Prosecutorial Disclosure and Negotiated Guilty Pleas

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I. INTRODUCTION

The scope and enforcement of prosecutorial disclosure obligations have generated great controversy in the more than five decades since Justice Douglas wrote his seminal opinion in *Brady vs. Maryland*.[1] These topics continue to generate controversy. Bennett Gershman is a prominent and articulate voice in a chorus of critics who complain both that the scope of required disclosure is unduly narrow and that there is inadequate adherence to and enforcement of the *Brady* disclosure obligation. A troubling number of high-profile cases, several of which Professor Gershman describes in his recent book, *Prosecution Stories,* have involved egregious disclosure violations.[2]

A contentious area has been prosecutorial disclosure requirements in the context of negotiated guilty pleas.[3] Should *Brady* disclosure be seen as a trial right that, like the right to a jury trial and the right to confront witnesses, is waived by entering a guilty plea? Or, like the right to counsel, should the right to *Brady* disclosure be retained by a defendant who pleads guilty? Should criminal procedure rules, such as Federal Rules of Criminal Procedure 16 and 11, be amended to require disclosure in the guilty plea context? Should ethics rules be amended or interpreted to require such disclosure?

In debates about disclosure, arguments grounded in fairness, efficiency, voluntariness, witness safety, psychology, accuracy and other concerns have been advanced. In this essay, I will not canvas those arguments. Nor will I survey the history of the Supreme Court's development of the *Brady* doctrine or state

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

[2] *See* BENNETT GERSHMAN, PROSECUTION STORIES ch. 6 (2017).

[3] Articles addressing disclosure in the guilty plea context include: R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 66 VAND. L. REV. 1427 (2011); John G. Douglass, *Can Prosecutors Bluff?* Brady v. Maryland *and Plea Bargaining*, 57 CASE W.R.L. REV. 581 (2007); John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437 (2001); Corinna Barret Lain, *Accuracy Where It Matters:* Brady v. Maryland *in the Plea Bargaining Context*, 80 WASH U.L.Q. 1 (2002); Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957 (1989); Kevin C. McMunigal, *Guilty Pleas,* Brady *Disclosure, and Wrongful Convictions*, 57 CASE W.R.L. REV. 651 (2007); Michael N. Petegorsky, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory* Brady *Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599 (2013).

legislative developments dealing with prosecutorial disclosure. Existing scholarship on guilty plea disclosure ably describes these. Instead, I focus on three facets of the guilty plea disclosure debate: (1) Does a negotiated guilty plea necessarily entail a bargain? (2) Is the accuracy of guilty pleas a genuine concern? (3) Should ethics authorities create prosecutorial rules more expansive than *Brady*?

II. DOES A NEGOTIATED GUILTY PLEA NECESSARILY ENTAIL A BARGAIN?

Those addressing guilty plea disclosure often describe the issue as disclosure in the context "plea bargaining" and "plea bargains."[4] In *United States v. Ruiz,* for example, the only case in which the United States Supreme Court has addressed guilty plea disclosure, Justice Breyer uses the phrases "plea bargain" or "plea bargaining" nine times.[5] What are the potential consequences of using the words "bargaining" and "bargain" in framing the guilty plea disclosure debate? The phrases "plea bargaining" and "plea bargain" are so ubiquitous in talking and thinking about negotiated resolution of criminal cases through entry of guilty pleas that their potential significance may fail to register with those who study and work in our criminal justice system.

The phrases "plea bargaining" and "plea bargain," in my view, have an unfortunate tendency to mislead by suggesting incorrectly that negotiated guilty pleas necessarily entail undue leniency toward defendants. The assumption that defendants who plead guilty receive lenient treatment, together with the assumption that defendants who plead guilty must be guilty, discussed below, prompt one to dismiss concern about our criminal justice system's use of negotiated guilty pleas as the primary mechanism for producing criminal convictions and to dismiss concern about guilty plea disclosure in particular. As I will explain, the defendant does not necessarily or routinely receive a "bargain" in any meaningful sense of the word. To avoid this misleading suggestion of necessary and undue leniency, I prefer in both my writing and teaching to use the phrase "negotiated guilty plea" rather than the more common phrase "plea bargain" to describe a criminal defendant waiving the right to trial and pleading guilty after entering into an agreement with the prosecution.

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[4] Examples of academic commentary using the terms "plea bargaining" and "plea bargain" in addressing guilty plea disclosure include: R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 66 VAND. L. REV. 1427 (2011); John G. Douglass, *Can Prosecutors Bluff?* Brady v. Maryland *and Plea Bargaining*, 57 CASE W.R.L. REV. 581 (2007); John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining,* 50 Emory L.J. 437 (2001); Charlie Gerstein, *Plea Bargaining and Prosecutorial Motives*, 15 U.N.H.L. REV. 1 (2016); Corinna Barret Lain, *Accuracy Where It Matters:* Brady v. Maryland *in the Plea Bargaining Context,* 80 WASH U.L.Q. 1 (2002); Michael N. Petegorsky, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory* Brady *Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599 (2013).

[5] *See* United States v. Ruiz, 536 U.S. 622, 625, 631–633 (2002).

The word "bargaining" conveys a process of negotiated exchange.[6] So understood, it accurately describes the process that produces a typical guilty plea. The word "bargain" conveys an agreement that is the product of negotiation.[7] Again, so understood, it accurately describes the agreement that typically accompanies a guilty plea.

But the words "bargaining" and "bargain" also strongly convey the idea of a discount, often a steep discount, having been offered and accepted.[8] The relevant discount in the guilty plea context typically concerns punishment, so the phrase "plea bargain" implies the granting of undue leniency in punishment.[9] Is punishment imposed after entry of a negotiated guilty plea necessarily steeply discounted? Is it discounted at all? In other words, do negotiated guilty pleas necessarily entail undue leniency?

How one answers this question depends on how one frames the question, on the choice of the point of comparison used to assess leniency. To what should post- guilty plea punishment be compared? One possibility is the punishment the defendant would have been exposed to or likely to have received if convicted after a trial. There is almost certainly less punishment imposed after a negotiated guilty plea, though not necessarily significantly less, than the possible or likely post-trial punishment. In murder cases in some states, for example, the possibility of the death penalty may be eliminated as a result of guilty plea negotiations, with a defendant receiving a life sentence after pleading guilty. In some cases, the prosecutor may agree to dismiss (or agree not to file) charges that would trigger mandatory minimum sentences. A reduction in punishment is often granted after a guilty plea based on the acceptance of responsibility the guilty plea is viewed as reflecting.[10]

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[6] THE NEW OXFORD AMERICAN DICTIONARY 131 ("bargain (verb) . . . . negotiate the terms and conditions of a transaction . . . .") (2001); WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 219 ("bargain . . . To negotiate over the terms of an agreement . . .") (2d ed. 2005).

[7] THE NEW OXFORD AMERICAN DICTIONARY 131 ("bargain (noun) . . . an agreement between two or more parties as to what each party will do for the other . . . .) (2001); WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 219 ("bargain . . . an agreement between parties setting forth what each shall give and receive in a transaction between them. . . .") (2nd ed. 2005).

[8] *See*, *e.g.*, CONCISE OXFORD ENGLISH DICTIONARY 107 ("bargain . . . a thing bought or offered for sale for a lower price than normal.") (11th ed. 2008).

[9] *See*, e.g., WEBSTER'S THIRD INTERNATIONAL DICTIONARY ("bargain plea *n. slang*: a plea of guilty to one usu. the least of several charges allowed by the prosecution when the prosecution stands to gain thereby . . . .") (3rd ed. 1961).

[10] Federal sentencing guidelines provide for a decrease in the offense level by two to three levels if the defendant accepts responsibility by pleading guilty. U.S. SENTENCING COMM'N, GUIDELINES MANUAL §3E1.1 (2016), *available at* https://perma.cc/RJ7E-5QSS [hereinafter USSG]. The acceptance of responsibility reduction decreases the offense level by two levels. *Id.* at §3E1.1(a). If the offense is level 16 or greater, the defendant may receive one additional level reduction "upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his how misconduct by timely

Instead of assessing leniency by comparing post-guilty plea punishment with potential or likely post-trial punishment, one can, more appropriately in my view, assess leniency by comparing post-guilty plea punishment with punishment proportionate to the purposes of punishment. In other words, are punishments imposed after guilty pleas necessarily disproportionately low in reference to retribution, deterrence, rehabilitation, and incapacitation? From the retributive perspective, for example, do defendants who plead guilty necessarily or routinely receive much less punishment than they deserve? In utilitarian terms, do defendants who plead guilty necessarily receive less punishment than required to incapacitate them or deter them or others? If one uses such proportionate punishment as the point of comparison rather than possible or likely post-trial punishment, one cannot conclude that a negotiated guilty plea necessarily or routinely results in steep discounting in punishment.

The view that "plea bargaining" necessarily or routinely results in unduly lenient sentences when measured by the purposes of punishment is contradicted by the current unprecedented levels of imprisonment in the United States in both state and Federal prisons. What is now commonly referred to as "mass incarceration" is not the product exclusively or primarily of severe post-trial sentences. Rather, mass incarceration in recent decades is the product of a criminal justice system in which punishment primarily (in over 90% of cases) is imposed after a negotiated guilty plea.[11] These facts alone—extraordinarily high levels of punishment and a system that imposes punishment primarily through negotiated guilty pleas—belie any suggestion that defendants who plead guilty necessarily or routinely are given a "bargain" in the form of undue leniency in return for their guilty pleas.

My experience as an Assistant United States Attorney and previously as a law clerk to a federal trial judge was that federal prosecutors do not as a matter of course negotiate unduly lenient punishments as part of guilty plea negotiations and that federal trial judges do not as a matter of course impose unduly lenient sentences after a guilty plea. Rather, my experience was that many defendants who entered negotiated guilty pleas, particularly those with prior criminal records, often received sentences of incarceration that, while perhaps less than they might have received if they had gone to trial and been convicted, were nonetheless severe, entailing substantial prison terms. Those that did not receive such sentences after negotiated guilty pleas (for example,

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notifying authorities of his intention to enter a plea of guilty." *Id.* at §3E1.1(b).

[11] An analysis of the use of guilty pleas in fourteen jurisdictions throughout the United States revealed that "[t]he median ratio of pleas to trials among these 14 jurisdictions is 11 pleas for every trial." U.S. DEP'T. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, THE PREVALENCE OF GUILTY PLEAS 2 (1984). A 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." PETER F. NARDULLI ET AL., THE TENOR OF JUSTICE 203 (1988).

first time offenders and those who had committed minor offenses) typically would not have received a harsher sentence if they had been convicted after a trial.

The suggestion implicit in the phrases "plea bargaining" and "plea bargain"—that defendants punished after a negotiated guilty plea as a matter of course get unduly lenient punishment—is simply inaccurate. In addition to being misleading, these phrases and what they suggest also, I fear, have had and continue to have a more subtle and pernicious impact. The suggestion of undue leniency through "plea bargains" prompts judges, legislators, and the public to conclude that those who plead guilty are necessarily "getting off easy" either with lenient punishment or perhaps no punishment at all. Such a false insinuation of undue leniency, consciously or unconsciously, creates a serious risk that legitimate concerns about the treatment and rights of defendants who plead guilty will, unwisely, be minimized or dismissed entirely. If they believe that defendants who plead guilty are always treated with leniency, then perhaps judges, legislators, and others who work in and study our criminal justice system conclude that they need not worry much, if at all, about those defendants, the process by which they are convicted, or the fairness and accuracy of the guilty pleas they enter. Such thinking may help explain the failures of both the Supreme Court and Congress to require prosecutorial disclosure prior to entry of a guilty plea.

My claim here is not that discounting, sometimes steep discounting, does not at times occur in negotiated guilty pleas. The prosecution may want cooperation and perhaps future testimony from a particular defendant against others the government is investigating and offer that defendant a steep discount and perhaps undue leniency to obtain that cooperation and testimony. County prosecutor offices in some states may routinely offer steep discounts and undue leniency in negotiated guilty pleas simply because they lack adequate resources to investigate, prepare, and try cases.[12]

A likely place to expect deep discounting in punishment during guilty plea negotiations is in cases in which the prosecution's case has a serious weakness. The prosecutor might learn that a key witness has died or cannot be found. In a heroin possession case, the police might accidentally destroy the heroin the prosecutor intends to introduce at trial. In a rape case, the prosecution's main witness might have reluctance to testify at trial because she fears the humiliation of cross- examination. The prosecutors in such cases have a powerful incentive to offer significantly reduced punishment during guilty plea negotiations to insure a conviction and eliminate the risk of acquittal the weakness creates if the case is tried. Evidence qualifies for *Brady* disclosure "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the

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[12] *See* Adam Gershowitz & Laura Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. L. REV. 261 (2011); Peter A. Joy & Kevin C. McMunigal, *Overloaded Prosecutors*, 33 CRIM. JUST. 31 (2018).

result of the proceeding would have been different."[13] In other words *Brady* material is outcome determinative in that it creates a reasonable probability of a not guilty verdict at trial.[14] *Brady* cases, then, are ones in which winning at trial is, at the very least, problematic. Some prosecutors may choose to disclose the *Brady* material and try such cases. Some may choose to violate (or perhaps not recognize) their constitutional obligation and try such cases without disclosing the *Brady* material. More risk averse prosecutors who fear losing at trial or committing a constitutional breach may dismiss such cases. But, as discussed in the next section, prosecutors who discover *Brady* material, if they do not dismiss the case in order to avoid the risks of losing at trial and violating their *Brady* obligation, have a powerful incentive to (1) negotiate a guilty plea without disclosing and (2) offer a very steep discount in punishment to motivate the defendant to plead guilty.

Although, as described in the previous paragraphs, negotiated guilty pleas may and almost certainly do at times reflect steep discounts and undue leniency, they do not necessarily or even routinely result in undue leniency. My primary point is that, in contrast to what the words "bargain" and "bargaining" suggest, many of the negotiated guilty pleas in the United States result in the imposition of punishment that is severe by any standard rather than unduly lenient. It is important for judges, legislators, academics, and others who work in and study our criminal justice system to squarely face this reality and not be misled by what the terms "plea bargaining" and "plea bargains" suggest when thinking, writing, and debating about negotiated guilty pleas in general and about the need for guilty plea disclosure in particular.

A. *Is Accuracy a Genuine Concern?*

Some are skeptical about whether requiring disclosure of *Brady* material in the context of a negotiated guilty plea would contribute to accuracy. Some are cavalier, completely dismissing the possibility of innocent defendants pleading guilty.[15]

An obvious response to such skepticism is an empirical one, pointing to the number of wrongful convictions based on guilty pleas that have been revealed.

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

[14] *Id.*

[15] *See, e.g.*, Steven Koppell, *An Argument Against Increasing Prosecutors' Disclosure Requirements Beyond* Brady, 27 GEO. J. LEGAL ETHICS 643, 651 (2014) (quoting Judge Learned Hand's statement that "[o]ur procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream"). Learned Hand expressed this view in 1923, almost a century ago in *United States v. Garsson*, 291 F. 646, 649 (S.D.N.Y. 1923). It is difficult to see how any reasonably well-informed lawyer or law student in 2014 could adhere to the view that innocent people being convicted is "an unreal dream" in the face of the many wrongful convictions that have been revealed and continue to be revealed across the country.

The Innocence Project website reports that 11% of DNA based exonerations were in cases involving inaccurate guilty pleas.[16] Data from the National Registry of Exonerations at the University of Michigan law school indicates that 15% of exonerations were in inaccurate guilty plea cases.[17] The incentives that exert pressure on both the prosecution and defense during plea negotiations in *Brady* cases (i.e. cases in which the prosecution has *Brady* material) also warrant serious concern about the accuracy of guilty pleas in *Brady* cases if disclosure is not required in the guilty plea context. In particular, two powerful incentives converge in *Brady* cases: (1) an incentive to resolve *Brady* cases through a negotiated guilty plea; and (2) an incentive to offer a substantial sentencing discount during the course of negotiating such a guilty plea.

Skepticism about factual accuracy in the negotiated guilty plea context is strongly grounded in two intuitively powerful but infrequently examined assumptions about criminal defendants. The first is the assumption that criminal defendants always have sufficient information to reliably establish all elements of the charged offenses. As this view is sometimes expressed, the defendant knows better than anyone "whether he did it." Or, as one author has put it, "Remember, a defendant is the only one who knows whether they are guilty or not."[18]

The second assumption is that innocent defendants never make false admissions when establishing the factual basis of guilty pleas because such admissions are at first glance appear to be so strongly against the defendants' penal and social interests. False statements in the guilty plea context initially seem particularly unlikely because they are made in open court after defendants typically have received the advice of counsel. They also have been warned that their statements will result in a criminal conviction and possibly a prison term, often a substantial one.

While both of these assumptions are often well grounded, they are not always, especially in *Brady* cases. In reference to the first assumption, defendants typically do know whether certain elements are fulfilled, such as whether the defendant engaged in the charged conduct (for example, committed the act that caused the victim's death) and whether the defendant intended a particular result (for example, the victim's death). But, as I have explained at length previously, there are a surprising number of cases in which defendants are likely not to have adequate knowledge to accurately establish fulfillment of an element, especially an element that does not involve the defendant's conduct

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[16] *When the Innocent Plead Guilty*, INNOCENCE PROJECT (Jan. 26, 2009), https://www.innocenceproject.org/when-the-innocent-plead-guilty/ (finding that thirty-one of the first 350 DNA exonerations involved persons who pled guilty to crimes they did not commit) [https://perma.cc/GNA9-KKJ4].

[17] *Innocents Who Plead Guilty,* NATIONAL REGISTRY OF EXONERATIONS (Nov. 24, 2015), http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf [https://perma.cc/B8V8-FGMM].

[18] Koppell, *supra* note 15, at 650.

or internal mental state.[19] In evidence terminology, criminal defendants at times lack the personal knowledge concerning some offense elements typically required of a witness.[20]

In reference to the second assumption, criminal defendants are unlikely in many, perhaps most, cases to make false statements against interest under oath in open court after being counseled by a lawyer. But the likelihood of a false statement increases in direct proportion to the magnitude of the sentencing differential the prosecutor offers. False admissions of guilt become self-serving if they achieve what the defendant views as a significant enough reduction in potential punishment. Accurately described, such statements are simultaneously self-serving and against interest. As the sentencing differential increases, the magnitude of the self-serving motivation may come to outweigh the fact that the admission of guilt is against the defendant's interest. For example, the incentive to falsely admit a crime can be very powerful if by doing so one is assured of a life sentence rather than the death penalty. The same would be true if the defendant is assured a 10-year sentence rather than a 20-year sentence or, say, a sentence of time served rather than a sentence of 5 years in prison.

To get a sense of the incentives likely to drive resolution of a *Brady* case, consider three possible avenues a prosecutor may pursue to resolve a *Brady* case: (1) dismissal; (2) trial; or (3) negotiated guilty plea. Which avenue or avenues is the prosecutor likely to pursue?

The most likely resolution for several reasons is dismissal. The prosecutor may conclude that dismissal is simply the right thing to do because the *Brady* material (for example, a DNA test eliminating the defendant as the assailant in a rape case) convinces the prosecutor the defendant is innocent. If the *Brady* material does not completely exonerate the defendant, it may nonetheless convince the prosecutor that dismissal is proper because the prosecutor no longer has probable cause to support the charge. Self-interest adds to the prosecutor's motivation to dismiss. Concern about reputation and future promotion creates an incentive to dismiss in order to avoid a public loss at trial once the *Brady* material is disclosed. Concern about reputation and judicial and ethical sanctions also gives the prosecutor a motive to choose dismissal rather than try the case without disclosing the *Brady* material.

What if the prosecutor chooses not to dismiss? There may be public pressure not to dismiss in a high-profile case. The psychological phenomena of tunnel vision and confirmation bias may also make the prosecutor reluctant to dismiss.[21] If the *Brady* material does not completely exonerate the defendant,

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[19] Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 970–82 (1989).

[20] *See* FED. R. EVID. 602.

[21] *See, e.g.*, Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1593 (2006) (arguing that confirmation bias, selective information processing, belief perseverance, and avoidance of cognitive dissonance impede prosecutor decision making); Keith A. Findley & Michael S. Scott, *The Multiple*

the prosecutor and police may retain a psychological commitment to a previously established view that the defendant is guilty. Or the prosecutor may be reluctant to dismiss out of fear that the defendant may be guilty.

If she does not dismiss, is the prosecutor likely to try a *Brady* case? It is conceivable that, if the *Brady* material does not completely exonerate the defendant, some prosecutors who have a low aversion to risk and are not strongly motivated by reputational concerns might choose to "roll the dice" and try the case. In my view, though, trial is the resolution of a *Brady* case rational prosecutors are least likely to choose for several reasons.

Trial after disclosure of *Brady* material is unappealing since the disclosure either assures or greatly increases the probability of an acquittal. As discussed above, concern about reputation and promotion create strong incentives for prosecutors to avoid trying weak cases. Also, if the prosecutor's office has a heavy caseload, as many do, the prosecutor and the prosecutor's supervisors may decide that such a high-risk case is not worth the expenditure of the office's limited trial resources. Trying the case without disclosing the *Brady* material is also unappealing since, although non-disclosure would increase the chances of a conviction, such failure to disclose is a violation of both constitutional and ethical obligations.

How about the third option for resolution of a *Brady* case—a negotiated guilty plea? In my view, especially under a regime in which *Brady* material does not need to be disclosed, a guilty plea is a much more likely avenue for prosecutors to choose than trial. In other words, most *Brady* cases that are not dismissed are likely to be resolved through negotiated guilty pleas.

A negotiated guilty plea is a much more likely resolution of a *Brady* case than a trial for several reasons. Guilty pleas are cheaper than trials, so overburdened prosecutors with scarce resources will naturally favor them. The negotiated guilty plea is the method of resolution prosecutors use most often and therefore are likely to favor due simply to familiarity—it is the path of least resistance. Many judges also encourage negotiated guilty pleas to manage their calendars. A negotiated guilty plea is less public than a trial, so there is less risk of damage to the prosecutor's reputation from press or public scrutiny. A guilty plea eliminates the risk of an acquittal, also reducing the risk of reputational damage. The fact that the typical guilty plea entails an admission of guilt may entice prosecutors who retain a commitment to an earlier adopted view that the defendant is in fact guilty. If the prosecutor is uncertain about guilt, and therefore hesitant to dismiss, the defendant's admission may be psychologically appealing and put the prosecutor's mind at ease. If the prosecutor does choose negotiated

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Dimensions of Tunnel Vision in Criminal Cases, 2006 WIS. L. REV. 291, 292 (analyzing how tunnel vision-focusing on a particular suspect, affects all phases of criminal proceedings); Dianne L. Martin, *Lessons About Justice from the "Laboratory" of Wrongful Convictions: Tunnel Vision, the Construction of Guilt and Informer Evidence*, 70 UMKC L. REV. 847, 848 (2002) (exploring how tunnel vision leads to constructing guilt based on unreliable informants).

resolution of a *Brady* case by guilty plea, how steep a discount is likely to be offered? Due to the *Brady* doctrine's strict materiality standard, the risk of acquittal at trial is significant if *Brady* material exists. Accordingly, in such cases the prosecutor's incentive to offer steep discounts is significant, and such steep discounts create a powerful incentive for the defendant to falsely admit guilt.

We see, then, in *Brady* cases the likely convergence of two strong prosecutorial incentives. One is a powerful incentive for a prosecutor, if she does not dismiss, to seek resolution by negotiated guilty plea. Second, because the outcome at trial is bleak, the prosecutor will have little if any incentive to limit the sentencing differential offered to motivate the defendant to plead guilty. These two prosecutorial incentives, when combined with a defendant's incentive falsely to plead guilty if the sentencing differential is great enough, should give us great concern about the likelihood of inaccurate guilty pleas in *Brady* cases.

In my view, current debate about guilty plea disclosure fails to reflect adequate concern with accuracy and, more particularly, with how the incentive structures of both the prosecution and defense, outlined in the previous paragraphs, are likely to generate inaccurate guilty pleas.

Requiring disclosure would not insure the accuracy of guilty pleas. The prosecutor might choose simply to violate that duty. The defendant might be so risk averse and offered such a steep discount that he chooses to plead guilty regardless of knowing of the *Brady* material. It should, though, increase the accuracy of guilty pleas by encouraging prosecutors to dismiss cases in which defendants are innocent and encouraging innocent defendants to resist pleading guilty.

III. SHOULD ETHICS AUTHORITIES CREATE PROSECUTORIAL DISCLOSURE RULES?

The defense bar, academics, and judges have long expressed concern about prosecutorial failure to disclose *Brady* material. The fact that failure to disclose *Brady* material has been identified as a factor in a significant number of wrongful conviction cases intensified this concern as did the number of high profile cases in which *Brady* violations were disclosed, such as the federal prosecution of Senator Ted Stevens.[22] In response, ethics authorities have begun to make greater use of ethical rules to address prosecutorial disclosure.[23]

This move by ethics authorities has itself created controversy about whether it is appropriate for ethics authorities to be taking on the task of trying to insure and expand prosecutorial disclosure. I have argued previously, as have others, that ethics authorities should address prosecutorial disclosure.[24] Others have taken issue with this view.[25] For example, Professor Michael Cassidy argues, on grounds of effectiveness and institutional competence grounds, that ethics authorities should leave prosecutorial disclosure issues to legislatures and courts.[26]

A. *Institutional Competence*

I agree that courts and legislatures are institutionally superior in many ways to state ethics authorities for taking on the task of figuring out what prosecutors should and should not be required to do. Courts have greater expertise and experience than ethics authorities in dealing with criminal discovery, though I very much doubt the same is true for many legislators. One might prefer legislative resolution of criminal procedural issues involving prosecutors for the same reasons we treat legislatures as supreme in the field of substantive criminal law. Legislatures are typically viewed as the most democratically representative branch of government. At least in theory, what they choose to enact is more likely to be and to be viewed by the public as democratically legitimate. When it comes to dealing with the most severe sanctions a government can impose on

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[22] *See* Gershman, *supra* note 2, at 162.

[23] *See, e.g.*, ABA Formal Op. 09-454.

[24] *See* Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 1025–26 (1989); Peter A. Joy & Kevin C. McMunigal, *ABA Explains Prosecutors' Ethical Disclosure Duty*, 24 CRIM. JUST. 41, 44 (2010); Ellen Yaroshevsky, *Ethics and Plea Bargaining—What's Discovery Got to Do With It?*, 23 CRIM. JUST. 28, 28 (2008).

[25] *See* Cassidy, *supra* note 3; Kristin M. Schimpff, *Rule 3.8, The Jencks Act, and How the ABA Created a Conflict Between Ethics and the Law on Prosecutorial Disclosure*, 61 AM. L. REV. 1729 (2012).

[26] *See*, Cassidy, *supra* note 3, at 1460–66.

its citizens, such as imprisonment and even death, both the fact and appearance of democratic legitimacy are particularly salient.

In contrast, most of those involved in the creation of legal ethics rules, such as state bar association officials and many ethics authorities, are neither democratically elected nor representative. State supreme court justices, though, have final say in the approval of a state's legal ethics rules and they do stand for election in many states. State bar associations are likely to be and to be viewed by the public as "captured" by the legal profession and thus likely to act in the interests of lawyers rather than the public interest. The influence of the defense bar within some state bar associations may be viewed as likely to distort the work of state ethics authorities to unfairly favor criminal defendants.

These points, though valid, are greatly undercut in my view by the reality of how courts and legislatures have actually acted (or, more precisely, how they have failed to act) in relation to prosecutorial disclosure in the context of negotiated guilty pleas. More than 50 years have passed since *Brady* was decided. Yet the United States Supreme Court has failed to tell federal and state prosecutors whether they are constitutionally required to disclose core exculpatory *Brady* material to a defendant who pleads guilty.[27] Nor has Congress required any disclosure prior to entry of a guilty plea—even of highly exculpatory evidence—by amending Federal Rule of Criminal Procedure 16 dealing with discovery or Federal Rule of Criminal Procedure 11 dealing with guilty pleas. In a criminal justice system that relies overwhelmingly on negotiated guilty pleas, the fact that the Supreme Court, Congress and many state courts and legislatures have left such an important duty in relation to guilty pleas unaddressed for so long seriously undermines confidence that they are in reality institutionally capable of addressing this issue.

Practical political realities undercut the institutional competence argument in regard to legislatures and may help explain this failure. Legislative action in regard to criminal justice issues tends overwhelmingly to move in just one direction— toward greater severity of punishment and harsher treatment of defendants. In a "post Willy Horton" era of political attack advertising, many legislators fear doing anything that decreases severity of punishment or provides defendants greater rights for fear of being labeled "soft on crime." For example, despite substantial and growing public support in many states, the legalization of marijuana, the most significant recent change in our country's drug laws, has not been accomplished by legislators. Rather, voters have to date been required to bypass legislators via referenda to achieve marijuana reform. Because the federal system lacks such a referendum process, there appears currently to be no

[27] In 2002, almost 40 years after *Brady* was decided, the Court did finally address one aspect of *Brady* disclosure in the guilty plea process, holding that a defendant can be required to waive disclosure of *Brady* impeachment material as part of a guilty plea agreement. United States v. Ruiz, 536 U.S. 622 (2002).

chance of reforming federal marijuana laws. While a state bar may be captured by the criminal defense bar, legislatures, due to the same "soft on crime" fear discussed in the previous paragraph, appear to be captured by the prosecutorial lobby.

In sum, institutional competence arguments against ethics authorities fail to reflect institutional flaws and political realities. While state bars certainly have their institutional weaknesses, so do courts and legislatures. But at least some state bars are addressing this important issue. Though, along with Professor Cassidy, I would prefer a criminal procedure rule setting forth a realistic and practical disclosure rule for the guilty plea setting, since the Supreme Court, Congress and many state legislatures have for a very, very long time largely abdicated the field of guilty plea disclosure, I think state ethics authorities, with their admitted weaknesses, should address prosecutorial disclosure.

B. *Effectiveness*

Professor Cassidy argues that enforcement of prosecutorial disclosure obligations by ethics authorities is likely to be ineffectual.[28] While there was for many years a complete lack of enforcement of the ethics rule requiring prosecutorial disclosure,[29] in recent decades ethics authorities in some states have disciplined wayward prosecutors. Perhaps the most notable example has been the disbarment of Michael Nifong in the wake of his failure to disclose exculpatory DNA evidence in the infamous Duke Lacrosse case.[30]

Despite these examples of increased enforcement, I agree with Professor Cassidy that ethics enforcement is unlikely to be terribly effective in terms of deterring prosecutorial wrongdoing. But that prediction does not lead me to conclude that ethics authorities should not create and enforce prosecutorial disclosure obligations.

First of all, many ethics rules, including such core rules as those dealing with confidentiality and conflict of interest, are often not well enforced. Lack of reporting by lawyers, judges and even clients is one reason for this. Lack of investigative and enforcement resources at both the local and state levels is another. If weak enforcement or enforceability were reason enough to bar creation of an ethics rules, we would have a much slimmer set of ethics rules than we do now.

Second, in addressing the enforceability of ethics disclosure rules we need

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[28] *See* Cassidy, *supra* note 3, at 1462.

[29] *See* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C.L. REV. 693 (1987).

[30] *See* Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257 (2008), for a detailed discussion of the Nifong disbarment and the events leading up to it.

to avoid running afoul of the Nirvana fallacy.[31] If one frames the issue, as Professor Cassidy appears to suggest, as a choice between imperfect enforcement of an ethics disclosure rule and robust enforcement of either the constitutional obligation or a proposed legislatively created disclosure rule, the obvious choice is robust enforcement of the constitutional or legislative rule. But that is not the choice we face. In the view of many, enforcement of the current constitutional obligation is itself anemic. And there is little reason to conclude that a legislative rule, even if created, would be robustly enforced.

If we view both enforcement of the constitutional obligation and the ethical obligation as being weak, is there a valid reason to choose one over the other? Should we even choose at all? It seems to me that we should assess the usefulness of an ethics disclosure rule by asking if it is likely to add at all to the deterrence of bad prosecutorial behavior and accept it if we conclude that it is likely to add, even marginally, to deterrence. In short, the fact that ethics enforcement might provide even a marginal increase in disclosure should be seen as a positive.

C. *Impact on Legal Reform*

Is activity regarding prosecutorial disclosure by state ethics authorities likely to discourage reform by courts and legislators? Or to encourage such reform? One possibility is that judges and legislators might conclude that there is no need for them to act to create new disclosure rules or enforce existing ones because ethics authorities are already addressing the issue. Judges and legislators may come to see prosecutorial disclosure as primarily an ethical issue, like solicitation, confidentiality, and conflict of interest. A lawyer working in ethics enforcement once told me that he felt that the low level of judicial enforcement of the *Brady* obligation and the low level of enforcement of the ethical disclosure obligation was the result of judges and ethics authorities each seeing enforcement of prosecutorial disclosure as being the primary responsibility of the other and thus failing to act.

In my view a more plausible possibility is that ethics authorities addressing prosecutorial disclosure will encourage courts and legislators to act by focusing attention on prosecutorial disclosure issues and reinforcing the view that certain types of disclosure are essential to the prosecutor's role in our criminal justice system.

D. *Informational Distortion*

Another reason ethics authorities should take an interest in prosecutorial disclosure in the guilty plea context is because prosecutorial non-disclosure of

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[31] *See* H. Demsetz*, Information and Efficiency: Another Viewpoint*, 12 J. L. & ECON. 1, 2 (1969).

Brady material in the guilty plea context raises serious issues of candor—of prosecutors effectively misleading the defense. Prosecutors have a strong incentive to disclose inculpatory evidence early in such a case to encourage acceptance of a guilty plea offer and, for the same reason, not to disclose evidence that weakens a case, such as *Brady* material. Unless disclosure is compelled in the guilty plea context, these incentives will inevitably lead some prosecutors to provide to the defense in *Brady* cases a very distorted view of information about the case that, though it does not involve the making of a false statement, is nonetheless highly misleading in a way that is inappropriate for a public prosecutor.

1. Inculpatory Evidence

In addition to exculpatory evidence, prosecutorial disclosure obligations also deal with inculpatory evidence, the items of evidence the prosecutor will introduce into evidence if the case goes to trial. The key concern with disclosure of inculpatory evidence typically is not compelling disclosure. The prosecutor's interest in winning the case assures that inculpatory evidence will be disclosed through admission at trial. The primary concern with inculpatory evidence is the *timing* of disclosure rather than complete failure to disclose. Without a discovery rule to the contrary, a prosecutor in anticipation of trial might seek strategic advantage by delaying disclosure of inculpatory evidence until just before or even during trial in order to surprise the defense, undermine the defense's ability to challenge or otherwise respond to the inculpatory evidence, or lure the defense into committing to a strategic position that the undisclosed inculpatory evidence makes untenable. Federal Rule of Criminal Procedure 16 focuses on inculpatory evidence and addresses the timing of disclosure in order to prevent prosecutors from obtaining such a strategic advantage.[32]

The fact that our criminal justice system relies on negotiated guilty pleas as the primary procedural vehicle for resolving criminal cases creates a natural counter- incentive that checks the incentive for a prosecutor to delay disclosure of inculpatory evidence to gain advantage at trial, as described above. The goal of convincing the defendant to accept and defense counsel to recommend a negotiated guilty plea gives the prosecutor an incentive to disclose inculpatory evidence early, well before trial. In a criminal justice system in which prosecutors often have heavy caseloads and insufficient resources, it is important for a prosecutor to know as early as possible which cases will and which cases will not go to trial in order to maximize the prosecutor's ability to allocate scarce trial preparation time and resources to the cases most likely to be tried.

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

2. Exculpatory Evidence

While prosecutors who operate in what is primarily a negotiated resolution system and are faced with a large number of cases are likely to be generous with telling defendants the "bad news" (i.e. the inculpatory evidence), the opposite is true in regard to exculpatory evidence. Just as exculpatory evidence reduces the prosecutor's chances of success at trial, awareness of that evidence by the defendant and defense counsel during guilty plea negotiations reduces the chances that the defense will accept a guilty plea offer.

What then is the potential impact of these two incentives operating together— the incentive to be generous in disclosing inculpatory evidence and the incentive not to disclose exculpatory evidence? In other words, what is the impact of a prosecutor being generous with inculpatory evidence while failing to disclose exculpatory evidence? In many cases, there is substantial inculpatory evidence and little, if any, evidence that weakens the prosecution's case. In such cases, the interaction of these incentives will have no significance. But in a case in which there exists both inculpatory evidence and exculpatory evidence that meets the *Brady* doctrine's restrictive materiality test, the prosecutor by not disclosing the *Brady* material creates for the defense a highly distorted view of the evidence in the case that borders on, if it does not in fact constitute, misrepresentation. The prosecutor will not have made a false statement. But the prosecutor will have created a situation in which the defense will be misled by being encouraged to draw a false inference about the state of the evidence in the case.

A good reason for ethics rules to require *Brady* disclosure in the guilty plea context is to avoid pressuring or allowing prosecutors to so mislead some defendants.

IV. CONCLUSION

Looking back over the academic literature, court opinions, and ethics opinions and rules of recent decades in regard to prosecutorial disclosure, I confess to mixed feelings. The good news is that the topic of prosecutorial disclosure has received a great deal of attention and continues to do so, as evidenced by Professor Gershman's recent book. Additional good news is that more jurisdictions are moving to open file discovery, which, in my view, is the only truly effective way to deal with prosecutorial disclosure. The discouraging news is that all that attention—including many well documented and publicized disclosure failures—has failed to register sufficiently with the Supreme Court, Congress, the Department of Justice, many state legislatures, and some prosecutors, both federal and state, across the country.