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Reconcilable Differences: The Supreme Court Should Allow the Marriage of *Brady* and Plea Bargaining

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INTRODUCTION

In 1963, the United States Supreme Court held, in *Brady v. Maryland*,[1] that in a criminal trial, "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."[2] In subsequent decisions, the Court jettisoned *Brady*'s defense request requirement.[3] The effect of those decisions was to create a pretrial prosecutorial duty to disclose material, exculpatory evidence to criminal defendants.

In the years since the Court decided *Brady*, five federal appellate courts have held that the prosecutorial duty to disclose material, exculpatory evidence to a criminal

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* J.D. Candidate, 2003, Indiana University School of Law—Bloomington; B.S. 1997, Indiana University—Bloomington. I would like to thank my family for their trust, support, and love. I would also like to thank Professor Joseph Hoffmann for helping me to develop a topic for this Note. Some credit for the title of this Note is due Professor John G. Douglass who also used a personal relationship metaphor in the title of his article, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437 (2001).

1. 373 U.S. 83 (1963).

2. *Id.* at 87.

3. *See* United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976).

defendant exists not only prior to a trial, but also before entry of a guilty plea.[4] Thus far, only the United States Court of Appeals for the Fifth Circuit has suggested otherwise.[5] Significantly, in a judicial system in which the vast majority of cases are resolved through plea bargains,[6] the Supreme Court has addressed only one post-guilty plea *Brady* challenge and in doing so failed to resolve the split of authority[7] created by the Fifth Circuit.[8] When one considers the very large number of criminal cases disposed of each year by guilty pleas, it would seem only a matter of time before the circuit split on this issue produces divergent resolutions of post-guilty plea *Brady* challenges—a result that should motivate the Supreme Court to consider this issue.[9]

This Note analyzes opposing academic arguments for and against application of the

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4. *See* United States v. Avellino, 136 F.3d 249, 254-62 (2d Cir. 1998); Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995); United States v. Wright, 43 F.3d 491, 496 (10th Cir. 1994); White v. United States, 858 F.2d 416, 422 (8th Cir. 1988); Miller v. Angliker, 848 F.2d 1312, 1320 (2d Cir. 1988). The Sixth Circuit has addressed the issue, but its holding was not clear. That Circuit seems to lean towards recognizing a *Brady* claim after a guilty plea as evinced by remarks such as "the Supreme Court did not intend to insulate all misconduct of constitutional proportions from judicial scrutiny solely because that misconduct was followed by a plea which otherwise passes constitutional muster as knowing and intelligent." Campbell v. Marshall, 769 F.2d 314, 321 (6th Cir. 1985).

5. *See* Matthew v. Johnson, 201 F.3d 353 (5th Cir. 2000). In *Matthew*, the court held that under the nonretroactivity rule from *Teague v. Lane*, 489 U.S. 288 (1989), it was prohibited from addressing Matthew's *Brady* claim because "Matthew, in order to hold that the prosecutor's failure to disclose exculpatory information prior to entry of a guilty plea is a *Brady* violation, would require adoption of a new rule. . . ." Matthew, 201 F.3d at 362. However, the court also commented that, in its view, *Brady* is a trial right, defined in terms of the effect on the judge or jury of nondisclosure of exculpatory information; a defendant who has waived his right to trial does not risk conviction by a judge or jury kept ignorant of exculpatory evidence. *Id.*

6. John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 438 (2001). Douglass notes that "[i]n recent years, about 92% of convictions in federal cases have come by guilty plea." *Id.* at 438 n.4 (citing U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 448 (1996)).

7. A split of authority occurs when different federal appellate courts resolve the same issue differently. Since the Fifth Circuit resolved the issue under the nonretroactivity rule from *Teague v. Lane*, 489 U.S. 288 (1989), and did not explicitly hold on the *Brady* issue, one might make a tenuous argument that a true split of authority has not yet been created. *See supra* note 5.

8. *See* United States v. Ruiz, 536 U.S. 622 (2002). In *Ruiz*, the defendant sought to have her guilty plea overturned because the federal prosecutor withheld exculpatory *impeachment* material. The Court held that the Constitution does not require the disclosure of exculpatory *impeachment* material before the entry of a guilty plea. The Court did not consider whether the Constitution requires disclosure of other kinds of material, exculpatory evidence before defendants enter guilty pleas.

9. "The Court often accepts cases in which there is a split of authority among different U.S. circuit courts. . . ." Toni M. Fine, *How the U.S. Court System Functions*, ISSUES OF DEMOCRACY (1999), *available at* http://usinfo.state.gov/journals/itdhr/0999/ijde/fine.htm. "We generally await what we call a split of authority below. . . . Returns from several other courts can enhance our understanding of the importance of an issue: the frequency in which the issue arises; the different settings; and the range of opinions on the proper resolution." Hon. Ruth Bader Ginsburg, Speech at the Annual Dinner of the American Law Institute (May 19, 1994), *available at* http://gos.sbc.edu/g/ginsburg.html.

Brady rule to plea bargaining.[10] The *Brady* rule in a pre-plea setting would allow a convicted defendant to challenge the validity of his or her guilty plea if the prosecutor withheld material, exculpatory evidence ("*Brady* material") from the defendant during negotiation of the plea. In order to prevail on such a challenge, the defendant would need to demonstrate that "there is a reasonable probability that but for the failure to disclose the *Brady* material, the defendant would have refused to plead and would have gone to trial."[11] This Note advocates the marriage of *Brady* and plea bargaining; in this respect it is primarily a response to Professor John G. Douglass who has recently argued against applying *Brady* in that setting.[12] It argues that the potential problems associated with a pre-plea *Brady* rule would not make the rule unworkable.[13] Further, it concludes that defendants preparing to plead guilty and the criminal justice system in general would be better served by an imperfect disclosure rule than by no rule at all.

Part I will discuss the *Brady* rule and the ideals it furthers in the criminal trial context. Next, Part II will discuss various arguments for and against molding the *Brady* rule into a rule of pre-plea disclosure. These arguments focus on the degree to which the *Brady* rule might or might not further two specific goals of disclosure in the plea bargaining setting: accuracy and informed choice.[14] Finally, Part III will point out that the problems Professor Douglass suggests will result from the marriage of *Brady* and plea bargaining might not be as bad as they seem. Some of those problems can be treated by altering the *Brady* rule slightly for its new setting. Others can be alleviated by considering how *Brady* might further other goals of disclosure in the plea bargaining process.

I. THE *BRADY* RULE: SERVING THE FAIR-PLAY IDEAL SINCE 1963

Part I provides background material helpful to the understanding of the arguments discussed in Part II. Subpart A will discuss the origins of the *Brady* rule. Subpart B will discuss *United States v. Bagley*,[15] which articulated the materiality standard for *Brady* evidence. Subpart C will discuss the justifications for the *Brady* rule in a trial setting.

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10. Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957 (1989) (arguing for application of *Brady* to the guilty plea process); Douglass, *supra* note 6 (arguing against judicial efforts to mold *Brady* into a rule of pre-plea disclosure).

11. Sanchez v. United States, 50 F.3d 1448, 1454 (9th Cir. 1995).

12. *See* Douglass, *supra* note 6.

13. One can identify potential problems with just about any rule of law. In the context of this Note, I have thought about this issue in terms of the costs and benefits both to persons accused of crimes and to our system of justice of some rule of pre-plea discovery versus no rule of pre-plea discovery. That is to say, is it better for criminal defendants considering the entry of a guilty plea to have the benefits of an imperfect rule of pre-plea discovery or to trust prosecutors in the absence of such a rule to provide them with information out of the goodness of their hearts?

14. Douglass, *supra* note 6, at 487.

15. 473 U.S. 667 (1985).

A. Brady v. Maryland[16]

In 1958, John Brady and a companion, Boblit, were arrested and charged with murder in the first degree.[17] While testifying at his trial, Brady admitted to his participation in the crime, but insisted that Boblit did the actual killing.[18] Brady was convicted of murder in the first degree and was sentenced to death.[19]

As part of his preparation for trial, Brady's attorney requested that the prosecutor disclose all of Boblit's extrajudicial statements.[20] The prosecutor shared several statements with the defense attorney, but did not disclose one such statement in which Boblit admitted to the actual killing.[21] Neither Brady nor his attorney knew that Boblit had confessed to the killing until Brady had been convicted of the murder and had lost his appeal to the Maryland Court of Appeals.[22]

After he learned of Boblit's confession, Brady petitioned the Supreme Court for relief from his conviction. Taking a "major stride away from [a] purely adversarial model"[23] of criminal trials, the Court held that the "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[24] Though the Court did not define what kind of evidence might be considered to be "material" to guilt or punishment, it hinted at a broad definition rooted in the notion of fair-play.[25] For example, the Court opined, after issuing its holding, that "[s]ociety wins not only when the guilty are convicted, but when criminal trials are fair."[26] The Court went on to say that a prosecutor who withholds evidence requested by the defendant that would tend to exculpate the defendant is the "architect of a proceeding that does not comport with the standards of justice."[27] Though such language could easily have lent itself to a broad category of evidence that would be "material" to guilt or punishment, subsequent decisions have, no doubt, disappointed those who might have hoped for just such a broad definition.

B. United States v. Bagley[28]

After some twenty-two years of evolution,[29] the Supreme Court issued the modern

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16. 373 U.S. 83 (1963).

17. *Id.* at 84. I have assumed that the arrest took place in 1958. The statement of facts in *Brady* makes reference to a statement given in July 1958 by Brady's companion during the investigation of the crime.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. Douglass, *supra* note 6, at 469.

24. *Brady*, 373 U.S. at 87.

25. *Id.*

26. *Id.*

27. *Id.* at 87-88.

28. 473 U.S. 667 (1985).

29. In *United States v. Agurs*, 427 U.S. 97, 103-107 (1976), the Court issued a definition of materiality that depended upon the specificity of the defense's request for information. In

definition of "materiality" for *Brady* evidence in its holding in *United States v. Bagley*.[30] In *Bagley*, the Court held that evidence favorable to a criminal defendant that is suppressed by the prosecutor is material "only if there is a reasonable probability that had the evidence been disclosed to the defense the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[31] Under *Bagley*, defendants claiming to have been wronged by prosecutorial suppression of favorable evidence will only find relief when that evidence is so important that it might have made a difference at trial; defendants must go farther than simply demonstrating that the prosecution did not play fair.

The *Bagley* treatment of materiality has been characterized as favorably as "quite restrictive"[32] and as harshly as "unfair and illogical."[33] To convicted criminal defendants who discover that the prosecution purposefully suppressed exculpatory evidence, the *Bagley* rule may seem "quite restrictive." Those defendants will only find relief from their convictions if they can show that there is a reasonable probability that had the suppressed evidence been disclosed, the trial would have had a different result. When this question seems a close call, convicted defendants who are denied relief must often wonder whether the jury, had it been exposed to the evidence at trial, might have felt differently about the matter than did the arbiters of their appeals. Defendants may also wonder why prosecutors can "get away with" breaking the rules. Prosecutors may find the rule illogical as well; the rule obligates a prosecutor before trial "to disclose a category of information that cannot be defined until after trial . . . *Brady*'s retrospective standard requires a prosecutor to speculate about events that she cannot fully anticipate before trial."[34]

Though some see the *Bagley* standard as unfair and illogical, its upside, according to the Court, is that prosecutors will avoid "toeing the line" by sharing all potentially material, exculpatory evidence with the defense.[35] Assuming that all prosecutors care more about the fairness of trials than they do about obtaining convictions,[36] the rule will work well; defendants will get any and all exculpatory evidence the prosecution has that is even arguably material to guilt or punishment. But in the case of a prosecutor who is inclined to play the odds and who is concerned more with

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Bagley, the plurality abandoned that definition and established a single standard of materiality. Douglass, *supra* note 6, at 470 n.141.

30. 473 U.S. 667 (1985).

31. *Id.* at 682.

32. McMunigal, *supra* note 10, at 961.

33. Douglass, *supra* note 6, at 471.

34. *Id.* A prosecutor's duty is to disclose *material*, exculpatory evidence *prior to* trial. But materiality is defined in terms of whether or not a particular piece of evidence, if not disclosed, would change the *result* of the trial. Thus, the rule requires prosecutors to speculate about the import of a particular piece of evidence in the context of what *might* be introduced at trial. One can imagine how difficult this inquiry might become in a complicated trial with dozens of witnesses.

35. *Id.* Douglass claims that the most prominent critic of the *Bagley* standard was Justice Marshall, "whose dissent argued that *Bagley*'s outcome-based definition of materiality created a standard that, in the pretrial context, 'virtually defies definition.'" *Id.* at 471 n.145 (quoting *Bagley*, 473 U.S. at 700 (Marshall, J., dissenting)).

36. I certainly do assume that the vast majority of prosecutors believe that justice demands that they treat criminal defendants fairly.

convictions than with the fairness of trials, this suggested "upside" evaporates.

C. What Justifies Disclosure of Brady Evidence at Trial?

If nothing else, articulating the *Brady* disclosure duty in terms of "due process"[37] implies that the chief ideal advanced by the rule is some notion of "fair play."[38] Before trial, a fair play ideal seems sufficient to justify disclosure of exculpatory evidence to criminal defendants. But fair play, on its own, may not seem a lofty enough ideal to justify the post-conviction results of the *Brady* rule. That is to say, it is reasonable to justify mandating pre-trial disclosure as part of an effort to insure the fairness of criminal trials, but post-conviction, a rule that upsets jury verdicts begs for something more than fair play as its primary justification.[39]

It seems, if we are willing to overturn jury verdicts when we think they might be incorrect, that we must be more concerned with the *accuracy* of jury verdicts than we are with the *finality* of jury verdicts. To put it another way, it would seem strange to concern ourselves more with finality than with accuracy. There is no point in protecting the finality of inaccurate verdicts. The *Brady* rule, then, is justifiable as promoting fair play and insuring the accuracy of jury verdicts even while it is in conflict with the systemic interest in the finality of jury verdicts.

If we imagine that the *Brady* rule was fashioned, at least in part, to promote fair play and to ensure the accuracy of jury verdicts even at the expense of the finality of those verdicts, then it would seem less justified when applied to plea bargains. While the *Brady* rule would still serve to promote fair play in that new setting, one might argue that a defendant's choice to plead guilty should resolve any concerns about the accuracy of the verdict entered on the plea.[40] After all, no defendant would plead guilty to a crime he did not commit. And once the accuracy rationale breaks down, the argument goes, nothing remains to justify making verdicts entered on guilty pleas less final.

II. CAN THIS WORK, OR CAN'T IT?

With the preceding background material in mind, Part II will consider whether the *Brady* rule is justified and functional in the plea bargaining setting. First, Subpart A will consider the practical implications of the rule in its new setting. Subpart B will then consider the justifications for extending the *Brady* rule to plea bargaining. Specifically, Subpart B argues that the accuracy rationale still serves to justify applying the rule to plea bargaining and addresses Professor Douglass's arguments against application of the rule in this setting.[41]

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

38. *See supra* text accompanying notes 25-27.

39. Douglass, *supra* note 6, at 472. In a post-conviction setting, the rule "is no longer just about disclosure." *Id.* There exists a tension between a "defendant's right to disclosure on the one hand, and the powerful systemic interest in the finality of a jury's verdict on the other." *Id.*

40. *See* McMunigal, *supra* note 10, at 969. "We assume that a defendant will not falsely condemn himself by pleading guilty since he knows that the immediate consequence is a criminal conviction." *Id. See also* Douglass, *supra* note 6, at 488-89.

41. Douglass, *supra* note 6 *passim*.

A. Application of the Brady *Rule to Plea Bargaining*

If the *Brady* rule allows defendants to overturn convictions because suppressed evidence has shaken the court's confidence in the jury's verdict, how does the rule apply to a defendant who has entered a guilty plea? When there is no jury verdict, how might suppressed evidence shake the court's confidence in the result of the proceeding? When a defendant stands up in court and admits that he or she is guilty of the charged offense, can new evidence really shake the court's confidence in that admission of guilt?

In order for plea bargaining to survive as a useful tool in our justice system, we should be supremely confident that defendants who are willing to plead guilty are actually guilty. But this is the compromise we make in order to feel good about plea bargaining. On the one hand, we assume that defendants know whether or not they committed the crimes they have been charged with[42] and that "a defendant will not falsely condemn himself by pleading guilty since he knows that the immediate consequence is a criminal conviction."[43] On the other hand, we certainly can see how "an especially 'good deal' will lead a rational defendant to plead guilty despite a weak case against him."[44] There must be some point at which an intelligent innocent defendant will choose the certainty of a good deal over the risk of a conviction and a harsher sentence at trial.

Those courts that have endorsed post-guilty plea *Brady* challenges have all adopted the same formulation of the rule after very little analysis.[45] The question one must ask in order to determine whether suppressed exculpatory evidence was *material* and thus important enough to allow the defendant to recant a guilty plea is whether "there is a reasonable probability that but for the failure to produce such information the defendant would not have entered the plea but instead would have insisted on going to trial."[46] The focus of the rule when applied after a trial is on the result of the trial itself: the jury verdict.[47] The focus of the rule after a guilty plea, however, is on the *defendant's decision to plead guilty*.[48] The question becomes, would the defendant still have entered a guilty plea had he had access to the suppressed evidence?

A hypothetical may help to illustrate how this process works. Consider a defendant who has been charged with several counts of statutory rape. The victim's family has told the prosecutor that the victim was underage at the time of several sexual

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42. McMunigal, *supra* note 10, at 968.

43. *Id.* at 969.

44. Douglass, *supra* note 6, at 445.

45. *See, e.g.*, Miller v. Angliker, 848 F.2d 1312, 1320 (2d Cir. 1988) (holding, after almost no analysis, that "even a guilty plea that was 'knowing' and 'intelligent' may be vulnerable to challenge if it was entered without knowledge of material evidence withheld by the prosecution."); *see also* Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995) (citing as justification for its holding that "if a defendant may not raise a *Brady* claim after a guilty plea, prosecutors may be tempted to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas.").

46. United States v. Avellino, 136 F.3d 249, 256 (2d Cir. 1998) (*quoting* Tate v. Wood, 963 F.2d 20, 24 (2d Cir. 1992)).

47. *See supra* text accompanying note 24.

48. *Avellino*, 136 F.3d at 256.

encounters with the defendant. One of those encounters resulted in pregnancy. In reality, the family, upset about the relationship the defendant has had with their daughter, has misinformed the prosecuting attorney about the age of the victim. Though our victim is young, she had reached the age of consent at the time she and the defendant engaged in the sexual activity that resulted in the pregnancy. The defendant does not know the age of the victim.

Our pregnant victim submits to a DNA test on the unborn child that confirms, to an accuracy of 99.9%, that the defendant is the father of the child. The results of the contemporaneous physical examination together with information from the victim pin down the moment of conception to a certain two-week period of time. Knowing that he had sex with the victim on several occasions and that the results of the DNA test confirm that, the defendant pleads guilty to several counts of statutory rape in exchange for a lenient sentence.

After sentencing, the defendant learns that prior to entry of his guilty plea, the prosecutor had obtained a copy of the victim's birth certificate, which proved that the victim was of legal age during the entire two-week period during which she became pregnant. The defendant was never given a copy of the birth certificate. The defendant petitions the court to withdraw his guilty plea, arguing that he never would have entered the plea had he known that the victim was of age when he had sex with her.

The question for the court at this point is not an easy one. The new evidence proves that the victim was of age *at the time she became pregnant*. The new evidence does not necessarily help the defendant much if it was also alleged that there were other sexual encounters with the same victim *before* the encounter, which resulted in the pregnancy. Would the suppressed evidence have been enough to cause the defendant to insist on a trial? The answer to this question depends on what the defendant knew about his own activities, what the defendant knew about the prosecutor's case against him, and the attractiveness of the plea bargain. The reviewing court will have a very difficult time coming to a determination of exactly what it was that the defendant knew at the time the plea was entered and, thus, whether the suppressed evidence would have been enough to cause the defendant to insist upon a trial.

B. Should Brady *Apply to Plea Bargaining?*

The difficulties created by the definition of materiality suggest that application of *Brady* to plea bargaining must be supported by something more than a notion of fair play. One academic has suggested that a compelling justification for applying *Brady* to plea bargaining is that mandatory pre-plea disclosure of exculpatory evidence might help to increase the accuracy of guilty pleas.[49] Others argue that a rule mandating such pre-plea disclosure might have exactly the opposite effect.[50] The following material examines competing arguments as to whether application of *Brady* to plea bargaining can be justified as increasing the accuracy of guilty pleas.

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49. McMunigal, *supra* note 10, at 1007.

50. *See* Douglass, *supra* note 6, at 494.

1. The Accuracy Rationale

One argument that might justify expanding present *Brady* doctrine to cover the guilty plea process is that mandatory discovery would help to ensure the accuracy of guilty pleas.[51] Professor McMunigal argues that our criminal justice system is committed to two deeply rooted assumptions about the guilty plea process: "the defendant knows the facts that determine his guilt and that he is sincere if he confesses those facts in a guilty plea."[52] McMunigal further argues that those assumptions break down in certain situations. There are times when defendants are genuinely unaware of the facts that are determinative of guilt or innocence.[53] There are also times when innocent defendants may be induced to plead guilty by large differentials between the bargained for sentence and the possible sentence at trial.[54]

Restricting *Brady* to a trial setting means that prosecutors can avoid disclosure obligations that they would face at trial by choosing plea bargaining over trial whenever they are in possession of material, exculpatory evidence.[55] When the prosecutor has possession of exculpatory evidence, opting for plea bargaining will allow the prosecutor to keep the defendant ignorant of that exculpatory evidence. Any prosecutor in possession of *Brady* evidence also faces a larger than normal incentive—after having opted to resolve a particular matter through a plea bargain—to induce a plea with a large sentencing differential.[56] That is to say, if a prosecutor knows that he or she will face disclosure obligations at trial that might lessen the chance of victory, there will be an increased incentive[57] to offer a deal that is, perhaps even for an innocent defendant, too attractive to refuse.

Mandatory disclosure, then, would help make guilty pleas more accurate by providing defendants with information to which they may not otherwise have access. Returning to the hypothetical described earlier, if our defendant receives evidence that the victim in his statutory rape case was actually of legal age at the time she became pregnant, he *might* not be so easily convinced to plead guilty to statutory rape.[58] Whatever the result, it will be more accurate than if the defendant had been kept unaware of the true age of the victim and had pled guilty to the charge to avoid what he thought would be a certain conviction and harsher sentence at trial.[59] The more

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51. Here, accuracy should be understood as accuracy in the separation of innocent from guilty—or the separation of the less culpable from the more culpable. "[T]he 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." McMunigal, *supra* note 10, at 1007.

52. *Id.* at 969.

53. *Id.* at 970-84.

54. *Id.* at 984-97.

55. *Id.* at 996.

56. *Id.*

57. If obtaining a conviction without the cost of a trial is the normal incentive to induce a plea, a prosecutor faces a greater than normal incentive to induce a plea if that prosecutor may have to go to trail after having armed the defendant with significant exculpatory information.

58. At least he may not be convinced of pleading guilty to that *specific instance* of statutory rape.

59. Inasmuch as the defendant might not plead guilty to a charge that alleged only the one

information a defendant has about the weaknesses in the government's case, the less likely he will be induced to plead guilty by a large sentencing differential because he will be better able to evaluate the risk of a loss at trial.[60]

An argument based on an accuracy rationale assumes that better-informed pleas will be more accurate and imagines that the *Brady* rule, when adapted to the plea bargaining setting, will produce better-informed criminal defendants. In the case where the defendant is truly unaware of the facts that determine guilt or innocence, innocent defendants might plead guilty when exculpatory evidence is not disclosed. The more information that a defendant has access to, the less likely he or she will be to plead guilty when factually innocent.

2. Will *Brady* Really Produce Better-Informed Defendants and More Accurate Guilty Pleas?: Professor Douglass's Concerns

The primary weakness of the post-guilty plea *Brady* claim is the effect of the definition of "materiality" in that setting.[61] When assessing the materiality of suppressed evidence in a post-guilty plea *Brady* claim, a court must consider that evidence not as it fits in with the evidence on record, as with a post-trial claim,[62] but in relation to what the defendant *knew* at the time the decision was made to accept a plea bargain.[63] Courts also must factor in the generosity of the bargain itself.[64]

In other words, a piece of suppressed evidence might be enough to motivate a defendant to insist on trial if the defendant were aware of the strength of the

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occurrence of statutory rape, this result would certainly be more accurate; the defendant would no longer be pleading guilty to an offense he did not commit. If there are other instances of statutory rape in the indictment, our defendant still might enter a plea as to those counts, but we would expect the sentence to be reduced as the number of offenses committed drops. This result is still more accurate than a guilty plea entered to all charges.

Of course, access to more information is not a *guarantee* that every plea will be 100% accurate. Even in those cases in which a defendant is provided with significant exculpatory evidence, a plea bargain may seem like a better idea than a trial. McMunigal provides an example:

> 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 . . . and the risk of . . . up to two years if convicted.

McMunigal, *supra* note 10, at 987.

60. *Id.* at 996.

61. Douglass, *supra* note 6, at 483-87.

62. *Id.* at 483. "In considering a post-trial *Brady* claim, courts cannot assess the materiality of evidence in a vacuum. An item of exculpatory or impeaching evidence may be more or less material depending upon its relation to other evidence presented at trial." *Id.*

63. *Id.* at 483-86.

64. *Id.* at 486-87.

prosecution's inculpatory evidence and if the bargain were not an especially attractive one. On the other hand, a defendant who knew nothing about the prosecution's case at the time of entering a guilty plea looks as though he knew he was guilty; it will be quite difficult for that defendant to claim that an item of suppressed exculpatory evidence would have led him to insist on going to trial. Further, even significant exculpatory evidence might not motivate a defendant to choose trial if the benefit of the plea bargain is very good.[65]

Aside from the difficulty associated with determining what evidence is material in a post-guilty plea setting, the *Brady* rule may not even serve the rationales identified above. It seems, at first glance, that a rule designed only to provide discovery of exculpatory evidence may not help to insure better-informed guilty pleas.[66] *Brady*, after all, does not mandate disclosure of *inculpatory* evidence, which is just as important to the decision of whether to plead guilty, as is exculpatory evidence.[67] Moreover, because it does nothing to discourage prosecutors from offering especially attractive deals that might even induce innocent defendants to plead guilty, *Brady* may do little to insure more accurate guilty pleas.

a. Information

Professor Douglass argues that one possible effect of applying the *Brady* rule to plea bargaining is that it might cause defendants to be *less* well informed than they would be in the absence of the rule.[68] If exculpatory evidence does not become material until it is "matched" up with inculpatory evidence,[69] then prosecutors can avoid disclosure of exculpatory evidence during plea bargaining simply by refusing to discuss the *inculpatory* evidence with defendants.[70] The result of this would be an increase in the number of defendants who would have to choose whether or not to plead guilty with no knowledge whatsoever about the case against them. They might then be motivated to accept a deal out of fear of the unknown.[71] This "bluffing"[72] is obviously no way to arrive at a well-informed guilty plea.

Professor Douglass concedes that the plea bargaining process "itself already creates an incentive for prosecutors to disclose much of their inculpatory evidence."[73] If that

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65. *See* United States v. Avellino, 136 F.3d 249, 256 (2d Cir. 1998).

66. Douglass, *supra* note 6, at 491.

67. *Id.*

68. *Id.* at 494.

69. *Id.* at 494-95. This is because exculpatory evidence takes on its material character only if it would change the defendants mind as to the plea. If a defendant does not know anything about the related inculpatory evidence, it becomes difficult to say that a piece of exculpatory evidence is material. How would that evidence have made a difference if the defendant was willing to plead without knowing anything of the corresponding inculpatory evidence?

70. *Id.* at 496.

71. *Id.* at 497.

72. *Id.*

73. *Id.* at 498. The fact that most defendants will not want to plead guilty without knowing whether the prosecution has a case against them creates the incentive for prosecutors to disclose inculpatory evidence. If prosecutors kept quiet about the inculpatory evidence they would not have anything with which to induce guilty pleas.

incentive already exists, and if a *Brady* rule in the pre-plea setting would remove some of that incentive, then a *Brady* rule mandating pre-plea disclosure of exculpatory evidence might do more to keep defendants ignorant than it would to provide them with information. A rule that does not increase the incentive to disclose but actually provides a counter-incentive to information sharing will do little to ensure that guilty pleas are well informed.

b. Accuracy

Professor Douglass argues further that if *Brady* creates counter-incentives to disclosure for prosecutors in the pre-plea setting, it cannot possibly assist in achieving increased accuracy in plea bargaining.[74] Plea bargains with no disclosure obligations are already fairly inaccurate relative to trials because defendants have access to less information than they would have access to at trial.[75] Absent mandatory disclosure rules applying to plea bargaining, there is already an incentive for prosecutors in possession of exculpatory information to opt for plea bargaining in an effort to avoid trial and the concomitant duty to disclose the exculpatory information.[76] Applying *Brady* in the pre-plea setting will only make this problem worse. Because *Brady* materiality means that the exculpatory evidence will only become material when "matched" with inculpatory evidence, a prosecutor in possession of exculpatory evidence will, under a pre-plea *Brady* rule, avoid disclosure of the exculpatory evidence by not disclosing anything at all.[77] Though perhaps counterintuitive, Douglass argues that the rule *decreases* the amount of information the defendant will receive and so might reduce the overall accuracy of an already fairly inaccurate process.[78]

c. An Economic Argument

Douglass's final argument for leaving *Brady* to the world of trials is an economic argument.[79] Douglass claims that *Brady* is too costly a rule for the post-guilty plea setting.[80] Because it is enforced after conviction, the rule in its traditional application already creates costly, protracted litigation after trials.[81] Because the post-guilty plea scenario does not leave a record for courts reviewing *Brady* claims, the factual inquiry becomes more difficult and more expensive than the traditional *Brady* inquiry.[82] This inquiry will require courts to "conduct evidentiary hearings regarding what the defendant knew and when he knew it."[83] The cost of litigating these claims over and

74. *Id.* at 501-03.

75. *Id.* at 502.

76. *Id.*

77. *Id.*

78. And, of course, prosecutors might still choose to offer especially attractive deals in this situation in order to come to quick resolutions of active matters.

79. *Id.* at 507-09.

80. *Id.* at 508.

81. *Id.*

82. *Id.*

83. *Id.* at 507. Douglass, assuming that the *Brady* rule in the world of plea bargaining is a useless rule, also points out opportunity costs associated with the rule: "To the extent that

over again makes application of the *Brady* rule to plea bargaining too expensive a proposition to be practical.

III. IMPERFECT RULE OR NONE AT ALL?

The *Brady* rule, even in the world of criminal *trials*, is not without its problems. The rule already creates difficult questions for prosecutors before trials and for courts after trials.[84] And the question does get more difficult in the guilty plea setting as courts must consider materiality based on the knowledge of the defendant and the benefits of the bargain without the help of a detailed record.[85] But Professor Douglass has overestimated *Brady*'s difficulties and underestimated its utility in the plea bargaining setting. This rule is not unworkable.[86]

Subpart A responds to Professor Douglass's arguments against applying *Brady* to plea bargaining. Specifically, Subpart A first argues that for prosecutors in a pre-plea setting, the incentive to withhold information that may be created by the *Brady* rule is not as real as Douglass has envisioned. Second, Subpart A suggests that the *Brady* rule can achieve increased accuracy in plea bargaining through increased access to information. Finally, Subpart A suggests that the enforcement costs of the *Brady* rule in its new setting might more properly be thought of as a compliance incentive for prosecutors than as an economic black mark against the rule.

Subpart B suggests an alternative justification for applying the *Brady* rule to plea bargaining. It points out that the Court has previously recognized, in the *Brady* opinion itself and elsewhere in its criminal procedure cases, that the integrity of the justice system suffers when it is willing to countenance unfair tactics without providing a remedy for adversely affected defendants. Subpart B argues that providing a remedy to defendants wronged by prosecutors who have purposefully withheld material, exculpatory evidence in the course of negotiating the plea bargain would serve to protect the integrity of our justice system.

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courts, defense counsel, and policymakers are attracted by the false hope of *Brady*, they will not be pursuing alternatives that might more effectively promote informed plea-bargains." *Id.* at 508.

84. *See id.* at 471.

85. *See supra* Part II.B.2.c.

86. The Supreme Court has articulated at least one other post-guilty plea test that asks, but for an error, would defendant have pleaded guilty. In the ineffective assistance of counsel context, in order to successfully challenge a guilty plea, "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." Hill v. Lockhart, 474 U.S. 52, 59 (1985). Associated with this inquiry are many of the same problems associated with *Brady* in the post-plea setting. If courts can assess the effect of defense counsel's "blunders" on defendant's decisionmaking, taking into consideration how attractive the prosecution's bargain might have been to the defendant, might they also be able to assess the prosecution's "blunders" with respect to exculpatory evidence disclosure in the same fashion?

A. Saving the Marriage: Addressing Professor Douglass's Concerns

1. The Incentive to Withhold Information

Professor Douglass argues that *Brady*, applied to plea bargaining, will create perverse incentives for prosecutors who possess *Brady* evidence to *withhold* more evidence from criminal defendants than they would in the absence of a pre-plea disclosure rule.[87] That argument is fairly easy to understand. It runs like this: since prosecutors can control what exculpatory evidence will become material by limiting the defendant's access to inculpatory evidence,[88] prosecutors will have an incentive to bargain without disclosing any inculpatory evidence if they are worried that disclosure of the exculpatory evidence will influence the defendant to demand a trial. That is to say, prosecutors may resort to "bluffing" in an effort to use defendants' fear of the unknown to influence them to plead guilty.[89] The argument concludes that applying *Brady* to plea bargaining is inappropriate because these incentives are not present in a world in which *Brady* does not apply.[90]

While the incentive to withhold inculpatory evidence might not exist at all in a world in which *Brady* did not apply, the incentive is not as real as Douglass assumes when *Brady* does apply. Assuming that there *are* many defendants who can be induced to plead guilty after hearing nothing of the inculpatory evidence the state has against them,[91] this argument still insults the intelligence of the defense bar. If the Supreme Court decides that *Brady* should be applied to plea bargaining and thereby mandates disclosure of material, exculpatory evidence prior to the entry of a guilty plea, it is unlikely that any defense attorney worth his or her salary would allow a prosecutor to manipulate defendants in such a way.

Under *Brady*, in a pre-plea setting, defense counsel would have increased motivation to demand to hear the inculpatory evidence against the defendant. Presently, in a world where *Brady* does not apply to plea bargaining, a defense attorney needs to see at least some of the prosecutor's inculpatory evidence to make certain that a plea bargain is a better option than a trial.[92] Under *Brady*, defense attorneys will ask for inculpatory evidence for the same reason, but also as part of an effort to produce the disclosure obligation regarding exculpatory evidence.[93]

One can imagine how skeptical defense attorneys would be of prosecutors who refuse to disclose inculpatory evidence in a plea bargaining world in which *Brady* applies. Two thoughts will immediately come to defense counsel's mind in that event:

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87. Douglass, *supra* note 6, at 493-99.

88. This result follows from the *Bagley* materiality standard. "In most instances . . . *Brady* evidence takes on its 'exculpatory' character only when the evidence is 'matched' against other 'inculpatory' evidence." *Id.* at 494-95.

89. *Id.* at 496-98.

90. *Id.* at 496.

91. To this writer it seems unlikely that large numbers of defendants will be willing to plead guilty after hearing nothing of the prosecution's case against them.

92. Douglass, *supra* note 6, at 458.

93. The disclosure obligation is produced when inculpatory evidence is disclosed because of the "matching" phenomenon. *See id.* at 494-95.

either the prosecution is not in possession of much inculpatory evidence at all, or the prosecution is worried about giving rise to a duty to disclose significant exculpatory evidence. Thus, the skepticism of defense attorneys will remove much of the incentive *Brady* might provide for prosecutors to withhold information.

2. Accuracy

If we agree that, in the usual plea bargaining scenario, prosecutors need to disclose at least some of the inculpatory evidence against a given defendant in order to induce a guilty plea,[94] and we accept that the incentive to withhold inculpatory evidence to avoid disclosure of exculpatory evidence will be reduced by defense counsel as discussed above, we can see how the *Brady* rule will increase the accuracy of guilty pleas. Disclosure of at least some of the inculpatory evidence against a defendant will likely give rise to a duty to disclose at least some exculpatory evidence.[95] The more information defense counsel can get out of the prosecution pertaining to its case against the defendant, the more exculpatory information the prosecution will be obligated to disclose.[96] Thus, defendants will wind up with more information than they would have without the rule and will be better equipped to make decisions regarding the guilty plea. This result is more obvious if we assume that a well-meaning prosecutor would likely interpret the *Brady* disclosure duty broadly, "disclosing anything that might affect a defendant's calculus."[97] The likelihood that innocent defendants will be induced to plead guilty by very attractive offers without any disclosure at all will thus be reduced by application of the *Brady* rule to plea bargaining.

3. Dollars and Cents Mean Disclosure Makes Sense

Professor Douglass has identified costs[98] of enforcement and compliance as reasons that the *Brady* rule is unworkable in the plea bargaining setting. He claims that compliance with the rule will increase costs for prosecutors because they will be required to devote time and effort to disclosure.[99] Further, Douglass is worried about the costs of enforcing *Brady* through "protracted litigation."[100] But in actuality, the

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94. *See supra* text accompanying note 55.

95. Assuming, of course, that the prosecution is in possession of some exculpatory evidence. After all, one can only disclose what one has. By way of explanation, this sentence assumes the accuracy of Professor Douglass's "matching" argument, whereby exculpatory evidence only becomes material once it is "matched up" with inculpatory evidence. *See* Douglass, *supra* note 6, at 494-95.

96. Assuming again, of course, that the prosecution *has* some exculpatory evidence.

97. Douglass, *supra* note 6, at 494.

98. *See supra* Part II.B.2.c.

99. Douglass, *supra* note 6, at 505. Of course, any way we choose to promote increased information sharing as between prosecutors and defendants will come with costs associated with the time and effort prosecutors will need to devote to compliance. If we desire, then, to address disclosure in the plea bargaining setting and we expect that increased information sharing will come with at least some compliance costs, then arguing that we should not apply *Brady* to accomplish increased information sharing because *Brady* comes with these costs is not productive.

100. *Id.* at 507.

high cost of enforcement is a positive in this setting. If the prosecution can control those enforcement costs, which would largely come out of their own pockets, these costs act as an incentive to comply with the rule rather than an economic black mark against the application of the rule to plea bargaining at all.

Certainly, any rule that is enforced primarily post-trial—or post guilty plea—carries with it enforcement costs in the form of post-conviction litigation.[101] But the fact that the cost of post-conviction litigation will come, to a significant extent, from the pockets of the prosecutors who must comply with the rule means that *Brady*'s enforcement costs will act as a compliance incentive for prosecutors. The cost of enforcement, though arguably a systemic cost, will hit prosecutors hard enough so as to function almost like a fine for noncompliance, thereby encouraging the very compliance that minimizes the cost.

If prosecutors already suffer from tight budgets, then it is safe to assume that they will do whatever is reasonably within their power to minimize expenses. This is part of the draw of plea bargaining in the first place.[102] As a means of avoiding trials, which are expensive, plea bargaining helps prosecutors to get more bang for their buck; they get more criminals in jail and spend less money on trials. When a case absolutely must go to trial, a prosecutor is able to allocate more resources to the trial than would be the case in the absence of plea bargaining. That is to say, for every case that does not go to trial, there is more money to spend on the ones that do.

This concern about the bottom line is why the enforcement costs of the *Brady* rule in a plea bargaining setting will encourage prosecutors to comply with the rule. Assuming that prosecutors must disclose at least some portion of their inculpatory evidence in order to induce a plea,[103] that disclosure will create at least the possibility that some of the exculpatory evidence in the possession of the prosecutor will become material.[104] If the *Brady* rule applies, and the prosecutor is obligated to reveal to the defendant any material, exculpatory evidence, there will now be an economic incentive to interpret the rule broadly. That is to say, prosecutors might almost completely preclude the possibility of any post-plea *Brady* litigation if they disclose anything in their possession that might be helpful to the defendant. If they choose not to disclose so broadly, anything that later comes to the attention of the defendant will leave the door open for post-plea litigation.[105] Thus, the very fact that the cost of enforcement is high will promote disclosure in an effort to minimize cost.

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101. *Id.*

102. *Id.* at 447.

103. We have worked under this assumption previously. *See supra* text accompanying note 55.

104. This is the "matching" concept again. *See* Douglass, *supra* note 6, at 494-95.

105. Of course, this argument is weak when one considers an unscrupulous prosecutor who is willing to win at any cost. The cost of post-plea litigation will only arise when the defendant learns that the prosecution has kept to itself some piece of arguably material, exculpatory evidence. If we are dealing with an unethical prosecutor who is confident that a piece of exculpatory evidence can be well buried, the risk of post-plea litigation is small. That is to say, if the defendant never learns of the suppressed evidence, he will never have any grounds upon which to file a post-plea *Brady* lawsuit. So, unethical prosecutors might choose to avoid enforcement costs by being sneakier rather than by interpreting the disclosure obligation broadly.

B. An Alternative Justification: The Judicial Integrity Rationale

Another possible rationale for applying the *Brady* rule to plea bargaining is that it would help protect the integrity of our criminal justice system. Plea bargaining is a process in which the prosecutor almost invariably has the upper hand and in which the defendant is induced to waive constitutional protections. It seems rather Machiavellian, in that context, to allow prosecutors to engage in such insulting tactics as suppression of exculpatory evidence without providing a remedy to adversely affected defendants.

1. In the *Brady* Context

The judicial integrity rationale can be observed at work in the *Brady* opinion itself. After holding that the suppression of material, exculpatory evidence at trial violates due process,[106] Justice Douglass commented that "our system . . . of justice suffers when any accused is treated unfairly."[107] Justice Douglass opined further that a prosecutor who "withholds evidence . . . which, if made available, would tend to exculpate [the defendant] or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice."[108]

What then, might we say about a justice system that is willing to countenance the same behavior by prosecutors in a plea bargaining setting?[109] It seems that courts further tarnish the integrity of the justice system when they are willing to place their stamps of approval on a process already tarnished by a prosecutor who has withheld material, exculpatory evidence from the defense during the negotiation of a guilty plea. Does this behavior not cast the prosecutor in the role of an architect of a plea bargain that does not comport with the standards of justice? If it does, it must follow that courts and our system are also stained when they observe such behavior and leave defendants with no remedy.

2. Elsewhere in Criminal Procedure

Justice Brennan advanced a similar argument in his dissent in *United States v. Leon*.[110] Arguing against a good-faith exception to the exclusionary rule for evidence obtained pursuant to an illegal search, Justice Brennan commented that

> [b]ecause seizures are executed principally to secure evidence, and because such evidence generally has utility in our legal system only in the context of a trial supervised by a judge, it is apparent that the admission of illegally obtained evidence implicates the same constitutional concerns as the initial seizure of that evidence. Indeed, by admitting unlawfully seized evidence, the judiciary becomes

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

107. *Id.*

108. *Id.* at 87-88.

109. At worst, this suggests that we just do not care as much about treating defendants fairly when we do not have to presume that they are innocent.

110. 468 U.S. 897, 928 (1984).

> a part of what is in fact a single governmental action. . . .[111]

The same rationale exists for allowing defendants to withdraw guilty pleas when prosecutors have treated them unfairly during the plea bargaining process. The acceptance of the plea by the court implicates the same fairness concerns as the prosecutor's conduct in suppressing exculpatory evidence during the bargaining process. When judges declare the resultant pleas to be acceptable after the prosecutorial suppression of evidence is brought to their attention, the judges become party to the unfairness that produced those pleas and the system, as a whole, suffers.[112]

CONCLUSION

"If due process forbids a prosecutor to sit silent through trial without disclosing exculpatory information to the defense,"[113] does it not also forbid the prosecutor from doing the very same thing during the plea bargaining process? The answer to this question must be yes. Five federal appellate courts have already answered this question in the affirmative, endorsing the marriage of *Brady* and plea bargaining.[114] The Supreme Court should do so as well.

Brady has concrete benefits in the plea bargaining setting. By obligating prosecutors to disclose material, exculpatory evidence to defendants before they enter guilty pleas, we ensure that at least some of those pleas will be better informed than they otherwise would have been. When defendants have access to more information, they are equipped to make more rational, intelligent decisions as to whether or not to plead guilty or go to trial; thus, we expect *Brady*, in the plea bargaining setting, to effect an overall increase in the accuracy of guilty pleas.

While *Brady* will bring with it some costs—just like any new procedural rule does—the operation of the rule itself will keep those costs to a minimum. Prosecutors will likely complain loudly about the strain on their budgets that will be created by all of the post-plea litigation that will come with the application of the *Brady* rule to plea bargaining. But the very fact that prosecutors can control the availability of causes of action by interpreting the disclosure duty broadly means that they can keep these costs down. And the very means that prosecutors will employ to keep *Brady* enforcement costs to a minimum will insure that the rule will do what it is intended to do. That is to say, when prosecutors, in an effort to minimize the cost of post-plea *Brady* litigation, disclose broadly, they will make sure that defendants get their hands on the information the rule intends for them to have.

Finally, allowing prosecutors to induce guilty pleas from defendants while all the while sitting on what could well be a mountain of exculpatory evidence strikes this writer as fundamentally unfair. When courts leave defendants without a remedy in such

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111. *Id.* at 933 (Brennan, J., dissenting).

112. Justice Brennan went on to argue that "courts . . . cannot be absolved of responsibility for the means by which evidence is obtained." *Id.* at 937 (Brennan, J., dissenting). Nor, in this context, can courts hope to wash their hands clean of the unfairness perpetrated upon defendants by prosecutors when they suppress exculpatory evidence during the plea bargaining process. The stain sticks until the unfairness is vindicated.

113. Douglass, *supra* note 6, at 439.

114. *See supra* note 4.

situations and declare the resultant pleas to be acceptable, they stain themselves and the entire criminal justice system with that unfairness. The marriage of *Brady* and plea bargaining would ensure the integrity of the plea bargaining process by demanding that prosecutors play fair and by providing defendants with a remedy in the event that prosecutors ignore that obligation.