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Plea Bargaining and Prosecutorial Motives

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Plea Bargaining and Prosecutorial Motives

CHARLIE GERSTEIN*

ABSTRACT

This Article argues that the structure of the plea-bargaining system—which the Supreme Court recently recognized “is the criminal justice system”—hinges on something previously unappreciated by scholars and unaddressed in criminal procedure doctrine: prosecutors’ motives. This Article addresses that problem by studying the prosecutor’s disclosure obligations when defendants plead guilty. Courts and commentators have been divided for years over whether Brady v. Maryland applies when defendants plead guilty. But the current split blinds us to more important, and more vexing, aspects of the problem. The fact is, there already is a disclosure obligation, albeit a hidden one. Armed with an understanding of the dormant disclosure obligation, this Article then addresses tricky issues surrounding this problem and, in doing so, exposes the centrality of prosecutorial motives, which existing scholarship has not addressed. A full understanding of the role of prosecutorial motives in the plea-bargaining system solves several existing doctrinal puzzles—chief among them whether defendants can waive their right to disclosure—yields workable definitions of concepts like “impeachment” and “materiality,” and addresses issues that go to the heart of the plea-bargaining system.

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INTRODUCTION

What role do prosecutors’ motives play in constitutional criminal procedure? Scholars have written much about what those motives are.¹ But they are virtually ignored in criminal procedure doctrine.² In this Article, I seek to close that gap by showing how a proper account of prosecutorial motives can solve a difficult problem in criminal procedure: prosecutors’ disclosure obligations when a defendant pleads guilty. I develop such an account by beginning with the question: whether prosecutors must disclose material exculpatory evidence prior to the entry of a guilty plea—rather than before a trial. This question has divided courts and commentators for at least twenty-five years.³

I argue that the current split among courts and commentators blinds us to more important, and more vexing, aspects of the problem. The fact is, prosecutors already have a disclosure obligation. In some jurisdictions, courts affirmatively hold that the disclosure obligation exists; in the rest, it is hidden. But once we look at a wider cross-section of criminal procedure doctrine, the disclosure obligation comes into view—and so do more pressing questions. I argue that we should get beyond the dispute over whether *Brady v. Maryland*⁴ applies at the guilty plea stage and turn to the important questions of how to administer the more general disclosure obligation during plea bargaining and whether the right to disclosure can be waived. After uncovering the hidden disclosure obligation, I offer a first cut at answering those important questions. And, I argue that the answers have much to tell us about waiver law and disclosure law in criminal procedure. That discussion leads me to the Article’s main argument: that the legitimacy of the plea-bargaining system hinges heavily—if counterintuitively—on what the prosecutor is probably trying to accomplish by offering a given bargain. By focusing narrowly on the debate over whether *Brady* applies to plea bargaining, scholars have missed the important questions of prosecutorial motives in the process.

This Article begins with the puzzles of current doctrine. Under *Brady*, prosecutors must disclose all material, exculpatory information⁵ known to the

¹ E.g., HENRY R. GLICK, COURTS, POLITICS, AND JUSTICE 234 (3d ed. 1993); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 50–51 (1988).

² See *infra* Part II.D.

³ See *infra*.

⁴ 373 U.S. 83 (1963).

⁵ *Id.* at 87.

prosecutor or another government agent⁶ in time for reasonable use at trial.⁷ But criminal convictions almost always result from guilty pleas.⁸ And, when a defendant pleads guilty, the Supreme Court has held that he waives the right to complain about constitutional violations that predate the plea.⁹ Thus, while the law purports to protect defendants' Due Process right to disclosure, that right is waived by the routine procedures that make up the overwhelming majority¹⁰ of criminal convictions. The Supreme Court last addressed the question of disclosure in plea bargaining in *United States v. Ruiz*,¹¹ in which it held that the prosecution has no obligation to disclose "material impeachment evidence"¹² prior to the entry of a guilty plea. But the Court did not say anything about non-impeachment exculpatory evidence, and lower courts remain divided on the question.

I argue that prosecutors already have to disclose at least some exculpatory information before making a plea bargain with a defendant. I do not mean that they *should* have to disclose this information, or that I think that requiring them to do so would be the appropriate resolution of the current split of authority. Rather, I mean that, as a matter of well-settled constitutional doctrine, prosecutors *do* have to disclose exculpatory information prior to a guilty plea, lest the plea be overturned later on. This obligation arises from the interaction of two settled, but largely overlooked, criminal-procedure rules. The first holds that you can vacate a guilty plea on the ground that you could not be convicted of the crime.¹³ The second holds that you can enter a guilty plea for which neither you nor the prosecution has produced any evidence of a factual basis of guilt.¹⁴ Combined, these two principles prove that you can plead guilty if you know that you cannot be convicted, but you cannot plead guilty if you do not know that you cannot be convicted. This creates a right to disclosure: to ensure the validity of a guilty plea for a defendant who could not otherwise be convicted, the prosecution must disclose the information proving that fact to the defendant. The

⁶ *Kyles v. Whitley*, 514 U.S. 419, 421–22 (1995) (police); *Pennsylvania v. Ritchie*, 480 U.S. 39, 43 (1987) (children and family services).

⁷ *E.g.*, *Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001).

⁸ *See* U.S. District Judge John L. Kane, *Plea Bargaining and the Innocent*, The Marshall Project, <https://www.themarshallproject.org/2014/12/26/plea-bargaining-and-the-innocent#.nA70cqUVe> [<https://perma.cc/GZU5-Q658>] ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the results of guilty pleas").

⁹ *E.g.*, *Tollet v. Henderson*, 411 U.S. 258 (1973).

¹⁰ *E.g.*, Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1118–19 (2011).

¹¹ 536 U.S. 622 (2002).

¹² *Id.* at 633.

¹³ *Bousley v. United States*, 523 U.S. 614, 621 (1998).

¹⁴ *E.g.*, *Meyers v. Gillis*, 93 F.3d 1147, 1153 (3d Cir. 1996).

disclosure obligation has been there all along—hiding behind the *Brady* question that the Court declined to answer in *Ruiz*.

In Part I, I discuss how lower courts have dealt with this issue after *Ruiz*. I argue that the split among them inheres only in how they talk about and administer the disclosure obligation—not in whether or not it exists.

In Part II, I consider whether defendants can waive the right to pre-plea disclosure in exchange for a lower sentence. The crucial question in a system dominated by plea bargaining is not whether you have a given right, but what that right is worth to you in the bargaining process. First, I offer a model of the plea-bargaining process that shows why this question is so important. I then conclude that this is one of those rare criminal procedure rights that cannot be waived in exchange for a lower sentence. The reason for this conclusion is surprisingly simple: the prosecution usually cannot point to a good reason why it would want to withhold non-impeachment *Brady* evidence other than to try to convince someone to accept a deal that she would not otherwise accept. The same conclusion does not follow with either impeachment evidence or inculpatory evidence. Relying on the fact that a disclosure obligation already exists, I argue that, given the correct definition of impeachment and materiality, prosecutorial motives explain why the right to non-impeachment exculpatory evidence cannot be waived in exchange for a lower sentence.

This conclusion produces sensible answers to the remaining questions about guilty-plea disclosures: namely, a definition of impeachment and a standard for materiality. I address these issues, respectively, in Parts III and IV. Part I's conclusions also point towards a subtle, but important change in materiality doctrine across many other *Brady* problems—that courts should focus on prosecutors more than defendants when analyzing *Brady* questions.

Finally, I conclude by discussing what this case study says about the meaning of a plea of “guilty.” Some jurists and commentators consistently say that a plea of guilty must mean that the defendant is, in fact, guilty.¹⁵ Under this interpretation, evidence tending to contradict the defendant's guilt is necessarily sidelined, and a claim that a defendant's guilty plea was unfair because he was not advised of material exculpatory evidence must be wrong. But other jurists and commentators recognize that pleas of guilty often result from bargains made to avoid the risk of a conviction, even if that conviction would be wrongful.¹⁶ By arguing that prosecutors already must disclose exculpatory evidence to defendants pleading guilty, this Article reveals that a

¹⁵ See *Poventud v. City of New York*, 750 F.3d 121, 165 (2d Cir. 2014) (en banc) (Livingston, J., dissenting) (“A ‘counseled plea of guilty is an admission of factual guilt so reliable . . . that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case.” (quoting *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975)).

¹⁶ *Id.* at 142–43 (Lynch, J., concurring).

guilty plea is not a definitive waiver of a defendant's right to argue his innocence.

This Article's broader goal is to elucidate a deeper connection between the disclosure question and other recurring problems in criminal procedure doctrine. And, in doing so, the article seeks a modest, but crucial reorientation of criminal-procedure scholarship, expanding the spotlight to include prosecutors alongside defense counsel in the analysis of plea bargaining questions.

I. THE DORMANT DISCLOSURE OBLIGATION

Courts and commentators keep asking if *Brady* applies when defendants plead guilty.¹⁷ Most courts say it does.¹⁸ Plenty say it doesn't.¹⁹ New

¹⁷ E.g. *Farr v. State*, 124 So. 3d 766, 779 n.17 (Fla. 2012).

¹⁸ *United States v. Ohiri*, 133 F. App'x 555, 562 (10th Cir. 2005); *McCann v. Mangialardi*, 337 F.3d 782, 788 (7th Cir. 2003) (“*Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence. Given this distinction, it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea.”); *United States v. Brown*, 250 F.3d 811, 816 n.1 (3rd Cir. 2001) (assuming in dicta, but not holding, “that *Brady* may require the government to turn over exculpatory information prior to entry of a guilty plea”); *United States v. Persico*, 164 F.3d 796, 804 (2d Cir. 1999); *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998); *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995); *Tate v. Wood*, 963 F.2d 20, 24 (2d Cir. 1992); *Miller v. Angliker*, 848 F.2d 1312, 1320 (2d Cir. 1988); *United States v. Nelson*, 979 F. Supp. 2d 123, 130 (D.D.C. 2013), *reconsideration denied*, 59 F. Supp. 3d 15 (D.D.C. 2014), *and appeal dismissed*, No. 13-3108, 2014 WL 3013970 (D.C. Cir. June 17, 2014); *United States v. Danzi*, 726 F. Supp. 2d 120, 126 (D. Conn. 2010); *Hill v. West*, 599 F. Supp. 2d 371, 379 (W.D.N.Y. 2009); *State v. Huebler*, 275 P.3d 91, 93 (Nev. 2012); *Hyman v. State*, 723 S.E.2d 375, 380 (S.C. 2012); *In re Miranda*, 182 P.3d 513 (Cal. 2008); *State v. Harris*, 680 N.W.2d 737, 750 n.15 (Wis. 2004) (“The State asks us to go one step further and overrule the court of appeals' decision in *State v. Sturgeon*, 605 N.W.2d 589 (Wis. Ct. App. 1999) [holding that there is a *Brady* right at a guilty plea]. We decline to do so.”) *Wallar v. State*, 403 S.W.3d 698, 707 (Mo. Ct. App. 2013).

¹⁹ *Friedman v. Rehal*, 618 F.3d 142, 154 (2d Cir. 2010) (choosing in dicta not to address the issue); *United States v. Conroy*, 567 F.3d 174, 179 (5th Cir. 2009); *United States v. Moussaoui*, 382 F.3d 453, 472 (4th Cir. 2004); *Matthew v. Johnson*, 201 F.3d 353, 361–62 (5th Cir. 2000); *White v. United States*, 858 F.2d 416, 421–22 (8th Cir. 1988); *Campbell v. Marshall*, 769 F.2d 314, 319 (6th Cir. 1985); *Cook v. Romanowski*, No. 2:12–10383, 2014 WL 859846, at *4 (E.D. Mich. Mar. 5, 2014) (right not “clearly established”); *United States v. McLean*, 419 F. App'x 473, 475 (5th Cir. 2011) (per curiam).

York's appellate court says both.²⁰ Almost all commentators think *Brady* applies.²¹ One thinks that it does not, but that prosecutors' non-constitutional obligations ought to require them to disclose exculpatory evidence.²² And, one commentator is against requiring prosecutors to disclose exculpatory evidence.²³ In this Section I hope to show that this debate overlooks an important feature of this problem: prosecutors already have to disclose some exculpatory information during plea bargaining.

The law is clear that if certain information comes to light after the entry of a guilty plea, the defendant can vacate the plea. But the law is also clear that—as a constitutional matter²⁴—defendants can strike deals with the

²⁰ Compare *People v. Philips*, 817 N.Y.S.2d 373, 373 (N.Y. App. Div. 2d Dep't 2006) (pleading guilty waives the right to *Brady* disclosures), with *People v. Delarosa*, 851 N.Y.S.2d 775, 776 (N.Y. App. Div. 4th Dep't 2008) (guilty plea doesn't waive the right to *Brady* disclosures); *People v. Martin*, 669 N.Y.S.2d 268, 271 (N.Y. App. Div. 1st Dep't 1998) (higher materiality standard); *People v. Ortiz*, 515 N.Y.S.2d 317, 319 (N.Y. App. Div. 3d Dep't 1987); see also *People v. Armer*, 501 N.Y.S.2d 203, 205 (N.Y. App. Div. 3d Dep't 1986) (plea upheld where defendant failed to prove a reasonable probability that he would not have pleaded guilty had the *Brady* material been furnished); *People v. Benard*, 620 N.Y.S.2d 242 (Sup. Ct. N.Y. Cnty. 1994).

²¹ Corinna Barret Lain, *Accuracy Where It Matters: Brady v. Maryland in the Plea Bargaining Context*, 80 WASH. U. L.Q. 1, 5 (2002); Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 484 (2009) (arguing for a “prophylactic rule” to supersede *Brady*'s materiality requirement); R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 67 VAND. L. REV. 1427, 1476 (2011); Russell D. Covey, *Plea-Bargaining Law After Lafler and Frye*, 51 DUQ. L. REV. 595, 609, 610 (2013); Kevin C. McMunigal, *Guilty Pleas, Brady Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. REV. 651, 652 (2007) [hereinafter McMunigal, *Wrongful Convictions*]; Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 569 (2006); Gerard Fowke, Note, *Material to Whom?: Implementing Brady's Duty to Disclose at Trial and During Plea Bargaining*, 50 AM. CRIM. L. REV. 575, 590 (2013); Michael Nasser Petegorsky, Note, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3650 (2013); Note, *The Prosecutor's Duty to Disclose to Defendants Pleading Guilty*, 99 HARV. L. REV. 1004, 1004 (1986); see also Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV. 952, 994 (2012).

²² Erica Hashimoto, *Toward Ethical Plea Bargaining*, 30 CARDOZO L. REV. 949, 949 (2008).

²³ John G. Douglass, *Can Prosecutors Bluff? Brady v. Maryland and Plea Bargaining*, 57 CASE W. RES. L. REV. 581 (2007) [hereinafter Douglass, *Can Prosecutors Bluff?*]; John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437 (2001) [hereinafter Douglass, *Fatal Attraction?*].

²⁴ Plenty of non-constitutional rules require a factual basis for guilt prior to the entry of a guilty plea. *E.g.*, FED. R. CRIM. P. 11(a).

prosecution to plead guilty to crimes that everyone knows they did not commit. This is often done to tailor the charges so that the court can impose a sentence that both the defense and the prosecution would agree to, but that the court could not impose if the crimes actually committed were charged and proven.

This Section proceeds in four parts. First, I explain that many of the courts that don't apply *Brady* when a defendant pleads guilty still recognize a disclosure obligation under a different name. Next, I hope to show that this is, in fact, consistent with long-settled constitutional doctrine. The doctrinal argument goes as follows. First, you can't plead guilty to a crime you couldn't be convicted of if you don't know you couldn't be convicted of it.²⁵ Second, you *can* plead guilty to a crime you couldn't be convicted of if you *do* know you couldn't be convicted of it. Therefore, if the prosecution discloses all its material exculpatory information prior to your guilty plea, that plea might be immune from attack;²⁶ but if the prosecution doesn't, your plea is vulnerable to constitutional challenge. The prosecution must disclose at least some material exculpatory information prior to a guilty plea. The fighting questions will be whether you can waive the right to this disclosure, what impeachment and materiality mean in this context, and how this works with existing doctrine.

A. *The Dormant Disclosure Obligation in Practice*

Courts are split on whether *Brady* applies to a guilty plea. In this Section, I hope to convince you that many courts that have held that *Brady* does not apply to guilty pleas impose disclosure obligations in practice. The purpose of this exercise is to show that, whatever courts and commentators say elsewhere, there is, in fact, at least some disclosure obligation.

States and federal circuits can be divided as follows. First, there are the courts that recognize a *Brady* obligation and call it one.²⁷ Before *Ruiz*, which

²⁵ What I mean here is crimes that you don't know you could not be convicted of. I don't mean to be referring to the problem of defendants pleading guilty to crimes that they truly do not know they did not commit by virtue of their intoxication at the time or loss of memory. See McMunigal, *Wrongful Convictions*, *supra* note 21. I mean crimes that defendants cannot be convicted of, regardless of their private knowledge of their guilt or innocence. I am going to use the two formulations interchangeably until a need to distinguish them arises. The need will arise later.

²⁶ I say "might be" here because, of course, there could be exculpatory evidence that neither the prosecutor nor the defendant knows about. Disclosure, then, is a necessary—but not a sufficient—condition to a valid guilty plea. For our purposes, though, this does not matter. If the prosecutor does not disclose this information, the plea will be overturned if the information comes out.

²⁷ *United States v. Ohiri*, 133 F. App'x 555, 560 (10th Cir. 2005); *McCann v. Mangialardi*, 337 F.3d 782, 787 (7th Cir. 2003); *United States v. Brown*, 250 F.3d 811, 816 n.1 (3rd. Cir. 2001); *United States v. Persico*, 164 F.3d 796, 804–05 (2d

held that prosecutors do not have to turn over impeachment evidence when a defendant pleads guilty, these courts took one of two doctrinal routes to the conclusion that *Brady* applies. The first camp concluded that a *Brady* violation renders a guilty plea unintelligent.²⁸ The second camp concluded that a *Brady* claim (like an ineffective-assistance-of-counsel claim) was not waived by the entry of a guilty plea where the *Brady* violation itself contributed to the plea, and that the claim accordingly survived intact.²⁹ The third camp held that *Brady* did not apply to a guilty plea.³⁰

After *Ruiz*, those courts that had declined to apply *Brady* to a guilty plea in the first place simply reasoned that *Ruiz* had not altered that conclusion.³¹ Those that did apply *Brady* in the first place read *Ruiz* closely—why would the Court restrict its holding to impeachment evidence, they reason, if not to suggest a contradistinction with *other* exculpatory evidence?³²

But three of the courts that have held that *Brady* does not apply to guilty pleas end up finding disclosure obligations that look a lot like *Brady*.

Cir. 1999); *United States v. Avellino*, 136 F.3d 249, 254–55 (2d Cir. 1998); *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995); *Tate v. Wood*, 963 F.2d 20, 24 (2d Cir. 1992); *Miller v. Angliker*, 848 F.2d 1312, 1321 (2d Cir. 1988); *United States v. Nelson*, 979 F. Supp. 2d 123, 126 (D.D.C. 2013), *reconsideration denied*, 59 F. Supp. 3d 15 (D.D.C. 2014), *and appeal dismissed*, No. 13-3108, 2014 WL 3013970 (D.C. Cir. June 17, 2014); *United States v. Danzi*, 726 F. Supp. 2d 120, 123–24 (D. Conn. 2010); *Hill v. West*, 599 F. Supp. 2d 371, 379 (W.D.N.Y. 2009); *State v. Huebler*, 275 P.3d 91, 93 (Nev. 2012); *Hyman v. State*, 723 S.E.2d 375, 380 (S.C. 2012); *In re Miranda*, 182 P.3d 513, 545 (Cal. 2008); *State v. Harris*, 680 N.W.2d 737, 750 n.15 (Wis. 2004) (“The State asks us to go one step further and overrule the court of appeals’ decision in *State v. Sturgeon*, 605 N.W.2d 589 (Wis. Ct. App. 1999) [holding that there is a *Brady* right at a guilty plea]. We decline to do so.”) *Waller v. State*, 403 S.W.3d 698, 707 (Mo. Ct. App. 2013).

²⁸ See *Sanchez*, 50 F.3d at 1453 (“A waiver cannot be deemed ‘intelligent and voluntary’ if ‘entered without knowledge of material information withheld by the prosecution.’”) ([mis]quoting *Miller*, 848 F.2d at 1320). Professor Douglass notes that this quote was actually taken out of context. Douglass, *Fatal Attraction?*, *supra* note 23, at 517 n.118.

²⁹ Douglass, *Fatal Attraction?*, *supra* note 23, at 517.

³⁰ *E.g.*, *supra* note 19.

³¹ *Friedman v. Rehal*, 618 F.3d 142, 154 (2d Cir. 2010); *United States v. Conroy*, 567 F.3d 174, 179 (5th Cir. 2009); *United States v. Moussaoui*, 382 F.3d 453, 472 (4th Cir. 2004).

³² *E.g.*, *McCann*, 337 F.3d at 788 (“*Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence.”); *Nelson*, 979 F.2d at 128 (“The Supreme Court held that ‘the Constitution does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant.’ But the Court found that providing information establishing the defendant’s factual innocence helped allay concerns about the absence of merely impeachment information.” (quoting *Ruiz*, 536 U.S. at 633)).

Consider the First Circuit, the Fourth Circuit, and the Supreme Judicial Court of Massachusetts. In the First Circuit's case, the same judge (Judge Selya) wrote both the opinion establishing that *Brady* does not apply to guilty pleas and the opinion establishing that prosecutors have to turn over at least some material exculpatory information.³³ Even courts that do not recognize a *Brady* obligation find themselves doing things an awful lot like *Brady* with a higher materiality standard. Their attempts to claim otherwise are difficult to square with their other reasoning.

In *United States v. Fisher*,³⁴ the Fourth Circuit, which has squarely held that *Brady* does not apply to a guilty plea,³⁵ was asked to set aside a defendant's guilty plea where the defendant was unaware of false statements in an application for a search warrant that ultimately lead to the evidence convincing him to plead guilty.³⁶ The false statements were made by a cop who later pleaded guilty to criminal fraud and who admitted specifically to lying about *Fisher*.³⁷

The court claimed that the case was not about non-disclosure. Instead, it wrote, "this case centers not on a *Brady v. Maryland* failure to disclose but rather on something categorically different: affirmative misrepresentations."³⁸ But, at some point, withholding information makes what you *do* say misleading. The difference is one of degree, not of kind. It is uncontroversially misleading to say, "one witness says you committed the crime" and fail to disclose that every other witness says otherwise. And, despite claiming not to address the *Brady* problem, the Fourth Circuit cites *Sanchez v. United States*,³⁹ the leading case at the time establishing a *Brady* obligation attendant to a guilty plea.⁴⁰ "If a defendant cannot challenge the validity of a plea based on subsequently discovered police misconduct," the *Fisher* court writes, "officers may be more likely to engage in such conduct, as well as more likely to conceal it to help elicit guilty pleas."⁴¹ The case was about non-disclosure.

³³ *United States v. Mathur*, 624 F.3d 498, 507 (1st Cir. 2010); *Ferrara v. United States*, 456 F.3d 278, 291 (1st Cir. 2006).

³⁴ 711 F.3d 460 (2013).

³⁵ *United States v. Moussaoui*, 591 F.3d 263, 285 (4th Cir. 2010), *as amended* (Feb. 9, 2010) ("The *Brady* right, however, is a *trial* right When a defendant pleads guilty, those concerns are almost completely eliminated because his guilt is admitted." (citing *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975))).

³⁶ *Fisher*, 711 F.3d at 460.

³⁷ *Id.* at 463.

³⁸ *Id.* at 465 n.2.

³⁹ 50 F.3d 1448.

⁴⁰ *Id.* at 1453.

⁴¹ *Fisher*, 711 F.3d at 469 (quoting *Sanchez*, 50 F.3d at 1453 (stating that "if a defendant may not raise a *Brady* [*v. Maryland*] claim after a guilty plea, prosecutors may be tempted to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas"))).

The *Fisher* court then attempts to distinguish the non-disclosure cases (chiefly *United States v. Moussaoui*⁴²) by arguing that here the non-disclosure goes to the “heart” of the prosecution’s case.

This case presents highly uncommon circumstances in which gross police misconduct goes to the heart of the prosecution’s case. Lunsford [the lying cop] falsely testified in his sworn search warrant affidavit that he targeted Defendant after a reliable confidential informant told him that Defendant distributed narcotics from his residence and vehicle and had a handgun in his residence. Lunsford identified the confidential informant in his affidavit, and he averred that the informant identified Defendant in a photograph and provided Lunsford with Defendant’s physical description, address, and vehicle information. On the basis of that affidavit, Lunsford secured a search warrant. That warrant enabled the search of Defendant’s home, *where evidence forming the basis of the charge to which he pled guilty was found*. After Defendant was charged, the prosecution provided Lunsford’s affidavit to Defendant, who relied on it in deciding whether to plead guilty.⁴³

In the quoted passage, the court simultaneously claims that the evidence forming the basis of the charge stemmed from the search of the house, not the false warrant application, *and* that the false warrant application was the “heart” of the prosecution’s case. All the while, the court ignored a Supreme Court case that would destroy this distinction, and failed to address the inquiry that ought to govern its resolution.⁴⁴ In *Haring v. Prosise*,⁴⁵ relying on *Tollet v. Henderson*,⁴⁶ the Supreme Court held that a guilty plea renders irrelevant all Fourth Amendment violations committed prior to its entry. “[W]hen a defendant is convicted pursuant to his guilty plea rather than a trial, the validity of that conviction cannot be affected by an alleged Fourth Amendment violation”⁴⁷

Fisher did not argue that the evidence found in his house was false; he argued that the warrant was invalid.⁴⁸ His was properly a Fourth

⁴² 591 F.3d 263.

⁴³ *Fisher*, 711 F.3d at 466 (emphasis added).

⁴⁴ See *Haring v. Prosise*, 462 U.S. 306, 321 (1983).

⁴⁵ *Id.*

⁴⁶ 411 U.S. 258 (1973) (holding that defendant cannot raise claim of unconstitutional discrimination in jury selection after pleading guilty even though it was impossible for him to have discovered it earlier).

⁴⁷ *Prosise*, 462 U.S. at 321.

⁴⁸ *Fisher*, 711 F.3d at 467.

Amendment claim,⁴⁹ which was waived when he pleaded guilty. And, even if he relied on the bogus affidavit in deciding to plead guilty, as the court obliquely claims, no one asked whether he would have pleaded guilty anyway given the evidence found in his house (seeing as he waived his right to suppress it). And, although the precise rate of police perjury is unknown, and probably unknowable, it is hardly “uncommon” for the police to lie in search-warrant applications.⁵⁰

The Fourth Circuit’s reasoning fails. So what’s the court up to? I think they’re finding a disclosure obligation in the face of governing precedent that says *Brady* does not apply to a guilty plea.

The First Circuit, in *Ferrara v. United States*,⁵¹ found that the government violates a defendant’s rights whenever the government’s non-disclosure rises to the level of “extreme misconduct.”⁵² The facts are complicated, but, basically, the government failed to disclose that a murder witness had recanted his story and that the government then manipulated that witness into confirming the prosecution’s version of the story.⁵³ The court held this sufficient to satisfy the “misconduct” prong of the voluntariness requirement for a plea, which prong allows a defendant to overturn a guilty plea that was procured by, essentially, outrageous government conduct.⁵⁴ “These egregious circumstances,” the court writes, “make this one of those rare instances in which the government’s failure to turn over evidence constitutes sufficiently parlous behavior to satisfy the misconduct prong of the involuntariness test.”⁵⁵

On what axis is the court measuring egregiousness? The court writes that the lying prosecutor, Jeffrey Auerhahn,⁵⁶ not only failed to turn over the

⁴⁹ See *Franks v. Delaware*, 438 U.S. 154, 156 (1978).

⁵⁰ E.g., COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP’T, CITY OF NEW YORK, COMMISSION REPORT 36 (Milton Mollen, Chair 1994) (finding that police perjury was “so common in certain precincts that it has spawned its own word: ‘testilying.’”); see also Myron W. Orfield, Jr., *Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts*, 63 U. COLO. L. REV. 75, 82 (1992) (finding “a pattern of pervasive police perjury”); I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835, 837 (2008); Julia Simon-Kerr, *Systemic Lying*, 56 WM. & MARY L. REV. 2175, 2202 (2015); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1042 (1996).

⁵¹ 456 F.3d 278 (1st Cir. 2006).

⁵² *Id.* at 291.

⁵³ *Id.* at 282.

⁵⁴ *Id.* at 297–98.

⁵⁵ *Id.* at 291.

⁵⁶ Auerhahn was initially sanctioned for his conduct in this case but eventually had those sanctions lifted by a three-judge panel of the District of Massachusetts. See David Boeri, *Federal Prosecutor Cleared of Charges to Surprise of Some*,

exculpatory evidence—in this case, the witness’s recantation—but also said that the witness would confirm his version of the story.⁵⁷ On this account, egregiousness is measured by how actively the prosecutor involves himself in concealing the exculpatory truth. But if this is “misconduct,” would it not be misconduct merely to fail to disclose the witness’s recantation? Maybe—and maybe that’s what the court means here. But I don’t see why that would be different from failing to disclose that the would-be witness is a habitual perjurer. Both pieces of concealed information make the witness’s story less likely and, without those pieces of information, could plausibly make the rest of the tale misleading.

It seems, then, that egregiousness in the First Circuit’s analysis is at least partially a proxy for materiality: where the information withheld is highly material, the prosecutor’s failure to disclose it is egregious. This is *Brady* with a very high materiality standard. But Judge Selya, who wrote the opinion in *Ferrara*, also wrote the following passage:

The *Ruiz* Court evinced a reluctance to extend a *Brady*-like right to the realm of pretrial plea negotiations *Ruiz* teaches that *Brady* does not protect against the possible prejudice that may ensue from the loss of an opportunity to plea-bargain with complete knowledge of all relevant facts. This makes good sense: when a defendant chooses to admit his guilt, *Brady* concerns subside.⁵⁸

Judge Selya, then, despite concluding that *Brady* does not apply to cases in which the defendant pleads guilty, finds himself imposing a similar obligation on the prosecution.⁵⁹

Lastly, the Supreme Judicial Court of Massachusetts recently followed *Ferrara* and overturned a defendant’s guilty plea made in reliance on a lab report produced by a charlatan, Annie Dookhan, who has since been indicted for fabricating lab results and her own qualifications.⁶⁰ (The First Circuit

WBUR NEWS, Sept. 16, 2011, <http://www.wbur.org/2011/09/16/jeffrey-auerhahn-cleared> [<https://perma.cc/A3JN-NJNQ>] (“[A]cross Boston, some attorneys found the panel’s ruling absolutely stunning. The three judges had chosen to ignore the factual findings [that the district court] had made about Auerhahn in 2003. The judges did so even while recognizing that [the district judge] had observed the key witnesses firsthand and made thorough findings at the hearings.”).

⁵⁷ *Ferrara*, 456 F.3d at 291.

⁵⁸ *United States v. Mathur*, 624 F.3d 498, 507 (1st Cir. 2010) (citing *United States v. Moussaoui*, 382 F.3d 453, 285 (4th Cir. 2004); see also *Matthew v. Johnson*, 201 F.3d 353, 361 (5th Cir. 2000) (“The *Brady* rule’s focus on protecting the integrity of trials suggests that where no trial is to occur, there may be no constitutional violation.”)).

⁵⁹ *Ferrara*, 456 F.3d at 291–92.

⁶⁰ *Commonwealth v. Scott*, 5 N.E.3d 530, 535, 548 (Mass. 2014).

recently considered a *Brady* claim resulting from her malfeasance.⁶¹) The Massachusetts court held that where a defendant can prove that egregious government misconduct had a “material influence”⁶² on his decision to plead guilty, the defendant’s plea can be overturned. The court claimed that although *Ferrara* was indeed about non-disclosure its framework is not so limited:

Although the particular form of misconduct in *Ferrara* was the prosecutor’s withholding of exculpatory evidence, the court in *Ferrara* did not limit its framework to cases of egregious prosecutorial nondisclosure. Rather, it set forth a general framework for determining whether government misconduct of any sort could have been sufficiently egregious to render the defendant’s guilty plea involuntary. Indeed even if the prosecutor in [this] case had a duty to disclose evidence of Dookhan’s wrongdoing as a result of the Commonwealth’s constructive knowledge of her actions, the failure to disclose this information is in no way as egregious as the prosecutor’s conduct in *Ferrara*, nor is it as egregious as the misconduct of Dookhan herself. Therefore, we apply the *Ferrara* analysis here in light of Dookhan’s own misconduct, not the conduct of any other government agent.⁶³

Basing the defendant’s relief on the misconduct of the lab technician is unusual. The court claims it stems from the *Ferrara* analysis, but it’s hard to see how. The court has absolved the prosecution of any wrongdoing—how were they supposed to know about the charlatan at the lab?—but, nonetheless, provides relief. If egregious misconduct by any government official is sufficient to overturn a guilty plea,⁶⁴ what is left of the rule in *Tollet v. Henderson*, which holds that a defendant waives his Fourth Amendment rights when he pleads guilty? The court is claiming that Dookhan herself was the source of the constitutional violation.⁶⁵ But if that’s the case, and the prosecutor’s conduct has nothing to do with the violation,

⁶¹ *Wilkins v. United States*, 754 F.3d 24, 30 (1st Cir. 2014).

⁶² *Scott*, 5 N.E.3d at 546.

⁶³ *Id.* at 541 n.6 (quoting *United States v. Wilkins*, 943 F. Supp. 2d 248, 257, *certificate of appealability granted*, 948 F. Supp. 2d 87 (D. Mass. 2013) (“It takes no leap of imagination to recognize that the government’s ‘suppression’ of impeachment evidence concerning Dookhan, [the scope of which it could not have been aware of at the time of the pleas,] falls miles short of . . . sufficiently egregious misconduct . . . that figured in *Ferrara*”)).

⁶⁴ *Scott*, 5 N.E.3d at 535.

⁶⁵ *Id.*

why isn't the remedy simply to suppress the chemical test—which sort of claim might be covered by *Tollet*? It seems, again, that this is a bit like *Brady* in disguise, again with a sky-high materiality standard.

The three cases I just discussed show that at least three courts that claim to deny—or not yet recognize—a *Brady* obligation attendant to a guilty plea really do recognize one, albeit with an extra-high materiality standard. The Fifth Circuit, then, is the outlier—it has yet to find a case falling within the scope of *Ferrara* (or another free-standing due process right) and have a square holding that *Brady* does not apply to a guilty plea.⁶⁶ But, as the next three Sections will show, even the Fifth Circuit is, in fact, bound to apply a disclosure obligation.

Before moving on, though, it is worth briefly pointing out that this feature of disclosure law is consistent with *Brady*'s substantive roots. *Brady* is a due-process case and, at a certain level, fundamental notions of fairness lead courts to overturn guilty pleas where the defendant was unaware of very important information. An outright bluff by an agent of the state is essentially intolerable.⁶⁷ Although, in the Sections that follow, I offer some complicated argumentation in the service of a doctrinal justification for this rule, the more basic justification retains significant purchase here. And, as I will briefly note in Part I below, the basic justification would also likely hold at least some of the right to disclosure to be non-waivable.

B. *You Can't Plead Guilty if You Don't Know You're Not Guilty*

In *Bousley v. United States*,⁶⁸ the defendant successfully attacked his guilty plea on the ground that he did not commit the crime to which he

⁶⁶ *Matthew v. Johnson*, 201 F.3d 353, 361 (5th Cir. 2000). (“The *Brady* rule’s focus on protecting the integrity of trials suggests that where no trial is to occur, there may be no constitutional violation.”).

⁶⁷ Cf. Jennifer E. Laurin, *Brady in an Age of Innocence*, 38 N.Y.U. REV. L. & SOC. CHANGE 505, 508 (2014) (“*Brady* itself originally resonated in . . . terms [of basic procedural fairness]. In its brief opinion, the Court said next to nothing about (obvious) harm to the innocent of prosecutorial withholding of favorable evidence; it did, however, extol the virtues of justice-seeking prosecution and elaborated on the imperative of fairly won victories.” (citing *Brady v. Maryland*, 373 U.S. 83, 86–88 (1963)); cf. also *Brady*, 373 U.S. at 87–88 (“Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: The United States wins its point whenever justice is done its citizens in the courts. A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him 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.” (footnote omitted)).

⁶⁸ 523 U.S. 614 (1998).

pleaded guilty.⁶⁹ And when he pleaded guilty, he did not know—and could not have known—that he could not be convicted of the crime.⁷⁰ This case establishes that you can't plead guilty to a crime for which you could not be convicted, if you do not know that you could not be convicted.⁷¹

Bousley is a weird case. Mr. Bousley pleaded guilty to “using” a gun in a drug crime in violation of the now-notorious 18 U.S.C. § 924(c)(1),⁷² in a circuit (the Eighth) that, at the time, interpreted the statute to require only possession of the gun at the scene.⁷³ Bousley sought habeas relief.⁷⁴ The district court denied the writ and Bousley appealed.⁷⁵ While his appeal was pending, the Supreme Court, in *Bailey v. United States*,⁷⁶ held that the statute to which Bousley pleaded guilty required “active employment of the firearm.”⁷⁷ Bousley’s guilty-plea colloquy had established only that he possessed the gun at the scene of the drug crime.⁷⁸ There was no evidence that he actively employed it.⁷⁹

Justice Rehnquist, for the Court, held that Bousley could collaterally attack his guilty plea on the ground that it was not voluntary and intelligent if he could show, by a preponderance of the evidence, that no reasonable juror would have convicted him of the charged offense, nor of any higher offense from which he may have bargained down.⁸⁰ *Bousley* established that actual innocence can overturn a guilty plea where the defendant was not aware that he was innocent.⁸¹

⁶⁹ *Id.* at 624.

⁷⁰ *Id.* at 616.

⁷¹ *Id.* at 616, 624.

⁷² The statute has generated bizarre litigation on the meaning of “us[e].” Compare *Smith v. United States*, 508 U.S. 223 (1993) (trading a gun for drugs counts), with *Watson v. United States*, 552 U.S. 74 (2007) (trading drugs for a gun does not).

⁷³ *Bousley*, 523 U.S. at 614.

⁷⁴ *Id.* at 617.

⁷⁵ *Id.*

⁷⁶ 516 U.S. 137, 144 (1995).

⁷⁷ *Id.*

⁷⁸ *Bousley*, 523 U.S. at 614.

⁷⁹ *Id.* at 617.

⁸⁰ *Id.* at 624 (“It is important to note in this regard that ‘actual innocence’ means factual innocence, not mere legal insufficiency. In other words, the Government is not limited to the existing record to rebut any showing that petitioner might make. Rather, on remand, the Government should be permitted to present any admissible evidence of petitioner’s guilt even if that evidence was not presented during petitioner’s plea colloquy and would not normally have been offered before our decision in *Bailey*. In cases where the Government has forgone more serious charges in the course of plea bargaining, petitioner’s showing of actual innocence must also extend to those charges.”) (quoting *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992) (footnote omitted)).

⁸¹ *Id.* at 623.

Maybe I'm over reading *Bousley*, you might think. Isn't this just a case about retroactivity? On a certain jurisprudential view, the law simply changed between Bousley's conviction and his Supreme Court case. Maybe this change was the operative fact in *Bousley*. If this is true, actual innocence alone is not enough; one must show some additional reason (like an interim change in the law) that caused the erroneous guilty plea. And, the major premise of my argument—that you can't plead guilty to a crime you can't be convicted of if you don't know you can't be convicted of it—fails for lack of generality. Sure, you can plead guilty to most crimes you don't know you can't be convicted of (and stay in jail after we find out about it), just not when the cause was an interim change in Supreme Court law, or something like it.

A couple points are sufficient to dismiss this objection. First, consider Justice Stevens, concurring in *Bousley*. He treats the Court's holding on the meaning of the statute as a timeless judicial proclamation. "A judicial construction of a statute," he writes, "is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."⁸² The rest of the Court appears to agree with this contention. The Court does not view cases like *Bailey* as *changes* in the law—rather, they are statements of what the law always was.⁸³

Similarly, other Supreme Court cases confirm that doctrinal changes between trial and appeal are neither necessary nor sufficient to invalidate convictions based on earlier rules of law. For example, compare *Bousley* with *Lockhart v. Fretwell*.⁸⁴ In *Fretwell*, the Court said that a defendant is not prejudiced for ineffective-assistance-of-counsel purposes if his lawyer fails to raise a defense that would have been successful at the time of the trial but has since been invalidated by a circuit court.⁸⁵ Mr. Fretwell was sentenced to death because his trial lawyer, Bill Vehick,⁸⁶ failed to raise a double-counting defense, which forbade the use of an element of the crime to aggravate the offense for capital-sentencing purposes.⁸⁷ The no-double-counting rule, under Eighth Circuit law at the time of trial, would have spared Fretwell the death penalty.⁸⁸ But the Eighth Circuit invalidated the

⁸² *Id.* at 626 (Stevens, J., concurring) (quoting *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13 (1994)).

⁸³ No need to get into the jurisprudential implications of all of this. Whatever one's take on the meaning of the word "law" in the text above, the Court's view is that this is not a case about only retroactivity, and that's all we need for the moment.

⁸⁴ 506 U.S. 364 (1993).

⁸⁵ *Id.* at 366.

⁸⁶ While researching another paper, I spoke with Mr. Fretwell's counsel in the Supreme Court, Ricky Reed Medlock of Arkadelphia, Arkansas. Mr. Medlock said he'd remember Vehick's name for the rest of his life. See Telephone Conversation with Ricky Reed Medlock, July 31, 2012 (notes on file with author).

⁸⁷ *Id.*

⁸⁸ *Fretwell*, 506 U.S. at 379.

rule between Fretwell's trial and his habeas appeal.⁸⁹ The Court held that Fretwell was not entitled to relief.⁹⁰

If *Bousley* were just about retroactivity—if an interim change in the law were necessary or sufficient to get relief—*Fretwell* would be anomalous in the extreme. *Fretwell* is a case where the law clearly did change in the interim, and yet no relief. Rather, I think that *Bousley* stands for the simple proposition that you cannot plead guilty to a crime you can't be convicted of if you do not know you can't be convicted of it. After *Bousley*, then, notwithstanding the persistent dictum that “[a guilty plea] may not be collaterally attacked,”⁹¹ we know that a guilty plea *can* be collaterally attacked on the ground that the defendant couldn't be convicted of the crime to which she pleaded guilty. But this holds true, as I'll show in the next Section, unless the defendant *knew* that she could not be convicted of the crime to which she pleaded guilty.

This is a high standard. Under *Bousley*, a guilty plea is invalid only if the defendant can show, by a preponderance of the evidence, that he did not commit the crime to which he pleaded guilty.⁹² This requires considerably more than the ordinary *Brady* claim does. But that is not the point here. The point here is that the Court has recognized that a defendant's guilty plea is invalid where he did not commit, and was not aware that he did not commit, the crime to which he pleaded guilty. And, as will become very important in the next Section, the defendant did not plead down to the crime from some other crime he *did* commit.

The *Bousley* rule requires only that the defendant know that he could not be convicted; it does not require that anyone in particular tell him so. Prosecutorial disclosure of actual innocence, then, is necessary to a constitutionally sound guilty plea; it is not sufficient. In *Bousley* itself, the prosecutor and the defendant were equally unaware that the defendant could not be convicted.⁹³ Strictly speaking the defendant has a right to know a certain fact, not a right to be told a certain fact. This accords with *Brady* more generally, which, on the prevailing interpretation, requires disclosure as

⁸⁹ *Collins v. Lockhart*, 754 F.2d 258, 268 (8th Cir. 1985).

⁹⁰ *Fretwell*, 506 U.S. at 366.

⁹¹ *Mabry v. Johnson*, 467 U.S. 504, 508 (1985) (citing *Tollett v. Henderson*, 411 U.S. 258, 266–67 (1973); *North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *Parker v. North Carolina*, 397 U.S. 790, 797–98 (1970); *McMann v. Richardson*, 397 U.S. 759, 772 (1970); *Brady v. United States*, 397 U.S. 742, 747–48 (1970); *see also Henderson v. Morgan*, 426 U.S. 637 (1976); *Menna v. New York*, 423 U.S. 61 (1975) (per curiam)).

⁹² *Bousley v. United States*, 523 U.S. 614, 624 (1998).

⁹³ *Id.* at 618, 624.

a prophylactic measure to ensure that the defendant *knows* the evidence in support of his defense.⁹⁴

C. You Can Plead Guilty if You Do Know You're Not Guilty

If everyone involved knows that you did not commit the crime to which you are pleading guilty, there is, as a matter of existing constitutional law, no problem with the court entering your plea and sending you to prison. This is likely a surprising proposition for some readers,⁹⁵ so I'll dwell on it a bit. But courts across the country have been very clear—as long as your plea is voluntary, you can plead guilty to a crime you did not commit.

Courts have consistently held that a factual basis for a guilty plea is not constitutionally required.⁹⁶ Consider Professor LaFave's example.⁹⁷ Imagine a statutory regime in which burglary at night has a mandatory fifteen-year sentence, but burglary during the day—which requires that the burglary *not* be committed at night—has a five-year sentence. As a constitutional matter, a defendant can plead guilty to burglary during the day even as he says the crime was committed at night. New York courts actually take this a step further: they permit defendants to plead guilty to non-existent crimes.⁹⁸ All these courts are entering pleas to crimes that *everyone knows* the defendant did not commit.

⁹⁴ Leslie Gielow Jacobs, *Bush, Obama and Beyond: Observations on the Prospect of Fact Checking Executive Department Threat Claims Before the Use of Force*, 26 CONST. COMMENT. 433, 476 n.186 (2010) (quoting *Kyles v. Whitley*, 514 U.S. 419, 439 (1995) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935))).

⁹⁵ Judge Wilkinson, for example, wrongly universalizes the federal experience and concludes that “[t]he requirement that courts assure themselves that guilty pleas possess a factual basis further undermines the attempt to discredit the plea bargaining system with the specter of innocents pleading guilty.” J. Harvie Wilkinson, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1141 (2014).

⁹⁶ See 5 WAYNE R. LAFAVE ET. AL., CRIMINAL PROCEDURE § 21.4(f) n.242 (4th ed. 2015) (citing *Loftis v. Almager*, 704 F.3d 645 (9th Cir. 2012); *Meyers v. Gillis*, 93 F.3d 1147 (3d Cir. 1996); *United States v. McGlocklin*, 8 F.3d 1037 (6th Cir. 1993); *Stewart v. Peters*, 958 F.2d 1379 (7th Cir. 1992); *Smith v. McCotter*, 786 F.2d 697 (5th Cir. 1986); *Willbright v. Smith*, 745 F.2d 779 (2d Cir. 1984); *People v. Hoffard*, 899 P.2d 896 (Cal. 1995); *Lacy v. People*, 775 P.2d 1 (Colo.1989); *Paulsen v. Manson*, 525 A.2d 1315 (Conn. 1987); *State v. Cooper*, 636 S.E.2d 493 (Ga. 2006); *McDonough v. Weber*, 859 N.W.2d 26 (S.D. 2015); *State ex rel. Farmer v. Trent*, 551 S.E.2d 711 (W. Va. 2001)).

⁹⁷ See LAFAVE ET. AL., *supra* note 96, § 21.4(f) n.242.

⁹⁸ *Id.* § 21.4(f) n.235 (“*People v. Foster*, [19 N.Y.2d 150 (N.Y. 1967)], *Foster* has been applied so as to (i) allow a plea to a technically nonexistent crime, as in *People v. Martinez*, [81 N.Y.2d 810 (N.Y. 1993)] (attempt to commit crime which is committed without intent); and (ii) allow a plea to a lesser crime technically inconsistent with the crime charge[d], as in *People v. Adams*, [57 N.Y.2d 1035 (N.Y. 1982)] (plea to manslaughter in satisfaction of felony-murder count).”).

The key here is that everyone, including the defendant, knows what the deal is, and knows that the defendant did *something* he wasn't supposed to do. *State v. Zhao*⁹⁹ is instructive. There, the Supreme Court of Washington upheld a plea "to amended charges for which there [was] no factual basis, but only [because] the record establishe[d] that the defendant [pleaded] knowingly and voluntarily and that there at least exist[ed] a factual basis for the original charge."¹⁰⁰ This principle extends to pleas to higher charges for which conviction is impossible,¹⁰¹ a plea one would presumably make only to avoid being charged with a still more serious crime. As long as the defendant does so with the knowledge that he's not guilty of the charged crime, and there is at least some reason to believe he committed some other crime—this distinction will be crucial in Part II—he can plead guilty regardless of whether he is or isn't guilty.

Justice Scalia thought that *Bousley* itself invalidated pleas without factual bases. Dissenting in *Bousley*, he wrote:

Under today's holding, a defendant who is the "wheel-man" in a bank robbery in which a person is shot and killed, and who pleads guilty in state court to the offense of voluntary manslaughter in order to avoid trial on felony-murder charges, is entitled to federal habeas review of his contention that his guilty plea was "involuntary" because he was *not advised* that intent to kill was an element of the manslaughter offense, and that he was "actually innocent" of manslaughter because he had no intent to kill.¹⁰²

Were there no distinction between pleas where the defendant knows he didn't commit the crime and pleas where he does, Justice Scalia would have been right. But there is a distinction, and the factual-basis cases have survived *Bousley*.¹⁰³ Scalia's prediction did not come true—at least it hasn't yet. *Bousley* notwithstanding, you can still plead guilty to crimes that you didn't commit.¹⁰⁴

⁹⁹ 137 P.3d 835 (Wash. 2006).

¹⁰⁰ *Id.*

¹⁰¹ *People v. Jackson*, 694 P.2d. 736, 839 (Cal. 1985) (en banc), *overruled on other grounds by People v. Guerrero*, 748 P.2d. 1150 (Cal. 1988).

¹⁰² *Bousley v. United States*, 532 U.S. 614, 634–35 (1998) (Scalia, J., dissenting) (emphasis added). Justice Scalia having been no fan of plea bargaining, see *Lafler v. Cooper*, 132 S. Ct. 1376, 1391 (Scalia, J., dissenting), one wonders why he considered his observation that the Court might be invalidating pleas to crimes that were not committed to be a bad thing. *But see id.*

¹⁰³ See LAFAVE ET. AL., *supra* note 96 (LaFave's treatise continues to quote all these cases as good law and two of them were decided after *Bousley*).

¹⁰⁴ One might be tempted to point to *North Carolina v. Alford*'s statement that a guilty plea may be entered against a defendant who continues to claim he is innocent

Finally, we have examples of courts upholding guilty pleas to crimes that could not be proven only where other crimes likely could be proven—or, at least, where the prosecution and the court do not know anything about the underlying conduct motivating the charges.¹⁰⁵ Presumably, courts would not uphold a plea of guilty to a (serious¹⁰⁶) crime that everyone knows is completely fabricated out of thin air. Maybe this is because such a plea reveals that something fishy is taking place, like “promises that are by their nature improper as having no proper relationship to the prosecutor’s business (e.g. bribes).”¹⁰⁷ I’ll come back to this in Part II. But for now, I’d like to note two facets of this distinction. First, I’d like to situate it on the axis of materiality. Defendants are less likely to plead guilty if they know that they can’t be convicted of *anything* than if they know they can’t be convicted of the crime charged but *can* be convicted of something else. Thus, to fall within the disclosure obligation that already exists as a matter of constitutional doctrine, information must be highly material to the guilty plea decision.

Second, I’d like to turn back to *Bousley*’s requirement that the defendant be actually innocent of other crimes down from which he could have bargained to his conviction.¹⁰⁸ This requirement supports my argument because it limits the defendant’s ability to attack his conviction to the case in which he did not know—and could not have known—that he could not be convicted of the crime with which he was charged. In the case where a defendant bargains down from a crime of which he could be convicted to a crime of which he could not be convicted—like *Zhao*¹⁰⁹—he almost certainly knows that, as a matter of law, he cannot be convicted of the second crime. He is making a deal where everyone knows the facts.

so long as there exists another “factual basis” for the plea. *N. Carolina v. Alford*, 400 U.S. 25, 37 (1970). But *Alford* requires the factual basis only where the defendant refuses to allocute to the elements of the offense and to admit his guilt. *Alford*’s requirement is a safeguard against guilty pleas that are based on improper inducements or the like.

¹⁰⁵ See, e.g., *State v. Zhao*, 137 P.3d 835, 836 (Wash. 2006).

¹⁰⁶ There are abundant examples of courts upholding utterly preposterous guilty pleas to low-level misdemeanors for the purpose of churning defendants through the system as expeditiously as possible. Cf., e.g., Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85 (2007). J.J. Prescott and I have written elsewhere that, because of the dominance of process costs, statutory law in fact has no role whatsoever in the prosecution of very low-level crimes. Charlie Gerstein & J.J. Prescott, *Process Costs and Police Discretion*, 128 HARV. L. REV. F. 268, 273 (2015).

¹⁰⁷ *Brady v. United States*, 397 U.S. 742, 755 (1970).

¹⁰⁸ *Bousley v. United States*, 532 U.S. 614, 624 (1998).

¹⁰⁹ 137 P.3d 835.

D. A Doctrinal Explanation of the Dormant Disclosure Obligation

Bousley says that you can overturn a guilty plea if the court later finds out that you were innocent.¹¹⁰ But the cases above say that you cannot overturn a guilty plea that was made as part of a deal in which everyone knew the charges couldn't be proven.¹¹¹ The difference is disclosure. In *Bousley*, no one knew that the charges couldn't be proven. But in the factual basis cases cited above, everyone knew that the charges couldn't be proven—indeed, sometimes, the charges aren't crimes at all.¹¹²

The obligation to disclose, though, is enforced post-hoc only, and is a necessary,¹¹³ but not a sufficient, condition to a successful guilty plea. If a defendant asked a court to compel disclosure of exculpatory information during plea bargaining, I do not argue that most courts would oblige the defendant. In *Bousley*, after all, even the *government* did not know that *Bousley* could not be convicted. Thus, more precisely stated, the cases in Sections B and C stand for the proposition that the defendant must know that he cannot be convicted, not that the prosecution must tell him. This won't matter for my purposes. If the prosecution knows of evidence establishing actual innocence and does not want the defendant to be able to vacate the plea later, the prosecution must give him the information. The mere fact that the plea might be vulnerable even if they do not know of the information does not, to my mind, change this result.

Perhaps, though, the distinction between the cases in Section B and the cases in Section C hinges not on disclosure—or even on the defendant's knowledge—but on the distinction between “factual” innocence and “legal” innocence (however slippery that distinction may be). On this account, *Bousley* protects only those defendants who really did not do anything and the cases in Section B are just about protecting guilty pleas from pesky post-hoc attacks.

Two points suffice to rebut this contention. First, consider the other informational requirements attendant to a guilty plea. For a guilty plea to be valid, a defendant must be advised of each of the “critical” elements of the

¹¹⁰ *Bousley*, 523 U.S. at 623.

¹¹¹ See, e.g., *Zhao*, 137 P.3d at 836.

¹¹² See *People v. Martinez*, 611 N.E.2d 277, 277 (N.Y. 1993) (“While we will allow a defendant to plead to a nonexistent crime in satisfaction of an indictment charging a crime with a heavier penalty ([*People v. Foster*, 225 N.E.2d 200, 200 (N.Y. 1967)]), and we will allow a conviction based on a lesser crime charged by the court that was in fact not a lesser included offense but nonetheless a valid crime ([*People v. Ford*, 465 N.E.2d 322, 322 (N.Y. 1984)]), these situations differ significantly from a *jury* conviction of a crime not recognized by law.” (emphasis added)).

¹¹³ Assuming, of course, that the prosecutor has information to disclose.

crime to which he is pleading guilty.¹¹⁴ Even where “the prosecutor ha[s] overwhelming evidence of guilt,” she must formally charge the defendant with, and someone¹¹⁵ must thoroughly explain the requirements of, the crime to which the defendant is pleading guilty. The Court is not, as a general proposition, averse to hypertechnical attacks on guilty pleas and, in fact, requires a rather precise set of disclosures even where they likely have no effect on the decision to plead guilty and have nothing whatever to do with the defendant’s factual innocence.¹¹⁶

Second, note that the Court has never explicitly recognized a freestanding constitutional innocence claim. The mere fact that a person *later* discovered to be innocent was convicted is not, in itself, necessarily a violation of the Constitution.¹¹⁷ It is certainly possible, as scholars have contended, that the Court would recognize a freestanding innocence claim if the question were squarely presented and the facts reasonably compelling.¹¹⁸ But, as it stands, the Court has yet to formally recognize such a claim and, thus, *Bousley* is not part of an overarching jurisprudence in which innocence is key to constitutional relief, even if the doctrine eventually goes in that direction. *Bousley*, then, creates, at least in part, a regime requiring disclosure in certain circumstances.

¹¹⁴ *Henderson v. Morgan*, 426 U.S. 637, 647 n.18 (1976).

¹¹⁵ Defense counsel can do this. See *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005).

¹¹⁶ See *Henderson*, 426 U.S. at 644–45 (“Instead of testing the voluntariness of a plea by determining whether a ritualistic litany of the formal legal elements of an offense was read to the defendant, petitioner argues that the court should examine the totality of the circumstances and determine whether the substance of the charge, as opposed to its technical elements, was conveyed to the accused. We do not disagree with the thrust of petitioner’s argument, but we are persuaded that even under the test which he espouses, this judgment finding respondent guilty of second-degree murder was defective. We assume, as petitioner argues, that the prosecutor had overwhelming evidence of guilt available. We also accept petitioner’s characterization of the competence of respondent’s counsel and of the wisdom of their advice to plead guilty to a charge of second-degree murder. Nevertheless, such a plea cannot support a judgment of guilt unless it was voluntary in a constitutional sense. And clearly the plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received ‘real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process.’” (quoting *Smith v. O’Grady*, 312 U.S. 329, 334 (1941) (footnote omitted)).

¹¹⁷ See Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1631 (2008) (“Most prominently, in 1993, in *Herrera v. Collins*, the Court narrowly failed to recognize a constitutional innocence claim in the context of capital cases, emphasizing the dual concerns of finality and reliability.” (citing *Herrera v. Collins*, 506 U.S. 390, 401, 403–04 (1993))).

¹¹⁸ E.g., Robert J. Smith, *Recalibrating Constitutional Innocence Protection*, 87 WASH. L. REV. 139, 174 (2012).

Occasionally, hints of this come out in courts' language. Consider Judge Easterbrook, explaining why courts often take a factual basis colloquy on the record, even though they don't have to: "Putting the basis on the record not only helps the defendant make a wise choice but also prevents subsequent litigation in which the defendant *denies knowing some vital bit of information.*"¹¹⁹ Why would he need to know the factual basis of the plea? Because later on, Judge Easterbrook must assume, he could attack the validity of his plea by claiming that he did not know everything he was supposed to in order to plead guilty. Namely, by claiming that he didn't know he could not be convicted.

Prosecutors, then, must disclose certain exculpatory information to the defense attendant to a plea of guilty: that which establishes the defendant's actual innocence by a preponderance of the evidence. This is a very high bar—considerably north of *Brady's* materiality standard. But there is *some* disclosure obligation on prosecutors attendant to a guilty plea. Courts and commentators have been focusing on whether there is such an obligation,¹²⁰ but those arguments overlook the important existing doctrine described above. That doctrine proves that there is a disclosure obligation, and we know from *Ruiz* that it doesn't cover impeachment information. The interesting questions, then, concern the scope of the obligation: Can the defendant trade it for a lower sentence? What's impeachment? And, what is the materiality standard? The next three Parts will consider these questions in turn.

II. WAIVING DISCLOSURE

Defendants can, in general, exchange their criminal-procedure rights for a lower sentence. The problem here is a species of unconstitutional conditions:¹²¹ the government can outright deny you a plea bargain; it can offer you a lower sentence *ex gratia*; and it can condition a lower sentence on, say, your waiver of the rights to trial, confrontation, and freedom from self-incrimination; but can it condition that lower sentence on your agreement to waive your right to exculpatory information?

¹¹⁹ *Higgason v. Clark*, 984 F.2d 203, 207–08 (7th Cir. 1993) (emphasis added).

¹²⁰ See *supra* notes 18–23.

¹²¹ There is a mountain of literature on the subject. For my personal favorite, see Mitchell Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 2 n.1 (2001) (citing Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1421 (1989); Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1921, n.36 (1995) (citing many others); David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government Funded Speech*, 67 N.Y.U. L. REV. 675, 679–80 (1992); Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 859, 860 (1995)).

Only one commentator, Daniel Blank, has addressed this question.¹²² Writing before *Ruiz*, Blank aimed to resolve a standoff that had developed in the Northern District of California, where he was an assistant Federal Public Defender at the time.¹²³ In 1995, the Ninth Circuit held that *Brady* applies to a guilty plea.¹²⁴ In response, the United States Attorney's Office for the Northern District started to request *Brady* waivers in all of their plea bargains.¹²⁵ The defenders refused to advise their clients to sign these waivers.¹²⁶ An impasse resulted.¹²⁷

Blank sought to clarify the doctrine of criminal-procedure waiver¹²⁸ not through resort to first principles of a coherent, unifying theory, but rather through “the eclectic, communicative approach . . . suggested by the emerging school of legal thought known as Legal Pragmatism, which proposes that legal theory begin with existing practice and then consider the range of potential jurisprudential approaches, treating the theories as perspectives, each of which can add to the understanding of law.”¹²⁹ He then brought a diverse set of legal doctrines to the problem, and, ultimately, concluded that “contract” principles invalidate these waivers, but that the doctrine of “unconstitutional conditions” cannot effectively distinguish between these waivers and other constitutionally kosher ones.¹³⁰ This, Blank thinks, is because the Court, “on a crass accounting of judicial economy, [concluded] that plea bargaining and its attendant waivers are immune to a claim of unconstitutional conditions.”¹³¹ Instead, contract law is the answer. “The contract principles of adhesion, duress, mistake, unconscionability, and public policy all suggest,” Blank writes, “that, even if the practice of plea bargaining as a whole can pass constitutional muster under contract analysis, waivers of the right to disclosure of *Brady* material cannot.”¹³²

I take the opposite approach. The problem with using contract law to invalidate *Brady* waivers is that waiver doctrine in criminal procedure obviously tolerates agreements that contract law would not. Consider first

¹²² Daniel P. Blank, *Plea Bargain Waivers Reconsidered: a Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011 (2006).

¹²³ *Id.* at 2011 n.1.

¹²⁴ See *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995).

¹²⁵ Blank, *supra* note 122, at 2014 n.13.

¹²⁶ *Id.* at 2014.

¹²⁷ *Id.*

¹²⁸ Importantly, he distinguishes between waiver (the intentional relinquishment of a right), forfeiture (the relinquishment of a right by operation of law), and alienation (trading the right for a lower sentence). See *generally id.* In this paper, I use the term “waiver” chiefly to mean “alienation,” but where the distinction is relevant, I will make it clear which I mean.

¹²⁹ *Id.* at 2014–15 (internal quotations omitted) (internal citations omitted).

¹³⁰ *Id.* at 2066–67.

¹³¹ *Id.*

¹³² *Id.* at 2074.

the waiver of Fifth Amendment rights. Waivers are valid when made in response to outright fraud,¹³³ and where no rational actor would reasonably make them (read: where they are unconscionable);¹³⁴ waivers become *presumptively* impermissible only after 36 continuous hours of custodial interrogation;¹³⁵ and, it is hard to imagine the doctrine of public policy coming to the rescue of *Miranda*.¹³⁶

Blank might respond that I am impermissibly trying to unify Fifth and Sixth Amendment waiver doctrines, thus butting up against his methodological premise of eclecticism. Fair enough. Let's look specifically at plea bargains. Defendants can, and often do, plead guilty merely to get out of jail because they would spend more time there waiting for trial than they will be sentenced to if they plead guilty.¹³⁷ No contract doctrine can save a heads-I-win-tails-you-lose deal like this. Prosecutors can condition your plea bargain on your agreement to waive the assistance of counsel.¹³⁸ This is a bar-exam-worthy example of procedural unconscionability.¹³⁹ A prosecutor can charge you with a crime punishable by life in prison to convince you to plead guilty to floating an \$88.30 check¹⁴⁰—meaning, she can make you plea bargain under duress. And, given that the Eighth Amendment imposes only the barest of restrictions on non-capital sentences for adults,¹⁴¹ a prosecutor can pretty much turn the screws as hard as she wants to get you to plead guilty to something.

To get you to plead guilty, a prosecutor can threaten to have you killed.¹⁴² This is not compatible with contract law.

Instead, I go back to what Blank calls the “unconstitutional conditions” approach. Blank claims that “under the doctrine of unconstitutional conditions, the prosecution should not be able to seek a plea bargain waiver of the defendant’s right to disclosure of material favorable evidence. However, starting with the *Brady* [*v. United States*] Trilogy, the Court has

¹³³ *E.g.*, *Miller v. Fenton*, 796 F.2d 598, 607 (3d Cir. 1986).

¹³⁴ *See* William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 842 (1989).

¹³⁵ *Ashcraft v. Tennessee*, 322 U.S. 143, 154 (1944).

¹³⁶ William J. Stuntz, *Miranda’s Mistake*, 99 MICH. L. REV. 975, 976 (2001).

¹³⁷ *E.g.*, Charlie Gerstein, Note, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 112 MICH. L. REV. 1513, 1514 (2013).

¹³⁸ *E.g.*, *State v. Guerrero*, 400 S.W.3d 576, 586 (Tex. 2013) (finding not “a single case in which the defendant’s plea was constitutionally involuntary because the State offered him an especially favorable plea bargain if he waived his right to counsel . . .”).

¹³⁹ *E.g.*, *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 752 S.E.2d 372, 389 (W. Va. 2013).

¹⁴⁰ *Bordenkircher v. Hayes*, 434 U.S. 357, 359 (1978).

¹⁴¹ *Ewing v. California*, 538 U.S. 11, 20 (2003).

¹⁴² *See* *Corbett v. New Jersey*, 439 U.S. 212, 218 (1978); *Brady v. United States*, 397 U.S. 742, 745 (1970).

resolutely reaffirmed, apparently on a crass accounting of judicial economy, that plea bargaining and its attendant waivers are immune to a claim of unconstitutional conditions.”¹⁴³ I disagree.¹⁴⁴ Instead, I think we can differentiate, in an important way, the *Brady* (v. *Maryland*) waiver from the ordinary crass and coercive plea bargain. My point is this: the government can act with the purpose of getting you to plead guilty, but cannot act with the purpose of getting you to plead guilty when it knows you are not guilty.

In fairness, I have the benefit of writing this article after *Ruiz*. Why, you might ask, is this a benefit? I will argue, in the Sections that follow, that the approach I just suggested helps explain why *Ruiz* distinguishes between impeachment and non-impeachment exculpatory information. Most of the time, the prosecution can point to good reasons to withhold impeachment information. It cannot, in general, point to similar reasons to withhold all exculpatory information.

This Part is organized as follows. First, I briefly discuss why I think this is such an important question. To do this, I set up a model of plea bargaining. It shows that only an unwaiveable *Brady* right will increase the accuracy of guilty pleas—with accuracy measured by how closely a bargained-for outcome approaches the likely outcome at trial—and that a waiveable one will not. Those readers familiar with the economic literature on plea bargaining can safely skip this Section (although Section II.D. may prompt the skippers to come back and take a look). Next, I set up a solution to the waiver problem that seems like it might work, but ultimately doesn’t: the concept of bootstrapping. The bootstrapping argument holds that you cannot waive those rights whose purpose is to protect the accuracy and validity of their own waiver. I discuss this argument to point to reasons why it doesn’t work, but also point to an argument that does, or might. Finally, I discuss what I think is a solution to the problem of waiving *Brady* rights in a plea bargain: unconstitutional conditions. I do not, however, want to wade too deeply into the abyss of unconstitutional-conditions doctrine and scholarship, so I will aim in this part to show you that under most, if not all, prevailing conceptions of unconstitutional conditions doctrine, these waivers aren’t kosher, even though the rest of plea bargaining is. The key, on all accounts, is governmental purpose.

¹⁴³ Blank, *supra* note 122, at 2067.

¹⁴⁴ Others are troubled by the doctrinal separation between plea bargaining and unconstitutional conditions. See, e.g., Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 801 (2003).

A. *Consequences of the Rule: Modeling the Plea Bargain*

Allow me to set up, briefly, a model¹⁴⁵ of plea bargaining in order to show you why this particular question—can you or can you not waive the right to view material exculpatory information when you plead guilty?—is so important.

Begin with the premise that we're in the Fifth Circuit and that the disclosure obligation is at its minimum—meaning, the materiality standard is as high as possible given *Bousley*.

Assume, for now, that an individual prosecutor selects a sentence in each case that she believes to be just and, therefore, seeks to strike a bargain that gets as close to that sentence as possible, with a discount for avoiding the risk and hassle of a trial. Although there is a vigorous debate about what prosecutors are generally trying to do—or, in the argot, “maximize”—when offering plea bargains, and, of course, motives vary from prosecutor to prosecutor and case to case, I assume here the prosecutor has a utility function with a satiation point,¹⁴⁶ in the argot again. This means that she seeks a sentence that is as close as possible to the sentence that she believes to be just. This assumption is warranted because (1) in some cases it may be true, and (2) other reasonable utility functions that the prosecutor might have will only make the following argument stronger. (I briefly relax this assumption below to prove point (2).)

Also assume that, because of the evidence in the case, the prosecutor has an extensive, but not unlimited, menu of criminal statutes with which she can charge the defendant. She picks the charge from the menu such that the bargained-for solution will likely reach her target point. She bargains by offering to drop charges if the defendant agrees to plead guilty to a charge with the target sentence or add them if he doesn't. The weaker the evidence she has, the greater the charge she must choose so that a (presumably rational, risk-averse) defendant will settle on the targeted sentence. Her evidence might be too weak, and the range of plausible charges insufficiently draconian, to achieve the targeted sentence. In this case, she must either settle for what she can get or tough it out and go to trial.

Finally, assume that there is an information asymmetry in plea bargaining that runs in favor of the *prosecutor*, because, as a very general matter, she almost always knows more about the evidence she can put on

¹⁴⁵ This model is limited to relatively serious cases. In low-level misdemeanors, factors like pretrial detention dominate the criminal process and prosecutors' motives are notably different from what I am about to describe. See Charlie Gerstein & J.J. Prescott, *supra* note 106; Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 615 (2014); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1132 (2008).

¹⁴⁶ For my purposes, this can be a range—rather than a point—without loss of generality.

than the defendant does.¹⁴⁷ Many economic models of plea bargaining make the opposite assumption.¹⁴⁸ But, generally speaking, even though defendants almost certainly know more about what actually happened, within the epistemological sphere of the courtroom, the prosecution knows what will be presented to the jury. Thus, for my purposes, I can assume that the prosecution has superior information with which to bargain, even if the defendant knows that he is, in truth, guilty of the charged offense.¹⁴⁹

If the defendant has no right to exculpatory information, the prosecutor can bluff.¹⁵⁰ By definition, the defendant does not know the exculpatory information he is bargaining away along with his right to trial. Maybe the prosecutor knows about it, and maybe she doesn't. But for my purposes, this won't matter, because either way the defendant seeks to minimize his sentence by bargaining with the prosecutor while uncertain of her knowledge. And, it is this uncertainty that allows the prosecutor to bluff.

Bluffing, on this model, reduces the accuracy of guilty pleas, where accuracy is measured by how closely the plea-bargaining process mirrors the likely outcome at trial, adjusted for the convenience of avoiding the trial and its attendant uncertainties. By hiding from the defendant what she will present at trial, the prosecutor can use the defendant's aversion to the risk of trial to get him to plead guilty. But defenders of the bluff may say that it can separate the guilty from the innocent: where a prosecutor doesn't know much about the facts of the underlying incident, but the defendant does, the innocent will call the bluff but the guilty won't. Anyone who watches *Law & Order* knows this argument. It's wrong for two reasons. First, the prosecutor's enormous advantage in bargaining power ensures that plenty of innocent defendants won't be able to call the bluff.¹⁵¹ Second, this would-be

¹⁴⁷ This assumption is not quite generally true. In alibi cases, for example, the defendant might know that his defense is much stronger than the prosecutor thinks it is. But, barring unusual circumstances or defendants, a defendant with a strong defense almost always benefits by telling the prosecution about it and thereby avoiding the nightmare of a criminal prosecution if he can. Thus, it isn't terribly important that we consider this subset of cases and I will, as such, ignore them from here on out.

¹⁴⁸ Compare Barrett Lain, *supra* note 21 (information asymmetry in favor of prosecutor), with Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1972 (1992) (information asymmetry runs in favor of the defendant), and Bibas, *supra* note 10, 1118 (2011) (same).

¹⁴⁹ See *supra* note 25.

¹⁵⁰ Douglass, *Can Prosecutors Bluff?*, *supra* note 23.

¹⁵¹ Samuel Gross has two excellent articles on the subject of innocent people pleading guilty. Samuel R. Gross, *Pretrial Incentives, Post-Conviction Review, and Sorting Criminal Prosecutions by Guilt or Innocence*, 56 N.Y. L. SCH. L. REV. 1009, 1014 n.15 (2011) (discussing "innocent defendants who plead guilty to avoid the process costs of a criminal prosecution, in particular those who have been held long enough in pretrial detention that they will get to go home if they accept the

bluffing-apologist is using accuracy in a manner different from the way I am. I'm talking about accuracy only in relation to trial.

To summarize, this is the model I work with in this Section: (1) prosecutors seek to hit a target sentence and have a wide range of charging options, and (2) defendants are rational, risk-averse sentence-minimizers who do not, before the bargaining begins, know much about the prosecution's case.

Now, imagine that we change criminal procedure doctrine to recognize a *Brady* obligation attendant to a guilty plea, but that a defendant can waive it in exchange for a lower sentence. In cases where the prosecutor's target sentence is moderate or low, the potential range of charges severe, and the evidence reasonably strong, the prosecutor need only up the charges a little bit in exchange for trading away the *Brady* right—she'll end up at the same targeted sentence. In these cases, recognizing the *Brady* right but allowing it to be waived will ratchet up the charges. But everyone will end up in the same place.

In other cases, where the evidence is weak, and the range of possible charges limited, the prosecutor will have already hit the top charge on the menu in order to reach (or try to reach) her target sentence. In these cases, the new right will give the defendant something of value to trade and will, generally, lower his bargained-for sentence. By how much is anybody's guess. But whatever the discount is, it will be totally unrelated to the content of the *Brady* material, because, by definition, the prosecutor is bargaining for the right to conceal that material. This is crucial. The *Brady* rule will not enhance accuracy because, even though some defendants will get lower sentences, those sentences won't be lower because of the *Brady* evidence, and, therefore, won't be lower because the defendant has a lower chance of being convicted at trial. Even if we relax the assumption that prosecutors seek to hit a targeted sentence and assume, instead, that they simply want to maximize the defendant's sentence in all cases,¹⁵² the prosecutor will have hit the top charge on the menu in every case anyway. If prosecutors seek only to maximize sentences, the *Brady* right will lower defendants' sentences across the board, but will have no relationship to accuracy.

But what if you can't bargain *Brady* away? Now, the prosecutor must turn over all material, exculpatory information to the defendant. The prosecutor will be strongly discouraged from bringing those charges for

prosecutor's offer to plead guilty in return for a sentence of imprisonment that they have already served.”); Samuel R. Gross, *Convicting the Innocent*, 4 ANN. REV. L. & SOC. SCI. 173, 180 (2008). *But see* Wilkinson, *supra* note 95.

¹⁵² This was supposed to be how U.S. Attorneys made charging decisions under John Ashcroft. *See* United States v. Purcell, 667 F. Supp. 2d 498, 506 (E.D. Pa. 2009), *as amended* (Oct. 30, 2009) (“[Ashcroft’s] memorandum directs federal prosecutors to charge the most serious, readily provable offense supported by the facts of the case.”).

which she knows she has a bunch of *Brady* evidence—meaning, those where the defendant is less likely to be convicted at trial. And, most importantly, the information asymmetry between prosecution and defense will be reduced, and the prosecutor will no longer be able to bluff. For the prosecutor who already sets her target sentence after some investigation, and sets it so that the state of the evidence and range of plausible charges allows her to reach her target sentence, this rule will not change that sentence. But for the prosecutor who doesn't investigate much in advance, or who does rely on bluffing to achieve her targeted sentence, this rule will serve to enhance the accuracy of guilty pleas. Now, she will have to investigate to assure the security of the plea, and she will no longer be able to bluff.

Academics debate the capacity of *Brady* to enhance the accuracy of guilty pleas. Professors Barrett Lain and McMunigal argue that *Brady* for plea bargains will serve to enhance accuracy and reduce information asymmetries,¹⁵³ while Professor Douglass counters that it won't.¹⁵⁴ But neither camp addresses the waiver question that, on the model above, as well as on Barrett Lain's own model,¹⁵⁵ is the crucial question if accuracy is our concern. And, Douglass claims that premising a *Brady* obligation on whether or not it enhances accuracy proves too much: *Brady*, he notes, covers only exculpatory information, so prosecutors can still hide as much inculpatory information as they want.¹⁵⁶ Barrett Lain responds to this objection by noting that defense counsel are repeat players and will sanction prosecutors with worse deals in the future if they withhold inculpatory evidence.¹⁵⁷ Both of them assume that the mere fact that *Brady* does not do everything possible to remedy inaccuracy means that it does not remedy inaccuracy. This is obviously wrong. The existing scholarship, by focusing on whether or not *Brady* applies to a guilty plea, and whether applying it to a guilty plea will enhance accuracy, overlooks the important question whether a defendant can waive the right to *Brady* information.

On my model, to summarize, an unwaiveable *Brady* right will enhance accuracy, but a waiveable one won't. By eliminating bluffing and reducing information asymmetries, a *Brady* rule will, generally, enhance accuracy, but only if you can't bargain it away. If you can, prosecutors will simply respond by upping the charges or offering you a better deal, the additional leniency of which is unrelated to the strength of the case against you. Whether you can waive the right is the crucial question. The following Sections aim to address it.

¹⁵³ Barret Lain, *supra* note 21; McMunigal, *Wrongful Convictions*, *supra* note 21.

¹⁵⁴ Douglass, *Can Prosecutors Bluff?*, *supra* note 23, at 588; Douglass, *Fatal Attraction?*, *supra* note 23, at 468.

¹⁵⁵ *See supra* note 152.

¹⁵⁶ Douglass, *Fatal Attraction?*, *supra* note 23, at 468.

¹⁵⁷ Barrett Lain, *supra* note 21, at 34–35.

B. A Solution that Doesn't Work: Bootstrapping

Before moving on to a solution that does work—or might work—I'd like to consider, briefly, one that doesn't: an anti-bootstrapping rule. This argument holds that constitutional doctrine forbids waiving rights whose purpose is to protect the validity of the waiver of those same rights.

The bootstrapping argument has prevailed in appellate cases concerning the validity of waivers of ineffective-assistance-of-counsel claims on appeal and collateral attack. When defendants specifically waive their rights to raise ineffective assistance of counsel, courts have consistently held that those waivers do not cover claims that the attorney was ineffective in advising the defendant to accept the plea deal itself.¹⁵⁸ “[A]n impermissible bootstrapping arises,” the Fifth Circuit writes, “where a waiver is sought to be enforced to bar a claim that the waiver itself—or the plea agreement of which it was a part—was unknowing or involuntary.”¹⁵⁹

This argument makes good sense, and it would solve our waiver problem easily—but it doesn't fit the rest of criminal-procedure doctrine well at all. Where the waiver of a right defeats its purpose in existing, you might think, you can't waive it. After all, although I have been writing as though you could separate the “right” from the “waiver” neatly, of course you can't. The ability to waive the right defines as much of its substantive scope as the class of defendants it covers or the strength of protection it affords when it does.¹⁶⁰ And, it would be a bizarre right that defeats itself. So, it would be absurd to allow that a right might be waived when the waiver would defeat the right.

And yet, if you think this is absurd, absurdity is what the doctrine gives us. Defendants can waive plenty of rights whose purpose is, at least in part,

¹⁵⁸ See *United States v. White*, 307 F.3d 336 (5th Cir. 2002); *Mason v. United States*, 211 F.3d 1065 (7th Cir. 2000) (waiver of ineffective assistance claim is enforceable against a claim that the attorney was defective in sentencing because that claim does not touch the validity of the plea); *Jones v. United States*, 167 F.3d 1142 (7th Cir. 1998) (waiver *not* enforceable because the claimed ineffective assistance concerned negotiating the agreement itself); *United States v. Djelevic*, 161 F.3d 104 (2nd Cir. 1998) (waiver enforceable because claim of ineffective assistance does not implicate the voluntary character of the plea); *United States v. Pruitt*, 32 F.3d 431 (9th Cir. 1995); see also *Jones v. United States*, 2014 WL 1328394 (11th Cir. 2014) (per curiam) (unpublished) (overturning district court's dismissal of a collateral attack on waiver grounds because the petitioner was “raising his claims based on his guilty pleas” and “specifically challenged the voluntariness of the pleas.”); Nancy J. King, *Plea Bargains That Waive Claims of Ineffective Assistance - Waiving Padilla and Frye*, 51 DUQ. L. REV. 647, 654–55 (2013).

¹⁵⁹ *White*, 307 F.3d at 343.

¹⁶⁰ See William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 831 (1989) (citing Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214, 1218 (1977))

to protect the validity of the waiver. In the remainder of this Section, I'll go through some of these waivers, with an eye to what they tell us about the solution that might work. I have three principal examples of this phenomenon. Defendants can waive the right to counsel as part of a plea bargain—meaning, the prosecution can insist on a defendant waiving the assistance of counsel in deciding whether to plead guilty as part of a deal in which he pleads guilty. Defendants can waive their rights to view information about confidential informants. And, defendants can waive their rights to appeal their convictions.

You might be surprised to learn that you can waive your right to counsel as part of a plea bargain. Indeed, Professor Gertner, then a prominent federal judge, and now a prominent professor, thought one cannot.¹⁶¹ But, constitutionally, you can waive your right to counsel when you plead guilty,¹⁶² even though the purpose of having counsel when you plead guilty is to assure that your waiver of your right to trial is knowing, intelligent, and voluntary.¹⁶³ Thus, bootstrapping is not strictly forbidden in criminal procedure.

Similarly, you can waive the right to the effective assistance of your counsel, which right would seem chiefly important in protecting its own waiver. That's not all. As Professor King noted in a recent article,

These ineffectiveness waivers block claims regarding incompetence occurring after the plea, such as bad advice during sentencing. They also bar claims based on pre-plea ineptitude, including trial error that leads to the plea, inadequate or erroneous advice about sentencing consequences, failing to suppress evidence, and failing to investigate or assert claims or defenses such as double jeopardy, or competency. A waiver has even been held to bar a defendant's claim that his lawyer should have advised him of the possibility of pleading guilty without the waiver.¹⁶⁴

¹⁶¹ Nancy Gertner, *The Right to Appeal is an Issue of Fairness*, N.Y. TIMES ROOM FOR DEBATE, July 15, 2013, <http://www.nytimes.com/roomfordebate/2012/08/19/do-prosecutors-have-too-much-power/having-the-right-to-appeal-is-an-issue-of-fairness> [https://perma.cc/XH29-B4EL] (“You can’t bargain away your right to counsel in a guilty plea deal . . .”).

¹⁶² *State v. Guerrero*, 400 S.W.3d 576 (Tex. Crim. App. 2013) (finding not “a single case in which the defendant’s plea was constitutionally involuntary because the State offered him an especially favorable plea bargain if he waived his right to counsel . . .”).

¹⁶³ *E.g.*, *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

¹⁶⁴ King, *supra* note 158, at 654–55 (internal citations omitted).

The final example is the most compelling, but the case establishing it was vacated after the article citing it was published.¹⁶⁵ At least where the district court has enforced a bargain in which the defendant actually waives his right to complain that he was given deficient advice in choosing to bargain away *his right to get that specific advice*, the defendant can get relief.¹⁶⁶ Other than that, though, courts routinely enforce waivers of the right to counsel when the defendant pleads guilty.¹⁶⁷

At trial, defendants have the right to cross-examine confidential informants. Pleading guilty waives the right to a trial and, thus, to cross-examine anyone. Similarly, plea bargains that require a defendant to forego his right to learn the identity of the witnesses against him are routinely enforced.¹⁶⁸ Defendants who plead guilty without learning the identities of those who provide the evidence against them waive a right whose purpose is to protect the accuracy of their waiver. If they knew that the informant against them was a known liar, they would not plead guilty. Nonetheless, courts enforce bargains requiring such waivers routinely.

Finally, every circuit court that has addressed the issue in the federal system has concluded that a defendant can waive his right to appeal,¹⁶⁹ whose purpose is to protect the constitutional sanctity of the guilty plea and the propriety of the resulting sentence.

To my mind—although I am less certain about this conclusion than about several others offered in this paper—these cases gesture towards a solution that might work. Take the confidential informant cases. In those cases, courts point to perfectly legitimate reasons why the prosecution might need to conceal the information, which reasons are totally unrelated to convincing the defendant to plead guilty.¹⁷⁰ Namely, the confidential informants may be involved in ongoing investigations that would be compromised, or the prosecutors might generally be worried about their safety. Similarly, waiving counsel when pleading guilty speeds up the criminal process—particularly in states where appointing counsel can take a while.¹⁷¹ While this has the effect of reducing the accuracy of the plea-bargaining process, the circumstances in which these waivers are likely to occur do not evince a

¹⁶⁵ *Jones v. United States*, No. 8:12-cv-914-T-30TGW, 2013 WL 24226 (M.D. Fla. 2013), *rev'd*, 559 F. App'x 976, 977 (11th Cir. Apr. 4, 2014) (per curiam).

¹⁶⁶ *Id.* at *3.

¹⁶⁷ *Id.*

¹⁶⁸ For good examples, see *Porter v. Commonwealth*, 394 S.W.3d 382, 391 (Ky. 2011) (waiver of *Brady* right to view information about a C.I. is okay *because* it is motivated by a desire to protect the informant, not a desire to railroad the defendant); *State v. Moen*, 76 P.3d 721 (Wash. 2003) (en banc); *People v. Moore*, 804 N.E.2d 595 (Ill. App. 2003).

¹⁶⁹ LAFAYETTE ET. AL., *supra* note 96, § 27.5(c) n.57.

¹⁷⁰ See *supra* note 168.

¹⁷¹ Compare *State v. Guerrero*, 400 S.W.3d 576 (Tex. Crim. App. 2013), *with* *Rothgery v. Gillespie Cnty.*, Tex., 554 U.S. 191, 196 (2008).

prosecutorial purpose to reduce accuracy. Query whether a court would sanction a plea bargain to murder that required the defendant to waive his right to counsel. And so I think this distinction—between circumstances in which an impermissible purpose is likely and circumstances in which it is not—is very important, both to the solution I offer below and generally.

C. A Solution that Might Work: Prosecutorial Purpose

Unconstitutional conditions doctrine is a mess¹⁷²—one into which I do not want to wade too deeply. That’s because the concept has been thoroughly covered by legal scholars¹⁷³ and I have precious little to contribute. Rather, I’d like to discuss unconstitutional conditions only briefly, and only for the limited purpose of elucidating something about criminal procedure that might not be obvious at first glance.

My point about unconstitutional conditions scholarship is this: when you ask people who think about this problem what makes unconstitutional conditions unconstitutional, they will tell you some combination of the following two things. Either they’ll tell you that the bargain is unconstitutional because it results in the impermissible effect of allowing the government to get you to give up a constitutional right, or they’ll tell you the bargain is unconstitutional because it is made with the purpose of getting you to give up a constitutional right.

I think the second position is basically right, with a few important qualifications.¹⁷⁴ But that is not the point of this article. Rather, the point is to leave you with the impression that—whatever your view on unconstitutional conditions¹⁷⁵—*Brady* waivers are unconstitutional but your garden-variety plea bargain is not.

So the solution is obvious. *Brady* waivers are unconstitutional because they effect an unconstitutional result—convicting the innocent—and because

¹⁷² E.g., Mitchell N. Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1348 n.142 (2013) (“You could read a dozen scholarly discussions of ‘the unconstitutional conditions doctrine’ before running into a clear statement of what the doctrine is supposed to say or what its content is.” (citing William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445–46 (1968)); Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 480 (2012) (“unconstitutional conditions therefore are considered a sort of Gordian knot”).

¹⁷³ I will resist the temptation to plug in citations to the mountainous literature on unconstitutional conditions. Take my word for it that the literature is mountainous.

¹⁷⁴ This accords with a broader view of legal rights. Cf. Don Herzog, *The Kerr Principle, State Action, and Legal Rights*, 105 MICH. L. REV. 1, 45 (2006).

¹⁷⁵ Unless you believe that no bargain is unconstitutional. E.g., Richard A. Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 8 (1988). If you believe that, I’m out of luck.

they evince the same impermissible purpose. Now I have to show you why *Brady* waivers are different from ordinary criminal-procedure waivers, which are constitutional. The next Section aims to do that.

But first, a brief rhetorical question. Consider again the First Circuit, the Fourth Circuit, and the Supreme Judicial Court of Massachusetts rulings discussed above.¹⁷⁶ Does it strike you as remotely plausible that the outcome of those cases would have been different if the defendant had recited, after the litany of recitations required at a guilty-plea hearing, that he agreed to waive his right to exculpatory information? I think that the answer to that question is obviously “no,” and that the intuitive reason why the answer is no points us to a deeper point about criminal procedure waivers. The results in those cases would not have changed because the government’s behavior would still have manifested an improper purpose.

D. *What’s So Special About Brady Waivers?*

Conditional bargains can be unconstitutional because of their unconstitutional purposes or their unconstitutional effects. The argument why *Brady* waivers are unconstitutional in their effects is, more or less, made by Section II.D. In that Section, I aimed to show that allowing people to waive their *Brady* rights when they plead guilty will allow the prosecutor to bluff—something that will increase her ability to convict the innocent, either by mistake or design. This effect is unconstitutional if and only if it is unconstitutional to use a procedure that produces an unacceptably high rate of false convictions. I discuss this below. With respect to purpose, the question for *Brady* waivers is this: if you think that governmental purpose is important to understanding unconstitutional-conditions problems, what’s so special about *Brady* waivers?

With respect to governmental purpose, let’s start by asking why a prosecutor might want a defendant to waive his right to exculpatory information. There are many answers to this question, but I’d like to start with two broad strokes. The innocent explanation is that she wants to minimize the pain of disclosure and wants to protect her bargain from future challenges on appeal. The guilty explanation is that she wants to convict those whom she could not convict at trial because of the disclosure obligation.

The Supreme Court has never explicitly held that innocence is a freestanding constitutional claim—meaning, it has never held that a state necessarily violates the constitution when it imprisons someone who is not guilty of the crime for which he was convicted.¹⁷⁷ So, at first blush, it might

¹⁷⁶ *Supra* Part I.A.

¹⁷⁷ *E.g.*, *supra* notes 35–40; see also Garrett, *Claiming Innocence*, *supra* note 117 (“Most prominently, in 1993, in *Herrera v. Collins*, the Court narrowly failed to recognize a constitutional innocence claim in the context of capital cases,

seem that offering a bargain whose purpose and effect is to convict the innocent is not necessarily unconstitutional. But this obscures the question by asking it at the wrong level of generality. The lack of a freestanding constitutional innocence claim applies (if at all) to the individual defendant: a conviction does not (perhaps) violate the Constitution merely because the person convicted did not commit the crime, so long as his conviction was the result of a process that does not generate an unacceptably high rate of false convictions. This is true—if for no better reason¹⁷⁸—because the Due Process clause prevents the government from employing procedures that produce an unacceptably high rate of false deprivations of liberty.¹⁷⁹

The question, then, is whether the guilty or the innocent explanation of a prosecutor's behavior better explains her choice to withhold a given piece of information, and whether her behavior produces an unacceptably high rate of false convictions. The answers to these questions will depend on—and give me an answer to—the meaning of impeachment and materiality.

I have already argued that there must be some disclosure obligation out there. Thus, if I find definitions of materiality and impeachment that, when satisfied, render the risk of false conviction unacceptably high and make clear that a prosecutor would not withhold the information for a constitutionally unproblematic reason, I have shown why *Brady* waivers are different from other waivers.

In the next two Sections, I will argue that the structure of the problem I have just described leads us to sensible definitions of impeachment and materiality. But in this Section, I rely on those definitions to show that *Brady* waivers are different from ordinary waivers. Aren't I bootstrapping? No. I have already argued that there must be *some* disclosure obligation out there. Therefore, there must be some material, exculpatory, non-impeachment information that the prosecutor must disclose. If I show that there exist definitions of materiality and impeachment that render the prosecutor's motives impermissible, then I have shown that there is some information that cannot be bargained away. There is no guarantee that these definitions of impeachment and materiality will be identical to those used in other areas of the law. But the definitions that make a prosecutor's motives invalid will define the scope of the non-waiveable *Brady* right.

In this Section, I hope that I have convinced you that if the correct definitions of impeachment and materiality are chosen, the right to material, exculpatory, non-impeachment information cannot be waived. This is so

emphasizing the dual concerns of finality and reliability.”) (citing *Herrera v. Collins*, 506 U.S. 390, 401, 403–04 (1993)).

¹⁷⁸ For a better reason, see *In re Winship*, 397 U.S. 358, 364 (1970) (holding “that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

¹⁷⁹ *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

because, under the correct definitions, (1) a prosecutor ordinarily would not withhold the information for any reason other than convicting someone she could not have convicted at trial, and (2) withholding the information produces an unacceptably high risk of false conviction. In previous Sections, I have modeled the plea bargain to show that withholding information can cause the innocent to plead guilty in this context, so condition (2) is already satisfied to the extent that risk is severe enough to be constitutionally impermissible. Now I have to give you sensible definitions of impeachment and materiality such that the guilty explanation for prosecutorial behavior prevails.

But first, I'd like to examine what all this tells us about the structure of waiver doctrine in criminal procedure. As long as you believe the uncontroversial proposition that evidence withheld for the purpose of convicting the innocent is generally more likely to convict the innocent than evidence withheld for convenience is, I have just argued that the prosecutor's motives control the constitutionality of her actions in this context. This is in tension with quite a bit of criminal procedure doctrine. For example, the prosecutor's decision to charge a defendant with a given crime is almost entirely unreviewable.¹⁸⁰ Consider *Wayte v. United States*.¹⁸¹ There, the Justice Department prosecuted thirteen people for failing to register for the draft.¹⁸² An estimated 674,000 people had failed to register for the draft.¹⁸³ The thirteen who were prosecuted were among the more "vocal" opponents of the draft.¹⁸⁴ It seems obvious that the government chose them, instead of the 673,987 other people it could have prosecuted, because of the defendants' protected speech. The Court said this was fine.¹⁸⁵

It might seem unusual, then, that an important piece of waiver doctrine hinges on why a prosecutor would seek to exact a given waiver. But it is not quite as unusual as it may seem. After all, the prosecutor's charging decision *is* reviewable where it presents an unacceptably high *risk* that her choices are motivated by a desire to punish the defendant for the exercise of his rights.¹⁸⁶ Looked at from a sensible level of generality, then, prosecutors' motives matter quite a bit. And, this will be the case here. The definitions of impeachment and materiality should be chosen so that, in general, prosecutors will withhold the information only if they are trying to convict

¹⁸⁰ *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”).

¹⁸¹ 470 U.S. 598 (1985).

¹⁸² *Id.* at 606.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 614.

¹⁸⁶ *E.g.*, *Blackledge v. Perry*, 417 U.S. 21, 27 (1974).

someone whom they couldn't otherwise convict. Definitions will not be chosen ad hoc in response to the behavior of each prosecutor.

III. IMPEACHMENT

In this Section, I define "impeachment" for the purposes of a prosecutor's disclosure obligation when taking a guilty plea. I've hopefully persuaded you that there is a disclosure obligation and that whether that disclosure obligation is waiveable depends on the definition of impeachment and materiality. The Supreme Court in *Ruiz* made clear that prosecutors do not have to disclose impeachment evidence when a defendant pleads guilty.¹⁸⁷ But what is the difference between impeachment evidence and all other evidence?

Most lawyers have a good intuitive sense of the difference between impeachment evidence and direct evidence at trial. When a defense witness testifies that someone else committed the charged crime, that isn't impeachment evidence. When a defense witness testifies that one of the prosecution's witnesses testified inconsistently with something else she said, that is impeachment evidence. But when the defendant pleads guilty no one knows whom the prosecution would have called had the case gone to trial. Because impeachment is generally defined in relation to the other witnesses at trial, when the defendant pleads guilty—and there are no witnesses at trial—our concept of impeachment hinges on who would have hypothetically testified at the trial if there had been one. Almost any information *could* be impeachment information because the parties could always put on evidence that contradicts something else any witness may know. If impeachment at trial is defined in relation to the other witnesses who testify at trial, this definition breaks down in plea bargaining, where we don't know who else would testify if there were a trial.

Ruiz describes impeachment evidence as that which "does not 'establish[] the factual innocence of the defendant.'"¹⁸⁸ But what if there is only one witness to the crime? Given that the background presumption is that the defendant is innocent, evidence that the witness is a liar surely makes it more likely that the defendant is innocent. What Justice Breyer means by this quote,¹⁸⁹ I think, is that impeachment information does not establish the defendant's innocence by any means other than discrediting another witness.

At least one court, and several commentators, have pointed out that this issue is a rather slippery one.¹⁹⁰ The courts that apply *Brady* to a guilty plea

¹⁸⁷ United States v. Ruiz, 536 U.S. 622, 633 (2002).

¹⁸⁸ *Id.* at 631 (internal citations omitted).

¹⁸⁹ *Id.*

¹⁹⁰ United States v. Danzi, 726 F. Supp. 2d 120, 127–28 (D. Conn. 2010) *opinion clarified*, 3:07 CR 305 MRK, 2010 WL 3463272 (D. Conn. Aug. 2, 2010) ("While the line dividing impeachment material from substantive exculpatory material may

post-*Ruiz*—and, therefore, need to distinguish between impeachment and non-impeachment information—often look to legal dictionaries and treatises to find impeachment’s meaning.¹⁹¹ Predictably, the definitions hinge on “discrediting” a witness at trial.¹⁹² But because we do not know what evidence a prosecutor would have put on had there been a trial, these definitions do not make sense in the guilty-plea context. How can you discredit a witness that does not exist?

We need something more. Given my argument in Part II, impeachment ought to be defined such that it isolates the kind of information that a prosecutor would not withhold, unless she were trying to sucker a defendant into pleading guilty when he otherwise would not. And, this question needs to be answered in light of *Ruiz* and the way the Court treated impeachment in that case.

Before doing that, though, it’s worth noting here that I can’t rule out the possibility that “impeachment” could mean one thing relative to an unwaivable disclosure right and another thing relative to a waivable one. The definition I offer, given the conditions I’ve chosen to generate it, will isolate information the right to which cannot be waived. That could still conceivably leave information to which one has a waivable right. Given my argument in Part I.A, that would be a somewhat odd result. But it’s not impossible. My definition, then, applies only to an unwaivable right.

As a first pass at the problem, let’s consider some of the good reasons prosecutors might have for failing to disclose exculpatory evidence. They might want to hide the identity of a confidential source. And, they might want to avoid investigating the potential evidence. For example, imagine that evidence exists discrediting the truthfulness of a witness that the prosecution does not even care about. Why bother investigating that? On these rationales, evidence that discredits someone the prosecutor does not mention during plea bargaining is impeachment.

Second, information that, were there no other witnesses at all, would tend to disprove the defendant’s guilt *isn’t* impeachment. This seems uncontroversial in light of what else we know about impeachment. And, at least one court has noted that where the evidence serves both to impeach and to reduce the likelihood of the defendant’s guilt on its own, it isn’t

be a difficult one to draw at times—and, of course, the same piece of evidence may serve both purposes in appropriate circumstances”); Cassidy, *supra* note 21, at 1438; Douglass, *Fatal Attraction?*, *supra* note 23, at 516.

¹⁹¹ Friedman v. Rehal, 618 F.3d 142, 153–4 (2d. Cir. 2010) (citing MUELLER & KIRKPATRICK, FEDERAL EVIDENCE § 6.75 (2010)); State v. Harris, 680 N.W.2d 737, 745 n.9 (Wis. 2004) (citing BLACK’S LEGAL DICTIONARY 578 (7th Ed. 1999) (“Impeachment evidence” is defined as “[e]vidence used to undermine a witness’s credibility.”)); State v. Huebler, 275 P.3d 91, 96–97 (Nev. 2012) (same).

¹⁹² 3 Christopher B. Mueller & Laird C. Kirkpatrick, FEDERAL EVIDENCE § 6.75 (3d ed. 2007).

impeachment.¹⁹³ This makes sense because the prosecution likely has no good reason for *categorically* withholding this sort of information. Perhaps they have tons of other evidence and do not want to bother with this—but that is a problem addressed chiefly under materiality.

Finally, what to do with evidence that impeaches the credibility of a witness that the prosecution tells the defendant about during the bargaining process. In my view, this is not impeachment, notwithstanding the fact that it does tend to reduce the credibility of prosecution witnesses. In light of what the prosecutor does tell the defendant, she has little—if any—remaining good reasons for failing to tell him about those witnesses' impeachment information. And, this is the key to the rule I propose. A prosecutor might have perfectly good reasons to withhold *all* evidence about a given case, or even a given element of a charged crime, in order to convince a defendant to plead guilty—namely, she might be trying to flush out an admission of guilt from a guilty defendant by forcing him to speculate on the state of her evidence.¹⁹⁴ But once she starts telling the defendant about the evidence against him with respect to an element of the charged crime without telling him about evidence that discredits it, she is increasingly trying to get someone to plead guilty who otherwise would not *because he might not be guilty*. And thus the rule for these cases: where the prosecutor tells the defendant about evidence to prove a certain element of the crime, she must also disclose the evidence in her possession that tends to disprove that element.

The first objection to this rule is likely to be that it is a funny use of the word “impeachment.” Indeed, the evidence tending to disprove the offered fact might well be classic impeachment evidence. But this concern ought not trouble us too much given how *Ruiz* uses the word “impeachment”: that which “does not ‘establish[] the factual innocence of the defendant.’”¹⁹⁵ The Court, given that statement and the factual context in which *Ruiz* arose, was likely referring to information that would discredit a witness who was not involved in the plea bargaining process itself.

In *Ruiz*, the Court was concerned that requiring disclosure of impeachment information could force the government to “abandon its general practice of not disclosing to a defendant pleading guilty information that would reveal the identities of . . . prospective witnesses.”¹⁹⁶ Similarly, the Court was concerned that requiring disclosure of impeachment information would force the government to devote “substantially more resources to trial preparation prior to plea bargaining.”¹⁹⁷ Both of these

¹⁹³ *In re Miranda*, 182 P.3d 513, 542–43 (Cal. 2008).

¹⁹⁴ I quibble with the proposition that this is a “good” reason. But it’s definitely a permissible one. *E.g.*, Easterbrook, *supra* note 148.

¹⁹⁵ *United States v. Ruiz*, 536 U.S. 622, 631 (2002) (internal citation omitted).

¹⁹⁶ *Id.* at 632.

¹⁹⁷ *Id.*

concerns are advanced by limiting the meaning of “impeachment” information to only information that discredits witnesses on whom the government does not rely during the bargaining process. Similarly, the *Ruiz* Court declined to force the government to disclose impeachment information because of its limited “value” as a procedural safeguard.¹⁹⁸ Where the government is bluffing and impeachment information allows a defendant to call the bluff, the information’s value is much higher than ordinary.

Ruiz noted that “impeachment information is special in relation to the fairness of a trial”¹⁹⁹ Since the *Ruiz* decision, the Court has taken a view of plea bargaining that much more closely parallels its view of trials.²⁰⁰ Rights once thought to be restricted only to trials have been extended to the guilty-plea process.²⁰¹ And, to the extent that *Ruiz* rested on the unique characteristics of impeachment information in relation to the trial process—impeachment, after all, is currently defined in relation to other trial testimony—the rule I just proposed serves to isolate the analogous functions that information has in the plea bargaining process. Inculpatory trial testimony is analogous to information the prosecutor uses to convince someone he will be convicted.

Finally, one might object that the rule poses significant administrability concerns. (Set aside whether this is a legitimate objection.) How are we going to know what the prosecutor did or did not tell the defendant during the plea-bargaining process? That seems like a pain. But the Court in *Cooper* and *Frye* made clear that those concerns must yield, as a general matter, to the overall fairness of the bargaining process. In those cases, the Court held that a defendant is prejudiced for ineffective-assistance-of-counsel purposes whenever he receives a worse plea bargain than he would have received had he been assisted by competent counsel. Determining whether a *Cooper* violation has occurred—and, assuming it has, what the appropriate remedy is—requires a detailed inquiry into who offered what to whom and when (and even why).²⁰² If the Court is comfortable with that inquiry, there is no reason to believe it shouldn’t be comfortable with this one. Indeed, the Court might be comfortable with this hearing because trial courts will be conducting *Cooper* hearings anyway.

¹⁹⁸ *Id.* at 631.

¹⁹⁹ *Id.* at 629.

²⁰⁰ *E.g.*, *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (“To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system.” (alterations in original) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L. J.* 1909, 1912 (1992)) (internal quotations omitted)); *see also* Covey, *supra* note 21, at 596; Gerstein, *supra* note 137.

²⁰¹ *Id.*

²⁰² *See* *Lafler v. Cooper*, 132 S. Ct. 1376, 1389 (2012).

All this is not to say that the rule is without complications. One of the foremost complications stems from the police. The police are part of the prosecution team, and their actions are imputed to the government, generally speaking, for *Brady* purposes.²⁰³ Imagine, then, that the police give the defendant a copy of the police report, which contains many facts. Need the prosecution disclose all those facts that tend to disprove anything in the report? To the extent that those facts are material and that the government is in possession of evidence that is inconsistent with them, the answer is yes.

IV. MATERIALITY

A brief word about materiality. *Brady* covers only “material” information.²⁰⁴ Where a defendant goes to trial, materiality is defined as information that “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.”²⁰⁵ This looks at the problem, more or less, from the perspective of the jury. But what about when the defendant pleads guilty? Several courts have imported the standard for ineffective-assistance-of-counsel claims that result in pleas of guilty, explained by the Court in *Hill v. Lockhart*.²⁰⁶ This standard asks whether there is “a reasonable probability that, but for [the ineffective advice], [the defendant] would not have pleaded guilty and would have insisted on going to trial.”²⁰⁷ This standard focuses on the defendant.

I owe you a definition of materiality. My argument in Part II was premised on selecting an appropriate definition such that the standard for these claims separates out those bargains for which the prosecutor’s purposes are kosher from those where they are not. The standard, then, should focus, at least in part, on the *prosecutor*. The question ought to be whether the information is such that a reasonable prosecutor would withhold it only where her purpose is to convince a defendant to plead guilty where he otherwise would not.

But my argument in Part II was two-fold. The definition of materiality ought to separate out bargains on the basis of both purpose *and* effect. So the appropriate definition of materiality in this context looks both to why the prosecutor withheld the information (purpose) and what the defendant would have done with it had he seen it (effect). This sounds awfully cumbersome. It’s not. I think this usually collapses to one question. A prosecutor would withhold information for the purpose of convincing someone to plead guilty

²⁰³ *Kyles v. Whitley*, 514 U.S. 419, 421–22 (1995).

²⁰⁴ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

²⁰⁵ *Kyles*, 514 U.S. at 421.

²⁰⁶ *E.g.*, *Commonwealth v. Scott*, 5 N.E.3d 530, 546 n.12 (Mass. 2014) (citing *Ferrara v. United States*, 456 F.3d 278, 294 (1st Cir. 2006) (citing *Hill v. Lockhart*, 474 U.S. 59 (1985))).

²⁰⁷ *Id.* at 551.

whom she otherwise could not convince only where she thinks that the information would have caused him not to plead guilty had he known it. The *Hill* standard, after all, does not look to “the idiosyncrasies of the particular decision-maker.”²⁰⁸ Neither should the standard here. Because individual motives are ordinarily impossible to divine, this is the sensible level of generality at which to assess motives. The only evidence that would meet the standard, would make a typical defendant choose not to plead guilty. A prosecutor generally can predict the behavior of a hypothetical typical defendant.

Thus, for the most part, the standard in *Hill* works for this purpose, with one potential refinement. *Hill* speaks of a defendant “insist[ing] on going to trial.”²⁰⁹ But, after *Frye*, it is clear that ineffective assistance of counsel claims are cognizable where the defendant rejects a favorable plea offer and accepts a less favorable one. Thus, the standard here ought to ask whether the defendant would have rejected the bargain and insisted either on trial or a materially better bargain. Difficult questions will likely arise—what’s “materially” better?—but those questions will arise under *Frye* regardless.

CONCLUSION—WHAT DOES PLEADING “GUILTY” MEAN?

I hope I’ve convinced you that, on a proper understanding of criminal procedure, defendants have an unwaivable right to disclosure of material exculpatory information when they plead guilty. I hope I’ve offered satisfying definitions of impeachment and materiality that accord with the purposes underlying the rule. And, I hope I’ve shown you that the rule requiring disclosure despite a defendant’s would-be waiver is an important one.

But what does all this say about the meaning of a guilty plea? First, as I mentioned above, I think it points to the crucial role of prosecutorial purpose in the guilty-plea process. But it also says something about defendants. The analysis above relies on the principle that defendants plead guilty not only because they are guilty, but rather because many must plead guilty in order to reach an equitable outcome—or to try to reach one—in the criminal process.

Realistically, there is no doubt that this is true in practice.²¹⁰ And, arguments to the contrary are often silly.²¹¹ But the law has been slow to

²⁰⁸ *Lockhart*, 474 U.S. at 60.

²⁰⁹ *Id.*

²¹⁰ See *supra* note 151.

²¹¹ See *Wilkinson*, *supra* note 95, at 1141 (simply declaring, without citation or support, that “[f]ar more often than not, agreements represent nothing more and nothing less than the best deal a lawyer can get for his client. That is the essence of what law is about.”).

accept the reality.²¹² This dichotomy plays out in the way that courts and scholars conceive of the information asymmetry between defendants and prosecutors. Some scholars continue to believe that plea bargaining serves as a reliable means of separating the guilty and the innocent *because* the innocent know they're innocent and won't plead guilty; the guilty know they're guilty and will. Other scholars are increasingly attuned to the reality that process costs can dominate the plea-bargaining process, and can force an innocent defendant to plead guilty. If this is true—it is—then the meaningful information asymmetry in plea bargaining must run in favor of the prosecutor. Although the defendant may know whether or not he is guilty in a spiritual and in a factual sense, the prosecutor knows what evidence will be put on in the courtroom.

Damages actions for wrongful imprisonment offer an interesting angle on this disconnect. In some states, the wrongfully convicted are entitled by statute to damages from the state.²¹³ But the law has been confused about what to do with defendants who falsely pleaded guilty. On the one hand, some courts hold that a guilty plea is just that: an admission of guilt.²¹⁴ But other courts are coming around to the view that a guilty plea—even though it involves a defendant's sworn declaration that he is, in fact, guilty—does not mean that the pleader is conclusively guilty for all purposes.²¹⁵ Hopefully, the above discussion will show that the law already understands this reality at a certain level and, hopefully again, that will point other parts of the doctrine in the right direction.

²¹² Cf. Wilkinson, *supra* note 95, at 1099 n.* (“Judge Wilkinson serves on the United States Court of Appeals for the Fourth Circuit.”).

²¹³ E.g., Daniel S. Kahn, *Presumed Guilty Until Proven Innocent: The Burden of Proof in Wrongful Conviction Claims Under State Compensation Statutes*, 44 U. MICH. J. L. REFORM 123, 125 (2010) (“[T]wenty-seven states, the District of Columbia, and the federal government” have enacted wrongful-conviction-compensation statutes.).

²¹⁴ See, e.g., *Mills v. State of New Jersey Dep’t Treas.*, 86 A.3d 741 (N.J. App. Div. 2014).

²¹⁵ For an interesting discussion of these issues, compare the perspectives of Judges Lynch, Livingston, and Jacobs in *Poventud v. City of New York*, 750 F.3d 121, 124 (2d Cir. 2014) (en banc).