pretrial disclosure where necessary to allow defendants to make effective use of witness statements in preparing to impeach government witnesses. *See* United States v. Tarantino, 846 F.2d 1384, 1414-15 n.11 (D.C. Cir. 1988); United States v. Starusko, 729 F.2d 256, 263 (3rd Cir. 1984).

[73] *See, e.g.*, United States v. Beckford, 962 F. Supp. 780 (E.D. Va. 1997) (ordering government to disclose specified categories of *Giglio* material and certain other evidence three days before trial, while delaying disclosure of Jencks material until trial).

[74] Rule 16 likewise sets no time limits on discovery. The advisory committee notes to Rule 16 state that "discovery contributes to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea . . . ." FED. R. CRIM. P. 16 advisory committee note to 1974 amendment. While the comment implies that prosecutors should comply with Rule 16 at an early stage in order to foster informed plea discussions, the Rule does not require that they provide Rule 16 discovery before discussing, or even before completing, a plea agreement. *See id.*

[75] Because the "price" of a plea to the defendant depends in part upon the "costs" saved by the prosecutor, defendants may receive more favorable plea proposals at early stages in the litigation, before the

Indeed, it is not unusual for a defendant to enter into a plea agreement even before formal charges have been filed.[76]

Moreover, the guilty plea process itself does little to address defendant's need for information. In the typical guilty plea proceeding, the court will quiz the defendant at length regarding the nature of the charge, the potential penalties, and the rights which he waives by pleading guilty.[77] But few courts will ask the simple question, "What do you know about the government's case?"[78]

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prosecutor has devoted significant time and effort to trial preparation. Scholars of plea bargaining argue, accurately, that an early plea is often a relatively uninformed plea, entered before either the prosecutor or the defense has completed its investigation of the case. *See, e.g.*, Saltzburg, *supra* note 29, at 1282 (suggesting rules requiring complete investigations prior to plea bargaining). Of course, that fact does not necessarily favor one party over the other in all cases. The unregulated sequencing of disclosure and bargaining can lead to strategic bargaining by either or both parties. A prosecutor may seek to induce a plea before rules of pretrial discovery would require her to disclose how weak her case really is. Conversely, a defendant might seek a quick plea agreement out of fear that further investigation by the prosecutor will only make matters worse. One defense attorney colorfully described that tactic as "sneaking the sun past the rooster." MILLER ET AL., *supra* note 42, at 72.

[76] In such cases, defendants typically waive the process of grand jury indictment and consent to the filing of a criminal information. Pre-indictment pleas have become more common since the advent of sentencing guidelines. By bargaining before the charges are filed, defendants sometimes can influence the nature of the formal charge itself which, in turn, can have a major impact on sentencing. In federal courts, neither the guidelines themselves nor Justice Department policy absolutely forbids the practice of "charge bargaining," *see* Schulhofer & Nagel, *supra* note 49, at 278, although the practice is somewhat constrained by Justice Department directives stating that prosecutors should not drop the most serious "readily" provable charge, *see id.* at 255 (citing U.S. DEP'T OF JUSTICE, PROSECUTOR'S HANDBOOK ON SENTENCING GUIDELINES AND OTHER PROVISIONS OF THE SENTENCING REFORM ACT OF 1984 (Nov. 1, 1987)). More recently, those directives have been incorporated into the United States Attorneys' Manual. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' OFFICE MANUAL § 9-27.430 (Sept. 1997).

[77] *See* FED. R. CRIM. P. 11(c). Rule 11 requires a court, before accepting a guilty plea, to address the defendant personally and "determine that the defendant understands," among other things, the nature of the charge, the applicable penalties, his right to counsel, his rights to trial by jury and to confront and cross-examine witnesses. *Id.* Further, Rule 11 requires the court to ascertain that the plea is voluntary. *See id.* Nothing in Rule 11, however, requires the court to inquire regarding the status of discovery or the defendant's factual understanding of the case against him.

In large measure, Rule 11(c) is designed to codify the constitutional requirements for the entry of a valid guilty plea, as outlined by the Court in *Boykin v. Alabama*, 395 U.S. 238 (1969).

[78] In most Rule 11 proceedings, the closest that the court will get to probing the defendant's knowledge about the government's case will come when inquiring about the assistance of counsel. Many courts will inquire whether defendant is satisfied with the assistance of his attorney and whether he has had an opportunity to discuss the charge and any potential defenses. But defendant's answer—typically a simple "yes" or a nod of the head—seldom will convey the substance of those discussions. A few courts may inquire about the status of discovery, but again those questions are typically perfunctory. *See, e.g.*, United States v. Banks, 920 F. Supp. 688 (E.D. Va. 1996). There the court merely inquired of defense counsel, "[H]as the government turned over to you everything that you would be entitled to under the rules of discovery?" *Id.* at 690.

In sum, as far as formal rules provide, plea bargaining and discovery are essentially separate procedures. Neither the subject matter nor the timing of criminal discovery is presently designed to insure fully informed guilty pleas.

D. Informal Discovery

In the absence of rules requiring more complete disclosure, one might conclude that plea bargaining must always be unfair to defendants.[79] The risks of uninformed and ill-advised guilty pleas—like the risks of buying a lemon from the only car dealer in town—are self-evident. But the rules do not tell the whole story. Most discovery occurs outside of the rules, in informal exchanges between prosecutors and defense counsel.[80] By contrast to the formal rules of discovery which are not "sequenced" to account for plea bargaining, informal discovery takes place largely to support the plea bargaining process. Prosecutors usually disclose most of their evidence early in the pretrial sequence because they expect disclosure will induce a guilty plea.[81] And early pleas are more convenient for prosecutors than eve-of-trial pleas.[82] On the

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For an interesting contrast, consider the more elaborate guilty plea procedures required under the Rules for Courts-Martial under military law. *See* Terry L. Elling, *Guilty Plea Inquiries: Do We Care Too Much?*, 134 MIL. L. REV. 195 (1991).

[79] Indeed, some critics call for abolition of plea bargaining in part because they fear that most defendants are poorly informed about their chances at trial and most defense attorneys are unable, or unmotivated, to pursue an independent investigation of the facts. *See* Stephen J. Schulhofer, *Effective Assistance on the Assembly Line*, 14 N.Y.U. REV. L. & SOC. CHANGE 137, 142 (1986) (arguing that counsel's failure to investigate undermines defendant's ability to make intelligent choices in plea bargaining); Schulhofer, *Plea Bargaining As Disaster*, *supra* note 5, at 1988-89. Whether the prevalence of overworked, or undermotivated defense counsel is reason to abolish plea bargaining is, of course, subject to debate. As Professors Scott and Stuntz point out, ineffective counsel may negotiate less than optimum plea agreements. Indeed, most tragically, they may occasionally negotiate them on behalf of innocent defendants. But abolishing plea bargaining does not save those unfortunate innocents. It just puts them in the hands of the same ineffective attorneys at trial, where the stakes—in terms of sentencing—are higher. Abolishing plea bargaining, Professors Scott and Stuntz argue, is not a panacea for protecting innocents from unjust conviction. *See id.* It is merely a trade-off. *See id.* Plea bargains may convict more innocents than trials, but at lower sentences. *See id.* Trials may convict fewer innocents, but will compound the injustice in their cases with higher sentences. *See* Scott & Stuntz, *Imperfect Bargains*, *supra* note 5, at 2013.

[80] *See* Douglass, *supra* note 51, at 2140-41; Levenson, *supra* note 68, at 562-63.

[81] *See* Brennan, *Progress Report*, *supra* note 3, at 2-3; Douglass, *supra* note 51, at 2140-41 and 2140 n.191; H. Richard Uviller, *Pleading Guilty: A Critique of Four Models*, 41 LAW & CONTEMP. PROBS. 102, 113-14 (1977). Justice Department policy encourages prosecutors to consider informal pretrial disclosures in part to "enhance the prospects that the defendant will plead guilty." U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-6.200 (Sept. 1997).

[82] The Department of Justice cautions federal prosecutors: "A plea offer by a defendant on the eve of trial after the case has been fully prepared is hardly as advantageous from the standpoint of reducing public expense as one offered months or weeks earlier." U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.420(B)(5) (Sept. 1997). The Federal Sentencing Guidelines themselves offer a sentencing benefit to

other side of the table, defense counsel recognizes that a guilty plea, especially an early plea, may carry important sentencing benefits for his client. He needs enough information to convince himself and his client that a trial would be a bad idea. Before signaling a willingness to recommend a plea, therefore, he asks to see what he is up against.[83]

For the most part, the process works effectively.[84] The defendant learns the basic contours of the government's case, and that is usually enough to suggest a high risk of conviction at trial. The plea follows in short order. In most cases, the process also works accurately; prosecutors provide a reasonably complete account of their evidence, both good and bad. They have an obvious incentive to disclose inculpatory material to induce the plea.[85] Their incentives to disclose exculpatory material are less obvious but still present. There is no doubt ethical rules play some role in promoting disclosure. The rules require prosecutors to disclose exculpatory information in a "timely" fashion, though they are ambiguous as to whether that means in time for trial or in time for an informed plea.[86] A wise prosecutor may disclose simply to avoid even the

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defendants who plead early enough to avoid trial preparation by the government. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(b)(2) (2000).

[83] Often, defense counsel's request for disclosure may be phrased as a need for information sufficient to convince the client that trial is a futile act. "Give me something that will convince my client to plead," is a typical refrain.

[84] In fact, informal discovery in criminal cases probably works more efficiently than discovery in most civil cases. In civil cases, "lawyers ordinarily would not consider disclosing items not legally required to be disclosed." Zacharias, *supra* note 60, at 1159 n.115.

[85] Of course, that incentive will not lead to full disclosure of inculpatory details in every case. Prosecutors may see strategic advantages in keeping some evidence to themselves. *See* Uviller, *The Neutral Prosecutor*, *supra* note 58, at 1700 n.11. "I still recall the sense that even inculpatory details, served up to wily counsel in advance of trial, might well stimulate the artful construction of an evasive defense." *Id.* And the rules of discovery do not require full disclosure of inculpatory evidence. *See supra* text accompanying notes 61-69.

[86] The Model Rules require a prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." MODEL RULES OF PROF'L CONDUCT Rule 3.8(d). The Model Code of Professional Responsibility includes a similar provision. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103(B) (1983). Neither the Model Rules nor the Model Code nor the related comments, however, suggest whether the requirement of "timely" disclosure applies in relation to plea negotiations. While one commentator suggests that the rules require disclosure in plea bargaining, *see* JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT 435-36 (2d ed. 1999), others contend that the rules simply fail to resolve the problem, *see* McMunigal, *supra* note 10, at 1025 & 1025 n.207. My own research has uncovered no legal ethics opinion applying a *Brady*-like obligation to prosecutors in plea bargaining, and no reported case of a prosecutor subjected to disciplinary action for failing to disclose exculpatory information in advance of a plea.

Studies of plea bargaining suggest that prosecutors themselves are divided in their views regarding disclosure in plea bargaining. *See* MILLER ET AL., *supra* note 42, at xxiii. As Professor McMunigal points out, the ambiguity in ethical rules for disclosure in plea bargaining reflects the more general lack of consensus

potential of an ethical breach. Equally important, a prosecutor's enlightened self-interest provides an incentive for disclosure in many cases. As a general rule, prosecutors are more interested in disposing of a case by conviction than they are in insisting on the toughest possible sentence.[87] Most pre-plea disclosure of favorable evidence is unlikely to induce a risk-averse defendant to choose trial in any event.[88] And, a candid disclosure of the limitations in the government's case is often the predicate for offering—and justifying—an attractively low sentencing recommendation as an inducement to plead. Indeed, under sentencing guidelines regimes, prosecutors can have a significant incentive to identify and disclose information favorable to the defense. Without it, they may have no means to justify a bargain that would otherwise dispose of the case.[89] Finally, perhaps the greatest incentive for

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among lawyers regarding the ethics of disclosure in any form of negotiation. McMunigal, *supra* note 10, at 1024; *see also* Gary Tobias Lowenthal, *The Bar's Failure to Require Truthful Bargaining by Lawyers*, 2 GEO. J. LEGAL ETHICS 411 (1988).

[87] *See* Schulhofer & Nagel, *supra* note 49, at 283. "Prosecutors focused upon maximizing their conviction rate, but were not oriented toward maximizing the severity of the sentences they obtained." *Id.* HEUMANN, *supra* note 39, at 107, 110-14 (noting that "certainty of time" matters more to experienced prosecutors than "amount of time").

[88] The accuracy of this assertion becomes evident when we consider the substantial number of defendants who plead guilty on the eve of trial, even after receiving full *Brady* and *Giglio* disclosure from the prosecutor.

[89] In non-guidelines systems, stipulations that are contrary to fact, entered into solely for purposes of arriving at an agreed-upon sentence and with no intention of misleading the court, often are regarded as standard operating procedure. *See* Schulhofer & Nagel, *supra* note 49, at 248. For example, the radar may have clocked defendant traveling 75 mph in a 50 mph zone, but the parties might agree to a conviction for speeding no more than 10 mph over the speed limit. Guideline sentencing, in theory at least, removes the option of stipulations contrary to fact. Under the Federal Sentencing Guidelines, in order to determine the actual sentence, the court must make factual findings with regard to a variety of sentencing factors. In plea bargaining, the parties may stipulate to facts with the intention of affecting those findings. Nevertheless, in order to prevent manipulation, the Guidelines provide that such stipulations shall "not contain misleading facts." U.S. SENTENCING GUIDELINES MANUAL § 6B1.4 (2000). Probation officers reach their own factual determinations during the pre-sentence investigation and, on occasion, will dispute the stipulations of the parties. The court is not bound by the stipulation, and may make findings resulting in a sentence higher than the parties anticipated. *See id.* In order to avoid that eventuality, a prosecutor interested in securing a plea may have an incentive to disclose favorable facts during plea bargaining in an effort to convince defense counsel that the court's ultimate sentencing findings will be consistent with the parties' expectations. By the time of sentencing, in effect, both prosecutor and defense counsel may have become advocates for the same "mitigated" view of the facts. The prosecutor may be generous in her disclosures of favorable information, and in her characterization of inculpatory evidence, in an effort to keep the sentence within the range contemplated during plea negotiations.

Explicit "fact bargaining," if it results in counter-factual stipulations, is inconsistent with the Guidelines' aim of "truth in sentencing." But in most cases, there are enough factual ambiguities to leave the parties some leeway for creativity. *See* Schulhofer & Nagel, *supra* note 49, at 276. "Far more common as a means of fact manipulation was the use of ambiguities of proof. More so than in the past, Assistant U.S. Attorneys ("AUSAs") were likely in guilty plea cases to limit their "Government Version" to unambiguous facts on which the opposing counsel had agreed. Other potentially aggravating circumstances were not

disclosure is that informal discovery carries its own informal sanctions for deceptive behavior. Defense attorneys are not shy about sharing their experiences with one another. A prosecutor with a reputation for tactical nondisclosure will find it hard to sell her version of informal discovery to a wary defense bar. Without some level of trust, plea discussions become more difficult, more time-consuming, and more reliant upon the processes of formal pretrial discovery.[90] In short, a prosecutor's principal incentive to disclose exculpatory information in today's plea discussions is her knowledge that she will have another case tomorrow.[91]

E. The Pitfalls of an Unregulated System: Why an "Open File" is Not Enough

Informal discovery works well enough in most cases. But that is small comfort to the defendant who discovers, after his guilty plea, that the prosecutor never told his counsel about the witness who identified someone else in the lineup. Informal discovery is far from perfect, and one of its greatest imperfections is that it tends to work best in cases where it matters least.[92] Prosecutors seeking guilty pleas have the strongest incentive to make voluntary disclosures in their strongest cases. A quick plea is likely, and even disclosure of a few tidbits of *Brady* material is unlikely to rock an otherwise stable boat. In the weaker cases, even the honest prosecutor may choose to limit disclosure to the letter of the pretrial discovery rules in order to maintain a tactical advantage at trial.[93] A misguided few will be tempted to disclose only the inculpatory part in the hopes that defendant will accept it as the full picture and agree to a negotiated plea.[94]

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affirmatively hidden or misrepresented; they were just not mentioned if they fell outside the scope of the negotiated deal." *Id.*

[90] *See* Rebecca Hollander-Blumhoff, *Getting to 'Guilty': Plea Bargaining As Negotiation*, 2 HARV. NEGOT. L. REV. 115, 135-45 (1997); David Aaron, Note, *Ethics, Law Enforcement, and Fair Dealing: A Prosecutor's Duty to Disclose Nonevidentiary Information*, 67 FORDHAM L. REV. 3005, 3033 (1999).

[91] *See* Easterbrook, *supra* note 7, at 1971 ("Reputations are valuable in markets characterized by repeat dealing.")

[92] *See* Brennan, *Progress Report*, *supra* note 3, at 2 ("[V]oluntary discovery is unusual when the defendant might benefit most from it, that is, where the government's case is weak."); *see also* Douglass, *supra* note 51, at 2141; Uviller, *supra* note 81, at 113-14 ("[T]he process [of informal discovery] is necessarily selective. Even the most scrupulous and conscientious counsel are in some degree responsive to their purposes in the negotiation.").

[93] *See* Uviller, *supra* note 58, at 1700 n.11. "Another former [prosecutor] remembers that plea-inducing inculpatory information was more readily imparted than potentially damaging exculpatory data." *Id.*

[94] This kind of practice might charitably be described as "puffing" or "bluffing" to induce a plea. The attitudes of prosecutors toward "bluffing" appear to vary widely, with some condemning the practice and others viewing it as appropriate "gamesmanship" in an adversary system. *See* William F. McDonald,

Informal discovery carries other imperfections as well. Without clear rules, sometimes informal communication becomes miscommunication. Different prosecutors may offer "open file discovery" and have vastly different ideas of what that means.[95] Seeing the prosecutor's file offers no guarantee that the defendant has seen all exculpatory information in government hands.[96] In some cases, that file may consist of whatever a police officer happened to photocopy for the prosecutor in a few hurried moments between late-night arrest and early-morning arraignment. The *Brady* case law is filled with examples of defendants who received "open file" discovery from well-meaning, but negligent prosecutors.[97] Without rules requiring the effort, there is little incentive for a prosecutor to undertake a thorough review of investigative files if she already has "enough" evidence to induce a plea.[98]

In sum, risk assessment is at the heart of most plea bargaining and information is at the heart of that risk assessment.[99] At present, however, our system has few, if any, clear rules regarding disclosure of information to a defendant before he pleads guilty. A system that relies so heavily on voluntary, informal disclosure carries significant opportunities for abuse, not to

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Prosecutorial Bluffing and the Case Against Plea Bargaining, *in* PLEA BARGAINING 1, 3 (William F. McDonald & James Cramer eds., 1980); MILLER ET AL., *supra* note 42, at xxiii-xxiv.

[95] *See* Uviller, *supra* note 81, at 113. "[T]he informal method is a capricious device, varying in character with local tradition, the attitudes of individual prosecutors, and the "old boy" status or personal reputation of a particular defense attorney." *Id.*

[96] In *Miller v. Angliker*, 848 F.2d 1312 (2d Cir. 1988), for example, the defendant received "open file" discovery in a case involving multiple homicides, all committed in the same neighborhood, all by the strangling of black, female victims. That "open file," however, did not include information regarding the arrest of another suspect who was caught while attempting to strangle a black, female victim in the same neighborhood during the same time period as the other assaults. *See id.* at 1317. In effect, prosecutors produced a complete "open file." But, for *Brady* purposes, it was the wrong file.

[97] *Strickler v. Greene*, 527 U.S. 263 (1999), offers a prime example of a case where the "open file" turned out to be a trap for the unwary. Defense counsel did not pursue a formal motion for discovery because he relied on the prosecutor's "open file" discovery policy. *See id.* at 276 & n.13. The prosecutor's file, however, did not contain a detective's notes and a witness's letters, both of which reflected that a key prosecution witness had changed her story. *See id.* The apparent reason for the omission was that the case was investigated by authorities in one county, but tried by a prosecutor from an adjoining county. *See id.* at 275 n.12.

[98] If the case goes to trial, then *Brady*—as a trial-related right to disclosure—would require a prosecutor to disclose exculpatory material not only from her own file, but from police and other investigatory files as well. *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995) (holding the prosecutor responsible for "any favorable evidence known to the others acting on the government's behalf in the case, including the police"). But that trial-related obligation may not solve the disclosure problem in all, or even most, plea bargains. Often, the prosecutor will focus more intently on the full range of evidence only in the final days of trial preparation in those cases not disposed of by an early guilty plea. Her *Brady* or *Giglio* search may not be completed until a relatively late stage in the pretrial process.

[99] *See supra* text accompanying notes 38-50.

mention simple misunderstanding and honest mistake. Hence, there is a natural attraction between the process of plea bargaining, on the one hand, and some kind of rule governing pre-plea disclosure, on the other.

For many commentators, defense attorneys, and courts, the solution also seems natural enough: apply traditional *Brady* doctrine to guilty pleas just as we do to trials.[100] But, *Brady* is not the right rule—or even a marginally effective rule—for the job. To understand *Brady*'s inherent weakness as a rule for governing disclosure in plea bargaining, we need first to understand how *Brady* applies when a case goes to trial. Then we can explore how courts—even the courts most receptive to *Brady* in the context of a guilty plea—have modified and diluted *Brady* to fit the world of plea bargaining. Part II addresses those issues.

II. A DOCTRINE THAT "ALTERS WHEN IT ALTERATION FINDS":[101] HOW A GUILTY PLEA CHANGES *BRADY*

Unfortunately, *Brady* doctrine is not the "ever fixed mark" of the poet's imagination. A guilty plea changes *Brady*, and not for the better. To assess what happens to *Brady* in the context of plea bargaining, this Part begins with the plea itself. Section A will describe how, in the eyes of a majority of courts, a *Brady* challenge may survive a guilty plea. Section B turns to *Brady*. That Section outlines the basic *Brady* doctrine, a rule that was substantially weakened when the Court tied its standard of "materiality" to the outcome of trial. Section C shows how courts have modified that standard when a guilty plea resolves the case without a trial.

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[100] *See, e.g.*, United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998); Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995); McMunigal, *supra* note 10, at 962-68.

[101] SHAKESPEARE, *supra* note 1, at 1770. The reference is to Shakespeare's familiar lines on the constancy of true love:

> Let me not to the marriage of true minds
> Admit impediments; love is not love
> Which alters when it alteration finds,
> Or bends with the remover to remove.
> O no, it is an ever-fixed mark
> That looks on tempests and is never shaken;
> It is the star to every wand'ring bark,
> Whose worth's unknown, although his highth be taken.

Id.

A. *Getting Past the Guilty Plea*

1. *The Court's Doctrine on the Finality of Guilty Pleas*

Prosecutors routinely disclose "*Brady* material"[102] before trial,[103] often in the absence of any request by the defendant.[104] Courts seldom get involved at that juncture.[105] *Brady* litigation, however, occurs almost exclusively after trial, when a defendant learns that the prosecutor failed to tell him something that may have made a difference at trial or sentencing.[106] The same pattern follows in guilty plea cases,[107] but it is decidedly more awkward for the defendant. One day, defendant stands in open court and admits his guilt.[108] Months or even years later, he demands to take it all back because, he argues,

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[102] Any reference to "*Brady* material" before trial is, in a technical sense, a misnomer. Because the Court defines "materiality" in relation to the outcome of trial, it is literally impossible to define what is and what is not "*Brady* material" until one knows what evidence is presented at trial. In the course of pretrial discovery, prosecutors often disclose a significant volume of favorable and impeaching evidence which, in light of the evidence ultimately presented at trial, would not be regarded as "material" under the Court's retrospective standard. As a matter of convention, however, prosecutors, defense counsel, and courts often use the term "*Brady* material," in its nontechnical sense, to mean any favorable evidence known to the government before trial.

[103] Though *Brady* sets no specific time limits for disclosure, courts have held that due process requires disclosure of favorable evidence in time for its effective use at trial. *See, e.g.*, United States v. Smith Grading and Paving, Inc., 760 F.2d 527, 532 (4th Cir. 1985); United States v. Pollack, 534 F.2d 964, 973 (D.C. Cir. 1976).

[104] No defense request is required to give rise to the prosecutor's obligations under *Brady*. *See* Kyles v. Whitley, 514 U.S. 419, 433 (1995).

[105] On occasion, disputes arise before trial regarding whether particular evidence is, or is not, "*Brady* material." In those cases, courts may hear pretrial arguments on the issue and may review the questioned evidence *in camera* in order to determine whether *Brady* requires its disclosure. *See* United States v. Beckford, 962 F. Supp. 780, 785 (E.D. Va. 1997).

[106] *Brady* itself, and all subsequent *Brady* cases which have reached the Supreme Court, are cases in which the exculpatory evidence came to light after trial. *See, e.g.*, Strickler v. Greene, 527 U.S. 263 (1999); *Kyles*, 514 U.S. at 419; United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976); Giglio v. United States, 405 U.S. 150 (1972). That is the typical pattern for almost all *Brady* litigation. *See* United States v. Cuthbertson, 651 F.2d 189, 199 (3rd Cir. 1981) (Seitz, C.J., concurring) ("In the ordinary *Brady* case, it is only after a judgment of conviction that a court reviews the failure of the prosecution to disclose material the defendant argues should have been admitted into evidence.").

[107] My own research has not disclosed a reported case in which the parties litigated a motion for "pre-plea *Brady* disclosure." All of the growing number of plea-related *Brady* cases involve post-plea litigation, arising when the defense learns of nondisclosure after the plea has been entered. *See, e.g.*, United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998); Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995); Banks v. United States, 920 F.Supp. 688, 691 (E.D. Va. 1996).

[108] Post-plea *Brady* claims occasionally have followed pleas of *nolo contendere*, where, at least, the defendant is not faced with the prospect of withdrawing a plea in the face of a prior open-court confession of guilt. *See, e.g.*, Matthew v. Johnson, 201 F.3d 353, 356 (5th Cir. 2000). One of the more influential post-plea *Brady* opinions actually arose out of the defendant's plea of not guilty by reason of insanity. Miller v. Angliker, 848 F.2d 1312, 1317 (2d Cir. 1988).

he would never have pled guilty in the first place had the prosecution only told him what he has belatedly discovered on his own.[109] Given that typical litigation posture, it is hardly surprising that the biggest impediment to *Brady* as a rule of pre-plea disclosure is the guilty plea itself.

Courts treat a guilty plea as the basis for a firm and final judgment of guilt.[110] Of course, in order to carry such weight, the plea itself must be valid.[111] The Court's standard for judging a guilty plea has remained largely unchanged for most of a century, though its basic formulation is typically attributed to a trilogy of 1970 cases labeled—somewhat ironically for our purposes—the "Brady trilogy."[112] In *Brady v. United States*, the Court upheld a guilty plea that had been entered to avoid the death penalty where the governing statute made that penalty applicable only in the event of trial by jury. "Guilty pleas are valid," the Court said, "if both 'intelligent' and

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[109] Normally, the demand to "take back" the guilty plea comes in the form of a post-trial motion or a habeas corpus petition filed by counsel. In some instances, the claims are supported by the defendant's own testimony or affidavit, asserting what he "would have done" had he been aware of the previously nondisclosed information. *See, e.g.*, United States v. Millan-Colon, 829 F. Supp. 620, 636 (S.D.N.Y. 1993) (quoting affidavits in which defendants asserted, "If I had known that members of the Drug Enforcement Task Force . . . were themselves under investigation . . . I would not have agreed to waive any constitutional rights and to plead guilty.").

[110] The Court has held, for example, that a valid guilty plea bars habeas review of most non-jurisdictional claims of constitutional violations that preceded the plea. *See* Tollett v. Henderson, 411 U.S. 258, 267 (1973). Exceptions to that general rule arise where the claim challenges the "very power of the State to bring the defendant into court to answer the charge brought against him," Blackledge v. Perry, 417 U.S. 21, 30 (1974), and where the claim asserts that the guilty plea is itself invalid, Hill v. Lockhart, 474 U.S. 52, 58 (1985). The Court's decisions regarding collateral challenges following guilty pleas have been the subject of extensive commentary. *See, e.g.*, Blank, *supra* note 17, at 2024-28; Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214 (1977).

[111] *See Hill*, 474 U.S. at 58 (permitting defendant to challenge guilty plea on the grounds that the plea was invalid where entered into without effective assistance of counsel).

[112] The "Brady trilogy" consists of *Parker v. North Carolina*, 397 U.S. 790 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); and *Brady v. United States*, 397 U.S. 742 (1970). All three cases involved challenges to guilty pleas.

In *Brady v. United States*, the defendant pled guilty in order to avoid the risk of a death sentence under a federal kidnapping statute which allowed imposition of the death penalty only upon a trial by jury. 397 U.S. at 742. Brady argued that his plea was invalid because it was, in effect, coerced by his fear of the death penalty. In rejecting Brady's claim, the Court held that a plea is not "involuntary" merely because it is motivated by a desire to avoid the risk of higher punishment, including the ultimate punishment of death. *Id.* at 751 ("We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged."). Similarly, in *Parker v. North Carolina*, the Court rejected a challenge by a defendant who claimed his guilty plea to burglary was motivated by a desire to avoid a possible death sentence following trial. 397 U.S. at 790. Finally, in *McMann v. Richardson*, the Court declined to permit a collateral attack on a guilty plea on the grounds that it was motivated by a coerced confession. 397 U.S. at 759.

'voluntary.'"[113] A defendant's fear of the death penalty, and his corresponding desire to seek a lesser penalty, did not render the plea involuntary. Hard choices of that sort are "inherent" in a system where guilty pleas, including bargained-for pleas, are permitted.[114]

Guilty pleas are valid if "voluntary" and "intelligent." Further, the Court tells us, a valid plea of guilty precludes any subsequent claims attacking constitutional violations that may have preceded the plea.[115] In the words of the Court, after "a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."[116]

2. *Overcoming Finality: An "Uninformed" Plea Is Not an "Intelligent" Plea*

These parallel doctrines—(1) that voluntary and intelligent guilty pleas are valid, and (2) that valid pleas foreclose claims of earlier constitutional violations—stand as formidable barriers to the marriage of *Brady* and plea bargaining. Absent some theory that surmounts or avoids those barriers, our discussion of *Brady* and plea bargaining would come to an abrupt end right here.

But, a number of courts have proved themselves willing to address the merits of post-plea *Brady* claims despite these barriers.[117] Two theories are at

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[113] 397 U.S. at 747 (quoting Boykin v. Alabama, 395 U.S. 238, 242 (1969)).

[114] *See id.* at 751-52.

[115] Tollett v. Henderson, 411 U.S. 258, 267 (1973).

[116] *Id.*

[117] Though the Supreme Court has yet to reach the issue, at least four federal circuits have held that a guilty plea may be challenged on the grounds of an antecedent *Brady* violation. *See* United States v. Avellino, 136 F. 3d 249, 254-62 (2d Cir. 1998); Sanchez v. United States, 50 F.3d 1448, 1453-54 (9th Cir. 1995); United States v. Wright, 43 F.3d 491, 495-96 (10th Cir. 1994); White v. United States, 858 F.2d 416, 421-22 (8th Cir. 1988); Miller v. Angliker, 848 F.2d 1312, 1319-20 (2d Cir. 1988). Federal district courts in at least three other circuits have entertained such claims. *See* Indelicato v. United States, 106 F. Supp. 2d 151, 155-59 (E.D. Mass. 2000); United States v. Brown, No. 99-508-4, 2000 U.S. Dist. LEXIS 6656, at *10511 (E.D. Pa. May 5, 2000); Banks v. United States, 920 F. Supp. 688, 691 (E.D. Va. 1996). And, several state appellate courts have likewise permitted defendants to raise *Brady* claims after a guilty plea. *See, e.g., Ex Parte* Lewis, 587 S.W.2d 697, 700-01 (Tex. Crim. App. 1979); Lee v. State, 573 S.W.2d 131, 134-35 (Mo. Ct. App. 1978).

The Sixth Circuit's position is not so easy to characterize. In *Campbell v. Morris*, 769 F.2d 314 (6th Cir. 1985), the court apparently considered the relevance and significance of alleged *Brady* material in relation to defendant's plea, suggesting in theory at least that some *Brady* violations might result in pleas that were not "intelligent and voluntary." *Id.* at 321-22. Nevertheless, the court noted, "[T]here is no authority within our

the heart of those rulings. Though the theories may be doctrinally distinct, they typically merge in judicial opinions and, in any event, lead to the same conclusion.

The first argument flows easily—perhaps too easily—from the requirement of a voluntary and intelligent plea. It takes no stretch of the English language to suggest that an uninformed plea is not an "intelligent" one. The defendant's decision to plead guilty rests largely upon his appraisal of the prosecution's case: his risk assessment. A plea entered in the face of a *Brady* violation, by definition, is entered without knowledge of a substantial weakness in the prosecution's case. Such a plea, the argument goes, is not "intelligent" and may be withdrawn. Courts endorsing the marriage of *Brady* and plea bargaining typically have taken this route.[118]

A second, closely related argument flows from an exception to the Court's waiver doctrine. One claim that survives a guilty plea is a claim of ineffective assistance of counsel in the guilty plea process itself.[119] Where counsel's performance in advising a plea of guilty has fallen below the minimal standard established in *Strickland v. Washington*,[120] the Court permits withdrawal of the plea if "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial."[121] By analogy to the ineffective assistance of counsel cases, therefore, one can argue that a guilty plea does not, and logically should not, result in waiver of other constitutional deficiencies that infect the defendant's decision to plead guilty. A pre-plea *Brady* violation, just like ineffective assistance of counsel, taints that decision because it deprives the defendant of a fair chance to make a reasonable calculation of his chances at trial.[122]

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knowledge holding that suppression of *Brady* material *prior to trial* amounts to a deprivation of due process." *Id.* at 322.

[118] *See Sanchez*, 50 F.3d at 1453 ("A waiver cannot be deemed 'intelligent and voluntary' if 'entered without knowledge of material information withheld by the prosecution.") (quoting *Miller*, 848 F.2d at 1320); *see also White*, 858 F.2d at 422; *Campbell*, 769 F.2d at 321. Interestingly, although the Ninth Circuit quotes *Miller* as authority for the notion that a plea in the face of a *Brady* violation is not "intelligent and voluntary," the quotation is actually taken out of context. The *Miller* Court took a different approach to arrive at the conclusion that a *Brady* violation may taint a guilty plea. *See infra* note 168.

[119] *See* Hill v. Lockhart, 474 U.S. 52 (1985).

[120] 466 U.S. 668 (1984).

[121] *Hill*, 474 U.S. at 59.

[122] Indeed, the Court itself has inadvertently contributed to the link between post-plea *Brady* claims and post-plea *Strickland* claims. In *Hill*, the Court offered an example of the kind of ineffectiveness that might taint a guilty plea. Its example was counsel's "failure to investigate or discover potentially exculpatory evidence . . . ." *Id.* at 59. The Court then set a standard for plea withdrawal that explicitly recognizes the significance of the risk assessment that typically leads to a guilty plea:

Several federal appellate opinions have adopted, and sometimes merged, these two approaches in holding that a *Brady* claim survives the guilty plea.[123] Whether the Supreme Court would agree, however, seems open to question. Either approach rests on the premise that a valid plea, or a valid waiver, requires some level of information regarding the strength of the government's evidence. There is ample reason to doubt that this premise is consistent with the Court's existing doctrine on guilty pleas. For one thing, despite their semantic similarity, it is a stretch to turn the Court's decisions on "intelligent" pleas into the requirement of an "informed" plea.[124] In the past, the Court has found pleas "intelligent" whenever they were entered with a general appreciation of the criminal charge and of the legal consequences of the plea.[125] The Court has never required that defendants pass a quiz about the

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> [W]hether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial.

Id.

[123] The Ninth, Eighth, and Sixth Circuits have all entertained post-plea *Brady* challenges under the theory that a plea may not be "voluntary and intelligent" in the face of a *Brady* violation. *See supra* note 117. The Second Circuit used the *Lockhart* analogy to develop a standard of "materiality" for post-plea *Brady* claims, *see* Miller v. Angliker, 848 F.2d 1312, 1321-22 (2d Cir. 1988), and the Ninth Circuit followed suit, *see Sanchez*, 50 F.3d at 1454 (citing *Miller*, 848 F.2d at 1321-22).

[124] *See* Matthew v. Johnson, 201 F.3d 353, 367 (5th Cir. 2000) (suggesting that courts that allow post-plea *Brady* challenges are "at odds with Supreme Court opinions").

[125] The Court has never held that an "intelligent" plea is one entered with an accurate understanding of the government's evidence. The Court's standard for an "voluntary and intelligent" plea, to the contrary, requires only that the defendant understand the "consequences" of his plea, including the nature of the constitutional rights he is waiving, *see* Henderson v. Morgan, 426 U.S. 637, 645 n.13 (1976), that he be represented by competent counsel, *see* Tollett v. Henderson, 411 U.S. 258, 267-68 (1973), and that he be free from physical harm or mental coercion sufficient to overbear his will, *see* Brady v. United States, 397 U.S. 742, 750 (1970). Unlike the other circuit courts which have entertained post-plea *Brady* challenges, the Second Circuit does not attempt to expand the notion of an "intelligent and voluntary" plea beyond the limited terms set by the Court. In *Angliker*, the Second Circuit wrote:

> As a general matter, a plea is deemed "intelligent" if the accused had the advice of counsel and understood the consequences of the plea, even if only in a fairly rudimentary way; it is deemed "voluntary" if it is not the product of actual or threatened physical harm, mental coercion overbearing the defendant's will, or the defendant's sheer inability to weigh his options rationally.

848 F.2d at 1320. Instead of concluding that a guilty plea is "unintelligent" when entered without knowledge of material exculpatory information, the Second Circuit chose a slightly different route, in effect adding a new requirement for valid pleas. Quoting *Brady*, the *Angliker* Court concluded that a "voluntary and intelligent" plea is valid only in the "absen[ce of] misrepresentation or other impermissible conduct by state agents." *Id.* (quoting *Brady*, 397 U.S. at 757). Accordingly, the *Angliker* Court held that "even a guilty plea that was 'knowing' and 'intelligent' may be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution." *Id.*

government's evidence as a prerequisite to a valid guilty plea.[126] Moreover, a rule premised on a defendant's right to make an "informed" pre-plea risk assessment may prove too much. *Brady* addresses only "favorable" information,[127] not the typically greater bulk of "unfavorable" information that is critical to an accurate pre-plea risk assessment. If a guilty plea is invalid where a defendant is deprived of material exculpatory information, then a plea would suffer the same infirmity where a defendant pled guilty without knowing that there was precious little inculpatory evidence.[128] The same logic would entitle a defendant who rejected a plea bargain and was then convicted at trial to attack his sentence on the grounds that, had he been fully informed, he would have pled guilty and received the benefits of the bargain.[129] In short, a right to make a fully informed plea would encompass discovery rights which do not presently exist, even for defendants who go to trial.

The ultimate resolution of this doctrinal clash between *Brady* and the finality of guilty pleas must await the attention of the Supreme Court.[130] For the moment at least, several federal courts seem inclined to entertain *Brady*

In sum, the *Angliker* Court appears to treat the pre-plea withholding of exculpatory evidence as "misrepresentation" or "other impermissible conduct" by the state. That kind of misconduct, then, invalidates even a guilty plea that meets the typical standards for "voluntary and intelligent" pleas.

[126] To the contrary, the Court has explicitly noted that guilty pleas often come at a time at which the defendant has only limited information about the case against him. McMann v. Richardson, 397 U.S. 759, 769 (1970) ("[T]he decision to plead guilty before the evidence is in frequently involves the making of difficult judgments. All the pertinent facts normally cannot be known unless witnesses are examined and cross-examined in court. Even then the truth will often be in dispute."). Miscalculation about the government's case, the Court has stated, is no grounds for later withdrawal of a plea. *Brady*, 397 U.S. at 757 ("A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case . . . .").

Likewise, nothing in Rule 11 requires a federal court to quiz a defendant about his knowledge of the government's evidence before accepting a guilty plea. *See* FED. R. CRIM. P. 11.

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

[128] The prosecution's case may be weak because of the existence of significant exculpatory or impeaching evidence. But, even in a case in which there is no *Brady* evidence at all, the government may have a weak case merely because it has so little inculpatory evidence. No rule of discovery, however, requires the government to apprise a defendant that there is so little evidence; neither *Brady* nor any other constitutional principle requires the government to disclose the bulk of its inculpatory evidence. Weatherford v. Bursey, 429 U.S. 545, 559 (1977). Even if *Brady* applies at the plea bargaining stage, therefore, no rule of discovery prevents the government from "bluffing" a plea in a case where the evidence is weak. *See infra* text accompanying notes 246-57.

[129] No court has overturned a conviction following trial based on defendant's claim that, had the government disclosed more, he would have entered a guilty plea. *See* United States v. Kidding, 560 F.2d 1303, 1313 (7th Cir. 1977) (rejecting defendant's claim of *Brady* violation where defendant argued that, had information been disclosed, he may have pled guilty).

[130] *See supra* note 13.

challenges even after a guilty plea.[131] But even in those courts, the clash with finality has an impact on *Brady*. To assess that impact, the remainder of this Part turns first to traditional *Brady* doctrine, as it applies in the context of trials, then considers how the guilty plea changes *Brady*.

B. Brady's *Weakness: A Retrospective Rule for Governing a Prospective Obligation*

Before *Brady v. Maryland*, little in our constitutional doctrine suggested that criminal trials were anything other than pure contests between adversaries.[132] While the Court had forbidden prosecutors from obtaining convictions through the knowing use of perjured testimony,[133] as of 1963, it had yet to consider whether prosecutors had the constitutional duty to disclose anything at all before trial.[134] In the view of the many critics of limited discovery, American trials were too much like sporting events, and too little like dispassionate and deliberate searches for truth.[135]

Brady took a major stride away from that purely adversarial model. In overturning a death sentence where the prosecutor failed to disclose an accomplice's statement admitting to the actual killing, the Court held, "[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."[136]

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[131] *See supra* note 117.

[132] *See* Brennan, *Progress Report*, *supra* note 3, at 3-4; Douglass, *supra* note 51, at 2134-35; Sarokin & Zuckermann, *supra* note 21, at 1100-02 (discussing early history of discovery in federal courts).

[133] *See* Mooney v. Holohan, 294 U.S. 103, 112-13 (1935). Based on its supervisory powers, the Court also had required federal prosecutors to disclose prior statements of key government witnesses. Jencks v. United States, 353 U.S. 657 (1957). Congress, however, quickly clamped tight limits on *Jencks*, narrowly limiting the "statements" that had to be produced, and delaying production until after the witness testified at trial. *See* 18 U.S.C. § 3500 (1994).

[134] *See* Brennan, *Progress Report*, *supra* note 3, at 4.

[135] *See* Brennan, *Sporting Event*, *supra* note 3, at 3-4. Earlier, in the Nuremburg War Crimes Trials, American prosecutors had faced the embarrassment of a Soviet protest that American rules of discovery were unfair to defendants. *See* Hon. Robert H. Jackson, *Some Problems in Developing an International Legal System*, 22 TEMP. L.Q. 147, 150-52 (1948).

[136] Brady v. Maryland, 373 U.S. 83, 87 (1963). Aside from its reference to the Due Process Clause, however, the doctrinal contours of *Brady* were far from clear. Because the *Brady* opinion is not concerned with plea bargaining, attempting to discern a pre-plea rule of disclosure from its language is an exercise in frustration. Read broadly, *Brady* supports the notion that due process makes prosecutors into more than adversaries. *Id.* at 88. Withholding exculpatory evidence, in the words of the Court, "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice." *Id.* It takes only a short step to extend that obligation of fairness, and *Brady*'s obligation of disclosure, to plea bargaining. On the other hand, the explicit aim of the *Brady* decision is "avoidance of an unfair trial," not "punishment of society

The *Brady* Court made no attempt to define what sort of evidence may be "material" to guilt or punishment. The Court may have used that term as it is used in the law of evidence, where "material" means "relevant," "pertinent," or "germane to the points at issue."[137] Given that interpretation, *Brady* would encompass all favorable evidence that would be admissible at trial, and perhaps any information useful to a defendant in preparing his case. If proponents of liberalized discovery expected *Brady* to have such a reach, however, their expectations were dashed in the decades that followed. As one commentator has noted, *Brady* was "both the beginning and the zenith" of the Court's development of a defendant's constitutional right to discovery.[138] In subsequent opinions, "materiality" became the rock on which most defense claims to disclosure have foundered.[139]

The timing of *Brady* litigation has molded, and limited, the Court's view of materiality. The Court always sees *Brady* claims after-the-fact.[140] Months, or sometimes years, after conviction, defendants raise *Brady* claims regarding evidence that surfaced for the first time after trial. Given that procedural context, perhaps it is not surprising that the Court has come to measure "materiality" by reference to the outcome of trial.[141] In *United States v. Bagley*, the plurality wrote that evidence that the prosecutor fails to disclose before or during trial is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding

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for the misdeeds of a prosecutor." *Id.* at 87. If *Brady* grants a trial right, and a guilty plea avoids trial altogether, one can just as easily argue that *Brady* has no application at all to a plea bargain. The Fifth Circuit has argued exactly that. *See* Matthew v. Johnson, 201 F.3d 353, 361 (5th Cir. 2000) ("The *Brady* rule's focus on protecting the integrity of trials suggests that where no trial is to occur, there may be no constitutional violation.").

[137] United States v. Bagley, 473 U.S. 667, 703 n.5 (1985) (Marshall, J., dissenting). In his vigorous dissent in *Bagley*, Justice Marshall argued that *Brady* used the term "material" in "its evidentiary sense." *Id.* In Justice Marshall's view, the "original theory and promise of Brady" was to establish a prosecutor's duty to disclose any evidence "that might reasonably be considered favorable to the defendant's case." *Id.* at 702.

[138] Goldberg, *supra* note 21, at 56.

[139] *See, e.g.*, Strickler v. Greene, 527 U.S. 263, 296 (1999); United States v. Bagley, 473 U.S. 667, 683-84 (1985).

[140] *See supra* note 106.

[141] For a while, the Court seemed inclined to allow defendants to participate in defining materiality for themselves. In *United States v. Agurs*, the Court established a sliding scale of materiality based upon the specificity of defendant's demand for exculpatory evidence. 427 U.S. 97, 103-07 (1976). The *Bagley* plurality later abandoned that approach in favor of a single standard of materiality, regardless of the defendant's demand. *Bagley*, 473 U.S. at 682 (Blackmun, J., plurality opinion). As a result, under prevailing *Brady* doctrine, the prosecution must produce favorable, material evidence whether or not the defense makes a demand for it. *See id.* (Blackmun, J., plurality opinion). Conversely, a defendant cannot make evidence "material" merely by making a specific demand for it before trial, however. *See id.*

would have been different."[142] Further, the plurality stated that "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[143] Cases after *Bagley* have refined and applied that standard of materiality, but the basic "outcome-based" standard seems firmly entrenched.[144]

Critics have attacked the *Bagley* standard as both unfair and illogical.[145] It is, after all, a retrospective standard that attempts to govern a prospective obligation. It seems curious, to say the least, that a prosecutor has a constitutional obligation *before* trial to disclose a category of information that cannot be defined until *after* trial. By definition, *Brady*'s retrospective standard requires a prosecutor to speculate about events that she cannot fully anticipate before trial.[146] And it gives broad leeway—even broader than traditional harmless error formulations[147]—for courts to find reasons why a jury would have reached a verdict of guilt even if the information had been available.

The Court has defended its approach by arguing that prudent prosecutors will give the rule a wide berth by disclosing all arguably material information in order to avoid a post-trial challenge.[148] That may be true of most prosecutors, especially because ethical rules governing pretrial disclosure do not carry *Brady*'s narrow definition of materiality.[149] But if a prosecutor is inclined to win by playing close to the vest—an inclination that no doubt is heightened when disclosure is most likely to matter— the Court's retrospective approach may be flexible enough to make the risk worthwhile in all but the most egregious cases.

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142 473 U.S. 667, 682 (1985) (Blackmun, J., plurality opinion).

143 *Id.*

144 *See, e.g.*, Strickler v. Greene, 527 U.S. 263 (1999); Kyles v. Whitley, 514 U.S. 419 (1995).

145 The most prominent critic was Justice Marshall, whose dissent argued that *Bagley*'s outcome-based definition of materiality created a standard that, in the pretrial context, "virtually defies definition." *Bagley*, 473 U.S. at 700 (Marshall, J., dissenting). *See also* Sarokin and Zuckermann, *supra* note 21, at 1105-07.

146 Equally curious, the prosecutor's pretrial obligation is defined in relation to all of the evidence later produced at trial by both prosecution and defense. Before trial, of course, the prosecutor may know little or nothing of the evidence a defendant expects to present.

147 *Brady* materiality was deliberately designed to be a tougher standard for defendants than typical harmless error analysis. *See Bagley*, 473 U.S. at 680-81. A defendant who can meet *Brady's* exacting standard of materiality has, by definition, identified an error that is not harmless. *See Kyles*, 514 U.S. at 435.

148 *See Kyles*, 514 U.S. at 439 ("[A] prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence.").

149 *See id.* at 437 (noting that ABA Standards for Criminal Justice require broader disclosure than the *Brady-Bagley* outcome-based standard).

In theory, of course, even a standard applied in retrospect could have teeth. As a practical matter, however, review after-the-fact will almost never be as generous to a defendant as judicial consideration of a disclosure issue before trial. After conviction, a *Brady* issue is no longer just about disclosure. Instead, post-conviction *Brady* claims pose a conflict between defendant's right to disclosure on the one hand, and the powerful systemic interest in the finality of a jury's verdict on the other. In other words, the question before the court in a *Brady* challenge is seldom, "Should the exculpatory information have been disclosed?" Instead the question becomes, "Is the exculpatory information so important that we should ignore the jury's verdict and start all over?" As a long series of post-*Brady* cases has demonstrated, it has become relatively easy for courts to answer "no" in the post-trial context.[150] And the collective responses of courts to that post-trial question now set the standard for a prosecutor's pretrial disclosure obligations. Therein lies *Brady*'s greatest weakness as a rule for promoting meaningful disclosure: it is a rule seriously limited by the bad timing of its enforcement. As a result, despite its early promise, *Brady* has lost much of its force as a deterrent to prosecutors tempted by nondisclosure.

C. *How* Brady's *Materiality Standard Applies to Guilty Pleas*

Information is material "if there is a reasonable probability that, had the information been disclosed to the defense, the result of the proceeding would have been different."[151] After a trial, that test requires second-guessing the fact finder based on the full trial record. That task has proved troublesome enough.[152] Translating the standard into the world of plea bargaining, however, is even more problematic.

For starters, what is the "result of the proceeding" in a plea bargain? Plea bargaining, of course, is an extra-judicial event. The only "proceeding" that takes place comes after the bargain has been reached, and consists only of the court's plea colloquy with defendant.[153] The "result" of that proceeding is the

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[150] It would take pages to catalogue the cases in which courts have denied post-trial *Brady* challenges on their merits, holding that previously undisclosed evidence was not "material." For a selection of such cases, see *Twenty-Ninth Annual Review of Criminal Procedure*, 88 GEO. L.J. 799, 1180-83 nn.1048-56 (2000). A close look at the facts of such cases should be enough to convince most readers that, had the issue of disclosure arisen in the pretrial context, the court readily would have ordered disclosure in many. *See, e.g.*, Strickler v. Greene, 527 U.S. 263 (1999).

[151] United States v. Bagley, 473 U.S. 667, 682 (1985).

[152] *See supra* note 150.

[153] For the basic elements of a guilty plea colloquy in federal courts, see FED. R. CRIM. P. 11.

court's acceptance of a guilty plea. If we apply the *Brady-Bagley* standard literally to that proceeding and that result, then information is material if there is a reasonable probability that, had it been disclosed, the court would not have accepted the plea. That literal approach, however, would lead courts in a meaningless circle. To accept the plea, the only constitutionally required finding is a determination that the defendant's counseled plea is voluntary and intelligent.[154] As we have already seen, the doctrinal basis that allows courts to consider a post-plea *Brady* challenge in the first place is the notion that a plea is not voluntary and intelligent, if *Brady* information—i.e. "material" information—has been withheld.[155] Hence, we have the circle. A plea is not voluntary and intelligent if "material" information has been withheld. And we define "material" information as information that, if disclosed, likely would result in a finding that the plea was not voluntary and intelligent.

We might escape this circle by looking at a different part of the "result" in a guilty plea proceeding. Most courts take an additional step before accepting a guilty plea. They make a finding that there is a "factual basis" for the plea.[156] The *Brady-Bagley* standard would make a good deal more sense if we applied it to that step in the guilty-plea proceeding. Under that approach, evidence would be material if, had it been disclosed at the time of the plea colloquy, there is a reasonable likelihood the court would not have found a factual basis for the plea. Such an approach offers some obvious benefits, not the least of which would be to encourage a more complete presentation of the prosecution's evidence when a plea is entered. At least in the current world of guilty plea proceedings, however, this approach faces a handful of apparently insurmountable hurdles. One problem is the lack of any clear standard for assessing the factual basis for a guilty plea.[157] Another is the nature of the "evidence" that courts consider in making that finding.[158] Some accept a

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[154] *See Brady*, 397 U.S. at 749-58; *Boykin v. Alabama*, 395 U.S. 238, 241-42 (1969).

[155] *See supra* text accompanying notes 117-18.

[156] FED. R. CRIM. P. 11(f). In federal courts, Rule 11(f) provides:

> "**(f) Determining Accuracy of Plea.** Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea."

Many states have similar guilty-plea procedures. *See* Ostrow, *supra* note 17, at 1596.

[157] In federal courts, Rule 11(f) of the Federal Rules of Criminal Procedure offers no standard for determining when there is sufficient "factual basis" for the plea. The Court has never defined any such standard by case law. *See generally* Ostrow, *supra* note 17, at 1596-97 (discussing the lack of standards for assessing the factual basis of guilty pleas).

[158] The Advisory Committee Notes to Rule 11 of the Federal Rules of Criminal Procedure suggest how flexible the process can be: "An inquiry might be made of the defendant, of the attorneys for the government

prosecutor's summary.[159] Many allow the defendant's own statements to suffice for that factual basis.[160] Except where the defendant equivocates about his own guilt, courts seldom require the government to present live testimony to establish a factual basis.[161] The biggest hurdle, however, is one of constitutional doctrine. The Court has never imposed a constitutional duty upon courts to find a factual basis in support of a guilty plea.[162] Rule 11 of the Federal Rules of Criminal Procedure and similar state rules impose such a requirement. But, except perhaps for "*Alford*" pleas,[163] the Court has never found a "factual basis" requirement in the Constitution. Without a constitutionally grounded starting point, it would make little sense to tie the *Brady-Bagley* standard of materiality to the finding of a factual basis for the plea. Legislators and rule makers would remain free to modify, or eliminate altogether, the "factual basis" requirement, thus nullifying any constitutional standards.

In order to apply the *Brady-Bagley* standard of materiality to plea bargaining, courts have been forced to modify the standard in a subtle but significant way. Instead of assessing materiality in relation to the adjudicated "outcome" of the guilty plea "proceeding"—that is, the court's acceptance of the plea—courts have shifted the focus to defendant's tactical decision to plead guilty. Under that modified standard, evidence is material if "'there is a reasonable probability that but for the failure to produce such information the

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and the defense, of the presentence report when one is available, or by whatever means is appropriate in a specific case." FED. R. CRIM. P. 11(f) advisory committee notes, 1974 amend.

[159] In my own experience as a prosecutor in two federal jurisdictions, most Rule 11 proceedings have involved only a prosecutor's summary of evidence. *See also* FED. R. CRIM. P. 11 advisory committee notes, 1974 amend. (inquiry may be made of attorneys for the government).

[160] *See* Ostrow, *supra* note 17, at 1597 (noting that a defendant's admission typically constitutes the principal evidence supporting plea's factual basis).

[161] *See* North Carolina v. Alford, 400 U.S. 25, 32-33 (1970).

[162] *See* Ostrow, *supra* note 17, at 1596 n.65 (stating that it remains an "open question" whether the Constitution requires courts to find a factual basis for a guilty plea); *see also* Matthew v. Johnson, 201 F.3d 353, 368 (5th Cir. 2000) ("In general, state courts are not required by the Constitution to ensure that a factual basis for a guilty plea even exists."); Higgason v. Clark, 984 F.2d 203, 207-08 (7th Cir. 1993) (rejecting the petitioner's contention that unless the record contains "strong evidence" of factual guilt, the constitution forbids the court to accept the plea).

[163] In *North Carolina v. Alford*, the defendant pled guilty while denying the factual elements of the offense. 400 U.S. 25, 28 (1970). The Court held that the defendant's admission of facts constituting the offense was not required for a valid plea. *Id.* at 37. Still, in upholding the plea, the Court relied heavily on the state's factual showing demonstrating guilt. *Id.* at 38.

defendant would not have entered the plea but instead would have insisted on going to trial.'"[164]

This approach, which has been adopted in most courts that entertain post-plea *Brady* challenges,[165] was derived from the Court's opinion in *Bagley* itself. In searching for a single materiality standard to govern all *Brady* claims, the *Bagley* Court seized upon the standard applied by *Strickland v. Washington* to determine when claims of ineffective assistance of counsel result in "prejudice."[166] In cases of ineffective assistance regarding guilty pleas, the Court focuses on the impact that counsel's poor performance may have had on a defendant's decision to plead. The Court allows withdrawal of the plea where "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial."[167] Because the *Bagley* and *Strickland* standards are consistent after a trial, courts have simply maintained that consistency in applying the standards after a plea.[168] For post-plea *Brady* challenges, then, the result is a standard of materiality that appears deceptively simple: information is material if, had it been disclosed before the plea, there is a reasonable probability defendant would have taken his chances at trial instead of agreeing to a plea.

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[164] United States v. Avellino, 136 F.3d 249, 256 (2d Cir. 1998) (quoting Tate v. Wood, 963 F.2d 20, 24 (2d Cir. 1992)); *see also* Sanchez v. United States, 50 F.3d 1448, 1454 ((9th Cir. 1995).

[165] *See Avellino*, 136 F.3d at 256; *Sanchez*, 50 F.3d at 1454; White v. United States, 858 F.2d 416, 424 (8th Cir. 1988) ("The remaining question is whether White's knowledge of the undisclosed material would have affected his decision to forego trial."). The Sixth Circuit's inquiry in *Campbell v. Marshall* appears more flexible, taking into account, for example, the potential impact of the withheld information on the factual basis for the plea. 769 F.2d 314, 321 (6th Cir. 1985).

[166] *See* United States v. Bagley, 473 U.S. 667, 681-82 (1985). The *Strickland* standard, in turn, had been derived with reference to *Brady*. *Strickland*, 466 U.S. at 694; *see also* Miller v. Angliker, 848 F.2d 1312, 1322-23 (2d Cir. 1988).

[167] Hill v. Lockhart, 474 U.S. 52, 59 (1985).

[168] The most comprehensive effort to derive, and justify, this post-plea *Brady* standard appears in the Second Circuit's opinion in *Angliker*, 848 F.2d at 1321-22. Ironically, *Angliker* presented the *Brady* issue in a context that differs in an important way from most post-plea *Brady* challenges, and that could have allowed the court to adopt a different standard. *Angliker* involved a plea of not guilty by reason of insanity, not a "true" guilty plea. *Id.* at 1313. Under Connecticut law, the trial court had to make an independent finding that the evidence established Miller's guilt beyond a reasonable doubt, and the prosecution presented a prima facie case to support that finding. *Id.* at 1317. Therefore, in the federal habeas proceeding, which was later heard by the Second Circuit, the court could have assessed the "materiality" of undisclosed information with relation to that fact finding, rather than with reference to defendant's tactical choice to enter the insanity plea. Apparently, the Second Circuit found the analogy to the *Strickland* line of cases more convincing, so the court derived a post-plea *Brady* standard that made no reference to the court's fact finding, but relied instead on the defendant's tactical decision to enter a plea. *See id.* at 1322.

Of course, few things in law are as simple as they appear. The plea-bargaining *Brady* standard is no exception. Like so many other criminal law standards, it requires courts to assess a defendant's state of mind.[169] In fact, it is even a bit more complex because the tactical decision to plead guilty typically begins with defense counsel's advice. So, the post-plea *Brady* inquiry has two steps. First, it requires a court to determine whether the undisclosed information likely would have changed counsel's advice. Second, the court must decide whether the new information, coupled with the new advice, if any, likely would have changed defendant's mind about the plea.[170]

In considering a motion to withdraw a guilty plea, courts will inevitably regard a defendant's after-the-fact account of his thought process with a heavy dose of skepticism. Defendant's post-plea protest—"I would never have pleaded guilty if I had only known"—is likely to be regarded as more opportunistic than sincere. Likewise, without disparaging the credibility of counsel, courts are reluctant to engage in after-the-fact probing of otherwise privileged conversations in order to establish which factors actually went into defense counsel's plea recommendation.[171] For both of these reasons, courts have been quick to note that the post-plea materiality test is an "objective" one.[172] Courts do not attempt to answer the historical question of what actually influenced a particular defendant to plead guilty. Instead, the test for *Brady* materiality in plea bargaining becomes a matter of two hypothetical judgments. The court must assess the likely impact of information on the judgment of a hypothetical "reasonable" defense attorney, and on his hypothetically reasonable client.

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[169] For a discussion of the shifting "objective" and "subjective" standards applied by the Court in assessing state of mind in the Fourth and Fifth Amendment context, see Ronald J. Bacigal, *Choosing Perspectives in Criminal Procedure*, 6 WM. & MARY BILL OF RTS. J. 677 (1998).

[170] In *Angliker*, the Second Circuit made this two-step process explicit. 848 F.2d at 1322-23. Other courts have simply merged the two inquiries into one, but clearly have considered counsel's advice as an integral factor in defendant's decision. *See, e.g.*, Campbell v. Marshall, 769 F.2d 314, 322 (6th Cir. 1985).

[171] *See* United States v. Avellino, 136 F.3d 249, 260-61 (2d Cir. 1998) (denying evidentiary hearing on defendant's motion to withdraw plea).

[172] *See, e.g., Avellino*, 136 F.3d at 256 (materiality involves an "objective inquiry that asks not what a particular defendant would do but rather what is 'the likely persuasiveness of the withheld information'"); Sanchez v. United States, 50 F.3d 1448, 1454 (9th Cir. 1995), 50 F.3d at 1454 (noting that the test is "an objective standard"); *Angliker*, 848 F.2d at 1322 ("In assessing the likelihood that either the recommendation of counsel or the decision by the accused would have been different if the prosecution had not withheld the exculpatory evidence, the test is an objective one, depending largely on the likely persuasiveness of the withheld information.").

In part, this inquiry looks like the same question a reviewing court must pursue in a post-trial *Brady* challenge. The inquiry, as several courts have defined it, depends "largely on the likely persuasiveness of the withheld information."[173] But the similarity to post-trial *Brady* ends there. After a trial, a reviewing court assesses the "likely persuasiveness" of evidence in relation to the full record of the trial.[174] After a guilty plea, however, it must assess the "persuasiveness of the withheld information" in relation to all other information known to the defendant when he pled guilty.[175] Further, it must assess the likelihood that the new information would have convinced the defendant to pass up the benefits offered in the plea agreement.[176] These inquiries raise a host of difficult problems that are not present in the post-trial *Brady* context.

III. *BRADY'S* WEAKNESS GETS WEAKER: A CRITICAL LOOK AT MATERIALITY AFTER A GUILTY PLEA

If the Court's retrospective standard of materiality creates headaches after a trial, it creates nightmares for cases disposed of by guilty plea. The post-plea *Brady* standard is so hypothetical, so flexible, and so diluted that it offers little more than an illusion of protection for most defendants.[177] What follows is a discussion of the reasons why a *Brady*-based rule for plea bargaining is so often doomed to futility when courts are called upon to enforce it after a guilty plea.[178]

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173 *Angliker*, 848 F.2d at 1322; *see also Avellino*, 136 F.3d at 256; *Sanchez*, 50 F.3d at 1454.

174 *See* Strickler v. Greene, 527 U.S. 263, 290 (1999) ("[T]he question is whether 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'") (quoting Kyles v. Whitley, 514 U.S. 419, 435 (1995)).

175 *See infra* text accompanying notes 202-09.

176 *See infra* text accompanying notes 210-17.

177 A survey of reported decisions in post-plea *Brady* cases bears out that assessment. Even where courts reach the merits in such *Brady* cases, they rarely allow withdrawal of a plea. *See* Stuntz, *supra* note 57, at 61 n.204 ("Cases overturning guilty pleas based on *Brady* violations are almost nonexistent."); *infra* note 184.

178 One might argue that even a virtually unenforceable rule would have an impact on the behavior of prosecutors during the course of plea bargaining. After all, most prosecutors are honorable people, committed to following the law. *See* Uviller, *supra* note 58, at 1702 ("[N]otwithstanding the sporadic wimps and whiners, the occasional Batmen and blockheads, from what I have known of prosecutors and former prosecutors, I consider them by and large the flower of the bar."). If courts impose a *Brady* obligation on plea bargainers, then most prosecutors will do what the law requires, whether or not practical or doctrinal problems might inhibit enforcement of the rule in a plea-withdrawal proceeding. In this respect, the precatory value of a plea-bargaining *Brady* rule is worth considering. *See infra* text accompanying note 242.

For ease of organization, this critique is divided into two segments. Section A discusses the practical hurdles of: (1) presenting a post-plea *Brady* claim to a court which has already heard the defendant confess his guilt, and (2) presenting such a claim in the absence of any record that would establish the facts which influenced the plea in the first place. Section B addresses the substance of "materiality" after a plea. Materiality in relation to many guilty pleas is a narrower concept than the already-narrow notion of materiality in relation to trial. In the context of a plea, I will argue that materiality of withheld evidence is defined, and confined, (1) by the other evidence available to defendant when he pled guilty, and (2) by the relative size of the benefit offered defendant in the plea bargain. As a result, *Brady* may offer the least to those who need it the most: those relatively uninformed defendants who enter quick pleas in response to "sweetheart" bargains.

A. *Practical Deficiencies: Convincing a Skeptical Court in the Absence of a Record*

1. *The Problem of a Skeptical Court*

The biggest obstacle to a post-plea *Brady* claim is the guilty plea itself. As we have seen, one part of that hurdle is purely doctrinal: a few courts hold that the plea is final and waives any claim of an antecedent *Brady* violation.[179] Even in courts that are willing to set aside that doctrinal hurdle in the name of "voluntary and intelligent" pleas, however, the guilty plea is like a gorilla in the kitchen. As a practical matter, it is simply impossible to ignore. Volumes of *Brady* opinions demonstrate that reviewing courts are reluctant to find nondisclosures "material" when it means upsetting a jury verdict.[180] It is not hard to imagine, then, how skeptical judges will be when a defendant demands to take back his own open-court confession of guilt. While attempting to follow the prescribed formula of assessing the "likely persuasiveness" of the newly disclosed information, even the most open-minded of jurists will find themselves engaged in an almost superhuman task of ignoring the obvious.[181]

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[179] *See* Matthew v. Johnson, 201 F.3d 353, 368-69 (5th Cir. 2000); Smith v. United States, 876 F.2d 655, 657 (8th Cir. 1989).

[180] *See supra* note 150.

[181] Indeed, because its post-plea *Brady* analysis focuses in part on the factual basis for the plea, the Sixth Circuit's approach explicitly takes the defendant's admissions into account, noting they are entitled to "great weight" when the defendant seeks to withdraw the plea. Campbell v. Marshall, 769 F.2d 314, 321-22 (6th Cir. 1985).

Moreover, judicial fears of opening floodgates of post-conviction *Brady* litigation will only be heightened in the guilty plea context. Around ninety percent of convictions come by way of guilty plea.[182] It is hardly surprising, therefore, that courts would be wary of developing precedent that might encourage post-plea *Brady* claims. In comparison to post-trial claims, the numbers could be daunting.[183]

In the last decade, as more courts have proved willing to reach the merits of post-plea *Brady* challenges, we begin to see how tightly courts grasp the reigns of materiality. Post-plea *Brady* challenges are an exercise in futility for most defendants.[184] While such cases occasionally give rise to judicial sermons directed at wayward prosecutors,[185] they seldom accomplish more than that. In

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[182] *See supra* note 4.

[183] Even though post-plea *Brady* claims are rarely successful, they are no longer uncommon. A decade ago, there were only a handful of reported cases of post-plea *Brady* claims. *See* McMunigal, *supra* note 10, at 963 & n.24 (collecting cases). The number has multiplied in the last few years. *See infra* note 184.

[184] In several dozen post-plea *Brady* opinions, even among those courts that consider such claims on the merits, the vast majority have declined to allow withdrawal, almost always on the grounds that the withheld evidence was not "material" to the plea. *See, e.g.*, United States v. Abrams, No. 98-1268, 1999 U.S. App. LEXIS 38370, at *10-11 (2d Cir. Dec. 30, 1999); United States v. Nagra, 147 F.3d 875, 891 (9th Cir. 1998); United States v. Avellino, 136 F.3d 249, 259 (2d Cir. 1998); United States v. McCleary, No. 95-6922, 1997 U.S. App. LEXIS 9391, at *11-12 (4th Cir. May 1, 1997); Murr v. Turner, No. 95-4013, 1996 U.S. App. LEXIS 30870, at *5 (6th Cir. Nov. 22, 1996); United States v. Kellett, No. 94-1920, 1995 U.S. App. LEXIS 20214, at *4-5 (1st Cir. Jul. 31, 1995); Sanchez v. United States, 50 F.3d 1448, 1454 (9th Cir. 1995); United States v. Wright, 43 F.3d 491, 497 (10th Cir. 1994); Tate v. Wood, 963 F.2d 20, 25-26 (2d Cir. 1992); White v. United States, 858 F.2d 416, 424 (8th Cir. 1988); Campbell v. Marshall, 769 F.2d 314, 322 (6th Cir. 1985); United States v. Brown, No. 99-508-4, 2000 U.S. Dist. LEXIS 6656, at *13 (E.D. Pa. May 5, 2000); Indelicato v. United States, 106 F. Supp. 2d 151, 158 (D. Mass. 2000); United States v. Patel, No. 99 C 2155, 1999 U.S. Dist. LEXIS 13341, at *19-20 (N.D. Ill. Aug. 19, 1999); Mannino v. United States, No. 98 Civ. 416-18, 1998 U.S. Dist. LEXIS 1784, at *8 (S.D.N.Y. Feb. 19, 1998).

In contrast, a search revealed only four opinions allowing withdrawal. *See* Miller v. Angliker, 848 F.2d 1312, 1324 (2d Cir. 1998); Banks v. United States, 920 F. Supp. 688 (E.D. Va. 1996); United States v. Millan-Colon, 829 F. Supp. 620, 637 (S.D.N.Y. 1993); Wisconsin v. Sturgeon., 60 N.W. 2d 589 (Wis. 1999). Significantly, *Miller* was not a guilty-plea case at all, but one in which the defendant pled not guilty by reason of insanity. 848 F.2d at 1314. As a result, the trial court had heard extensive evidence at the time of the plea and had actually made a finding that the state proved its case beyond a reasonable doubt. *See id.* at 1319. Accordingly, the reviewing court was not faced with the typical post-plea *Brady* situation in which a competent defendant has acknowledged guilt and there is no record against which to assess the materiality of withheld information. Similarly, the plea withdrawal motion in *Millan-Colon* followed a partial trial of codefendants which created a factual record more complete than would normally be available following a guilty plea. 829 F. Supp. at 627-28.

[185] In post-plea *Brady* cases, as in post-trial *Brady* cases, courts seem far more willing to castigate the prosecutor than to overturn a conviction. *See, e.g., Avellino*, 136 F.3d at 256 (affirming convictions despite "troublesome questions" regarding government's conduct); *Campbell*, 769 F.2d at 318, 323 (affirming conviction while suggesting that nondisclosure was "at best . . . 'cute', at worst . . . reprehensible," and "subject to censure as a bargaining tactic" (citing Fambo v. Smith, 433 F. Supp. 590 (W.D.N.Y.), *aff'd* 565 F.2d 233 (2d Cir. 1977))).

short, even among jurists willing to set aside doctrinal concerns with finality of guilty pleas, few have found reason to permit withdrawal of pleas based on alleged *Brady* violations.

2. *The Absence of a Record*

In a post-plea *Brady* challenge, the court must assess the likely impact of newly disclosed evidence on a defendant's decision to plead guilty. That plea decision presumably rested in part on an assessment of the strength of the prosecution's case.[186] Even under an "objective" standard, it is impossible to evaluate the impact of previously undisclosed "*Brady* material" without knowing what other information the defendant possessed at the time he made that assessment.[187] After all, the decision to plead guilty involves an assessment of all the evidence, not just a piece of it. The same piece of favorable evidence might be material in one context, but not in another, depending upon its relation to other evidence known to the pleading defendant. For example, a defendant who knew the prosecution had only one eyewitnesses to a crime may find it quite material that the witness had a serious vision problem. Disclosure of evidence that "Smith is a pathological liar," by contrast, would mean little when a defendant decided to plead guilty without even knowing that Smith existed, was a witness to the crime, and would testify for the government.[188] Similarly, information suggesting that a fingerprint identification was in error might seem highly material to a defendant considering a guilty plea, unless of course he knew that DNA evidence and a videotape nevertheless proved his presence at the scene of the crime. In order to make its post-plea determination of materiality under *Brady*, therefore, a reviewing court will need to know what other information was available to the defendant at the time he made the decision to plead guilty.[189]

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[186] *See supra* text accompanying notes 41-46.

[187] The use of an "objective" standard does not imply the use of an objective standard in a factual vacuum. Even the decisionmaking process of an "objectively reasonable" defendant must be evaluated in relation to the information available for a reasonable person to assess.

[188] Of course, the defendant in the example might contend that, "I would never have pleaded guilty, if I had known that Smith, a convicted perjurer, was the government's best witness." But that argument would stretch *Brady* beyond its existing limits, requiring disclosure of the government's inculpatory evidence (the anticipated testimony of Smith) as a predicate to any claim that the exculpatory evidence (Smith's perjury conviction) was material.

[189] Most post-plea *Brady* cases simply ignore this aspect of the materiality inquiry, perhaps because they have found most such claims easy enough to reject without reaching that level of detail. *See, e.g.*, United States v. Sanchez, 50 F.3d 1448 (9th Cir. 1995). The Second Circuit has noted that evidence that the government might have presented at trial, and that was unknown to defendant at the time he decided to plead, is irrelevant in the post-plea *Brady* analysis. Miller v. Angliker, 848 F.2d 1312, 1323 (2d Cir. 1988) ("We

When a court considers a motion to withdraw a guilty plea—or a habeas petition predicated on denial of such a motion—the task of determining the defendant's knowledge at the time he entered the plea puts a court in a difficult position. The typical guilty plea colloquy creates little record regarding the prosecution's evidence, and often no record at all regarding the range of information available to the defendant when he decided to plead.[190] Moreover, even formal discovery requests and written responses often provide an incomplete record of that information.[191] And because most discovery occurs informally in the majority of cases, the problem can be compounded. Meticulous attorneys may maintain clear records of their discovery exchanges. But the reality of a busy criminal docket means that many attorneys, prosecutors and defense counsel alike, are not that meticulous. A few weeks or months after a guilty plea, the status of informal discovery may be a faded memory for most.[192] By contrast, when *Brady* claims arise after trial, courts have much more solid information. True, in the typical post-trial *Brady* case, courts must make a difficult hypothetical judgment about the likely impact of new information on a jury's verdict. But at least such courts have the full trial record to analyze. The details in that record often are critical. Courts can and do decide post-trial *Brady* claims when they see that the undisclosed evidence was cumulative, or that the issues raised in a *Brady* claim have little to do with

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believe the State is not entitled to seek to minimize the materiality of the withheld information by arguing that it could have produced additional evidence at a fuller trial."). Logically, of course, the converse would also be true; information known to the defendant at the time of the plea would be relevant to the post-plea *Brady* analysis.

The Second Circuit's statement in *Angliker* points out another peculiarity of a post-plea materiality standard that focuses on the defendant's decisionmaking, rather than on the result of any proceeding, whether actual or hypothetical. The outcome of a post-plea *Brady* motion may bear little relation to the outcome of the trial that would have occurred absent the guilty plea.

190 *See supra* text accompanying notes 77-78.

191 For one thing, discovery pleadings often say nothing about information the defendant may have obtained through his own investigation or facts of which he became aware during commission of the offense. For another, discovery pleadings themselves often refer to other, less clearly specified information as, for example, "The government has produced all *Giglio* material," or "All documents seized in the search have been made available." *See, e.g.*, Banks v. United States, 920 F. Supp. 688, 690 (E.D. Va. 1996) (noting that the defendant's discovery motion requested "all Brady material in the government's possession that would serve to exculpate Banks or impeach the government's witnesses" and recounting plea colloquy in which court asked whether the government had turned over "everything that you would be entitled to under the rules of discovery").

192 *Strickler v. Greene* offers a good example of the problem in a post-trial context. There, the prosecutor and defense counsel disagreed in their recollections of what was in the "open file" at the time the prosecutor showed it to defense counsel. 527 U.S. 263, 275 & n.11 (1999).

the central issues emphasized by the parties in closing argument.[193] After a guilty plea, however, a reviewing court has none of those opportunities.

Faced with a post-plea materiality question and no trial record, a court has two options, neither of which is especially appealing.[194] One would be to assess the newly disclosed information only in relation to the other evidence disclosed at the guilty plea proceeding. Under current practice, however, courts typically hear only a brief summary of prosecution evidence or rely solely on a defendant's admission of guilt to establish a factual basis for the plea. Accordingly, that option often would present the impossible task of assessing the new *Brady* information in a vacuum, or the largely futile task—from a defendant's point of view—of assessing it only in relation to a defendant's own in-court confession of guilt. The second option would be to conduct an evidentiary hearing to determine what the defendant and his counsel knew and when they knew it.[195] Such a hearing, of course, not only would be tainted by the distance and perspective of hindsight, but also would confront the court with the prospect of turning counsel into witnesses and delving into otherwise privileged conversations between a defendant and his attorney. For good reason, courts are less than enthusiastic about that kind of approach.[196]

In sum, current guilty-plea practice leaves courts without the tools necessary to evaluate a post-plea *Brady* challenge in most cases. At guilty plea proceedings, courts typically do not require the prosecutor to outline her evidence in detail, nor do they ask the defendant what he knows about the government's case.[197] Yet such information is critical under even the

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[193] *See, e.g. id.* at 290 (relying on details of prosecutor's closing argument to assess materiality of previously undisclosed information).

[194] A third possibility might be to rely on information available from other proceedings such as the trial of a codefendant. *See, e.g.*, United States v. Millan-Colon, 829 F. Supp. 620 (S.D.N.Y. 1993). Aside from the fact that such an approach would not be available in all cases, it would not really serve the purpose of the post-plea *Brady* inquiry, i.e., to determine how new information would have affected a defendant's decision to plead. Presumably, though it might accurately duplicate much of the evidence that a defendant would have faced at trial, the record of a codefendant's trial would not tell us what a defendant knew weeks or months before trial about the strength of the government's case.

[195] Some information about the status of the defendant's knowledge at the time of the plea might be available from other sources. Search warrant affidavits, complaints, and transcripts of preliminary hearings may have provided the defendant a summary of evidence before he entered a plea. Of course, such sources would not exist in every case and, in any event, may provide only a sketchy version of the evidence.

[196] *See, e.g.*, United States v. Avellino, 136 F.3d 249, 260-61 (2d Cir. 1998) (affirming district court's denial of evidentiary hearing on motion to withdraw plea).

[197] In federal cases, Rule 11 sets no standard for the type of evidence, degree of detail, or standard of proof necessary to establish a factual basis. *See* FED. R. CRIM. P. 11(f) advisory committee notes, 1974

"objective" materiality standard that most courts now apply to post-plea *Brady* challenges.[198] Courts that entertain post-plea *Brady* claims have created a standard of materiality that requires a detailed evaluation of the defendant's decision to plead guilty.[199] At least in the current world of criminal procedure, however, there is seldom a factual foundation for applying that doctrine.[200] Without changes to the guilty plea proceeding itself, those courts have succeeded only in building "castles in the air."[201]

B. Substantive Weakness: How Brady *Shrinks in the Plea Bargaining Context*

1. "Materiality" in Relation to Defendant's Knowledge

When courts shift the focus of their materiality inquiry to a defendant's decision whether to plead guilty, the resulting standard can produce some troubling outcomes. Sometimes, the less a defendant knows about the prosecution's case, the less protection he will get from *Brady* in the course of plea bargaining. In essence, this is because exculpatory information is, or is not, material only when viewed in relation to other information known to the defendant.

In considering a post-trial *Brady* claim, courts cannot assess the materiality of evidence in a vacuum. An item of exculpatory or impeaching evidence may be more or less material depending upon its relation to other evidence presented at trial. Cumulative evidence, for example, is not material under *Brady*.[202] Evidence impeaching a minor witness likewise is not material.[203] Similarly, in the plea bargaining context, the likely impact of a piece of exculpatory evidence on a defendant's decision to plead guilty will depend in

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amend. Nor does the Rule 11 inquiry require a court to ask about the status of discovery. *See* FED. R. CRIM. P. 11(c), (d), and (f).

198 *See supra* text accompanying notes 164-73.

199 *See supra* text accompanying notes 164-73.

200 *See supra* text accompanying notes 190-93.

201 Henry David Thoreau, *Walden, in* THE VARIORUM WALDEN AND THE VARIORUM CIVIL DISOBEDIENCE 245 (Walter Harding ed., 1968).

202 *See, e.g.*, Unied States v. Amiel, 95 F.3d 135, 145 (2d Cir. 1996) (finding no *Brady* violation where undisclosed impeachment evidence was merely cumulative).

203 *See, e.g.*, United States v. Payne, 63 F.3d 1200, 1210 (2d Cir. 1995) (finding no *Brady* violation where impeachment evidence related to witness whose testimony was only a function of the evidence linking the defendant to crime).

large measure on "what else" the defendant knows about the government's case.[204]

We can see the effects of this dependence by contrasting two cases. At the extreme, consider the case of a defendant who accepts a highly favorable plea bargain early in a case, knowing very little about the prosecution's evidence, and having asked for and received no discovery at all. A defendant who accepted such a deal would be hard-pressed to raise a successful post-plea *Brady* challenge upon belated discovery of exculpatory evidence. For one thing, because he pled without knowing the identity or likely testimony of prosecution witnesses, that defendant could scarcely claim that undisclosed impeachment evidence was material.[205] Even with respect to more directly exculpatory information, such a defendant would have a difficult *Brady* claim. He has already signaled that he was willing to plead guilty knowing little about the case. It would be difficult to establish how new information would have affected a "risk assessment" that he apparently never made in the first place.

Critics of plea bargaining would suggest that this "extreme" case is, in fact, far from unusual.[206] Indeed, it may be the most typical case of all.[207] Plea bargains often result from a quick phone call or hallway conversation between prosecutor and defense counsel. Both calculate the "market price" of a plea based on similar cases, the sentencing habits of the judge, and a variety of ballpark estimates that collectively amount to "experience." The prosecutor applies a little pressure by setting a deadline and suggesting that defendants

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[204] Given the narrow limits of formal discovery, most of that "what else" will have been supplied by the government through informal discovery. *See supra* text accompanying notes 79-91. As a result, the application of *Brady*'s materiality standard in many plea bargains is subject to manipulation by the very prosecutor it is supposed to govern. *See infra* text accompanying notes 252-57.

[205] The example is more than a hypothetical. Many, perhaps even most, defendants enter guilty pleas early in the pretrial process, with little or no discovery. Even where discovery occurs, it often is far from complete when the plea is entered. In many jurisdictions, for example, prosecutors delay disclosure of witnesses, witness statements, and *Giglio* material until shortly before trial. *See, e.g.*, United States v. Beckford, 962 F. Supp. 780, 789-95 (E.D. Va. 1997) (ordering government to disclose *Giglio* material three days before trial). Plea discussions nevertheless occur quite often, and often result in guilty pleas, at a much earlier stage in the case, and well before any witness-related discovery has been produced by the government. *See, e.g.*, United States v. Ruiz, 241 F.3d 1157, 1160-66 (9th Cir. 2001) (describing "Fast Track" program wherein defendants plead guilty before receiving *Giglio* disclosure). In such cases, defendants may plead guilty without ever seeing the *Giglio* material showing that the government's principal witnesses are truly despicable, and highly unreliable, characters.

[206] *See* Alschuler, *supra* note 5, at 677-78; Kaplan, *supra* note 5, at 218.

[207] *See* Scott & Stuntz, *Plea Bargaining As Contract*, *supra* note 5, at 1911-12 ("Most cases are disposed of by means that seem scandalously casual: a quick conversation in a prosecutor's office or a courthouse hallway between attorneys familiar with only the basics of the case, with no witnesses present, leading to a proposed resolution that is then 'sold' to both the defendant and the judge.").

who "plead early" get better deals, a fact of which defense counsel is probably already aware. The message—and the favorable bargain—are communicated to the defendant, and the deal is struck with little or no attention to discovery.

In contrast, consider the case of a defendant whose counsel has filed formal discovery motions, requiring the prosecutor to respond by identifying what has and what has not been disclosed. Imagine that the same defendant has declined the invitation to an early plea but instead has "held out" to await the end of pretrial discovery, ultimately learning much of the government's evidence and the anticipated testimony of key prosecution witnesses before finally capitulating. Should undisclosed exculpatory evidence later come to light, that defendant likely will have a stronger post-plea *Brady* claim than our first, and less well-informed, defendant.[208] The second defendant can show that the expected testimony of key witnesses may have influenced his decision to plead. Unlike the first defendant, he stands at least a chance of demonstrating that impeachment evidence was material to his decision. The same may be true with respect to other types of *Brady* material. Because he has shown that the government's inculpatory evidence played a role in his decision, the defendant can challenge the withholding of anything that may have put those inculpatory disclosures in a less favorable light.[209]

In sum, because materiality in plea bargaining depends upon the scope of a defendant's knowledge, some relatively well-informed defendants may have stronger post-plea *Brady* claims than others who plead in relative ignorance. *Brady* may offer the least protection to those who need it the most. Indeed, as is outlined in the following section, this imbalance may be exacerbated by another factor. Defendants who eschew discovery in exchange for favorable bargains may face a tougher standard in post-plea *Brady* claims because of the benefits of the bargain itself.

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[208] *Avellino* is such a case. United States v. Avellino, 136 F.3d 249 (2d Cir. 1998). Though the *Avellino* defendants ultimately failed in their *Brady* claim, their claim was at least plausible only because they were aware, at the time of their pleas, of the identity and anticipated testimony of D'Arco, the government's principal witness. *See id.* at 251-53, 262.

[209] Of course, it is not always the case that a defendant who receives more pre-plea discovery will ultimately fare better in a post-plea *Brady* claim. Where, for example, the government disclosed some *Brady* or *Giglio* material but failed to disclose other, similar evidence, defendant's subsequent *Brady* claim might fail because the undisclosed portion was merely cumulative, or would serve to impeach a witness whose testimony was already subject to question anyway. *Avellino* was ultimately decided on that basis. 136 F.3d at 257.

2. *Accounting for the Benefit of the Bargain*

Under the prevailing standard for post-plea *Brady* challenges, favorable evidence becomes "material" when it would make the risk of conviction at trial seem low enough that an objectively reasonable defendant would reject the plea bargain and choose to go to trial.[210] In its initial stage, at least, that approach parallels the assessment a court must make in reviewing a *Brady* claim after a trial.[211] Both questions turn largely on "the likely persuasiveness of the . . . information" that the prosecutor had previously failed to disclose.[212]

Courts assessing post-plea *Brady* claims, however, must consider an additional factor not present in a post-trial *Brady* case. The risk of conviction at trial is only part of a defendant's plea bargaining calculus. On the other side of the equation, we must consider the benefits offered in the plea bargain. Those benefits generally come in the form of dismissed charges and favorable sentencing recommendations for the defendant by the prosecutor. From the defendant's point of view, these are the reasons for bargaining in the first place. A defendant's willingness to plead guilty, therefore, turns not only on the persuasiveness of the government's evidence, but also on the benefit offered in the bargain.[213] Plea bargaining theory suggests, and experience confirms, that a minimal benefit typically induces a plea only where the government's case appears strong.[214] More significant benefits are more likely to induce pleas where the evidence appears less persuasive. Put more bluntly, many defendants will plead even to a weak case if offered a good enough deal.

This additional variable—the benefit of the bargain—makes post-plea *Brady* analysis even more complex than post-trial analysis. On a motion to withdraw a plea on *Brady* grounds, it is not enough for courts to find that the newly discovered evidence threatens our "confidence" that trial would have resulted in conviction. In some cases, it may not be enough even to find that the favorable evidence would make acquittal probable. The benefits offered in the plea bargain may have been so significant that a reasonable defendant would have taken the deal even had he believed the case against him was weak.[215]

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210 *See supra* text accompanying notes 164-72.

211 *See supra* text accompanying notes 142-44.

212 Miller v. Angliker, 848 F.2d 1312, 1322 (2d Cir. 1988).

213 *See supra* text accompanying notes 42-44.

214 *See supra* text accompanying notes 42-44.

215 As critics of plea bargaining have emphasized repeatedly, some bargains are simply too good to refuse, even for innocent defendants with a high probability of acquittal. *See infra* text accompanying notes 261-69.

In effect, by tying materiality to the defendant's tactical decision to plead guilty, courts have created a sliding scale of materiality for post-plea *Brady* claims.[216] Exculpatory information becomes more or less material depending upon the benefits offered in the plea bargain. And that sliding scale brings with it a troublesome anomaly: defendants who receive the greatest benefits in a plea bargain will have to meet the most stringent test of materiality in any post-plea *Brady* challenge. If we accept the theory that prosecutors offer the best deals in their weakest cases then, once again, our post-plea *Brady* rule provides the least protection for defendants who need it the most.[217]

IV. ACCURACY AND INFORMED CHOICE: DOES *BRADY* REALLY SATISFY THE GOALS OF DISCLOSURE IN PLEA BARGAINING?

We have seen how *Brady*'s already limited rule of disclosure shrinks even more following a guilty plea. But even a weak rule of disclosure may be better than none. We should consider, then, whether on balance *Brady* brings some value to plea bargaining despite its weakness. That assessment depends upon the goals we hope to achieve through disclosure. Of course, in the

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[216] *White v. United States* is one of the few reported cases in which the court explicitly considered the "benefit of the bargain" in its post-plea *Brady* calculus. 858 F.2d 416, 424 (8th Cir. 1988).

[217] Another peculiarity of plea bargaining further complicates the application of *Brady*. Quite typically, as part of the consideration for a guilty plea, prosecutors agree to dismiss or reduce charges. As a result, a defendant's plea to one charge may be induced largely by his fear of conviction on a different charge carrying a higher penalty. In those situations, the information that may mean the most to a defendant may have little to do with the charge to which he ultimately pleads guilty. Instead, that information may relate to the more serious charge that is dismissed as part of the bargain, or even to a threatened charge that the prosecutor agrees not to file. This pattern of strategic bargaining is not unusual among American prosecutors. Indeed, in many cases, prosecutors make initially aggressive charging decision in order to increase their leverage in bargaining. *See* Scott & Stuntz, *Plea Bargaining As Contract*, *supra* note 5, at 1962-65.

In theory at least, a defendant could bring a post-plea *Brady* challenge if his plea was induced by the withholding of material, exculpatory information that related to a dismissed charge, or even to a charge that was never filed. In theory, this aspect of post-plea *Brady* offers some interesting prospects. It could help address one of plea bargaining's most objectionable sore spots: the unchecked use of "overcharging" as a strategic tool to induce guilty pleas. Prosecutors who knew they might be called upon to disclose the warts on their most aggressive charges might be more circumspect in bringing those charges in the first place. Their choice of "bargaining chips" might become more realistic, and the bargaining process might become less coercive as a result.

Still, for all its theoretical promise, the notion that *Brady* might provide a realistic check on overcharging and the resulting strategic bargaining by prosecutors is unrealistic as a practical matter, at least without other systemic reforms. There is, as far as I can determine, no reported case in which a court has even entertained a post-plea *Brady* challenge regarding exculpatory information that related to a dismissed charge.

controversy-plagued world of plea bargaining, those goals themselves are subject to debate.[218]

A. *Defining Goals of Disclosure in Plea Bargaining*

In its opinions justifying plea bargaining, the Supreme Court starts with the premise that guilty-pleading defendants are in fact guilty.[219] From that premise, the Court has little trouble justifying plea bargaining as a fair and efficient way to speed up justice.[220] Since defendant saves the system the cost of his trial, he gets to share in those savings through a reduced sentence.[221]

If we begin with this simple model of plea bargaining, then any rule of disclosure is immediately suspect. For one thing, a disclosure obligation reduces the cost savings of plea bargaining. It requires more of the prosecutor's time and attention in pre-plea discovery and, presumably, more of the court's time in enforcing the rule. Moreover, if we accept this model, one could debate whether disclosure contributes anything to the fairness of plea bargaining. After all, a guilty defendant knows what he did, one might argue, so why does disclosure really matter?[222] Indeed, if defendant is willing to make a true confession of his guilt and to accept the consequences, then

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[218] The literature is filled with theories alternately justifying and condemning plea bargaining on a variety of grounds. *See supra* note 5. This Article makes no attempt to extend that debate. Rather, this Article presupposes the practical reality that plea bargaining is a firmly entrenched part of our system for resolving criminal cases. For most defendants, it is the only part of the system they will ever experience. *See* Scott & Stuntz, *Plea Bargaining As Contract, supra* note 5, at 1912 ("[P]lea bargaining . . . is not some adjunct to the criminal justice system; it *is* the criminal justice system."). The only question this Article addresses is whether the *Brady* doctrine, as it has been applied by courts in the context of plea bargaining, makes that system any better.

[219] "[A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case." Menna v. New York, 423 U.S. 61, 62 n.2 (1975) (per curiam). Critics assail this approach on the grounds that it begins with an assumption that only guilty defendants plead guilty, an assumption that is not factually accurate. *See infra* text accompanying notes 261-69. Perhaps a more charitable characterization of the Court's approach is that it simply takes a defendant at his word. *See* Blackledge v. Allison, 431 U.S. 63, 73-74 (1977) ("Solemn declarations in open court carry a strong presumption of verity."); Brady v. United States, 397 U.S. 742, 757 (1970) ("*Brady II*") ("We find no requirement in the Constitution that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the State would have had a weaker case than the defendant had thought . . . .").

[220] *See Brady II*, 397 U.S. at 752 (noting that prompt disposition by plea bargaining offers advantages to prosecution and defense).

[221] *Cf. id.* (noting "materiality of advantage" in plea bargaining); Santobello v. New York, 404 U.S. 257, 261 (1971) (suggesting that plea bargaining "is to be encouraged because of efficiency and cost-savings).

[222] "Knowing what he did," of course, is not always equivalent to knowing that he has committed a crime. *See* McMunigal, *supra* note 10, at 970-84.

compelling the prosecutor to disclose weaknesses in her case merely offers a windfall that may obstruct the search for truth.[223] For guilty defendants lucky enough to face a weak case, disclosure would allow them to press for a sentence lower than they deserve,[224] or perhaps to risk trial and escape justice altogether. From this perspective, it is easy enough to view bargaining as a purely adversarial process where bluffing is a legitimate prosecutorial tool for inducing a guilty defendant to do the right thing. At a minimum, this view suggests that we would do well enough to leave the exchange of information to the bargaining process itself, without imposing external rules compelling disclosure.[225]

There are, however, at least two good reasons for choosing a different model as our basis for assessing the value of *Brady* in plea bargaining. First, the assumption that only guilty defendants plead guilty is a suspect starting point. Some bargains may be too attractive for even innocents to pass up.[226] Theorists and practitioners differ over the frequency of guilty pleas by innocent defendants,[227] and documented cases are hard to come by.[228] In truth, no one really knows how often innocent defendants plead guilty. But even if cases of false self-condemnation are relatively rare, a system that disregards their existence is callous to say the least. If rules of pre-plea disclosure might

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[223] If [the litigation process] is (as we are fond of declaiming) a 'search for the truth,' then all matters affecting the persuasiveness of the prosecutions case should be irrelevant. A guilty plea is, after all, a confession of culpability, or at least a voluntary consent to suffer judgment. And the conviction founded on that basis is not impaired by any weakness in the trial evidence which the prosecutor could have adduced had the issue of guilt been contested.

Uviller, *supra* note 81, at 114.

[224] Indeed, the likely result of a successful post-conviction *Brady* claim is a guilty plea by the same defendant with an agreement for a reduced sentence. *Cf.* Banks v. United States, 920 F. Supp. 688, 690 n.2 (E.D. Va. 1996) (noting government's agreement to resentencing of defendants convicted at trial following *Brady* violation).

[225] This view accords generally with the "free market" view of plea bargaining which suggests that, as a general rule, less regulation leaves the parties with maximum freedom to arrive at optimal bargains. *Cf.* Easterbrook, *Plea Bargaining As Compromise, supra* note 7, at 1973 ("If there is to be reform, let us make changes that reduce regulation of sentence negotiation and bring it more into line with contractual premises.").

[226] *See infra* text accompanying notes 261-69.

[227] *Compare* MILLER ET AL., *supra* note 42, at xix ("Most prosecutors and defense attorneys believe factually innocent people do not plead guilty."), *with* Ostrow, *supra* note 17, at 1597 ("[P]leas by legally innocent defendants are common . . . .") (citing Michael O. Finkelstein, *A Statistical Analysis of Guilty Plea Practices in Federal Courts*, 89 HARV. L. REV. 293, 309 (1975)).

[228] Cases of false confessions, on the other hand, are being documented with increasing frequency now that forensic science offers more reliable means to establish innocence in some cases. For example, among the DNA exonerations studied by The Innocence Project, twenty-three percent were based on false confessions. *See* BARRY SCHECK ET AL., ACTUAL INNOCENCE 92 (2000).

reduce the number of innocents who are induced to plead guilty, then such rules deserve our careful attention. In assessing *Brady*, then, we should consider whether it is likely to contribute to the accuracy of guilty pleas.

Second, we need not make assumptions about innocence and guilt in order to justify plea bargaining. Innocent defendants may sometimes plead guilty.[229] But the same innocent defendants may also be convicted at trial.[230] Plea bargaining may be a good thing simply because it offers all defendants, both innocent and guilty, a choice. Both the Supreme Court and a number of contemporary scholars have defended plea bargaining as a means to allow defendants and prosecutors to make choices for their "mutual advantage," choices that a system without bargaining would not permit.[231] Put simply, even hard choices are better than no choice.[232] If choices based on "mutual advantage" justify a system of plea bargaining, then that system makes more sense where the defendant has at least enough information to choose which course is to his best advantage. Not surprisingly, therefore, the most

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229 *See supra* text accompanying notes 226-28.

230 *See* Scott & Stuntz, *Imperfect Bargains*, *supra* note 5, at 2013.

> The choice is not between innocent defendants pleading guilty and the same defendants winning acquittals at trial—again, if trials are perfect, innocent defendants will not plead, and the problem disappears altogether. Rather, the choice is between permitting innocents to plead under the most favorable circumstances possible and forcing them to trial, where they risk vastly greater punishment.

Id.

231 *See Brady II*, 397 U.S. at 752; Easterbrook, *supra* note 7, at 1975-76; Scott & Stuntz, *Plea Bargaining As Contract*, *supra* note 5, at 1913-17. Free choice or "autonomy" theories justify plea bargaining as a matter of individual freedom of choice or freedom of contract. Individual defendants are better off, autonomy theorists contend, if they remain free to choose whether to stand on their right to trial or to sell it for something they prefer, i.e., a guarantee of a lower sentence. *See* Easterbrook, *supra* note 7, at 1975 ("Rights that may be sold are more valuable than rights that must be consumed . . . ."). From a systemic perspective, autonomy theorists argue that, if left free to make their own choices, bargaining parties can and will reach mutually advantageous agreements which, in the long run, will create a net gain for the system of justice as a whole. *See, e.g.*, Scott & Stuntz, *Plea Bargaining As Contract*, *supra* note 5, at 1915 ("[T]he gains the participants realize from the exchange presumably have *social* value, not just value to the bargaining parties.").

Critics of such theories argue that the defendant's plea bargaining choices are seldom really free, but instead are encumbered by such serious bargaining disadvantages that defendants as a group would be better off without such "freedom." Perhaps the most serious of those disadvantages are the "agency costs" associated with representation by appointed counsel with neither the resources nor the incentives to bargain effectively for their clients. *See* Schulhofer, *Plea Bargaining As Disaster*, *supra* note 5, at 1987-90. From a systemic perspective, critics argue that plea bargains, which are designed to satisfy the mutual interests of prosecutors and defendants, often disregard more important societal interests. The principal public criticism of plea bargaining comes from that perspective. A majority of the public thinks that plea bargains result in sentences that are too lenient. *See* Cohen & Doob, *supra* note 5, at 97.

232 Judge Easterbrook put it more colorfully: "Black markets are better than no markets." Easterbrook, *supra* note 7, at 1975.

frequent—and perhaps the most convincing—argument in favor of pre-plea disclosure rules is simply that they promote the goal of informed choice.[233] The following sections, then, will assess the benefits and costs of *Brady* in relation to these two goals: (1) the goal of insuring informed choice in plea bargaining, and (2) the goal of insuring accuracy—that is, accuracy in separating the innocent from the guilty.

B. Brady *and the Goal of Informed Choice*

1. A Theoretical Mismatch

The notion of informed choice provides the theoretical basis by which most courts have applied *Brady* to plea bargains in the first place. A valid guilty plea must be "voluntary and intelligent."[234] Absent material, exculpatory evidence withheld by a prosecutor, a number of courts have held defendants' uninformed—or misinformed—choice is not voluntary and intelligent.[235] Given that theoretical starting point, one might expect a plea-bargaining *Brady* rule to provide at least most defendants with sufficient information about the government's case to allow for an informed choice whether to plead guilty. But *Brady* does not work that way. As a doctrine aimed to insure informed guilty pleas, *Brady* is a mismatch from the start. The reason is that *Brady* encompasses only a small part of the information that is relevant to most defendants considering a plea bargain.[236] *Brady* requires disclosure only of evidence "favorable" to the accused.[237] Evidence "unfavorable" to the accused is just as important to an informed guilty plea. Indeed, in most cases, it may be more important. But a *Brady*-based rule of disclosure does nothing to provide it.[238] As a result, the defendant can receive all the information *Brady* provides, yet still have no idea what he may be up against at trial.[239]

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[233] *See, e.g.*, Ostrow, *supra* note 17, at 1602-06; Blank, *supra* note 17, at 2041-42; Zacharias, *supra* note 60, at 1145-47.

[234] *Brady II*, 397 U.S. at 747 (emphasis omitted).

[235] *See, e.g.*, Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995); *see also* White v. United States, 858 F.2d 416, 422 (8th Cir. 1988).

[236] *See* Matthew v. Johnson, 201 F.3d 353, 369 (5th Cir. 2000) ("If it were the case that defendants assessing whether to plead guilty must be given the opportunity to weigh the state's case in order to make a voluntary and intelligent decision, requiring that 'material' exculpatory information be provided prior to entry of a guilty plea would not achieve the objective. . . . *Brady* information would provide only part of the picture.").

[237] Brady v. Maryland, 373 U.S. 83, 87 (1963).

[238] Other proponents of pre-plea disclosure have recognized this weakness in *Brady*, *see* Ostrow, *supra* note 17, at 1615 ("In the guilty plea context, disclosure of exculpatory evidence is not enough."), and have argued that disclosure should extend to the state's exculpatory evidence as well. Such proposals, admirable as

Of course, this deficiency in *Brady*'s coverage applies generally, whether a case goes to trial or is resolved by a guilty plea. In the trial context, however, at least the limitation is consistent with the theory supporting the rule. If, as the Court's post-*Brady* cases suggest, the aim of due process is a "fair trial, understood as a trial resulting in a verdict worthy of confidence,"[240] then a rule limited to favorable evidence is arguably sufficient to meet that purpose.[241] After all, the trial itself will require the prosecution to "show its cards": to disclose its inculpatory evidence in order to get a conviction. In that context, *Brady* merely insures that the fact finder gets the rest of the picture. By contrast, if the goal in applying *Brady* to plea bargaining is to insure informed decisionmaking by defendants, then the rule will necessarily miss its mark in most cases. By definition, the *Brady* rule can only provide a small portion of the information needed for an informed plea.

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they may be, really amount to a call for more general reform of the criminal discovery process as a whole. It is simply unrealistic to believe that courts would, or even could, effectively mandate broader discovery for plea-bargaining defendants than for those who go to trial. If that were the rule, then every well-represented defendant would circumvent the limits on pretrial discovery simply by claiming an interest in pleading guilty. After the defendant received his pre-plea discovery, of course, he could not be required to plead guilty. In effect, if we create discovery rules for plea bargaining that are broader than our pretrial discovery rules, then the plea bargaining discovery "tail" will wag the pretrial discovery "dog."

For present purposes, those proposals for more comprehensive pre-plea discovery merely reinforce the point that *Brady* was not conceived or designed as a tool for addressing nondisclosure in plea bargaining. If our aim is informed decisionmaking in plea bargaining, then *Brady* is, at best, an inadequate answer.

239 *Brady* also leaves out other information that may be critical to an "informed" choice to plead guilty. There are many "nonevidentiary" facts which can affect a defendant's decision to plead guilty. *See generally* Aaron, *supra* note 90. For example, a defendant may choose to take his chances at trial if he learns the important, but "nonevidentiary" fact that the government's principal witness has died or disappeared.

The *Brady* doctrine, however, does not extend to such nonevidentiary information. *Brady* itself uses the term "evidence" rather than the broader term, "information." 373 U.S. at 87. Though the Supreme Court has never considered a *Brady*-like case involving such nonevidentiary information, its reluctance to extend *Brady* to such cases may be predictable. *Cf.* United States v. Armstrong, 517 U.S. 456, 458-62 (1996) (declining to extend Rule 16 discovery of items "material to the preparation of defendant's defense" to include items not "respon[sive] to the Government's case in chief"). Other courts have shown little inclination to extend *Brady* to nonevidentiary information. In the only reported appellate case directly on point, the New York Court of Appeals held that *Brady* did not require a prosecutor, before entering into a plea agreement, to disclose the fact that a key witness had died:

> [T]o the extent that proof of the fact of the death of this witness might have been admissible on trial, it would not have constituted exculpatory evidence,—i.e., evidence favorable to an accused where the evidence is material either to guilt or to punishment. Accordingly, it does not fall within the doctrine enunciated by the Supreme Court of the United States in *Brady v. Maryland* . . . ."

People v. Jones, 375 N.E.2d 41, 43 (N.Y. 1978).

240 Kyles v. Whitley, 514 U.S. 419, 434 (1995).

241 Of course, even this assertion is debatable. Disclosure of inculpatory evidence in advance of trial may be critical to important strategic decisions and may allow a defendant to pursue his own pre-trial investigation.

Still, on balance, some information is better than none. One could argue that prosecutors are likely to provide the inculpatory pieces to the puzzle out of their own self-interest. As long as they do so, then arguably *Brady* functions in plea bargaining much as it does for trials. Unfortunately, for reasons I explain below, even this limited benefit is subject to doubt.

2. *Perverse Incentives—How* Brady *May Inhibit Disclosure in Plea Bargaining*

So far, we have looked at *Brady* from the same perspective as most courts: in retrospect. We have considered how severely limited *Brady*'s standard of materiality will become when courts are called upon to enforce the rule after a violation has been discovered. But that may be an unfairly restrictive view. Even a hard-to-enforce rule may have an important precatory influence on the decisions of prosecutors. After all, if courts announce a disclosure rule for plea bargaining, we would expect most prosecutors to follow it, even if it is largely unenforceable after-the-fact.[242] We cannot dismiss *Brady* as useless without considering how it may affect the behavior of prosecutors in making prospective decisions about disclosure and guilty pleas.

Unfortunately, in the world of plea bargaining, even *Brady*'s prospective effect on disclosure decisions is problematic. One problem is that materiality—from the prosecutor's point of view—is sometimes difficult to define. As long as materiality under *Brady* is linked to the defendant's tactical decision to plead guilty, even well-meaning prosecutors will not always know what the rule requires in a given case.[243] For example, identifying *Brady* material relating to an affirmative defense may be impossible unless the defendant reveals his defense. To know for sure what is material, a prosecutor would need to know what the defendant is thinking. And defendants are seldom explicit in defining the factors which motivate them to consider a plea.

Of course, in many cases a prosecutor who voluntarily outlines her inculpatory evidence to defense counsel should have a reasonable idea of those elements which will prove most material in the defendant's risk assessment.

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[242] This may be one lesson of the California *Brady*-waiver debate. *See infra* text accompanying notes 306-08. Presumably, California AUSAs would not bother with waivers unless they took the *Sanchez* rule seriously in the first place. Sanchez v. United States, 50 F.3d 1448 (9th Cir. 1995).

[243] *See* United States v. Bagley, 473 U.S. 667, 701 (1985) (Marshall, J., dissenting) ("At best, this standard places on the prosecutor a responsibility to speculate, at times without foundation, since the prosecutor will not normally know what strategy the defense will pursue or what evidence the defense will find useful.").

Identifying exculpatory evidence material to those elements may be simple enough in many cases. A prosecutor can avoid subsequent *Brady* controversies merely by interpreting her obligation broadly, disclosing anything that might affect a defendant's calculus. If *Brady* has any positive impact in plea bargaining, this is where we will find it. The rule can motivate well-meaning or highly cautious prosecutors to disclose more than the rule actually requires. Indeed, this is probably *Brady*'s most important contribution where cases go to trial as well.[244] In the pretrial context, many careful prosecutors conceive of *Brady* material as "anything favorable to the defendant," even though in a post-trial review the vast majority of that evidence would not fall within the Court's definition of material evidence that is reasonably likely to affect the outcome of a trial.[245]

There is, however, an important difference between the disclosure incentives created by *Brady* as a rule of pretrial discovery and the incentives it may create in the context of plea bargaining. Ironically, *Brady* can create an incentive for prosecutors to withhold information in bargaining. Even more disturbing, that incentive can be strongest in weak cases in which disclosure can make the most difference. To understand this apparently anomalous result, we must return to the fundamental notion that evidence is "material" to a defendant's plea bargaining decision only in relation to other information known to the defendant: the "what else" he has learned through discovery or through other sources.[246] I will refer to this notion as *Brady*'s "matching" phenomenon. Here is how it can impact plea bargaining in such a perverse way.

Some *Brady* material is directly exculpatory: for example, another suspect confessed to the crime, or DNA analysis reflects that the defendant could not have been the rapist.[247] In most instances, however, *Brady* evidence takes on

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[244] Courts seldom reverse convictions on *Brady* grounds, but most prosecutors still probably disclose more than *Brady* requires. In any event, that is apparently how the Supreme Court expects its rule to work. *See Kyles*, 514 U.S. at 439.

[245] *See supra* text accompanying notes 141-44.

[246] *See supra* text accompanying notes 202-09.

[247] Most commentators who argue for *Brady* disclosure in plea bargaining seem to focus on such cases of directly "exculpatory" evidence. *See, e.g.*, McMunigal, *supra* note 10, at 973 (discussing hypothetical where prosecutor fails to disclose physical evidence negating an element of the crime). While those are obviously important, and often egregious, cases of nondisclosure, it is important to recognize that they represent only a small minority of *Brady* cases. The vast majority of *Brady* evidence disclosed by prosecutors—as well as most *Brady* evidence which becomes the focus of post-trial challenges—does not directly demonstrate defendant's innocence. If it did, few prosecutors would bring such cases in the first place. Instead, most *Brady* material serves to negate or contradict some evidence in the prosecutor's case. To a fact-finder at trial,

its "exculpatory" character only when the evidence is "matched" against other "inculpatory" evidence.[248] Though not directly exculpatory, the evidence negates or minimizes the impact of inculpatory evidence. Evidence of the forensic laboratory's error rate, for example, is exculpatory only where the prosecution makes use of the inculpatory results of the laboratory's ballistics tests. The clearest and most frequent example of this "matching" phenomenon is impeachment evidence, so-called "*Giglio* material."[249] Evidence that impeaches the credibility of a witness is exculpatory only if the witness has something inculpatory to say. Further, under *Brady* standards, that impeachment evidence is only material if the witness has something to say that is both inculpatory and critically important to the prosecution's case.[250] At trial, the impeaching evidence never becomes "material" if the witness never testifies to something both important and inculpatory. Obviously, such evidence is not material if the witness never testifies at all. Likewise in the context of a plea bargain, the impeaching evidence never becomes material to a defendant's decision unless the defendant (1) is aware of the witness, (2) has some idea of the likely inculpatory testimony of the witness, and (3) views that testimony as important in proving guilt.

This matching phenomenon creates little difficulty for prosecutors in deciding which items of exculpatory evidence they must disclose in anticipation of trial. In fact, it makes the prosecutor's chore easier. If the government must prove its case through the mouth of a given witness, then sooner or later the prosecutor knows she must disclose *Giglio* material relating to that witness.[251] If the prosecutor uses the results of the laboratory tests, then she cannot go through trial without disclosing information reflecting a serious rate of laboratory error.

Plea bargaining, however, gives the prosecutor a different set of choices when it comes to disclosure under *Brady*. As we have already seen, the rules

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the difference often may be insignificant. But in plea bargaining, because of the "matching" phenomenon described in the text, the difference has a significant impact on materiality.

248 *See supra* text accompanyingt notes 202-09.

249 *See* Giglio v. United States, 405 U.S. 150 (1972).

250 *See, e.g.*, Strickler v. Greene, 527 U.S. 263 (1999). Though the evidence withheld in *Strickler* was obviously important in impeaching a prosecution witness, the Court ultimately denied the *Brady* claim after noting that other, unimpeached evidence was more important to Strickler's conviction and death sentence. *Id.* at 294-95.

251 In fact, with regard to *Giglio* material, many prosecutors should have at least a mental checklist of standard sources to check to make sure they comply with their disclosure obligations. Typical *Giglio* materials would include a witness's criminal record, plea or cooperation agreement, and prior inconsistent statements.

of pretrial discovery seldom require disclosure of all inculpatory evidence before trial.[252] Because those rules are not sequenced in relation to plea bargaining, the prosecutor retains the option of seeking an early plea while some, or all, of her evidence stays in the closet. She can bargain before disclosing anything at all about her inculpatory evidence. Here is where *Brady*'s "matching" phenomenon comes into play. Until she discloses the inculpatory evidence, the "matching" exculpatory evidence remains immaterial to the defendant's decisionmaking. If the defendant never sees the laboratory results, then the error rate means nothing. If the defendant has no idea who will testify for the government, or what they will say, then impeachment evidence is meaningless. In many cases, the prosecutor has the option to keep much of her inculpatory case in the closet until the moment of trial.[253] If she does that, and the defendant nevertheless chooses to plead guilty, then much of what might become "*Brady* material" in the event of trial will not be "material" under the *Brady* standard applied to plea bargaining. In short, not all "trial-related" *Brady* material will be "plea-related" *Brady* material.

As a rule for governing the prosecutor's disclosures in plea bargaining, then, *Brady* suffers from a perverse circularity. *Brady* requires a prosecutor to disclose favorable evidence material to the defendant's decision.[254] But quite often, the same prosecutor can control what is, and what is not, "material" through her decisions regarding informal discovery of other, inculpatory evidence. Once we understand this matching phenomenon, then we can appreciate two serious flaws in applying *Brady* to the world of plea bargaining. First, *Brady* may never come into play at all in many bargaining situations, even though it would ultimately require some disclosures if the same case went to trial.[255] Second, and much more troubling, the matching phenomenon can create incentives for prosecutors to withhold inculpatory evidence in order to avoid disclosing the "matching" *Brady* or *Giglio* material. Those incentives would not exist in a plea bargaining world in which *Brady* did not apply.

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252 *See supra* text accompanying notes 60-69.

253 *See supra* text accompanying notes 60-69.

254 Brady v. Maryland, 373 U.S. 83, 87 (1963).

255 Of course, one might argue that this is not a flaw at all, but really an advantage. It means that parties retain the option of striking a relatively early bargain, with relatively little disclosure, without violating *Brady*. That is a desirable option, or an undesirable one, depending upon one's philosophical preference for unregulated freedom of choice, and one's faith in defendants and—especially—defense counsel to make rational choices between the advantages of disclosure on the one hand, and the advantages of an early plea on the other.

An example illustrates the point.[256] Assume that a prosecutor is motivated to obtain a guilty plea, and is willing to do so by any means permitted by the rules of disclosure. Assume further that her case rests primarily on the testimony of a few key witnesses whose identity and anticipated testimony is not otherwise known to the defense. Finally, assume that the prosecutor possesses substantial *Giglio* material suggesting that the witnesses are less than exemplary folk. Our prosecutor will have an incentive to disclose the identity and anticipated testimony of her witnesses, since such inculpatory evidence may help convince the defendant that the government will win at trial. In a world in which *Brady* does *not* apply to plea bargains, however, she need not disclose the "matching" *Giglio* material. Her most advantageous course, then, may be to disclose the inculpatory part of her case, and delay *Giglio* disclosure while attempting to negotiate a deal.

By contrast, in a world in which *Brady* does govern her plea-bargaining conduct, the same prosecutor has two options. First, she may choose to disclose her inculpatory evidence, namely, the witness's statements. If she chooses that option, however, she also must disclose her *Giglio* material in advance of the plea. Her second option, which is permissible under *Brady*, is to disclose nothing about her witnesses at the plea-bargaining stage and simply leave the defendant to guess what he may face at trial. In other words, she can bluff and invite the defendant to take his chances.

Consider which option she is likely to choose, if her aim is to get a guilty plea. If her evidence is relatively strong and her *Giglio* material is relatively insignificant, then disclosing both may be the best way to induce a plea. On the other hand, the more significant her *Giglio* material, and the weaker her inculpatory evidence, the stronger her incentive to bluff will become. She may be better off inducing a plea out of the defendant's fear of the unknown than risking a trial through full disclosure of a weak case. And *Brady* would not stop her from making that choice. Indeed, *Brady* may encourage that choice, because the less she chooses to disclose about her inculpatory evidence, the less she must disclose in the way of "matching" exculpatory evidence. In other words, by injecting *Brady* into the plea bargaining process, we may inhibit

[256] If the hypothetical example sounds too hypothetical, I would encourage another look. In fact, this scenario is quite typical in drug conspiracy cases, which are often built largely on the testimony of cooperating witnesses who have criminal records, axes to grind against their former compatriots in crime, and plea agreements that offer substantial incentives to testify. In many cases, the government jealously will guard the identities of such witnesses, partly out of concern for their safety and the safety of their families. *See, e.g.*, United States v. Beckford, 962 F. Supp. 780 (E.D. Va. 1997).

disclosure in the very cases in which disclosure is most needed. *Brady* can encourage a prosecutor to bluff in weak cases.

In adopting a rule permitting post-plea *Brady* claims, the Ninth Circuit reasoned, "[I]f a defendant may not raise a *Brady* claim after a guilty plea, prosecutors may be tempted to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas."[257] No doubt that is a troubling prospect. But the Ninth Circuit, like other courts and scholars that have embraced *Brady* as the natural companion of plea bargaining, never considered the flip side of its rule. If defendants are permitted to raise *Brady* claims after a guilty plea, then prosecutors may be tempted to elicit pleas by withholding both exculpatory and inculpatory information. In the weakest cases, *Brady* may be an invitation for prosecutors to stonewall.

Of course, the notion that a prosecutor might choose a plea-bargaining strategy aimed at limiting her exposure to post-plea *Brady* claims may sound a bit Machiavellian. In practice, it is likely that other incentives, not to mention a sense of fair play, would govern the conduct of prosecutors in most plea bargains. The prospect of a plea itself already creates an incentive for prosecutors to disclose much of their inculpatory evidence.[258] In that environment, as our earlier hypothetical demonstrates, a *Brady*-based rule of disclosure has one clear benefit. It at least prohibits a prosecutor from manipulating the process of informal discovery by providing deceptively incomplete disclosures. Our hypothetical prosecutor would violate *Brady* if she sought to induce a guilty plea by disclosing highly incriminating testimony of an apparently reliable witness without disclosing the "matching" *Giglio* material. At a minimum, then, *Brady* would protect defendants from pleas induced through downright fraud or its functional equivalent—manipulative partial disclosure.

Whether this is enough to salvage *Brady* as a rule for promoting informed choice is a difficult proposition. If given the choice in our hypothetical case, perhaps most defense counsel would rather learn the identities and anticipated testimony of the government witnesses, even without disclosure of the matching impeachment information. Defense counsel are, by professional necessity, a skeptical lot. They would not easily assume that they had heard the full story from the prosecutor. Disclosure of inculpatory evidence at least

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[257] Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995).

[258] That is the primary motivating force behind most informal discovery in current practice. *See supra* text accompanying note 81.

gives counsel an opportunity to pursue impeachment evidence through their own investigation. Moreover, if *Brady* boils down to a rule against using fraud to induce a guilty plea, then perhaps courts would do better to apply such a rule in a more direct fashion, rather than to strain a trial-related concept of materiality to serve a purpose it was never designed to serve.[259]

C. Brady *and the Accuracy of Guilty Pleas: The Innocence Problem*

1. The Theory of Coerced Innocents

A guilty plea is a process of self-selection. A defendant stands in open court and identifies himself as guilty of a crime. At first blush, the notion that an innocent defendant might do such a thing seems highly implausible, especially because the consequence of the guilty plea is punishment, a consequence most humans would prefer to avoid.[260] Therefore, it may seem reasonable to assume that defendants who plead guilty are, in fact, guilty. Because plea bargaining simply offers inducements to encourage such defendants to identify themselves, one might argue that plea bargaining is the perfect means of separating at least some of the guilty from the larger pool of defendants. Plea bargaining, from that perspective, seems "accurate."

For decades, however, critics have argued that plea bargaining is a highly inaccurate means for separating the innocent from the guilty;[261] no more accurate some have said than the medieval practice of identifying the guilty through torture.[262] The reason is that plea bargains can offer inducements, or threats, strong enough to offset the normal disinclination of anyone, including an innocent person, to condemn himself.[263] And, because the prosecutor presumably cannot identify the few innocents she has inaccurately charged

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[259] *See, e.g.*, United States v. Wolczik, 480 F. Supp. 1205, 1211 (W.D. Pa. 1979) (rejecting notion that *Brady* applies to plea bargaining, but suggesting a plea induced by affirmative misrepresentation would be invalid).

[260] The Supreme Court seems attracted to this logic. *See* Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) ("Defendants advised by competent counsel and protected by other procedural safeguards are ... unlikely to be driven to false self-condemnation.").

[261] *See, e.g.*, Alschuler, *supra* note 46, at 60; McMunigal, *supra* note 10, at 989-94; Schulhofer, *Plea Bargaining As Disaster*, *supra* note 5, at 2000.

[262] *See generally* Langbein, *supra* note 5.

[263] *See supra* Part III.B.2.

from among the universe of defendants,[264] those inducements are offered to innocent and guilty alike.[265]

The problem is worse than that, critics say, because "the greatest pressures to plead guilty are brought to bear on defendants who may be innocent."[266] The reason has nothing to do with malevolent prosecutors. Rather, it is an unfortunate byproduct of the bargaining system. The "price" of a plea bargain is determined in some measure by the parties' assessments of the likelihood of conviction.[267] Therefore, the theory goes, the weaker her case, the more a prosecutor must "pay," in terms of reducing charges or making sentencing concessions, to obtain a plea. That means that she offers the most attractive deals in the weakest cases.[268] Assuming even a modicum of accuracy in police investigations, cases with weak evidence will be those in which innocent defendants are over-represented. Finally, the theory continues, innocent defendants are by nature more risk averse than guilty ones.[269] The sum of these factors makes for a highly coercive confluence of events. The prosecutor is most likely to make her most attractive offers in weak cases that, comparatively speaking, more often involve innocent defendants who, in turn, are more likely to accept such offers and plead guilty. Thus, according to the theory of coerced innocents, plea bargaining is a highly inaccurate means of separating the innocent from the guilty.

2. *How Disclosure Might Enhance Accuracy*

Sunshine may be an effective medicine for the plea bargaining disease of coerced innocents. In his study of disclosure and accuracy in plea bargaining, Professor Kevin McMunigal identifies two principal means by which disclosure rules in general, and *Brady* in particular, may offer some relief to innocent defendants who might otherwise face coercive choices in plea

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[264] If she could make that distinction, of course, the prosecutor would presumably not have brought the charge in the first place, or would have dismissed it as soon as the defendant's innocence became evident.

[265] *See* Scott & Stuntz, *Plea Bargaining As Contract*, *supra* note 5, at 1946-47. Professors Scott and Stuntz refer to this problem as the "pooling" phenomenon, the tendency of plea bargaining to "pool" the guilty and the innocent together and subject them both to the same incentives to plead guilty.

[266] Alschuler, *supra* note 5, at 60.

[267] *See supra* text accompanying notes 41-50.

[268] Practice confirms the accuracy of the theory. *See, e.g.*, MILLER ET AL., *supra* note 42, at xxii ("Most prosecutors appear willing to plea bargain [by] offering 'sweet deals' in very weak cases.").

[269] *See* Scott & Stuntz, *Plea Bargaining As Contract*, *supra* note 5, at 1948; Schulhofer, *Plea Bargaining As Disaster*, *supra* note 5, at 1984.

bargaining.[270] First, Professor McMunigal suggests, a system that applies *Brady* to trials and not to plea bargains will inevitably encourage prosecutors to dispose of "*Brady* cases,"[271] those in which the prosecutor is aware of significant exculpatory evidence, through plea bargaining rather than through trial.[272] Second, he argues, disclosure of *Brady* material reduces coercion of innocent defendants because it reduces the attractiveness of a plea bargain in relation to trial.[273] Simply put, a defendant who pleads in ignorance of *Brady* material has overestimated his risk of conviction at trial, making the "bargain" offered by the prosecutor seem unrealistically attractive by comparison.[274] *Brady* disclosure, Professor McMunigal argues, reduces the "differential" between that otherwise inflated risk assessment and the inducements offered by the plea bargain.[275] The deal therefore becomes less attractive. Fewer innocents will accept it and plead guilty.

3. Brady *and Accuracy: A More Skeptical View*

The notion that *Brady* will enhance accuracy in plea bargaining, (1) by changing the incentives of prosecutors, and (2) by limiting coercive pressures on defendants, makes sense if we regard *Brady* as a fixed rule requiring prosecutors to disclose all significant evidence favorable to a defendant,

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[270] McMunigal, *supra* note 10, at 985-97. Professor McMunigal identifies a third reason why *Brady* disclosure might enhance the accuracy of guilty pleas. He points out that there are some "legally innocent" defendants who mistakenly believe themselves to be guilty because they do not have personal knowledge of all of the facts necessary to establish their guilt. *Brady* disclosure would correct those erroneous beliefs, Professor McMunigal suggests, and therefore lead to fewer false guilty pleas. *Id.* at 971-84.

Professor McMunigals's view is correct, as long as we conclude that many defendants choose to plead guilty primarily because they believe themselves to be guilty. But bargaining theory suggests otherwise. Even those defendants who know they are guilty will normally choose trial if acquittal seems certain. The relevant factor in the defendant's risk assessment is not the defendant's perception of his own guilt, but his perception of the prosecution's ability to convince a jury that he is guilty. For that reason, the category of "confused innocents" should not be set aside for separate analysis in considering the application of *Brady* to plea bargaining.

[271] The notion that we can conveniently label some prosecutions "*Brady* cases" at the plea bargaining stage is itself subject to question, on two grounds. First, as a practical matter, bargains often are struck before even the prosecutor knows enough about the case to identify what will or will not be *Brady* material. Second, as a doctrinal matter, a case may or may not be a *Brady* case for plea bargaining purposes depending on the prosecutor's choices about the disclosure of inculpatory evidence. *See supra* text accompanying notes 202-09, 246-51.

[272] *See* McMunigal, *supra* note 10, at 997 ("A criminal justice system that condemns concealment of *Brady* material as a due process violation at trial, but not in plea bargaining, essentially encourages prosecutors to divert *Brady* cases into plea bargaining.").

[273] *Id.* at 996-97.

[274] *Id.* at 991-92.

[275] *Id.* at 996-97.

whether he pleads or goes to trial. But, as we have already seen, *Brady* requires less than that at trial, and much less than that in the context of a plea bargain.[276]

In light of the narrow limits of materiality under *Brady*, and a prosecutor's power to control those limits through her other discovery choices, I do not share Professor McMunigal's confidence that applying *Brady* to plea bargains will reduce the incentives for prosecutors to offer "cheap" deals in an effort to "bargain away" weak *Brady* cases without full disclosure. *Brady* offers little deterrent to the prosecutor who prefers to "bluff" a plea by offering no discovery at all.[277] Except in rare cases of highly significant, directly exculpatory evidence, that kind of bluffing will not violate *Brady*. Indeed, in the much more typical case in which most exculpatory evidence is "matched" to inculpatory evidence—as with most *Giglio* material—*Brady* can create an incentive to disclose little or nothing to defendants. And that incentive increases for the weakest cases: the very cases in which innocent defendants are over-represented. Far from enhancing accuracy in plea bargains, then, *Brady* may have the opposite effect.

Further, though as a theoretical matter *Brady* disclosure reduces the apparent "sentencing differential" that can coerce a plea,[278] such reduction will not make pleas more accurate. The reduction in that "sentencing differential," relatively speaking, would be the same for guilty defendants. Moreover, because courts enforce plea-related *Brady* doctrine after-the-fact, guilty defendants will profit from *Brady* in greater proportion than innocents, for two reasons.

First, the "prize" for winning a plea withdrawal motion or a habeas petition challenging a conviction obtained by guilty plea is not acquittal. Instead, the "winning" defendant then faces prosecution not only on the charge to which he pled guilty, but on all of the other (presumably more serious) charges that were dismissed as part of the plea bargain, along with the full range of penalties applicable to those charges.[279] If the "coerced innocents" theory holds true,

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276 *See supra* text accompanying notes 137-39, 202-09.

277 *See supra* text acccompanying notes 246-57.

278 *See* McMunigal, *supra* note 10, at 996.

279 *See, e.g.*, Miller v. Angliker, 848 F.2d 1312, 1324 (2d Cir. 1988) ("The judgment should provide that the writ will be granted unless within a reasonable time the State brings Miller to trial."); United States v. Millan-Colan, 829 F. Supp. 620, 637 (S.D.N.Y. 1993) (confirming the court's order by scheduling trial of defendant's whose plea-withdrawal motion was granted). In most cases, double jeopardy considerations

few innocent defendants are likely to take advantage of that opportunity. According to theory, they are the defendants who got the greatest sentencing benefit from pleading guilty and who, accordingly, have the most to lose by withdrawing a plea.[280] And they are, as the theory tells us, the most risk averse. The logic of the theory suggests that few innocents would take the risk of pursuing a post-plea *Brady* motion.

The same logic suggests that even fewer innocents will win such a challenge. To succeed, the defendant would have to show that the undisclosed information was material to his decision to plead guilty.[281] That decision was one that presumably balanced the risks of conviction against the benefit offered in the plea bargain.[282] Exculpatory information becomes more or less "material" depending upon the size of that benefit.[283] Under *Brady*'s "sliding scale" of post-plea materiality, therefore, the pool of defendants who received the greatest benefits will have to make the most convincing showing of materiality.[284] According to theory, coerced innocents will be over-represented in that pool. The converse, of course, is equally true. Defendants who received the least benefit from bargaining—the group that, according to the theory, is least likely to include coerced innocents—will have an easier time establishing that undisclosed *Brady* material would have changed their minds.

In sum, innocent defendants likely will be under-represented among defendants who file post-plea *Brady* challenges and further under-represented among those who succeed in such challenges. If that is true, then *Brady* makes plea bargaining an even less accurate means for distinguishing the innocent from the guilty.

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would not preclude the government from reinitiating prosecution on all charges which the defendant originally faced before the guilty plea.

280 *See supra* text accompanying notes 266-69.

281 *See, e.g.*, United States v. Sanchez, 50 F.3d 1448, 1454 (9th Cir. 1995).

282 *See supra* text accompanying notes 42-46.

283 *See supra* text accompanying notes 210-16.

284 The undisclosed evidence would have to be so significant that it would justify abandoning the considerable benefits derived from the bargain. *Cf.* White v. United States, 858 F.2d 416, 424 (8th Cir. 1998) (noting that the district court focused on the benefits of the plea bargain in denying motion to set aside guilty plea).

D. Recapping Brady's *Limited Benefits: Counting Some Costs*

1. Limited—and Misdirected—Benefits

Despite the more optimistic assessments of other scholars,[285] there is little reason to believe *Brady* can be an effective—or even marginally useful—rule for promoting informed choice or accuracy in plea bargaining. Because it is enforced only after-the-fact, by skeptical courts, in the absence of a meaningful record, *Brady* offers little deterrent to prosecutors who might choose nondisclosure as a bargaining tactic. Certainly, there is little in existing case law to suggest otherwise.[286] Instead, *Brady*'s value in plea bargaining may be largely symbolic. It may encourage careful prosecutors to do more than the rule requires. That may be no small benefit, but it probably comes where it is needed the least. Most enlightened prosecutors already make such disclosures in the interest of maintaining an efficient bargaining system.[287]

On the other side of the scale, *Brady* can create perverse incentives for prosecutors to bluff in order to achieve pleas in their weakest cases.[288] As a result, *Brady* can actually stand in the way of more informed choices in some plea bargains. And *Brady*'s enforcement mechanism—weak as it may be—is probably more accessible, and more useful, to the guilty than to the innocent. *Brady* probably does little, therefore, to enhance accuracy in guilty pleas. In fact, it may do the opposite.

2. Costs in Bargaining

The costs of *Brady* to plea bargainers obviously depend on the scope of the obligations the rule creates. If materiality remains largely within the prosecutor's control in most cases,[289] then the rule's costs *and* benefits may be inconsequential. Prosecutors would remain free under *Brady* to seek early, cheap pleas with minimal disclosure in many cases.[290] On the other hand, to the extent that the rule actually required disclosures that would not otherwise

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[285] *See supra* note 17.

[286] Post-plea *Brady* challenges have proliferated in recent years, but the results are almost always the same. The reviewing court may complain about the government's tactics, or its negligence, but the conviction is nonetheless affirmed after a finding that the withheld evidence was not "material." For a collection of cases, see *supra* note 184.

[287] *See supra* text accompanying notes 87-91.

[288] *See supra* text accompanying notes 242-57.

[289] *See supra* text accompanying notes 252-54.

[290] *See supra* text accompanying notes 256-57.

occur, then compliance by prosecutors would necessarily entail increased costs. Prosecutors would need to devote time and effort to disclosure in order to comply with the rule. That might be a simple matter in many cases, assuming the prosecutor could easily identify the evidence favorable to the accused. In some cases, however, *Brady* disclosure would be more cumbersome. *Brady* applies to evidence in the hands of the police as well as the prosecutor.[291] To assure that she had complied with the rule, a careful prosecutor would need to complete a review not only of her own files, but of police files as well, in advance of the plea.

To some degree, this process would make plea bargaining less efficient because on the whole pleas might be delayed to await disclosure. But it is hard to regard that form of inefficiency as much of a cost at all. Many guilty pleas are already too efficient. The prosecutor and defense counsel exchange a few words in the hallway and the case is settled with little scrutiny of the prosecutor's evidence.[292] Indeed, slowing that process a bit might actually increase the efficiency of justice. Not only would defendants have the opportunity to make better informed plea decisions, but prosecutors would have reason to pause over their initial charging decisions. A designedly more cumbersome pre-plea disclosure process, therefore, could bring a net gain in efficiency if it led prosecutors to weed out the weakest cases from the start.

The real costs of attaching a *Brady*-like obligation to plea bargaining, however, are not efficiency costs, but rather opportunity costs. These probably would burden defendants more than prosecutors. Unless the rule could be waived by agreement of the parties,[293] a *Brady* disclosure requirement in plea

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[291] *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.").

[292] *See* Scott & Stuntz, *Plea Bargaining As Contract*, *supra* note 5, at 1911-12.

[293] Before counting the costs of a pre-plea *Brady* rule, however, we must pause over an additional complication: the possibility of a bargained-for waiver. If a disclosure obligation stood in the way of an opportunity for a quick, less-informed plea which both parties preferred, then that opportunity could be preserved if defendant agreed to waive his *Brady* rights explicitly, right in the written plea agreement itself. In fact, in some jurisdictions "*Brady* waivers" have become a standard term in plea agreements, as well as a standard object of defense protests regarding their enforceability. *See* Blank, *supra* note 17, at 2042-43; *see infra* text accompanying notes 306-08. The *Brady*-waiver controversy is important to our analysis, because waivers have the practical potential of undoing what many courts have done by inserting *Brady* into the plea-bargaining world. *See infra* Part V. For the purpose of considering the "opportunity costs" of applying *Brady* to plea bargaining, however, assume for purposes of this discussion that such waivers are not enforceable. To assume otherwise, of course, would negate many of these costs, just as waivers would negate the potential benefits of disclosure.

bargaining would reduce the range of options available to both defendants and prosecutors. In many cases, for entirely legitimate reasons, the prosecutor may be willing to agree to certain plea terms before thorough *Brady* compliance, but not at a later stage in the case. For example, a prosecutor who desires to protect the privacy or safety of a witness may be willing to offer favorable terms as long as she can avoid any witness-related disclosures. Those terms might change substantially, however, and agreement may be beyond reach, if full "*Giglio*" disclosure were required. In other cases, a prosecutor's principal motivation in offering an early plea might be to obtain one defendant's cooperation in the prosecution of others.[294] Often, delay can be fatal to that kind of deal.[295] A nonwaivable *Brady* rule may force such cases to trial against the better interests of both defendant and prosecutor.[296]

This assumption, as it turns out, is consistent with my conclusion in Part V. As long as courts find that a plea is not voluntary and intelligent in the absence of *Brady* disclosure, it is hard to imagine the same court upholding a waiver of access to the very information required to validate the plea. *See infra* text accompanying note 321.

[294] The Federal Sentencing Guidelines have created powerful incentives for defendants to seek "cooperation" deals as part of a plea agreement. The Guidelines empower the prosecutor to bring a motion for a downward departure on the grounds that a defendant has provided "substantial assistance" to the government. U.S. SENTENCING GUIDELINES MANUAL § 5K1.1. (2000). Prosecutors typically enjoy broad discretion in deciding when to file such motions. *See* Wade v. United States, 504 U.S. 181, 185-86 (1992) (holding that, in absence of a plea agreement requiring otherwise, prosecutor has virtually unfettered discretion in choosing whether to file substantial assistance motion); *compare* United States v. Forney, 9 F.3d 1492, 1500 (11th Cir. 1993) (holding that court would not review prosecutor's choice not to file a substantial assistance motion where plea agreement left that choice in "sole discretion" of prosecutor), *with* United States v. Isaac, 141 F.3d 477, 481-83 (3rd Cir. 1998) (ruling that courts may review prosecutor's decision for bad faith). And the Guidelines set no "floor" for such departures. Accordingly, in a great number of federal prosecutions, especially multiple defendant conspiracy cases, the prospect of a "substantial assistance motion" motivates a number of defendants to bargain by offering to cooperate with prosecutors and testify against their former partners in crime.

[295] In multiple defendant cases, the first defendant "through the door" often gets the most favorable consideration by the prosecutor. Defendants are most likely to win the government's favor, and the prized substantial assistance motion in federal cases, when they cooperate early enough to provide real assistance to the government. If a defendant waits until a handful of his codefendants have agreed to cooperate, his plea overtures are likely to be rejected by a prosecutor who already has all the assistance she will need. In the cooperation game, the familiar adage holds true: "He who hesitates is lost."

[296] In cases involving "plea and cooperation" agreements, disclosure may present an entirely different set of problems. Concerns over the credibility of cooperating defendants as trial witnesses are well documented. *See* United States v. Singleton, 144 F.3d 1343 (10th Cir. 1998) (holding that a prosecutor violates the federal anti-gratuity statute by offering sentencing leniency in exchange for testimony), *rev'd*, 165 F.3d 1297 (10th Cir. 1999) (en banc), *cert. denied*, 527 U.S. 1024 (1999). *See generally* Stephen Trott, *Words of Warning for Prosecutors Using Criminals As Witnesses*, 47 HASTINGS L.J. 1381 (1996). A careful prosecutor, intent on getting the "straight story" from a potential cooperator during initial interviews, should be careful to avoid influencing or "tainting" the witness by disclosing other evidence in the case. If *Brady* required prosecutors to disclose all favorable evidence in the course of negotiating a "plea and cooperation" deal, such disclosures could allow some cooperators to tailor their responses in an effort to curry favor with prosecutors. In such

At a minimum, a nonwaivable obligation would reduce the value of the principal commodity a defendant has to "sell" in a plea bargain: his right to take the case all the way through trial. Put simply, a defendant may get a better deal if he can sell his plea before discovery than if he is prohibited from doing so by a nonwaivable *Brady*-like rule.[297] A rational defendant may well prefer a relatively uninformed, but "cheap" plea to a more thoroughly considered, but more expensive one. Of course, one might debate whether the option of a quick, relatively uninformed plea is worth preserving. As long as parties remain free to make such deals, prosecutors could use nondisclosure as a tactic to induce ill-advised pleas. Still, if our aim is to protect some defendants against that tactic through a nonwaivable rule of pre-plea disclosure, we should at least recognize what we are giving up. The ultimate cost may be higher sentences for defendants on the whole.[298]

3. *Costs of Post-Plea Litigation*

In addition, there are costs associated with enforcing *Brady* through post-plea litigation. Any rule enforced primarily after conviction carries the cost of protracted litigation. Post-guilty plea *Brady* litigation may pose higher costs than most post-trial claims, for the simple reason that reviewing courts have no trial record to rely upon. If courts are serious about determining the likely persuasiveness of withheld information on the defendant's decision, they may have little choice but to conduct evidentiary hearings regarding what the defendant knew and when he knew it. If existing case law is any indicator, those expenditures will prove futile in most cases.[299] Ironically, even the

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instances, *Brady* disclosure for one defendant might reduce the accuracy of testimony presented against other defendants.

[297] "Rights that may be sold are more valuable than rights that must be consumed . . . ." Easterbrook, *supra* note 7, at 1975.

[298] One might argue that the capacity to promote more favorable bargains for guilty defendants may not be the best measure of a rule of criminal procedure. Still, as long as our system allows—indeed, encourages—prosecutors to make "plea and cooperation" deals, and as long as the rules of discovery continue to recognize and protect legitimate interests in witness protection, then we must acknowledge these "costs" of a mandatory pre-plea rule of disclosure. Prosecutors, quite legitimately, will see mandatory disclosure as a substantial burden in some cases, especially those cases where their aims include timely cooperation, or secrecy to protect a witness. If rules of disclosure require prosecutors to pay those costs, then they almost certainly will pass along some portion of their increased costs to defendants in the form of less favorable "deals." In some cases, that will mean no deal at all.

[299] *See supra* note 184.

occasional post-plea *Brady* "winners" may conclude their cases with another plea bargain, albeit on terms more favorable than the original deal.[300]

The costs of post-conviction litigation involve more than just the time and effort of courts, prosecutors, and defense counsel. There are intangible costs as well. The deterrent effect of criminal convictions necessarily suffers to some degree when their finality is subject to ongoing debate. Even more significant, justice suffers whenever courts and litigants divert their efforts into largely futile pursuits (as post-plea *Brady* challenges almost always turn out to be) if those efforts could be better spent elsewhere.[301] To the extent that courts, defense counsel, and policymakers are attracted by the false hope of *Brady*, they will not be pursuing alternatives that might more effectively promote informed plea bargains.[302]

On balance, defendants would be better off, and the system of plea bargaining no less fair and no less accurate, if we simply left *Brady* to the world of trials rather than straining it to solve problems it was not designed to solve. The Fifth Circuit has suggested just such an approach, treating *Brady* as a component of the Fifth Amendment right to a fair trial, waived like many other fair-trial rights when defendant pleads guilty.[303] In considering the practical impact of its ruling, the Fifth Circuit observed: "In light of the existing protections afforded individuals pleading guilty . . . , we doubt that new rules allowing individuals to challenge the validity of their pleas on

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[300] Successful post-plea *Brady* challenges have been so rare that it is hard to generalize about the likely result of a "win" by the defendant. Winners of post-trial *Brady* claims, by comparison, quite typically negotiate a favorable plea agreement with the government. *See, e.g.*, Banks v. United States, 920 F. Supp. 688, 690 n.2 (E.D. Va. 1996) (noting that codefendants were resentenced under agreements with the government when *Brady* violations came to light after trial).

[301] *Cf.* John G. Douglass, *Beyond Admissibility: Real Confrontation, Virtual Cross-Examination, and the Right to Confront Hearsay*, 67 GEO. WASH. L. REV. 191, 222 (1999) (arguing that, when defendants devote efforts to litigating admissibility of evidence under the Confrontation Clause, they may do so at the expense of other, more effective efforts to challenge the credibility of that same evidence before the jury); Stuntz, *supra* note 57, at 3-6 (arguing that modern criminal procedure doctrines often steer resources into procedural litigation when such resources could be spent on efforts aimed more directly at protection of the innocent).

[302] The California defense bar has itself fallen into such a trap. *See infra* Part V. California defense counsel seem intent upon challenging "*Brady* waivers," although their clients might be better served by embracing those very waivers and inviting courts to take them seriously. *See infra* text accompanying notes 300-06.

[303] *See* Matthew v. Johnson, 201 F.3d 353, 364-67 (5th Cir. 2000). I would disagree with the narrow characterization of *Brady* as a "trial right" to the extent that term suggests the right has no application in the pretrial context. Many rights which aim to promote fairness or accuracy at trial cannot be fully effective unless they have the power to control some pretrial behaviors. The right to counsel may be the clearest example. *See* Powell v. Alabama, 287 U.S. 45 (1932) (finding due process violation where counsel had no meaningful opportunity to prepare for trial).

grounds that the state failed to supply them with exculpatory information prior to entry of their plea will seriously enhance the accuracy of convictions."[304]

In light of *Brady*'s limited value in plea bargaining, the Fifth Circuit is probably right. But that does not mean we should give up on disclosure altogether. *Brady*'s biggest weakness stems from its bad timing: its substantive weakness, namely a narrow concept of materiality, is inextricably linked to its procedural weakness—retrospective enforcement.[305] Better informed plea bargaining will result by addressing the issue when it matters: before the plea. Ironically, at the moment when a defendant waives his traditional *Brady* right (the right to disclosure to assure a fair trial) we may find an opportunity to enhance the likelihood of a better informed plea.

V. BREAKING OFF THE ENGAGEMENT: *BRADY* WAIVERS

The California federal courts have become the principal battleground in the current debate over *Brady* and plea bargaining.[306] Prosecutors have placed explicit "*Brady* waivers" in standard plea agreements.[307] The defense bar has responded that such waivers are unenforceable.[308] For our purposes, the resulting controversy is worth exploring for three reasons. First, if "plea-related" *Brady* disclosure can be waived in a plea bargain, then a prosecutor with a word processor can easily undo what the majority of federal courts have done in applying *Brady* to plea bargains. It is doubtful that those courts will allow that.[309] Second, the California debate demonstrates and fosters a fundamental misconception about *Brady* and plea bargains. In advocating a nonwaivable, pre-plea *Brady* right, the defense bar overestimates the scope of that right because it fails to recognize how limited *Brady* becomes when we try to apply it to plea bargains. As a result, the debate is really about a great deal less than may appear on its surface, because *Brady*, when applied to plea bargains, is worth a great deal less than its proponents in the California defense bar have acknowledged. Third, and most important for purposes of this

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304 *Matthew*, 201 F.3d at 370.

305 *See supra* text accompanying notes 132-50.

306 There are several, detailed accounts of the ongoing *Brady*-waiver debate in California. *See* Blank, *supra* note 17, at 2042-45; Franklin, *supra* note 36, at 567-69; Kupers & Philipsborn, *supra* note 36, at 64-66.

307 *See* Blank, *supra* note 17, at 2042-43.

308 *See id.* at 2043-45.

309 In an opinion issued shortly before this Article went to press, a divided Ninth Circuit panel ruled that a defendant's right to receive *Brady* material cannot be waived through a plea agreement. United States v. Ruiz, 241 F.3d 1157 (9th Cir. 2001); *see also infra* note 315.

Article, the kind of *Brady* waivers actually at issue in the California debate—that is, waivers of "trial-related" rather than "plea-related" *Brady* disclosure—present a valuable opportunity to arrive at better-informed plea bargains. In other words, defendants in California and elsewhere would benefit more by embracing, rather than challenging, such waivers and by inviting courts to take them seriously.

A. *The California* Brady-*Waiver Debate*

In *Sanchez v. United States*, the Ninth Circuit ruled that a guilty plea "cannot be deemed 'intelligent and voluntary' if 'entered without knowledge of material information withheld by the prosecution.'"[310] The *Sanchez* Court adopted the now-familiar post-plea standard of materiality, holding that the defendant may withdraw a guilty plea if "there is a reasonable probability that but for the failure to disclose the *Brady* material, the defendant would have refused to plead and would have gone to trial."[311] Prosecutors in both the Northern District and the Southern District of California responded to *Sanchez* by including "*Brady* waiver" provisions in standard form plea agreements.[312] In essence, the provisions call upon defendants to waive their rights to *Brady* material as part of the plea agreement.[313]

The outcry from the defense bar was as immediate as it was predictable. Even as defendants continued to plead guilty and to sign such agreements,[314]

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[310] 50 F.3d 1448, 1453 (9th Cir. 1995) (quoting Miller v. Angliker, 848 F.2d 1312, 1320 (2d Cir. 1988)). Following the typical pattern in cases which reach the merits of a post-plea *Brady* challenge, however, the Ninth Circuit found the prosecutor's nondisclosure was not "material" to Sanchez's plea and, accordingly, affirmed her conviction.

[311] *Id.* at 1454. Without further analysis, the *Sanchez* Court merely borrowed the materiality standard from the Second Circuit's opinion in *Angliker*. 848 F.2d at 1322. *Angliker*, in turn, had derived that standard through analogy to the standard applied by the Court in determining prejudice where a defendant claims his guilty plea was the result of ineffective assistance of counsel. 848 F.2d at 1322 (citing Hill v. Lockhart, 474 U.S. 52, 59 (1985)); *see supra* text accompanying notes 165-68.

[312] *See* Blank, *supra* note 17, at 2042 n. 177.

[313] The waivers have taken a variety of forms. *See* Blank, *supra* note 17, at 2042-43. One example reads as follows:

> The defendant understands that discovery may not have been completed in this case, and that there may be additional discovery to which he would have access if he elected to proceed to trial. The defendant agrees to waive his right to receive this additional discovery which may include, among other things, evidence tending to impeach the credibility of potential witnesses.

Id. at 2043 (quoting Pamela A. MacLean, *Defense Groups Oppose Plea Bargain Waivers*, DAILY J. (San Francisco), May 27, 1998, at 1).

[314] Defense counsel have refused to sign such agreements and have advised their clients not to sign them. *See* Blank, *supra* note 17, at 2043. Clients sign, and plead guilty, nonetheless. *See id.* That somewhat

defense counsel argued that *Brady* waivers were unenforceable because, without *Brady* disclosure, the plea itself would be invalid.[315]

*B. "Plea-*Brady*" vs. "Trial-*Brady*": Defining the Rights to be Waived*

The solution to the California debate lies in defining the scope of the waivers. If the waivers are properly limited, then the answer to the enforceability debate is that both parties are right. The defendants fear that the rights they won in *Sanchez* would be meaningless if the defendants could be forced to waive those rights in exchange for a plea bargain. That argument makes sense as long as *Sanchez* is the law.[316] For their part, prosecutors resist the obligation to provide all pretrial *Brady* disclosure—especially *Giglio* disclosure regarding government witnesses—in advance of every plea.[317]

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peculiar scenario leaves one to wonder whether the attorneys' "advice" and refusal to sign are, for the most part, aimed at preserving an issue for appeal rather than actually suggesting that the defendant should go to trial. Some defense attorneys contend that they cannot sign such agreements, because to do so would violate the rules of ethics. *See* Kupers & Philipsborn, *supra* note 36, at 66. The accuracy of that contention is doubtful. It appears to be based on the three-step argument that: (1) a prosecutor cannot ethically require a defendant to waive potential claims of prosecutorial misconduct, (2) a defense attorney cannot ethically advise a defendant to agree to such a waiver; and, most critically, (3) a prosecutor commits an act of "misconduct" by entering into a plea agreement before all pretrial *Brady* and *Giglio* material has been produced. Regardless of the merits of points (1) and (2), I believe a prosecutor's ethical duties to disclose exculpatory material in advance of a plea are far from clear. *See supra* note 10.

315 *See* Blank, *supra* note 24, at 2043-45. In an opinion published shortly before this Article went to press, a divided panel of the Ninth Circuit held that a defendant's right to *Brady* disclosure is not waivable, even by explicit terms in a plea agreement. In *United States v. Ruiz*, 241 F.3d 1157 (9th Cir. 2001), the defendant challenged the government's "Fast Track" program, a case-disposition method under which the government offered a two-level downward sentencing departure for defendants who agreed to plead guilty, waive indictment, forego pretrial motions, waive appeal, and waive the right to *Giglio* disclosures regarding government witnesses. *See id.* at 1160-61, 1165-66. Ruiz pled guilty without such a plea agreement, then argued that the government violated her right to due process by failing to move for a downward departure solely because of her refusal to waive her *Brady* rights. *Id.* at 1161. In part, Ruiz claimed that the government could not penalize her for refusing to waive a right that is not waivable. *See id.* The Ninth Circuit panel agreed, holding that, "The disclosure of *Brady* evidence is just as important in ensuring the voluntary and intelligent nature of a plea bargain as it is in ensuring the voluntary and intelligent nature of a guilty plea." *Id.* at 1164. By definition, the court held, a plea agreement waiving the right to discover unknown evidence cannot be voluntary and intelligent.

As long as *Sanchez* is the law of the Ninth Circuit, *Ruiz* is not surprising. But because of the unusual procedural posture of the case, the *Ruiz* Court has never reached the more difficult problem of defining materiality in relation to a plea bargain. The court never had to explain what sort of exculpatory information might be "material" to a defendant who explicitly chose to plead guilty knowing nothing about the government's case, or how *Giglio* evidence might be relevant to a defendant unaware of the identity of government witnesses.

316 Of course, also doubtful is that those rights are worth much, for the reasons already described here.

317 Prosecutors often delay *Giglio* disclosure until late in the pretrial process to protect against harassment, threats, or harm to witnesses. *See supra* note 72. It is hardly surprising, then, that pre-plea *Giglio* disclosure

They are also right, because *Sanchez* does not require them to go that far with disclosure in any event.[318]

The rhetoric of the California debate has obscured the fundamental difference between "plea-related" materiality and "trial-related" materiality under *Brady*. *Sanchez* does not require a prosecutor (as the predicate to a plea bargain) to disclose all information that might become *Brady* material if the case ultimately went to trial. Instead, *Sanchez* requires disclosure only of that favorable evidence that is *material to the defendant's decision to plead guilty*.[319] And not all favorable evidence that might become material at trial will be "material" to a defendant when he chooses to plead guilty. Because of the matching phenomenon that Part IV considered, not all evidence that might become *Brady* material in relation to trial will be "*Sanchez* material," that is, in relation to a defendant's decision to plead.[320]

If we understand this distinction, then the California waiver debate comes into better focus. To the extent that the *Brady* waivers purport to waive future challenges to a guilty plea entered in the absence of favorable evidence material to a defendant's decision to plead, they are not enforceable as long as *Sanchez* itself remains the law. After all, the Ninth Circuit has already ruled that such a plea would be invalid because it is not "voluntary and intelligent."[321] A prosecutor trying to defend a *Sanchez* waiver would find herself in the awkward position of claiming that the plea was unintelligent but the simultaneous waiver was not. Moreover, *Sanchez* would essentially be a nullity if prosecutors could avoid it merely by placing a *Brady* waiver in the same plea agreement that they induced defendant to sign in the first place by violating *Brady*.

However, to the extent that the California *Brady* waivers purport to waive a defendant's right to receive other pretrial discovery that *Brady* and *Giglio*

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seems to be at the heart of prosecutors' concerns in drafting *Brady* waivers. Though the waivers generally cover a broad range of favorable information, they take pains explicitly to include evidence relating to the impeachment of witnesses. *See* Blank, *supra* note 17, at 2042-43 (quoting two sample waiver provisions, both of which make explicit reference to impeachment evidence).

318 *See supra* text accompanying notes 202-09, 246-57.

319 *See Sanchez*, 50 F.3d at 1454.

320 *See supra* text accompanying notes 246-57.

321 *Sanchez*, 50 F.3d at 1453. Of course, as the Fifth Circuit noted in *Matthew v. Johnson*, 201 F.3d 353, 367 (5th Cir. 2000), the fundamental ruling in *Sanchez*—that an "uninformed" plea is an "unintelligent" and therefore invalid plea—may be at odds with much of what the Supreme Court has said about plea bargains. *See supra* text accompanying notes 125-30.

might require in the event of trial,[322] there is no reason why the waivers could not be enforced. *Sanchez* itself does not require that kind of disclosure, nor does *Sanchez* hold that defendants' pleas are "unintelligent" if all trial-related *Brady* discovery is not complete.[323]

The literature generated by the California debate, which is written primarily by defense attorneys, opposes *Brady* waivers but recognizes no distinction between trial-related materiality and plea-related materiality.[324] The logical extension of that position is that no plea is valid until full trial-related *Brady* disclosure, including all *Giglio* disclosure, is complete. That argument seeks broader pre-plea disclosure than any court has yet required under the umbrella of *Brady* or, for that matter, under any other theory. The implication of that argument is that defendants who are considering a plea have greater discovery rights than those who contemplate going to trial.[325] Boiled to its essence, the

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[322] In a rough way, this is what some of the California waivers attempt to do. They acknowledge the government's obligation to disclose "information establishing the factual innocence of the defendant," but then seek to waive any obligation to disclose, e.g., impeachment material. *See* Blank, *supra* note 17, at 2042 n.178 (quoting waiver agreement); *see also* Kupers & Philipsborn, *supra* note 36, at 65 (describing prosecutors' argument as follows:

> The prosecutors have taken the position that their standard plea terms do not amount to a "*Brady* waiver" but rather a waiver of "discovery" after the plea is entered. That "discovery" includes *Giglio* material but not *Brady* material. The former can be waived; the latter cannot. They argue that it is standard practice throughout the country for defendants to enter into plea agreements without the benefit of information they would have received had they gone to trial. Chief examples of such information are *Jencks* materials and *Giglio* materials.

Id.).

[323] *Sanchez*, 50 F.3d at 1455-54.

[324] *See* Blank, *supra* note 17, at 2040 (arguing that "at the plea bargain stage," *Brady* material includes impeachment evidence, without suggesting that the doctrine might be limited in cases where defendants were not even aware of the identities of government witnesses); Kupers & Philipsborn, *supra* note 36, 66-67 (arguing *Brady* disclosure cannot be waived, but not addressing limits on materiality in the plea-bargaining context).

[325] In federal courts, for example, defendants in non-capital cases have no right to require the government to identify its witnesses before trial. The Jencks Act explicitly provides that witness statements are not subject to discovery until trial has begun. 18 U.S.C. § 3500(a) (1994). Pretrial disclosure of impeachment evidence, i.e., *Giglio* material, however, often results in identifying witnesses and sometimes would include disclosing their statements. In most cases, prosecutors disclose both *Giglio* and Jencks material (witness statements) before trial. But often they elect to delay such disclosure until trial out of concern for the safety of witnesses. In such cases, a prosecutor's *Giglio* obligation may conflict with the time limits in the Jencks Act. Some federal courts have held that the Jencks time limits restrict *Giglio* disclosure before trial. Others have adopted a case-by-case "balancing" approach. *See, e.g.*, United States v. Beckford, 962 F. Supp. 780, 789-92 (E.D. Va. 1997) (identifying federal circuit court split and collecting cases). But none has held that *Giglio* material must always be produced in advance of trial. The position of the defense advocates in the California debate, by contrast, would have the effect of requiring *Giglio* production in advance of the plea and therefore, in most cases, in advance of trial.

California defense position would require federal prosecutors to disclose their witnesses for defendants contemplating a guilty plea, where Congress and the federal courts have declined to require such disclosure for defendants contemplating trial.[326] While I am sympathetic to arguments for expanding pretrial discovery, courts merely encourage gamesmanship when they pursue that goal through the back door of the guilty plea.

Whether the California defense position makes sense as a tactical matter is also questionable. There are plenty of cases in which both prosecutors and defendants may benefit from striking a deal without awaiting all discovery that *Brady* and *Giglio* might require in the event of trial.[327] The case of the defendant who seeks to minimize his punishment by cooperating at the earliest possible stage in the investigation and prosecution of others may be the most typical. There, speed is often of the essence and full disclosure is often impractical and sometimes inadvisable.[328] If the *Brady*-waiver opponents really seek to outlaw such pleas, I would caution them to "be careful what they ask for." They might achieve more "justice" than their clients really want.

C. Turning Adversity into Opportunity: Taking Brady *Waivers Seriously*

To the extent that the California waivers address "trial-related" rather than the narrower category of "plea-related" *Brady* material, they do not call upon defendants to give up anything that most defendants do not already give up when they enter a plea before pretrial discovery is complete. The principal effect of an explicit "*Brady* waiver," therefore, may be to inform the defendant of another trial-related right that he is giving up by pleading guilty. As a result, and somewhat ironically, explicit *Brady* waivers may actually lead to better informed pleas. At a minimum, a defendant confronted with a *Brady* waiver must give a moment's thought to issues of disclosure. That is more than may now occur before many guilty pleas.

More importantly, a waiver of rights at the time of a guilty plea should require at least a moderate dose of judicial scrutiny.[329] In the *Brady* context,

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[326] *See* Douglass, *supra* note 51, at 2136 (describing unsuccessful efforts to expand witness-related discovery rules in federal courts).

[327] *See supra* text accompanying notes 293-96.

[328] *See supra* note 295.

[329] *Cf.* Boykin v. Alabama, 395 U.S. 238 (1969) (holding that a court must apprize defendant in person, on the record, regarding rights waived by guilty plea). Similarly, in the context of a waiver of the right to counsel, the Court has long held that such waiver may not be presumed from silence. *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938). Instead, the Court requires a detailed, open-court examination of the

an appropriate inquiry might begin with the simple question, "What has the prosecutor told you about her evidence?" The Court might then describe the available avenues of discovery that, by pleading guilty, defendant would forego. At a minimum, then, a defendant would plead guilty with a more precise idea of what he was "missing." Moreover, the anticipation of that kind of judicial inquiry might spur the prosecutor to be more forthcoming with discovery at the pre-plea stage.[330] Whether defendant waives his *Brady* rights explicitly in a plea agreement—as in the California cases—or by virtue of the plea itself—as under the Fifth Circuit's approach[331]—the waiver should require a court to do something that few courts otherwise do: to address issues of disclosure at the time of the guilty plea colloquy in order to determine whether the *Brady* waiver itself is a voluntary and intelligent waiver of rights.[332]

There are two substantial benefits that would flow from such a colloquy. First, it would thrust courts into a more active role in reviewing disclosure issues *before* the plea, a time at which judges will be much less tolerant of nondisclosure than in the typical post-trial or post-plea *Brady* review.[333] Moreover, even that limited judicial involvement, in many cases, would spur both prosecutors and defense counsel to be more explicit in defining the terms of their informal discovery.[334] Because misunderstandings and false assumptions, rather than deliberate deception, are at the heart of many *Brady* claims,[335] a dose of clarity would go a long way in the plea bargaining

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accused to make certain that the waiver represents "an intentional relinquishment or abandonment of a known right." *Id.* at 464.

[330] It might also encourage prosecutors to scrutinize charging decisions more thoroughly. *See infra* text accompanying note 292.

[331] *See* Matthew v. Johnson, 201 F.3d 353, 367-69 (5th Cir. 2000).

[332] By comparison, under current federal rules, waiver of the right to jury trial, the right of confrontation, and the right against self-incrimination all must be addressed explicitly in the guilty-plea colloquy. *See* FED. R. CRIM. P. 11(c); *see also supra* note 77.

[333] It would be hard to pursue such a colloquy with the defendant without at least some judicial inquiry of the prosecutor regarding the nature of information already disclosed, and some discussion of the categories of information that remained undisclosed. The mere asking of those questions would be enough to encourage many prosecutors, before the guilty plea proceeding, to make certain that they conducted both discovery and plea bargaining in a manner that would be viewed favorably by the court. While the existing rules of pretrial discovery might allow a prosecutor to respond, "Your honor, I told defendant nothing because I'm hoping that he will plead in total ignorance," few prosecutors would want to subject themselves to the judicial rejoinder to such a position. And a court unsatisfied with the prosecutor's response would have the power to delay acceptance of a guilty plea until pretrial discovery had progressed to a more satisfactory stage.

[334] A detailed "discovery colloquy" before guilty pleas would have an additional benefit as well. It would spur defense counsel to pursue discovery more actively before recommending a guilty plea, because he would have to describe—and perhaps defend—his discovery efforts in open court.

[335] *Brady* applies "irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1965).

environment. Second, in those jurisdictions that allow post-plea *Brady* challenges, such a plea colloquy would create the record that is now missing from post-plea *Brady* claims. If courts took such *Brady* waivers seriously, as they should, they would put a foundation under the post-plea *Brady* "castle in the air."[336]

In sum, the California *Brady*-waiver debate is about less—and more—than may appear on its surface. A victory for defendants—in rendering the waivers unenforceable—ultimately may mean little, because *Brady* functions so poorly as a rule for governing disclosure in plea bargaining. Still, the debate points the way toward something potentially more valuable: a chance to obtain judicial scrutiny of disclosure issues *before* a defendant enters his plea. If a guilty plea—or an explicit provision in the plea agreement—waives *Brady* claims, then courts should take that waiver seriously: something few courts do under current practice. The waiver process itself might offer more meaningful protection than courts could ever wring out of *Brady* through retrospective enforcement.

CONCLUSION

Brady presents a rule with noble aspirations. It reflects the highest calling of a prosecutor, "not to achieve victory but to establish justice."[337] The notion that the same rule might govern plea bargaining—the process that decides most criminal cases—is almost too attractive to resist. Regrettably, that is a fatal attraction. Plea bargaining brings out the worst in *Brady*.

In the context of trial, *Brady* suffers from a severe case of bad timing. *Brady* establishes a retrospective standard for defining a prospective obligation. That is, it requires the prosecutor to disclose favorable evidence before or during trial. But it measures that obligation by looking back on the outcome of trial. The resulting standard of narrowly limited "materiality" is *Brady*'s greatest weakness. A guilty plea only magnifies that weakness, by

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[336] Thoreau wrote, "If you have built castles in the air, your work need not be lost; that is where they should be. Now put the foundations under them." THOREAU, *supra* note 242, at 245. Promoting disclosure in plea bargaining is a laudable goal, a "castle in the air" that appeals to our sense of fair play. But the current pursuit of that goal through a modified *Brady* doctrine is doomed, at least in part, because guilty pleas do not create a foundation: the record necessary for enforcing that doctrine. *See supra* text accompanying notes 187-97. If, on the other hand, courts made even limited efforts to establish a "disclosure record" at the time of the guilty plea, then post-plea review might become a more realistic possibility.

[337] *Brady*, 373 U.S. at 87 n.2 (quoting Simon E. Sobeloff, Solicitor General of the United States, Address before the Judicial Conference of the Fourth Circuit (June 29, 1954)).

requiring a court to assess the materiality of evidence not in relation to the record from a trial, but in relation to the complex and largely undocumented factors which may have affected the defendant's choice to plead guilty. Worse yet, because the prosecutor controls pre-plea disclosure of most inculpatory evidence, she often can control which favorable evidence does, or does not, become "material" to the defendant's decisionmaking. In plea bargaining, then, *Brady* emerges as a diluted version of an already weakened rule. For defendants who plead guilty, *Brady* offers little of the promise that its noble origins might suggest.

We would contribute more to the fairness of plea bargaining by considering pre-plea procedures aimed at promoting disclosure, rather than relying upon an after-the-fact remedy that is doomed to failure. If we are serious about better-informed guilty pleas, then we should address the problem when it matters most: before the plea. Providing a fully informed waiver of *Brady*, as a trial right, may offer more to many defendants than the strained effort to reinvent *Brady* as a right attached to plea bargaining.

In the end, much of the futility in applying *Brady* to plea bargaining arises because courts have tried to force *Brady* to do more in the context of a guilty plea than the rules of discovery—including *Brady*—can do for defendants who go to trial. It is unrealistic to expect courts to develop a broad right for defendants to be well informed in advance of a plea when there is no corresponding right to be well informed in advance of a trial. When we struggle to define distinct "plea-related" discovery rules, we are really asking the wrong questions. We would do better by pursuing discovery reforms that offered all defendants a right to be ready for their adversarial contest with the government, whether the contest ended in a plea or a trial.