Disclosure and Accuracy in the Guilty Plea Process

Kevin C. McMunigal

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_law_journal/vol40/iss5/2

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.
Disclosure and Accuracy in the Guilty Plea Process

by

KEVIN C. McMUNIGAL*

Consider the following disclosure problem. The government indicts a defendant on an armed robbery charge arising from a violent mugging. The prosecution's case is based entirely on the testimony of the victim, who identified the defendant from police photographs of persons with a record of similar violent crime. With only the victim's testimony to rely on, the prosecutor is unsure of her ability to obtain a conviction at trial. She offers the defendant a guilty plea limiting his sentencing exposure to five years, a significant concession in light of the defendant's substantial prior record and the fact that the charged offense carries a maximum penalty of fifteen years incarceration. As trial nears, the victim's confidence in the identification appears to wane. The robbery took place at night. He was frightened and saw his assailant for a matter of seconds. The victim refuses to talk to the defense, but confides to the prosecutor his fear of a mistake in the photo identification. He is now unsure if the man he picked from the police photographs is the man who robbed him. On the eve of trial, the defendant responds to the prosecutor's plea offer. He indicates that he is willing to plead guilty if the prosecutor will limit the sentence to one year. Is the prosecutor free to accept a guilty plea without disclosing the victim's statement of uncertainty about the identification?

The prosecutor who tries a criminal case is bound by a constitutional and ethical duty of disclosure. The seminal constitutional case, *Brady v. Maryland,*\(^1\) articulates a rule grounded in due process mandating disclosure of material evidence favorable to the defendant. The past twenty-six years have seen the *Brady* rule established as a familiar feature

---

* Assistant Professor of Law, Case Western Reserve University; B.A. 1973, Stanford University; J.D. 1979, University of California, Berkeley. I thank Kathryn Boselli, Wayne Brazil, Rebecca Dresser, Frank H. Easterbrook, Paul Giannelli, Lew Katz, Gerald Korngold, Jeff Lawrence, Robert Lawry, William Marshall and Robert Strassfeld for helpful comments on earlier drafts. I also thank Dominic DiPuccio and Michael Smith for their research assistance and Heidi Emick for her invaluable secretarial support.

of constitutional criminal procedure. It is cited in hundreds of opinions, routinely invoked in criminal trial courts, treated in virtually every modern criminal procedure text, and echoed in the ethical mandates of the prosecutor's office. C\textasciitilde;\textasciitilde;e would think that during its twenty-six year history the question of the \textit{Brady} rule's application to cases in which guilt is determined by guilty plea—the vast majority of federal and state criminal cases\textsuperscript{3}—would have been resolved. Despite widespread familiarity with the \textit{Brady} rule, however, the prosecutor's disclosure obligation in situations such as the one posed in the introductory hypothetical remains uncertain. The constitutional, ethical, and statutory requirements for such disclosure are largely unresolved.

This ambiguity in the rules of plea bargaining is striking. 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.\textsuperscript{4} Yet few have attempted to analyze or answer the question of disclosure of \textit{Brady} material in the guilty plea process.\textsuperscript{5} The fact that the guilty plea is the primary means for resolving criminal cases suggests the importance of the issue. One might conclude that \textit{Brady} disclosure in the guilty plea context is at least as important as in the trial context because of the much greater frequency of guilty pleas. Examination of the dynamics of plea bargaining reveals

\begin{itemize}
\item \textsuperscript{2} See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(d) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(B) (1980). The full text of these rules is set forth infra note 206.
\item \textsuperscript{3} The United States Supreme Court has estimated that "well over three-fourths of the criminal convictions in this country rest on pleas of guilty." \textit{Brady} v. United States, 397 U.S. 742, 752 (1970). An analysis of the use of guilty pleas in 14 jurisdictions throughout the United States published in 1987 revealed that "[t]he median ratio of pleas to trials among these 14 jurisdictions is 11 pleas for every trial." \textsc{Bureau of Justice Statistics, U.S. Dep't of Justice, The Prevalence of Guilty Pleas 2} (1987) [hereinafter \textsc{Justice Dep't Statistics}]. A recently published study of felonies in nine county court systems in Illinois, Michigan, and Pennsylvania found that "[c]ontested trials account for less than 8 percent of all dispositions, whereas guilty pleas and diversions together account for more than 81 percent of all dispositions and 93 percent of all convictions." P. Nardulli, J. Eisenstein & R. Fleming, \textit{The Tenor of Justice} 203 (1988).
\item \textsuperscript{5} The phrase "\textit{Brady} material" is used in this Article as a shorthand term for evidence that would qualify for disclosure pursuant to the \textit{Brady} rule under current Supreme Court doctrine if the case were tried. The phrase "\textit{Brady} cases" is used as a shorthand term for cases in which \textit{Brady} material exists.
\end{itemize}
that *Brady* disclosure in the guilty plea context is more significant than even the figures on the frequency of guilty pleas suggest. As the analysis set forth in section II(B) indicates, the dynamics of the plea negotiation process tend to direct prosecuted cases posing *Brady* disclosure questions away from trial and into the guilty plea process for resolution. In fact, the more exculpatory the information, the greater the pressure toward resolving the case by guilty plea rather than by trial.

This Article advocates mandatory disclosure of *Brady* material to criminal defendants who plead guilty. Although the primary focus is on the constitutional dimension of disclosure, the Article also makes a case that ethical and statutory rules should require the disclosure of *Brady* material in the guilty plea process. Section I reviews the origins and significance of the *Brady* rule as well as the importance of examining the accuracy implications of disclosure in plea negotiations. Section II maintains that *Brady* disclosure would enhance the factual accuracy\(^6\) of guilty pleas. Such disclosure would reinforce the reliability of confessions underlying guilty pleas\(^7\) by enhancing two distinct factors on which that reliability depends: the knowledge and the sincerity of the defendant.\(^8\) First, *Brady* disclosure will enhance the reliability of confessions when the defendant literally does not know facts critical to his own criminal liability. The force of this claim is clearly limited to *Brady* cases presenting defects in the defendant's knowledge. Second, and more generally, *Brady* disclosure will help safeguard the defendant's sincerity in confessing by providing a check on the considerable pressure to plead guilty, regardless of guilt or innocence, that tends to be generated in the plea negotiation of *Brady* cases. The force of this claim is broader than the first claim since it extends to all prosecuted *Brady* cases. An economic model of plea bargaining utilized by Judge Frank Easterbrook illustrates the corrosive influence that a *Brady* disclosure rule restricted to trial

---

6. By "factual accuracy" I mean an accurate determination of the questions of historical fact necessary to determine whether or not the elements required by the definition of the charged offense and any applicable defenses have been fulfilled.

7. "Central to the [guilty] plea and the foundation for entering judgment against the defendant is the defendant's admission in open court that he committed the acts charged in the indictment." *Brady v. United States*, 397 U.S. at 748. The accuracy of a guilty plea is not dependent on the defendant's confession in the unusual situation of an "Alford plea." In such cases, the defendant entering a plea of guilty refuses to admit guilt and the government provides the factual basis for the plea. See North Carolina v. Alford, 400 U.S. 25, 28, 38 n.10 (1970).

would have on the accuracy of the results of plea negotiations. In section III the Article proposes due process, ethical, and statutory approaches to implementing the Brady rule in the guilty plea process.

I. The Issue: Brady Doctrine and the Accuracy of Guilty Plea Convictions

A. The Brady Rule

The starting point for any discussion of the Brady doctrine is the original and most often cited formulation of the Brady rule: "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."9 The original Brady opinion went on to define "evidence favorable to the accused" as that which "would tend to exculpate him or to reduce the penalty."10 The wording of the rule indicates that its operation is contingent on a number of factors, such as the materiality of the evidence and a defense request. Arguing that Brady implies a constitutional right to broad discovery and disclosure in criminal proceedings, proponents of government openness in criminal proceedings have urged expansive interpretation of these factors.11

The Supreme Court, however, has rejected explicitly the claim that Brady created a constitutional right to discovery.12 Rather than reading

10. Id. at 88. Lower courts have varied in interpreting the term "evidence" in the Brady rule. Some view Brady material as limited to admissible evidence, but others include material that could readily lead to the discovery of admissible evidence. Still others treat admissibility as irrelevant. Y. Kamisar, W. LaFave & J. Israel, supra note 4, at 1159; see also Comment, The Prosecutor's Duty to Disclose: From Brady to Agurs and Beyond, 69 J. Crim. L. & Criminology 197, 209-11 (1978) (authored by Michael E. Rusin) (discussing admissibility as a factor in determining materiality of exculpatory evidence).
the Brady rule expansively, the Court has limited its scope severely through a tightly circumscribed definition of materiality, restricting the disclosure obligation to evidence that is highly outcome determinative in the context of the particular case. Evidence currently qualifies for Brady disclosure “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.”

While the Court’s current treatment of materiality is quite restrictive, its treatment of other factors dictating the scope of the prosecutor’s disclosure obligation has been more generous. For example, although use of the word “suppression” in the Brady rule suggests that it is aimed at purposeful concealment of evidence, subjective culpability on the part of a particular prosecutor is not required. The original Brady rule clearly makes the fact of good faith or bad faith irrelevant. Rather than focusing solely on the particular prosecutor handling the case at the time the disclosure issue arises, the rule focuses on the prosecutor’s office as an entity. In addition, the Court has included impeachment evidence as a type of exculpatory evidence encompassed by the rule.

In comparison with the factors treated above, the fate of the request facet of the Brady rule under current doctrine is more ambiguous. At one time, the Court treated a defense request for specific information as triggering a broader materiality standard than that applicable if either no request or a general request had been made. Under present doctrine, however, the request has no explicit effect on the scope of the materiality standard. The request is relegated to the vague status of a fact that “the reviewing court may consider . . . in light of the totality of the circumstances” in applying the materiality standard.

14. Brady v. Maryland, 373 U.S. at 87 (withholding material, exculpatory evidence following a request by the accused violates due process “irregardless of the good faith or bad faith of the prosecution”).
17. See United States v. Agurs, 427 U.S. 97 (1976). According to Agurs, if a specific request had been made for the item of evidence, it was material if it “might have affected the outcome of the trial.” Id. at 104. If no request or a general request had been made, evidence was material if it created “a reasonable doubt which did not otherwise exist.” Id. at 112.
B. Application of the *Brady* Rule in Plea Bargaining

The *Brady* rule's original formulation does not address the issue of its application to guilty pleas and their negotiation. Nor does the *Brady* case address this issue elsewhere.\(^{19}\) 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.\(^{20}\) Although the question of the *Brady* rule's application to guilty pleas has been posed by leading scholars in the area of criminal procedure and ethics,\(^{21}\) few have attempted to analyze or resolve the question.\(^{22}\) Some commentators have simply assumed without analysis that *Brady* applies

---

19. This fact is not surprising in light of the uncertain legitimacy of the negotiated guilty plea at the time *Brady* was decided. In 1963 the Supreme Court had not yet adopted its current attitude toward the negotiated guilty plea as an essential and highly desirable part of the criminal process. The Supreme Court had not even recognized the negotiated guilty plea as a major component of the criminal process, much less accepted it as the primary mechanism for resolving questions of guilt. See Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 40 (1979). The Supreme Court has stated in reference to the negotiated guilty plea that it was not until the decision in Santobello v. New York, 404 U.S. 257, 260 (1971), "that lingering doubts about the legitimacy of the practice were finally dispelled." Blackledge v. Allison, 431 U.S. 63, 76 (1977).


21. See G. BELLOW & B. MOULTON, supra note 4, at 352; Y. KAMISAR, W. LAFAVE & J. ISRAEL, supra note 4, at 1221-22; A. KAUFMAN, supra note 4, at 387; T. MORGAN & R. ROTUNDA, supra note 4, at 269; S. SALTBURG, supra note 4, at 774 n.34.

22. Two student commentators have considered the issue. See Note, *The Prosecutor's Duty to Disclose to Defendants Pleading Guilty*, 99 HARV. L. REV. 1004 (1986); Comment, Disclosure to the Guilty Pleading Defendant: *Brady* v. Maryland and the *Brady* Trilogy, 72 J. CRIM. L. & CRIMINOLOGY 165 (1981) (authored by Lee Sheppard). The limited analysis of this issue to date may be explained in a number of ways. The issue seldom is raised before courts since *Brady* violations are hard to detect. Unless the defendant somehow fortuitously learns of the exculpatory information and the prosecution's possession of it, a *Brady* violation will never come to light. Moreover, since a guilty plea eliminates trial and appeal as well as the investigation, preparation, and participation of counsel that trial and appeal entail, there is less chance a *Brady* violation will come to a defendant's attention. Thus, defendants who plead guilty are seldom in a position to raise the issue. The small number of lower court cases dealing with *Brady* violations in the guilty plea context is consistent with this proposition. Defendants also may be unwilling to raise the issue even if a *Brady* violation is discovered after entry of a guilty plea because to do so may require an admission of perjury if the defendant's admission to the crime was made under oath. Courts have held that a defendant's statements made under oath during a guilty plea proceeding may form the basis for a perjury charge if the defendant later testifies contrary to the earlier statements. See United States v. Gleason, 766 F.2d 1239, 1245 (8th Cir. 1985), cert. denied, 474 U.S. 1058 (1986); State v. Bennett, 370 S.E.2d 120, 123-27 (W. Va. 1988).
in the guilty plea context.\textsuperscript{23} The few courts that have addressed the issue have been divided.\textsuperscript{24} Their analysis has been varied and generally superficial.

The ethical and statutory mandates for disclosure during plea bargaining are in a similar state of disarray. The Federal Rules of Criminal Procedure, for example, simply fail to address the issue. While the subject of negotiation ethics has drawn significant scholarly interest in recent years, the topic has tended to produce "more heat than light."\textsuperscript{25} One issue on which little, if any, consensus has been achieved is that of disclosure in negotiation. Consequently, the ethical context in which prosecutorial disclosure issues occur is "a normative no-man's land."\textsuperscript{26}

Cogent arguments for prosecutorial disclosure in the guilty plea process can be predicated on a number of rationales. Claims for disclosure might simply be based on a notion of fairness in negotiating.\textsuperscript{27} Alterna-

\textsuperscript{23} See McDonald, Cramer & Rossman, Prosecutorial Bluffing and the Case Against Plea Bargaining, in Plea Bargaining 1, 6 (McDonald & Cramer eds. 1980) [hereinafter Prosecutorial Bluffing].

\textsuperscript{24} Compare Campbell v. Marshall, 769 F.2d 314, 322 (6th Cir. 1985) (finding the prosecution's non-disclosure of \textit{Brady} material during plea bargaining "certainly objectionable," but noting that "there is no authority within our knowledge holding that suppression of \textit{Brady} material prior to trial amounts to a deprivation of due process.") and United States v. Wolczik, 480 F. Supp. 1205, 1210 (W.D. Pa. 1979) ("a defendant cannot expect to obtain \textit{Brady} material for use in a pretrial decision to plead guilty") with Fambo v. Smith, 433 F. Supp. 590, 598 (W.D.N.Y. 1977) (refusing to overturn the guilty plea conviction in the case due to lack of prejudice, but stating that "[i]n order to maintain the integrity of the plea bargaining process and to assure that a guilty plea entered by a defendant is done so voluntarily, knowingly and intelligently, a prosecutor has a duty, during the course of plea bargaining, to disclose to the defendant evidence that is as clearly exculpatory of certain elements of the crime charged as is the contested evidence in this case.") aff'd, 565 F.2d 233 (1977); Lee v. State, 573 S.W.2d 131, 134-35 (Mo. Ct. App. 1978) (holding that when "exculpatory evidence existed at the time of the guilty plea which reasonably would have led the defendant not to so plead" and "was known to and suppressed by the prosecutor . . . the defendant should be entitled to withdraw his guilty plea.") and Ex Parte Lewis, 587 S.W.2d 697, 701 (Tex. Crim. App. 1979) ("We hold that the prosecutor's duty to disclose favorable information (whether relating to the issue of competence, guilt, or punishment) extends to defendants who plead guilty as well as to those who plead not guilty."). When the prosecutor has failed to disclose strategic information during plea bargaining that would have changed the defendant's mind about entering a guilty plea but did not bear on guilt or punishment, courts have refused to find a \textit{Brady} violation. See, e.g., People v. Jones, 44 N.Y.2d 76, 85, 375 N.E.2d 41, 44-45 (finding no \textit{Brady} violation based on prosecutor's failure to disclose death of complaining witness during plea bargaining), cert. denied, 439 U.S. 846 (1978).

\textsuperscript{25} Hazard, \textit{The Lawyer's Obligation to be Trustworthy When Dealing with Opposing Parties}, 33 S.C.L. REV. 181, 192 (1981) (discussing the Kutak Commission's 1980 proposal of an ethical rule of fairness in negotiations encompassing a duty of disclosure of material facts). The current state of negotiation ethics is reviewed in more detail in section III(B).

\textsuperscript{26} McDonald, Cramer & Rossman, \textit{Prosecutorial Bluffing}, supra note 23, at 3.

\textsuperscript{27} See Rubin, \textit{A Causerie on Lawyers' Ethics in Negotiation}, 35 LA. L. REV. 577, 589-93 (1975). The Supreme Court has stated that the considerations it has relied on in finding the
tively, disclosure could be viewed on deontological grounds as an intrins-ic right of the defendant and an intrinsic obligation of the prosecutor. One also could assert that failure to disclose vitiates the waiver of constitutional rights inherent in a guilty plea by rendering it "unintelligent."28 Analysis of plea bargaining as a market mechanism29 might lead to the claim that failure to disclose results in inefficiency.

The few commentators, courts, and model code authors venturing an answer to the question of the appropriateness of prosecutorial disclosure in plea bargaining have ignored, denied, or discounted an accuracy rationale focusing on the protection of innocent defendants from conviction. Professor Uviller has commented that an accuracy rationale should render prosecutorial disclosure of Brady material irrelevant.30 Another commentator, while arguing for application of Brady to guilty pleas, has discounted the risk that failure to apply Brady could lead to innocent defendants pleading guilty.31 Although some courts dealing with the is-

28. See Comment, supra note 22 at 185-189; Comment, The Case for Preplea Disclosure, 90 YALE L.J. 1581, 1582-83 (1981) (authored by Eleanor J. Ostrow) ("disclosure must be broad in scope to ensure the defendant a meaningful opportunity to assess his chances of acquittal, and thereby to make meaningful the consent on which the legitimacy of plea bargaining rests"). The standard for determining the validity of a guilty plea "was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford, 400 U.S. 25, 31 (1970).

29. For an essay using the tools of positive economics to analyze the market-like features of plea bargaining, see Easterbrook, Criminal Procedure as a Market System, 12 J. LEGAL STUD. 289, 308-22 (1983).


31. Note, supra note 22, at 1013-14 (During plea bargaining, suppression of evidence favorable to the accused poses two dangers: it could either induce innocent defendants to plead guilty or compel guilty defendants to plead guilty to charges more serious than the crimes they committed. The first of these problems "shocks our sensibilities, but is less important than it seems: observers agree that the criminal justice system accuses very few truly innocent persons of crime."). The primary danger posed by failure to apply Brady, according to this commentator, is the inaccuracy of compelling "guilty defendants to plead guilty to charges more serious than the crimes they committed," a risk presented because failure to disclose unfairly erodes the defendant's bargaining power in plea negotiations. Id. at 1015. Another student commentator has used various models to analyze the issue of the Brady rule's application to plea negotiations, among them a "factual basis" model related to accuracy. Comment, supra note 22, at 192-95. This Comment's treatment of the "factual basis" model and the general topic of accuracy is cursory. The Comment rejects the "factual basis" model, along with several other models, since they "fail to provide an adequate safeguard of the guilty pleading defendant's right to disclosure because their logically appealing distinctions break down when applied to real cases." Id. at 196.
sue have mentioned accuracy in passing, none have explored the accuracy implications or placed primary reliance on this ground. The few model codes requiring disclosure prior to a guilty plea have utilized primarily a fairness, and not an accuracy, rationale. Perhaps the failure to recognize or utilize an accuracy rationale stems from the fact that the alternative rationales for disclosure suggested above intuitively seem better suited for assessing negotiations than an accuracy rationale. It would seem inapt, for instance, to evaluate the negotiation of a sale price, contract term, or settlement of a civil case in terms of "accuracy." Rather, it seems more appropriate to evaluate the bargaining process and its results in terms such as fairness or efficiency. Nonetheless, there are several important reasons for exploring the accuracy implications of disclosure in plea negotiations.

First, the accuracy issue derives its deepest significance simply from the importance of avoiding the conviction and punishment of the innocent. Shielding the innocent from punishment is pervasive in the justifications for punishment that form the underpinnings of the substantive criminal law. The closely related ideal of accurate determination of

32. In Fambo v. Smith, 433 F. Supp. 590, 599 (W.D.N.Y. 1977), for example, the court noted that without Brady material being disclosed, "the trial court that accepted the plea could not, in fact, satisfy itself in any meaningful sense that petitioner's guilty plea was voluntarily and intelligently made by an informed defendant with adequate advice of counsel, and that there was nothing to question the accuracy and reliability of this defendant's admission that he had committed the crime with which he had been charged." The court, however, ventured no further in analyzing the accuracy implications of Brady disclosure for guilty pleas.

33. Details of these codes are provided infra section III(B).

34. The lodestar of modern substantive criminal law codification and reform, the Model Penal Code, provides that one of its general purposes is "to safeguard conduct that is without fault from condemnation as criminal." MODEL PENAL CODE § 1.02(1)(c) (1962). The comment to this section states:

The penal law promotes the general security not only by repressing conduct that is properly condemned as criminal but also—and no less importantly—by building confidence that those whose conduct does not warrant moral condemnation will not be convicted of a crime. This is, indeed, a necessary corollary of the nulla crimen sine lege principle. The values sought to be protected by the rule of law demand as well that law should be so fashioned that abusive condemnation is not sanctioned in its name.

1 MODEL PENAL CODE AND COMMENTARIES § 1.02 comment 2c (1985). For a review of approaches to the issue of punishing the innocent among major legal theorists, see M. Golding, PHILOSOPHY OF LAW 79-83 (1975). Endorsement of the value of protecting the innocent from the criminal sanction has not, however, been universal. See, e.g., B. Wootton, CRIME AND THE CRIMINAL LAW 32-84 (1963). The general tenor of theorists such as Lady Wootton is that "[m]oral innocence should . . . give way to social dangerousness as the basis for a criminal disposition." Kadish, The Decline of Innocence, 26 CAMBRIDGE L.J. 273, 273 (1968).
guilt in the distribution of punishment is also widely shared and deeply rooted in the tradition of due process.\textsuperscript{35}

The negotiated guilty plea necessarily implicates these values. A guilty plea is a criminal conviction.\textsuperscript{36} As such it stigmatizes a defendant\textsuperscript{37} and legitimizes the exercise against him of the state's most coercive power, the criminal sanction. The combination of stigma and risk to liberty and life inherent in the negotiated guilty plea make it unlike other negotiations, such as a sale, a contract, or the settlement of a civil case. It makes accuracy as a criterion for assessing guilty pleas and the guilty plea process not only cogent, but critical. The fact that the aspiration for accuracy in the criminal process is highly and widely valued makes the issue of accuracy a logical starting place and a valuable point of reference in resolving the uncertainty surrounding prosecutorial disclosure in plea bargaining. Thus, because the same values and concerns are implicated, accuracy is as important in the guilty plea context as it is in the trial context.\textsuperscript{38}

\textsuperscript{35} The emphasis on accuracy in the current Supreme Court's articulated hierarchy of values is reflected in its recent statement that "the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986). The Court's stated commitment to accuracy is discussed infra notes 141-48 and accompanying text. Justice Brennan, a frequent critic of current criminal procedure doctrine, has stated that "[i]t is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." In re Winship, 397 U.S. 358, 364 (1970). One of the traditional objectives of due process "is the goal of insuring the reliability of the guilt-determining process—reducing to a minimum the possibility that any innocent individual will be punished." Kadish, Methodology and Criteria in Due Process Adjudication—A Survey and Criticism, 66 YALE L.J. 319, 346 (1957).

\textsuperscript{36} "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." Boykin v. Alabama, 395 U.S. 238, 242 (1969).

\textsuperscript{37} "[T]he fact that [a person] has been convicted and punished ... stamps a mark upon him for life." 2 J. Stephen, A History of the Criminal Law of England 81 (1883).

\textsuperscript{38} This is not an entirely uncontroversial premise. My argument posits a paradigm of the guilty plea as an adjudication of the historical facts determining criminal liability, a procedural device aimed in part at accurately answering the same questions of fact submitted to the jury in the usual criminal trial. A different and competing view of the guilty plea sees it as a form of dispute resolution in which factual issues are compromised rather than adjudicated, as in the settlement of a civil case. See Alschuler, The Changing Plea Bargaining Debate, 69 CALIF. L. REV. 652, 683-87 (1981). An argument such as mine, premised on the value of promoting accurate answers in the guilty plea process to the factual questions posed by a criminal charge, obviously is rendered irrelevant if one adopts the view that the guilty plea does not and should not provide accurate answers to these factual questions. The Supreme Court's attitude toward the guilty plea at times appears to reflect adherence to the adjudication model of the guilty plea, and at other times to reflect adherence to the compromise model. See infra note 171.
A second reason to explore the accuracy implications of disclosure in plea negotiations is the need to correct the failure of commentators, courts, and code drafters to realize that the issue has accuracy implications. One commentator, for example, has stated that a view of the criminal process as a "search for the truth," an accuracy-oriented perspective, would lead to the conclusion that the prosecutor's disclosure of exculpatory information should be irrelevant in the guilty plea process. Such a rejection of accuracy claims springs from failure to examine fundamental assumptions about guilty pleas and to appreciate the effect of disclosure rules on the dynamics of the plea bargaining process. Examination of these assumptions and assessment of the interaction between disclosure rules and the dynamics of plea negotiation is aided significantly by disentangling accuracy claims from claims based on other rationales and evaluating them independently.

Third, arguing for Brady disclosure in terms of its accuracy implications responds to current Supreme Court doctrine. Application of the Brady rule as a due process requirement for guilty pleas could founder on a number of doctrinal hazards: the Supreme Court's restrictive view of the Brady rule, its optimistic view of the accuracy of guilty pleas, or the expansive view of the loss of constitutional rights through waiver or forfeiture, which the Court has found implicit in guilty pleas. Without attempting exhaustive treatment of each of these areas of Supreme Court doctrine, section III(A) suggests that an accuracy rationale for applying the Brady rule to guilty pleas holds promise as a means for eluding these doctrinal hazards, largely because of accuracy's recent ascendancy in the Supreme Court's stated hierarchy of criminal procedure values and, in particular, accuracy's prominence in the Supreme Court's writing about both Brady and guilty plea doctrine.

A constitutional disclosure rule grounded in due process is not the only means for achieving disclosure of Brady material in the guilty plea context. It also could be achieved by ethical rule or statute. Thus, a fourth reason to examine the accuracy implications of Brady disclosure is to provide a rationale for shaping both the ethical and statutory rules of plea bargaining. Section III(B) is devoted to the ethical and statutory aspects of Brady disclosure in the guilty plea process.

39. Uviller, supra note 30, at 114-15. ("The extent to which the prosecutor is bound to divulge such information prior to the defendant's decision to plead guilty depends largely on one's view of the nature of the litigation process. If it is ... a 'search for the truth,' then all matters affecting the persuasiveness of the prosecution case should be irrelevant.").
II. The Accuracy Rationale for Applying Brady to Guilty Pleas

The correlation between Brady disclosure and accuracy can be best understood by first reviewing two distinct and deeply rooted assumptions about guilty pleas. Examination of each assumption is critical in assessing the contribution of Brady disclosure to guilty plea accuracy.

The first assumption is that the defendant always knows the facts that determine his guilt or innocence. In the usual criminal trial, these facts are found by the jury through a process of evaluation and reasoning based on evidence. The jury begins the trial fact-finding process with no knowledge of the facts, weighs the evidence adduced through the trial process, and then reasons along a chain of logical inferences from the evidence. At the end of this inferential chain, the jury reaches conclusions about the facts required by the legal definition of the offense charged and any applicable defense. When this sort of reasoning mechanism is relied on to establish the facts, it is essential that the jury consider all critical evidence in its rational fact-finding process. Thus, to ensure the factual accuracy of the jury’s factual conclusions, the prosecution must disclose highly exculpatory evidence available only to it.40

In the usual guilty plea, the fact-finding task assigned to the jury at trial is displaced by the defendant’s confession. Why should the defendant need exculpatory information disclosed to him in order to provide an accurate confession of guilt? We assume that, unlike jurors entering the trial process, the defendant enters the guilty plea process knowing the facts. Whereas we see the jury at trial as discovering the facts through a reasoning process based on evidence, we conceive of the defendant in a guilty plea as simply revealing the crucial facts.41 Although the defendant’s strategic decision to plead guilty or to stand trial turns in large part on evaluation of the evidence, we do not think of the evidence in the case as having any bearing on his ability to confess accurately. In contrast to the rational fact-finding mechanism of the trial, we think of the guilty plea’s fact-finding mechanism of defendant revelation as being independent of the completeness or accuracy of the evidence. Thus, disclosure to insure a complete and accurate evidentiary basis for reliable fact-finding seems unnecessary in the guilty plea process.

40. "The due process duty to disclose is based on the elemental notion that a conviction should rest only on accurate evidence and on a record that is as complete on the question of innocence as is permitted by the state of information available to the prosecution at trial.” C. Wolfram, Modern Legal Ethics § 13.10.5, at 768 (student ed. 1986).
41. The verb "to confess" often is defined as meaning "to disclose or reveal," and the noun "confession" as meaning "the act of disclosing sins or faults." See Webster’s New International Dictionary of the English Language 559 (2d unabridged ed. 1959).
A second assumption that must be examined to understand the link between disclosure and accuracy concerns the defendant's sincerity rather than his knowledge. We assume that a defendant will not falsely condemn himself by pleading guilty since he knows that the immediate consequence is a criminal conviction. This assumption relies on the intuitive unlikelihood of false self-condemnation in the face of the consequences that attach to a guilty plea and the procedural safeguards of a guilty plea's trustworthiness. Thus, false confession to a crime seems unlikely not only because punishment will follow, but also because the defendant has assistance of counsel, the plea takes place in open court, details are placed on the record, plea bargains are disclosed, and the court taking the plea satisfies itself that there is a factual basis for the plea. The Supreme Court's attitude toward guilty pleas reflects just such an assumption concerning sincerity: "[d]efendants advised by competent counsel and protected by other procedural safeguards are . . . unlikely to be driven to false self-condemnation."  

The assumptions described above support an argument that there is no connection between Brady disclosure and either the knowledge or the sincerity underlying the defendant's confession. According to that position, Brady disclosure is a check or safeguard functionally suited to the adversary system of rational truth determination in which a neutral fact-finder is charged with deriving factual conclusions from the evidence. When a defendant pleads guilty and substitutes confession for an adversary determination of guilt by trial, however, this removes the need for Brady disclosure to assure accuracy. Though access to Brady material may still be of crucial importance in terms of nonaccuracy criteria, disclosure as a procedural safeguard would be viewed as ill suited to assuring the accuracy of guilty pleas in the way it does jury verdicts of guilt.

The present guilty plea process reveals the degree to which our criminal justice system is committed to the dual assumptions that the defendant knows the facts that determine his guilt and that he is sincere if he confesses those facts in a guilty plea. When a verbal statement other than the defendant's forms even part of the basis for a criminal conviction at trial, our system expresses a strong preference for certain safeguards of reliability. Both the knowledge and sincerity of the declarant are normally supported by oath and tested by cross-examination. The jury observes and evaluates the declarant's demeanor and weighs state-

43. Access to Brady material still might be important to the defendant in terms of nonaccuracy values such as fairness, efficiency, protection of bargaining expectation interests, or informed waiver of constitutional rights.
ments on crucial points in the context of a larger story adduced from the declarant and other witnesses at trial. In the guilty plea process, by contrast, the defendant normally is not cross-examined. No jury evaluates the defendant's demeanor. Admissions to the critical facts normally are not related within the context of other testimony provided by the defendant. Nor is there typically any context provided by documents, other items of physical evidence, or the testimony of other witnesses within which to evaluate the knowledge or sincerity of the defendant’s confession. Although an oath may be used, it is not required.

Dispensing in the guilty plea process with the normal trial safeguards aimed at assessing the reliability of testimony, reflects our system's strong faith in the defendant's knowledge and sincerity in confessing his guilt. In many cases, this faith in accuracy is well-placed. It is a mistake, however, to conclude that it is always sound. As the analysis in the following sections demonstrate, flaws in either knowledge or sincerity can impair the accuracy of guilty plea confessions, particularly in Brady cases.

A. Guilty Plea Accuracy: The Defendant's Knowledge

The reliability of a defendant's guilty plea confession depends in part on the defendant's knowledge, which the law of evidence treats as comprised of his perception and memory of the historical facts that determine his criminal liability. Simply put, if the defendant has not observed and remembered a fact accurately, he cannot be counted on to reveal it accurately in his guilty plea confession.

44. R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 351-54 (2d ed. 1982). This preference is expressed through constitutional requirements such as the rights to confrontation and jury trial, and also through the statutory requirements of the hearsay rule. Even at trial a defendant's confession, as an admission, can avoid some of the trial safeguards. The contextual safeguard, however, still applies with admissions at trial, and the confession is not treated as conclusive on the issue of guilt.

45. FED. R. CRIM. P. 11, for example, does not require use of the oath in taking a guilty plea, although the possibility of its use is referred to in several parts of the text of Rule 11. See FED. R. CRIM. P. 11(c)(5), (e)(6). The notes of the Advisory Committee on Rules to the 1974 amendment to Rule 11 state in reference to the factual basis inquiry required by Rule 11(f) that “[w]here inquiry is made of the defendant himself it may be desirable practice to place the defendant under oath.” FED. R. CRIM. P. 11(f) advisory committee's note. The notes of the Committee on the Judiciary, House Report No. 94-247 states parenthetically, however, that “[t]he Committee does not intend its language to be construed as mandating or encouraging the swearing-in of the defendant during proceedings in connection with the disclosure and acceptance of rejection of a plea agreement.” HOUSE COMM. ON THE JUDICIARY, FEDERAL RULES OF CRIMINAL PROCEDURE AMENDMENTS ACT, H.R. REP. NO. 247, 94th Cong., 1st Sess. 7 n.9 (1975), reprinted in 1975 U.S. CODE CONG. & ADMIN. NEWS 674, 680.
Trust in a defendant's knowledge seems well placed when we focus on the defendant's *actus reus* and *mens rea*, the traditional components of criminal liability.\(^{46}\) In regard to elements dealing with his own conduct and subjective mental state, the defendant normally is in the best position to know the critical facts. For instance, in the armed robbery hypothetical that introduces this Article, the defendant seems completely capable of accurately revealing whether or not he engaged in the required conduct of taking property from the person or presence of the victim, using force, violence, or intimidation. Similarly, in regard to *mens rea*, the defendant's ability to know the answer to a question about his own purpose, belief, knowledge, premeditation, deliberation, advertence to risk, or other subjective mental requirement seems unique. In a homicide case involving a claim of self-defense, for example, who could determine more precisely than a defendant pleading guilty whether at the time of the killing he lacked the honest belief in the necessity of self-defense normally required for such a defense?\(^{47}\) Our intuitive confidence in the defendant's knowledge in regard to conduct and subjective mental state stems from the defendant's seemingly unparalleled ability to perceive and remember his own conduct and mental state. Due perhaps to this intuitive confidence in the defendant's knowledge concerning *mens rea* and *actus reus* and the prominence of those concepts in our thinking about criminal liability, the notion that a defendant pleading guilty may not know a fact critical to the existence of criminal liability is counterintuitive.

The fallacy of the generalization that a defendant *necessarily* knows all of the facts critical to a determination of his criminal liability is demonstrated in the hypotheticals that follow. These cases tend to fall into three categories. First are cases dealing with knowledge problems based on defects in perception or awareness, in which the defendant never knew or misperceived information critical either to the definition of an offense or the applicability of a defense. A second category of cases deals with knowledge problems based on defects in memory, in which the defendant cannot remember information critical to liability. Finally, a third category of cases deals with defects in a defendant's expertise in resolving factual issues critical to liability.

\(^{46}\) "Crime, as a compound concept, [is] generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand . . . ." Morissette v. United States, 342 U.S. 246, 251 (1952).

\(^{47}\) The Model Penal Code requires only that the belief in the necessity for self-defense be honest, not that it be reasonable. *Model Penal Code* § 3.04(1) (1962). Most jurisdictions require that the belief be both honest and reasonable. W. LaFAVE & A. SCOTT, *CRIMINAL LAW* § 5.7(c), at 457-58 (2d ed. 1986).
(1) **Defects in Perception or Awareness**

A case charging statutory rape provides an example of the first type of case. Since most jurisdictions do not require a defendant to know the victim's age for conviction of statutory rape and instead apply a level of culpability less than knowledge to the age element, defendants who are in fact ignorant of the victim's actual age come within the ambit of statutory rape statutes. The ability of a defendant charged to establish accurately as part of the factual basis for his guilty plea whether the complainant was under age at the time of the offense is contingent on the quality of the information available to him concerning that issue.

Ignorance of critical information, such as the complainant's actual age in a statutory rape case, can result in a defendant's pleading guilty although no crime actually has occurred. Assume, for example, that the statute under which the defendant is charged requires that the victim be under the age of sixteen. The prosecution has made the defendant a guilty plea offer, but while the plea offer is outstanding, *Brady* material regarding the complainant's age comes to the prosecution's attention. The prosecution obtains evidence that strongly suggests that the complainant and her parents, out of anger at the defendant, misrepresented her age by several months and that she turned sixteen just prior to the act of sexual intercourse that is the basis for the statutory rape charge. If the defendant appears willing to accept the guilty plea offer, the prosecutor might adopt the attitude that the defendant knows whether he is guilty and accordingly that the defendant's guilty plea obviates any need to pursue or disclose the *Brady* material regarding the complainant's age. The defendant's willingness to plead guilty, however, does not necessarily guarantee that he knows the girl was below the statutory age and consequently does not remove the need for disclosure in order to avoid an inaccurate resolution of the age element. Once charged with statutory rape, the defendant and his lawyer may simply assume, based on the charge, that the complainant was under sixteen at the critical time. In short, a defendant uninformed of the existence of the *Brady* material might plead guilty because of an erroneous conclusion regarding the essential element of age, just as a jury uninformed of such *Brady* material might render a guilty verdict because of the same erroneous conclusion at trial.


49. Most jurisdictions apply strict liability to the element of age, while some apply negligence. *Id.*
Another type of case in which the defendant may not know that an element of the crime is missing involves a causation problem. A hypothetical drawn from one of the original Brady case's progenitors, United States ex rel. Almeida v. Baldi,\footnote{195 F.2d 815, 816-19 (3d Cir. 1952), cert. denied, 345 U.S. 904 (1953). Justice Douglas relied on the Baldi case in his opinion in Brady v. Maryland, 373 U.S. 83, 86 (1963).} provides an illustration. Assume the defendant committed the felony of armed robbery. During his attempted escape, a skirmish with the police took place and a police officer was shot and killed. The defendant has been charged with felony murder based on the death of the police officer. The defendant was armed with a .45 caliber pistol, while the police officers all were armed with .38 caliber weapons. The prosecution obtains physical evidence and a ballistics report, which determine that a .38 caliber bullet killed the police officer, but does not reveal the evidence to the defendant.

The jurisdiction in which the defendant is charged utilizes the "agency theory" as a limitation on felony murder, pursuant to which felony murder liability attaches only if the felon or one of his accomplices rather than a bystander or another police officer shot the decedent.\footnote{See S. KADISH, S. SCHULHOFER & M. PAULSEN, supra note 48, at 497. The "agency theory" appears to be the majority view. See State v. Canola, 73 N.J. 206, 211-12, 219, 374 A.2d 20, 23, 26-27 (1977); Annotation, Criminal Liability Where Act of Killing is Done by One Resisting Felony of Other Unlawful Act Committed by Defendant, 56 A.L.R.3d 239, 242 (1974).} Thus, the identity of the person who in fact shot the officer is crucial to determining the defendant's liability for felony murder. If the defendant pleads guilty, he well might resolve this issue erroneously unless the prosecution discloses the evidence showing that another police officer in fact shot the decedent.

While our first two hypotheticals dealt with knowledge problems concerning elements of the offense, such defects can also cause a defendant to be unaware of a fact that could provide him with a defense. Consider, for example, a defendant who has been entrapped by an acquaintance working as an informant for government narcotics investigators. Investigation of the defendant by the authorities began when a tip from the informant indicated that the defendant might be interested in selling illegal drugs. The defendant had no prior involvement in illegal drug dealings, but was experiencing financial difficulties. The informant induced the defendant to engage in the illegal drug sale with which he is presently charged by persuading him that it would provide a quick and effective cure for his financial woes. In this scenario, the government through its agent, the informant, obviously has run afoul of the exonerating principle of entrapment.\footnote{"Where a person has no previous intent or purpose to violate the law, but is induced}
the informant then introduced the defendant to an undercover narcotics officer posing as an interested buyer of illegal drugs.\textsuperscript{53} The informant, to avoid revealing his identity as a government agent, then receded into the background. The undercover narcotics officer made the final arrangements with the defendant, consummated the sale, and arrested the defendant. At the time of the arrest, the officer obtained all the evidence needed for the government's case-in-chief against the defendant.

The entrapment defense in this hypothetical turns on a key ingredient unknown to the defendant: the informant's status as an agent of the government. At the time of the illegal drug sale, the defendant presumably was ignorant of the fact that the acquaintance who encouraged him was actually a government informant, or he would not have gone ahead with the sale. After the arrest, the defendant may suspect that his acquaintance was an informant but, he lacks the knowledge to resolve that question accurately. Rather than the defendant’s knowledge of his own conduct or subjective mental state, his knowledge of the critical fact of the informant’s status as a government agent is deficient. Disclosure by the prosecution would help assure that the defendant’s guilty plea does not resolve inaccurately a critical factual issue on which the defense of entrapment depends.

This hypothetical is not an esoteric example. The prosecution of drug cases using informants and raising potential issues of entrapment is daily fare in both state and federal criminal courts. Frequently, the government has considerable incentive to resist disclosure of an informant's status simply to protect the informant from reprisal. Moreover, since informants often work on more than one investigation, a strong incentive exists for the prosecution to resist disclosure in order to keep the informant productive for future investigations and to protect the confidentiality of other investigations already underway.

\textsuperscript{53} Having the officer rather than the informant make the purchase has several advantages for the prosecution. The officer rather than the informant becomes the primary witness in the government's case. The officer usually makes a more effective witness than the informant, whose credibility may be severely impeached on the grounds of financial or other incentives. Having the officer make the purchase also permits the investigating officer to maintain personal control of the often large amounts of cash that need to be displayed before the defendant will consummate the sale. In addition, the officer then takes personal control of the drugs and avoids introducing the informant into the chain of custody which must be established for introduction of the drugs at trial.
These hypotheticals demonstrate that if we expand our focus beyond elements of conduct and subjective mental state, the potential for defects in a defendant’s knowledge undermines the validity of the assumption that a defendant always has the ability to reveal accurately the truth as to critical factual issues in a guilty plea confession. In regard to elements dealing with required circumstances, the validity of the assumption that the defendant necessarily knows the critical facts is clearly unfounded. In a federal bank robbery case, for example, it is unreasonable simply to assume a charged defendant knows whether or not the bank’s federal deposit insurance was in effect at the time of the robbery, a circumstance that is a necessary federal jurisdictional element. The hypotheticals set forth above provide additional examples of the potential for defects in a defendant’s knowledge regarding the required circumstance of age in a charge of statutory rape or the status of an informant as a government agent in a defense of entrapment. Similarly, with offenses requiring a certain type or degree of resulting harm, such as bodily injury, property damage, or property loss, the defendant may not have the knowledge that would make him capable of simply revealing the type or degree of harm which he actually caused.

A defendant’s inaccurate determination of the presence of a required circumstance or result may seem less troubling than his inaccurate evaluation of his own conduct or mental state since absence of a circumstance or result frequently is not totally exculpatory. Often the lack of one of these elements only lowers the degree of the crime rather than completely exonerating the defendant. For example, if the federal jurisdictional circumstance of federally insured status of the bank’s funds were lacking in a bank robbery case, the defendant would still be liable for robbery under state law. In regard to such jurisdictional circumstances, it is often asserted that they have “no bearing on a person’s culpability.” Such elements, however, are not always limited in function to

54. 18 U.S.C. § 2113(a), (f) (1982), United States v. Maner, 611 F.2d 107, 108 (5th Cir. 1980) ("To establish federal jurisdiction and to prove a violation of § 2113, the Government must show that the bank was insured by the FDIC at the time of the robbery.").

55. 18 U.S.C. § 113(f), for example, penalizes assaults “resulting in serious bodily injury.” New York Penal Law § 145.10, defining criminal mischief in the second degree, requires among other elements damage to “property of another person in an amount exceeding one thousand five hundred dollars.” N.Y. PENAL LAW § 145.10 (McKinney 1988).

56. NAT’L COMM. ON REFORM FED. CRIM. LAWS, FINAL REP. § 201 comment (1971); see also Low, The Model Penal Code, the Common Law, and Mistakes of Fact: Recklessness, Negligence, or Strict Liability?, 19 RUTGERS L.J. 539, 558-59 (1988) (strict liability is often advocated for jurisdictional elements of federal offenses because they often are not essential to the criminality of the defendant’s behavior). In regard to lack of a particular result, a comment to the Model Penal Code states that “[w]hat will usually turn on determinations [of
determining severity. At times, as with government agency in entrapment or the age of the victim in statutory rape, such elements play a critical role in separating punishable from nonpunishable conduct. Even in cases in which the role of such elements is limited to determining the severity of the offense or jurisdiction, the accurate establishment of these facts is nonetheless of considerable import. Since offense severity can have a critical impact on length, place, and type of incarceration, inaccuracy as to these elements implicates both theoretical and practical concerns with limiting punishment to that which is warranted by the actual offense. Federal jurisdictional circumstances, even though frequently limited in function to determining whether a federal or state forum is appropriate, raise the critical issue of a federal court's subject matter jurisdiction, the legitimacy of the exercise of its power to convict, sentence, and incarcerate a defendant.

Disclosure also may have an effect on accuracy when a guilty plea entails a question of the fulfillment of objective norms of conduct or mental state. Crimes and defenses utilizing objective standards of liability routinely present questions such as deviation from reasonable standards of conduct or belief, the resolution of which may be affected by *Brady* disclosure. Analyzing the defendant's ability to reveal in a guilty plea confession accurate answers to such questions, however, is more complex than assessing his ability to resolve accurately the circumstance and result elements dealt with above. Accordingly, analyzing the effect of *Brady* disclosure on that ability is more complex.

Establishing the culpability for negligent homicide under the Model Penal Code, for example, requires in part a determination of whether the defendant's conduct involved "a gross deviation from the standard of care that a reasonable person would observe" in the defendant's situation.\(^5\) It also requires determinations of whether the risk of death was "substantial and unjustifiable" and whether the defendant should have been aware of that risk.\(^5\) Similarly, in most jurisdictions a claim of self-defense requires a determination of the reasonableness of the defendant's belief in the need to use defensive force\(^5\) and the defense of provocation requires a determination of the reasonableness of the provoking circum-

\(^5\) MODEL PENAL CODE § 2.02(d) (1962) (defining negligence); id. § 210.4 (defining negligent homicide).

\(^5\) See id. § 2.02(d).

\(^5\) W. LaFAVE & A. SCOTT, supra note 47, § 5.7(c), at 457.
It is problematic to expect the typical defendant pleading guilty to provide accurate answers to questions such as the reasonableness of the defendant’s conduct or belief, or the justifiability of taking a particular risk, in the same way that we rely on a defendant pleading guilty to reveal the truth about his own conduct or subjective mental state. First, issues of reasonableness and justifiability are more complex in most cases than an issue such as conduct. Second, although such questions are routinely treated as questions of fact to be submitted to the jury at trial, in many ways they seem more like questions of moral judgment and value than historical fact.

A hypothetical dealing with the issue of self-defense illustrates the problems associated with resolving such questions in the context of a guilty plea. Assume the defendant in a case charged with aggravated assault is a woman who was approached on an urban subway car by two young men who intended to rob her and were armed with concealed weapons, which they intended to use in perpetrating the robbery. One of the young men stood close to the defendant and asked for money. The other young man stood to one side of the defendant and put one hand inside a pocket as if reaching for a weapon. Having been the victim of prior subway crime, the defendant was carrying a loaded pistol. The defendant, interpreting the conduct of the young men as a robbery entailing a threat of serious bodily injury, pulled her gun and shot the two young men, seriously wounding but not killing them. Later, medical personnel attending the young men in a hospital emergency room found a loaded

---

60. Id. § 7.10, at 654.

61. In his book on the Bernhard Goetz trial, in which the critical issue was the reasonableness of Goetz’s actions as self-defense, George Fletcher wrote:

The trial turned not on a simple question of fact, but on a question of moral interpretation. The question was not whether Goetz did the deed, but whether his judgment in doing it was good or bad. . . . Beyond the agreed-upon factual premises lay an unexplored realm of value. Goetz’s shooting required evaluation—was it reasonable in a moral sense?

G. FLETCHER, A CRIME OF SELF-DEFENSE 100 (1988).

62. The facts of this hypothetical are a modified version of the facts presented in the Bernhard Goetz case, People v. Goetz, 116 A.D.2d 316, 319-20, 501 N.Y.S.2d 326, 329 (N.Y. App. Div. 1986), treated at length in G. FLETCHER, supra note 61. A number of cases have presented fact patterns raising this issue. In Griffin v. United States, 183 F.2d 990, 992 (D.C. Cir. 1950), the defendant claimed self-defense and the prosecution failed to disclose the discovery of an open knife in the victim’s pocket. The defendant was convicted at trial. A similar scenario was presented in Campbell v. Marshall, 769 F.2d 314, 316 (6th Cir. 1985), cert. denied, 475 U.S. 1048 (1986), another case in which self-defense was claimed. Investigators found a semi-automatic pistol in the pocket of the victim and failed to disclose it to the defendant. The defendant, uninformed of the weapon, pleaded guilty. In United States v. Agurs, 427 U.S. 97, 100-01 (1976), the female defendant, after raising a self-defense claim, was convicted at trial without disclosure of the victim’s record of prior violent crime.
gun in the pocket of one and an open knife in the pocket of the other. The prosecutor, who has made a guilty plea offer to the defendant, has been informed of the victims' possession of the weapons, but has not disclosed these facts to the defense.

The defendant's criminal liability in this situation obviously turns on the question of self-defense and on the contours of that defense in the jurisdiction in which the defendant is charged. If one adopts a purely subjective view of self-defense, then the only relevant question is whether the defendant honestly believed in the need for her use of deadly force. This question of subjective mental state does not seem to be an inherently difficult one for the defendant pleading guilty to answer and, as pointed out above, the defendant should be capable of accurately resolving it without disclosure. In our hypothetical, for example, the defendant had the requisite honest belief and there seems no need to disclose the concealed weapons for her accurately to resolve that question.

If one adopts a purely objective view of self-defense, however, as a number of commentators have urged, then both the nature of the factual inquiry and the role of disclosure are fundamentally altered. Under a purely objective view, the relevant question in our hypothetical is whether the two young men in fact threatened a harm that the defendant's use of force prevented, even if that threat was not known to the defendant. This is a more difficult factual question for the defendant to resolve than the question of her own subjective belief since calculation of the harm threatened involves a number of variables that in our hypothetical are beyond the defendant's ability to perceive, such as the young men's intentions and their ability to inflict harm. This factual inquiry also differs from the question of the defendant's belief under a subjective theory of self-defense in that disclosure may be critical in order for the defendant accurately to assess the victim's intentions and ability to inflict harm. In our hypothetical, for example, the possession of the weapons, even if unknown to the defendant, helps demonstrate that sufficient harm

63. The Model Penal Code provides an example of a purely subjective approach to self-defense requiring only an honest belief in the need for self-defense. See Model Penal Code § 3.04(1) (1962).

64. Advocates for the objective view of self-defense include Paul Robinson and Glanville Williams. See 2 P. Robinson, Criminal Law Defenses § 131(e)(6) (1984); G. Williams, Textbook of Criminal Law 504 (2d ed. 1983); Robinson, A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability, 23 UCLA L. Rev. 266, 283-84, 291-92 (1975). In reference to a hypothetical similar to the self-defense one in the text, Glanville Williams has written that "the law would be oppressive if it said: It is true that you took this action because you felt it in your bones that you were in peril, and it is true that you were right, but you cannot now assign reasonable grounds for your belief, so you were only right by a fluke and will be convicted." Id.
actually was threatened to trigger the use of defensive force under an objective theory of self-defense. Without this disclosure, the defendant pleading guilty may conclude erroneously that she misjudged the young men and their intentions and used deadly force unjustifiably under an objective theory of self-defense.

The law of most jurisdictions is a blend of subjective and objective requirements. A subjective belief in the need to use defensive force typically is required. Most jurisdictions also require that the defendant’s belief in the need to use defensive force be objectively reasonable, but limit what can be considered in assessing reasonableness to what was known or apparent to the defendant. The resolution of such a question of reasonableness in the context of a guilty plea presents a number of problems. First, as pointed out above, such a question does not call simply for the revelation by the defendant of a historical fact. Rather, it calls for an assessment of the norm of reasonable belief in the situation and then a comparison of the defendant’s belief with that norm. In a typical trial involving negligence, a group of jurors drawn from the community assesses this norm and compares the conduct in question with it. The typical guilty plea relies on the defendant to perform accurately each of these functions simply because he is willing to resolve the ultimate question of reasonableness against himself. It seems paradoxical, though, to rely on someone charged with failing to recognize or observe the norms of reasonable conduct or belief to perform the task of factually assessing what those norms are. If we treat the question of reasonableness as more of a moral than a factual inquiry, as George Fletcher has suggested, it seems even more problematic to rely on a criminal defendant’s moral judgment about reasonableness. It seems odd as well to expect the defendant to perform satisfactorily the difficult task of retro-

65. “Of course, whether a reasonable belief is required or not, the defendant must actually believe in the necessity for force. He has no defense when he intentionally kills his enemy in complete ignorance of the fact that his enemy, when killed, was about to launch a deadly attack upon him. Nevertheless, if he acts in proper self-defense, he does not lose the defense because he acts with some less admirable motive in addition to that of defending himself, as where he enjoys using force upon his adversary because he hates him.” W. LAFAVE & A. SCOTT, supra note 47, § 5.7, at 458 (emphasis in original).

66. Id. at 457-58; see, e.g., Dixon v. State, 352 S.E.2d 572, 574 (Ga. 1986) (“The general rule is that evidence of threats previously made by one who is killed by another but uncommunicated to the latter, are not admissible on the question of whether the defendant was justified in killing the victim.”); People v. Perez, 66 Mich. App. 685, 692, 239 N.W.2d 432, 435 (1976) (“[t]he self-defense justification for homicide is based upon the circumstances as they appeared to the defendant, and not as they actually existed.”).

67. See G. FLETCHER, supra note 61, at 100.
spectively and objectively comparing his own conduct or belief with the standard of reasonableness.

Once we have decided to rely on the defendant to resolve such issues, though, what is the effect of disclosure on his ability to perform this task? We have seen that if the test for self-defense is purely objective, the need for disclosure in our hypothetical is clear, but that if the test is purely subjective, the need for disclosure appears to be obviated. If the jurisdiction in question requires the element of reasonable belief based on what was apparent to the defendant, then disclosure still would play a role, but a more subtle one than under the purely objective test.

Take the defendant in our hypothetical. If she pleads guilty, accurate resolution of her liability requires her to resolve the issue of the reasonableness of her belief in the need for the use of deadly force in self-defense. Since this reasonableness is limited to those circumstances apparent to her, it would seem that evidence of danger unknown to the defendant should be irrelevant for purposes of assessing the reasonableness of her belief. In short, the fact that one of the defendants reached into his pocket as if he had a weapon would be relevant because it was apparent to the defendant. The contents of the pocket, however, whether it turned out to be loose change or a loaded gun, should be irrelevant since the contents were not apparent to the defendant and therefore could not have contributed to the reasonableness of the defendant’s belief. But the effect in the guilty plea context of the disclosure of the existence of the weapons is not as restricted as its strict evidentiary relevance. A defendant such as the one in our hypothetical, forced to decide on the use of deadly defensive force quickly and under ambiguous circumstances, later may well question her own judgment and the reasonableness of her belief in the need for self-defense, particularly when it has caused serious harm to others. The very fact that the government has

68. Evidence of an uncommunicated threat such as a gun or other weapon hidden on the victim is inadmissible to show a criminal defendant’s honest or reasonable belief, but is admissible to show that the victim was the aggressor by virtually all courts. IA Wigmore, Evidence 111 at 1685-90 (Tillers rev. ed. 1983). See, e.g., Griffin v. United States, 183 F.2d 990, 992 (D.C. cir. 1950) (“The view that evidence of uncommunicated threats, including the evidence of [the victim’s] opened knife, should be admitted seems to us logical and humane. . . . It is of course true that the apparent conduct of the deceased at the time of the homicide, rather than any concealed plan he may have had, bears directly on the question whether the accused acted in self-defense, but evidence that the deceased had a concealed plan of attack bears on the question what his apparent conduct was. We therefore adopt the following rule as the one we think should prevail in the District of Columbia. When a defendant claims self-defense and there is substantial evidence, though it be only his own testimony, that the deceased attacked him, evidence of uncommunicated threats of the deceased against the defendant is admissible.”)
charged her with acting unreasonably may give rise to such doubts or reinforce those that have already occurred. If the existence of the weapons is not disclosed to the defendant, she likely will conclude that the men she shot were in fact unarmed and may not even have been acting with the intent of robbing her. Because of this erroneous belief, the defendant might conclude that she overreacted to what she observed. By contrast, if the victims' possession of the weapons is revealed, the defendant's tendency toward regarding her actions as reasonable will be reinforced.  

(2) Defects in Memory or Expertise

The problems of a defendant's lack of knowledge dealt with so far have focused primarily on defects in a defendant's perception or awareness rather than defects in recollection. The last paragraph suggests, however, that memory defects may also result in a defendant's inability to establish the facts accurately in a guilty plea confession. Voluntary alcohol or drug intoxication, for example, might result in the inability of a defendant to recall facts relating to his own conduct or mental state at the time of the charged offense. If a guilty plea is entered in such a case, Brady disclosure may be required to insure the accuracy of the defendant's admission of facts that fall within the knowledge of the typical defendant, such as his identity as the perpetrator of the crime.

Guilty plea cases in which the defendant's liability turns on the issue of mental disease or defect often combine these perception and memory problems with the more peculiar issue of a defendant's impaired ability to draw conclusions from the facts. In a case in which insanity at the time of the crime is a serious issue, it would seem absurd to rely only on the defendant to determine the applicability of an insanity defense. The defendant obviously lacks the expert qualifications, for example, to determine whether he was suffering from a mental disease or defect and whether that disease or defect impaired his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law.

69. The susceptibility of a witness' memory of an event to distortion by information learned after the event has been well documented. See, e.g., E. Loftus & J. Doyle, Eyewitness Testimony: Civil and Criminal § 3.05 (1987); Hall, Loftus & Tousignant, Postevent Information and Changes in Recollection for a Natural Event, in Eyewitness Testimony: Psychological Perspectives 124 (1984).

70. In the Bernhard Goetz case, there was considerable question as to whether the version of the critical facts recalled by Goetz in his confession was accurate. The testimony of a number of witnesses supported a version of the facts more favorable to Goetz, which the jury apparently accepted. See G. Fletcher, supra note 61, at 122-23.

71. Model Penal Code § 4.01(1) (1962) provides as follows for mental disease or defect excluding responsibility: "A person is not responsible for criminal conduct if at the time of
Some defendants, because of mental defects, may be unable to answer accurately even more straightforward factual questions concerning conduct, mens rea, or facts triggering a defense such as self-defense, all of which are unrelated to mental capacity. In granting a habeas corpus petition based on prosecutorial failure to disclose in a guilty plea a report revealing a viable insanity defense as well as other exculpatory information, a Texas appellate court concluded: "It would be anomalous to hold that the (concededly) illiterate, mentally retarded, alcoholic, and (according to the psychiatrist), psychotic applicant had a duty to tell his counsel that there was available evidence of his insanity and incompetence." It would likewise be anomalous to assume that the confession of such a defendant provides an accurate revelation of the facts determining criminal liability.

(3) Brady Disclosure as a Remedy for Defects in Knowledge

The problems regarding a defendant's knowledge reviewed so far are hardly insurmountable obstacles to accurate fact-finding. Such problems simply indicate that the fact-finding mechanism of defendant revelation is not always equal to the task of resolving critical factual issues, some as simple as the age of the victim in a statutory rape case, others as complex as the existence of a mental disease or defect. Such facts could be established accurately in a number of ways other than by relying on the defendant's guilty plea confession. We could insist on trial of the issues that are beyond the defendant's capacity to reveal. Without resorting to an adversarial trial, during the guilty plea process the judge could find the facts that the defendant is incapable of confessing by relying on a such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law."

72. A Texas case, Ex parte Lewis, 587 S.W.2d 697 (Tex. Crim. App. 1979), illustrates the dangers in this sort of scenario. The defendant, Lewis, was charged with murder and the trial court appointed counsel to represent him. On the same day as the appointment of counsel, Lewis pleaded guilty to the murder charge, later receiving a sentence of five years to life. A letter from a state psychiatrist in the prosecutor's file at the time of the guilty plea reported the results of a psychiatric examination of Lewis conducted 11 days before the guilty plea. The report contained substantial indications of Lewis' present incompetence and his insanity at the time of the offense, as well as suggestions of mental retardation, alcohol abuse, and a basis for a claim of self-defense. The letter was not disclosed during the guilty plea process. Id. at 699-700.

73. Id. at 701.

74. The guilty plea could be treated as resolving only those issues the defendant can reveal accurately in the same way that partial summary judgment removes only certain issues from a civil trial. See Fed. R. Civ. P. 56; 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure §§ 2736, 2737 (2d ed. 1983).
factual basis provided by the government, as in a guilty plea in which the defendant refuses to confess guilt. Or we could simply rely on defense counsel and the defendant to assess the evidence and make sure that all of the elements of the applicable crimes and defenses are resolved accurately before agreeing to a guilty plea. This last proposal probably comes closest to describing the way factual issues beyond the defendant’s knowledge currently are resolved in guilty plea practice.

Whatever mechanism is chosen, the important point for disclosure analysis is that resolution of issues beyond the defendant’s ability to reveal is based on evaluation and reasoning grounded in evidence. Thus, it is dependent on a complete and accurate evidentiary base for accurate results, just as the jury is at trial. If we reject the mechanism of defendant revelation normally used in the guilty plea process as being inadequate for resolving a particular factual question, our alternative is to resort to a method of rational fact-finding such as that used by a jury at trial. And disclosure of critical items of exculpatory evidence is as essential to any of these mechanisms as it is to the classic jury trial.

The role of *Brady* disclosure in aiding accuracy in situations in which the defendant’s knowledge of critical facts is lacking or at least doubtful can be demonstrated easily by referring to the fact issues delineated in the hypotheticals used earlier in this section. The defense of entrapment, for instance, would not be resolved accurately by a jury at trial unless the government revealed the informant’s status as a government agent. In a trial to a court in which all issues have been stipulated except entrapment, the judge could not resolve the entrapment question accurately without similar disclosure. In an *Alford* type plea, the court could not make an accurate finding concerning entrapment if the government did not disclose the informant’s status. Similarly, defense counsel and the defendant cannot be expected to resolve the question of entrapment accurately without such disclosure.

In short, disclosure of *Brady* material in the guilty plea process provides a significant measure of assurance that the defendant, his counsel, or whatever other factfinder is entrusted with resolving the particular issue, does not arrive at an erroneous conclusion concerning a critical fact by relying on an evidentiary base lacking an essential exculpatory item. Disclosure of highly exculpatory evidence in the guilty plea process in such cases helps assure accuracy by alerting the defense to exonerating facts that the defendant may be incapable of providing and

75. See North Carolina v. Alford, 400 U.S. 25, 28, 38 n.10 (1970); see also supra note 7.
76. See Alford, 400 U.S. at 38 n.10; see also supra note 7.
allowing those facts to be taken into account in the reasoning process used to decide the critical facts.

The need for *Brady* disclosure as a safeguard against a defendant's lack of knowledge is restricted to the category of cases in which the defendant's knowledge of critical facts or mental capacity is questionable.\(^7\) Thus, the force of this claim for enhancing guilty plea accuracy by *Brady* disclosure is confined to those *Brady* cases in which the defendant cannot accurately resolve critical factual issues. Such cases are a clearly limited subset not only of all guilty plea cases, but also of all *Brady* cases. As the range of hypotheticals in this section demonstrates, however, the incidence of such cases should not be considered insignificant. Within that range of cases, *Brady* disclosure plays as important a role as it does in the trial context.

Problems with perception, memory, or expertise regarding historical facts may be compounded if the defendant's mental competence at the time of the guilty plea is in question. Such problems may also be compounded by forces undermining the sincerity of the defendant's confession, which may make the defendant hesitant to reveal his lack of knowledge. It is to the problem of sincerity rather than knowledge that we turn next.

**B. Guilty Plea Accuracy: The Defendant's Sincerity**

In the debate over plea bargaining, concern about inaccurate bargained pleas resulting from a defendant's insincerity, as opposed to his ignorance of important facts, has been a persistent theme. The language of the Supreme Court guilty plea cases emphasizes the accuracy of guilty pleas.\(^8\) The Court's attitude, however, has been to assume such accuracy without seriously questioning it. Critics of plea bargaining have been skeptical of such an assumption, emphasizing in particular the subverting influence on a defendant's sincerity of inducements to plead guilty, particularly inducements in the form of sentencing differentials.\(^9\)

\(^7\) In some cases, there may be ambiguity as to whether the facts, once established, are legally sufficient to constitute a crime. Consequently, a question is raised about the defendant's "knowledge" of his guilt. This would seem most likely to occur in offenses with complex definitions, such as some white collar crimes, or in those cases that arise at the margin of the definition of any offense. Advice of counsel and the requirement of an evaluation of the legal sufficiency of the facts by the judge as part of the guilty plea process would remedy uncertainty about legal sufficiency. My primary focus, though, is on the defendant's knowledge of the underlying historical facts rather than their legal sufficiency.

\(^8\) See *infra* note 171.

\(^9\) A sentencing differential is simply the difference between the sentence faced by a defendant if he takes his case to trial and the sentence faced by the same defendant if he pleads guilty. Most frequently the differential is quantitative, expressed in months or years of incar-
This section focuses on a novel function for *Brady* disclosure, providing a check on the pressure to plead guilty generated through the use of sentencing differentials in the negotiation of *Brady* cases. In particular, it examines the influence the *Brady* trial rule exerts—the "shadow" it casts—on guilty plea negotiations. The analysis in this section demonstrates that refusing to apply the *Brady* rule to guilty pleas allows that "shadow" to distort the incentive structure of plea negotiations in a way that undermines factual accuracy.

1) The Impact of Sentencing Differentials on the Sincerity of Self-Condemnation

The idea that an innocent defendant would condemn himself falsely in a guilty plea initially strikes one as implausible since a guilty plea entails considerable and immediate negative consequences. As in the law of evidence, the psychological assumption is "that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true." In the guilty plea context, admitting to a crime is clearly damaging: it constitutes a criminal conviction with all the detrimental consequences that flow from conviction. The defendant entering a guilty plea is made aware of these consequences by the court at the time of his admission of guilt. It seems unlikely, then, that a defendant would admit to a crime in open court with advice of counsel and the other procedural safeguards that accompany a guilty plea unless he was in fact guilty.

80. Focus on the effect of legal rules on negotiations has been advocated by Professors Mnookin and Kornhauser in *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951-52 (1979). This approach departs from the traditional analytic preoccupation with the effect of legal rules on cases adjudicated in court, considering instead the "shadow" that legal rules cast over out of court negotiations and bargaining, "how the rules and procedures used in court for adjudicating disputes affect the bargaining process that occurs . . . outside the courtroom." Id. at 951 (emphasis in original). Although their immediate concern was divorce negotiations, they noted that their perspective has implications in other contexts, such as plea bargaining. Id. at 997.

81. FED. R. EVID. 804(b)(3) advisory committee's note (statement against interest exception to the hearsay rule).

82. See supra notes 36-37.

Inducements to plead guilty, and sentencing differentials in particular, undermine the psychological basis for this assumption. Although the element of damage from conviction and exposure to punishment are present in any guilty plea, the offering of a sentencing differential introduces a significant element of benefit from the admission. If the defendant has accepted the bargain, he must think that the benefit outweighs the damage. If what is to be gained from the admission outweighs in the defendant's mind the damage to be incurred, then the psychological basis for our initial faith in the truth of the admission as a statement against interest is largely negated. In more precise terms, the sentencing differential converts the confession from a statement against interest into what is on balance a self-serving one.

The hypothetical used to introduce this essay, involving a criminal defendant accused of armed robbery and facing as much as fifteen years in prison if convicted at trial, illustrates the effect of sentencing differentials. The prosecutor, whom we will assume to be highly motivated to avoid trial, offers a five year term of incarceration if the defendant pleads guilty. Whether the defendant, whom we will assume is innocent, resists the offer and runs the risk of an additional ten years in his sentence if convicted at trial depends in large part on the defendant's perception of his chance for acquittal and his degree of risk aversion. If the defendant resists the offer and the prosecutor increases the differential by decreasing the sentence in her plea offer, the prosecutor is almost certain to strike a point at which the benefits of the guilty plea's leniency and certainty outweigh the risk of trial in the defendant's mind, even if he is innocent. Can we be certain that an innocent defendant would reject an offer of one year of incarceration for a guilty plea and risk instead fifteen years' imprisonment after trial if, as in our hypothetical, he has a prior record and believes the victim has positively identified him? If the defendant resists this offer, the prosecutor may increase the differential even further. If the prosecutor were to offer straight probation for a guilty plea, a tremendous incentive is created even for an innocent defendant not to run the

84. Factors other than the sentencing differential, such as family pressures and desire to avoid the cost and publicity of a trial, may also induce a defendant to plead guilty regardless of guilt. See Alschuler, The Defense Attorney's Role in Plea Bargaining, 84 YALE L.J. 1179, 1192-94 (1975).

85. The certainty offered by a guilty plea, quite apart from any leniency, is an attractive feature to many defendants. "[M]ost people—rich or poor—have a low tolerance for uncertainty. Defense attorneys report that after a long delay, the defendant becomes anxious for any action to terminate his case and tends to become less concerned with the specific outcome or procedures involved." Levin, Delay in Five Criminal Courts, 4 J. LEGAL STUD. 83, 111 (1975).
risk of imprisonment after trial when the alternative is a criminal conviction with no risk of incarceration.

The pressure of sentencing differentials is not limited to serious cases in which the defendant faces a heavy penalty after trial. Another hypothetical illustrates this point. Assume a minor theft case in which the defendant faces a possible term of two years imprisonment after trial. Unable to make bail, the defendant is detained pending trial. A week after his initial incarceration, and with another sixty days remaining until trial, the prosecutor offers a plea to a reduced charge and agrees to immediate sentencing at which the defendant will be sentenced to the seven days already served. If the defendant pleads guilty, he is out of jail immediately and runs no risk of further incarceration. If he insists on trial, however, he faces the certainty of at least another two months of incarceration awaiting trial and the risk of incurring further incarceration of up to two years if convicted. Again, there is a substantial incentive for a rational, innocent defendant to plead guilty.\(^\text{86}\)

These hypotheticals focus on the incarceration consequences of a defendant's choice between pleading guilty and facing trial. The collateral consequences of conviction, such as social stigmatization as a criminal and harm to future employment, create additional disincentives apart from incarceration that may be enough to keep the innocent defendant from pleading guilty even in the face of a substantial sentencing differential. This issue needs to be analyzed separately for two distinct groups of defendants, those without prior criminal records and those with such records.

For criminal defendants without a prior record, the collateral consequences of a conviction undoubtedly add powerful disincentives to pleading guilty quite apart from sentencing exposure. Such defendants, by definition inexperienced with the criminal justice system, may also tend to overvalue their chances for acquittal at trial, reinforcing their resistance to inducements to plead guilty. Such defendants may believe justifiably that their lack of a prior record provides some informal guarantee of leniency at sentencing both at the hands of the prosecutor and the judge, thus reducing the need for the protection offered by the plea. It seems

\(^{86}\) The sentencing differential may gain a qualitative aspect not just by the nature of the sentence threatened after trial, such as capital punishment but also by the nature of the sentence offered with the plea. When the prosecutor offers a sentence that results in immediate release, such as probation or a sentence to time served while awaiting trial, the availability of immediate freedom adds something to the differential which again cannot be captured simply by a number. Judge Easterbrook has commented on this tendency to discount future criminal sanctions: "For many people the opportunities of the present seem more important than those of the future . . ." Easterbrook, supra note 29, at 294.
less likely, then, that the prosecutor will be able to offer a strong enough inducement to overcome these disincentives. But certainly the sentencing differential offered could be great enough—as in a case in which life imprisonment is risked after trial and the prosecution offers a minimal sentence for a guilty plea—to overcome the collateral forces reinforcing the defendant’s aversion to pleading guilty.

For a defendant with a criminal record, the calculation of the relative advantages of a guilty plea and a trial will be quite different. First, the negative force of the collateral consequences of the plea will tend to be greatly reduced. Such defendants already have incurred the damage of stigmatization as a criminal from prior convictions. In many cases, the collateral consequences of an additional conviction will not add much marginal disincentive to pleading guilty. In addition, the defendant with a prior record probably will be considerably less optimistic than a defendant without a criminal record about his chances for acquittal at trial. In part, this attitude may simply be the result of cynicism bred by experience. Or it may be the result of the quite rational realization that a defendant with a prior record faces significant disadvantages at trial compared with a defendant with no record. In addition, the fact that a criminal record most likely will result in a higher sentence upon conviction gives the defendant with a record a greater need for the relative advantages of the plea. In sum, it would seem that for a criminal defendant with a prior record—whether innocent or not—the point at which a guilty plea offer’s benefits outweigh the advantages of trial is reached more easily by the prosecutor’s offer of a sentencing differential. For this reason, we should be concerned particularly about the susceptibility to a plea offer of an innocent defendant with a criminal record.

One might ask whether the advice of counsel would protect against this sort of pressure toward false self-incrimination. Many factors, however, work toward inclining the defense attorney to prefer guilty pleas over trials, such as financial incentives, heavy caseloads, and pressures from prosecutors and judges to process cases efficiently. Even if the

87. If the additional conviction is for a particularly heinous crime, such as sexual abuse of a child, or if the additional conviction triggers the provisions of a recidivist statute, then powerful collateral disincentives can be present even for the defendant with a prior record.

88. The defendant with a prior record may be impeached by certain prior crimes. See FED. R. EVID. 609(a). Or he simply may be influenced not to testify by the threat of such impeachment. Prior crimes also may be admitted into evidence “as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” FED. R. EVID. 404(b). Once the jury learns of a defendant’s prior record, the effect on the verdict tends to be substantial. See H. KALVEN & H. ZEISEL, THE AMERICAN JURY 1159-61 (Phoenix ed. 1971).

89. Alschuler, supra note 84.
defense attorney resists such pressures, anecdotal evidence suggests that many defense lawyers, even if uncertain of the client’s guilt, are extremely reluctant to stand in the way of a client’s pleading guilty, if the guilty plea gives the defendant what both the defendant and counsel perceive as a "good deal." Such a situation pits the client’s interest in minimizing risk against the criminal justice system’s interest in accurately determining the truth. The criminal defense lawyer is admonished repeatedly to prefer his client’s interests over the truth-finding interest of the criminal justice system. Moreover, the defense lawyer is also instructed that final responsibility for the decision to plead guilty rests with the defendant and not with counsel. Finally, even if counsel resists the innocent defendant’s choice to plead guilty, the defendant can put his lawyer’s qualms to rest and reduce this barrier to pleading by simply falsely admitting guilt to his counsel. Thus, the presence of defense counsel provides little protection against the pressure of sentencing differentials undermining the sincerity of a defendant’s guilty plea.

(2) Brady Cases and the Generation of Sentencing Differentials

What are the chances that prosecutors will offer differentials of sufficient magnitude to reach an innocent defendant’s risk aversion point? It is clear that the prosecutor legally may offer differentials of such magnitude that an innocent and even moderately risk averse defendant would find them tempting. There is presently no limit on the size of sentencing differentials that may be offered to a defendant, although commentators

90. Id. at 1280-306. In my own experience teaching criminal process, I have found that a hypothetical posing the dilemma of a defendant claiming innocence but confronted with an attractive plea offer brings advice from roughly half the class that the defendant should accept the guilty plea offer and not risk trial.

91. Whether the defense attorney may ethically advise or allow a client who claims innocence to plead guilty other than through the use of an Alford plea, discussed supra at note 7, is a matter of some controversy. See I TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES 215 (1984) (“Views differ on whether a lawyer may properly advise (or even permit) a client to plead guilty who protests his or her innocence. . . . Obviously, a client who believes and asserts that s/he is innocent should not be advised to plead guilty unless the client, as well as counsel, is very strongly convinced that is plea is distinctly to the client’s best advantage. This condition met, the hard decision follows.”) For opposing points of view on the criminal defense lawyer’s ethical obligations in this situation, compare Burger, Standards of Conduct for Prosecution and Defense Personnel, 5 AM. CRIM. L.Q. 11, 15 (1966) with Bowman, Standards of Conduct for Prosecution and Defense Personnel: An Attorney’s Viewpoint, 5 AM. CRIM. L.Q. 28, 31 (1966).

92. “A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable . . . but it is for the client to decide what plea should be entered . . . .” MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980).

93. In Bordenkircher v. Hayes, 434 U.S. 357, 358-59 (1978), the defendant was offered
have urged such limits.\footnote{94} Moreover, a number of factors may motivate the prosecutor to plea bargain and offer the inducement of a sentencing differential even if in doing so the prosecutor severely discounts her case. She may feel simply that the lower sentence is appropriate in the particular case. She may have limited resources. Or she may feel that she has a weak case. The incentive to negotiate a guilty plea based on a weak case has been noted to pose a particular threat to accuracy in guilty pleas since it tends to combine questionable guilt with a strong inducement to plead guilty. In other words, "the greatest pressures to plead guilty are brought to bear on defendants who may be innocent."\footnote{95} The incentive to negotiate a guilty plea due to a weak case is of particular interest in assessing the importance of the \textit{Brady} rule in plea bargaining.

Judge Frank Easterbrook's plea bargaining model provides an excellent illustration of this tendency.\footnote{96} According to Easterbrook's model, the prosecutor's "minimum settlement demand" in bargaining is "determined by the penalty the prosecutor thinks he may obtain after trial" plus the difference between the cost of trial and the cost of plea bargaining.\footnote{97} Our primary interest is in the part of the equation dependent on

\begin{itemize}
\item the choice between five years if he pleaded guilty and mandatory life imprisonment if he went to trial. The defendant refused the offer, was convicted and then sentenced to life imprisonment. In \textit{Brady v. United States}, 397 U.S. 742, 743 (1970), the defendant pleaded guilty to avoid the death penalty. The Court has found no problem with the offering of inducements of such magnitude. It has yet to indicate any limits on the size of differentials used in plea bargaining. If anything, the ability of the prosecutor to offer powerful sentencing differentials has increased with the use of determinate sentencing. See Alschuler, \textit{Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing}, 126 U. Pa. L. Rev. 550, 572 (1978).
\item Alschuler, \textit{The Prosecutor's Role in Plea Bargaining}, 36 U. CHI. L. REV. 50, 60 (1968). Logical inference alone leads one to the conclusion that prosecutors will tend to offer substantial sentencing differentials in weak cases, since it is rational risk avoidance behavior. Alschuler provides anecdotal support for this proposition. \textit{Id.} at 61-62. Others have provided more systematically gathered empirical support. See Note, \textit{Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas}, 112 U. Pa. L. Rev. 865, 901 (1964) (authored by Dominick R. Vetri).
\item Easterbrook, supra note 29, at 289. According to Easterbrook, plea bargaining, along with prosecutorial discretion and discretionary sentencing, exhibit many of the features one would expect in a market system geared to efficiently allowing achieving "the maximum deterrent punch out of whatever resources are committed to crime control." \textit{Id.} at 290.
\item \textit{Id.} at 297. The cost to the prosecutor is figured not in monetary terms, but in terms of opportunity cost, "penalties that could be obtained in other cases by using the resources released from settling the case at hand." \textit{Id.}
\end{itemize}
the probable penalty after trial. "As the sentence on conviction and the probability of conviction rise, so does the prosecutor's minimum demand."98 Obviously, then, as the sentence on conviction and the probability of conviction fall, so does the prosecutor's minimum demand. Thus, we should expect an inverse relationship between the strength of the evidence and the strength of the inducement to plead: the weaker the evidence, the greater the sentencing differential.99 In short, "Easterbrook's analysis provides powerful explanation for why a plea-bargaining system, in the hands of a rational prosecutor, will generate extremely strong inducements for defendants to waive trial and pronounce themselves guilty, whether they are guilty or not."100

Brady cases by definition are ones in which evidence favorable to the defendant exists. If such evidence relates to guilt, it weakens the prosecutor's case for trial. If the favorable evidence is of only marginal materiality, the weakening may be insignificant. At the other extreme, if the Brady material is totally exculpatory, then the strength of the case is completely eviscerated. Under the Supreme Court's current definition of materiality, evidence qualifies as Brady material if there is a reasonable probability that it would change the outcome.101 Any case in which there exists evidence that creates a reasonable probability of nonconviction is by definition a weak case. All Brady cases under the current definition of materiality used by the Supreme Court, then, are by definition weak cases, cases in which prosecutors will be prone to offer high sentencing differentials. In short, Brady cases inherently present the risk that Easterbrook's model illustrates. They tend to combine questionable guilt with a strong inducement to self-condemnation.

Since a characteristic of Brady cases is the exclusive possession by the prosecution of favorable information, Brady cases present a third factor that increases the risk of false self-condemnation: the defendant's ignorance of the weakness in the government's case. If the defendant is unaware of the weakness in the government's case, he will overestimate the chances for conviction. This inflated view of the risk in going to trial should render the rational defendant much more prone to accepting a plea offer than one who has an accurate picture of the major strengths and weaknesses in the government's case. In short, the apparent risk

98. Id.
99. "The universal rule is that the sentence differential between guilty-plea and trial defendants increases in direct proportion to the likelihood of acquittal." Alschuler, supra note 84, at 60 (footnote omitted); Note, supra note 22, at 1010; Comment, supra note 22, at 170.
100. Schulhofer, Criminal Justice Discretion, supra note 94, at 74.
associated with trial based on a false overestimation of the government's case due to lack of disclosure in turn leads to an inflated differential, providing an inducement to plead guilty more powerful than would be generated by a well-informed estimate of the government's case. In Brady cases, then, three factors will tend to converge: questionable guilt, strong inducements to plead guilty in the form of high sentencing differentials, and a defendant who overestimates the government's chances for conviction. Convergence of these three factors significantly increases the risk that innocent defendants will condemn themselves falsely.

The concern with false self-condemnation in weak cases may appear more theoretical than practical. It may seem more realistic to expect the prosecutor simply to dismiss these cases rather than plea bargain them. Moreover, if the evidence is so weak that the prosecutor thinks conviction improbable, is not probable cause lacking? The prosecutor, after all, ethically is required not to pursue cases if probable cause is lacking. Aside from ethics, the prosecutor's interest in pursuing these cases should diminish as the proof diminishes, leading the prosecutor to dismiss or decline such cases because both conviction and guilt are too uncertain.

Undoubtedly, many Brady cases are dismissed or declined as a result of the combined effects of questionable guilt, the Brady rule, the ethical requirements regarding probable cause, and the low chance of

102. "A criminal defendant's decision to plead guilty reflects his assessment of the strength of the state's case against him. The prosecution's failure to disclose evidence favorable to the defendant skews that calculation." Note, supra note 22, at 1004. "Nondisclosure during plea bargaining creates a real threat of inaccurate results by eroding the defendant's bargaining position. Because a defendant's bargaining power depends on his knowledge of the evidence in the state's possession, suppression of exculpatory evidence reduces this power." Id. at 1014.

103. Courts vary on the definition of probable cause applicable to the initiation of criminal proceedings. Some have equated it with the probable cause standard applied under the fourth amendment. Others have equated it with the much more stringent standard used for deciding a motion for acquittal at trial. Others have defined it as somewhere between these two. Y. Kamisar, W. LaFave & J. Israel, supra note 4, at 953-54.

104. "A public prosecutor . . . shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(A) (1981). The prosecutor in a criminal case shall "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(a) (1987).

105. Declination and dismissal simply refer to the two means by which a prosecutor executes a decision not to prosecute a case. When a prosecutor decides to forego prosecution before any charges have been filed, the case is simply declined. If charges have been filed, implementation of the decision to forego prosecution requires dismissal of pending charges under a rule such as FED. R. CRIM. P. 48(a).
conviction at trial.\textsuperscript{106} In cases in which the \textit{Brady} material is totally exculpatory,\textsuperscript{107} for example, a prosecutor usually will have no interest in pursuing prosecution of the defendant.

There are countervailing factors, however, which may incline the prosecutor against dismissal or declination in particular cases. An assumption that all \textit{Brady} cases will be not be prosecuted would be seriously deficient in failing to take these factors into account. Pressures extrinsic to the particular case, such as political or publicity concerns, may influence some prosecutors to continue prosecution. If the defendant has some contact with other criminal activity, other pressures may be generated. For instance, if the defendant, though innocent of the charged crime, has information or knowledge about other crimes that the prosecutor needs, the prosecutor may feel pressure to continue the prosecution for leverage in gaining the defendant's cooperation. Or the defendant himself, though innocent of the charged crime, may be unsympathetic. He may have a bad criminal record. He may be suspected of other crimes by investigating authorities. Or the prosecutor may in fact have proof that the defendant has committed other crimes but be unable to obtain a conviction because of a legal impediment to prosecution unrelated to guilt, such as a fourth amendment violation. In short, prosecuting authorities may view the defendant as a "bad actor" against whom they are seeking some basis for conviction, and thus be reluctant to dismiss.\textsuperscript{108}

The most troublesome \textit{Brady} cases, though, are those in which the \textit{Brady} material is not totally exculpatory.\textsuperscript{109} They may tempt the prosecutor most to resolve the case by guilty plea rather than terminating the

\textsuperscript{106} Commentators disagree on the amount of bluffing engaged in by prosecutors to obtain guilty pleas in weak cases. \textit{Compare} Alschuler, \textit{supra} note 95 (claiming that such bluffing is widespread), \textit{with} McDonald, Cramer & Rossman, \textit{Prosecutorial Bluffing, supra} note 23 (disputing Alschuler's claim and finding that although some bluffing does occur, the practice is neither widespread nor unscrupulous).

\textsuperscript{107} An example of totally exculpatory \textit{Brady} material would be a DNA or blood grouping test of a semen sample from the victim in a rape case that positively excluded the defendant as the rapist.

\textsuperscript{108} \textit{See} F. MILLER, \textit{Prosecution: The Decision to Charge a Suspect with a Crime} 287-92 (1969). In deciding to prosecute a particular defendant, among the factors that "may make officials especially anxious to 'put him away' for a long time" are "his criminal record, noncriminal conduct bearing on his 'character,' official suspicion of the commission of offenses which they cannot prove, or connection of the suspect with a professional criminal or with syndicated criminalism." \textit{Id.} at 287.

\textsuperscript{109} An example of \textit{Brady} material that is less than totally exculpatory would be a statement by a key witness casting serious doubt on the witness' credibility, such as the statement of uncertainty regarding identification made by the robbery victim to the prosecutor in the introductory hypothetical.
prosecution. In such a case, the prosecutor, though unable to prove guilt at trial, may be unconvinced of the defendant's innocence. If the crime is a serious one, the prosecutor may be particularly reluctant to dismiss charges against someone who may in fact be guilty. The prosecutor may also assume, as the Supreme Court does, that no innocent defendant would plead guilty. She thus may feel that she has ascertained the truth if the defendant has pleaded guilty and admitted the crime. The prosecutor's attempt to secure a guilty plea in this way may seem morally acceptable when compared with the risk of freeing a defendant who may be guilty and dangerous. The introductory armed robbery hypothetical confronts the prosecutor with this sort of case. In that hypothetical, the prosecutor might feel, for example, that the witness' uncertainty is due to fear rather than a true mistaken identification.

It would be difficult, if not impossible, to determine the exact percentage of Brady cases declined or dismissed. How do we know, then, that enough Brady cases stay in the system to merit constitutional concern over their fate in the guilty plea process? The answer is provided by the Brady rule itself. If we were to assume that all Brady cases would be dismissed or declined, we would need no Brady rule at all. The very existence of the Brady rule reflects the view that some percentage of Brady cases will continue to be prosecuted. This view may simply reflect a realistic appraisal of the many complex countervailing forces that operate on the resolution of Brady cases or a practical assessment that not all prosecutors are virtuous. Or it may be based on the theoretical premise that due process exists quite apart from the requirements of ethics or empirical assessments about the frequency of certain types of prosecutorial behavior. The very existence of the Brady rule, though, clearly attests to the fact that Brady cases that are prosecuted rather than dismissed or declined are a matter of constitutional concern. It is the resolution of these cases that remain in the prosecutorial system with which this article is concerned.

(3) Safeguarding the Sincerity of Self-Condemnation: Brady Disclosure as a Check on the Inducement to False Self-Condemnation

We now turn to the issue of how mandatory disclosure of Brady material in the guilty plea process would affect the convergence of weak proof of guilt, powerful sentencing differentials, and uninformed defendants. Our analysis so far has led to the conclusion that the prosecutor

110. See, e.g., M. HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 122-23 (1978) ("Veteran prosecutors scoff at the notion that plea bargaining coaxes innocent defendants to plead guilty.").
will tend to prefer plea bargaining and to offer high sentencing differentials in weak cases. We should expect then, that *Brady* cases regularly will tend to be resolved by plea negotiation rather than trial through the use of high sentencing differentials. This would be true regardless of the existence of the *Brady* rule. We should expect a significant sentencing differential in a case in which *Brady* material exists even without a rule of mandatory disclosure at trial. A prosecutor might well decide to offer an attractive plea with a significant differential simply to avoid the risk of the defendant finding the exculpatory information on his own, particularly since the chances of such discovery are heightened by the trial and appeal process and the continued preparation, investigation, and involvement of counsel the process entails.

The *Brady* rule, by requiring the prosecutor to disclose at trial, converts the risk that a defendant might discover the exculpatory information at trial into a virtual certainty, the only alternative at trial being the commission of clear constitutional and ethical violations. Once the information is disclosed, the prosecutor’s chances for losing at trial are somewhere between reasonably probable and certain, depending on how exculpatory the evidence is. Faced with such a prospect, the rational prosecutor’s most likely choice is either to dismiss or to offer a plea. If she takes the plea route, her incentive to offer a high sentencing differential is greatly increased by the fact that the *Brady* rule operates at trial.

Again, the Easterbrook model provides an excellent means for illustrating this tendency. With the *Brady* rule requiring disclosure at trial, in Easterbrook’s terminology the expected return of going to trial is very low since the probability of conviction at trial is very low, possibly even zero, if the *Brady* material is totally exculpatory. This gives the prosecutor only one realistic choice other than dismissal, which is to try to obtain some penalty through a guilty plea. If the defendant is resistant, the rational prosecutor should drop her minimum settlement demand. Faced with the alternative of getting nothing or close to nothing at trial, the prosecutor will have virtually no theoretical limit on her willingness to reduce her plea offer by increasing the sentencing differential. The only theoretical limit should be the point at which the defendant accepts the offer.\footnote{There may, of course, be practical limitations on the prosecutor’s ability to lower her offer, such as internal guidelines of the prosecutor’s office setting limits on plea bargaining.}

One would expect the rational prosecutor who encounters a case with *Brady* material and faces a mandatory disclosure rule in the trial context, but not in the plea context, never to take it to trial. Thus, the
*Brady* rule, if applied only in the trial context, would have the ironic result not of compelling disclosure, but of steering *Brady* cases into the guilty plea context for resolution without disclosure. Thus, the cases the rule was intended to regulate would not come within the reach of the rule, the trial context. In the terminology of Professors Mnookin and Kornhauser, the "shadow" of a *Brady* rule restricted only to trials would keep *Brady* cases out of the trial context and increase the pressure of the sentencing differential in such cases in the guilty plea context.\(^{112}\)

In sum, we should expect restriction of the disclosure rule to trials to have two direct consequences. First, it should increase the incentive of a rational prosecutor to avoid trial in order to avoid the *Brady* disclosure rule, by choosing plea bargaining over trial as a means for resolving *Brady* cases not declined or dismissed. Second, it should increase the incentive of a rational prosecutor in such cases to offer inducements to plead guilty so substantial that the plea will be very attractive to the defendant whether innocent or guilty. Consequently, if plea negotiations took place in the shadow of a disclosure rule restricted to trials, the likelihood in the plea negotiation process of the convergence of three factors would increase substantially: questionable guilt, a very strong inducement to plead guilty in the form of a high sentencing differential, and a defendant uninformed of a major weakness in the prosecution's case. Convergence of these three factors significantly increases the risk of innocent defendants falsely condemning themselves in *Brady* cases and thus threatens the accuracy of the plea. This risk is inherent in all *Brady* cases.

*Brady* disclosure in the guilty plea process could help remedy the problem of this convergence. It would decrease the risk to accuracy posed by these cases by informing the defendant of the major weaknesses in the prosecution's case. Such disclosure would allow the defendant to calculate more accurately the risk of going to trial and would lower his estimation of the risks associated with trial. As the estimated risk at trial decreases, so does the perceived value of the prosecutor's plea offer and the inducement to false self-condemnation. In sum, the disclosure would provide a means of checking the power of the inducement to false self-condemnation that such cases will tend to generate. Finally, it should be noted that while *Brady* disclosure would help remedy the problem of insincerity undermining the accuracy of a guilty plea confession, it would not guarantee the accuracy of a guilty plea confession any more than *Brady* disclosure at trial guarantees the accuracy of a jury verdict. *Brady*

---

\(^{112}\) See Mnookin & Kornhauser, *supra* note 80, at 951.
Disclosure, in short, would not cure completely the problem of high sentencing differentials interacting with weak cases. This fact is an important qualification to the accuracy claims advanced above. If the prosecutor discloses *Brady* material in the guilty plea process, a highly risk adverse defendant may still wish to plead guilty even knowing the existence of the *Brady* material. Application of *Brady* to guilty pleas, however, should work to encourage a significant number of cases in which the defendant would have agreed to plead guilty to be dismissed outright or resolved by trial.

A more abstract way of assessing the value of disclosure in the guilty plea process is from the point of view of the incentives disclosure rules create for prosecutors. 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. The main point of the argument in this section is that the possible inaccuracy of plea bargaining in such cases renders such an incentive system seriously flawed.

C. The Potential Costs of Disclosure

In the preceding two sections, the claim has been advanced that disclosure of *Brady* material in the guilty plea context would promote the accuracy of guilty pleas by helping to ensure the knowledge and sincerity of the admission of guilt, which is the foundation of the guilty plea. There are several counter-arguments to a rule of mandatory disclosure: conviction of guilty defendants will be hindered; the search for exculpatory information by police and prosecutors will be discouraged; and police will be reluctant to share exculpatory information with prosecutors.

113. If the *Brady* material is totally exculpatory, there is little if any chance of the defendant pleading guilty. Once the prosecutor has decided to reveal totally exculpatory evidence, most likely the case will be dismissed. Even if the case were not dismissed, the defendant should resist a guilty plea since acquittal is virtually certain at trial. If the *Brady* material is less than totally exculpatory, however, the likelihood of the prosecutor or judge dismissing the case, while still great, is lessened. If the case is not dismissed, the prosecutor simply may increase the sentencing differential to compensate for the weakening of the case caused by the disclosure. In our introductory hypothetical, for example, even if the defendant knows that the only key witness cannot identify him, if the prosecutor makes the sentencing differential great enough—for example straight probation—the innocent defendant may still plead guilty to avoid even the very small chance of a conviction and jail sentence after trial.

114. It has been argued that trial is a better mechanism for accurately resolving questions of doubtful guilt. Schulhofer, *Criminal Justice Discretion*, supra note 94, at 74-77. It also could be argued that trial is a morally superior way to handle cases of questionable guilt since the full panoply of constitutional safeguards would have been devoted to protecting the defendant compared with the reduced number of safeguards present with a guilty plea.
I. Guilty Defendants

One argument is that in some cases disclosure will hinder the conviction of guilty defendants. When the *Brady* material is totally exculpatory, disclosure serves to protect the innocent with no disservice to the goal of convicting the guilty. But when the *Brady* material is less than totally exculpatory, disclosure may be at the cost of not convicting some guilty defendants. Turning to the robbery hypothetical with which we began, even though the victim apparently thinks he has identified the wrong person, the defendant may still in fact be guilty. This uncertainty about guilt or innocence is the very reason why the prosecutor hesitates to dismiss such a case, as mentioned previously. If the defendant is in fact guilty, forcing the government to disclose *Brady* material in the guilty plea process reduces the prosecutor's ability to bluff a guilty defendant into pleading guilty.

This problem reveals a tension between two different goals of the truth determining function of the criminal process: maximizing protection of innocent defendants from conviction and maximizing the conviction of guilty defendants. With perfect information, there would exist no tension between these two goals. But with imperfect information, protection of the innocent and the conviction of the guilty are frequently in conflict.

If *Brady* disclosure in the guilty plea process protects the innocent from false conviction at the cost of allowing some guilty defendants to escape punishment, then mandating *Brady* disclosure in the guilty plea process requires some rationale for preferring protection of innocent defendants. A powerful reason for such a preference is found in a value fundamental to our criminal justice system and implicit in the constitutional *Brady* rule. As expressed by Justice Harlan: "In a criminal case . . . we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty. . . . In this context, I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."115

The *Brady* rule in the trial context reflects the value judgment, expressed by Justice Harlan, that the utility of protecting the innocent from punishment should be given much greater weight than "the disutility of acquitting someone who is guilty." If the case in the introductory robbery hypothetical, for example, went to trial, the *Brady* rule would ad-

vance the accuracy of the jury’s verdict by helping assure that the jury
hears the exculpatory information, even though the most likely result of
disclosure at trial would be the acquittal of a defendant who still might
be guilty. Similarly, we should prefer the utility of Brady disclosure in
the guilty plea process over its disutility in the loss of convictions of the
guilty. Unless a procedural mechanism, whether at trial or during plea
negotiations, provides a high degree of assurance that it protects the in-
nocent from conviction, we should reject it even at the risk of freeing a
guilty defendant.

2. Production and Sharing of Exculpatory Information

The advantages of disclosure must also be weighed against two dif-
ferent sorts of disutilities. The first is that a mandatory disclosure rule
would hinder investigations leading to exculpatory information. In
short, both police and prosecutors may be less likely to produce exculpa-
tory information if required to reveal it to criminal defendants pleading
guilty.\textsuperscript{116} Second, even if the police find exculpatory information, they
will be less likely to share it with prosecutors bound by a mandatory
disclosure rule. The beneficial effects claimed for disclosure in the previ-
ous sections would then be reduced or nullified both by less thorough
investigation and restricted access for the prosecutor to whatever excul-
patory information is produced. If exculpatory information is not pro-
duced or shared with the prosecutor, she simply will be unable to reveal
it. Moreover, other benefits of the prosecutor’s access to exculpatory in-
formation—primarily the exercise of prosecutorial discretion to dismiss
the case—will be lost. In other words, the accuracy of the criminal jus-
tice system is best served by creating the maximum incentives for thor-
ough investigation and complete revelation to the prosecutor.

These arguments reveal the “tension between creating incentives to
create new information and obtaining the optimal use of existing infor-
mation”\textsuperscript{117} found in such diverse areas as patents, copyrights, evidentiary
privileges, and insider trading. So far our analysis has focused on the use

\textsuperscript{116} In some contexts, such as civil discovery, the “production” of information refers to
turning information over or making it available for copying and inspection by someone else.
See, e.g., FED. R. CIV. P. 34 (Production of Documents and Things). As the term is used in
the text of this Article, however, it refers to a search which results in either the gathering of
existing information or the creation of new information. The police looking for and finding the
testimony of an eyewitness to a crime is an example of production through gathering existing
information. The performance of scientific tests on blood or fibers is an example of production
through the creation of new information.

\textsuperscript{117} Easterbrook, Insider Trading, Secret Agents, Evidentiary Privileges, and the Produc-
aspect of disclosure, the advantages to be gained in accuracy by making exculpatory information available to defendants pleading guilty. Now we must examine the creation and access aspects of disclosure to determine whether the advantages of extending a mandatory disclosure rule from the trial context to the guilty plea context should be preferred to any costs incurred through a reduced incentive to produce and share exculpatory information.\(^{118}\)

a. Production

It might be argued that police would be less likely to create exculpatory evidence by running a DNA or blood grouping test on a semen sample in a rape case, for example, if they knew that an exculpatory result had to be disclosed in plea bargaining. Similarly, the prosecutor would be less likely in interviewing witnesses to seek out exculpatory inconsistencies if she had to disclose the results in plea bargaining.

This argument is well developed in the law and economics literature. Professor Kronman, for example, argues that economic analysis leads to a nondisclosure rule for “deliberately acquired information” in order to maximize the incentive to acquire such information.\(^{119}\) However, disclosure would be required for “casually acquired information,” which is not the product of deliberate search but the by-product of other activity.\(^{120}\) Kronman’s distinction between deliberately and casually acquired information provides a useful means for analyzing the potential costs of extending Brady to guilty pleas.

First, much Brady material is not the product of a search by the police or prosecutors. For example, in the entrapment hypothetical discussed earlier,\(^{121}\) the fact that a particular person is acting as an agent of the government in enticing someone to sell drugs is not the result of a

\(^{118}\) The sincerity claim set forth previously takes as an assumption that the Brady rule and ethical disclosure rules exist in the trial context. One could appropriately focus the creation/access arguments advanced in the text on the Brady trial rule and reexamine it in light of these arguments. But the question this Article addresses is a narrower one: accepting the Brady rule in the trial context, should it be extended to guilty plea negotiations as well. Hence, the creation/access arguments need to be precisely focused on the question of the disincentives created by extension of Brady to the guilty plea context. The Brady trial rule already creates a disincentive for the creation of and access to exculpatory information. Since this Article argues for extension of Brady disclosure to the guilty plea context, the real question here is the marginal increase in disincentive versus the marginal increase in accuracy resulting from such an extension of disclosure.


\(^{120}\) Id.

\(^{121}\) See supra notes 52-53 and accompanying text.
search, but rather simply a by-product of the government’s use of informants. Similarly, exculpatory information in the form of a promise or concession to a witness, such as a reduction in sentence in return for testimony, is not produced or created by a search for such information. This information is simply a by-product of the government’s use of promises or concessions to gain the cooperation of witnesses: Clearly, this Brady material would qualify as “casually acquired” and thus should be subject to disclosure, since the information will still be generated regardless of a disclosure rule.

Second, when exculpatory information is the product of a search—such as a DNA test on a semen sample—the search for the exculpatory information is difficult if not impossible to segregate from the search for incriminating evidence. Thus, much Brady material will tend to be generated as a by-product of the prosecution’s pursuit of its own self-interest in finding incriminating evidence. Again, this Brady material would qualify for disclosure as a “casually acquired” by product of another activity—the search for incriminating evidence.

Third, when the search for exculpatory information can be segregated from the search for incriminating information, there are a number of powerful incentives that push the prosecutor and the police to continue to search for this information. First, the police and the prosecutor have an obvious interest in knowing if the defendant is innocent especially in the early stages of an investigation, either because they are motivated to discover the truth or because they want to avoid wasting investigative time and resources in pursuing the wrong suspect. Once the prosecution and police have committed themselves to the prosecution of a particular defendant, these incentives become much weaker, in part because the police and prosecutors will have made a psychological commitment to their belief in the defendant’s guilt. At this later stage, however, the police and prosecutors still have a strategic interest in learning the weaknesses of their case so that they may most effectively either cure them before trial or know whether the case should be dismissed or pleaded out, unless they are positive the defense cannot find the information. Again, exculpatory information is generated as a by-product of the police and prosecution’s self-interested pursuit of conviction of a guilty person. Much, perhaps most, of Brady material will be “casually acquired information” in Kronman’s terminology and thus qualify for

---

122. Ironically, the need for Brady disclosure, set forth in Section II(B)(3), supra, as a check on the powerful inducements to false self-condemnation which Brady cases naturally tend to generate, would be greatly reduced if the police were to withhold the exculpatory information from the prosecutor. As demonstrated in Section II(B), the threat to sincerity is
disclosure without significantly damaging the search for exculpatory information.

b. Sharing

A second and perhaps more important problem is that the police may not share the exculpatory information they do find with the prosecutor if she is required to disclose. Here, the value of the disclosure rule could be nullified if the prosecutor were denied access to the very information to be disclosed. The fear is that the disclosure rule would bring about precisely the situation found in the Supreme Court's most recent Brady case, in which the investigating agents entered into agreements to pay the prosecution's two main witnesses for their undercover investigative work and testimony, but never informed the prosecutor of these facts.123

This argument is well developed in the area of attorney-client confidentiality and evidentiary privilege.124 In his treatment of the defense attorney's handling of perjury, for example, Monroe Freedman has argued that a mandatory disclosure rule requiring a defense lawyer to use information about client perjury to the client's disadvantage often will assure that the client simply will not disclose the fact that he has committed or intends to commit perjury. Thus, attorneys will be "ignorant of the perjury and therefore will be in no position to attempt to discourage the client from presenting it."125

There are a number of responses to this argument, the weight of which ultimately compel adoption of a disclosure rule. First, much important Brady material is generated in such a way that it cannot be hidden from the prosecutor. Many agreements with informants or other cooperating witnesses, unlike the agreements in the Bagley case, require

largely a product of the large sentencing differential which will tend to be generated by a rational prosecutor aware of a major weakness in the case. If the prosecutor is uninformed of the weakness, she should not be driven to offer the kind of sentencing differential which we have identified as one of the key ingredients undermining the accuracy of a defendant's guilty plea in a Brady case.

123. United States v. Bagley, 473 U.S. 667, 671, n.4 (1985) (The government's two main trial witnesses had entered into agreements with the Bureau of Alcohol, Tobacco and Firearms for payment of $300 each in return for undercover gathering of evidence and testifying in court. "The Assistant United States Attorney who prosecuted respondent stated in stipulated testimony that he had not known that the contracts existed and that he would have furnished them to respondent had he known of them.").


the prosecutor's involvement in terms of a sentencing recommendation or reduction or dismissal of charges. Other Brady material, such as prior statements by witnesses, is generated during the prosecutor's interviewing of a witness, as in our first hypothetical.

Clearly, though, there is a substantial amount of exculpatory evidence, such as a lab report or the existence of an exculpatory witness or piece of evidence, that the prosecutor will know of only if the police inform the prosecutor of its existence. The inclination of investigating agents to hide such evidence in order to avoid disclosure by the prosecutor is subject to a number of conflicting incentives. Without question, a mandatory disclosure rule in plea bargaining creates a disincentive for sharing exculpatory information with the prosecutor. Just as in the area of production of exculpatory information discussed in the preceding section, however, there exist a number of counter-incentives prompting the police to share the exculpatory material with the prosecutor in spite of the disclosure rule.

First, the police have an incentive to disclose to the prosecutor in order to avoid convicting the wrong person and to refocus both their own and the prosecutor's resources in pursuing other suspects. Second, the police have an incentive to reveal evidentiary weaknesses so that the prosecutor may be able to take steps to minimize the damage caused to the case or negotiate a guilty plea, especially if they feel that the information may be found by the defense. The rational police officer, like the rational prosecutor, is likely to want to resolve weak cases through the use of a guilty plea. This normally will entail sharing the evidentiary weakness that dictates negotiation of a guilty plea with the prosecutor. Another factor influencing the incentive to conceal exculpatory information from the prosecutor is the degree of openness and cooperation between the particular investigative agency and the prosecutor's office.

A final and important counter-incentive to hiding the exculpatory information from the prosecutor arises from the risks entailed if the investigating agent's failure to share the information with the prosecutor is discovered. This counter-incentive is a function of the risk and consequences of detection. The risk of detection increases with the number of people involved in the investigation who know of the exculpatory information. The existence of statutes such as the Freedom of Information Act, which can open investigative files for later scrutiny by the defendant, also increase the risk of detection. The active and early in-
volvement of the prosecutor in the investigative phase of the case, as when a grand jury is used in the investigation, similarly increases the risk of detection.

The consequences of detection may range from violation of the investigating agency's own rules for providing information to the prosecutor to actual retaliation by the prosecutor's office. Unlike the relationship between the typical criminal defendant and his lawyer, the police and the prosecutor's office normally have a continuing relationship. Thus, the prosecutor may have either formal means of retaliating, such as a complaint to the investigating agent's superiors, or informal means through withholding cooperation in the investigation or prosecution of future cases.¹²⁹

Ultimately, though, as with the disutility of the loss of convictions of guilty defendants, we must face the question of why we should prefer the utility of disclosure in helping ensure knowledge and sincerity over the utility of maximizing incentives for the production and sharing of exculpatory information. Preference for the utility of disclosure could be based on a conclusion that the gains in accuracy of the guilty plea process will exceed the costs in exculpatory information not sought out or shared with the prosecutor because of the number and strength of the incentives to produce and share exculpatory information in spite of a mandatory disclosure rule. The analysis set forth above, regarding production of exculpatory information indicates strong support for this judgment. In regard to the police sharing the information with the prosecutor, the balance between the benefits and costs seems to be a closer one. In either case, though, the questions presented are difficult if not impossible to resolve empirically.¹³⁰

Finally, though, a value judgment implicit in the very existence of the Brady rule provides a powerful argument for resolving in favor of disclosure the tension between the utility of disclosure and the disutility of reduced incentives for creation of and access to exculpatory information. The Brady rule exists in the trial context as a matter of constitutional imperative despite the fact that its existence creates precisely these types of creation and access disincentives. Although the Brady cases do

¹²⁹. See K. Scheppele, supra note 126, at 51-52.

¹³⁰. See, e.g., Easterbrook, supra note 117 at 361, 364 (in reference to a similar tension in the area of attorney-client privilege, Judge Easterbrook has stated that tracing the web of the effects of privileges in litigation "is a stupefying complex task. Economists (including the game theorists) have only begun to grapple with the problems of creating and using information in litigation." Id. at 361. "The analysis of information problems is difficult, and answers are elusive; much depends on empirical work that is undone or undoable." Id. at 364.)
not explicitly discuss this tension, a preference for the utility of disclosure is implicit in the very existence of the rule.131

III. Implementing Brady Disclosure in the Guilty Plea Process

The benefits of disclosure of Brady material in the guilty plea process demonstrated in section II might be implemented with varying degrees of effectiveness through three means: a constitutional, ethical, or statutory rule. A constitutional rule would likely be the most effective of these for several reasons. First, a constitutional rule based in due process would be applied uniformly to both federal and state prosecutions, as is the present Brady trial rule. Statutory criminal procedure and ethical rules, by contrast, are enacted jurisdiction by jurisdiction and consequently are subject to lack of uniformity. Second, a constitutional rule may have greater deterrent value as well. Prosecutors may take it more seriously due simply to the symbolic stature of a constitutional rule. Apart from symbolism, a constitutional rule may have a greater effect because the violation of a constitutional rule tends to have greater remedial significance in post-conviction review than statutory or ethical violations. For example, only constitutional violations are cognizable under the federal habeas corpus remedy for review of state convictions.132 Unlike a constitutional violation, the remedies for an ethical violation, even on direct appeal, may not include reversal of a conviction. Rather, the primary sanction may be referral to the state bar for disciplinary proceedings,133 a remedy that, according to many commentators, is seldom

131. A number of possible rationales might explain the preference expressed in the Brady rule for disclosure. First, it might simply be a result of a normative preference for openness on the part of prosecutors and police, the sort of value reflected in the Freedom of Information Act. Another possible rationale for the preference for Brady rule's disclosure might be based on the superior access to such information which the prosecution and police frequently have. In the area of discovery, "the defendant's right of discovery is said to be particularly strong with respect to evidence that is peculiarly within the control of the prosecution and not otherwise available to the defense." Westen, The Compulsory Process Clause, 73 MICH. L. REV. 71, 124 n.251 (1973). Superior access to information in other contexts has frequently led to disclosure requirements. See K. SCHEPPELE, supra note 126 at 134-38. Indeed, even Professor Kronman's economic analysis leads him to the conclusion that efficiency requires disclosure even of deliberately acquired information by a party who has superior access. Kronman, supra note 119 at 4 ("a court concerned with economic efficiency should impose the risk on the better information-gatherer.").


133. See, e.g., United States v. Page, 828 F.2d 1476, 1480 (10th Cir. 1987) ("If the prosecutor in fact has violated ethical or legal canons in his discharge of Brady obligations, the proper remedy is a disciplinary action against him, rather than a new trial for the defendant."); People v. Jones, 44 N.Y.2d 76, 89 n.*, 375 N.E.2d 41, 44 n.*, cert. denied, 439 U.S. 846 (1978) ("Reference to [the Model Code of Professional Responsibility standard on prosecutorial disclosure of exculpatory evidence] should not be taken to imply that sanction for violation of
effectively invoked against prosecutors. Having in mind some of the advantages and disadvantages of each mode of implementation, we now turn to the particulars of implementing *Brady* disclosure through each of these mechanisms.

A. *Brady* Disclosure as Due Process in Pleading Guilty

Section II of this Article advances instrumental arguments for disclosure of *Brady* material in the guilty plea process: such disclosure would be useful in advancing the accuracy of guilty pleas by enhancing both the defendant’s knowledge and sincerity in confessing guilt. In turning now to the issue of constitutional recognition for such a rule, a primary concern is what if any weight should be accorded such arguments in constitutional analysis. The instrumental value of a rule obviously does not mandate constitutional recognition for that rule. A rule’s utility may simply warrant its adoption as a statute or rule, such as the many Federal Rules of Criminal Procedure that exist as useful rules without constitutional status. Although instrumental reasoning related to accuracy of process has featured prominently in the development of criminal due process, the arguments in the following sections are not based on the assumption that instrumental reasoning and constitutional imperative can necessarily be equated. Rather, as the following

---

professional responsibilities on the part of a prosecutor would necessarily inure to the benefit of a defendant. The appropriate remedy might be limited to disciplinary proceedings. In any event, we now express no view on this aspect of the matter.”). 134. See, e.g., C. Wolfram, supra note 40, ¶ 13.10.2, at 761 (1986) (“One finds, however, that prosecutors are relatively rarely subjected to professional discipline. That probably does not reflect uniformly superior conduct as compared with defense counsel or lawyers in other roles. Instead, disciplinary agencies are probably reluctant to pursue complaints against prosecutors that may be motivated by resentment at convictions or that might be politically motivated by a desire to compromise the political power of the prosecutor’s office.”); N. Dorson & L. Friedman, Disorder in Court 187 (1973); Alschuler, Courtroom Misconduct By Prosecutors and Trial Judges, 50 Tex. L. Rev. 629, 670-75 (1972). In relation to violations of the ethical disclosure rules that parallel the *Brady* trial rule, such disciplinary proceedings have been rare. Rosen, Disciplinary Sanctions Against Prosecutors For Brady Violations: A Paper Tiger, 65 N.C.L. Rev. 693, 730-31 (1987).

135. “It must be recognized that constitutional rules represent only the minimum protections that must be afforded criminal defendants. Statutes and court rules can and do build upon or add to constitutional minima and fill out the interstices of the criminal justice process.” S. Saltzburg, supra note 4, at 4.

136. See Kadish, supra note 35, at 346 (One of the traditional objectives of due process “is the goal of insuring the reliability of the guilt-determining process—reducing to a minimum the possibility that any innocent individual will be punished.”).

sections make clear, they are based in part on the prominence of instrumental reasoning related to accuracy in the areas of constitutional doctrine most relevant to the disclosure question this Article addresses.

The Supreme Court's restrictive attitude toward the *Brady* rule in recent years initially suggests that the Court would be unreceptive to the idea of expanding the rule's applicability to a new context. But the emphasis in many criminal procedure opinions of both the Burger and Rehnquist Courts on the central importance of accurate determination of the question of factual guilt in the criminal process indicates that the present Court might be receptive to a rationale premised on advancing accuracy in the guilty plea process. The very ground used for narrowing the rule in other contexts may serve to help it gain recognition in the guilty plea context.

Two lines of Supreme Court authority are most relevant to the issue of *Brady*'s application to guilty pleas: cases dealing with the *Brady* doctrine and cases dealing with guilty pleas. Opinions in both these areas articulate a high value on accuracy, echoing the more general theme of the ascendancy of accuracy in the Supreme Court's stated hierarchy of values. This emphasis on accuracy may beckon us to an overly optimistic prediction of the Court's receptiveness to the accuracy argument advanced in the preceding section. Certain facets of Supreme Court doctrine in both the *Brady* rule and guilty plea areas dictate at best a qualified optimism about the prospects for recognition of a right to *Brady* disclosure in the guilty plea process. Although exhaustive treatment of the Court's approach to *Brady* and to guilty pleas is beyond the scope of this Article, this section evaluates the amenability of Supreme Court doctrine in each of these areas to an accuracy rationale for the application of the *Brady* rule as a due process requirement for guilty pleas.

---

138. See, e.g., Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) ("The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence."); Stone v. Powell, 428 U.S. 465, 490 (1976) ("the ultimate question of guilt or innocence ... should be the central concern in a criminal proceeding"). The analytical focus of recent criminal procedure opinions on the centrality of factual guilt has drawn significant scholarly attention. See, e.g., C. WHITEBREAD & C. SLOBOGIN, CRIMINAL PROCEDURE 3-5 (1986); Saltzburg, Foreword: The Flow and Ebb of Constitutional Procedure in the Warren and Burger Courts, 69 GEO. L.J. 151, 154-58 (1980); Seidman, Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure, 80 COLUM. L. REV. 436, 456-83 (1980); Stacy & Dayton, Rethinking Harmless Constitutional Error, 88 COLUM. L. REV. 79, 79-88 (1988). Some commentators see this analytic focus as representing a true commitment to advancing the value of factual accuracy. Other commentators, while noting the preoccupation of recent Supreme Court opinions with factual guilt, claim that the court's devotion to it is little more than rhetorical. See Seidman, supra, at 483.
(1) Brady Doctrine

Justice Douglas' opinion in the original Brady case provided sparse explanation of the constitutional foundation of the Brady rule, other than noting that it was based on due process. The opinion treats the case as simply an extension of existing precedent rather than the creation of a major new rule. Nonetheless, the creation and development of the Brady doctrine have been marked by three recurring themes, which provide some guidance to the rule's constitutional bases. The first and dominant theme is that the rule is concerned primarily with evidence that is outcome determinative and that bears on factual accuracy. A secondary theme is that of giving expression to a special obligation of the prosecutor to justice. A final and minor theme is protection of the criminal process from the corrupting effect of perjury. The following section demonstrates that the current Brady doctrine, based on a commingling of three different themes, should prove receptive to an accuracy rationale for disclosure in the guilty plea process.

a. The Outcome Determinative Requirement

The most conspicuous aspect of current Brady doctrine is its virtually exclusive concern with the outcome of the criminal proceeding. The Supreme Court's treatment of materiality is the clearest expression of this concern. The Court's most recent Brady case, United States v. Bagley, defines evidence as being material, and thus triggering the Brady disclosure obligation, "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." The Court emphasized this standard's result oriented focus by defining a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." Materiality, then, is keyed exclusively to effect on result. In short, the Brady rule is con-

139. See infra note 166.
141. Id. The Court's exclusive focus on result found in the definitions of materiality and reasonable probability is echoed and reinforced throughout the rest of the Court's opinion. The Court relied in part on precedent in the Bagley opinion, using both the language and the results of earlier cases to justify the result oriented focus it adopted. The Court quoted language from United States v. Agurs, 427 U.S. 97, 104 (1976), which found concern with outcome "implicit in the requirement of materiality." 473 U.S. at 674-75. From Giglio v. United States, 405 U.S. 150, 154 (1972), the Court quoted language indicating the insignificance of disclosure of "evidence possibly useful to the defense but not likely to have changed the verdict." 473 U.S. at 677. From Brady, the Court pointed out that the new trial ordered for the defendant in that case was limited only to the issue of punishment since the evidence at issue could only have affected the outcome on punishment and not on guilt. Id. at 675. As the use of each of these cases makes clear, the Court's orientation is toward result.
cerned only with a narrow range of evidence, disclosure of which has a very strong and direct correlation with the "result of the proceeding." 142

Disclosure of Brady material has an outcome determinative quality in the guilty plea context, just as it does in the trial context. Since the defendant's calculation of the likelihood of conviction at trial is a critical element in the decision to plead, evidence that dramatically changes the likelihood of conviction at trial should have an equally dramatic effect on the defendant's willingness to plead. 143 At trial the Brady material's effect is on the fact finder in resolving the question of the defendant's guilt. In the guilty plea process, the Brady material's effect is on the defendant and his lawyer in resolving the question of whether to plead or go to trial. In both situations, Brady material has a strong and direct correlation to result.

The verbal formulation of the Brady materiality rule, speaking as it does of a change in the result of the "proceeding" rather than just trial, seems to recognize that Brady material can have a result determining effect outside of the trial context, as in a guilty plea proceeding. In a recent case, the Supreme Court acknowledged that exculpatory evidence can have just such an outcome determinative effect in a guilty plea proceeding. 144 Application of Brady to guilty pleas, then, meets the literal requirement of the Brady rule that the evidence in question be outcome determinative.

142. The only exception is in the area of perjury, treated infra notes 164-69 and accompanying text.
143. For a highly risk averse defendant, the disclosure might not change the defendant's mind about pleading guilty, but simply allow him to drive a better bargain. Here too, though, the disclosure would change the outcome in terms of varying the terms of the plea bargain.
144. In Hill v. Lockhart, 474 U.S. 52, 59 (1985) (footnote omitted), the Supreme Court articulated an outcome determinative test for assessing ineffective assistance of counsel claims in the guilty plea context: "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Like the current materiality test under the Brady doctrine, this outcome determinative test was drawn from Strickland v. Washington, 466 U.S. 668 (1984). Hill, 474 U.S. at 57-59. One of the hypotheticals chosen by Justice Rehnquist for illustrating outcome determinative impact in a guilty plea situation was the failure of defense counsel to investigate or discover potentially exculpatory evidence. Id. at 59. Justice Rehnquist pointed to the close tie between exculpatory evidence's potential impact on the outcome of trial and its impact on the defendant's decision to plead:

For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether 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.
b. Factual Accuracy

The present Supreme Court's use of outcome determinative analysis, as in the Brady materiality standard, generally correlates with the Court's underlying concern with factual accuracy. The connection becomes clear when one takes a broader look at the Supreme Court's use of outcome determinative standards and their derivation from harmless error doctrine. This approach reflects the Court's view that "[t]he harmless error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." Indeed, this reasoning "lies at the very core of the Court's harmless error jurisprudence." The fact that current Brady doctrine incorporates a version of the harmless error test suggests that a primary concern of the doctrine is with the factual question of the defendant's guilt or innocence. Indeed, the fact that the Bagley case uses a version of the harmless error doctrine, not just as a remedial rule but to define the very scope of the Brady right, suggests an even greater importance to the factual accuracy question in Brady doctrine.

Other features of the Bagley opinion reinforce this theme of concern for accuracy of result. For instance, the Court uses "fair trial" language to describe the scope of the disclosure duty: the prosecutor is required "only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial." These passages initially seem inconsistent with a focus on result because the idea of fairness is commonly used to denote something other than accuracy of result. It has often been used to convey the idea of conforming to established rules...
and procedures. The apparent inconsistency in the Court's reliance on fairness in Bagley evaporates, however, when one consults other recent cases for the meaning the Court attaches to "fair trial" in its present vernacular. In Strickland v. Washington, the case from which the present Brady materiality standard was taken, the Court defined a "fair trial" as one with a reliable result. The emphasis on reliable result shows that the Court's fair trial language is simply another way of expressing the Court's concern with accuracy of result.

The dominant theme, then, of current Brady doctrine is a concern with disclosure of evidence that is both outcome determinative and closely tied to accuracy of guilt determination. The arguments in section II advance this concern since they demonstrate that Brady disclosure in the guilty plea process is both outcome determinative and closely tied to the accuracy of a guilty plea.

c. Governmental Obligation

Another theme of present Brady doctrine, and one that runs back to the original Brady opinion, is the special obligation of the prosecutor to justice. The Bagley court noted that the Brady materiality standard is more lenient to the defense than the standard for a new trial motion based on newly discovered evidence not in the government's possession.
because of the "prosecutor's obligation to serve the cause of justice." 154
The Court reasoned that if the standard applied to the motion for a new trial was the same regardless of whether the exculpatory evidence was found in a neutral source or in the government, there would be no special significance to the prosecutor's obligation to serve the cause of justice. 155

A number of observations about this theme of governmental obligation are pertinent. First, even after the prosecutor's special obligation to justice is factored in, the Brady materiality formula still limits disclosure to evidence that would probably change the result. 156 Thus, the prosecutor's justice obligation is only to avoid inaccurate results rather than to treat defendants equally, a traditional view of justice. 157 In short, it seems that the Supreme Court has a reductionist notion of justice similar to the reductionist notion of fairness demonstrated in its view of what constitutes a "fair trial." Justice and fairness have been reduced simply to synonyms of concern for accuracy of result.

Second, actual comparison of the Brady standard with the standard used in new trial motions based on newly discovered evidence reveals a difference that seems little more than semantic. 158 The fact that the prosecutor's special obligation only has the effect of moving the materiality

154. United States v. Bagley, 473 U.S. 667, 680 (1985) (quoting United States v. Agurs, 427 U.S. 97, 111-12 (1972)). In another part of the Bagley opinion, reconciling the Brady duty with the requirements of the adversary system, the Court again emphasized the prosecutor's special obligation, noting that:

[b]y requiring the prosecutor to assist the defense in making its case, the Brady rule represents a limited departure from a pure adversary model. The Court has recognized, however, that the prosecutor's role transcends that of an adversary: he "is the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Id. at 675 n.6 (citation omitted).

155. Id. at 680 (citing Agurs, 427 U.S. at 111).

156. In the Court's view, the prosecutor apparently has a broader obligation to process as opposed to result only in the area of use of perjury. See infra notes 164-69 and accompanying text.

157. The Supreme Court's apparent definition of justice, though consonant with the Court's central concern with accuracy of result, is at odds with traditional notions of justice. "[T]he idea of justice is that individuals are entitled in respect of each other to a certain relative position of equality or inequality ... and its leading precept is often formulated as 'Treat like cases alike.'" H.L.A. HART, THE CONCEPT OF LAW 155 (1961).

158. The standard generally applied to a motion for a new trial on the basis of newly discovered evidence not in possession of the government is that the new evidence "probably would have resulted in acquittal." Agurs, 427 U.S. at 111 (footnote omitted). When the government was in possession of the evidence and it qualifies as Brady material, the standard is whether there is "a reasonable probability" that with disclosure of the evidence "the result of the proceeding would have been different." Bagley, 473 U.S. at 682 (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).
standard to at best a slightly more lenient position than the traditional new trial standard suggests that the governmental obligation rationale plays only a negligible role in current *Brady* doctrine. Such a conclusion, however, understates the functional importance of the prosecutor’s involvement.

The remedy of a motion for new trial based on newly discovered evidence is statutory and not of constitutional dimension. In the federal system it is provided by Federal Rule of Criminal Procedure 33. Constitutional due process is implicated only when the government has possession of the favorable evidence. In other words, even exculpatory evidence showing gross inaccuracy does not give rise to a constitutional remedy unless the government’s obligation to disclose is involved. Thus, the prosecutor’s involvement, even though it has only a negligible impact on the materiality standard, is a key ingredient in invoking the constitutional protection of due process embodied in the *Brady* rule.

This theme in *Brady* doctrine of a special obligation of the prosecutor to avoid an inaccurate result provides some guidance in determining the proper use of *Brady* disclosure in the guilty plea context. There are obvious differences between the prosecutor’s role in the trial process and her role in the guilty plea process. She takes a more obvious and open role in shaping the result in a trial than she does in the guilty plea process. At trial, the prosecutor selects and presents the evidence and argues based on that evidence for a finding of guilt. It is the engaging in this activity, this active part in shaping the trial result, that seems to trigger the constitutional *Brady* disclosure duty.

In the guilty plea process, the prosecutor’s role in shaping the result is less open and obvious. The traditional notion of a guilty plea as a unilateral gesture of contrition, confession, and acceptance of guilt insulates the prosecutor from responsibility for the result. But the more modern conception of the guilty plea as a negotiated resolution to a criminal dispute casts the prosecutor in a role in which her actions as negotiator shape the guilty plea proceeding and its result as much as her actions

159. See P. JOHNSON, CRIMINAL PROCEDURE 627-28 (1988). “It is important to distinguish the constitutional issue (knowing use of perjured testimony or suppression of exculpatory evidence) from the non-constitutional question of when a defendant can obtain a new trial on the basis of newly discovered evidence.” Id. at 627.


[T]here is much to be said for the Commonwealth’s position that on a plea of guilty the defendant has already entered on the rehabilitative process, that he is purging himself thereby of his wrongdoing, and it must be conceded that a sense of contrition therefore must have motivated his conduct.
as litigator shape the trial and its result. In both a trial and a negotiated guilty plea, she is the "architect of a proceeding" that bears heavily on a defendant. Rather than calling witnesses, introducing evidence, and arguing the factual inferences to be drawn from the evidence, the prosecutor as negotiator shapes the conditions and inducements for the plea. Consider, for example, a hypothetical in which the prosecutor did not divulge totally exculpatory information and the defendant pleaded guilty in response to the offer of a large sentencing differential to avoid a very high sentencing exposure after trial. In this situation the prosecutor, by offering a sentencing differential, failing to disclose exculpatory information, and accepting the plea, is the "architect" of an inaccurate conviction as much as the prosecutor who fails to disclose such information at a trial of the same defendant.

If the prosecutor as negotiator actively and powerfully shapes the result of the guilty plea proceeding, the governmental obligation theme in the Brady doctrine supports imposition of a disclosure duty in the guilty plea process as well as at trial. The Brady doctrine clearly calls for a special responsibility on the part of the prosecutor for the accuracy of the result in a criminal case. The Supreme Court has told us that the negotiated guilty plea is to be accepted and utilized as an "essential" and "highly desirable" component of our criminal justice system. Current statistics reveal that it is the criminal justice system's primary means for resolving essential questions of guilt and innocence. If the prosecutor's primary role is to be that of negotiator, and if she is to be permitted to offer the powerful inducements to plead guilty that current Supreme Court doctrine allows, then recognition of that special responsibility is at least as important in the negotiation context as in the trial context.

d. Perjury

In one area only, current Brady doctrine does not apply a result oriented standard. In the area of knowing use of perjury by the prosecution, the standard is more demanding of the prosecutor and requires broader disclosure. If the prosecutor has used perjury knowingly, or has failed to disclose that perjured testimony was used to convict the defendant, then "the fact that the testimony is perjured is considered material unless failure to disclose it would be considered harmless beyond a rea-

161. Withholding exculpatory evidence at trial "casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice." Brady v. Maryland, 373 U.S. at 88.
163. See supra note 3.
DISCLOSURE IN THE GUILTY PLEA PROCESS

reasonable doubt." The reason given for the broader disclosure duty is that such use of perjured testimony "involves prosecutorial misconduct and, more importantly, involves 'a corruption of the truth-seeking function of the trial process.'"165

Perhaps the special concern with perjury stems from the fact that it is a crime. Perhaps it stems from the fact that perjury seems more of an affront to the court than plain nondisclosure. The special concern with perjury, though, may have more to do with the history of the Brady rule than logic.166 Regardless of the reason, the important point for our purpose is that present Brady doctrine singles out the avoidance of perjury as a particular concern.

The Brady rule's concern with preventing perjury in the trial setting also is implicated in the guilty plea context. Judicial inquiry into the factual basis for a plea is a routine feature of the guilty plea process.167 Although the prosecution may fulfill the factual basis requirement,168 normally it takes the form of inquiry of the defendant. The judge, or sometimes the prosecutor, asks questions, and the defendant in response admits the facts necessary to fulfill the essential elements of the crime. This procedure is the only attempt made during the guilty plea process to satisfy the court of the defendant's factual guilt.

If an innocent defendant pleads guilty, then he normally must not only formally withdraw his plea of not guilty and substitute a plea of guilty, he must also make false statements in which he admits the facts constituting the essential elements of the crime, sometimes under oath.169 Thus, the pressure exerted in Brady cases on an innocent defendant to

165. Id. (quoting United States v. Agurs, 427 U.S. 97, 104 (1972)).
166. In the original Brady opinion, Justice Douglas stamped the Brady doctrine as the offspring of a line of cases dealing with perjury on the part of a prosecution witness in criminal trials. 373 U.S. at 86. This series of cases had first established that a prosecutor's intentional use of perjury violated due process. See Pyle v. Kansas, 317 U.S. 213, 216 (1942); Mooney v. Holohan, 294 U.S. 103, 112 (1935). Later cases established that the prosecutor's failure to correct perjury violated due process. See Napue v. Illinois, 360 U.S. 264, 269 (1959). Suppression of exculpatory information was implicit in each of these cases, since knowing use or failure to correct perjury inevitably entails failure to disclose the information by which the prosecutor knows that the testimony is perjured. In Brady, the link between perjury and suppression was severed and for the first time suppression outside of the perjury context stood on its own as a due process violation rather than as a subordinate and necessarily incidental facet of perjury.
167. Although it has not been recognized explicitly as a constitutional requirement for a plea, it is required by rule in both federal court and many state courts. See, e.g., Fed. R. Crim. P. 11(f).
169. See supra note 45.
plead guilty, illustrated in section II(B), often includes pressure to commit perjury. Even if the oath is not administered to the defendant, a guilty plea by an innocent defendant entails false statements to a court closely akin to perjury. In either case, as with perjury at trial, there is deliberate deception of the court.

If applying the Brady rule to guilty pleas will have the effect of reducing pressure on innocent defendants to plead guilty, then it will have a concomitant and incidental effect of reducing the pressure to commit perjury or make other false statements as a means of obtaining the guilty plea’s benefits. Thus, the Brady rule’s concern for protecting the criminal process from perjury will be served by applying the Brady rule in the guilty plea context.

The suggestion that perjury by a government witness against a defendant at trial and perjury by a defendant used to gain the advantage of a plea bargain should be given equal weight under Brady doctrine may appear too facile. After all, the defendant in the trial scenario is the victim of that crime, but the defendant in the guilty plea scenario is the perpetrator. Perhaps we should not be as concerned about protecting the defendant from his own perjury as we are about protecting him from the perjury of government witnesses. Or perhaps the defendant’s unclean hands as a perjurer should keep him from claiming the remedial benefits of the rule.

Without question, the types of perjury engendered by failure to disclose Brady material in the trial and plea contexts are quite different. But the argument dismissing perjury in the guilty plea context as a concern should be treated as unavailing for several reasons. First, perjury implicates larger institutional concerns with the accuracy of criminal proceedings beyond the defendant’s protection. These concerns may well be more important in the guilty plea context than at trial since the defendant’s confession is the sole basis for conviction in a guilty plea, while perjury at trial may form only a part of the basis for conviction and its effect may be diluted by other evidence. Moreover, the moral culpability of the innocent defendant who commits perjury to avoid the risk of trial is dissipated by the degree of coercion inherent in confronting the defendant with the sort of sentencing differential pressure Brady cases tend to generate. In fact, the government created that coercion by simultaneously offering a powerful inducement to plead guilty and failing to disclose Brady material. Although probably not sufficient to establish a defense to a perjury charge, such factors make a criminal defendant particularly susceptible to perjury. Accordingly, the existence of these pressures increases the need to take steps to avoid such perjury and mitigates
the criminal defendant's moral blame if he does engage in it. Perhaps more to the point, nowhere does the Brady doctrine suggest that one of its purposes is to function as a litmus test of the defendant's moral culpability. The concern with perjury, though not pivotal in deciding Brady's applicability to guilty pleas, certainly weighs in favor of its application.

(2) The Guilty Plea Cases

The second area of constitutional doctrine that is relevant in exploring extension of the Brady rule is the Supreme Court's line of guilty plea cases. The Supreme Court's guilty plea cases in this area reflect a number of major themes relevant to our inquiry.

First, the Court is clearly committed to the negotiated guilty plea as a necessary and desirable component of the criminal justice system. Recognition of Brady as a due process right of defendants who plead guilty does not challenge this commitment. The acceptance of Brady does not amount to a broad based challenge to the validity or accuracy of guilty pleas in general. Rather, it is simply a means for making a portion of those pleas more reliable. In fact, application of the Brady rule to guilty pleas should encourage defendants to plead guilty. If the Brady right were openly recognized as not applying in guilty plea cases, however, defendants would be given an increased incentive to go to trial on the chance that Brady material might be forthcoming.

A second major theme in the Supreme Court's guilty plea cases is the repeated assertion that guilty pleas are factually accurate. The

170. See, e.g., Bordenkircher v. Hayes, 434 U.S. 357, 361-64 (1978); Blackledge v. Allison, 431 U.S. 63, 71 (1977) ("[T]he guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned."); Santobello v. New York, 404 U.S. 257, 260-61 (1971) (Plea bargaining "is an essential component of the administration of justice. Properly administered, it is to be encouraged. . . . Disposition of charges after plea discussions is not only an essential part of the process, but a highly desirable part for many reasons.").

171. See, e.g., Bordenkircher, 434 U.S. at 363 ("defendants advised by competent counsel and protected by other procedural safeguards are . . . unlikely to be driven to false self-condemnation"); Menna v. New York, 423 U.S. 61, 62 n.2 (1975) (per curiam) ("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"). The premise of this article is that factual accuracy is important in guilty pleas. As noted previously, this premise is not uncontroversial. It is based on a paradigm of the guilty plea as an adjudication of critical factual issues rather than a compromise of them. See supra note 38. The Supreme Court has given mixed signals as to which paradigm of the guilty plea it adheres to. Its repeated emphasis on accuracy and its importance in guilty pleas reflects adoption of the adjudication paradigm. The Court, however, has found constitutional a guilty plea by a defendant who maintains his innocence. Alford, 400 U.S. at 25. It also permits conviction of a criminal defendant with no inquiry into guilt based on a plea of nolo contendere. Hudson v. United States, 272 U.S. 451, 457 (1926). The acceptance by the court of such Alford and nolo pleas reflects
Court frequently has appeared unwilling to examine the assumptions that underlie this assertion, that the defendant always knows the facts determining guilt and is sincere if he confesses them in a guilty plea. For example, the Court has given no sign of willingness to consider the impact of the magnitude of sentencing differentials on the defendant's sincerity in confessing guilt. A refusal to entertain any challenge or qualification to the assumptions underlying its assertion of the guilty plea's accuracy would lead the Court to dismiss the accuracy implications of Brady disclosure as either unnecessary or redundant.

Another theme found in the guilty plea cases, however, provides hope that the Court may be open to the need for Brady disclosure in the guilty plea process. A frequently expressed corollary to the Supreme Court's accuracy assertion is the need for procedural safeguards to assure accuracy. The Court has stressed that the guilty plea as a "mode of conviction is no more foolproof than full trials to the court or to the jury" and that, consequently, "great precautions against unsound results" should be taken. This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to ensure the defendant what is reasonably due in the circumstances." This stress in the Supreme Court's language on the procedural protections necessary to assure the guilty plea's accuracy provides an analytic niche in present doctrine which would allow recognition that the Brady rule is a safeguard that is due defendants who plead guilty.

Another theme reflected in the Supreme Court's guilty plea cases that is relevant and potentially troublesome for application of the Brady disclosure rule to guilty pleas is that of loss of constitutional rights by guilty plea, the idea that a defendant who pleads guilty waives or forfeits certain constitutional rights, such as the right to jury trial. An argument for waiver of Brady might highlight the court's characterization of adherence to a paradigm of compromise of factual issues. The Court's ambivalence about both adjudication and accuracy are aptly exemplified by the fact that the Court has not given constitutional status to the only direct guarantee of accuracy in a normal guilty plea the factual basis inquiry. See A. Goldstein, The Passive Judiciary 39-47 (1981).

172. See Seidman supra note 138 at 470-83. "The guilty plea cases ... make the point [that while] consistently ignoring the truth-distorting effect of plea bargaining, the Court has been scrupulous in enforcing the procedural niceties concerning the method by which the plea is taken." Id. at 481.


175. This line of cases is most often identified as originating with the "Brady trilogy": Parker v. North Carolina, 397 U.S. 790 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Brady v. United States, 397 U.S. 742 (1970).
the *Brady* rule as grounded in the constitutional right to a fair trial.\textsuperscript{176} If *Brady* is seen as a trial right, the conclusion might well follow that one who pleads guilty forgoes the *Brady* right just as he does other trial rights, such as the rights to confront witnesses and to have a jury determine the facts.

A counter argument could be based on the passages in which the Supreme Court emphasizes a broader, more generalized due process grounding of the rule.\textsuperscript{177} Since due process transcends trial and applies in many contexts of the criminal justice system other than trial, including the procedure for taking a guilty plea, this broader due process grounding for the *Brady* rule weighs in favor of a broader application of the rule.\textsuperscript{178} Support for this broader due process view of the rule is found in the explicit incorporation into the original *Brady* rule formulation of the requirement for the prosecution to turn over favorable evidence that is "material . . . to punishment" as well as that which relates to guilt.\textsuperscript{179} This mitigation facet of the rule clearly seems to acknowledge that *Brady* has a role to play at sentencing as well as in the guilt determination phase normally associated with trial. Thus, it would seem that the *Brady* rule transcends the trial context.\textsuperscript{180} Recognizing that *Brady* is more properly characterized as a due process rather than simply a trial right, though, does not answer the question of whether due process requires application

\textsuperscript{176} The opinion in *Brady* v. Maryland, 373 U.S. 83 (1963), treated its holding as simply an extension of precedent and described the principle drawn from those precedents as "not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Id.* at 87 (emphasis added). The Supreme Court continues to use the notion of a fair trial in expressing the grounding of the *Brady* right. See *supra* notes 150-51 and accompanying text.

\textsuperscript{177} See, e.g., *United States v. Bagley*, 473 U.S. 667, 675 (1985). ("The *Brady* rule is based on the requirement of due process.").


\textsuperscript{179} *Brady v. Maryland*, 373 U.S. at 87.

\textsuperscript{180} The original *Brady* case was a sentencing case dealing with mitigating rather than exculpatory information. The sentencing in *Brady*, a capital case, was by jury trial, as is not uncommon in capital cases. The "mitigation" facet of the rule, although repeated in all Supreme Court *Brady* cases, remains largely unexplored and unutilized. But see *Caron, The Capital Defendant's Right to Obtain Exculpatory Evidence from the Prosecution to Present in Mitigation Before Sentencing*, 23 AM. CRIM. L. REV. 207 (1985) (examining the capital defendant's right to present mitigating evidence before sentencing). Justice Marshall, in a dissent from denial of *certiorari*, has recently urged the Court to deal with the issue of the *Brady* rule's application in the sentencing phase of a capital trial. *Neelby v. Alabama*, 109 S. Ct. 821, 822 (1989) (Marshall, J., dissenting from denial of *certiorari*).
of Brady to guilty pleas. It simply helps to defuse the waiver argument based on characterization of the rule as a trial right reviewed above.

Looking beyond the text of the Brady rule and the Brady v. Maryland line of cases, what guidance do the Supreme Court guilty plea cases provide in determining whether the Brady right is lost in pleading guilty? The Brady right is not normally included in the litany of rights read to the defendant during the plea process. Therefore, it is not waived explicitly. A defendant pleading guilty might cure any ambiguity about waiver by asking the prosecution to incorporate a specific representation that all Brady material had been disclosed as a term of the plea bargain put on the record at the time of entry of the plea. The defendant would then be entitled to rescind the plea if the representation was false. 181 But in the entry of most guilty pleas, no mention is made of the Brady right.

The Supreme Court’s guilty plea cases 182 have established the idea that a guilty plea acts as an implicit waiver or forfeiture of certain constitutional rights beyond those explicitly waived during the guilty plea procedure. This implicit waiver or forfeiture, though, does not extend to all constitutional rights. 183 In which category does the Brady disclosure right belong? Is it one of the constitutional rights waived or forfeited, or should it be counted among the constitutional rights retained?

Existing Supreme Court precedent on the issue of loss of constitutional rights inherent in the guilty plea does not yield an answer readily. These cases have drawn considerable critical scholarly attention because they are both significant and controversial. 184 One of their most conspicuous features, however, is confusion regarding the principle upon which they are based. In Menna v. New York, the Supreme Court offered the following interpretation of this line of cases: “A guilty plea . . . simply

182. See supra note 175.
renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt.”185 The Court’s use of a triple negative clouds the meaning of this sentence, typifying the muddled state of the law in this area.186 As Professor Saltzburg has noted, “The state of the law respecting the rights foregone after pleading guilty is obviously unsatisfactory. Nothing in the language of any of the Supreme Court’s cases articulates a rule that helps even slightly in addressing new cases or evaluating the merits of those already decided.”187

The task of identifying the principle that explains these cases has absorbed the efforts of a number of commentators.188 Resolution of this issue is well beyond the scope of this Article. Rather, it ventures only so far as to examine a number of theories that have been offered to explain these cases and assess the result for the Brady disclosure right under those theories. Finally, the Article suggests that the proper way to analyze application of the Brady disclosure right in the guilty plea context is to rely on none of these theories, but rather on analogy to the right to effective assistance of counsel, which all agree is a constitutional right that is neither waived nor forfeited by guilty plea.

If the Menna theory suggested by the passage quoted above means that only constitutional claims unrelated to factual guilt survive, then the Brady disclosure right, if grounded in concern for accuracy of the determination of factual guilt, would seem to be lost. Under Professor Saltzburg’s theory of these cases, a defendant who pleads guilty loses all constitutional rights except those “premised on notions of litigation avoidance.”189 Unlike such “litigation avoidance” rights as double jeopardy or vindictive prosecution, the Brady disclosure right is not premised on litigation avoidance. Rather, it assumes that a trial will take place and that disclosure is necessary at such a trial. Thus, Professor Saltzburg’s theory seems to require the conclusion that the Brady right is

185. 423 U.S. at 62 n.2.
186. B. Garner, A Dictionary of Modern Legal Usage 372-73 (1987) (“Lawyers have become notorious for their proclivity to pile negative upon negative. The result is sentences that most fellow lawyers have a hard time decoding.”). Professor Saltzburg finds it necessary to correct the Court’s language in the Menna footnote in order to make sense of the passage. See Saltzburg, Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty, 76 Mich. L. Rev. 1265, 1278 n.69 (1978) (“I assume that the Court erred in its choice of words. Obviously, it should have said ‘consistent’ not ‘inconsistent.’”).
187. Saltzburg, supra note 186, at 1280.
189. Saltzburg, supra note 186, at 1267.
lost with the guilty plea. Professor Westen's forfeiture theory claims that only those constitutional claims survive that "if asserted before trial, would forever preclude the state from obtaining a valid conviction against" the defendant.\textsuperscript{190} If by preclusion Professor Westen means legal preemption of the prosecution's right to bring the defendant to trial, the \textit{Brady} disclosure right would not qualify for the same reason it fails to meet Professor Saltzburg's theory: it does not legally preempt trial of the defendant.\textsuperscript{191}

The weakness of the theories advanced above is demonstrated by using them to evaluate the right to effective assistance of counsel. The cases and commentators agree that the right to effective assistance of counsel survives a guilty plea.\textsuperscript{192} Under the \textit{Menna} footnote theory, it is certainly possible that factual guilt could be established without the representation of counsel. The right to effective assistance of counsel is not a "litigation avoidance" right as required by Professor Saltzburg's theory to survive the guilty plea. Nor does the right to counsel operate as the kind of preclusive bar that Professor Westen would require. How then is it that the right to effective assistance of counsel survives a guilty plea? The survival of this right indicates that there is an implied exception to the waiver or forfeiture of rights in addition to those described by the theories set forth above: those constitutional rights that assure the integrity of the guilty plea process itself. The right to counsel is such a right. And based on the arguments advanced in section II of this Article, \textit{Brady} disclosure is such a right.

Exemption from waiver or forfeiture of rights that determine the integrity of the guilty plea process is consistent with the major themes of the Supreme Court's guilty plea cases. If the criminal justice system is to accept and rely on the guilty plea as an "essential" and "highly desirable" procedural vehicle for resolving questions of guilt, as the Supreme Court stated in \textit{Santobello},\textsuperscript{193} then the systemic importance of the integrity of the guilty plea process and those rights that assure its integrity seem vital. If Supreme Court doctrine is going to rely, as in \textit{Menna}, on

\begin{itemize}
    \item 190. Westen, \textit{Away from Waiver}, supra note 188, at 1226.
    \item 191. \textit{Brady} disclosure may, of course, have the practical effect of preempting trial. For example, disclosure of completely exculpatory information will almost always result in dismissal. Comment, supra note 22, at 191 ("if Westen's model is applied to \textit{Brady v. Maryland}, the defendant's right to prosecutorial disclosure of material and favorable evidence is forfeited by a guilty plea because a claim based on this right does not forever preclude the state from obtaining a valid conviction." \textit{Id.}).
    \item 192. Hill v. Lockhart, 474 U.S. 52 (1985): Saltzburg, supra note 186, at 1274 n.53 ("Plainly the competence of counsel could be challenged under the decisions.").
\end{itemize}
assertions that an accurate guilty plea satisfies fundamental concerns with guilt and innocence, then it would be anomalous to find rights that help guarantee the validity of the assertion of accuracy to be waived or forfeited. Indeed, the Supreme Court has expressed this very idea in its corollary to its assertion of accuracy, that procedural safeguards are necessary in order to insure the accuracy of guilty pleas.

B. *Brady* Disclosure as an Ethical and Statutory Requirement

The ethics of negotiation, and in particular the ethical problems of truthfulness and disclosure in negotiation, recently have attracted considerable interest. In part this appears due to a realization that negotiating in various forms occupies a significant portion of almost every lawyer's time. For trial lawyers in particular, the prevalence of negotiated resolutions in both civil and criminal litigation means that litigators in fact are involved much more often in settling cases than in trying them. Recent statistics on the prevalence of guilty pleas, for example, suggest that for every case tried by prosecutors and defense counsel, eleven cases are resolved by guilty pleas. The interest in negotiation ethics may also be a function of the seeming intractability of the issues the subject presents.

 Disclosure is a central issue in negotiation ethics. Although commentators have argued for a duty of disclosure, present negotiation practice countenances nondisclosure. Certain affirmative misrepresentations are seen as unethical, but nondisclosure appears to be an accepted convention for negotiators. In the words of two well-known authors in the area of negotiation strategy, although lying is disapproved, "good faith negotiation does not require total disclosure."


196. Professor White explains the difficulty in drafting ethical norms for negotiation as deriving in part from "the almost galactic scope of disputes that are subject to resolution by negotiation" and the fact that misleading one's opponent is inherent in the negotiator's role. White, *supra* note 194, at 927.


198. See Peters, *supra* note 194, at 13; Rubin, *supra* note 27, at 584 ("The professional literature contains many instances indicating that, in the general opinion of the bar, there is no requirement that the lawyer disclose unfavorable evidence in the usual litigious situation.").

The present state of the ethical requirements for disclosure in negotiation is epitomized in the fate of a negotiation disclosure rule proposed for inclusion in the most recent comprehensive revision of the ethical norms for American lawyers, the American Bar Association's Model Rules of Professional Conduct, currently in force in a majority of jurisdictions. The proposed rule required only limited disclosure by a lawyer in negotiations—when required by law, by ethics rules, or to correct a misapprehension of fact or law resulting from a previous representation by the lawyer or the lawyer's client. Even this limited rule of disclosure, however, was vehemently opposed and ultimately rejected. Professor Hazard explains the rejection as follows:

The fundamental difficulty appears to stem from the lack of a firm professional consensus regarding the standard of openness that should govern lawyers' dealings with others and the lack of settled and homogeneous standards of technique in the practice of law. This lack of consensus indicates that lawyers, at least nationally, do not share a common conception of fairness in the process of negotiation. The lack of this consensus means that lawyers lack the language to express norms of fairness in negotiation and the institutional means to give effect to these norms.

It is against this backdrop that the ethical disclosure obligations of the prosecutor in negotiations must be viewed. One might think that the formulation of ethical disclosure standards for a prosecutor negotiating with counsel for a private citizen in a criminal matter would not have been impeded by the same sort of uncertainty as that found in the civil context. The idea that the prosecutor has a special obligation to justice and accordingly is held to a higher standard than other lawyers is expressed in the Brady doctrine. This notion of special obligation is echoed in the ethical standards for prosecutors. But examination of

---

200. The proposed rule provided:

4.2 Fairness to Other Participants

(a) In conducting negotiations a lawyer shall be fair in dealing with other participants.

(b) A lawyer shall not make a knowing misrepresentation of fact or law, or fail to disclose a material fact known to the lawyer, even if adverse, when disclosure is:

(1) Required by law or the Rules of Professional Conduct; or

(2) Necessary to correct a manifest misapprehension of fact or law resulting from a previous representation made by the lawyer or known by the lawyer to have been made by the client.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (Discussion Draft 1980).


202. Id. at 193 (footnote omitted).

203. See supra notes 124-34 and accompanying text.

204. See, e.g., Comment [1], Rule 3.8, MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 comment (1983) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").
the ethics rules regarding prosecutorial disclosure shows that rather than explicitly expressing such a higher standard in the negotiation area, they seem to mirror the same ambiguity about plea bargaining reflected in the constitutional rule of disclosure.

The Supreme Court has emphasized the importance of the ethical rules governing prosecutors at trial:

In many ways the prosecutor, by accident or by design, may improperly subvert the trial. The primary safeguard against abuses of this kind is the ethical responsibility of the prosecutor who . . . may 'strike hard blows' but not 'foul ones.' If that safeguard fails, review remains available under due process standards . . . .

The prosecutor's duty under professional ethics codes to disclose favorable evidence to a criminal defendant is explicit. However, these ethical rules dealing with the prosecutorial duty make no mention of plea negotiations or guilty pleas. Rather, they reflect the same ambiguity about disclosure in the guilty plea context as the constitutional Brady rule does.

This uncertainty leaves open the danger that the line between ethically appropriate and inappropriate behavior will be drawn by reference to prevailing civil negotiation standards, which do not generally require disclosure of evidence favorable to one's adversary.

The precise contours of the ethical norms for prosecutors in plea bargaining, and in particular the norms for disclosure, are yet to be

---


206. Disciplinary Rule 7-103(B) of the Model Code of Professional Responsibility provides:

A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

Rule 3.8(d) of the Model Rules of Professional Conduct provides that the prosecutor in a criminal case 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, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

The formulation of each of these rules is more expansive than the original formulation of the Brady rule, since neither contains a "materiality" limitation or a requirement that the material be requested by the defense.

207. Although some treatise writers claim that Model Code of Professional Responsibility DR 7-103(B) (1981) requires disclosure in the plea bargaining context, no authority for this proposition is provided. See J. Lawless, Prosecutorial Misconduct 318 (1985).
shaped. For a number of reasons, the accuracy arguments in section II could and should play an important role in assuring that disclosure of *Brady* material in the guilty plea context is included in the prosecutor's ethical mandate. First, the ethical norms for the prosecutor express many of the same concerns underlying the constitutional *Brady* rule. For example, the notion of the prosecutor's special obligation to justice finds expression in constitutional *Brady* doctrine and in the ethical rules for prosecutors. Thus, much of the argument set forth above for recognition of *Brady* as a constitutional rule applies with equal force to the question of incorporating a duty of *Brady* disclosure within the prosecutor's negotiation ethics. But more practically, recognition that disclosure has accuracy implications in the guilty plea context should serve to distinguish guilty plea negotiations from other negotiations, and consequently, the ethics of guilty plea negotiations from general negotiation ethics. Unlike other negotiations, the guilty plea has an adjudicative element—it establishes the factual basis for a conviction which will both stigmatize a criminal defendant and expose him to the risk of loss of liberty and possibly life. Thus, it deserves a different standard than that applied to other negotiations.

Another means for achieving disclosure of *Brady* material in the guilty plea process would be through a statute mandating disclosure.208 Such a statute could supplement a constitutional rule or serve as a substitute if the Supreme Court finds the case for applying the constitutional *Brady* rule to guilty pleas unpersuasive. In the related area of criminal discovery, although arguments for recognition of a constitutional right to discovery have been largely unavailing before the Supreme Court, arguments in favor of broader discovery have been well received by many legislatures and have resulted in the statutory enactment of broad discovery rights for criminal defendants.209 Similarly, legislatures could address the problem of *Brady* disclosure in the guilty plea process.

The negotiated guilty plea in fact has drawn considerable attention from both legislators and the drafters of model codes of criminal procedure. Probably the most widely known statutory treatment of guilty plea procedures is Federal Rule of Criminal Procedure 11. Rule 11 simply ignores the issue of the prosecution's disclosing evidence prior to entry of a guilty plea, much less specifically addressing *Brady* material. Although Federal Rule of Criminal Procedure 16, the primary vehicle for criminal

208. State statutes may expand the number of constitutional rights that survive a guilty plea in state court, and a defendant is not precluded from raising those additional rights in a federal habeas corpus proceeding. Lefkowitz v. Newsome, 420 U.S. 283, 291-93 (1975).

209. Y. KAMISAR, W. LAFAVE & J. ISRAEL, supra note 4, at 1108.
discovery in the federal system, does not explicitly use the terms “favorable” or “exculpatory” evidence, it does contain provisions that cover some *Brady* material.\(^{210}\) The notes to Rule 16 indicate that discovery is intended to contribute “to the fair and efficient administration of criminal justice by providing the defendant with enough information to make an informed decision as to plea.”\(^{211}\) The text of Rule 16, however, gives no indication that its provisions require pre-plea disclosure. Rule 16 is thus deficient in scope to assure complete *Brady* disclosure and also is unclear about requiring disclosure prior to a guilty plea.

The Jenck’s Act, another federal disclosure device, gives the defendant a statutory right to prior written or recorded statements of a witness that might net some *Brady* impeachment material.\(^{212}\) Jenck’s Act disclosure, however, is not triggered unless and until the witness testifies at trial.\(^{213}\) Thus, Jenck’s Act disclosure is not required prior to a guilty plea. In sum, existing federal rules and statutes are clearly inadequate to ensure a guilty pleading defendant the right to disclosure of *Brady* material.

Some model criminal procedure codes deal more effectively with the issue. The National Advisory Commission’s (NAC) rule is the clearest.\(^{214}\) Standard 3.6 provides: “No prosecutor should, in connection with plea negotiations, engage in, perform, or condone any of the following: . . . Failing to grant full disclosure before the disposition negotiations of all exculpatory evidence material to guilt or punishment.”\(^{215}\) The commentary to this standard indicates that it requires pre-plea disclosure “to the extent required by *Brady v. Maryland.*”\(^{216}\) No particular rationale is provided other than a general reference to disclosure helping obtain “the best possible compromise disposition.”\(^{217}\) The justifications offered in the commentary for the general prohibition of improper inducements to entering a guilty plea are promotion of “greater fairness in the negotia-

\(^{210}\) FED. R. CRIM. P. 16(a)(1)(c) requires disclosure to the defendant upon request of “books, papers, documents, photographs, tangible objects . . . which are material to the preparation of the defendant’s defense.” Rule 16(a)(1)(D) similarly requires disclosure of reports of examinations and tests “which are material to the preparation of the defense.”

\(^{211}\) FED. R. CRIM. P. 16 advisory committee’s notes to 1974 amendment. The notes refer to the ABA Standards dealt with *infra* notes 219-21 and accompanying text.


\(^{214}\) NAT’L ADVISORY COMM. CRIM. JUST. STANDARDS AND GOALS, REPORT ON COURT (1973).

\(^{215}\) *Id.* at 57.

\(^{216}\) *Id.* at 58.

\(^{217}\) *Id.*
tion process” and reducing post-conviction litigation.\textsuperscript{218} Accuracy of the plea is not used as a justification for either the disclosure requirement or the more general prohibition against improper inducements.

The American Bar Association model is less clear about requiring pre-plea disclosure, but more generous than the NAC standard.\textsuperscript{219} Section 2.1(c) of the Standards for Discovery and Procedure Before Trial provides that: “The prosecuting attorney shall disclose to defense counsel any material or information within his possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce his punishment therefore.”\textsuperscript{220} That such disclosure is required in guilty pleas and not just at trials is strongly suggested, but not made explicit.\textsuperscript{221}

The American Law Institute’s model provides specifically for pre-plea disclosure by requiring that prior to any plea agreement “the prosecutor shall disclose to the defendant sufficient information within his knowledge to enable the defendant to make an informed assessment of the likely outcome upon a trial of the case.”\textsuperscript{222} Although not as explicitly directed at Brady material as the NAC model, this formulation would certainly encompass Brady material since by definition Brady material is highly outcome determinative. However, Brady is not mentioned in either the official text or the commentaries. Nor is any accuracy rationale used to justify this provision. Rather, the rationale is based on the value of having the defendant make a fully informed decision in the choice between plea and trial.

As the above brief review of statutory treatments of disclosure indicates, none of the statutory formulations examined have utilized the accuracy implications of Brady disclosure. Acceptance of those implications as argued in section II of this Article would lead to a number of statutory revisions. First, the Federal Rules and state codes

\begin{thebibliography}{222}
\bibitem{218} Id. at 57.
\bibitem{219} ABA Project on Standards for Criminal Justice, Standards Relating to the Administration of Criminal Justice (1974).
\bibitem{220} Id. at 256.
\bibitem{221} Section 2.2(a) states that the material referred to in the previous section should be turned over “as soon as practicable following the filing of charges against the accused.” Id. As part of its general principles, one of the needs pretrial procedures should serve is “to provide the accused sufficient information to make an informed plea.” Section 1.1(a)(ii). Id. at 253. Again as a general principle, the ABA Standards provide that “in order to provide adequate information for informed pleas,” discovery should be “as full and free as possible.” Section 1.2. Id. at 253-54. The commentary to the ABA Standards does not make explicit the desire to include Brady material as part of a pre-plea disclosure.
\bibitem{222} AMERICAN LAW INSTITUTE, MODEL CODE OF PRE-ARRAIGNMENT P. § 320.3(1) (1975).
\end{thebibliography}
modeled on them should recognize explicitly a statutory right to *Brady* disclosure and include an accuracy rationale in their justifications. The ALI and ABA models should clarify their recognition of a right to *Brady* disclosure in the guilty plea process, as well as utilize an accuracy rationale. Finally, the NAC rules should recognize an accuracy rationale in their justification for explicit inclusion of *Brady* disclosure among a defendant’s bargaining rights.

**Conclusion**

Two major concerns pervade the extensive literature the institution of plea bargaining has generated. The first is discovering and describing how plea negotiation works, a task that has engendered numerous empirical studies and, more recently, attempts to understand the process through modeling. The second concern is the task of evaluating what these studies and models tell us. This second task has engendered a continuing debate over the propriety of plea bargaining, a debate that has revealed more than simple differences in opinion on the rightness or wrongness of plea bargaining. What has also been revealed is a wide array of norms, often conflicting, regarding the standards by which plea bargaining, its rightness or wrongness, should be judged. Both the case law and the secondary literature show that various values compete for recognition in discussions of plea bargaining. Efficiency, administrative necessity, fairness, concern for the dignity of criminal defendants and their constitutional rights, and concern for unchecked executive discretion are just some of the values that, along with accuracy, have appeared prominently in the debate over plea bargaining.

This Article has focused on the accuracy implications of disclosure. It has demonstrated that disclosure of *Brady* material—whether by constitutional rule, ethical rule, or statute—has an important role to play in advancing the accuracy of guilty pleas and that as long as we value the accuracy of guilty pleas we should insist on such disclosure. Limitation of the focus of this Article to the accuracy implications of disclosure in the guilty plea process is not intended to foreclose discussion of other rationales or values disclosure might advance. Rather, this Article seeks to provide a foundation upon which other rationales may build, a starting point rather than a termination point in the discussion of disclosure in plea negotiations.