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## Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures

R. Michael Cassidy

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# ARTICLES

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*R. Michael Cassidy\**

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## INTRODUCTION

Several recent high-profile cases have illustrated flaws with the government's discovery practices in criminal cases and have put prosecutors across the country on the defensive about their compliance with disclosure obligations. The conviction of former Alaska Senator Ted Stevens on ethics charges was set aside after it was revealed that federal prosecutors withheld notes of an interview with a key government witness; one member of the Stevens prosecution team who was under investigation for contempt subsequently committed suicide.<sup>1</sup> The Supreme Court remanded a double murder case from Tennessee for potential resentencing after it was revealed that state prosecutors had withheld substantial evidence of inconsistent statements made by government witnesses.<sup>2</sup> Chemical giant W.R. Grace and three of its high-level executives were acquitted on criminal environmental charges in Montana after a federal judge gave blistering jury instructions criticizing the prosecution team for failing to disclose the depth of their relationship with a star whistleblower.<sup>3</sup> In each of these cases, prosecutors drew the ire of the judiciary for their cavalier approach to discovery and their lack of attention to the constitutional rights of defendants. These stories and others<sup>4</sup> have made the public more attuned than ever before to the prevalence and pernicious consequences of prosecutorial misconduct.

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1. United States v. Stevens, No. 08-cr-231 (EGS), 2009 WL 6525926 (D.D.C. Apr. 7, 2009) (order setting aside verdict); Jeffrey Toobin, *Casualties of Justice*, NEW YORKER, Jan. 3, 2011, at 39.

2. *Cone v. Bell*, 129 S. Ct. 1769, 1786 (2009).

3. United States v. W.R. Grace Co., CR 05-07-M-DWM (D. Mont. 2009). The jury instructions are summarized at <http://www.insidecounsel.com/Issues/2009/July-2009/Pages/Fiery-Jury-Instructions.aspx>.

4. In response to another disclosure violation in a high-profile federal organized crime prosecution, then-Chief District Judge for the District of Massachusetts, Mark Wolf, initiated disciplinary proceedings against a prosecutor in his own court, having documented several prior instances of *Brady* violations in the District from which he concluded that the Department of Justice was either unable or unwilling to police prosecutors who violated their discovery obligations. See *In re Auerhahn*, 650 F. Supp. 2d 107 (D. Mass. 2009); Shelley Murphy, *Three Judge Panel Urged to Suspend Lawyer*, BOS. GLOBE, Dec. 12, 2010, at 1. Subsequently, a panel of three District Court judges declined to impose discipline. See *In re Auerhahn*, 2011 WL 4352350, at \*13 (D. Mass. Sept. 15, 2011) (concluding that bar counsel failed to make out a violation of attorney conduct rules by the AUSA by clear and convincing evidence in organized crime prosecution; although prosecutor "fail[ed] to document more carefully" inconsistent statements that cooperating witness had made to him and investigators during debriefing and trial preparations sessions, and took "too casual an approach" to his discovery obligations, bar counsel had failed to prove "actual knowledge" by prosecutor of exculpatory evidence).

What do those three cases have in common? All involved so-called “impeachment evidence,” which the prosecutor is required to disclose to the defendant under the Due Process Clauses of the Fifth and Fourteenth Amendments if the evidence has any reasonable probability of affecting the outcome of a criminal case.<sup>5</sup> Impeachment is the process of challenging a witness with the objective of weakening or discrediting his testimony. “Impeachment evidence” is any evidence that can be used by the defendant—typically on cross-examination—to undermine the credibility of a government witness. It includes promises, rewards, and inducements made by the prosecution to its witnesses that might establish the witness’s bias in favor of the government; prior statements inconsistent with the witness’s trial testimony that could be used on cross-examination to show fabrication or mistake; acts or conduct showing the witness’s motive of ill will or hostility toward the defendant; past misconduct of the witness showing character for dishonesty; and medical, mental health, or addiction issues that might cloud the witness’s ability to perceive, remember, or narrate.

Deciding whether and when to disclose impeachment evidence is one of the thorniest problems prosecutors face.<sup>6</sup> The impeachment concept has almost limitless elasticity, and it can be difficult for prosecutors to assess the “materiality” of impeachment evidence before a trial has commenced and the parties’ strategies (and witness lists) have crystallized. There is also an ever-present danger that some impeachment material might be possessed by government agents investigating the case but unknown to the prosecutor.<sup>7</sup> Finally, impeachment disclosures risk exposing witnesses to harassment, intimidation, and embarrassment before trial. Due to these problems and uncertainties, many prosecutors now draft plea agreements to require the defendant to waive disclosure of impeachment evidence upon a guilty plea to avoid efforts to reopen a conviction should such information come to light after sentencing.<sup>8</sup>

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5. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

6. See Bruce A. Green, *Beyond Training Prosecutors About Their Disclosure Obligations: Can Prosecutors’ Offices Learn from Their Lawyers’ Mistakes?*, 31 *CARDOZO L. REV.* 2161, 2179 (2010).

7. See *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (construing *Brady v. Maryland* to require prosecutors to “learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police”).

8. A typical federal plea agreement includes a waiver provision such as the following: The defendant understands that discovery may not have been completed in this case, and that there may be additional discovery to which he would have access if he elected to proceed to trial. The defendant agrees to waive his right to receive this additional

There are now serious battles looming over the disclosure of impeachment information that have the potential to pit prosecutors against bar disciplinary authorities. This issue is reminiscent of the controversies in the mid-1990s over then Model Rule 3.8(f) (the attorney subpoena rule) and Model Rule 4.2 (the no-contact rule), each of which raised fundamental constitutional questions regarding who has the power to regulate the conduct of federal prosecutors practicing in U.S. courts.<sup>9</sup> Government attorneys argue that there is no constitutional duty to disclose impeachment evidence before trial unless it is “material” (that is, possibly outcome determinative)<sup>10</sup> and no constitutional obligation whatsoever to disclose impeachment information prior to a guilty plea.<sup>11</sup> But in 2009, the Standing Committee on Ethics and Professional Responsibility of the American Bar Association (“ABA”) issued a formal ethics opinion construing Model Rule 3.8 to impose discovery obligations on prosecutors far broader than those imposed by the Due Process Clause and most states’ rules of criminal procedure.<sup>12</sup> If state bar disciplinary authorities follow the lead of the ABA and interpret their own rules of prosecutorial ethics in a similarly broad fashion, then they may force another showdown on the issue of who has the authority to regulate the discovery practices of this nation’s prosecutors with regard to impeachment material.

This Article proceeds in five parts. In Part I, I review the Supreme Court’s jurisprudence to date under the Due Process Clause with regard to the disclosure of exculpatory evidence. In Part II, I examine the nature and scope of impeachment evidence and the various factual contexts in which it might arise in criminal cases. I argue that impeachment material presents far greater complexities than “classically” exculpatory evidence for the reasons the Supreme Court recognized but failed adequately to explain in *United States v. Ruiz*.<sup>13</sup> In Part III, I discuss developments since the *Ruiz* decision—in

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discovery which may include, among other things, evidence tending to impeach the credibility of potential witnesses.

Erica G. Franklin, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of “Discovery” Waivers*, 51 STAN. L. REV. 567, 568 (1999).

9. See Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291, 315–16 (1992); Rory Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 FORDHAM L. REV. 355, 359–67 (1996).

10. *Bagley*, 473 U.S. at 682.

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

12. ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 454 (2009).

13. 536 U.S. 622 (2002).

particular, (1) efforts to amend the Federal Rules of Criminal Procedure to address disclosure of exculpatory and impeachment evidence that have gathered momentum since the *Stevens* dismissal but have been thus far successfully resisted by the Department of Justice (“DOJ”) and (2) calls to amend or interpret attorney conduct rules to broaden the government’s disclosure obligations. In Part IV, I argue that rules of criminal procedure are a far better vehicle than state attorney conduct rules to resolve the many competing interests and tensions at play with regards to impeachment evidence. Contrary to the positions taken by Professors McMunigal<sup>14</sup> and Yaroshefsky,<sup>15</sup> I argue that state disciplinary authorities should *not* follow the recent formal opinion of the ABA by adopting broad, burdensome, and inherently impractical interpretations of their professional conduct rules. This Part advances institutional competence and legitimacy arguments in favor of regulating certain questions of prosecutorial ethics through rules of criminal procedure rather than through rules of attorney conduct. In Part V, I argue that if any reform is undertaken, courts should adopt more specific rules of criminal procedure that categorize the specific types of impeachment material that must be turned over before a guilty plea.

#### I. EXCULPATORY EVIDENCE AND THE DUE PROCESS CLAUSE

In *Brady v. Maryland*, the Supreme Court ruled that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process . . . .”<sup>16</sup> The Court likened the withholding of exculpatory evidence by the prosecutor to the knowing presentation of perjured testimony, which it had previously declared to violate due process in *Mooney v. Holohan*.<sup>17</sup> According to the Court:

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 . . . .<sup>18</sup>

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14. Peter A. Joy & Kevin C. McMunigal, *ABA Explains Prosecutors’ Ethical Disclosure Duty*, 24 CRIM. JUST. 41, 44 (2010); Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957, 1025–26 (1989).

15. Ellen Yaroshefsky, *Ethics and Plea Bargaining—What’s Discovery Got to Do With It?*, 23 CRIM. JUST. 28, 28 (2008).

16. 373 U.S. 83, 87 (1963).

17. *Id.* at 86 (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)).

18. *Id.* at 87–88. Although the Court’s decision in *Brady* referenced the prosecutor’s constitutional duty to turn over exculpatory evidence “on request” of the defendant, subsequent cases recognized that this constitutional duty of disclosure exists whether the defendant

The primary principle supporting the *Brady* holding is the “avoidance of an unfair trial to the accused.”<sup>19</sup> Nine years after *Brady*, the Supreme Court enlarged its construction of constitutionally “exculpatory” evidence to encompass impeachment evidence.<sup>20</sup> In *Giglio v. United States*, the Supreme Court ruled that the government must disclose to the defendant any promises, rewards, or inducements made to a government witness in exchange for his testimony that would be helpful on cross-examination to show bias.<sup>21</sup> Although *Giglio* involved a promise of immunity, subsequent cases have made clear that impeachment material includes more than just agreements not to prosecute.<sup>22</sup> *Brady*, *Giglio*, and their progeny require a prosecutor to disclose to the defendant any evidence that may be used to impeach a key government witness on a material point of his testimony.<sup>23</sup> The Supreme Court has consistently treated impeachment evidence as a form of “evidence favorable to the accused” subject to the *Brady* disclosure standards.<sup>24</sup>

In determining when prosecutorial nondisclosure of exculpatory evidence violates due process, the good faith or bad faith of the prosecution is irrelevant.<sup>25</sup> The Supreme Court in *Kyles v. Whitley* essentially imposed an affirmative duty on the prosecutor to learn of any exculpatory evidence possessed by anyone “acting on the government’s behalf”<sup>26</sup> in the case, including government agents working on the investigative team.<sup>27</sup> Facts known to the police will

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specifically requests the withheld material, only generally requests exculpatory information, or files no discovery requests at all. *United States v. Bagley*, 473 U.S. 667, 682 (1985) (plurality opinion). In other words, the prosecutor’s duty to turn over evidence favorable to the accused is *self-executing*; it does not depend on the presence or precision of discovery requests filed by defense counsel. *See id.*

19. 373 U.S. at 87.

20. *Giglio v. United States*, 405 U.S. 150, 154–55 (1972).

21. *Id.*

22. *See United States v. Ruiz*, 536 U.S. 622, 628 (2002) (citing *Giglio* for the proposition that exculpatory evidence includes “evidence affecting witness credibility”) (internal quotation marks omitted); *Strickler v. Greene*, 527 U.S. 263, 263 (1999) (requiring disclosure when evidence is favorable to the accused, “either because it is exculpatory, or because it is impeaching”).

23. *Bagley*, 473 U.S. at 676 (rejecting any constitutional distinction between impeaching information and exculpatory evidence).

24. When the “reliability of a given witness may well be determinative of guilt or innocence,” nondisclosure of evidence “affecting [that witness’s] credibility” falls within the constitutional disclosure rule announced in *Brady*. *Id.* at 677 (quoting *Giglio*, 405 U.S. at 154).

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

26. *Kyles v. Whitley*, 514 U.S. 418, 437 (1995).

27. Whether an investigating agent will be considered to be a member of the “prosecution team” for *Brady/Giglio* purposes is a fact-specific inquiry. *See United States v. Meros*, 866 F.2d

thus be imputed to the prosecutor for *Brady/Giglio* purposes, whether or not the prosecutor had actual knowledge of them.<sup>28</sup>

*Brady* and its progeny involved exculpatory “evidence,” contemplating documents or testimony that the defendant could have used at trial to help establish his innocence or undermine the government’s proof.<sup>29</sup> Unsubstantiated tips, inadmissible hearsay, rumor, and innuendo favorable to the accused typically do not fall within the *Brady* disclosure rule, either because they are not admissible “evidence” or because they are unlikely to have led to evidence that could reasonably alter the trial result.<sup>30</sup>

Evidence will be considered “material” within the meaning of *Brady/Giglio* “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”<sup>31</sup> In *Kyles*, the Supreme Court clarified this standard, stating that evidence is material if it could “reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.”<sup>32</sup> The Court explained that a court reviewing a claim of *Brady* error need not decide whether the evidence, if disclosed, would have established innocence, but rather

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1304, 1309 (11th Cir. 1989). Not all government investigators will be considered agents of the prosecutor, if, for example, they work for a different sovereign or are not participating in the case under investigation. *See, e.g.*, *United States v. Reyerros*, 537 F.3d 270, 283 (3d Cir. 2008); *United States v. Risha*, 445 F.3d 298, 306 (3d Cir. 2006); *United States v. Antone*, 603 F.2d 566, 567–68 (5th Cir. 1979).

28. *See Strickler v. Greene*, 527 U.S. 263, 280–81 (1999) (quoting *Kyles*, 514 U.S. at 438).

29. *See Giglio*, 405 U.S. at 154; *Brady*, 373 U.S. at 87.

30. *See Wood v. Bartholomew*, 516 U.S. 1, 11 (1995) (ruling that undisclosed results of polygraph examinations on government witnesses did not require reversal where polygraph evidence was inadmissible under state law and defendant’s claim that knowledge of results could have led to admissible evidence or altered cross-examination was based on mere speculation). There is no uniform approach in the federal courts to the treatment of inadmissible “information” as the basis for *Brady* claims. *See generally* *Felder v. Johnson*, 180 F.3d 206, 212 & n.7 (5th Cir. 1999) (discussing different approaches taken by circuits and collecting cases). Some circuits and state supreme courts have ruled that if the withheld evidence was inadmissible, then it cannot be material under *Brady*. *See, e.g.*, *United States v. Wilson*, 605 F.3d 985, 1005 (D.C. Cir. 2010), *cert. denied*, 10-7456, 2010 WL 4604820 (U.S. Dec. 13, 2010); *Hoke v. Netherland*, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996); *Commonwealth v. Lambert*, 884 A.2d 848, 857 (Pa. 2005). Other circuits allow that inadmissible evidence can sometimes be material under *Brady*, if it could have led to the discovery of admissible evidence. *See, e.g.*, *Ellsworth v. Warden, N.H. State Prison*, 333 F.3d 1, 5 (1st Cir. 2003); *Wright v. Hopper*, 169 F.3d 695, 703 & n.1 (11th Cir. 1999).

31. *United States v. Bagley*, 473 U.S. 667, 682 (1985). In *Bagley*, the Court adopted a uniform standard of materiality to be applied to all instances of undisclosed exculpatory evidence, irrespective of whether the evidence withheld was specifically requested by the defendant, only generally requested, or not requested at all. *Id.*

32. *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).



“whether in its absence [the defendant] received a fair trial, understood as a trial resulting in a verdict worthy of confidence.”<sup>33</sup>

Many scholars have bemoaned the conflation of nondisclosure and prejudice in one test under *Brady*, decrying it as an unworkable standard and a circular spectacle.<sup>34</sup> In order to assess whether a piece of evidence is constitutionally material and thus subject to mandatory disclosure under due process standards, the prosecutor must look *ahead* to a trial that has not happened yet and predict how an appellate tribunal might *thereafter* assess its impact on that proceeding.<sup>35</sup> In other words, “*Brady* establishes a retrospective standard for establishing a prospective obligation.”<sup>36</sup> Notwithstanding the conceptual difficulties inherent in this task, the Supreme Court continues to adhere to materiality as an essential component of the *Brady* disclosure obligation. In *Strickler*, the Court stated that “there is never a real ‘*Brady* violation’ unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.”<sup>37</sup>

Difficulties in applying the *Brady* materiality standard in any predictable fashion—coupled with several high-profile instances of discovery lapses across the country—have led some scholars to call for abandonment of materiality as an element of a prosecutor’s disclosure obligation.<sup>38</sup> The current rhetoric about the failures of *Brady* seems to

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33. *Id.* at 434.

34. See Bennet L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685 (2006); Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541, 564; Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643, 659 (2002).

35. See Daniel S. Medwed, *Brady’s Bunch of Flaws*, 67 WASH. & LEE L. REV. 1533, 1542 (2010).

36. John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L. J. 437, 516 (2001).

37. *Strickler v. Greene*, 527 U.S. 263, 281 (1999); see *United States v. Coppa*, 267 F.3d 132, 135 (2d Cir. 2001) (“*Brady* does not, however, require the prosecution to disclose all exculpatory and impeachment material; it need disclose only material ‘that, if suppressed, would deprive the defendant of a fair trial.’”) (quoting *United States v. Bagley*, 473 U.S. 667, 675 (1985)). See generally Alafair S. Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L.J. 481, 487 (2009).

38. See Jennifer Blasser et al., *New Perspectives on Brady and Other Disclosure Obligations: Report on the Working Group of Best Practices*, 31 CARDOZO L. REV. 1961, 1963 (2010) (“The boundaries of the *Brady* decisions are uncertain and contested; because of the ‘materiality’ requirement they are not capable of being easily or mechanically applied . . . .”); Burke, *supra* note 37, at 483 (arguing that after 45 years of *Brady* jurisprudence “the judiciary has failed to provide coherent guidelines to prosecutors who remain uncertain of the scope of their disclosure obligations,” and advocating for move to open file discovery). See generally *Bagley*, 473 U.S. at 699–703 (Marshall, J., dissenting) (arguing that materiality standard is unworkable and prosecutor should be constitutionally required to disclose all evidence favorable to the defendant).

range from two extremes: the critics who view prosecutors as zealous advocates willing to “gamble” by withholding evidence on a close materiality determination in order to win at all costs<sup>39</sup> or the apologists who view prosecutors as honest but mistaken partisans frequently unable to recognize the materiality of exculpatory evidence due to their own cognitive biases, inexperience thinking from a defense point of view, and/or assimilation into the prosecutorial role.<sup>40</sup> Whichever form the discourse takes, frustrations with *Brady* have led the defense bar to look to rules of criminal procedure and attorney conduct rules as vehicles for imposing obligations on prosecutors to disclose evidence favorable to the accused beyond due process requirements.

## II. THE COMPLEX NATURE OF IMPEACHMENT EVIDENCE

Impeachment evidence is different from other forms of exculpatory evidence because it does not directly suggest that the defendant did not commit the crime; rather, it indirectly supports innocence (or failure of proof) by undermining the government’s affirmative evidence of guilt.<sup>41</sup> Nevertheless, the Supreme Court treats evidence affecting credibility as falling within the constitutional disclosure rule of *Brady*, which is discussed above. When a key witness’s reliability might be determinative of guilt or innocence, “nondisclosure of evidence affecting that witness’s credibility” falls within the general rule that suppression of material favorable evidence by the prosecution justifies a new trial.<sup>42</sup>

Impeachment material is any evidence having the potential to alter the jury’s assessment of the credibility of a significant prosecution witness.<sup>43</sup> It may include prior statements of the witness that are inconsistent with his anticipated trial testimony;<sup>44</sup> acts of dishonesty on the part of the witness that could be used to attack the witness’s character for truthfulness under Federal Rule of Evidence

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39. See, e.g., ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 4, 130–32 (Oxford Univ. Press 2007); Gershman, *supra* note 34, at 715–22.

40. See, e.g., Alafair S. Burke, *Talking About Prosecutors*, 31 *CARDOZO L. REV.* 2119, 2135 (2010); Prosser, *supra* note 34, at 569.

41. Douglass, *supra* note 36, at 497.

42. See *United States v. Giglio*, 405 U.S. 150, 153–54 (1972).

43. See *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) (citing *Giglio*, 405 U.S. at 154–55; *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

44. See, e.g., *United States v. Hanna*, 55 F.3d 1456, 1459 (9th Cir. 1995); *Goins v. Commonwealth*, 470 S.E.2d 114, 124 (Va. 1996).

608(b) or a corollary state evidentiary rule;<sup>45</sup> evidence that reveals that a witness has a bias, motive, or interest against the accused,<sup>46</sup> and evidence of promises made or rewards paid to a government witness in exchange for his cooperation and testimony.<sup>47</sup> Some evidence may be both factually exculpatory and impeaching, such as a witness's early identification of someone other than the defendant as the perpetrator or a prior inconsistent statement of the witness exculpating the defendant from participation in the crime.<sup>48</sup>

To appreciate the potential elasticity of the impeachment concept, consider the hypothetical scenarios described below:

Scenario 1: The alleged victim of a sexual assault gives several sequential interviews to a sexual assault nurse examiner, to a police officer, and later to the prosecutor as she prepares for grand jury testimony. The victim knew her alleged attacker because they had previously worked in the same office and the attack occurred after a company social event. Minor details of the victim's story change over the course of several interviews, including times, a description of the defendant's clothing and the words spoken by the defendant immediately preceding the attack. One composite report is written by the police officer after the details are clarified over the course of several interviews, although the police officer's notes reflect some of the discrepancies.

Scenario 2: The victim of a robbery at knife-point outside an automated teller machine ("ATM") later identifies his attacker from both a photo array and lineup. The victim was with three companions at the time of the attack, and each bystander also picked the defendant out of a photo array. One of the bystander witnesses had spent the earlier part of the evening at a party drinking alcohol.

Scenario 3: Defendant is charged with bank fraud for overstating his assets in several commercial real estate loans that

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45. See, e.g., *United States v. Kelly*, 35 F.3d 929, 936 (4th Cir. 1994).

46. See, e.g., *Berry v. Oswalt*, 143 F.3d 1127, 1132 (8th Cir. 1998).

47. See, e.g., *Tassin v. Cain*, 517 F.3d 770, 778 (5th Cir. 2008); *Bell v. Bell*, 512 F.3d 223, 244 (6th Cir. 2008).

48. See, e.g., *Giles v. Maryland*, 386 U.S. 66, 78–79 (1981) (vacating and remanding because undisclosed police report revealed victim had previously said only two of three defendants raped her); *Ferrara v. United States*, 456 F.3d 278, 291–92 (1st Cir. 2006) (affirming vacation of plea and sentence in organized crime prosecution where government failed to turn over recantation by key witness of claim that defendant had given him permission to kill one victim). As I will argue below, the greater includes the lesser: where evidence is both factually exculpatory and impeaching, it is perfectly appropriate to treat it as exculpatory for purposes of Rule 3.8(d) and pertinent rules of criminal procedure, and to require its disclosure prior to a guilty plea absent waiver. My argument in this paper addresses only evidence that is purely impeaching.

subsequently defaulted. The FBI agent leading the investigation has been accused of violating bureau policies with respect to confidential informants when he previously worked for the organized crime strike force. These allegations have not yet been substantiated or resolved, but the prosecutor is aware of the ongoing internal investigation.

Scenario 4: The elderly victim of a mugging at night picked the defendant out of a photo array and a lineup. As the prosecutor prepares the victim to testify at trial, the victim appears hesitant. She is very nervous about testifying and states that she is not sure whether she will be able to identify her attacker in the courtroom. As she prepares to leave the prosecutor's office, she states that she cannot remember where she parked her car.

Scenario 5: After a barroom fight, defendant is charged with assault and battery with a dangerous weapon (a beer bottle). The victim was hospitalized after the attack for severe contusions and lacerations. Responding officers interviewed several patrons at the bar who claim to have witnessed the argument and fight leading up to the alleged assault. One of the patrons tells a police officer that she "heard that the victim is a serious pothead."

Each of these scenarios presents one or more potential avenues for impeachment. As will be explored below, however, whether or not the information needs to be disclosed during discovery under prevailing constitutional norms is far from clear and will depend upon several factors; including, (1) whether the government intends to call the potential witness at trial; (2) how central that witness's testimony is likely to be in proving an element of the government's case in light of other available avenues of proof; (3) how strongly the particular form of impeachment is likely to undercut the witness's credibility in the minds of the jury; (4) whether the impeaching information is in the form of admissible evidence or inadmissible hearsay; and (5) whether the defendant opts for a trial or decides to plead guilty.

"Materiality" is more difficult to assess for impeachment evidence than it is for classically exculpatory evidence. With respect to the latter, the *Brady* standard asks the prosecutor to assess whether the exculpatory evidence, if made known to the jury, could have had any reasonable probability of affecting the outcome of the trial in light of other evidence of the defendant's guilt. Prudent prosecutors are urged to resolve doubtful cases in favor of disclosure.<sup>49</sup> With impeachment evidence, however, the prosecutor's task is far more nuanced. The prosecutor must first assess the centrality of the witness

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49. *Kyles v. Whitley*, 514 U.S. 419, 439 (1995).

to the government's proof in light of the entire case. Then, she must assess what particular aspect of the witness's testimony is likely to be impeached and the importance of that evidence; that is, is it a general form of impeachment intended to undermine the witness's credibility as to all aspects of his testimony (such as a prior criminal conviction or promise of immunity), or is it a specific form of impeachment that will likely be used by the defendant to undermine the witness's testimony on a particular point (such as a prior inconsistent statement)? Finally, the prosecutor must assess how powerfully the particular form of impeachment undermines the witness's credibility. For example, a prior act of dishonesty twenty years old that could be used to impeach the witness under Federal Rule of Evidence 608(b) (such as a youthful indiscretion of cheating or stealing) may be less probative of credibility than a more recent or more serious fabrication. For these reasons, appellate courts assessing post-conviction claims of undisclosed impeachment evidence struggle with the materiality issue and often produce split opinions.<sup>50</sup> If anything, their task—conducting a review of a completed trial record to determine if the proceedings were fair in

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50. See *United States v. Madori*, 419 F.3d 159, 169–70 (2d Cir. 2005) (majority concludes that testifying codefendant's undisclosed cooperation with the government in another investigation was not material in the context of entire case); *Wilson v. Whitley*, 28 F.3d 433, 439–42, 443 (5th Cir. 1994) (reversing grant of habeas corpus petition in state armed robbery prosecution where state failed to disclose police interview report with victim describing circumstances of attack and direction from which robbers approached; majority terms it a “close” and “extremely difficult” question of materiality, but ultimately concludes that defendant was not deprived of a fair trial; dissent concludes the report was material because it affected sole identifying witness's opportunity to view his assailants); *Britson v. Lewis*, No. 87-2815, 1988 WL 131765, at \*6, \*8 (9th Cir. Nov. 29, 1988) (affirming denial of habeas corpus petition in state first degree murder prosecution where prosecutor failed to turn over statement which would have enabled defense to locate impeachment witness who could have testified to drinking with critical eyewitness earlier on day of murder; dissent argues that impeachment on basis of inebriation could have undermined testimony “fundamental to the prosecution's case”); *Garrison v. Maggio*, 540 F.2d 1271, 1274 (5th Cir. 1976) (undisclosed supplemental police report revealed inconsistent statement by robbery victim about height and build of perpetrator; dissent argues it was material and could have created reasonable doubt); *State v. Curtis*, 384 So. 2d 396, 398–99 (La. 1980) (failure of sole eyewitness to shooting to identify defendant from earlier photo array was materially impeaching of in-court identification; dissent disagrees based on strength of other evidence in the case); *State v. Carter*, 449 A.2d 1280, 1306 (N.J. 1982) (Clifford, J., dissenting on issue of whether inconsistency between polygraph examiner's oral report and written report was material); *Hartman v. State*, 896 S.W.2d 94, 102, 112–13 (Tenn. 1995) (majority concludes that evidence prisoner was paid \$1000 to convince other inmate to testify against defendant not material within meaning of *Brady*, but dissent argues that fact that witness refused to speak with or provide any information to the state until after payment was made to a third person was “seriously damaging to his credibility and highly material”); see also *Strickler v. Greene*, 527 U.S. 263, 301 (1999) (Souter, J., dissenting) (dissenting on materiality of officer's undisclosed notes of interview with key witness: “Even keeping in mind these caveats about the appropriate level of materiality, applying the standard to the facts of this case does not give the Court easy answers, as the Court candidly acknowledges.”).

light of all the circumstances—is *easier* than the task a prosecutor faces prior to trial before the defense attorney’s strategy and trial theory have been laid bare.

Returning to the hypotheticals posed above, I suspect that most conscientious prosecutors would agree that the inconsistent statements made by the victim to the alleged acquaintance rape in Scenario 1 are impeachment evidence that must be disclosed under *Brady*. The real challenge for prosecutors in these situations is to make sure that there are mechanisms in place to capture inconsistencies reflected in sequential interviews because, under *Brady*, information possessed by government agents will be imputed to the prosecutor.<sup>51</sup> I further suspect that there would be widespread *disagreement* over whether the impeachment information in Scenarios 2 through 5 must be disclosed. If the government does not intend to call the third bystander to the ATM robbery as a witness in Scenario 2, then his potential intoxication is irrelevant. If the hearsay rumor that the victim of the attack in Scenario 5 was a drug user is not based on first-hand knowledge, then it is not “evidence” that would likely fall within the *Brady* rule.<sup>52</sup> Because the alleged police misconduct in Scenario 3 has not been substantiated, the prosecutor might not believe that it would be admissible to impeach the agent at trial. The strength of the possible impeachment with regard to the victim’s memory in Scenario 4 might be so slight that the prosecutor does not reasonably believe it would rise to the level of “material” evidence, especially in light of countervailing concerns for the victim’s privacy. While conscientious prosecutors might heed the Supreme Court’s admonition and “err on the side of transparency”<sup>53</sup> by disclosing these four avenues of impeachment prior to trial, these very same prosecutors might change their calculus dramatically were the defendants in each case to plead guilty.

It is these very complexities with regard to impeachment evidence that led the Supreme Court in 2002 to conclude that the Constitution does not require a prosecutor to turn over impeachment material before a guilty plea. Prior to *Ruiz*, the Supreme Court had

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51. *Kyles*, 514 U.S. at 437. See discussion of Ogden Memo, *infra* at notes 96–103 and accompanying text, wherein federal prosecutors are encouraged to have agents memorialize witness interviews other than trial preparation sessions, and preserve their notes. See also Robert P. Mosteller, *The Special Threat of Informants to the Innocent Who are not Innocents: Producing “First Drafts,” Recording Incentives, and Taking a Fresh Look at the Evidence*, 6 OHIO ST. J. CRIM. L. 519, 565–70 (2009) (recommending legislation that would require law enforcement officers to preserve all first drafts of informant interviews).

52. See *supra* note 30 and accompanying text.

53. *Cone v. Bell*, 129 S. Ct. 1769, 1783 n.15 (2009).

never explicitly addressed the timing requirement of *Brady* disclosures.<sup>54</sup> While the Court's opinion in *Ruiz* might have confused that timing issue more than it helped illumine it with regard to "classically" exculpatory evidence,<sup>55</sup> the Court nevertheless was quite clear about the low value it ascribed to impeachment evidence at the plea bargaining stage of a criminal proceeding.

In *Ruiz*, the Court ruled that the fair trial guarantees of the Fifth and Sixth Amendment were not violated where the government conditioned a fast-track plea offer on the defendant's waiver of her right to impeachment information.<sup>56</sup> Writing for a unanimous court,<sup>57</sup>

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54. See *United States v. Ruiz*, 536 U.S. 622, 629 (2002); *United States v. Beckford*, 962 F. Supp. 780, 785 (E.D. Va. 1997) (quoting *United States v. Anderson*, 481 F.2d 685, 690 n.2 (4th Cir. 1973), *aff'd*, 417 U.S. 211 (1974)). The Supreme Court in *Strickler* cited as justification for the exculpatory evidence obligation "the special role played by the American prosecutor in the search for truth in criminal trials." 527 U.S. at 281 (emphasis added). The language invoked by the Court in *Kyles*, *Bagley*, and *Agurs* discussing the evidence's likely impact on the trial proceedings also suggests that *Brady* material must be disclosed prior to trial, or at least early enough during the trial for the defendant to make effective use of it at that proceeding. See *Kyles*, 514 U.S. at 434; *United States v. Agurs*, 427 U.S. 97, 108 (1986); *United States v. Bagley*, 473 U.S. 667, 675 (1985). Some circuits have confronted this timing issue in explicating the relationship between *Brady* and the Jencks Act, which is codified at 18 U.S.C. § 3500(b) and requires federal prosecutors to turn over a witness's statements after that witness has testified on direct examination. A potential conflict between the Jencks Act and *Brady* arises where a written, recorded or adopted statement of a witness contains exculpatory information, such as impeachment material or evidence suggesting factual innocence. Some circuits have ruled that where evidence is both *Brady* and Jencks material, disclosure after the witness has testified on direct examination pursuant to Jencks meets the timeliness requirement of *Brady*. See, e.g., *United States v. Presser*, 844 F.2d 1275, 1283 (6th Cir. 1988); *United States v. Jones*, 612 F.2d 453, 455 (9th Cir. 1980); *United States v. Scott*, 524 F.2d 465, 467 (5th Cir. 1975). Other circuits have ruled that the due process concerns of *Brady* might, under certain circumstances, require pretrial disclosure of Jencks Act material. See, e.g., *United States v. Rittweger*, 524 F.3d 171, 181 n.4 (2d Cir. 2008); *United States v. Starusko*, 729 F.2d 256, 263 (3d Cir. 1984); *United States v. Pollack*, 534 F.2d 964, 974 (D.C. Cir. 1976).

55. See *United States v. Buendo*, 701 F. Supp. 937, 939–40 (D. Mass. 1988), *aff'd sub nom. United States v. Penta*, 923 F.2d 839 (1st Cir. 1990) (distinguishing classic exculpatory evidence from impeachment evidence).

56. *Ruiz*, 536 U.S. at 633. It is important to recognize the unique procedural context in which *Ruiz* arose, because the Court addressed the *Brady* doctrine's application to guilty pleas in a case that presented that issue only indirectly. Kevin C. McMunigal, *Guilty Pleas, Brady Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. REV. 651, 663–64 (2007). In response to a large volume of narcotics trafficking arrests in the southwestern part of the United States, several United States Attorneys' Offices in the 1990s developed a so-called "fast track" plea system whereby defendants waived their right to indictment, their right to file pretrial motions, their right to certain discovery, and their right to contest deportation proceedings in exchange for sentencing concessions. *Ruiz* was offered such a fast-track agreement upon her arrest for transporting thirty kilograms of marijuana into the United States, but she rejected it. She later pleaded guilty and was sentenced to a longer period of incarceration than she would have been under the proposed fast track plea agreement (18 to 24 months as opposed to 12 to 18 months). Following her conviction, *Ruiz* claimed that the conditions of the fast track plea agreement were unconstitutional because they required her to forego her rights to *Brady* material, and that she

Justice Breyer concluded that *Brady* does not require the government to turn over impeachment evidence<sup>58</sup> or evidence supporting possible affirmative defenses (e.g., insanity, self-defense, entrapment) prior to a guilty plea. The Court rested its reasoning primarily on concerns for the efficient administration of justice, determining that the costs of such disclosure would far outweigh its benefits to the accused.<sup>59</sup> If impeachment material must be tracked down and disclosed to a defendant prior to a guilty plea, one of the government's primary incentives for engaging in plea bargaining—disposing of cases simply and quickly—would be eliminated. The Court stated that such a construction of a defendant's due process rights could "require the Government to devote substantially more resources to trial preparation prior to plea bargaining, thereby depriving the plea-bargaining process of its main resource-saving advantages."<sup>60</sup>

Moreover, the Court considered impeachment information particularly important "in relation to the *fairness of a trial*, not in

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should have been provided the two-level downward departure recommended by the government in the proposed fast-track plea agreement. The Ninth Circuit Court of Appeals agreed, ruling that a guilty plea cannot be considered knowing and voluntary if it is made without knowledge of *Brady* material withheld by the prosecutor, and that the Constitution therefore prohibits a waiver of the sort proposed by the government in *United States v. Ruiz*. 241 F.3d 1157, 1164 (9th Cir. 2001). The Supreme Court could have resolved the case by assuming without deciding that all forms of *Brady* material must be turned over prior to a guilty plea, and resting its decision simply on the ground that such a constitutional right, like others, could be waived by the defendant. But the Court did not limit its opinion to the consideration of waivability. Instead, Justice Breyer's opinion addressed the disclosure obligation directly, and held that under *Brady* defendants have no constitutional right to disclosure of information relevant to either impeachment or affirmative defenses prior to a guilty plea. *Ruiz*, 536 U.S. at 633. Evidence supporting factual innocence was not waived or alleged to have been withheld in *Ruiz*, so the Court did not address whether a waiver of this most substantial form of exculpatory evidence was enforceable, or whether a plea of guilty in the face of its nondisclosure could later be vacated. *See id.* at 631.

57. Justice Thomas concurred only in the judgment, seeming to suggest that, because *Brady* was intended to protect a defendant's right to a fair trial, it may have no application whatsoever to a prosecutor's discovery obligations prior to a guilty plea. *See Ruiz*, 536 U.S. at 633–34 (Thomas, J., concurring).

58. The Court reached the same conclusion with regard to evidence supporting affirmative defenses (e.g., insanity, self-defense, entrapment). In one short paragraph at the end of the *Ruiz* opinion, and without undertaking a separate analysis of just how probative affirmative defense evidence may be of innocence or the costs/benefits of mandating its disclosure prior to a guilty plea, the Court equated affirmative defense evidence with impeachment evidence, and concluded that the two should be treated similarly for the purposes of due process clause analysis. *Id.* at 633. Discussion of a prosecutor's ethical obligations with regard to affirmative defense evidence is beyond the scope of this article.

59. *Id.* at 631.

60. *Id.* at 632.



respect to whether a plea is *voluntary*.”<sup>61</sup> Since the Court has never created a constitutional right to discovery in criminal cases, during plea negotiations the prosecutor has no constitutional duty to disclose *incriminating* evidence to the accused (although she may have every strategic incentive to do so to encourage a plea).<sup>62</sup> Because disclosure of inculpatory evidence is not constitutionally mandated, the Court reasoned that it made little sense to impose a constitutional duty on the prosecutor to disclose evidence that tends to undercut such affirmative proof.<sup>63</sup> The value of impeachment information to defendants during plea negotiations varies with their awareness of the prosecutor’s case in chief, which the Court characterized as “random” and not a matter of constitutional concern.<sup>64</sup> Finally, the Court felt that imposing a duty to disclose impeachment material prior to a guilty plea could reveal the identity of informants and undercover agents and jeopardize the physical safety and security of other potential witnesses who might be subject to tampering or intimidation. These risks had already been addressed by Congress through the carefully drawn witness statement disclosure requirements of the Jenks Act, which mandates the disclosure of certain witness statements only after the witness has testified on direct examination.<sup>65</sup>

Whether and how much of the *Brady* doctrine survives *Ruiz* in the context of guilty pleas remains uncertain. It is abundantly clear that the Supreme Court has severely *restricted Brady’s* role in preplea discovery,<sup>66</sup> if it did not eliminate it altogether.<sup>67</sup> There remains a narrow opening for the Court to rule that due process requires a prosecutor to disclose evidence supporting factual innocence prior to a guilty plea or that an express waiver of such evidence as a legal matter cannot possibly be knowing and voluntary due to the centrality

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61. *Id.* at 629 (internal parenthetical omitted).

62. *See Weatherford v. Bursey*, 429 U.S. 545, 559 (1997).

63. *Ruiz*, 536 U.S. at 629, 633.

64. *Id.* at 623.

65. *Id.* at 631–32.

66. McMunigal, *supra* note 56, at 664.

67. Whether the Supreme Court will develop any future theory to require preplea disclosures of evidence bearing on factual innocence remains to be seen. It has certainly left open the possibility of ruling that *Brady* is merely a trial right and does not apply at all to the plea bargaining context. Some circuits since *Ruiz* have ruled that *Brady* is a trial right and that even evidence that supports factual innocence need not be disclosed prior to a change of plea, reminiscent of Justice Thomas’s concurrence in *Ruiz*. *See, e.g., United States v. Conroy*, 567 F.3d 174, 179 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 1502 (2010); *see also United States v. Mathur*, 624 F.3d 498, 507 (1st Cir. 2010) (dictum); *United States v. Moussauoui*, 591 F.3d 263, 285 (4th Cir. 2010) (dictum).

of such information to the defendant's exercise of volition.<sup>68</sup> With regard to impeachment information, however, the Court was clear and spoke with one voice: due process does not require its disclosure by the prosecution prior to a guilty plea, irrespective of materiality and irrespective of the presence or absence of an express waiver.

### III. POST-*RUIZ* DEVELOPMENTS: REACTION BEGETS COUNTER-REACTION

When the Constitution fails, try legislation.<sup>69</sup> Since *Ruiz*, members of the profession who believe that more fulsome disclosures will enhance the fairness and accuracy of guilty pleas have shifted their lobbying efforts toward bar disciplinary authorities and the drafters of rules of criminal procedure.<sup>70</sup> The DOJ has strategically forestalled efforts to amend Rule 16 of the Federal Rules of Criminal Procedure by issuing a series of pointed directives providing guidance to federal prosecutors about their discovery obligations and, in limited circumstances, by requiring disclosure slightly beyond the requirements of *Brady*. But the Department has not made any significant concessions on impeachment evidence. An impasse seems imminent, if not already at hand. Now the ABA Standing Committee on Ethics and Professional Responsibility has stepped into the fray to propose a broad new interpretation of Model Rule 3.8(d) that has significant implications for discovery in the guilty plea context. Each of these developments will be discussed in turn.

#### A. Federal Rule of Criminal Procedure 16

Efforts by the trial bar to amend Rule 16<sup>71</sup> began very soon after the *Ruiz* decision. In 2003 the American College of Trial Lawyers

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68. Some federal courts after *Ruiz* have allowed defendants to challenge the voluntariness of their guilty pleas based on the failure of the government to disclose evidence supporting factual innocence. See *Ferrara v. United States*, 456 F.3d 278, 294 (1st Cir. 2006) (explaining that failure to disclose evidence may be sufficiently outrageous to constitute the conduct that is needed to ground a challenge to the validity of a guilty plea); *United States v. Lestrick*, 82 F. App'x 4, 6 (10th Cir. 2003) (unpublished opinion) ("[U]nder certain limited circumstances, the prosecution's violation of *Brady* can render a defendant's plea involuntary.") (quoting *United States v. Wright*, 43 F.3d 491, 496 (10th Cir. 1994)).

69. See Barry Tarlow, *Brady/Giglio Disclosures: Beware of Prosecutors Bearing Gifts*, 30 CHAMPION 60, 70 (2006).

70. See McMunigal, *supra* note 56, at 670.

71. Rule 16 of the Federal Rules of Criminal Procedure, as presently written, does not mention exculpatory evidence. FED. R. CRIM. P. 16. Indeed, the primary focus of the Rule is on disclosure to the accused of *inculpatory* evidence intended to be relied on by the government at

(“ACTL”) proposed modifying Rule 16 to impose a duty on the government to disclose any “information favorable to the defendant” within fourteen days of request by the accused.<sup>72</sup> The ACTL proposal would also have created a requirement of due diligence by the prosecutor in collecting favorable information from government agents. A corresponding amendment to Rule 11 would have required any favorable information subject to disclosure under Rule 16(f) to be disclosed to the defendant fourteen days *prior to a guilty plea*. The combined effect of these amendments would have been to dispense with the materiality element of *Brady* and to reverse the effect of *Ruiz* in terms of disclosure of impeachment evidence and evidence supporting affirmative defenses before a change of plea.<sup>73</sup> The scope of impeachment information that would be subject to preplea disclosure under the ACTL proposal was thus incredibly broad. ACTL’s proposal never received the recommendation of the Advisory Committee on Criminal Rules.<sup>74</sup>

In 2006 a second proposal to amend Rule 16 made it out of the Advisory Committee on Criminal Rules and onto the agenda of the Standing Committee of Rules of Practice and Procedure for the U.S. Judicial Conference. By an 8–4 vote, the Advisory Committee on September 5, 2006, recommended requiring federal prosecutors in criminal cases to disclose to the defense upon request “all exculpatory and impeaching information.”<sup>75</sup> The effect of this amendment would have been to require prosecutors to turn over all exculpatory and impeachment evidence without regard to materiality, absent waiver by the defendant or a protective order of the court.<sup>76</sup> However, the

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trial and thus “material to preparing the defense” of the accused. *See id.* Specific evidence mandated for disclosure by the government upon the request of the defendant under Rule 16 includes written or recorded statements of the defendant; the substance of oral statements of the defendant made to government agents upon interrogation; the defendant’s prior criminal record; documents, objects and tangible things the government intends to use at trial in its case in chief, reports of physical examinations and scientific tests; and, a written summary of expected expert testimony. *Id.* Unlike discovery rules in many states, Rule 16 does not require federal prosecutors to turn over a witness list prior to trial. *Id.* Congress has required the government to disclose its list of witnesses before trial only in capital cases. *See* 18 U.S.C. § 3432 (2006).

72. American College of Trial Lawyers, *Proposed Codification of Disclosure of Favorable Information Under Federal Rules of Criminal Procedure 11 and 16*, 41 AM. CRIM. L. REV. 93, 95 (2004).

73. *See id.* at 115–16.

74. Yaroshefsky, *supra* note 15, at 28.

75. *See* Stephen Spivack, David Roth & Daniel Golden, *Troubling the Heavens: The Production of Evidence Favorable to Defendants by the United States*, 30 CHAMPION 24 (2010).

76. LAUREL HOOPER & SHELIA THORPE, FED. JUDICIAL CTR., *BRADY V. MARYLAND MATERIAL IN THE UNITED STATES DISTRICT COURTS 23* (May 2007), available at [http://www.fjc.gov/public/pdf.nsf/lookup/bradyma2.pdf/\\$file/bradyma2.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/bradyma2.pdf/$file/bradyma2.pdf).

proposed amendment effectively preserved the result in *Ruiz* by authorizing the withholding of impeachment material, at least where the defendant pleaded guilty well in advance of the scheduled trial date. The second sentence of the 2006 proposal provided that “[t]he court may not order disclosure of impeachment information earlier than 14 days before trial.”<sup>77</sup> Notwithstanding this limitation, the DOJ strongly opposed the amendment to Rule 16 because it would extend disclosure requirements beyond *Brady* and create conflicts between Rule 16 and the Jencks Act.<sup>78</sup> The Department argued instead that modifications to the U.S. Attorneys’ Manual might help clarify and bring uniformity to federal prosecutors’ discovery practices across the country.<sup>79</sup> The Standing Committee took no action on the Advisory Committee’s 2006 recommendation, deciding to not publish it for public comment and to table further consideration indefinitely.<sup>80</sup>

In truth, the amendments to the U.S. Attorneys’ Manual that successfully forestalled rules reform in 2006 did very little to alter prevailing practice with respect to the disclosure of impeachment evidence. First, the Manual is advisory only and creates no enforceable rights in federal court.<sup>81</sup> But more importantly, what it purports to give with one hand (the promotion of disclosures beyond *Brady*), it takes away with the other. The Manual claims to require disclosures beyond those constitutionally mandated in three respects: (1) by requiring disclosure of exculpatory and impeachment “information,” regardless of whether such information is in the form of admissible evidence;<sup>82</sup> (2) by requiring disclosure of such information “regardless of whether it is intended to make the difference between conviction and acquittal of the defendant for a charged crime”;<sup>83</sup> and (3) with regard to classically exculpatory information, by requiring

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77. *Id.*

78. *Id.* at 6. See discussion *supra* note 54 and *infra* note 212 and accompanying text.

79. Ellen S. Podgor, *Pleading Blindly*, 80 MISS. L.J. 1633 (2011).

80. SUMMARY OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 29–30 (Sept. 2007), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2007.pdf>. The Standing Committee deferred further consideration of the proposed amendment in part based on its desire “to obtain information about the experience with the Department of Justice’s recent revisions to its U.S. Attorneys’ Manual.” *Id.* at 29.

81. See Spivack, Roth & Golden, *supra* note 75, at 25 n.22 and cases cited. See also U.S. ATT’YS’ MAN. § 9-5.001(F) (“This expanded disclosure policy, however, does not create a general right of discovery in criminal cases. Nor does it provide defendants with any additional rights or remedies.”), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/5mcrm.htm](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm).

82. U.S. ATT’YS’ MAN., *supra* note 81, § 9-5.001(C)(3).

83. § 9-5.001(C)(1), (2).

disclosure “reasonably promptly after it is discovered.”<sup>84</sup> On the subject of impeachment information,<sup>85</sup> however, the policy takes a very curious turn. Having ostensibly abandoned materiality as a consideration for federal prosecutors with the language cited above, the Manual later reintroduces concepts of materiality with regard to impeachment information by suggesting that a prosecutor should disclose the following: information that casts “*substantial* doubt upon the accuracy of any evidence . . . the prosecutor intends to rely on to prove an element of any crime” and information that “might have a *significant* bearing on the admissibility of prosecution evidence.”<sup>86</sup> These italicized words clearly indicate some threshold level of importance or likely causal impact.<sup>87</sup> Moreover, with regard to the timing of impeachment disclosures, the Manual recognizes that what constitutes impeachment evidence depends on the prosecutor’s decision “on who is or may be called as a government witness,” so that disclosure of this category of information may be made closer to trial, at trial, or even in camera, if the interests of witness security or national security so require.<sup>88</sup> As a practical matter, therefore, the revisions to the Manual make very few changes to discovery with regard to disclosure of impeachment information; they certainly do not either abandon a materiality element altogether or upset the *Ruiz* determination that impeachment evidence need not be turned over prior to a guilty plea.<sup>89</sup>

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84. § 9-5.001(D)(1).

85. The preface to section 9-5.100 states that “[t]he exact parameters of potential impeachment information are not easily determined” but “may include . . . (a) specific instances of conduct of a witness for the purpose of attacking the witness’ credibility or character for truthfulness; (b) evidence in the form of opinion or reputation as to a witness’ character for truthfulness; (c) prior inconsistent statements; and (d) information that may be used to suggest a witness is biased.” § 9-5.100.

86. §9-5.001(C)(2) (emphasis added).

87. In fact, the U.S. Attorneys’ Manual unapologetically reintroduces concepts of materiality after purporting to abandon them in the immediately preceding sentence. See § 9-5.001(C) (“This policy requires disclosure by prosecutors of information beyond which is ‘material’ to guilt . . . . The policy recognizes, however, that a trial should not involve consideration of information, which is irrelevant or not significantly probative of the issues before the court and should not involve spurious issues or arguments which serve to direct the pretrial process from examining the genuine issues. Information that goes only to such matters does not advance the purpose of a trial and thus is not subject to disclosure.” (citations omitted)).

88. See § 9-5.001(D)(2) (citing Jencks Act); § 9-5.001(A) (citing Classified Information Procedures Act).

89. Arguably, the flow of information from investigative agents to the prosecutor was improved somewhat by section 9-5.001, which requires any law enforcement agency within the Department of Justice (DOJ) to provide impeachment material to Assistant U.S. Attorneys, to appoint a designated supervisor to receive requests for impeachment material, and to establish a system for collecting and producing it. § 9-5.001.

On the heels of the dismissal of the *Stevens* case in 2009, the presiding judge in that case, Judge Emmet G. Sullivan, wrote a letter to the Advisory Committee on Criminal Rules trying to breathe new life into proposals to amend Rule 16. Citing the history of high-profile *Brady* violations in federal court and the Supreme Court's admonition that "the prudent prosecutor [should] err on the side of transparency, resolving doubtful questions in favor of disclosure,"<sup>90</sup> Judge Sullivan called for amending Rule 16 to require disclosure of "all exculpatory and impeachment information" to the defense without regard to materiality and irrespective of any specific request from the accused.<sup>91</sup> Unlike the 2006 proposed amendment, the effect of Judge Sullivan's proposal, if enacted, would have been to require disclosure of all impeachment evidence known to the government before a guilty plea,<sup>92</sup> unless expressly waived by the defendant. In October 2009 Assistant Attorney General and Chief of the Criminal Division Lanny Breuer addressed the Committee and indicated that, although the DOJ would not object to amending Rule 16 to codify the government's *Brady* obligations, it objected strenuously to any proposed amendment of the rule that would extend *Brady* as to either scope (e.g., materiality) or timing.<sup>93</sup>

At least partly in an effort to blunt the momentum for Rule 16 reform spurred by the *Stevens* dismissal,<sup>94</sup> in 2009 Attorney General Eric Holder appointed a task force of experienced prosecutors, investigative agents, and information technology professionals from the DOJ to study discovery practices in federal criminal cases.<sup>95</sup> Following this study, on January 4, 2010, Deputy Attorney General David Ogden issued an updated directive to federal prosecutors addressing their disclosure obligations (hereinafter the "Ogden

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90. *Cone v. Bell*, 129 S. Ct. 1769, 1783 n.15 (2009).

91. Letter from Hon. Emmet G. Sullivan to Hon. Richard C. Tallman, Chair, Judicial Conference Advisory Comm. on the Rules of Criminal Procedure (Apr. 28, 2009), available at <http://lawprofessors.typepad.com/files/exhibit-b---judge-sullivan-letter.pdf>.

92. It is clear from the context of Judge Sullivan's April 2010 letter that he uses the term "exculpatory evidence" in its broad sense to include impeachment evidence, because he quotes a section from the transcript of the hearing to set aside the Steven's verdict in which the prosecutor acknowledges that the failure to turn over a variance in the statement of government witness Bill Allen was *Giglio* material. See *id.* and discussion *infra* note 277 and accompanying text.

93. Joe Palazzolo, *Justice Department Opposes Expanded Brady Rule*, MAIN JUSTICE (Oct. 15, 2009, 12:43 AM), <http://www.mainjustice.com/2009/10/15/justice-department-opposes-expanded-brady-rule/>.

94. See *United States v. Jones*, 620 F. Supp.2d 163, 171 (D. Mass. 2009) (describing "ardent and successful" efforts by Department of Justice to defeat proposed amendments to Rule 16).

95. Podgor, *supra* note 79, at 1.

Memo”).<sup>96</sup> The Ogden Memo was intended to “establish a methodical approach to consideration of discovery obligations . . . to avoid lapses that can result in consequences adverse to the Department’s pursuit of justice.”<sup>97</sup> Although it reiterates the DOJ’s previously stated policy in the 2006 U.S. Attorneys’ Manual revisions that disclosure of exculpatory evidence should be broader than due process safeguards,<sup>98</sup> the primary focus of the directive is on better training and supervision of prosecutors.<sup>99</sup> Its sole real innovations are (1) to call on discovery coordinators in each U.S. Attorney’s Office to conduct annual training and serve as on-location advisors for trial attorneys;<sup>100</sup> (2) to direct individual prosecutors to be vigilant in gathering and reviewing potentially discoverable information from the files of investigative agencies, including emails and handwritten notes of agents;<sup>101</sup> and (3) to provide a useful checklist for line attorneys of potentially discoverable information.<sup>102</sup> The Ogden Memo certainly breaks no new ground with respect to the timing or scope of impeachment disclosures<sup>103</sup> or the ability of prosecutors to seek waivers of such discovery as a condition of a plea agreement.<sup>104</sup> On the contrary, the Memo lists a number of “countervailing” considerations that might justify federal prosecutors’ departure from the Memo’s stated presumption of “broad and early” discovery, including protecting victims and witnesses from intimidation or harassment, protecting the

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96. The “Ogden Memo” is actually a series of three memoranda issued by Deputy Attorney General Ogden on the same day: a “Summary” of actions taken in response to the report of the working group, a “Directive” to all United States Attorneys and Heads of Department Litigating Components Handling Criminal Matters, and a “Memorandum for Department Prosecutors.” See Memorandum from David W. Ogden, Deputy Att’y Gen., to Dep’t Prosecutors (Jan. 4, 2010) [hereinafter Summary of Actions Memo] (regarding “Issuance of Guidance and Summary of Actions Taken in Response to the Report of the [DOJ] Criminal Discovery and Case Management Working Group”), available at <http://www.justice.gov/dag/dag-memo.pdf>; Memorandum from David W. Ogden, Deputy Att’y Gen., to Heads of Dep’t Litigating Components and all U.S. Att’y’s (Jan. 4, 2010) (regarding “Requirement for Office Discovery Policies in Criminal Matters”), available at <http://www.justice.gov/dag/dag-to-usas-component-heads.pdf>; Memorandum from David W. Ogden, Deputy Att’y Gen., to Dep’t Prosecutors (Jan. 4, 2010) [hereinafter Main Memo] (regarding “Guidance for Prosecutors Regarding Criminal Discovery”), available at <http://www.justice.gov/dag/discovery-guidance.pdf>.

97. Main Memo, *supra* note 96, at 1.

98. *Id.* at 7.

99. See Green, *supra* note 6, at 2163.

100. See Main Memo, *supra* note 96, at 9; Summary of Actions Memo, *supra* note 96, at 3.

101. Main Memo, *supra* note 96, at 4–6.

102. *Id.* at 3–7.

103. As a further example of how the DOJ continues to adhere to a materiality standard for impeachment disclosures, see *id.* at 7–8, where prosecutors are urged to memorialize and turn over “material variances” in a witness’s statement.

104. Podgor, *supra* note 79, at 12.

privacy interests of witnesses, protecting privileged information, protecting the integrity of ongoing investigations, and protecting national security interests.<sup>105</sup>

It appears that the DOJ's focus on heightened training and clarified discovery policies may once again have been successful at forestalling Rule 16 reform. At its April 11–12, 2011, meeting in Portland, Oregon, the Advisory Committee considered a “discussion draft” of a proposed amendment to Rule 16 prepared by its Chair, Judge Richard C. Tallman of the Ninth Circuit Court of Appeals.<sup>106</sup> The draft would have required prosecutors to turn over all “exculpatory” information to the defense at least fourteen days before trial and all “impeachment” information to the defense at least seven days before trial.<sup>107</sup> Exculpatory information was defined as any information “inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense,” significantly excluding any materiality element.<sup>108</sup> Impeachment information was defined as information “that casts *substantial* doubt upon the accuracy of any witness testimony that the government intends to rely on to prove an element of any crime charged.”<sup>109</sup> The discussion draft gave prosecutors the unreviewable option to withhold discovery if they filed an *ex parte* affidavit under seal explaining why the government believed in good faith that such pretrial disclosure would “threaten the safety of witnesses, victims, or the public; jeopardize national security; or lead to obstruction of justice.”<sup>110</sup> Notwithstanding the presence of this escape valve, Assistant Attorney General Lanny Breuer once again filed a letter with the Advisory Committee opposing the discussion draft.<sup>111</sup> Breuer's primary objections in this letter were that the Department's “comprehensive steps” to improve discovery practices within the Department had already “resulted in dramatic and positive change”;<sup>112</sup> that “expanding the scope of required prosecutorial disclosure” was

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105. Main Memo, *supra* note 96, at 9.

106. ADVISORY COMM. ON CRIMINAL RULES, AGENDA BOOK, APR. 11–12, 2011 MEETING, available at <http://www.uscourts.gov/uscourts/RulesandPolicies/rules/Agenda%20Books/Criminal/CR2011-04.pdf>. [hereinafter “AGENDA BOOK”].

107. Memorandum from Hon. Richard C. Tallman to Criminal Rules Advisory Comm. (Mar. 25, 2011), in AGENDA BOOK, *supra* note 106, tab III.C, at 6.

108. *Id.*

109. *Id.* (emphasis added).

110. *Id.* at 7.

111. Letter from Lanny Breuer to Hon. Richard Tallman (Mar. 18, 2011), in AGENDA BOOK, *supra* note 106, tab III.C, at 5.

112. *Id.* at 4.



the wrong approach to ensuring that prosecutors meet their current constitutional disclosure obligations;<sup>113</sup> and that the definition of impeachment information “would require decades of litigation to clarify what categories . . . meet the new definition.”<sup>114</sup> Once again, the potential elasticity of the impeachment concept seemed to be a primary sticking point for the DOJ: Breuer argued that the new rule would “create tremendous uncertainty” and “expose witnesses to greater intrusions into their safety and privacy.”<sup>115</sup> After a spirited and contentious meeting, the Advisory Committee voted 6–5 not to go forward with any proposed amendment to Rule 16 this year.<sup>116</sup>

Given that over fifty percent of federal judges and ninety percent of defense attorneys recently surveyed by the Federal Judicial Center favor some form of codification of the government’s *Brady/Giglio* obligations,<sup>117</sup> the temporary defeat of Rule 16 reform at the national level will likely lead to efforts by individual federal district courts to modify their local criminal rules. Meanwhile, advocates for enhanced *Brady* disclosures have begun to focus their attention on attorney conduct rules and the professional responsibility of prosecutors.<sup>118</sup>

### B. ABA Model Rule 3.8(d)

Most states have enacted attorney conduct rules fashioned after ABA Model Rule 3.8(d),<sup>119</sup> which requires prosecutors to disclose exculpatory evidence to the defense. On its face, the “tends to negate the guilt of the accused” language of Rule 3.8(d)<sup>120</sup> provides little

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113. *Id.* at 5.

114. *Id.* at 9.

115. *Id.* at 6–7.

116. David Markus, *When Liberty is at Risk, Fair Disclosure Required*, DAILY BUS. REV., May 2, 2011, [www.dailybusinessreview.com/PubarticleDBR.jsp?id=1202492322147&hblogin=1#](http://www.dailybusinessreview.com/PubarticleDBR.jsp?id=1202492322147&hblogin=1#).

117. Mike Scarcella, *Divided on Discovery*, NAT’L L.J., Mar. 14, 2011.

118. Norman L. Reimer, *Federal Discovery Reform: DOJ’s Baby Steps are Inadequate*, 34 CHAMPION 7, 8 (2010) (“Considering that the Ogden memoranda are unlikely to produce tangible change, the defense bar should look beyond the narrow contours of *Brady* and pursue the ethics route to obtain discovery.”).

119. Niki Kuckes, *The State of Rule 3.8: Prosecutorial Ethics Reform Since Ethics 2000*, 22 GEO. J. LEGAL ETHICS 427 (2009). A chart showing states that have adopted the Model Rules may be found at [http://www.abanet.org/cpr/mrpc/alpha\\_states.html](http://www.abanet.org/cpr/mrpc/alpha_states.html).

120. Rule 3.8(d) provides that a prosecutor in a criminal case shall “make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.” MODEL RULES OF PROF’L CONDUCT R. 3.8(d) (1983).

helpful guidance on the pressing issue of whether and how much impeachment information must be turned over to a defendant prior to a guilty plea. The Supreme Court has twice suggested that Rule 3.8 may impose disclosure obligations on prosecutors broader than due process protections, although it has never precisely articulated how.<sup>121</sup> In July 2009 the ABA Standing Committee on Ethics and Professional Responsibility (hereinafter “Standing Committee”) stepped into this controversy and created a firestorm by issuing a bold and controversial opinion that could have serious implications for the timing and scope of impeachment disclosures.

In Formal Opinion 09-454, the Standing Committee stated explicitly that Model Rule 3.8 was intended to extend discovery obligations on prosecutors beyond constitutional requirements set forth by *Brady* and its progeny.<sup>122</sup> The Standing Committee then went on to discuss four important respects in which the ethical rule is broader than constitutional norms.

First, the Standing Committee stated that, unlike *Brady*, Rule 3.8 contains no materiality element.<sup>123</sup> Exculpatory evidence must be disclosed to the defendant whether or not it has a reasonable probability of affecting the outcome of the case.

Nothing in the rule suggests a de minimis exception to the prosecutor’s disclosure duty where, for example, the prosecutor believes that the information has only a minimal tendency to negate the defendant’s guilt, or the favorable evidence is highly unreliable.<sup>124</sup>

The Standing Committee based this determination not on the text of the rule itself, but rather on the history of the rule’s enactment. This argument from the rulemaking history is particularly unconvincing. Imposing a special duty on prosecutors to disclose exculpatory evidence dates as far back as the ABA Canons of Professional Ethics, which in 1908 contained the following provision: “The suppression of facts or the secreting of witnesses *capable of establishing the innocence*

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121. See *Cone v. Bell*, 129 S. Ct. 1769, 1783 n.15 (2009) (“Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor’s ethical or statutory obligations.”) (citing *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (“[T]he rule in *Bagley* . . . requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate.”)).

122. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 09-454 at 1 (2009) [hereinafter ABA Formal Op. 09-454].

123. *Id.* at 4–5.

124. *Id.* at 5.

of the accused is highly reprehensible.”<sup>125</sup> The words “capable of establishing” clearly denote some threshold of level of materiality, such as likelihood of influencing the proceedings. With the adoption of the Model Code in 1969, the ABA changed this language to the “tends to negate guilt” standard (now also found in Model Rule 3.8(d)).<sup>126</sup> Although the Committee suggests that “experts” at the time of the Model Code’s enactment were of the opinion that DR 7-103 imposed obligations beyond the due process standard, the Standing Committee cites only one such “expert.”<sup>127</sup> Moreover, the Standing Committee suggested that the Supreme Court’s decision in *United States v. Agurs*<sup>128</sup> somehow provides support for the proposition that Rule 3.8(d) contains no materiality element.<sup>129</sup> It is certainly true that *Agurs*—decided seven years after the enactment of DR 7-103 and later repudiated by *Bagley*—imposed a heavy burden on the defendant in the absence of a specific request to show that the withheld evidence created a reasonable doubt that did not otherwise exist.<sup>130</sup> While some lower courts following *Agurs* and preceding *Bagley* imposed a harmless error standard when dealing with withheld evidence that was specifically requested by the defendant,<sup>131</sup> the comment to Model Code 7-103(B) was modified following the *Agurs* decision to reiterate that materiality remained an element of the prosecutor’s ethical duty.<sup>132</sup> Irrespective of how the materiality element morphed from *Brady* through *Agurs* to *Bagley*, this history does nothing to undermine the proposition that materiality was considered an

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125. ABA CANONS OF PROF'L ETHICS, *Canon 5*, available at [http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons\\_Ethics.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/Canons_Ethics.authcheckdam.pdf) (emphasis added) (noting that the Preamble and Canons 1 through 32 were first adopted August 27, 1908).

126. See MODEL CODE OF PROF'L RESPONSIBILITY DR 7-103 (B).

127. See ABA Formal Op. 09-454, *supra* note 122, at 3 n.12 (citing Olavi Maru, ANN. CODE OF PROF'L RESPONSIBILITY 330 (Am. B. Found. 1979) (“[A] disparity exists between the prosecutor’s disclosure duty as a matter of law and the prosecutor’s duty as a matter of ethics.”)).

128. *United States v. Agurs*, 427 U.S. 97 (1976).

129. ABA Formal Op. 09-454, *supra* note 122, at 4 n.12 (citing *Agurs*, 427 U.S. 97).

130. *Agurs*, 427 U.S. at 107, 113. Nine years after *Agurs*, the Court in *Bagley* determined that the defendant bears the burden of proving that undisclosed evidence was material, irrespective of whether the undisclosed evidence was subject to a specific request, only a general request, or not request at all. *United States v. Bagley*, 473 U.S. 667, 682 (1985). See also discussion *supra* note 31 and accompanying text.

131. See Barbara Allen Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1153 (1982).

132. Distinguishing *Agurs*, the ABA in 1979 added a comment to DR 7-103(B) stating that the ethical rule does not impose “a restrictive view” of materiality. ABA MODEL CODE OF PROF'L RESPONSIBILITY, DR 7-103(B) cmt. (1980) (emphasis added). Imposing a less restrictive view of materiality than set forth in the *Agurs* decision is something quite different than imposing no materiality standard whatsoever.

essential part of the due process obligation in 1963<sup>133</sup> and was retained in some fashion in DR 7-103, adopted six years later. I am thus not nearly as confident as the Standing Committee that the “background and history” of Rule 3.8(d) reveal an intent to dispense with materiality considerations altogether, especially since the drafters of DR 7-103 and Rule 3.8(d) used the phrase “tends to negate guilt,” which is very similar to language that appears in the *Brady* opinion itself.

Second, the Standing Committee concluded that Rule 3.8(d) requires “timely” disclosure to the accused, which the Committee equated with “as soon as reasonably practical,” and certainly in time for the defense attorney to make reasonable use of the evidence or information, *including for use in plea negotiations*.<sup>134</sup> Reasoning that “among the most significant purposes for which disclosure must be made under Rule 3.8(d) is to enable defense counsel to advise the defendant regarding whether to plead guilty,”<sup>135</sup> the Committee concluded:

Because the defendant’s decision may be strongly influenced by defense counsel’s evaluation of the strength of the prosecution’s case, timely disclosure requires the prosecutor to disclose evidence and information covered by Rule 3.8(d) prior to a guilty plea proceeding, which may occur concurrently with the defendant’s arraignment.<sup>136</sup>

This section of the opinion suggests that a prosecutor who withholds impeachment evidence prior to a guilty plea may be subject to professional discipline, even though she clearly is not violating constitutional safeguards after *Ruiz*.

Third, the Standing Committee concluded that Rule 3.8(d) requires the disclosure of evidence “or information” that tends to negate guilt while the *Brady* decision only arguably requires disclosure of exculpatory “evidence.”<sup>137</sup> In Formal Opinion 09-454 the Standing Committee determined that

[the] ethical duty of disclosure is not limited to admissible “evidence,” such as physical and documentary evidence, and transcripts of favorable testimony; it also requires disclosure of favorable “information.” Though possibly inadmissible itself, favorable

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133. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (“We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process *where the evidence is material either to guilt or to punishment* . . .”) (emphasis added).

134. ABA Formal Op. 09-454, *supra* note 122, at 6.

135. *Id.*

136. *Id.* (footnotes omitted).

137. *Brady*, 373 U.S. at 87. See discussion *supra* note 30 and accompanying text.

information may lead a defendant's lawyer to admissible testimony or other evidence or assist him in other ways, such as in plea negotiations.<sup>138</sup>

As discussed above, this construction of Rule 3.8(d) exceeds the duty imposed on prosecutors under *Brady*, which has been interpreted by some lower courts to apply only to admissible evidence.

Fourth, and perhaps most significantly for the purposes of our present discussion, the Standing Committee discussed *Ruiz* and opined that Rule 3.8(d), unlike constitutional guarantees, is not waivable by the defendant as part of a plea agreement.<sup>139</sup> "A defendant's consent does not absolve a prosecutor of the duty imposed by Rule 3.8(d) and, therefore, a prosecutor may not solicit, accept, or rely on the defendant's consent."<sup>140</sup> The Standing Committee reasoned that Rule 3.8 (unlike other attorney conduct rules such as prohibitions on conflicts of interest<sup>141</sup> or disclosure of client confidences<sup>142</sup>) does not specifically mention the consent of the defendant or his counsel.<sup>143</sup> Absent an express exception, a "third party may not typically absolve a lawyer of their [sic] duty to comply with ethical obligations."<sup>144</sup> The Standing Committee concluded that one of the primary purposes of Rule 3.8's disclosure requirement is to promote the public's interest in the reliability and accuracy of criminal proceedings; quality representation at the plea bargaining stage would be undermined by the allowance of a waiver of Rule 3.8(d) because defense counsel would not have access to the information they need to advise and represent their clients effectively.<sup>145</sup>

The Standing Committee's very cursory two-paragraph discussion of waiver in Formal Opinion 09-454 suffers from two principal flaws. First, Rule 3.8(d) pertains to the disclosure of evidence. The Standing Committee's conclusion (unsupported by any citation or authority) that a prosecutor may not "solicit or accept" a waiver of access to exculpatory evidence is clearly wrong: nothing in the text of the rule prohibits a prosecutor from including waiver language in a plea agreement, presuming there is no subsequent

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138. ABA Formal Opinion 09-454, *supra* note 122, at 5.

139. *Id.* at 7.

140. *Id.*

141. See MODEL RULES OF PROF'L CONDUCT R. 1.7 (1983).

142. See MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (1983).

143. ABA Formal Op. 09-454, *supra* note 122, at 7.

144. *Id.*

145. *Id.*

withholding of evidence in reliance on that waiver.<sup>146</sup> More fundamentally, the text of the rule explicitly allows for nondisclosure of evidence upon approval of a tribunal.<sup>147</sup> Where a court accepts a plea agreement containing a waiver provision during a Rule 11 colloquy<sup>148</sup> and advises the defendant about the rights he is foregoing under the agreement (including, if applicable, the right to further discovery), this functionally relieves the prosecutor of her obligations under the rule.

In one critical respect, the Standing Committee interpreted Model Rule 3.8(d) to be narrower than the constitutional disclosure rule. As discussed above, the Due Process Clause requires disclosure of exculpatory evidence in the possession of anyone “acting on the government’s behalf in the case,”<sup>149</sup> including police and other investigative agents. The text of Rule 3.8(d) requires disclosure of evidence “known to the prosecutor.”<sup>150</sup> The Standing Committee interpreted this phrase to require “actual knowledge,” although they recognized that knowledge “may be inferred from the circumstances” and that a prosecutor “cannot ignore the obvious.”<sup>151</sup> This latter language slightly objectifies what otherwise appears to be an explicitly subjective standard. For example, a prosecutor might be generally aware that certain impeachment evidence about an informant exists in the hands of police or agents without knowing its precise scope or contours. A prosecutor might also have general knowledge of the existence of impeachment evidence about a victim from the victim’s involvement in prior cases or discussions with other prosecutors, but this information might not have been documented and might have faded from the prosecutor’s memory. Both of these forms of knowledge would apparently suffice to trigger disclosure obligations (or at least further inquiry) under Rule 3.8(d) as interpreted by the Standing Committee.<sup>152</sup>

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146. Cf. MODEL RULES OF PROF’L CONDUCT R. 3.8(c) (1983) (“Prosecutor in a criminal case shall . . . not seek to obtain from an unrepresented accused a waiver of important pretrial rights.”).

147. MODEL RULES OF PROF’L CONDUCT R. 3.8(d) (1983).

148. See FED. R. CRIM. P. 11(c)(2) (requiring parties to disclose any existing plea agreement when defendant offers a change of plea); FED. R. CRIM. P. 11(c)(3)–(5) (circumstances under which court may accept or reject agreement).

149. *Kyles v. Whitley*, 514 U.S. 419, 437 (1995).

150. MODEL RULES OF PROF’L CONDUCT R. 3.8(d) (1983).

151. ABA Formal Op. 09-454, *supra* note 122, at 7 (citing Model Rule 1.0(f) and Model Rule 1.13 cmt. 3).

152. See *id.* at 6 (“If the prosecutor has not yet reviewed voluminous files or obtained all police files, however, Rule 3.8 does not require the prosecutor to review or request such files

The Standing Committee was clearly anxious to distinguish the requirements of Model Rule 3.8(d) from the Supreme Court's *Brady* jurisprudence with regard to timing and materiality. In doing so, however, it waded into a hornets' nest with perhaps unintended consequences by failing to explicitly distinguish impeachment evidence from other forms of exculpatory evidence and by foreclosing the possibility of waiver. The reasoning of Formal Opinion 09-454 is thus misguided and flawed in several important respects. The opinion suggests that prosecutors may be subjected to bar discipline if they fail to disclose to the defense *any* favorable evidence in their possession before a guilty plea, no matter how de minimis or inconsequential it may be and no matter what waivers are agreed to by the defendant as part of the plea arrangement. Needless to say, it has sent a chill down the spine of the prosecutorial community.

Perhaps to garner enough votes to reach its preferred conclusions, the Standing Committee on Ethics and Professional Responsibility sidestepped any explicit conclusion about impeachment information. It did so in a very strategic fashion, by crafting a hypothetical to frame its opinion that dealt only with evidence that was "classically" exculpatory in the sense that it directly supported the innocence of the accused.<sup>153</sup> But there is no reason to believe that the same conclusions it reached regarding the materiality and timing of disclosures of exculpatory evidence would not also apply to impeachment information. First, impeachment evidence is a subset of evidence "favorable to the accused," as the Supreme Court has consistently recognized.<sup>154</sup> The Standing Committee admitted as much in footnote 6, when it cited two impeachment cases for the proposition that state disciplinary authorities sometimes discipline prosecutors for *Brady* violations.<sup>155</sup> Even more ominously, in discussing the nonwaivability of Rule 3.8(d) and addressing the *Ruiz* decision's

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unless the prosecutor actually knows or infers from the circumstances, or it is obvious, that the files contain favorable evidence or information." (emphasis added).

153. The hypothetical the Committee used to frame its opinion involved two bystander witnesses to an armed robbery who viewed a line-up in which the accused was a participant and told police officers that "they did not see the perpetrator," and a confidential informant's tip to law enforcement that someone other than the accused committed the offense. Both are examples of evidence or information supporting factual innocence. *Id.* at 1.

154. See *supra* notes 23–24.

155. ABA Formal Op. 09-454, *supra* note 122, at 3 n.6 (citing Office of Disciplinary Counsel v. Wrenn, 790 N.E.2d 1195, 1198 (Ohio 2003) (prosecutor failed to disclose at pretrial hearing results of DNA tests in child sexual abuse case that were favorable to defendant and fact that that victim had changed his story); *In re Grant*, 541 S.E.2d 540, 540 (S.C. 2001) (prosecutor failed to fully disclose exculpatory material and impeachment evidence regarding statements given by state's key witness in murder prosecution)).

characterization of impeachment information as less critical to the accused at the plea bargaining stage of a criminal proceeding than at trial, the Committee stated that “[i]n any event, even if courts were to hold that the right to favorable evidence may be entirely waived for constitutional purposes, the ethical obligations established by Rule 3.8(d) are not coextensive with the prosecutor’s constitutional duties of disclosure . . . .”<sup>156</sup> These two sections of the Formal Opinion strongly suggest an intention to apply its conclusions to impeachment information, even if the Committee lacked the political will to say so directly.

It is too early to tell whether and to what extent state bar authorities will interpret their own disciplinary rules consistently with ABA Opinion 09-454. So far, two states (California and Ohio) have shown explicit hostility to its reasoning.<sup>157</sup> Yet defense counsel are already using the opinion very aggressively in an effort to obtain more preplea discovery, particularly in federal court.<sup>158</sup>

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156. ABA Formal Op. 09-454, *supra* note 122, at 7 n.33.

157. In September 2010 the California State Bar Board of Governors approved sixty-seven new professional conduct rules for consideration by the California Supreme Court, as part of an ongoing effort to modernize that state’s attorney conduct rules and bring them more in line with the ABA Model Rules. One of the main points of controversy during its September meeting was “how broadly or narrowly to frame the prosecutor’s ethical obligation to disclose exculpatory evidence.” Joan C. Rogers, *In Its Final Look at Full Set of Updates, California Bar Endorses Last Seven Rules*, 26 LAWYERS’ MAN. PROF’L CONDUCT 619, 620 (2010). In light of California prosecutors’ fierce opposition to the language and reasoning of ABA Ethics Opinion 09-454, the Committee decided to forego the highly general “timely disclosure of evidence or information that tends to negate guilt” language of ABA Model Rule 3.8(d) and replace it with the more specific and narrower requirement that prosecutors comply with “all constitutional obligations, as interpreted by relevant case law.” *Id.* at 621. In February 2010, the Ohio Supreme Court rejected arguments that state disciplinary rule 7-103 imposes an ethical obligation on prosecutors to disclose impeachment information before a guilty plea, without explicitly referencing ABA Formal Opinion 09-454. *See Disciplinary Counsel v. Kellogg-Martin*, 923 N.E.2d 125, 130 (Ohio 2010) (finding disciplinary obligation no more extensive than legal obligation). Prior to the release of ABA Formal Opinion 09-454, two jurisdictions had already interpreted their disciplinary rules to contain a materiality element, contrary to the ABA Ethics Committee’s analysis. *See In re Attorney C*, 47 P.3d 1167, 1167, 1173 (Colo. 2002) (en banc) (requiring both materiality and intentional failure to disclose for violation of Colo. Rules Prof’l Conduct 3.8(d), and defining the requisite intent as “conscious objective or purpose to accomplish a particular result”); *see also* D.C. RULES PROF’L CONDUCT R. 3.8 cmt. 1 (“[Rule 3.8] is not intended either to restrict or to expand the obligations of prosecutors derived from the United States Constitution, federal or District of Columbia statutes, and court rules of procedure.”).

158. Irwin H. Schwartz, *Beyond Brady: Using Model Rule 3.8(d) in Federal Court for Discovery of Exculpatory Information*, 34 CHAMPION 34, 35 (2010); *see, e.g.*, *United States v. Colacurcio*, No. CR-09-209TAJ, at \*7 (W.D. Wash. Apr. 9, 2010); *United States v. Kott*, No. 07-00056 (D. Alaska Oct. 23, 2009).



#### IV. WHO SHOULD REGULATE THE CONDUCT OF PROSECUTORS WITH REGARD TO PREPLEA IMPEACHMENT DISCLOSURES, AND HOW?

In the coming months it is likely that many federal district courts will be debating amendments to their local criminal rules, and state supreme courts will be debating whether to adopt the ABA's broad construction of Model Rule 3.8(d). In both arenas, a focal point of controversy is likely to be the preplea disclosure of impeachment evidence. The crux of that debate is twofold: (1) Are attorney conduct rules or rules of criminal procedure the better vehicle to regulate a prosecutor's preplea discovery obligations?; and (2) How much impeachment evidence should a prosecutor be required to disclose before a guilty plea? In this Part, I will turn my attention to these two questions. The first, I submit, is a question of institutional competence and the second is a question of fundamental fairness.

##### *A. Institutional Competence*

Attorney conduct rules are a very poor vehicle to convey and enforce prosecutors' preplea disclosure obligations. Prosecutors are seldom disciplined for failing to turn over material exculpatory evidence *prior to trial*, even where the misconduct has been identified by an appellate court upon reversal of a criminal conviction<sup>159</sup> and even where the misconduct is intentional.<sup>160</sup> Many commentators have identified and criticized the reluctance of bar disciplinary authorities to enforce Rule 3.8(d), speculating that their reticence results from lack of expertise,<sup>161</sup> reluctance to interfere with the executive branch,

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159. See Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations, A Paper Tiger*, 65 N.C. L. REV. 693, 731 (1987); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 744–45 (2001) (a survey of 100 bar discipline complaints against prosecutors found very few sanctions for failure to disclose exculpatory evidence; and when discipline was imposed this misconduct was usually coupled with other infractions such as presenting false evidence or lying to the court); see also Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors Ethics*, 55 VAND. L. REV. 381, 398 (2002) (“[D]isciplinary authorities do not appear particularly eager to bring actions against prosecutors except in situations involving unambiguously wrongful conduct.”).

160. Medwed, *supra* note 35, at 1546–47 (2010) (citing “glaring example of disciplinary inaction” in California with regard to Tulare County prosecutor).

161. According to the California Bar Journal, there were 4,741 public disciplinary actions taken against that state's attorneys in the twelve years between 1997 and 2009, and only six of those cases involved conduct by prosecutors in handling criminal cases. See Kathleen M. Ridolfi & Maurice Possley, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at 54 (Oct. 2010), available at <http://law.scu.edu/ncip/file/>

a belief that courts are better situated to enforce discovery through the rules of criminal procedure, and the political power of law enforcement.<sup>162</sup> If bar disciplinary authorities are hesitant to investigate and prosecute instances of discovery abuse in the trial context, then they will be even more hesitant to do so in the guilty plea context, where the defendant has admitted his guilt and where a lengthy and expensive adversarial process has not been subverted by a prosecutor's missteps. Moreover, recent studies show that prosecutors—and particularly state prosecutors—seem to be unaffected by the rules of professional conduct.<sup>163</sup> Adding a toothless standard to Rule 3.8(d)—or worse yet, a toothless interpretation of an already highly generalized ethical norm<sup>164</sup>—is unlikely to have any impact on a prosecutor's discovery practices prior to a guilty plea.<sup>165</sup> If such a professional conduct rule has any signaling function at all, then it may signal that ethical norms are out of touch with the realities of criminal practice.<sup>166</sup>

I do not claim that state bar disciplinary authorities lack the *authority* to regulate preplea impeachment disclosures. Ethical rules may and sometimes do impose obligations on attorneys above and beyond the Constitution or rules of civil and criminal procedure.<sup>167</sup>

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ProsecutorialMisconduct\_BookEntire\_online%20version.pdf. This statistic suggests that the staff of bar disciplinary agencies may not have sufficient experience with criminal matters to handle complex issues involving the materiality of impeachment information.

162. See Peter Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions*, 2006 WIS. L. REV. 399, 427; Ellen Yaroshefsky, *Wrongful Convictions: It is Time to Take Prosecution Discipline Seriously*, 8 UDC/DCSL L. REV. 275, 292–93 (2004).

163. Ellen Yaroshefsky & Bruce A. Green, *Prosecutors' Ethics in Context: Influences on Prosecutorial Disclosure* (forthcoming 2011) (manuscript at 6) (on file with author); see Blasser et al., *supra* note 38, at 1996 (“Rules have limited influence, particularly where the compliance infrastructure related to the rule is weak.”); Janet C. Hoeffel, *Prosecutorial Discretion at the Core: The Good Prosecutor Meets Brady*, 109 PENN. ST. L. REV. 1133, 1146 (2005) (suggesting that “the prudent prosecutor is unconcerned about an ethical violation. . . . [H]e has never heard of a prosecutor being disciplined for his exercise of discretion in withholding evidence.”).

164. See ABA Formal Op. 09-454, *supra* note 122, and related discussion.

165. See Stephanos Bibas, *Prosecutorial Regulation versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 977–83 (2009) (arguing that tougher disciplinary rules generally are not going to be effective at changing prosecutorial behavior because they will not necessarily lead to increased enforcement, and advocating for solutions based on corporate stakeholder strategies to increase accountability of each office).

166. See W. Bradley Wendel, *Non-Legal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955, 1957 (2001) (“A fairly stable consensus now seems to exist in the legal ethics literature that rules of ‘ethics’ stated in the form of enforceable penal codes, have limited utility to remedy many of the observed problems with the professional conduct of lawyers.”).

167. See *United States v. Hammad*, 858 F.2d 834, 839 (2d Cir. 1988) (declining to interpret DR 7-104 as coextensive with the Sixth Amendment because the Model Code of Professional

Rule 3.8(d) could be amended (or interpreted in its commentary) to require prosecutors to disclose impeaching information prior to a guilty plea, and these state rules could certainly be applied to state prosecutors. Whether such regulations could be applied to federal prosecutors is a much closer question. Although federal prosecutors are bound by the state ethical rules in the jurisdictions in which they practice,<sup>168</sup> there is a convincing argument that the Citizens Protection Act (commonly known as the McDade Amendment) would prevent state bar disciplinary authorities from applying such a broad construction of Rule 3.8(d) to federal prosecutors operating within their jurisdictions. This is because, as discussed below, it would conflict not only with *Ruiz* but also with the Jencks Act and several local district court rules.<sup>169</sup>

My point is that a broad construction of Rule 3.8(d) that requires preplea impeachment disclosures would be ineffectual and inappropriate. It would be ineffectual because a prosecutor is unlikely to heed such an interpretation with regard to impeachment material in the face of a directly contrary ruling by the Supreme Court under the Due Process Clause, and a disciplinary board is unlikely to bring any enforcement actions where the defendant has waived trial and pleaded guilty. It would be inappropriate because such a detailed and specific rule regarding the contours and timing of impeachment disclosures is really a rule of discovery masquerading as a rule of professional responsibility. Rather than conduct having a negative

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Responsibility is “designed to safeguard the integrity of the profession” and therefore “secures protections not contemplated by the Constitution”).

168. 28 U.S.C. § 530B (2006).

169. See *Stern v. U.S. Dist. Court for Dist. of Mass.*, 214 F.3d 4, 20 (1st Cir. 2000) (in addressing whether local federal rule adopting 3.8(f) and constraining subpoenas to defense attorneys violated rulemaking power of district court, the court concluded that the McDade Amendment did not render issue moot: the regulations pursuant to 530B “dispel the notion that § 530B grants states or local federal district courts the power, in the guise of regulating ethics, to impose strictures [on federal prosecutors] that are inconsistent with federal law”); *United States v. Syling*, 553 F. Supp. 2d 1187, 1192–93 (D. Haw. 2008) (holding that state ethics rule could not be applied to impose a duty on federal prosecutors to present exculpatory evidence to grand jury). The second paragraph of the McDade Amendment provides that “the Attorney General shall make and amend rules of the Department of Justice to assure compliance with this section.” 28 U.S.C. § 530B(b). The Attorney General has implemented a regulation under the Act providing that “[§] 530B requires Department attorneys to comply with state and local federal court rules of professional responsibility, *but should not be construed in any way to alter federal substantive, procedural, or evidentiary law* or to interfere with the Attorney General’s authority to send Department attorneys into any court in the United States.” 28 C.F.R. § 77.1(b) (emphasis added); see *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1975) (explaining that state laws can be preempted by federal regulations as well as by federal statutes); *Green & Zacharias*, *supra* note 159, at 414 (arguing that 530B(b) is a grant by Congress to the DOJ of power to preempt state ethical rules).

impact on a particular cause of action, attorney conduct rules typically focus on conduct exhibiting an affront to the court, conduct exhibiting unfitness to practice law generally, or conduct “recognized by consensus within the bar as inappropriate.”<sup>170</sup>

Even if one considers the disclosure of impeachment information to implicate the “ethics” of a prosecutor, attorney conduct rules are not the sole or even the dominant source of norms with regard to litigation ethics.<sup>171</sup> Rules of procedure, rules of evidence, and the court’s inherent supervisory authority are also sources of ethical guidance for litigators, and these standards complement and sometimes supplement each other.<sup>172</sup> Other scholars have noted the limitations of ethical rules in the context of civil litigation and have recommended greater attention to procedural and evidentiary rules as a way to monitor controversial attorney behavior.<sup>173</sup> Moreover, ethical rules and rules of criminal procedure derive from different perspectives; the former are driven largely by recommendations from the bar with very little public input, while the latter are driven primarily by the judiciary, subject to public comment and, in many jurisdictions, legislative approval.<sup>174</sup> If, as the ABA Standing Committee opined in Formal Opinion 09-454, the preplea disclosure of exculpatory information serves primarily to promote “the public’s interest in the fairness and reliability of the criminal justice

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170. See *United States v. Colo.* Supreme Court, 189 F.3d 1281, 1287 (10th Cir. 1999) (citing factors court should look to in deciding whether rule is one of ethics or procedure for purposes of McDade Amendment).

171. See Judith A. McMorrow, *The (F)Utility of Rules: Regulating Attorney Conduct in Federal Court*, 58 SMU L. REV. 3, 22 (2005) (explaining collapse of effort to create uniform rules of attorney conduct in federal court).

172. *Id.* at 10.

173. See Carrie Menkel-Meadow, *Ethics and the Settlement of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1217–19 (1995) (arguing that ethical rules alone will not promote just settlements in class actions, and that courts need to undertake more substantive review of settlement processes and outcomes under Fed. R. Civ. P. 23(e)). A distinguished panel on the subject of spoliation of e-discovery at Duke Law School recently concluded that the rules of civil procedure are the appropriate vehicle to address the preservation of electronic records and consequences for failing to do so. Thomas Y. Allman, *Preservation Rulemaking after the 2010 Litigation Conference*, 11 SEDONA CONF. J. 217, 225 (2010); see Dan H. Willoughby, Jr., Rose Hunter Jones & Gregory R. Antine, *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789 (2010).

174. See Benjamin H. Barton, *Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167, 1205–08 (2003) (concluding that when enacting professional conduct rules, state supreme courts may be too susceptible to the lawyer lobby and too inaccessible to the public); see also LAFAVE, ISRAEL, KING & KERR, 1 CRIMINAL PROCEDURE § 1.7(f) (some state constitutions give authority over criminal rulemaking directly to the judiciary, while other states follow the model of the Rules Enabling Act and consider it a delegation of authority from legislative branch).

system,”<sup>175</sup> then regulating such disclosures should be undertaken by the stakeholder with the greatest expertise in the matter and in a fashion that permits the most public involvement.

Rules of criminal procedure are a far more promising vehicle for regulation of prosecutors with regard to preplea impeachment disclosures for at least three reasons. First, the courts are accustomed to regulating discovery in criminal cases and resolving competing tensions with regard to fairness, efficiency, and witness privacy. Second, the rules of criminal procedure tend to be enacted at a more granular level of specificity than attorney conduct rules, which are typically written in highly generalized terms.<sup>176</sup> Third, the courts have a broader array of case-based sanctions available to them for discovery violations, such as exclusion of evidence, contempt, fines, attorney fee awards, adverse jury instructions, and, if extreme prejudice could be shown, possibly dismissal of an indictment.<sup>177</sup> This arsenal of case-based sanctions is far more likely to be effective in motivating prosecutors to be fastidious about their discovery obligations than the unlikely threat of a private or public reprimand from a bar disciplinary board long after a criminal case has concluded. They are also more closely aimed at remedying the harm to the defendant caused by the prosecutor’s conduct.

Even where attorney conduct rules overlap with rules of criminal procedure in spheres of mutual influence, bar disciplinary authorities tend to defer to a trial court’s prerogative to enforce discovery obligations in the context of live pending cases. The decision of the Colorado Supreme Court in *In the Matter of Attorney C*<sup>178</sup> is instructive on the relative institutional competence of trial courts and bar disciplinary authorities. The respondent was an assistant district

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175. ABA Formal Op. 09-454, *supra* note 122, at 7.

176. See Christina Parajon, *Discovery Audits: Model Rule 3.8(d) and the Prosecutor’s Duty to Disclose*, 119 YALE L.J. 1339, 1143–44 (2010) (“[V]agueness inhibits the implementation of the Model Rule, a process that is demonstrably incomplete. Research indicates that local disciplinary authorities are generally reluctant to find and sanction 3.8(d) violations . . . .”); Prosser, *supra* note 34, at 603–608 (arguing that specific articulation of disclosure obligations through new and more detailed rules of criminal procedure would make nondisclosure based on ignorance less likely and would provide greater guidance to prosecutors).

177. See FED. R. CRIM. P. 16(d)(2)(D) (authorizing court to enter any sanction for noncompliance “that is just under the circumstances”); see also *United States v. Shaygan*, 661 F. Supp. 2d 1289, 1292–93 (S.D. Fla. 2009) (awarding attorney fees to defense counsel under Hyde Amendment following acquittal for discovery violations); *United States v. W.R. Grace*, CR 05-07-M-DWM (D. Mont. 2009) (adverse jury instruction). See generally *United States v. Horn*, 29 F.3d 754, 766–67 (1st Cir. 1994) (discussing inherent supervisory powers of the federal courts); *United States v. Jones*, 620 F.Supp.2d 163, 178–80 (D. Mass. 2009) (same).

178. *In re Attorney C*, 47 P.3d 1167 (Colo. 2002).

attorney charged with misconduct for failure to disclose exculpatory evidence before preliminary hearings in two different criminal matters. The hearing board found that the respondent violated Colorado Rule of Professional Conduct 3.8(d) in both cases—negligently in the first and knowingly in the second—and recommended a public reprimand.<sup>179</sup> The Colorado Supreme Court reversed, ruling for the first time that their state version of Rule 3.8(d) incorporated both a materiality element and a mens rea of intent. Construing the “timely” component of the rule to require disclosure before the next critical stage of the criminal proceeding, the court held that the “rule was unclear” before its application to the respondent and therefore respondent could not have had an intent to withhold evidence in contravention of the ethical mandate.<sup>180</sup> In ruling for the respondent, the court took a very dim view of the efficacy of professional discipline in the area of criminal discovery:

[D]iscovery issues arise in almost every criminal case. Trial courts routinely make findings of fact and enter orders and sanctions designed to respond to the severity of the violation . . . . Not only is management, regulation, and supervision of discovery preeminently a trial court function . . . but we also have case law and rules of procedure specifically tailored to redress any discovery violations. We neither wish to upset that process nor to interject regulatory counsel into it.<sup>181</sup>

While perhaps extraordinary in terms of its candor, the *In re Attorney C* case reflects the view that the attorney grievance system is “ill-suited to address[] any but the most serious discovery violations”<sup>182</sup> in criminal cases. The North Carolina version of ABA Model Rule 3.8(d) explicitly recognizes the superior competence of courts in this area by requiring prosecutors to “make timely disclosure to the defense of all evidence or information *required to be disclosed by applicable law, rules of procedure, or court opinions* including all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.”<sup>183</sup>

### *B. Fundamental Fairness*

Should the rules of criminal procedure attempt to undo in any fashion the effect of *Ruiz*? Today’s dominant justification for plea bargaining is the so-called “trial shadow” theory—plea bargaining is

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179. *Id.* at 1173.

180. *Id.* at 1174.

181. *Id.* at 1173–74.

182. *Id.* at 1174.

183. N.C. State Bar Rules, ch. 2, Rule 3.8(d) (emphasis added).

the product of both parties' rational forecast of the likely sentence after trial, discounted by the risk of conviction/acquittal and the costs to the party of going forward.<sup>184</sup> Within the trial shadow framework, arguments in favor of broader preplea disclosure essentially proceed on two levels: voluntariness and accuracy.<sup>185</sup>

According to the voluntariness argument,<sup>186</sup> enhanced impeachment disclosures will help make sure the guilty plea process more closely mirrors trial outcomes by promoting the defendant's informed assessment of the strength of the government's case and the likelihood of conviction following trial. The problem with the voluntariness argument is that it proves too much. The absence of impeachment evidence is just one form of information deficit that a defendant faces when he pleads guilty. A defendant may not know whether the government's evidence will be suppressed, whether key witnesses will show up for trial, whether the victim will be able to make an in-court identification, whether the judge will consider the evidence at trial sufficient to warrant a particular jury instruction favorable to the defense (e.g., self-defense, entrapment), whether the government will survive a directed verdict and make it tactically necessary for the defendant to take the stand, and so forth.<sup>187</sup> What separates discovery questions from other forms of trial uncertainty is that in the former situation the information is known to the government but not to the defendant, whereas in the latter situation

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184. Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73, 77 (2009); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1948 (1992).

185. Yaroshefsky, *supra* note 15, at 31–32 (arguing for enhanced disclosures prior to guilty plea to promote voluntariness and accuracy).

186. See Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2040–42 (2000) (arguing that *Brady* disclosure insures the voluntariness of guilty pleas, promotes factual accuracy, and encourages meaningful consent); Erica Hashimoto, *Toward Ethical Plea Bargaining*, 30 CARDOZO L. REV. 949, 952 (2008) (“Lack of information about impeachment or exculpatory evidence exacerbates the inequity of the plea process because without access to this information, defendants have no leverage to obtain pleas that accurately reflect the strength of the government's case against them.”).

187. See *Brady v. United States*, 397 U.S. 742, 757 (1970) (upholding a guilty plea against later attack on grounds that it was not voluntary: “We find no requirement in the Constitution . . . that a defendant must be permitted to disown his solemn admissions in open court that he committed the act with which he is charged simply because it later develops that the state would have had a weaker case than the defendant had thought.”); *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (plea of guilty based on reasonably competent advice of counsel not open to later attack on the ground that counsel have misjudged admissibility of confession: “All the pertinent facts normally cannot be known unless witnesses are examined and cross-examined in court . . . . In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case.”).

both parties labor under the same uncertainty. But if by “voluntary and intelligent”<sup>188</sup> we mean autonomous as opposed to fully informed, the government’s state of mind (knowing information and failing to disclose it) cannot convert an otherwise volitional act on the part of the defendant into an involuntary one. Both parties possess information at the time of a guilty plea unshared with the other. The prosecutor may have more experience trying cases before the trial judge than the defense attorney and have greater insights into her likely rulings; the prosecutor might have tried several other cases with a particular police officer as a witness and know that she will not fare particularly well on cross-examination; and the prosecutor may know that the victim is terminally ill and unlikely to live until the time of trial. No plausible construction of due process or Model Rule 3.8(d) would suggest that *any of that information* needs to be shared with a defendant before his sworn admission of guilt before a judge will be considered “voluntary.” The critical value of impeachment information lies in its function to help prepare a trial attorney to cross-examine adverse witnesses.<sup>189</sup> Since by pleading guilty the defendant is specifically *waiving* the right to confront the witnesses against him,<sup>190</sup> it is particularly difficult to argue that this form of information deficit (i.e., what ammunition he might use on cross-examination and to what effect) is any more troubling than many other uncertainties faced by a defendant.

Other scholars have argued that enhanced discovery before a plea bargain will help promote the “accuracy” of guilty pleas.<sup>191</sup> For example, Professor McMunigal’s accuracy argument proceeds as follows. Innocent defendants sometimes may not know whether they are guilty due to cognitive impediments present at the time of the event, but they nevertheless may plead guilty to avoid harsh sentencing consequences following trial. For example, youth, mental infirmity, or intoxication may all render a suspect incapable of assessing accurately the factual circumstances leading up to the

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188. Under Supreme Court precedent a guilty plea is voluntary and intelligent if the defendant (1) is aware of the essential nature of the charges against him, (2) is advised by competent counsel, and (3) is not induced to plea by threats, inducements, or improper promises. *Brady*, 397 U.S. at 755.

189. See Laura Berend, *Less Reliable Preliminary Hearings and Plea Bargains in Criminal Cases in California: Discovery Before and After Proposition 115*, 48 AM. U. L. REV. 465, 472 (1998).

190. See FED. R. CRIM. P. 11.

191. McMunigal, *supra* note 14, at 968; McMunigal, *supra* note 56, at 660; Prosser, *supra* note 34, at 549, 560.



alleged offense.<sup>192</sup> Disclosure of impeachment information prior to a guilty plea to defendants who actually *do not know* whether they are guilty will help such defendants better understand their chances of acquittal following trial and reduce the incidence of inaccurate outcomes.

The accuracy problem should certainly cause us more pause than the voluntariness concern. There may be rare situations<sup>193</sup> where an accused does not remember the incident with sufficient clarity to make an honest assessment of his legal responsibility.<sup>194</sup> But the critical question is whether those situations are common enough to warrant a major resource commitment to enhanced preplea discovery.<sup>195</sup> A solemn admission in open court by the defendant during allocution that he committed the offense is entitled to great deference;<sup>196</sup> this presumption of regularity should not be disturbed merely because we can imagine a situation where the defendant is unsure whether he committed the offense but is willing to say that he did in order to gain the benefits of a favorable plea bargain. Moreover, the same defendants under Professor McMunigal's scenario who are handicapped in assessing their own conduct are also handicapped in assessing the strength of the *inculpatory* evidence against them (e.g.,

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192. McMunigal, *supra* note 14, at 968; McMunigal, *supra* note 56, at 657-58.

193. Professor McMunigal concedes that it is "undoubtedly true in most cases" that a criminal defendant knows whether he or she committed the offense charged. McMunigal, *supra* note 56, at 657.

194. Professor McMunigal envisions a situation where a defendant charged with motor vehicle homicide who blacked out and lost control of her car in a rainstorm might not be in a position to have observed the circumstances leading up to the accident, and therefore might not be in a good position to challenge the conclusions of an accident reconstruction expert that she was grossly exceeding the speed limit. *Id.* at 659. In the hypothetical raised by Professor McMunigal, that state expert is subject to impeachment on a number of grounds not disclosed prior to the guilty plea. *See id.*

195. *See* United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923) ("Our procedure has been always haunted by the ghost of the innocent man convicted. It is an unreal dream."). Although criticism certainly may be leveled at Judge Hand's cynical observation in *Garsson*, especially in light of modern technology's ability to help exonerate those wrongfully convicted by a jury after trial, our *moral* concern about the incidence of false conviction is justifiably less where the defendant admits his guilt before a judge under oath.

196. *See, e.g.,* Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) ("[D]efendants advised by competent counsel and protected by other procedural safeguards are . . . unlikely to be driven to false self-condemnation."); Menna v. New York, 423 U.S. 61, 62 n.2 (1975) (per curiam) ("[A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case."); *see also* United States v. Hyde, 520 U.S. 670, 676-77 (1997) ("Given the great care with which pleas are taken under [the] revised Rule 11, there is no reason to view pleas so taken as merely 'tentative,' subject to withdrawal before sentence whenever the government cannot establish prejudice." (quoting FED. R. CRIM. P. 32 advisory committee's note) (alteration in original)).

the physical presence of purported eyewitnesses, their proximity to the event in question, the circumstances under which forensic or other evidence was gathered from the defendant at the scene, etc.). As the court implied in *Ruiz*, unless we are prepared to say that full disclosure of inculpatory evidence is a precondition to a knowing and intelligent guilty plea, any rule that requires disclosure of impeachment evidence would benefit defendants with *more* independent knowledge about the incident in question over the cognitively handicapped defendants that Professor McMunigal seeks to protect.<sup>197</sup>

The accuracy argument is also flawed because it proceeds as if the prosecutor were the only relevant actor in plea negotiations. If a defense attorney confronts a client who suffers cognitive impediments that could limit the client's ability to comprehend whether or not he committed the alleged offense, that attorney has a duty to investigate the case more thoroughly than otherwise before counseling a guilty plea.<sup>198</sup> Certainly impeachment material is more accessible to the government than to the defense, especially in federal court where the prosecutor is not required to provide the accused with a list of witnesses. But in cases where the client is mentally, emotionally, or cognitively impaired, defense attorneys may counsel their clients to refuse to sign plea agreements containing waivers of access to impeachment information and wait until fuller discovery is provided closer to trial before entertaining a change of plea. Moreover, plea negotiations do not take place in a vacuum; they take place during oral and written *communications* between the prosecutor and defense counsel. If during plea bargaining the defense counsel specifically *asks* the prosecutor about the presence or absence of impeachment evidence, then rules pertaining to candor already prohibit the prosecutor from engaging in misrepresentation.<sup>199</sup>

In addition to these conceptual problems with the accuracy argument, there are serious pragmatic obstacles to mandating enhanced disclosure of impeachment information at the guilty plea

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197. *United States v. Ruiz*, 536 U.S. 622, 630–31 (2002) (recognizing that the extent to which preplea impeachment disclosure helps a defendant depends on the defendant's independent knowledge of the prosecution's case).

198. *See Strickland v. Washington*, 466 U.S. 668, 691 (1984) (holding that guarantee of effective assistance of counsel under Sixth Amendment encompasses defense attorney's obligation to conduct reasonable investigation of facts); *see also Padilla v. Kentucky*, 130 S. Ct. 1473, 1484 (2010) (explaining that, when considering motions for post-conviction relief after guilty plea on grounds of ineffective assistance of counsel, there is no relevant distinction between acts of omission or commission of defense counsel for purposes of *Strickland* analysis).

199. *See ABA MODEL RULES OF PROF'L CONDUCT* R. 3.4(d), R. 4.1 (1983).

stage of criminal proceedings. In my view, these implementation problems collectively outweigh the accuracy concerns voiced by McMunigal, Prosser, and others. Some but not all of these obstacles were identified by the Supreme Court in *Ruiz*, where the Court quite appropriately recognized that due process analysis allows courts to weigh the nature of the private interest at stake against any adverse impact or costs imposed upon the government and the public interest by increased disclosure.<sup>200</sup>

First, requiring the disclosure of impeachment information before a guilty plea poses a serious timing problem. Evidence is only impeaching if it can be used to undercut the credibility of a government witness or exhibit. Especially for plea bargaining discussions that occur soon after arraignment, before any concerted trial preparation has begun, the government may not know whom it will call as a witness at trial and what exhibits it will introduce. Professor Douglass properly refers to that as a “matching” problem.<sup>201</sup> The matching problem is highlighted in Scenario 2 in Part II above. If there are a number of eyewitnesses to an armed robbery and not all of them will testify, evidence of intoxication that is impeaching as to one observer but not others would not be subject to disclosure under *Brady* and not admissible at trial unless that particular bystander is called by the government as a witness. Similarly, in Scenario 3, the government may attempt to prove the bank fraud without calling the lead case agent who packaged the referral for prosecution. This may be possible if other investigators worked on the case or if important documentary evidence is admissible as a business or public record without authentication from the lead agent. In that situation, the contents of the agent’s personnel file and the ongoing internal affairs investigation would likely be inadmissible.<sup>202</sup>

Second, requiring disclosure of all impeachment evidence prior to a guilty plea would cause a delay in criminal proceedings while prosecutors comb their files and the files of investigative officers

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200. *Ruiz*, 536 U.S. at 631.

201. Douglass, *supra* note 36, at 497–98 (pre-*Ruiz* discussion concluding that *Brady* doctrine is ill-suited to guilty plea situations, and should be left to its original purpose of assuring a fair trial).

202. While it is true that in many jurisdictions a defendant may impeach his own witness, see FED. R. EVID. 602, and thus could conceivably call the lead agent for the primary purpose of getting impeachment evidence in front of the jury, as a matter of discovery rather than permissible trial strategy, the *Brady/Giglio* line of cases does not require the government to assist the defense by disclosing impeachment information for defense witnesses. See, e.g., *United States v. Johnson*, 581 F.3d 320, 331 (6th Cir. 2009); *United States v. Presser*, 844 F.2d 1275, 1285 (6th Cir. 1988).

attempting to identify impeachment information. Typically it is the process of trial preparation (carefully scrutinizing witness statements and police reports, preparing exhibits, re-interviewing witnesses, etc.) that prompts prosecutors to notice discrepancies that could be used for impeachment purposes. It takes considerable skill and effort to extract impeachment information from case agents,<sup>203</sup> as reflected in Scenario 1, where not all of the alleged rape victim's inconsistent statements were reduced to writing. This is particularly true in complex white collar cases that may involve parallel civil and criminal proceedings and multiple indictments involving sequential violent crimes (e.g., serial rapes or murders) that may cross several jurisdictions and involve more than one police department. A rule of criminal procedure or ethics that required disclosure of all impeachment information before a guilty plea (especially if it is nonwaivable) would require prosecutors to conduct an exhaustive review of government files before disposing of any case to make sure that everything conceivably impeaching has been turned over. Criminal cases would take longer to resolve, and prosecutors would be capable of handling fewer cases, undercutting the primary efficiency rationale for plea bargaining. These delays might actually end up hurting criminal defendants more than they are helped by a rule of preplea disclosure. Since one of the government's primary motivations for plea bargaining is resource preservation, a prosecutor might offer less favorable sentencing recommendations to defendants once the functional equivalent of trial preparation has occurred.<sup>204</sup> Moreover, if pretrial proceedings take longer from arraignment to disposition, then defendants held in custody awaiting trial will be adversely affected, particularly where the ultimate disposition pursuant to a plea bargain is a suspended sentence or "time served."<sup>205</sup>

Third, requiring disclosure of impeachment information before a guilty plea does not reflect the reality of criminal justice practice in very busy state courts, particularly with respect to the handling of routine misdemeanors and low-level felonies. Those who advocate for enhanced disclosures seem to focus primarily on federal court practice, where Assistant U.S. Attorneys often work closely with case agents on criminal investigations and spend substantial time interviewing critical witnesses in the presence of those agents. In those situations,

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203. Green, *supra* note 6, at 2179.

204. See Covey, *supra* note 184, at 74. Under the trial shadow theory of plea bargaining, a rational prosecutor will discount the likely sentence after trial by the likelihood of acquittal and the costs associated with preparing and trying the case.

205. Douglass, *supra* note 36, at 448 n.43.

prosecutors may have more knowledge of and access to impeachment information. However, for routine misdemeanors in state court, guilty pleas with little or no investigation or discovery beyond an arresting officer's police report and a booking sheet are often the norm.<sup>206</sup> Given high caseload volume, prosecutors might not have an opportunity to speak with victims or police officers before a guilty plea other than in a busy corridor of the courthouse at or near arraignment.<sup>207</sup> If they do, then they may not have an opportunity to commit these conversations to writing for their files. Staff turnover, reassignment, or horizontal prosecution systems might mean that more than one prosecutor is involved in a case from screening to disposition. In those situations, information obtained by one prosecutor may not be communicated adequately to another, or if it is, it may not have been adequately documented. Exacerbating this problem is the fact that low-level criminal charges are frequently handled by the most junior and inexperienced lawyers. Whereas case volume might prevent prosecutors from having time to review their files thoroughly before a change of plea, inexperience might prevent them from even recognizing the significance of certain impeachment information if they see it.

Finally, plea agreements that are entered into prior to the completion of discovery often promote witness privacy and safety. Mandating preplea disclosure of impeachment evidence might require prosecutors to reveal the identity of undercover operatives and cooperating witnesses very soon after arraignment, thus risking their physical safety, exposing them to tampering and intimidation, and undermining their ability to continue to work with the government on other pending investigations.<sup>208</sup> Presently, federal prosecutors seek to protect these security interests either by delaying disclosure of witness identity and statements until immediately before trial<sup>209</sup> or by

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206. See Prosser, *supra* note 34, at 555.

207. See Blasser et al., *supra* note 38, at 1981.

208. It is for this reason that some states do not require the government to disclose the list of witnesses it plans to call until a specified number of days before trial. See, e.g., CAL. PENAL CODE §§ 1054.1(a), 1054.7 (prosecuting attorney must produce witness list no fewer than thirty days before trial); DEL. SUPER. CT. CRIM. R. 12.3(a)(2) (attorney general must produce witness list no fewer than twenty days before trial).

209. FED. R. CRIM. P. 16, unlike the criminal discovery rules in many jurisdictions, does not require the government to turn over a list of witnesses prior to trial. Although the Jencks Act, 18 U.S.C. § 3500, allows a prosecutor to turn over witness statements immediately after that witness has testified on direct examination, as a practical matter most federal prosecutors turn over Jencks material within a reasonable time before trial, often as part of an agreed-upon discovery order. See Ellen S. Podgor, *Criminal Discovery of Jencks Witness Statements: Timing Makes a Difference*, 15 GA. ST. U. L. REV. 651, 671 (1999).

seeking a protective order under Federal Rule of Criminal Procedure 16(d). The Jencks Act<sup>210</sup> was intended to mediate the tension between witness safety and the disclosure of sufficient evidence to allow the defendant to prepare for trial.<sup>211</sup> A rule requiring disclosure of impeachment evidence before a guilty plea would undercut this legislative accommodation, because in most instances it is impossible to disclose impeachment material without giving away the identity of the witness whom it impeaches.<sup>212</sup>

Impeachment information may also be included in the school records, employment records, and medical records of victims or witnesses. If all such impeachment information were required to be disclosed prior to a guilty plea, then the government's ability to protect those witnesses from embarrassing personal revelations would vanish. In the long run, the diminished protection could discourage victims from reporting crime. The Crime Victims' Rights Act grants victims the right "to be reasonably protected from the accused"<sup>213</sup> and the right to be treated "with respect for [their] dignity and privacy"<sup>214</sup> and requires prosecutors to use their "best efforts" to protect these rights.<sup>215</sup> A broad construction of Model Rule 3.8(d) would be inconsistent with the purpose—if not the explicit requirements—of that Act.

Returning to our hypotheticals, imagine an alleged instance of acquaintance rape of the sort described in Scenario 1. In addition to the prior inconsistent statements of the victim, assume that the government has information that the victim in question made an allegation of child sexual abuse against her stepfather when she was twelve years old that was later withdrawn. *Arguably* this is impeachment evidence that could be used at trial under Federal Rule of Evidence 608(b) or its state equivalent and is therefore subject to

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210. 18 U.S.C. § 3500 (2006).

211. *See* *United States v Bobadilla-Lopez*, 954 F.2d 519, 521 (9th Cir. 1992).

212. *See* *United States v. Colacurcio*, No. CR-09-209TAJ, at \*9 (W.D. Wash. Apr. 9, 2010) (ruling that a Washington state ethical rule requiring a prosecutor to make "timely" disclosure of exculpatory evidence to the accused did not override the Jencks act by operation of the McDade Amendment, and that in any event, disclosure of witness statements eight weeks before trial was timely for purposes of state ethics rule). The court recognized in *Colacurcio* that "[i]n general, it will be difficult at best to extract 'information' from a witness statement without revealing the witness's identity or at least giving substantial clues as to the witness's identity." *Id.*

213. 18 U.S.C. § 3771(a)(1) (2006).

214. § 3771(a)(8).

215. § 3771(c).

disclosure before trial under *Brady*.<sup>216</sup> Let us further assume that the co-employee in the date rape case is willing to plead guilty to a lesser included offense of indecent assault and battery in exchange for the prosecutor's recommendation of a suspended sentence and probation. Many prosecutors would prefer to avoid a very difficult *Brady* issue while at the same time protecting the victim's privacy by entering into a plea bargain. A rule that requires disclosure of all impeaching material before a guilty plea, *without the capacity for waiver*, would effectively preclude such a pragmatic calculus. It would also conflict with many child abuse protection<sup>217</sup> and rape counseling privilege statutes<sup>218</sup> across the country that treat such information as confidential and not subject to disclosure except by following a rigorous protocol, such as motion, threshold showing, and in camera judicial inspection.<sup>219</sup> Similar privacy concerns have motivated some states to enact police protection statutes,<sup>220</sup> which preclude prosecutors from turning over impeachment information contained in law enforcement personnel files except upon motion of the defendant establishing grounds and materiality (as in Scenario 3).

Advocates of more fulsome preplea disclosure undoubtedly will argue that the witness privacy and safety interests I have identified

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216. See *State v. Harris*, 680 N.W.2d 737, 752–53 (Wis. 2004). Whether a prior withdrawn allegation of sexual assault can be used to impeach an alleged rape victim will depend on the particular context of the case and the contours of the state's rape shield statute. The allegation of child abuse may have been withdrawn because it was insincere or inaccurate, or it may have been withdrawn because family members or medical professionals caring for the victim did not wish to expose her to further trauma or intimidation. See *Dennis v. Commonwealth*, 306 S.W.3d 466, 472 (Ky. 2010) (under Kentucky's rape shield rule, evidence concerning an alleged victim's prior allegation of sexual impropriety is not admissible unless the proponent establishes at a pretrial hearing that the accusation was demonstrably false); *State v. Guenther*, 854 A.2d 308, 321 (N.J. 2004) (collecting cases).

217. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 n.17 (1987) (recognizing that all fifty states have enacted statutes providing in some fashion for the confidentiality of state records of child abuse investigations, and reconciling a criminal defendant's right to a fair trial under the Fourteenth Amendment with this statutory privilege by remanding for in camera judicial review to determine what information was material to the defense).

218. See, e.g., 735 ILL. COMP. STAT. 5/8-802.1(d) (2003); MASS. GEN. LAWS ANN. ch. 233, § 20J (2000); N.Y. C.P.L.R. § 4510(b) (MCKINNEY 2007).

219. See Tera Jackowski Peterson, *Distrust and Discovery: The Impending Debacle in Discovery of Rape Victim's Counseling Records in Utah*, 2001 UTAH L. REV. 695, 705–06 (2001) (explaining that, after *Ritchie*, procedures governing disclosure of counseling records of rape victims "vary widely"); see also *Commonwealth v. Dwyer*, 859 N.E.2d 400, 418 (Mass. 2006) ("Before ordering that a summons issue for [presumptively privileged] records, [a] judge . . . must evaluate whether the . . . requirements of relevance, admissibility, necessity, and specificity have been met . . .") (internal quotations omitted).

220. See, e.g., CAL. PENAL CODE § 832.7(a) (West 2008); N.Y. CIV. RIGHTS LAW § 50-a (MCKINNEY 2009).

can best be accommodated by protective orders of the court and that we should entrust such determinations to neutral judges rather than to the unchecked discretion of adversarial prosecutors. For example, Federal Rule of Criminal Procedure 16 allows a prosecutor to submit potentially discoverable material to the court for in camera inspection and request an order denying, restricting, or deferring disclosure.<sup>221</sup> ABA Model Rule 3.8(d) similarly creates an exception for a prosecutor's disclosure obligations "when the prosecutor is relieved of this responsibility by a protective order of the tribunal."<sup>222</sup> But requiring the prosecutor to seek a protective order to protect the privacy and safety interests of victims, witnesses, and undercover operatives—even when the defendant intends to plead guilty—creates further steps in the litigation, causes delays, and imposes resource costs on the courts, undermining several of the primary efficiency rationales for plea bargaining. Given the limited resources of many prosecutors' offices and the pressure on them to move cases—especially in busy urban state courts—it is simply impractical to expect them to seek protective orders at the very early stage of every criminal case where the safety and privacy interests of witnesses may be implicated, especially when they have received every indication that the defendant intends to plead guilty.<sup>223</sup>

With these significant obstacles in mind, let us now return to Professor McMunigal's "accuracy" argument in favor of preplea impeachment disclosures. I concede that the pressures on defendants to plead guilty in the U.S. criminal justice system are enormous<sup>224</sup> and that innocent defendants sometimes plead guilty.<sup>225</sup> They may do so to protect loved ones, to avoid harsh sentencing schemes enacted by the legislature, to avoid trial if they distrust the ability of their counsel to represent them effectively, or to avoid outcome uncertainty due to the information deficits as to their own guilt or innocence that McMunigal and others describe. In my view, the proper way to improve the

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221. FED. R. CRIM. P. 16(d)(1). The Classified Information Procedures Act (CIPA) also allows the government to move for a protective order to protect against the disclosure of any classified information that might pose a harm to national security. See 18 U.S.C. app. 3 §§ 1, 3 (2006).

222. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (1983).

223. Blasser et al., *supra* note 38, at 1969 (noting disagreement among members of the discovery working group as to whether protective orders are feasible given the limited resources of many prosecutors' offices).

224. *Brady v. United States*, 397 U.S. 742, 750–51 (1970); see Albert Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 58 (1968).

225. See Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 536 (2005) (a study of defendants later exonerated through DNA evidence showed that six percent of them had pleaded guilty).



accuracy of guilty pleas is to repeal (or at least curtail the expansion of) harsh mandatory-minimum penalties,<sup>226</sup> reduce the huge disparity in sentences between those who plead guilty and those who are convicted at trial,<sup>227</sup> improve the investigative and trial resources available to counsel for the indigent,<sup>228</sup> and prohibit prosecutors from threatening to prosecute loved ones to obtain leverage over a defendant.<sup>229</sup> Courts should also require disclosure of all “core” or “classic” *Brady* material prior to a guilty plea and be unwilling to accept any plea agreement containing a waiver of access to evidence that supports factual innocence.<sup>230</sup> With each of these inequities addressed, defendants in doubt about their guilt or innocence will feel less constrained to plead guilty and more empowered to proceed to trial (prior to which impeachment disclosures will be made by the prosecutor under *Giglio*). Starting with impeachment disclosures as a way to attack the accuracy problem is like performing surgery with a sledgehammer; it creates all of the problems I identified above while ignoring some of the most troublesome sources of injustice in our criminal justice system.

In fact, mandating preplea disclosure of impeachment information might turn out primarily to benefit *guilty* defendants, who will either (1) be provided with a strategic advantage during the plea bargaining in terms of leveraging a more favorable deal or (2) due to the excessive baggage carried by government witnesses, be more willing to roll the dice and proceed to trial notwithstanding their factual guilt. Defendants who prey on victims with troubled histories, through either fortuity or guile, may fare better in our plea bargaining system than those who victimize the strong and the less vulnerable. Neither the retributive nor the deterrent aims of our criminal justice system are furthered by such a perverse result.

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226. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2468, 2486–87 (identifying structural impediments that distort plea bargaining, including mandatory minimum sentences).

227. See Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 552–53 (1997) (advocating for enhancing legitimacy of plea bargaining by improving Rule 11 colloquies and reducing prosecutors’ sentencing leverage).

228. See Babcock, *supra* note 131, at 1174 (arguing for more public defenders, increased support for them, and a greater commitment by the private bar to pro bono work).

229. See R. Michael Cassidy, *Some Reflections on Ethics and Plea Bargaining: An Essay in Honor of Fred Zacharias*, 48 SAN DIEGO L. REV. 93, 105 (2011) (condemning such practice as highly coercive).

230. See *supra* note 68 and cases cited.

## V. POTENTIAL SOLUTIONS GOING FORWARD

There appear to be at least three obvious solutions to the question of how much impeachment evidence should be disclosed by a prosecutor before a guilty plea. First, the rules of criminal procedure might not require the disclosure of any impeachment information before allocution (the *Ruiz* approach). Another possibility is to require disclosure of impeachment information that is so important and potentially significant to the defendant's decision to plead guilty that the evidence is considered "material." A third possibility would be to require disclosure of *all* impeachment information known to the prosecutor (the stance arguably taken by ABA Formal Opinion 09-454 and the 2003 ACTL proposal to amend Federal Rule of Criminal Procedure 16). Yet each of these resolutions is unsatisfactory, which is precisely why the problem of impeachment disclosures has thus far presented itself as so intractable.

For the reasons described above, requiring disclosure of all impeachment information without regard to materiality is unwise and unworkable. In a domestic violence case where the victim confides in the prosecutor in the courtroom corridor, "I told my boss I was sick today because I was too embarrassed to tell him that I was coming to court," that prosecutor would have to turn that statement over to the defendant as evidence of a prior act of dishonesty.<sup>231</sup> For good reason, *Brady* does not require that the government deliver its entire file to defense counsel<sup>232</sup> or "divulge every possible shred of evidence that could conceivably benefit the defendant."<sup>233</sup> The world is too vast and hindsight bias is too strong.

Even the move to "open file" discovery undertaken by a limited number of jurisdictions<sup>234</sup> will not eliminate the impeachment conundrum. First, open file discovery presupposes that the prosecutor

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231. Other complications ensue. If the prosecutor was the only witness to the statement, she risks being disqualified from representing the state should the case proceed to trial. See MODEL RULES OF PROF'L CONDUCT R. 3.7(a) (1983); see also *In re Attorney C*, 47 P.3d 1167, 1169 (Colo. 2002). If the prosecutor anticipates that risk and brings another witness into the conversation, such as a victim witness advocate or police officer, that agent then must undertake the additional burden of memorializing the conversation in writing so that it can be accurately disclosed to the defense.

232. *United States v. Bagley*, 473 U.S. 667, 675 (1985) ("[T]he prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial.").

233. *United States v. Hamilton*, 107 F.3d 499, 509 (7th Cir. 1997).

234. See, e.g., N.C. GEN. STAT. ANN. § 15A-903 (2010); E.D. Wisc. Crim. R. 16. See generally Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to Disbarment of Mike Nifong: The Critical Importance of Open File Discovery*, 15 GEO. MASON L. REV. 257 (2008).

will turn over documents and tangible evidence contained in his file; it does not capture situations where the victim or another witness has told the prosecutor or police officer something *orally* that has not been reduced to writing, as in Scenario 4 above. Moreover, open file discovery policies typically do not specify what documents in the possession of other government agencies must be *transmitted* to the prosecutor's office, as in Scenario 3, with regard to impeachment material contained in an agent's personnel file. While an open file approach to discovery might be intuitively appealing due to its simplicity, it fails to capture the complexities of many real-life impeachment scenarios.

The tensions I identify above seem to cry out for a middle ground solution. One possibility is a renewed focus on materiality.<sup>235</sup> Although both the ABA in Formal Opinion 09-454 and the advocates of Rule 16 reform have advocated abandoning materiality as a touchstone for a prosecutor's disclosure obligations with respect to classically exculpatory evidence, perhaps jurisdictions should retain it as the litmus test for when impeachment information needs to be turned over by the prosecutor prior to a guilty plea. The problem with this approach is that materiality—already decried as an unworkable framework to guide prosecutorial disclosure obligations<sup>236</sup>—is even more vague and indefinite with regard to impeachment evidence than it is with regard to classically exculpatory information.<sup>237</sup> Identification procedures that suggest someone else committed the

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235. Notwithstanding *Ruiz*, the Supreme Court of Wisconsin has interpreted that state's pertinent rule of criminal procedure to require a prosecutor, upon request, to turn over material impeaching information prior to a guilty plea, at least where the change of plea occurs close to the scheduled trial date. See *State v. Harris*, 680 N.W.2d 737, 755–56 (Wis. 2004) (affirming allowance of motion to withdraw guilty plea where prosecutor failed to turn over in child sexual assault prosecution other pending accusation by victim against grandfather, because other incident might have been used to show sexual knowledge by youthful victim). The court in *Harris* was interpreting WIS. STAT. § 971.23, which required the disclosure of exculpatory evidence “within a reasonable time before trial.” *Id.* at 755.

236. See *Burke*, *supra* note 37, at 509 (noting that after 45 years of *Brady* jurisprudence there are very few useful guidelines for prosecutors about materiality).

237. Eleven years ago, the Ethics 2000 Commission proposed to amend the comments to Model Rule of Professional Conduct 3.8(d) to require prosecutors to disclose evidence that “materially tends to impeach” a government witness. This comment would have added a materiality element for impeachment material, even though as discussed above materiality *arguably* is not a precondition for the ethical obligation to disclose classically exculpatory evidence under the “tends to negate guilt” language of Rule 3.8(d). Nevertheless, the Department of Justice successfully opposed this revised comment due to the potential elasticity of the impeachment concept and the difficulty of predicting materiality in a pretrial context. See Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 469 (2002); see also Kuckes, *supra* note 119, at 439.

crime, evidence from other eyewitnesses that exculpate the defendant, or forensic test results inconsistent with the defendant's guilt are easier to spot as material in the sense that they could affect a jury's determination of guilt or innocence. The significance of impeachment evidence, because it is so contextualized in terms of what affirmative evidence it undermines and how convincingly it does so, is far more difficult to assess.<sup>238</sup> In the absence of reciprocal discovery from the defendant, the prosecutor may not know what shape the defense will take and what elements of the crime will be in dispute.<sup>239</sup> A materiality approach also raises the difficult conceptual question of "material to what?" Is the prosecutor supposed to forecast the likely effect of the impeachment evidence on a trial if one were to occur, or the likely effect of the impeachment evidence on the defendant's decision to plead guilty?<sup>240</sup> The former might be too far away at the time of plea discussions to assess with accuracy before the prosecutor determines which witnesses are likely to be called and what physical evidence will be introduced. The latter requires the prosecutor to speculate about the impact of the information on a defendant's decision to plead guilty, which of course will vary depending on the defendant's degree of risk aversion.<sup>241</sup> If the death of Nicholas Marsh, Stevens's former prosecutor,<sup>242</sup> teaches us anything, it is that prosecutors need more concrete guidance and direction with regard to impeachment evidence than a vague "materiality" standard can provide.

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238. This is why Lanny Breuer, on behalf of the Department of Justice, opposed the most recent proposal to amend Rule 16 to require disclosure of information that casts "substantial doubt" upon the testimony of any witness, suggesting that codifying that standard would prompt "decades of litigation" to unpack its meaning. *See supra* note 111.

239. Burke, *supra* note 40, at 2125 (arguing that a lack or failure of reciprocal discovery can also impair *Brady* disclosures because "the prosecutor may not realize that a piece of evidence is favorable to the defense if she does not know the defense's theory of the case"); *see, e.g.*, FED. R. CRIM. P. 12.1 (requiring notice of alibi defense); FED. R. CRIM. P. 12.2 (requiring notice of insanity defense); FED. R. CRIM. P. 12.3 (requiring notice of public authority defense).

240. *See* Douglass, *supra* note 36, at 472–74 (discussing the effect on, and application of, *Brady*'s materiality standard on guilty pleas); Hashimoto, *supra* note 186, at 955 (noting that with respect to nondisclosure of evidence that supports factual innocence, courts since *Ruiz* have been inquiring whether there is a reasonable probability that it would have affected the defendant's decision to plead guilty).

241. Even if a court takes an objective approach and asks whether the disclosure of the withheld evidence would have caused a *reasonable* defendant to elect to proceed to trial, that task is still exceptionally difficult. *See* Ferrara v. United States, 456 F.3d 278, 294 (1st Cir. 2006) ("While this checklist is useful, experience teaches that each defendant's decision as to whether or not to enter a guilty plea is personal and, thus, unique. Consequently, the compendium of relevant factors and the comparative weight given to each will vary from case to case.").

242. Toobin, *supra* note 1, at 39.

Right now, local federal rules vary greatly on the subject of *Brady* and *Giglio* disclosures.<sup>243</sup> Some district rules, similar to Federal Rule of Criminal Procedure 16, say nothing about exculpatory evidence and leave that requirement to enforcement of constitutional norms.<sup>244</sup> Other districts expressly incorporate *Brady* and *Giglio* by reference.<sup>245</sup> Still other districts have begun to distinguish in their local rules between evidence that is exculpatory because it supports factual innocence and evidence that is exculpatory because it is impeaching, requiring the disclosure of the former a certain number of days following arraignment and the latter a certain number of days before trial (similar to the 2006 proposal submitted by the Advisory Committee to the Standing Committee).<sup>246</sup> Finally, some jurisdictions have followed the 2003 ACTL suggestion (now resurrected by Judge Emmet Sullivan) by requiring disclosure of all favorable evidence without regard to materiality and without distinguishing between classically exculpatory and impeaching information.<sup>247</sup> Given that over ninety percent of criminal cases in federal court are resolved by a guilty plea,<sup>248</sup> one nettlesome question this landscape presents is whether such a huge disparity in practice across the federal districts is acceptable.

State rules of criminal procedure also vary widely in their approach to the disclosure of impeachment evidence, although they tend to be even less evolved than the local federal rules.<sup>249</sup> A minority of states have narrow rules like Federal Rule of Criminal Procedure 16 that make no explicit reference at all to exculpatory evidence and therefore leave that obligation to judicial construction of due process

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243. See HOOPER & THORPE, *supra* note 76, at 25–38 (providing a district by district comparison).

244. See, e.g., D. ARIZ. LOC. R. 16.1; D. WYO. CRIM. R. 16.1.

245. See, e.g., N.D.N.Y. R. Crim. P. 14.1(b)(2); M.D. TENN. CRIM. R. 16.01(a)(2)(d).

246. D. HAW. CRIM. R. 16.1(a)(7), (g)(2) (requiring disclosure of *Brady* material seven days after arraignment, and impeachment material “as ordered by the court”); N.D.N.Y. R. CRIM. P. 14.1(b)(2), (d)(1) (requiring disclosure of *Brady* material fourteen days after arraignment and *Giglio* material fourteen days prior to trial); D. VT. CR. R. 16(a)(2), (d)(1) (requiring disclosure of *Brady* material fourteen days after arraignment and *Giglio* material fourteen days prior to jury selection).

247. S.D. ALA. R. 16.13(b)(1)(B) (requiring disclosure of all information “favorable to the defendant . . . without regard to materiality”); S.D. GA. CRIM. R. 16.1(f) (requiring disclosure of “any evidence favorable to the defendant” within seven days of arraignment).

248. Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 741 (2010).

249. See Prosser, *supra* note 34, at 577 (providing an overview of jurisdictional variations).

requirements.<sup>250</sup> Most states incorporate the constitutional requirements of *Brady/Giglio* in their criminal discovery rules, either explicitly<sup>251</sup> or implicitly, by using terms such as “exculpatory evidence,”<sup>252</sup> information “favorable” to the accused,<sup>253</sup> or evidence that “tends to negate” guilt,<sup>254</sup> with notes in their commentaries linking the obligation to *Brady* and thereby implicitly incorporating a materiality element. My research revealed no state jurisdiction that explicitly distinguishes between disclosure of exculpatory evidence before trial or before a guilty plea: in some states, the timing of disclosures is left vague with words such as “timely,” “as soon as practicable,” or “within a reasonable time before trial,”<sup>255</sup> while in other states disclosure is required a specified number of days after request.<sup>256</sup> California has the narrowest disclosure rules. As a result of Proposition 115, California Penal Code section 1054 requires prosecutors to disclose an extensive list of matters to the defendant, including “exculpatory evidence.”<sup>257</sup> However, section 1054.7 provides that these disclosures need only be made thirty days before trial.<sup>258</sup> Two of the primary goals of the referendum were to simplify criminal litigation and to protect witnesses from harassment or intimidation.<sup>259</sup>

While some state rules require disclosure of certain *types* of impeachment information,<sup>260</sup> only one state appears to generally reference all “impeachment” evidence in its criminal discovery rules. Maryland differentiates when impeachment information must be disclosed to the defendant based on seriousness of offense and court of jurisdiction. In practice before the district courts of Maryland, the prosecutor must disclose *before trial* all evidence and information that

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250. See Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pre-Trial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1099, 1123 (2004) (providing an overview of jurisdictional variations).

251. N.H. SUP. CT. R. 98(A)(2)(iv); TENN. R. CRIM. P. 16, advisory commission comment.

252. See, e.g., CAL. PENAL CODE § 1054.1(e) (West 2008); WIS. STAT. ANN. § 971.23(1)(h) (West 2008); MASS. R. CRIM. P. 14(a)(1)(A)(iii).

253. See, e.g., LA. CODE CRIM. P. ANN. art. 718(1); OHIO CRIM. R. 16(B)(1)(5).

254. See, e.g., ILL. SUP. CT. R. 412(c); MINN. R. CRIM. P. 9.01(6).

255. See, e.g., ILL. SUP. CT. R. 412(c), (d); WIS. STAT. ANN. § 971.23(1)(h).

256. See, e.g., ALA. R. CRIM. P. 16.1(c)(1); S.C. R. CRIM. P. 5(a)(3).

257. CAL. PENAL CODE § 1054.1(e) (West 2011).

258. See CAL. PENAL CODE § 1054.7.

259. Berend, *supra* note 189, at 495 n.105.

260. Massachusetts requires disclosure of “promises, rewards or inducements” made to Commonwealth witnesses, MASS. R. CRIM. P. 14(a)(1)(A)(ix). Illinois requires disclosure of “any record of prior criminal convictions” of persons whom the state intends to call as witnesses. ILL. SUP. CT. R. 412(a)(vi).

“tends to impeach a State’s witness.”<sup>261</sup> No preplea disclosure of impeachment material is required, provided that the change of plea occurs before the start of trial. However, for felonies prosecuted in the circuit courts of Maryland, the rule is quite different. The prosecutor must disclose without request and within thirty days after the defendant’s first appearance “all material or information in any form, whether or not admissible, that tends to impeach a State’s witness.”<sup>262</sup> The term “tends to impeach” is defined to include seven specific subcategories of information.<sup>263</sup> Maryland thus takes a rather schizophrenic approach, requiring either the disclosure of all impeachment information or no impeachment information before a guilty plea (absent waiver), depending on the seriousness of the offense.

Clearly jurisdictions are struggling with this issue.<sup>264</sup> Yet, unlike Goldilocks testing out the beds in the house of the three bears,

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261. MD. R. 4-262(d)(1).

262. *Id.*

263. See MD. R. 4-263(d)(6)(A)–(G) (including prior conduct of untruthfulness, agreements, or understandings to induce testimony, prior criminal convictions, and pending charges against witness, prior materially inconsistent statements, medical or psychiatric condition that may impair the witness’s ability to testify truthfully and accurately, the fact that the witness has taken but did not pass a polygraph, and the failure of the witness to identify the defendant or a codefendant).

264. Another committee of the American Bar Association, the Standards Committee of the Criminal Justice Section, is presently in the process of drafting a fourth edition of the Standards on Administration of Criminal Justice: Prosecution and Defense Functions (latest available draft, Summer 2010). Their work is only in draft form, and has not yet been approved by the ABA. See Rory K. Little, *The ABA’s Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111 (2011) (draft standards available at appendix). The Criminal Justice Standards Committee has encountered the same tensions and difficulties with regard to preplea impeachment disclosures as those identified in this article. The proposal as presently drafted distinguishes between disclosure obligations before trial, *id.* at 1147 (Proposed Standard 3-5.5), and disclosure obligations before a guilty plea, *id.* at 1148–49 (Proposed Standard 3-5.7 (e)). For disclosure obligations before trial, the Standards Committee recommends specifically adding reference to information that “impeaches the government’s witnesses or evidence.” *Id.* at 1147 (Proposed Standard 3-5.5(a)). It also expressly dispenses with the materiality element of *Brady*, by requiring pretrial disclosure “regardless of whether the prosecution thinks it will change the result of the proceeding.” *Id.* (Proposed Standard 3-5.5(c)). Thus, according to these draft standards, *all* impeachment evidence must be turned over before trial. But in the case of plea bargains, the Committee reverts to the bald “tends to negate guilt” language of the old standard, thereby preserving the “materiality” ambiguity. All evidence “tending to negate guilt” should optimally be turned over before a guilty plea, although a prosecutor “on an individualized basis [may] seek and accept a knowing and voluntary waiver.” *Id.* at 1149 (Proposed Standard 3-5.7(e), (f)). Even in that event, however, the “prosecutor should always disclose evidence known to the prosecutor that directly suggests the defendant is innocent.” *Id.* (Proposed Standard 3-5.7(f)). On the difficult issue of preplea disclosure of impeachment information, therefore, the Standards Committee has essentially “punted.” Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 HASTINGS L.J. 1321, 1341 (2011) (“This

none of the approaches identified above seem to fit quite right. Certainly the solution that is the clearest, the easiest to apply, the most efficient, and the most protective of witness privacy is to require no impeachment disclosures whatsoever before a guilty plea. But is that fair to defendants? Two particular forms of impeachment material strike me as serious enough to potentially undermine our confidence in the voluntariness and accuracy of a guilty plea. One is a witness's inability or failure to identify the defendant from an identification procedure (e.g., photo array, lineup, etc.).<sup>265</sup> In a case that hinges on identification, the failure of a witness to identify the defendant when given an opportunity to do so is perhaps the most damaging form of impeachment imaginable, bordering on the factually exculpatory. The other powerful form of impeachment evidence is promises, rewards, and inducements given to a government witness.<sup>266</sup> This evidence may be critical not only to show a motive by the witness to fabricate, but also to allow the defendant to assess whether the actions of the cooperating witness during the investigation are attributable to the government for purposes of raising a possible entrapment defense.<sup>267</sup> While experienced defense counsel typically move for disclosure of these two forms of impeachment evidence during discovery,<sup>268</sup> making such disclosure automatic prior to a guilty plea (absent a protective order or waiver) may serve the collateral purpose of helping to insulate convictions from later attack on the grounds of ineffective assistance of counsel.

These observations lead me to conclude that if any changes are contemplated in this area, the rules of criminal procedure might be amended to require the disclosure of certain *categories* of impeachment information prior to a guilty plea, on the presumption that more often than not those categories of impeachment evidence

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leaves unresolved the debate over whether impeachment evidence should be revealed prior to entry of a guilty plea.”).

265. See *State v. Curtis*, 384 So. 2d 396, 398 (La. 1980) (explaining that the sole eyewitness's failure to identify the defendant from earlier photo array was materially impeaching of eyewitness's later in-court identification because “[in court] identification was the most important and key evidence presented against defendant, and his reliability would have been a crucial factor in the jury's determination of defendant's guilt”).

266. See generally R. Michael Cassidy, “Soft Words of Hope:” *Giglio, Accomplice Witnesses, and the Problem of Implied Inducements*, 98 NW. U. L. REV. 1129 (2004).

267. See *Roviaro v. United States*, 353 U.S. 53, 64 (1957) (explaining the importance of such evidence).

268. See, e.g., JACK B. HOOD & HERBERT H. HENRY II, ALABAMA CRIMINAL TRIAL PRACTICE FORMS § 16:3(II)(20)(I), (M) (2010) (including as part of a discovery template requests for information relating to the misidentification of the defendant and promises made to witnesses); OHIO CRIMINAL DEFENSE MOTIONS F 2:6 (2008) (same).



are critical to a defendant's decision whether to plead guilty or to proceed to trial. The U.S. District Court in Massachusetts has adopted such a categorical approach in its local rules. This court distinguishes between information that must be automatically disclosed by the prosecutor (absent waiver) twenty-eight days after arraignment and information that must be disclosed twenty-one days before trial.<sup>269</sup> Four particular types of impeachment information are considered so-called "twenty-eight day" material: promises, rewards, and inducements to prospective government witnesses; the prior criminal record of prospective government witnesses; pending criminal charges against prospective government witnesses; and a written description of the failure of any percipient witness to identify the defendant during an identification procedure.<sup>270</sup> Other common forms of impeachment information are included in the list of "twenty-one day" material, which may be withheld until shortly before trial. These include prior inconsistent statements of government witnesses; information revealing a bias or prejudice of the witness against the defendant; a written description of any prior acts of dishonesty of the witness that may be admissible under Federal Rule of Evidence 608(b); and information known to the government of any mental or physical impairment of the witness that may cast doubt on the ability of the witness to testify accurately and truthfully.<sup>271</sup> The practical result of this bifurcated approach is to require disclosure of what the court felt were the most important and damaging forms of impeachment information prior to a guilty plea but to authorize the government to delay other impeachment disclosures (particularly those that would embarrass or invade the privacy of witnesses) until shortly before trial.<sup>272</sup>

Jurisdictions inclined to follow a categorical approach might consider including in the early discovery category substantial inconsistencies between a witness's versions of events on key elements

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269. D. MASS. R. 116.2(B)(1), (2).

270. *Id.* at R. 116.2(B)(1)(b)-(f).

271. *Id.* at R. 116.2(B)(2)(b)-(g). This latter list is not exclusive, as Rule 116.2(B)(2)(a) requires disclosure before trial of any information that "tends to cast doubt" on the credibility or accuracy of any witness.

272. The local federal rule in Massachusetts also contains a written declination procedure whereby the prosecutor can decline to produce certain information otherwise required by the local rule. If the defendant files a motion to compel, the court may examine the material *in camera* to determine whether any legitimate law enforcement interests (e.g., privacy, witness safety, national security, or the integrity of ongoing investigations) warrants withholding the material. *Id.* at R. 116.6(A).

of the government's proof.<sup>273</sup> While this category of *Giglio* information resurrects the troublesome concept of materiality, that concession may be necessary to capture instances where a victim's recollection of events substantially changes over time.<sup>274</sup> An example might highlight the difference in degree between varying forms of prior inconsistent statements. In my rape hypothetical above (Scenario 1 in Part II), a victim's description of events that varies over time in minor detail (color of clothes, time of day, etc.) would be considered "twenty-one day material" under the local federal rule in Massachusetts and therefore such information would be subject to disclosure only before trial. But if that same witness gave conflicting accounts of other aspects of the alleged attack (use of contraceptives, number of instances or methods of penetration, etc.) those inconsistencies may be so central to the charged events as to seriously undermine the victim's credibility, even if they are not factually exculpatory. In my view, conscientious prosecutors should disclose those inconsistencies prior to a guilty plea (absent an express waiver) even though in the District of Massachusetts they would still be considered "twenty-one day material" rather than "twenty-eight day material" because they do not "directly" negate the defendant's guilt.<sup>275</sup>

Let us return to the trial of Alaska Senator Ted Stevens on charges of knowingly failing to list on Senate disclosure forms approximately \$250,000 in gifts and home renovations to a vacation home in Alaska. Two of the damaging pieces of information that the government withheld in that case were contained in notes from prosecutors' pretrial interview with Bill Allen, a construction company executive and friend of Stevens with close ties to the oil industry who had agreed to cooperate with the government after being indicted for bribing state legislators in Alaska.<sup>276</sup> During that interview

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273. The Maryland Rules of Criminal Procedure require the prosecutor in circuit court cases to disclose within thirty days of the defendant's first appearance "an oral statement of the witness, not otherwise memorialized, that is *materially* inconsistent with another statement made by the witness or with a statement made by another witness." MD. R. 4-263(d)(6)(D) (emphasis added). The Local Rule of the United States District Court in Vermont defines *Giglio* material to include "the content of substantially inconsistent statements that a witness has made concerning issues material to guilt or punishment." D. VT. R. 16.0(d)(1)(B).

274. The January 4, 2010, Memorandum from Deputy Attorney General David Ogden to federal prosecutors encourages prosecutors to memorialize and disclose "material variances in a witness's statements," Main Memo, *supra* note 96, at 8-9, although the timing of these disclosures is left to the discretion of individual prosecutors and local district court rules.

275. See D. MASS. R. 116.2(B)(1)(a) (requiring disclosure within twenty-eight days of arraignment of "[i]nformation that would tend directly to negate the defendant's guilt concerning any count in the indictment or information").

276. Toobin, *supra* note 1, at 43.

approximately five months before trial, Allen told prosecutors (contrary to his later trial testimony) that the value of the contracting services his company performed at the Girdwood chalet was only about \$80,000 and that he did not remember Bill Persons (a Stevens emissary) telling Allen that the Senator did not want a bill, he was only asking for one to “cover himself.”<sup>277</sup> Both of those statements were favorable to the defense because they directly impeached Bill Allen on central and damaging points of his trial testimony. The latter statement was particularly relevant because it undercut the government’s theory that a note written by Stevens to Allen during construction stating “you owe me a bill . . . [This] just has to be done right” was just a cover for the Senator to protect himself.<sup>278</sup> The prior statements themselves were not directly exculpatory, however; the difference in value of the services (\$250,000 or \$80,000) does not suggest factual or legal innocence, and the inability of Allen to recall the Persons statement at the time of the interview, while impeaching of a later ability to do so, did not directly exculpate Senator Stevens on the issue of whether he knew that he had not fully paid for Allen’s services. The irony here is that *Giglio* requires the disclosure of these inconsistencies before trial, but *Ruiz* does not require the disclosure of them before a guilty plea. Even the Massachusetts local rule would not alter that result. Had Ted Stevens entered into a plea agreement containing a typical *Ruiz* waiver, he may never have learned of these inconsistencies—even in the District of Massachusetts. If the drafters of federal and state rules of criminal procedure opt to take a categorical approach to impeachment disclosures—in my view, the best available alternative if any amendment is undertaken—the vexatious question that they must confront is whether fundamental fairness requires the disclosure of material inconsistencies in the accounts of key witnesses prior to a guilty plea.

#### CONCLUSION

In this Article, I urge caution on the part of rulemakers with regard to mandating the disclosure of impeachment information before a guilty plea. Although impeachment information has the same constitutional stature as other forms of exculpatory evidence under

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277. Neil A. Lewis, *Dismissal for Stevens, but Question on ‘Innocent’*, N.Y. TIMES, Apr. 12, 2009, at A14, available at <http://www.nytimes.com/2009/04/12/us/politics/12stevens.html>; see Transcript on Hearing on Motion to Set Aside Verdict at 13–14, *United States v. Stevens*, No. 08-cr-231 (EGS), 2009 WL 6525926 (D.D.C. Apr. 7, 2009).

278. Toobin, *supra* note 1, at 43–44.

*Brady*, treating it like other forms of evidence favorable to the accused at the plea bargaining stage of a criminal case presents unique dangers and obstacles. Professional conduct rules are a particularly poor vehicle for reform in this area because they tend to be written at such a high level of generality that they fail to provide concrete guidance to attorneys and because they are enforced so infrequently that they tend to be ignored. Due to the wide disparity in types of cases handled (simple misdemeanors to complex felonies) and the significant differences in the courts in which such crimes are prosecuted (state versus federal), this matter is better dealt with by individual jurisdictions in enacting rules of criminal procedure than by broad and mostly hortatory rules of prosecutorial ethics. A categorical approach to preplea impeachment disclosures is the most promising option for jurisdictions seeking to provide more fulsome discovery to defendants beyond *Brady* while at the same time protecting other important interests such as efficiency, witness safety, and victim privacy.

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