OPEN-FILE DISCOVERY: A PLEA FOR TRANSPARENT PLEA-BARGAINING*

I. INTRODUCTION

Ninety-seven percent of criminal cases in the United States result in a guilty plea.[1] Plea-bargaining is when a prosecutor offers a defendant a lower sentence than they would likely receive at trial in exchange for their admission of guilt by way of a guilty plea.[2] The difference between the sentence offered in a plea and the maximum penalty a defendant faces at trial is often called the "trial penalty."[3] At a minimum, the decision to enter a guilty plea involves a complex estimation of the probability of conviction, the maximum sentence faced, and the expected return on the bargain.[4] Therefore, a defendant's access to information about those factors is critical to making an informed decision about whether to plead guilty.[5] Before a criminal trial, prosecutors have a duty to provide some of this information to the defendant during the discovery process.[6] And yet, in the majority of jurisdictions—including Pennsylvania—defendants do not have a right to discovery before a plea bargain.[7] Because discovery is considered a constitutional guarantee of a fair *trial*, the overwhelming majority of defendants who accept plea bargains before reaching the trial stage do not receive the safeguards of fairness and transparency bound in the right to discovery.[8]

Open-file discovery, wherein defendants are entitled to all nonprivileged information in the prosecutor's file regarding their cases, increases defendants' bargaining power by reducing the uncertainties about trial risks.[9] Pre-plea access to discovery provides defendants a more complete picture of the case against them so that they can more accurately calculate the benefit and risk of accepting a plea bargain.[10]

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1. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 14 (2018), http://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf [https://perma.cc/D9KX-LLS7].

2. *See id.* at 5–6.

3. *Id.*

4. See *infra* Part II.C for an overview of the guilty plea decisionmaking rationality.

5. See *infra* Part III.A.2 for a breakdown of the key factors affecting the expected value of a guilty plea.

6. *See, e.g.*, FED. R. CRIM. P. 16(a); PA. R. CRIM. P. 573. In Pennsylvania, the scope and timing of discovery disclosure is governed by Pennsylvania Rule of Criminal Procedure 573. *See* PA. R. CRIM. P. 573.

7. *See infra* Part II.D.3.

8. See *infra* Part II.D for an explanation of the constitutional protections provided at the trial stage that are not available pretrial.

9. See *infra* Part III.A.2 for an evaluation of the role of pre-plea discovery in plea-bargaining decisions.

10. *See infra* Part III.A.2.

Open-file discovery expands the scope of a defendant's own routes for investigation while reducing opportunities for police and prosecutorial misconduct.[11] Following the example of open-file jurisdictions, this Comment advocates for the modification of the Pennsylvania Rules of Criminal Procedure to mandate open-file discovery from the time of arrest as a remedy to the trial penalty and to facilitate fair, accurate, and transparent criminal proceedings.

II. OVERVIEW

This Section introduces the pieces of criminal procedure jurisprudence and rational decisionmaking that reinforce the role of the guilty plea and form the foundation of the trial penalty. Part II.A analyzes the evolving role of the guilty plea in criminal adjudication. Part II.B describes the magnitude of the trial penalty in practice. Part II.C unpacks the rationality underlying a criminal defendant's decision to plead guilty. Part II.D provides an overview of the law governing criminal discovery, and finally, Part II.E expounds upon the relationship between criminal discovery and the decision to enter a plea.

A. A System of Pleas

The Sixth Amendment to the U.S. Constitution guarantees criminal defendants the right to a speedy, public jury trial.[12] This, however, is extremely resource intensive.[13] The jury trial demands the prosecutor and defense attorney prepare extensively.[14] This time and preparation can be costly due to investigations, gathering witnesses and evidence, and picking jurors.[15] All of these costs are exacerbated by the high stakes: the defendant's potential loss of liberty and the prosecutor's obligation to meet the highest standard of proof—beyond a reasonable doubt.[16] These costs would increase exponentially if, for example, all of the 10,554,985 people arrested and charged in the United States in 2017 actually exercised their right to trial.[17] Within the last fifty years, guilty pleas have come to dominate the criminal justice system.[18] The system is "to the point that [trial by jury] now occurs in less than 3% of state and federal criminal cases."[19]

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11. See *infra* Part III.B for a discussion of the ways in which open-file discovery allows defendants to make better-informed plea decisions while reducing the risks of official misconduct.

12. U.S. CONST. amend. VI.

13. *See, e.g.*, Talia Fisher, *The Boundaries of Plea Bargaining: Negotiating the Standard of Proof*, 97 J. CRIM. L. & CRIMINOLOGY 943, 957–58 (2007) (analyzing the elements that compound the costs of proving guilt beyond a reasonable doubt in a criminal trial through cost intensive fact-finding processes).

14. *See id.*

15. *See id.*

16. *See id.* at 949 (comparing the cost of proving guilt beyond a reasonable doubt to lower standards of proof).

17. *See Total Number of Arrests in the US by Year and Type of Offense*, DRUG WAR FACTS, http://drugwarfacts.org/chapter/crime_arrests#Total=&overlay=table/total_arrests [https://perma.cc/3E8X-PCD6] (last visited Feb. 1, 2020) (cataloging the total number of arrests in the United States in 2017).

18. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 1, at 5.

19. *Id.*

Due to the rising volume of criminal cases—and their attendant costs—guilty pleas have replaced trials as the primary mechanism for determining criminal case outcomes.[20] This shift has happened for several reasons, including increased prosecutorial discretion,[21] limited resources in a saturated criminal justice system,[22] and evolving jurisprudence from the U.S. Supreme Court accepting the legitimacy of the practice.[23]

1. Prosecutorial Discretion To Induce Pleas

Plea-bargaining occurs when, in lieu of a trial, prosecutors offer to lower defendants' charges or reduce their sentences in exchange for defendants' guilty pleas.[24] Prosecutors' discretion to decide the offenses charged and sentence lengths offered in plea bargains has increased incentives for defendants to plead guilty.[25] Prosecutors give defendants a choice: plead guilty or risk a longer sentence at trial.

Prosecutors use two types of plea-bargaining approaches: (1) charge bargaining, and (2) sentence bargaining.[26] Charge bargaining occurs when a prosecutor offers a defendant the option to plead guilty either to charges that carry lower sentences than those the defendant is facing or in exchange for other charges being dropped entirely.[27] Sentence bargaining occurs when the prosecutor and defense attorney stipulate to certain facts and circumstances that would impact sentencing.[28] By failing to report certain relevant facts that could impact sentencing guideline calculations, "the prosecutor can reduce the guideline range to secure a sentence to which she and defense counsel have agreed."[29]

An example of the power of plea-bargaining can be seen in the case of a Baylor University student, Jacob Walter Anderson.[30] Prosecutors charged Anderson with the

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20. *See id.* at 30.

21. *See, e.g.*, Lucian E. Devran, *Bargained Justice: Plea-Bargaining's Innocence Problem and the* Brady *Safety-Valve*, 2012 UTAH L. REV. 51, 61 [hereinafter Devran, *Bargained Justice*]; Michael Nasser Petegorsky, *Plea Bargaining in the Dark: The Duty To Disclose Exculpatory* Brady *Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3611 (2013).

22. *See, e.g.*, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 1, at 14; Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 38 (1979) [hereinafter Alschuler, *Plea Bargaining and Its History*] (attributing the increase in pressure to plead to "the growing backlog of criminal cases," and the increase in the average length of a felony trial to the Supreme Court's decision to expand the due process rights of criminal defendants, and explaining how as a result of that decision, "[p]rosecutors' offices were required to devote a greater share of their resources to appellate litigation").

23. Devran, *Bargained Justice*, *supra* note 21, at 65, 77–82.

24. *See* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 1, at 24.

25. Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. MICH. J.L. REFORM 345, 368 (2005).

26. Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 928 (2006).

27. *See* Dawn Reddy, *Guilty Pleas and Practice*, 30 AM. CRIM. L. REV. 1117, 1133–35 (1993).

28. *See id.* at 1135–37. Sentence bargaining can also involve the prosecutor agreeing to recommend a certain sentence at the sentencing hearing. *Id.* at 1136–37.

29. Gardina, *supra* note 25, at 367.

30. *See* Nomaan Merchant, *Former Baylor Frat President Accused of Rape Gets No Jail Time*, PBS (Dec. 11, 2018, 7:16 PM), http://www.pbs.org/newshour/nation/former-baylor-frat-president-accused-of-rape-gets-no-jail-time [https://perma.cc/VU9W-2AYS].

sexual assault of another Baylor student in 2016.[31] His charges carried a possible twenty-year sentence and a lifetime sex offender registration if found guilty.[32] Prosecutors negotiated a deal in which Anderson pleaded "no contest"[33] to the lesser charge of unlawful restraint.[34] The court ultimately sentenced Anderson to probation, mandated he go to counseling, and fined him $400, but he did not have to register as a sex offender.[35] The prosecutor's decision to drop the sexual assault charge in exchange for a plea to unlawful restraint demonstrates the power of charge bargaining. Whereas the original sexual assault charge carried a potential twenty-year sentence, bargaining to plead to the lesser charge of unlawful restraint guaranteed Anderson a dramatically more lenient punishment.[36] Such discretion gives prosecutors the ability to over- or undercharge defendants or threaten additional charges in order to induce a plea prior to trial.[37] This discretion demonstrates how prosecutors' ability to determine the offenses charged and bargain over the terms of a plea have increased incentives for defendants to plead guilty.[38] Herein lies the allure of plea-bargaining: to avoid the risk of facing a longer sentence attendant to sentencing guidelines if convicted of more serious charges at trial.[39]

Legislative and judicial efforts to develop more sophisticated criminal procedures have also had the unintended consequence of giving prosecutors an arsenal of tools to induce pleas.[40] The expansion of criminal codes,[41] the Supreme Court's recognition of new due process rights for criminal defendants,[42] and the development of the Federal Sentencing Guidelines[43] have given prosecutors unprecedented incentives to negotiate with criminal defendants.[44] As criminal codes developed in detail and complexity

31. *Id.*

32. In Texas, sexual assault is a second-degree felony. TEX. PENAL CODE ANN. § 22.011 (West 2019). Second-degree felonies carry a minimum of two years and a maximum of twenty years of imprisonment as well as a fine of up to $10,000. *Id*. § 12.33. An individual who is convicted of one of the enumerated "reportable convictions" must register as a sex offender. TEX. CODE CRIM. PROC. ANN. art. 62.051(a) (West 2019). Sexual assault is one of the "reportable convictions" for which the judge could require sex offender registration. *Id*. art. 62.001(5)(A).

33. A plea of "no contest," also called "nolo contendere," is "a plea by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty." North Carolina v. Alford, 400 U.S. 25, 35 (1970).

34. Merchant, *supra* note 30. Unlawful restraint is defined as "the restriction of a person's movement or conduct, against that person's will, without lawful authority to do so." *Unlawful Restraint (Unlawful Detention)*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION (Stephen Michael Sheppard ed., 2012).

35. Merchant, *supra* note 30.

36. *See id.*

37. *See* Petegorsky, *supra* note 21, at 3611.

38. *See* Gardina, *supra* note 25, at 368.

39. *Id.*

40. *See* Devran, *Bargained Justice*, *supra* note 21, at 61–62.

41. *Id.* at 62.

42. *Id.* at 81–82.

43. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 211, 98 Stat. 1987, 1988 (codified as amended at 18 U.S.C. § 3551 (2018)).

44. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 1, at 16.

around the turn of the twentieth century,[45] prosecutors gained bargaining power through their ability to exercise discretion when charging defendants and recommending sentences.[46] A more detailed criminal code gave prosecutors more options of crimes to charge a defendant with.[47] Each charge had its own sentencing implications, and as such, each crime created a bargaining chip for the prosecutor in a plea negotiation.[48]

The expansion of criminal codes and creation of the Federal Sentencing Guidelines spurred a flood of new cases requiring prosecution.[49] Federal prosecutors responded by turning to negotiated guilty pleas as a means of resolving cases quickly during the Prohibition Era.[50] This reliance on guilty plea negotiations persisted and spread to state courts: the Federal Bureau of the Census found that guilty pleas resolved seventy-seven percent of felony convictions in 1936, rising to eighty-six percent by 1940.[51] As prosecutors' power to "select from various criminal statutes with significantly different sentences" grew, so did their ability to induce defendants to accept a plea agreement.[52]

The Warren Court's "due process revolution" of the 1960s increased prosecutors' incentives to plea bargain even further by expanding criminal defendants' due process rights.[53] Through landmark rulings in cases such as *Mapp v. Ohio*,[54] *Gideon v. Wainwright*,[55] and *Miranda v. Arizona*,[56] the Warren Court dramatically expanded the scope of criminal defendants' constitutional rights and devised procedural safeguards to protect those rights.[57] Complying with defendants' newly recognized due process rights created a backlog of criminal cases and "increased the complexity, length, and cost of

45. *See* Devran, *Bargained Justice*, *supra* note 21, at 62 (citing Alschuler, *Plea Bargaining and Its History*, *supra* note 22, at 32).

46. *Id.*

47. *Id.*

48. *See id.* at 63 ("While defendants also play an important role in the plea bargaining process, Prosecutors' control of charging decisions and their influence over sentencing are key elements that contributed to the system's dominance.").

49. *See* Alschuler, *Plea Bargaining and Its History*, *supra* note 22, at 32.

50. *See id.*

51. *Id.*

52. Devran, *Bargained Justice*, *supra* note 21, at 61.

53. Alschuler, *Plea Bargaining and Its History*, *supra* note 22, at 38; Devran, *Bargained Justice*, *supra* note 21, at 81–82.

54. 367 U.S. 643 (1961).

55. 372 U.S. 335 (1963).

56. 384 U.S. 436 (1966).

57. *Miranda*, 384 U.S. at 444 (holding that "the prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the [Fifth Amendment] privilege against self-incrimination"); *Gideon*, 372 U.S. at 343–45 (establishing the criminal defendant's right to appointed counsel "at every step in the proceedings against him" and incorporating the Sixth Amendment to the States through the Due Process Clause of the Fourteenth Amendment (quoting Powell v. Alabama, 287 U.S. 45, 68–69 (1932))); *Mapp*, 367 U.S. at 655 (extending the applicability of exclusion to the states through the Due Process Clause of the Fourteenth Amendment as a sanction for violations of the Fourth Amendment right to privacy); *see also* Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 190 (1983).

trials."[58] In addition, this compliance required prosecutors to spend time litigating evidentiary and appellate issues.[59] All of these factors increased costs and incentivized prosecutors to negotiate pleas as quickly as possible.[60]

Ironically, the due process revolution focused its concern on the relationship between *police* and the due process rights of defendants, "repeatedly ignor[ing] the leverage that prosecutors exerted upon criminal defendants at the courthouse."[61] Nonetheless, the expansion of criminal defendants' due process rights also expanded defendants' bargaining power by increasing the costs of prosecution; in return, it increased prosecutors' incentives and tools to induce a guilty plea.[62]

The establishment of the Federal Sentencing Guidelines (Guidelines) through the Sentencing Reform Act of 1984[63] and the introduction of similar procedures in various state courts created another important facet of prosecutorial power in the plea-bargaining process.[64] The Sentencing Reform Act was a congressional response to "studies finding widespread racial, gender, inter-judge, and inter-district disparities in sentencing"[65] and the hallmark of the "tough on crime," War on Drugs, "crime control" machinery.[66] The Sentencing Guidelines provided a grid that measured "the conviction offense plus additional aggravating or mitigating sentencing facts" against the defendant's criminal history to determine the range of sentences available for the defendant.[67] Until the Supreme Court's holding in *United States v. Booker*,[68] federal courts had extremely limited discretion to diverge from the mandated sentence range.[69]

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58. Lucian E. Devran, Class v. United States*: Bargained Justice and a System of Efficiencies*, 2018 CATO SUP. CT. REV. 113, 123 [hereinafter Devran, Class v. United States].

59. *See* Alschuler, *Plea Bargaining and Its History*, *supra* note 22, at 38.

60. *See id.*

61. *Id.* at 37.

62. *Id.* at 38.

63. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 211, 98 Stat. 1987, 1988 (codified as amended at 18 U.S.C. § 3551 (2018)); U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (U.S. SENTENCING COMM'N 2018); *see also* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 1, at 16 ("The federal sentencing laws in turn provide prosecutors with an arsenal of tools that can be manipulated to convince defendants to plead guilty. The federal Sentencing Guidelines . . . can result in excruciatingly steep penalties that are frequently disproportionate to a defendant's actual culpability, and important reductions from those penalties are generally only available to defendants who plead guilty.").

64. Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 YALE L.J. 2, 13 (2013).

65. *Id.* at 11.

66. *See* Michael Tonry, *Sentencing in America, 1975–2025*, 42 CRIME & JUST. 141, 159–61 (2013) ("The promulgation of federal sentencing guidelines, which took effect in 1987, signaled the beginning of the end of the sentencing reform period that targeted disparities and the beginning of the tough on crime period that sought increased certainty and severity."); Matthew C. Lamb, Note, *A Return to Rehabilitation: Mandatory Minimum Sentencing in an Era of Mass Incarceration*, 41 J. LEGIS. 126, 138 (2015) ("[T]he rigid sentencing of the Federal Sentencing Guidelines has contributed to the drastic fiscal and social costs of the War on Drugs and resulted in a state of mass incarceration.").

67. Starr & Rehavi, *supra* note 64, at 11.

68. 543 U.S. 220, 245 (2005) ("[We find] the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp. 2004), incompatible with today's constitutional holding. . . . So modified, the federal sentencing statute makes the Guidelines effectively advisory." (second citation omitted)).

69. *See* Starr & Rehavi, *supra* note 64, at 11–14.

As district court judges found their hands virtually tied with respect to sentencing decisions, prosecutors "obtained greater leverage in plea-bargaining—they could nearly promise that defendants would get more lenient sentences if they pled guilty and harsher ones if they refused."[70] Before the Sentencing Reform Act implemented the Guidelines in 1987, guilty pleas accounted for eighty-seven percent of federal convictions; by 2005, the last year of mandatory adherence to the Guidelines, that number rose to ninety-seven percent.[71]

2. Reluctance to Reliance: The Supreme Court's Evolving View of the Plea

The Supreme Court was slow to embrace plea-bargaining as a constitutional method of guilt determination.[72] Historically, the idea of bargained-for justice sat uncomfortably in English common law.[73] In 1783, the court in *Rex v. Warickshall*[74] held confessions inadmissible if they were induced by "promises of favor" or made out of fear.[75] Similarly, until 1970, the Supreme Court continuously "struck down every guilty plea induced by threats of punishment or promises of leniency that had arrived on its docket."[76] The notion that a favor or fear could not coerce a plea was the foundation for the voluntariness requirement in U.S. guilty plea jurisprudence.[77] In 1897, the Supreme Court grappled with the question of what constituted a truly voluntary statement in *Bram v. United States*.[78] The *Bram* Court explained that any confession induced by fear or hope was not voluntary.[79] The Court especially considered the mindset of a prisoner when making a confession to a police officer because of the inherent pressure prisoners are subject to while in custody.[80]

In *Brady v. United States*,[81] the Supreme Court reversed the course of its trajectory and redefined its concept of voluntariness.[82] In *Brady*, the defendant was charged with a crime that carried the possibility of a death sentence if convicted.[83] To avoid the death penalty, he pleaded guilty and was sentenced to fifty years in prison.[84] The *Brady* Court held that his decision to plead guilty was not coerced but a voluntary decision based on his intelligent ability to weigh the probabilities of each outcome and

70. *Id.* at 13.

71. *See* Albert W. Alschuler, *Disparity: The Normative and Empirical Failure of the Federal Guidelines*, 58 STAN. L. REV. 85, 112 (2005).

72. Devran, *Bargained Justice*, *supra* note 21, at 65.

73. *See* Devran, Class v. United States, *supra* note 58, at 120.

74. (1783) 168 ENG. REP. 234, 1 LEACH 263.

75. Devran, *Bargained Justice*, *supra* note 21, at 65 (citing *Rex*, 168 ENG. REP. at 234).

76. *Id.* at 76.

77. *Id.* at 66–68; *see also* FED. R. CRIM. P. 11(b)(2) ("Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).").

78. 168 U.S. 532 (1897); *see also* Devran, Class v. United States, *supra* note 58, at 120–21.

79. *Bram*, 168 U.S. at 557–58; *see also* Devran, *Bargained Justice*, *supra* note 21, at 67–68.

80. *Bram*, 168 U.S. at 556–67; *see also* Devran, *Bargained Justice*, *supra* note 21, at 67–68.

81. 397 U.S. 742 (1970).

82. *See Brady*, 397 U.S. at 757.

83. *Id.* at 743.

84. *Id.* at 743–44; *see also* Devran, *Bargained Justice*, *supra* note 21, at 77.

consequence.[85] The Court rejected the notion that an innocent defendant might enter a guilty plea to avoid the possibility of a death sentence.[86] Therefore, a guilty plea was not involuntary and void merely because it was entered to avoid the possibility of a death sentence.[87]

In *Brady*, the Court adapted its reasoning to the realities of the oversaturated criminal justice system.[88] Its holding considered the system's practical limitations and need for efficiency.[89] When the Court decided *Bram* it was feasible to expect plea-bargaining only under rare circumstances; in contrast, the *Brady* Court recognized that crowded criminal dockets rely on the regular use of plea-bargaining to resolve the high volume of cases quickly.[90] At the time when the Court decided *Bram*, the jury trial was considered more than a safeguard of liberty; it was practically the tool of justice.[91] By the time the Court decided *Brady* in the 1970s, however, only the few defendants willing to test their odds and demand the government meet its burden of proof used the jury trial.[92]

B. The Trial Penalty

The ultimate power of plea-bargaining stems from fear of the trial penalty—the difference between the sentence a criminal defendant faces if found guilty at trial and the sentence offered if that same defendant agrees to plead guilty.[93] This is referred to as a penalty because it effectively punishes defendants not based on the specifics of the crime charged but on the defendants' insistence that the government meet its burden of proof in a court of law.[94] Conversely, the concept is also sometimes referred to as a "plea discount" because it is perceived as a reward for honesty and taking responsibility for one's actions.[95]

Data on the trial penalty is difficult to gather because plea negotiations occur off the record, meaning there are no available transcripts of plea negotiations.[96] As such, it is challenging to calculate the specific trial penalty (the actual difference in the

85. *Brady*, 397 U.S. at 758; *see also* Devran, *Bargained Justice*, *supra* note 21, at 77–78.

86. *See Brady*, 397 U.S. at 758.

87. *Id.* at 755; *see also* Devran, *Bargained Justice*, *supra* note 21, at 78.

88. *See Brady*, 397 U.S. at 752 ("[T]he advantages of pleading guilty and limiting the probable penalty are obvious . . . . [W]ith the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt . . . . It is this mutuality of advantage that perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty."); *see also* Devran, Class v. United States, *supra* note 58, at 123–24.

89. *See* Devran, *Bargained Justice*, *supra* note 21, at 79–82.

90. *See id.* at 76.

91. *Cf. id.* at 58 (describing that guilty pleas were rejected "with resounding frequency" when they began to appear right after the Civil War).

92. *See id.* at 80–81 (emphasizing the importance of plea-bargaining in the 1960s and 1970s with ninety to ninety-five percent of convictions resulting from guilty pleas).

93. *See* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 1, at 15.

94. *See id.* at 7.

95. *See* Albert W. Alschuler, *Departures and Plea Agreements Under the Sentencing Guidelines*, 117 F.R.D. 459, 471–72 (1988) (evaluating the concept of sentencing departures as a "guilty plea discount"); *see also* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 1, at 39–40.

96. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 1, at 16.

potential sentence the defendant could receive if found guilty at trial compared with the sentence offered in the plea bargain) each individual defendant faced when making the decision to accept that plea.[97] However, some data is available.[98] The National Association of Criminal Defense Lawyers (NACDL) report of the United States Sentencing Commission's (USSC) data on federal sentencing, for example, revealed that "the average post-trial sentence was more than triple the average post-plea sentence."[99] The NACDL report also found that 50.7% of federal defendants who accepted a plea deal "received a sentence below the applicable sentencing guideline range."[100] Furthermore, the government requested 59.3% of those sentence reductions.[101] While 46.7% of federal defendants who went to trial (2.9% of total cases) received sentences below the guidelines, the government only sought reductions in 10.6% of cases.[102] Studies have also attempted to measure the trial penalty's impact on state and local defendants' decisions to plead.[103] A small-scale study of adults and juveniles charged with felonies in New York City found that the adults faced an average eighty percent plea discount.[104] For juveniles, the average plea discount was ninety-eight percent.[105]

C. To Plead or Not To Plead: That Is the Rationality Equation

Some might assume that only guilty defendants plead guilty. When faced with uncertainty, attractive plea bargains can incentivize even innocent defendants to forego a trial.[106] The decision each defendant makes to plead guilty is highly personal—innocence is only one of several factors that influence that decision.[107] Evaluating the decision to enter a plea through a model of expected value, also known as the "shadow model,"[108] may, however, help explain why ninety-seven percent of defendants made that choice.[109] Economists use one model of expected value, the expected value theory, to model a rational individual's choices. This model is limited,

97. *See id.*

98. *See id.* at 15–16.

99. *Id.* at 15. The NACDL calculated this statistic using USSC data files for 2015. *See id.* at 15, 17.

100. U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2015, at 4 (2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/FY15_Overview_Federal_Criminal_Cases.pdf [https://perma.cc/Z4J8-LHY5].

101. *Id.*

102. *Id.*

103. *See, e.g.*, Tina M. Zottoli et al., *Plea Discounts, Time Pressures, and False-Guilty Pleas in Youth and Adults Who Pleaded Guilty to Felonies in New York City*, 22 PSYCHOL. PUB. POL'Y & L. 250, 250 (2016).

104. *Id.* at 254.

105. *Id.*

106. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 1, at 15.

107. *See* Allison D. Redlich et al., *Understanding Guilty Pleas Through the Lens of Social Science*, 23 PSYCHOL. PUB. POL'Y & L. 458, 460–61 (2017) (describing the categories of defendants most likely to enter a plea).

108. *Id.* For an explanation of the expected utility theory and the expected utility formula, see *Normative Theories of Rational Choice: Expected Utility*, STAN. ENCYCLOPEDIA PHIL., http://plato.stanford.edu/entries/rationality-normative-utility/#OutUti [https://perma.cc/LS4Z-4WCT] (last modified Aug. 15, 2019).

109. *See* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 1, at 14.

however, because it assumes that individuals are risk neutral, which is not necessarily true.[110] Nonetheless, it provides a framework for predicting rational decisionmaking under uncertainty. When faced with the choice between a potential guilty verdict at trial—which could result in an unknown, long sentence—and a plea bargain with a known sentence, the rational, risk-averse defendant will choose to plead guilty.[111] The simplified expected value formula is: *Expected Value = [Probability of event 1 x Value 1] + [Probability of Event 2 x Value 2]*.[112] The formula breaks down the decision to plead or go to trial as follows: *Expected Value of Going to Trial = [Probability of Conviction x Maximum Sentence] + [Probability of Acquittal x 0 years]*,[113] and *Expected Value of Plea = [1 x Negotiated Sentence]*.[114]

For example, if a defendant faces an eighty percent probability of conviction for a crime that carries a maximum sentence of seventeen years and is offered a plea deal for seven years, the expected value of going to trial is -13.6; whereas, the expected value of pleading guilty is -7.[115] These values are negative because they are measuring time lost to a prison sentence—the smaller the negative number is, the lesser the penalty in terms of time. Therefore, based on this factor, any rational actor applying this formula would choose to plead guilty.[116]

Two factors control this formula: the length of the sentence and probability of conviction.[117] As discussed above in Part II.A.1, the prosecutor and sentencing guidelines attributed to the defendant's charges primarily control the sanction.[118] Numerous factors, however, control the probability of conviction, from the makeup of

110. *See* Redlich et al., *supra* note 107, at 462–64 (explaining that not all defendants perceive probability of conviction and the scope of the risk of trial in the same manner).

111. *See id.* at 461–62.

112. *See id.*

113. For the sake of this formula, I am assuming that acquittal will result in zero prison time and sentences are calculated as negative values, as they measure a penalty or loss of time. I am also assuming that the probability of acquittal is exactly 100 minus the probability of conviction.

114. In this formula, I am assuming that there is 100% certainty that the defendant will receive the negotiated sentence. Where the plea agreement involves the prosecutor agreeing not to bring certain charges (charge bargaining) or where the prosecutor "promises to recommend" a certain sentence (sentence bargaining), the court is not obligated to follow that recommendation, and the defendant does not have the right to "withdraw the plea if the court does not follow the recommendation." *Guilty Pleas*, 46 GEO. L.J. ANN. REV. CRIM. PROC. 471, 483 (2017) (quoting FED. R. CRIM. P. 11(c)(3)(B)).

115. The math breaks down as follows: *E(trial) = (.80)(-17)+(.20)(0) → E(trial) = -13.6*; *E(plea)= (1)(-7) → E(plea)= -7*. The expected value of accepting the plea (-7) is greater than the expected value of going to trial (-13.6).

116. Redlich et al., *supra* note 107, at 461–64.

117. *See Normative Theories of Rational Choice*, *supra* note 108 (explaining that the expected utility formula contains the assumption that each act has exactly one possible outcome depending on the state of the world). For example, for the act of bringing an umbrella, there are two possible states: rain or no rain. *Id.* This formula assumes that if you bring your umbrella, and it rains, there is only one possible outcome—you will be dry. *Id.* It does not allow for the possibility that you will bring your umbrella but get wet anyway. *Id.* For an application of the expected utility formula (described as an expected value formula) to the plea decision context, see Redlich et al., *supra* note 107, at 461–65.

118. *See* Redlich et al., *supra* note 107, at 462.

the jury to the disposition of the judge, which are impossible for either the prosecution or defense to perfectly control for.[119]

There are two underlying variables here that may limit the usefulness of using the expected value formula in the context of the plea process. First, this formula assumes that expected value is a function of only one factor: length of the possible prison sentence.[120] Importantly, this is not the only possible measure of value.[121] For example, this model cannot accurately account for the value of certain bargaining factors such as the possibility of receiving the death penalty at trial, offers for probation or the potential of parole, whether the defendant will have to register as a sex offender, or a guarantee of being incarcerated closer to home.[122] Second, this formula assumes that the individual making the decision is risk neutral and perfectly (or at least *moderately*) aware of the probability of each outcome.[123]

This rationality calculation does not change for a factually innocent defendant. Factual innocence is just one of a myriad of variables that factor into an individual's estimation of their likelihood of success at trial.[124] In a glimpse at the game of odds, it is estimated that four percent of inmates on death row are innocent.[125] Of the 367 people in the United States who have been exonerated by DNA evidence, forty-one "pled guilty to crimes they did not commit."[126] This reality stands against the rationale that "defendants should not be accepting plea-bargains unless they are guilty."[127] Therefore, an accurate estimation of the prosecution's case against the defendant is critical to the defendant's evaluation of the likelihood of success at trial.[128]

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119. *See id.* at 460–62 (describing the multitude of factors that contribute to a defendant's decision to enter a guilty plea).

120. *See Normative Theories of Rational Choice*, *supra* note 108.

121. *See* Redlich et al., *supra* note 107, at 460–62.

122. *See id.* at 459–60 (listing examples of elements of a plea that can be bargained for).

123. It goes without saying that perfect knowledge of the probability of each outcome could only exist in a thought experiment. Of course, in reality, such knowledge does not exist. Later this Comment argues that the materials that the government discovers and the defendant's knowledge of those materials determine the probability of conviction and acquittal.

124. *See* Redlich et al., *supra* note 107, at 460–65.

125. Emily Barone, *The Wrongly Convicted: Why More Falsely Accused People Are Being Exonerated Today Than Ever Before*, TIME, http://time.com/wrongly-convicted/ [https://perma.cc/DAS2-ZUPM] (last visited Feb. 1, 2020).

126. *DNA Exonerations in the United States*, INNOCENCE PROJECT, http://www.innocenceproject.org/dna-exonerations-in-the-united-states/ [https://perma.cc/N33D-94YL] (last visited Feb. 1, 2020).

127. *E.g.*, TEX. APPLESEED & TEX. DEF. SERV., TOWARDS MORE TRANSPARENT JUSTICE: THE MICHAEL MORTON ACT'S FIRST YEAR 33 (2015), http://texasdefender.org/wp-content/uploads/Towards_More_Transparent_Justice.pdf [https://perma.cc/T88B-DKAR] (quoting Letter from Meredith L. Kennedy, Civil Chief, Wichita Cty. Dist. Attorney's Office, to Rebecca Bernhardt, Policy Dir., Tex. Def. Serv. (May 27, 2014) (on file with Texas Defender Service)).

128. Daniel S. McConkie, *Structuring Pre-Plea Criminal Discovery*, 107 J. CRIM. L. & CRIMINOLOGY 1, 16–17 (2017).

D. The Development of Criminal Discovery

A defendant's ability to make that estimation depends in large part on the defendant's access to discovery.[129] In criminal cases, discovery is the process through which prosecutors must disclose certain information about the case file to the defendant.[130] In *Brady v. Maryland*,[131] the Court held that a prosecutor has a constitutional obligation to "disclose material, exculpatory evidence in time for use at trial or sentencing."[132] The Court recognized that the suppression of "evidence favorable to an accused" that is requested by the defense and is material to guilt or sentencing violates defendants' due process rights.[133] This ruling created "*Brady* rights," whereby criminal defendants have the right to obtain favorable evidence from the prosecutor.[134]

Brady rights are governed by the U.S. Constitution and the rules of criminal procedure in each jurisdiction.[135] *Brady* provided the constitutional floor for evidence-disclosure rights, but federal and state courts have expanded *Brady* in their rules of discovery.[136] This Part provides an overview of criminal defendants' pretrial *Brady* rights, the resulting post hoc analysis, and the absence of *Brady* rights in the pre-plea stage. Further, it compares *Brady*'s application in federal and state courts—specifically, Pennsylvania—through differing discovery systems.

1. Pretrial *Brady* Rights: The Prosecutor's Duty To Disclose

In *Brady*, the Supreme Court held that a defendant's Sixth Amendment right to a fair trial required the prosecutor to disclose certain evidence to the defense before trial.[137] The *Brady* Court stated that the suppression of "evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[138] The Court explained that the suppression of exculpatory evidence hindered the fact finder's ability to determine the truth and that a conviction in the absence of such truth violated the defendant's due process rights.[139] However, the *Brady* obligation to disclose evidence only applies to evidence that is both favorable and material.[140]

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129. *Id.*

130. THE JUSTICE PROJECT, EXPANDED DISCOVERY IN CRIMINAL CASES: A POLICY REVIEW 1 (2007), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/death_penalty_reform/expanded20discovery20policy20briefpdf.pdf [https://perma.cc/6WA8-8RYL].

131. 373 U.S. 83 (1963).

132. Miriam H. Baer, *Timing* Brady, 115 COLUM. L. REV. 1, 4 (2015).

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

134. *See id.*

135. *See* THE JUSTICE PROJECT, *supra* note 130, at 6–7.

136. *See* Brian Gregory, Comment, Brady *Is the Problem: Wrongful Convictions and the Case for "Open File" Criminal Discovery*, 46 U.S.F. L. REV. 819, 822 (2012).

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

138. *Id.*

139. *See id.* at 87–88 ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. . . . A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate

In *United States v. Agurs*,[141] the Supreme Court began to define "materiality" in determining which evidence the prosecutor had a constitutional duty to disclose to the defendant.[142] The *Agurs* Court differentiated three situations in which *Brady* obligations to disclose evidence arise and evaluated the "standard of materiality" that applies to *Brady* material.[143] In each situation, the prosecutor knowingly withholds information from the defense.[144]

The first situation involves undisclosed evidence that "demonstrates that the prosecution's case includes perjured testimony and that the prosecutor knew, or should have known, of the perjury."[145] The Court analyzed the fairness of convictions obtained in a series of cases after the prosecutor intentionally used perjured testimony by applying "a strict standard of materiality, not just because they involve prosecutorial misconduct, but . . . because they involve a corruption of the truth-seeking function of the trial process."[146]

The second situation where *Brady* obligations arise is "illustrated by the *Brady* case itself."[147] In *Brady*, the defense explicitly requested specific "material" evidence from the prosecution, which would have included a statement from Brady's accomplice in which he admitted to the murder Brady was charged with.[148] Through an analysis of the definition of "materiality" in the *Brady* holding—that the suppression of exculpatory evidence violated of Brady's due process rights—the *Agurs* Court explained that in order for suppressed evidence to be considered material, it must have potentially "affected the outcome of the trial."[149]

The third and final situation the *Agurs* Court evaluated is where defense counsel does not request specific exculpatory evidence but instead makes a request for "all *Brady* material" or, even more generally, requests "anything exculpatory."[150] Because defense counsel is often unaware of the exculpatory information the prosecutor possesses, the prosecutor's duty to disclose "derive[s] from the obviously exculpatory character of certain evidence in the hands of the prosecutor."[151] Therefore, where "the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even if no request is made."[152]

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him . . . casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice . . . .").

140. Jason B. Binimow, *Constitutional Duty of Federal Prosecutor To Disclose* Brady *Evidence Favorable to Accused*, 158 A.L.R. FED. 401, § 2[a] (1999).

141. 427 U.S. 97 (1976).

142. Binimow, *supra* note 140, § 2[a].

143. *See Agurs*, 427 U.S. at 103–07.

144. *Id.* at 103.

145. *Id.*

146. *Id.* at 103–04.

147. *Id.* at 104.

148. *Id.*; *see also* Brady v. Maryland, 373 U.S. 83, 84 (1963).

149. *Agurs*, 427 U.S. at 104–06.

150. *Id.* at 106.

151. *Id.* at 107.

152. *Id.*

In these situations, "the mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality.'"[153] As such, the materiality of a piece of suppressed evidence that is not expressly requested hinges on a determination that its disclosure would have determined the outcome of the case.[154]

2. Pretrial *Brady* Rights Result in Post Hoc Analysis

Inevitably, most *Brady* violations are litigated after a criminal defendant is found guilty at trial.[155] As a result, the court must evaluate the materiality of the evidence in a post hoc analysis.[156] As discussed in Part II.D.1, the potential probative value of the undisclosed evidence in the defendant's case determines materiality; it is not "measured by the moral culpability, or the willfulness, of the prosecutor."[157] Before the trial, the burden falls on the prosecutor to recognize the significance of "evidence highly probative of innocence [that is] in his file," whether or not the prosecutor accidently overlooked such evidence.[158]

The materiality analysis of undisclosed evidence occurs post hoc—after trial.[159] If the evidence "actually has no probative significance at all, no purpose would be served by requiring a new trial simply because an inept prosecutor incorrectly believed he was suppressing a fact that would be vital to the defense."[160] Because of the "overriding concern with the justice of finding guilt" beyond a reasonable doubt, determining the materiality of undisclosed evidence in these situations involves an evaluation of "the omission . . . in the context of the entire record."[161] If the undisclosed evidence "creates a reasonable doubt that did not otherwise exist, constitutional error has been committed."[162] On review, the defendant has the burden of proving that the omission was *not* a harmless error and that the undisclosed evidence created reasonable doubt that otherwise did not exist.[163] This process of litigating the materiality of undisclosed evidence after a guilty verdict is referred to as "post hoc materiality analysis" for the remainder of this Comment.

3. *Brady* Rights Do Not Apply Pre-Plea

Brady created a *pretrial* obligation to disclose material evidence.[164] Until 2002, the Supreme Court had not decided how, if at all, *Brady* obligations applied at the

153. *Id.* at 109–10.

154. *See id.* at 106–07.

155. *See* THE JUSTICE PROJECT, *supra* note 130, at 6.

156. *See* Thea Johnson, *What You Should Have Known Can Hurt You: Knowledge, Access, and* Brady *in the Balance*, 28 GEO. J. LEGAL ETHICS 1, 8 (2015).

157. *Agurs*, 427 U.S. at 110.

158. *Id.*

159. Johnson, *supra* note 156, at 8.

160. *Agurs*, 427 U.S. at 110.

161. *Id.* at 112.

162. *Id.*

163. *See id.*

164. *See* McConkie, *supra* note 128, at 9–10.

pre-plea and guilty-pleading stages.[165] In *United States v. Ruiz*,[166] the Court held that "defendants who plead guilty have no pre-plea right to *Brady* information relevant to either impeachment or an affirmative defense."[167] The Court explained that, while the "right to receive from prosecutors exculpatory impeachment material" is within the Fifth and Sixth Amendments' guarantees of a fair trial, under *Brady*, a defendant who pleads guilty "forgoes not only a fair trial, but also other accompanying constitutional guarantees."[168] The *Brady* right to exculpatory impeachment material attaches to the constitutional guarantee of a "fair trial."[169] That right was unrelated to the constitutional requirement that guilty pleas and related waivers be entered "voluntar[ily,] . . . knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences."[170] The Court held that impeachment evidence—evidence that challenges the credibility of a witness—was not "critical information" that the defendant must be aware of before entering a guilty plea because "[t]he degree of help that information can provide will depend upon the defendant's own independent knowledge of the prosecution's potential case."[171] The Court decided this was beyond the scope of what the Constitution requires prosecutors to disclose.[172]

4. Federal Approaches to *Brady* Rights

Federal courts are divided with respect to the applicability of *Brady* at the pleading stage.[173] In *Ruiz*, the Supreme Court held that the constitutional right to *Brady* impeachment evidence does not extend to the pre-plea phase.[174] U.S. Courts of Appeals have disagreed, both before and after *Ruiz*, as to whether *Brady* obligations apply to plea-bargaining.[175]

Before *Ruiz*, in *Campbell v. Marshall*,[176] the Sixth Circuit recognized that a *Brady* violation could factor into whether a guilty plea is "voluntary and knowing" in analyzing the validity of a plea.[177] Initially accepting the Sixth Circuit's holding in *White v. United States*,[178] the Eighth Circuit jumped the track soon after in *Smith v. United States*,[179] holding that "[i]n pleading guilty, a defendant waives all challenges to the prosecution except those related to jurisdiction."[180] The Second Circuit allows "a

165. *See id.* at 7.

166. 536 U.S. 622 (2002).

167. Ellen Yaroshefsky, *Prosecutorial Disclosure Obligations*, 62 HASTINGS L.J. 1321, 1339 (2011).

168. *Ruiz*, 536 U.S. at 628–29.

169. *Id.* at 628.

170. *Id.* at 629 (second, third, and fourth alterations in original) (quoting Brady v. United States, 397 U.S. 742, 748 (1970)).

171. *Id.* at 630.

172. *See id.*

173. Petegorsky, *supra* note 21, at 3602.

174. *See supra* Part II.D.3.

175. Petegorsky, *supra* note 21, at 3614–15.

176. 769 F.2d 314 (6th Cir. 1985).

177. *See Campbell*, 769 F.2d at 324; *see also* Petegorsky, *supra* note 21, at 3615–16.

178. 858 F.2d 416 (8th Cir. 1988).

179. 876 F.2d 655 (8th Cir. 1989).

180. *Smith*, 876 F.2d at 657; *see also* Petegorsky, *supra* note 21, at 3616–17.

defendant to challenge the validity of a guilty plea for the failure of the prosecution to disclose material exculpatory evidence" but only if there is "misrepresentation or other impermissible conduct by state agents."[181] The Second Circuit clarified that the nondisclosure of *Brady* material does not undermine the "knowing" or "intelligent" requirements of a guilty plea but "nevertheless renders it constitutionally invalid" because of unlawful conduct by state agents.[182]

Then, in *United States v. Wright*,[183] the Tenth Circuit held that a defendant can "challenge his conviction by asserting that he did not enter his plea intelligently or voluntarily" as a result of a *Brady* disclosure violation.[184] The Ninth Circuit similarly held that "a waiver cannot be deemed 'intelligent and voluntary' if 'entered without knowledge of material information withheld by the prosecution.'"[185] On the opposite end of the spectrum, the Fifth Circuit held that *Brady* is "purely a trial right" that does not extend to plea-bargaining.[186]

After the Court's ruling in *Ruiz*, which held that there is no constitutional requirement to disclose *impeachment* evidence pre-plea, a new circuit split emerged regarding the pre-plea disclosure of *exculpatory* evidence.[187] The Seventh[188] and Tenth[189] Circuits held that "exculpatory evidence, unlike impeachment evidence, had to be disclosed prior to the entry of a guilty plea."[190] The Fifth,[191] Fourth,[192] and Second[193] Circuits held that *Ruiz* precludes *Brady* challenges to a guilty plea whether the suppressed evidence could have been admitted for impeachment *or* exculpation.[194]

5. Pennsylvania's Application of *Brady* Rights

Brady obligations also apply to state courts through the Fourteenth Amendment's "constitutional guaranty of due process."[195] In response to *Brady*, many states—including Pennsylvania—passed pretrial discovery access laws that require prosecutors to disclose information to defense counsel.[196]

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181. Petegorsky, *supra* note 21, at 3617–18 (quoting Miller v. Angliker, 848 F.2d 1312, 1320 (2d Cir. 1988)).

182. *Id.* at 3618 (quoting *Miller*, 848 F.2d at 1320).

183. 43 F.3d 491 (10th Cir. 1994).

184. Petegorsky, *supra* note 21, at 3619.

185. Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995); *see also* Petegorsky, *supra* note 21, at 3620.

186. Petegorsky, *supra* note 21, at 3622 (citing Matthew v. Johnson, 201 F.3d 353 (5th Cir. 2000)).

187. *See id.* at 3625.

188. *See* McCann v. Mangialardi, 337 F.3d 782, 787–88 (7th Cir. 2003).

189. *See* United States v. Ohiri, 133 F. App'x 555, 562 (10th Cir. 2005).

190. Petegorsky, *supra* note 21, at 3625.

191. *See* United States v. Conroy, 567 F.3d 174, 179 (5th Cir. 2009).

192. *See* United States v. Moussaoui, 591 F.3d 263, 285–86 (4th Cir. 2010).

193. *See* Friedman v. Rehal, 618 F.3d 142, 153–54 (2d Cir. 2010).

194. *See* Petegorsky, *supra* note 21, at 3628–31.

195. Binimow, *supra* note 140, § 2[a]. The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend XIV, § 1.

196. *See* PA. R. CRIM. P. 573; *see also* John Kimpflen & Karl Oakes, *Criminal Pretrial Procedures*, *in* STANDARD PENNSYLVANIA PRACTICE 2d § 134:34 (Westlaw 2019).

States' translations of *Brady* obligations into pretrial discovery laws vary in terms of when the disclosure obligation begins and what material is included.[197] States that have open-file discovery require prosecutors to disclose their entire nonprivileged case file to the defense and prohibit prosecutors from withholding information based on discretionary decisions as to what information is material to the defendant's defense.[198] Closed-file discovery systems "allow the prosecution to avoid production of critical information either entirely or until very near the time of trial."[199] Open-file discovery requires the disclosure of *information*, which is a substantial expansion upon the traditional requirement to disclose *evidence*.[200] Unlike evidence, considerations of eventual admissibility at trial do not restrict information.[201] The distinction between information and evidence removes prosecutorial discretion to withhold information that would not be admissible at trial.[202]

Pennsylvania's pretrial discovery system is considered an "intermediate" system.[203] Under Pennsylvania's system, defendants are only entitled to the discovery that prosecutors and, by extension, police, who obtain the material through investigations, determine to be material or exculpatory.[204] Pennsylvania adopted Rule 573 of the Pennsylvania Rules of Criminal Procedure (Rule 573) after *Brady* to require the prosecutor to provide the defense attorney with certain discovery at the defense attorney's request and as ordered at the court's discretion.[205] Rule 573 mandates that, upon the defendant's request, "the Commonwealth shall disclose to the defendant's attorney all of the following requested items or information, provided they are material to the instant case."[206] The rule lists:

> (a) [a]ny evidence favorable to the accused that is material either to guilt or to punishment, and is within the possession or control of the attorney for the Commonwealth;
> (b) any written confession or inculpatory statement, or the substance of any oral confession or inculpatory statement, and the identity of the person to whom the confession or inculpatory statement was made . . . ;
> (c) the defendant's prior criminal record;
> (d) the circumstances and results of any identification of the defendant by voice, photograph, or in-person identification;

197. Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285, 288 (2016).

198. THE JUSTICE PROJECT, *supra* note 130, at 2; *see also* Yaroshefsky, *supra* note 167, at 1331.

199. Turner & Redlich, *supra* note 197, at 288.

200. *See* Yaroshefsky, *supra* note 167, 1330–31.

201. *See id.* at 1331–32.

202. *Id.* ("Some federal and state court courts hold that information need not be produced unless the information in question would itself be admissible at trial. . . . Some courts hold that the information need only be useful to the defense in building its case in order to be discoverable.").

203. Turner & Redlich, *supra* note 197, app.B at 406.

204. *See id.* at 305, app.B at 406; *see also* Commonwealth v. Puksar, 951 A.2d 267, 281 (Pa. 2008) ("[T]he [*Brady*] obligation extends to exculpatory evidence in the files of police agencies of the same government bringing the prosecution . . . .").

205. *See* PA. R. CRIM. P. 573(B); *see also* Kimpflen & Oakes, *supra* note 196, § 134:34.

206. PA. R. CRIM. P. 573(B)(1).

(e) any results or reports of scientific tests, expert opinions, and written or recorded reports of polygraph examinations or other physical or mental examinations of the defendant . . . ;
(f) any tangible objects, including documents, photographs, fingerprints, or other tangible evidence; and
(g) the transcripts and recordings of any electronic surveillance, and the authority by which said transcripts and recordings were obtained.[207]

Pennsylvania's rule is considered an "intermediate" rule because it is designed to "permit parties in criminal matters to be prepared for trial and thus to prevent trial by ambush."[208] Rule 573 states that parties must "make a good faith effort to resolve all questions of discovery" and that motions to compel unresolved discovery should "be made within 14 days after arraignment," but it does not specify the point at which a defendant is entitled to pretrial discovery.[209] However, Rule 571 comments that one of the purposes of arraignment is "to commence the period of time within which to initiate pretrial discovery."[210] This means that defendants may request disclosure of the enumerated materials, but that right does not attach until the defendant is arraigned.[211] Consequently, there is no right to discovery at a preliminary hearing nor during any plea bargain stages that precede indictment.[212]

E. Discovery and the Decision To Plead

The prevalence of official misconduct through failure to disclose exculpatory evidence in discovery is a critical factor that increases incentives for innocent defendants to plead guilty.[213] Part II.E.1 discusses official misconduct in resultant wrongful *trial* convictions. Part II.E.2 explores the issue of wrongful guilty pleas and the practical barriers to measuring the extent of this problem.

1. Official Misconduct and Wrongful Trial Conviction

Data on exonerees in the United States details the frequency in which "official misconduct" is a contributing factor to an individual's wrongful conviction.[214] Of the 2,547 exonerees in the National Registry of Exonerations database as of January 26, 2020, official misconduct impacted 1,376 (54%) of these individuals' cases.[215] The database defines official misconduct as instances where "[p]olice, prosecutors, or other

207. *Id.* 573(B)(1)(a)–(g).

208. Kimpflen & Oakes, *supra* note 196, § 134:12 (footnote omitted).

209. PA. R. CRIM. P. 573(A).

210. *Id.* 571.

211. *See* Kimpflen & Oakes, *supra* note 196, § 134:3 cmt. ("[T]he main purposes of arraignment are: (1) to ensure that the defendant is advised of the charges; (2) to have counsel enter an appearance . . . ; and (3) to commence the period of time within which to initiate pretrial discovery . . . .").

212. *See id.*

213. *See* Note, *The Prosecutor's Duty To Disclose to Defendants Pleading Guilty*, 99 HARV. L. REV. 1004, 1011 (1986).

214. *See* NAT'L REGISTRY EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx [https://perma.cc/ZS8C-9G2Y] (last visited Feb. 1, 2020).

215. *Id.* (filtering results by Official Misconduct (OM)).

government officials significantly abused their authority or the judicial process in a manner that contributed to the exoneree's conviction."[216] Of the eighty-one exonerees in Pennsylvania, official misconduct impacted forty-seven (58%) of their cases.[217]

One recent example of official misconduct in Pennsylvania occurred in the wrongful conviction of Dontia Patterson. Patterson was seventeen years old when he was arrested and charged with the first-degree murder of his friend Antwine Jackson.[218] Police interviewed Patterson on the day of the shooting, and Patterson told the police that Jackson, who sold drugs in the area, "had recently been threatened by one of the witnesses at the scene" of the murder.[219] Nonetheless, the jury convicted Patterson of first-degree murder, and the court sentenced him to life without parole.[220] In 2017, the Pennsylvania Innocence Project filed a petition for post-conviction relief on Patterson's behalf.[221] The petition uncovered fundamental errors with the evidence presented against Patterson.[222] Philadelphia District Attorney Larry Krasner filed a motion to enter *nolle prosequi* on Patterson's charges, detailing the information that was never disclosed in discovery to Patterson's defense counsel.[223]

Among the undisclosed evidence was a "white paper" that police wrote the day after the murder.[224] The report "contained information from a confidential source" that the murder was the "result of an ongoing battle over the drug corner" where the victim was shot and included the witness's identification of "three people who were involved in the crime," including the actual shooter.[225] Further, the lead detective's "homicide file contained extensive notes of witness interviews" that were never formalized into written statements and never disclosed.[226] In those interviews, witnesses "corroborated and supplemented the conclusions in the white paper—including two witnesses who named the gunman and where he lived at the time."[227] On May 16, 2018, the

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216. *Glossary*, NAT'L REGISTRY EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/glossary.aspx#OM [https://perma.cc/K9YD-8YH6] (last visited Feb. 1, 2020).

217. NAT'L REGISTRY EXONERATIONS, *supra* note 214 (filtering results by Pennsylvania (PA) and OM).

218. Maurice Possley, *Dontia Patterson*, NAT'L REGISTRY EXONERATIONS (May 24, 2018), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5330 [https://perma.cc/6RYR-9ZFU].

219. Motion to Enter Nolle Prosequi at 7, Commonwealth v. Patterson, No. CP-51-CR-0012287-2007 (Phila. Ct. Com. Pl. May 15, 2018).

220. Possley, *supra* note 218.

221. Amended Petition for Post-Conviction Relief Pursuant to 42 Pa. C.S. § 9541, *et seq.*, Commonwealth v. Patterson, No. CP-51-CR-0012287-2007 (Phila. Ct. Com. Pl. Aug. 16, 2017); *see also Dontia's Story*, PA. INNOCENCE PROJECT, http://www.innocenceprojectpa.org/DontiaPatterson [https://perma.cc/7CPC-9NDB] (last visited Feb. 1, 2020).

222. *See* Amended Petition for Post-Conviction Relief Pursuant to 42 Pa. C.S. § 9541, *et seq.*, *supra* note 221, ¶¶ 1–5.

223. *See* Motion to Enter Nolle Prosequi, *supra* note 219, at 1–4; Possley, *supra* note 218. A *nolle prosequi* is the process by which a prosecutor may voluntarily withdraw any or all charges against a defendant with the court's approval. RICHARD S. WASSERBLY ET AL., *Disposition Prior to Trial or Without Verdict Nolle Prosequi*, *in* WEST'S PA. PRAC., CRIM. PRAC. § 24:3 (Westlaw 2019).

224. Possley, *supra* note 218.

225. Motion to Enter Nolle Prosequi, *supra* note 219, at 8.

226. Possley, *supra* note 218.

227. *Id.*

prosecution's motion to enter *nolle prosequi* was granted, and Patterson was freed after having spent eleven years incarcerated for a crime he did not commit.[228]

In *Commonwealth v. Patterson*,[229] the prosecutor's failure can only be characterized as misconduct.[230] As the District Attorney explained:

> [I]t is inconceivable that both trial prosecutors involved in the case were unaware of the exculpatory documents contained in the police homicide file. . . . Homicide prosecutors are and were trained to review the police homicide file and ask questions. There were two trials and two periods of preparation. Yet, both trial prosecutors did not provide the exculpatory information they knew to the defense.[231]

The National Registry of Exonerations data on exoneration and the prevalence of prosecutorial misconduct coupled with the *Patterson* case underscore the fact that innocent defendants are often found guilty at trial.[232] It follows that innocent defendants face powerful incentives to plead guilty due to the widespread effect of prosecutorial misconduct in securing wrongful trial convictions.[233]

2. Underestimating the Problem of False Pleas

A defendant's access to discovery, including exculpatory, impeachment, and witness credibility evidence, is a critical factor in the pre-plea rationality calculation because evidence "can affect punishment by diminishing the degree of a defendant's culpability or offense level."[234] Data from the National Registry of Exonerations as of January 26, 2020, has records of 507 exonerations where the defendant entered a guilty plea.[235] That number comprises twenty percent of the 2,547 total cases recorded.[236] However, estimating the full extent of the problem of false guilty pleas—that is, factually innocent defendants who nonetheless enter a guilty plea—is extremely difficult for overlapping reasons and, as a result, is probably not accurately captured by the exoneration database.

The first reason exoneration data understates the prevalence of false pleas is that defendants faced with more serious crimes have less of a chance at getting offered an attractive plea deal.[237] There are diminishing returns on a guilty plea where a defendant is ultimately still offered a long prison sentence.[238] For example, if a defendant is

228. *Id.*

229. No. CP-51-CR-0012287-2007 (Phila. Ct. Com. Pl. 2007).

230. *See* Motion to Enter Nolle Prosequi, *supra* note 219, at 2.

231. *Id.* at 2–3.

232. *See* NAT'L REGISTRY EXONERATIONS, *supra* note 214 (filtering results by OM).

233. *See id.*

234. Yaroshefsky, *supra* note 167, at 1340.

235. NAT'L REGISTRY EXONERATIONS, *supra* note 214 (filtering results by Tag: Guilty Plea case (P)).

236. *See id.*

237. *See* NAT'L REGISTRY OF EXONERATIONS, INNOCENTS WHO PLEAD GUILTY 3 (2015), http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf [https://perma.cc/PC6J-QTE6].

238. See *supra* Part II.C for a discussion of the expected value formula as a function of probability and sentence length. The trial penalty is smaller when there is a larger bargained-for sentence, which reduces incentives to enter a plea.

charged with a crime that carries the highest sentence, such as murder or rape, they are more likely to insist on proceeding to trial.[239] This is true even for innocent defendants.[240] This is both because of the stigma of being labeled a murderer or rapist and because there is little room to negotiate a plea offer that would be dramatically better than the possible trial sentence.[241] Because of the nature of those crimes and public perception, it would be difficult for a prosecutor to justify, to the alleged victim and to society at large, offering a defendant a lenient sentence.[242] Given the choice between the possibility of receiving an extremely high sentence at trial or receiving an equally high sentence through a plea, a rational innocent defendant would likely proceed to trial.

However, this tradeoff provides a greater incentive to plead for the innocent defendant who is charged with a less serious crime.[243] For example, consider a prosecutor who is able to offer a much more "generous" deal to an innocent defendant charged with a drug crime. Less constrained by the interests of any alleged victim, a prosecutor might offer the defendant two years for a drug crime that could carry a minimum of ten years. The plea becomes especially attractive to a defendant who has previous drug convictions and would therefore be subjected to even higher mandatory minimum sentences.[244] This tradeoff explains the first reason why the majority of known exonerees have been charged with serious crimes, such as murder and rape, and were wrongfully convicted *at trial*.[245]

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239. *See* NAT'L REGISTRY OF EXONERATIONS, *supra* note 237, at 3 (noting that "avoiding the stigma of a sex-crime conviction" may explain the low prevalence of guilty pleas in sexual assault exoneration cases).

240. *See id.*

241. *See id.* Take the example of George Cortez, an innocent defendant in Pennsylvania charged with first-degree murder. Maurice Possley, *George Cortez*, NAT'L REGISTRY EXONERATIONS (June 14, 2016), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4914 [https://perma.cc/K867-PWAX]. Cortez did not enter a plea and, upon conviction at trial, was sentenced to life without parole. *Id.* The day after his exoneration, the "real" murderer was arrested for the crime. *Id.* This defendant pleaded guilty to third-degree murder and was sentenced to eighteen to thirty-six years of incarceration. *Id.* There is no record to suggest that Cortez was ever offered the deal that the subsequent defendant was offered. *See id.* However, it seems reasonable that a minimum of eighteen years would not seem appealing to an innocent defendant, even if eighteen years is significantly less than life without parole. Conversely, the second defendant would reasonably estimate his even lower likelihood of acquittal at trial, having been arrested after Cortez's exoneration. *See id.* Therefore, the second defendant, who has a much higher estimation of the likelihood of spending life in prison if convicted, has stronger reasons to accept a plea of eighteen to thirty-six years. *See id.*

242. *See, e.g.*, Rebecca Hollander-Blumoff, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOTIATION L. REV. 115, 132–33 (1997) ("Victims' concerns may provide disincentives for plea bargaining . . . . Victims have a tremendous emotional stake in seeing that perpetrators of crimes against them receive appropriate punishment.").

243. *See* Redlich et al., *supra* note 107, at 463.

244. *See, e.g.*, Maurice Possley, *Rosa Sade Batts*, NAT'L REGISTRY EXONERATIONS (Sept. 14, 2013), http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4273 [https://perma.cc/LVE2-UXQ2]. Rosa Sade Batts had several prior drug convictions when charged with possession of narcotics. *Id.* Facing a maximum of twenty-five years to life if convicted at trial, Batts accepted the prosecutor's offer of a two-year sentence in exchange for her plea. *Id.* Batts was exonerated a year after her conviction. *Id.*

245. *See* NAT'L REGISTRY OF EXONERATIONS, *supra* note 214. As of January 26, 2020, of the total 981 recorded exonerees charged with murder, only fifty-seven pleaded guilty. *Id.* (filtering results by Crime: Murder, then adding a filter for Tags: P). Of the total 332 recorded exonerees charged with sexual assault, only twenty-four pleaded guilty. *Id.* (filtering results by Crime: Sexual Assault, then adding a filter for Tags: P).

The second related reason why guilty pleas are relatively underrepresented among exonerees is the limited access to post-conviction resources for individuals who have pleaded to less serious crimes.[246] Groups such as the Innocence Project focus their extremely limited resources on representing defendants serving the longest prison sentences.[247] Where defendants are serving shorter sentences, the appellate process itself would likely take more time than the actual sentence. As such, an innocent defendant who is convicted of or pleads guilty to a lesser crime like a drug offense is unlikely to be exonerated. Therefore, exoneration data cannot paint a complete picture of wrongful conviction, especially of wrongful guilty pleas.

In spite of the aforementioned barriers to quantifying and recognizing wrongful guilty pleas, the District Attorney's Office of Harris County, Texas, has taken on the task of reviewing drug convictions and pleas.[248] In 2014, the Conviction Integrity Unit of the Harris County District Attorney's Office played an outsized role in national exonerations by exonerating thirty-three people, compared to a nationwide total of 125.[249] Of the 125 people exonerated nationwide, forty-seven (37.6%) entered guilty pleas.[250] Of the thirty-nine drug-crime exonerees, thirty-six (92.3%) entered guilty pleas.[251] In comparison, as of January 26, 2020, the National Registry of Exonerations database has a record of eighty-one *total* exonerations in Pennsylvania, and only two convictions were the result of guilty pleas.[252] Only one person has ever been exonerated for a drug conviction in Pennsylvania.[253] If Harris County's data is even moderately representative of other large U.S. cities,[254] it is clear that exoneration data does not accurately capture the prevalence of false guilty pleas.[255]

246. *See, e.g.*, *Submit a Case*, INNOCENCE PROJECT, http://www.innocenceproject.org/submit-case/ [https://perma.cc/NA5Z-RC6E] (last visited Feb. 1, 2020) (listing the criteria for the Innocence Project to consider representation, such as requiring "physical evidence that, if subjected to DNA testing, will prove that the defendant is actually innocent" and explicitly excluding cases challenging drug and theft convictions).

247. *See id.*

248. Anita Hassan & Mike Tolson, *Harris County Leads Way in 2014 Exonerations*, HOUS. CHRON. (Jan. 26, 2015), http://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-leads-way-in-2014-exonerations-6041657.php [https://perma.cc/JK4H-5EDZ].

249. *Id.*

250. NAT'L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2014, at 3 (2015), http://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2014_report.pdf [https://perma.cc/3LDR-PGVE].

251. *Id.* at 3–4.

252. NAT'L REGISTRY EXONERATIONS, *supra* note 214 (filtering results by State: PA, then adding a filter for Tags: P).

253. *Id.* (filtering results by results State: PA and Crime: Drug Possession or Sale).

254. Harris County, Texas, has a population of 4.7 million. *QuickFacts Harris County, Texas*, U.S. CENSUS BUREAU, http://www.census.gov/quickfacts/harriscountytexas [https://perma.cc/RCS7-DRRM] (last visited Feb. 1, 2020). By comparison, the population of Philadelphia County, Pennsylvania, is 1.58 million. *QuickFacts Philadelphia County, Pennsylvania*, U.S. CENSUS BUREAU, http://www.census.gov/quickfacts/philadelphiacountypennsylvania [https://perma.cc/YBM9-JA7M] (last visited Feb. 1, 2020).

255. *See id.* (filtering results by State: PA and Tags: P) (revealing the only two recorded cases of exoneration in Pennsylvania where the defendant pleaded guilty).

III. BRINGING TRUTH TO LIGHT IN PLEA-BARGAINING

Both the rationale underlying the false guilty plea and the reasons for its underrepresentation in "innocence" data call for a remedy that addresses the crux of this issue: lack of information. This Section argues for the modification of the Pennsylvania Rules of Criminal Procedure to mandate open-file discovery, attaching the right to discovery upon arrest. Open-file discovery will promote the underlying truth-seeking policy of *Brady* by reducing the amount of innocent defendants who plead guilty,[256] eliminate some uncertainty and allow defendants to make an informed decision about whether to plead,[257] and limit opportunities for police and prosecutorial misconduct.[258] Using Texas's system as a starting point, Pennsylvania can effectively implement an open-file discovery system.[259]

A. Brady *Bears the Gifts of Truth and Knowledge for a System of Pleas*

Guilty pleas resolve the overwhelming majority of criminal cases in the United States.[260] This reality calls for the adjustment of existing constitutional protections designed to protect the fair trial to ensure a fair plea. This Part argues that the application of *Brady* to the pre-plea stage serves the interests of all players in the criminal justice system. Part III.A.1 demonstrates that *Brady*'s truth-determination function promotes the goal of accurate prosecution by ensuring that *only* the true perpetrator of a crime pleads guilty. Part III.A.2 illustrates the way in which pre-plea *Brady* rights provide defendants the information necessary to enter an informed and fair guilty plea.

1. *Brady* Promotes Pre-Plea Bargain Truth Determination

The purpose of *Brady* was to enable the fact finder in a criminal case to determine the truth and produce accurate outcomes.[261] The Court's emphasis on truth determination is served by providing access to *Brady* material pre-plea as a means of effectuating more accurate and truthful guilty pleas. Framed as a due process right, the *Brady* rule clearly aims to protect fairness in the criminal justice system.[262] Importantly, however, the *Brady* rule is also clearly concerned with assuring the accuracy of trial outcomes, as *Brady* violations are grounds for overturning guilty verdicts.[263]

Brady centers on the reasoning that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair," which demands the disclosure of discovery during the pretrial phase and justifies overturning guilty verdicts obtained where

256. *See infra* Part III.A.1.

257. *See infra* Part III.A.2.

258. *See infra* Part III.B.

259. *See infra* Part III.C.1.

260. *See* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 1, at 14.

261. *See* Brady v. Maryland, 373 U.S. 83, 87–88 (1963).

262. *See* Andrew P. O'Brien, Comment, *Reconcilable Differences: The Supreme Court Should Allow the Marriage of* Brady *and Plea Bargaining*, 78 IND. L.J. 899, 904 (2003).

263. *See id.*

prosecutors suppressed *Brady* material.[264] It follows that those same interests would justify *Brady* obligations during plea-bargaining.[265] Assuming that the Court sought to protect accuracy in criminal adjudication broadly, and not solely in trial verdicts, it should follow that because access to *Brady* materials decreases the likelihood of an innocent defendant entering a plea, the goal of accuracy also requires *Brady* disclosure pre-plea. Because the overwhelming majority of criminal defendants resolve their cases through a guilty plea,[266] the principles of fairness and accountability inherent in due process require both extending discovery rights to defendants throughout all parts of the criminal prosecution process and effective enforcement mechanisms.[267]

2. The Devil You Know: Discovery as a Key Plea Bargain Rationality Factor

The decision to enter a guilty plea, based on an individual defendant's expected utility of both possible outcomes, relies in significant part on the defendant's knowledge of the prosecutor's case against them.[268] Without the disclosure of exculpatory material at the pre-plea stage, a rational defendant is unlikely to walk away from an attractive offer made during plea-bargaining.[269] Knowing this, a prosecutor may withhold information to induce a plea.[270] A prosecutor who possesses exculpatory evidence faces "a larger than normal incentive . . . to induce a plea with a large sentencing differential."[271] If the prosecutor fears their chance of victory at trial is at risk because of the exculpatory material they are not yet obligated to disclose, the prosecutor will be incentivized to offer the defendant a heavily discounted plea deal—one no rational defendant, innocent or guilty, would refuse.[272]

This is also a likely outcome under a standard expected value model analysis.[273] Lack of pre-plea discovery denies the defendant the opportunity to adopt a defense strategy around the evidence as well as conduct additional timely investigations.[274] The absence of pre-plea discovery also contributes to the devastating effect of prosecutorial

264. *See Brady*, 373 U.S. at 87–88; O'Brien, *supra* note 262, at 904.

265. O'Brien, *supra* note 262, at 904.

266. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 1, at 14; *see also* Johnson, *supra* note 156, at 20 ("Because pleas are the primary means by which criminal cases are resolved in our adversarial system, the rule substantially impacts the efficiency and fairness of the process.").

267. *See* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 1, at 9, 12; *see also* McConkie, *supra* note 128, at 16 ("In general, liberal pre-plea discovery is necessary to let the defense put up a fair fight.").

268. *See* Johnson, *supra* note 156, at 20 ("At the plea phase, defendants are left without access to critical information and that in turn makes them poor partners in plea negotiations."); *id.* at 33 ("A number of studies demonstrate that a large part of the plea bargaining process is based on the strength of the government's evidence against the defendant.").

269. *See id.* at 33–34.

270. *See, e.g.*, Cynthia E. Jones, *A Reason To Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 432–33 (2010) (noting that prosecutors can purposely withhold evidence knowing that such evidence could improve the defendant's case or undermine the prosecutor's case).

271. O'Brien, *supra* note 262, at 907.

272. *See id.*

273. See *supra* Part II.C discussing the rationality equation and how length of sentence is a driving factor in the calculation.

274. *See* Jones, *supra* note 270, at 468.

misconduct in the outcome of a determination of guilt.[275] Where the defendant is uncertain of the likelihood of success at trial due to their lack of knowledge of the exculpatory evidence, and the length of the trial punishment is significantly higher than the length of the punishment offered through the plea bargain, a rational actor will be incentivized to accept the plea for the significantly discounted penalty.[276]

As discussed previously, both innocent and guilty defendants plead guilty.[277] Using the basic utility function model to analyze the plea decisionmaking process, all defendants ultimately face the same risk assessment regardless of their guilt.[278] Therefore, the defendant's access to information that is "useful in assessing the likelihood of conviction at trial" is critical to the defendant's ability to make a rational assessment of the risk of going to trial.[279] While the typical defendant has *knowledge* about their own guilt or innocence, which the prosecutor may not have, that information may be of marginal value in the plea-bargaining process where "uncorroborated protests of innocence mean little" to the prosecutor.[280]

Therefore, information about the prosecutor's case against the defendant is critical to the defendant's assessment of the risk in going to trial.[281] Because the defendant does not know the extent of the prosecution's case against them if the prosecutor suppresses exculpatory evidence before a plea bargain, the defendant will "view[] the government's case as being stronger than it actually is," and the defendant will be "compelled to accept a seemingly favorable plea offer to avoid trial."[282] The same logic should apply to *inculpatory* evidence in the prosecutor's file, which the defendant does not have access to, that is beyond the scope of *Brady* required disclosure.[283] To more accurately estimate success at trial and weigh the benefit of accepting a plea offer, a defendant needs access to the full information regarding the prosecution's case against them through open-file discovery.

B. Open-File Discovery Reduces Misconduct and the Need for Post Hoc Review

This Part evaluates the shortcomings of relying on after-the-fact determinations of the materiality of suppressed evidence. A post-trial materiality analysis available as a

275. *See id.*

276. *See* O'Brien, *supra* note 262, at 907 (discussing the increased prosecutorial incentives to offer drastic plea offers where they possess exculpatory evidence). See *supra* Part II.C for an explanation of expected utility models in plea-bargaining rationality analysis.

277. See *supra* Parts II.B and II.C for a discussion of the incentives innocent defendants face to plead guilty.

278. *See* John G. Douglass, *Fatal Attraction? The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437, 448–49, 449 n.46 (2001) (analyzing plea-bargaining decisions using a risk assessment model that mirrors expected utility models).

279. *See id.* at 450–52.

280. *Id.* at 451.

281. *See, e.g.*, Johnson, *supra* note 156, at 20.

282. Petegorsky, *supra* note 21, at 3649.

283. *See* McConkie, *supra* note 128, at 13–14.

remedy under *Brady*[284] is inadequate to address the purpose of evidentiary disclosure and to prevent the possibility of official misconduct or prosecutorial error.[285] Accordingly, open-file discovery will reduce prosecutorial and police discretion and misconduct as well as prevent the court from having to review evidence post hoc.

1. Pennsylvania's Official Misconduct Problem

As seen in *Patterson*, the U.S. criminal justice system makes mistakes. The National Registry of Exonerations collects data on the exoneration of innocent criminal defendants, including demographics of the exoneree, the crime of conviction, and the state of conviction.[286] It also tracks factors that contributed to the wrongful conviction, including "Mistaken Witness Identification," "False Confession," "Perjury or False Accusation," "False or Misleading Forensic Evidence," "Official Misconduct," and "Inadequate Legal Defense."[287] As mentioned in Part II.E, as of January 26, 2020, official misconduct played a role in the conviction of forty-seven of the eighty-one defendants (58%) later exonerated in Pennsylvania.[288] "Official Misconduct" is defined as instances where "[p]olice, prosecutors, or other government officials significantly abused their authority or the judicial process in a manner that contributed to the exoneree's conviction."[289] This analysis focuses on the cases within that category where both the police and the prosecutor's failure to disclose exculpatory material contributed to the wrongful conviction.

The police error in *Patterson*—the withholding of a multitude of exculpatory evidence—demonstrates the importance of an open-file discovery process to eliminate the role of the police in the materiality analysis. In deciding not to memorialize the witness statements naming the true gunman, perhaps the investigators were acting under the belief, consistent with practices compliant with *Brady*,[290] that the content of the witness interviews was not material to the defense. If the investigators did act under this belief, then, because they believed the witness interviews were immaterial, the investigators effectively denied the defense the opportunity to conduct further investigation in connection with those witness statements.

Materiality is ultimately an issue a judge determines on an appeal of the trial verdict.[291] Government investigators should not serve as the first arbiters of materiality.[292] This same logic applies to prosecutorial failure to disclose exculpatory material. Under a system of adversarial justice, it is illogical at best, and an

284. *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 431–32, 454 (1995) (describing a post-conviction *Brady* challenge where the Court held the trial was not fair because of the prosecution's failure to disclose certain evidence).

285. *See* Douglass, *supra* note 278, at 471.

286. NAT'L REGISTRY EXONERATIONS, *supra* note 214.

287. *Id.*

288. *See id.* (filtering results by State: PA, then adding a filter for OM).

289. *Glossary*, *supra* note 216.

290. *See* Commonwealth v. Puksar, 951 A.2d 267, 281 (Pa. 2008) (citing *Kyles*, 514 U.S. at 437, for the proposition that *Brady* extends to evidence in the files of all those acting on the government's behalf in a case, including the police).

291. *See* Gregory, *supra* note 136, at 828.

292. *See* McConkie, *supra* note 128, at 13–14.

unconstitutional violation of due process at worst, to entrust prosecutors with the responsibility of evaluating the potential exculpatory, mitigating, or impeachment value to the defense of all of the evidence in its possession.[293] Objective truth-seeking requires that the lawyer who intends to use each piece of evidence determines its value—not their opponent.[294]

For defendants like Patterson, a post hoc materiality determination for this nondisclosure is an insufficient remedy because the defense counsel is often unaware of the undisclosed evidence both during trial and even later upon post-conviction reinvestigation.[295] This insufficiency is a common challenge in cases involving *Brady* violations.[296] However, even in a hypothetical scenario in which the defense *had* been aware of the undisclosed white paper, Patterson would likely have had a difficult time meeting the post hoc standard of review to prove its materiality as exculpatory evidence.[297] As discussed in Part II.E.1, Patterson would have to prove that the undisclosed white paper, when viewed in the context of the entire case, created a reasonable belief that, had it been disclosed, the result of the trial would have been different.[298] This burden means that even if, hypothetically, the post hoc review was a remedy available to address the prosecutorial misconduct, the standard of review *after* a finding of guilt renders it an unlikely path to relief.[299]

Patterson's eleven-year struggle for justice demonstrates the vital role of discovery disclosure in criminal defense and truth determination, the devastating impact of prosecutorial misconduct on innocent defendants, and the insufficiency of the post hoc remedy prescribed under *Brady*.[300] At the crux of these concurrent problems is an imbalance in power grounded in unequal access to information.[301]

2. Post Hoc Review Is Too Little, Too Late

As discussed in Part II.D.2, *Brady* prohibits prosecutors from suppressing evidence "favorable to an accused upon request" where the "evidence is material either

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293. *See* Gregory, *supra* note 136, at 852 ("Open file discovery largely removes prosecutors from this inherently conflicted dual role and allows them to act almost exclusively as partisan advocates for the state—free to make the case for conviction on a level playing field with a defendant who is fully informed of the evidence in the case. . . . *Brady* ask[s] prosecutors to carry out an impossible task. Open file discovery removes this burden.").

294. *See id.*

295. *See* United States v. Agurs, 427 U.S. 97, 106–07 (1976). Dontia Patterson spent eleven years incarcerated for a crime he did not commit before his post-conviction pro bono team could reinvestigate and prove his innocence. *See supra* notes 218–228 and accompanying text.

296. *See* Motion to Enter Nolle Prosequi, *supra* note 219, at 6.

297. *Id.* ("Due to the nature of *Brady* violations, it is highly unlikely wrongdoing will ever come to light in the first place . . . . In the rare event that the withheld evidence does surface, the consequences usually leave the prosecution no worse than had it complied with *Brady* from the outset. This case, however, is different." (citation omitted)).

298. *See* Commonwealth v. Chambers, 807 A.2d 872, 887–88 (Pa. 2002) (first citing United States v. Bagley, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.); then citing *Agurs*, 427 U.S. at 109–10) (explaining the standard of review for the materiality of undisclosed evidence).

299. See *supra* Part II.E.1 for a discussion of official misconduct and wrongful convictions.

300. See *supra* notes 218–231 and accompanying text for a discussion of the *Patterson* case.

301. *See* Johnson, *supra* note 156, at 20.

to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[302] The Court continued to develop a standard for materiality to assess whether the suppressed evidence "undermines confidence in the outcome of a trial" to a "reasonable probability."[303] This standard resembles the "outcome determinative" standard in that it asks the likelihood that the suppressed evidence would have determined the outcome of the trial.[304] This evaluation of materiality begs for a post hoc materiality analysis.[305] The applicable standard of review asks the judge to put down the gavel and pick up the crystal ball to determine what the outcome could have been had the prosecution disclosed a piece of suppressed information.[306] This standard of review, in earnest, asks the judge to look at a piece of undisclosed evidence and determine its usefulness to the defense, how that evidence might have shaped their investigation or defense theory, while also entering the minds of the jury to determine what weight the jury could have given the evidence.[307]

The judge is asked, after the fact finder has made a determination of guilt or innocence, if there is a reasonable probability that the result could have been different.[308] Unsurprisingly, on post-trial review, judges are more reluctant to find undisclosed evidence material.[309] The outcome-determinative test may be a useful standard of review in other areas of the law,[310] but it requires a level of omniscience that is inappropriate where an individual's freedom is in question. If truth determination is the ultimate goal of the justice system, its achievement requires efficient, accurate, and proactive access to discovery, which post hoc materiality litigation under *Brady* is unable to provide.

For all of the reasons discussed above, post hoc evaluation of the materiality of undisclosed evidence is an inadequate mechanism for challenging prosecutorial misconduct in suppressing evidence material to the defense. However, as it exists under *Brady*, post hoc litigation of the materiality of suppressed evidence is a remedy

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

303. Kyles v. Whitley, 514 U.S. 419, 434 (1995) (citing *Bagley*, 473 U.S. at 678).

304. *See* Daniel Conte, *Swept Under the Rug: The* Brady *Disclosure Obligation in a Pre-Plea Context*, 17 SUFFOLK J. TRIAL & APP. ADV. 74, 81 n.37 (2012).

305. *See id.* at 79.

306. *See Kyles*, 514 U.S. at 453 ("But the question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same.").

307. *See* Michael T. Fisher, Note, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line*, 88 COLUM. L. REV. 1298, 1321 (1988) ("In order to properly protect the process values inherent in the right to due process, the due process fairness inquiry must remain separate from the determination of the impact on the outcome. Otherwise, constitutional limitations on prosecutorial conduct would fluctuate with the strength of the state's case against the defendant . . . .").

308. *See* Johnson, *supra* note 156, at 8–9.

309. *Id.*

310. *See, e.g.*, Guaranty Trust Co. v. York, 326 U.S. 99, 109 (1945) (applying an outcome-determinative standard of review to evaluate whether, in cases arising under diversity jurisdiction, a state's statute of limitation is a substantive or procedural matter such that it should apply to and bar recovery in federal courts).

available only to defendants convicted at trial.[311] As discussed in Part II.D, rights to *Brady* material are *trial* rights; defendants do not have a constitutional right to discovery during the plea-bargaining process.

The quality of the "government's evidence against the defendant," including *Brady* materials, factors heavily into an individual's "ability to make an informed decision about whether or not to plead guilty."[312] Despite the importance of this material to an individual's plea decisionmaking process, because there is no *Brady* right at the pleading stage defendants cannot challenge a prosecutor's suppression, even in the inadequate post hoc forum.[313]

C. A Framework for Open-File Discovery in Pennsylvania

Full open-file discovery, where prosecutors are obligated to disclose all relevant information upon the defense's request[314] from the beginning of the criminal proceeding—the time of arrest—will help resolve these problems and mitigate the inherent disadvantage that defendants have in plea negotiations. Open-file discovery plays an important power-balancing role for defendants both at the trial stage and pre-plea stage.[315] Using Texas's revolutionary discovery laws as a blueprint, the Pennsylvania Rules of Criminal Procedure should be modified to require open-file discovery.

1. Lessons from Texas

Texas, the state that executes the highest number of inmates on death row in the nation,[316] passed the Michael Morton Act (Act) in 2013.[317] The Act dramatically expanded criminal defendants' discovery rights by mandating open-file discovery in criminal proceedings.[318] The Act aimed to "level[] the playing field between the prosecution and the defense."[319] The Texas legislature passed it after the exoneration of Michael Morton due to DNA evidence and the revelation that prosecutors had failed to disclose critical evidence.[320] The Act expands on the existing *Brady* discovery rule in

311. Because *Brady* rights only attach to defendants at trial, defendants who enter a plea cannot later challenge the validity of their plea based on the suppression of *Brady* material as such defendants never had a right to *Brady* materials. *See supra* Part II.D.3.

312. Johnson, *supra* note 156, at 33.

313. *See supra* Part II.D.3.

314. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 39.14(a) (West 2019) ("[A]s soon as practicable after receiving a timely request from the defendant the state shall produce and permit the inspection and the electronic duplication, copying, and photographing, by or on behalf of the defendant, of . . . objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state.").

315. *See* Johnson, *supra* note 156, at 5–8.

316. DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 3 (2019), http://deathpenaltyinfo.org/documents/FactSheet.pdf [https://perma.cc/QS52-5XMP].

317. *See* Michael Morton Act, 2013 Tex. Gen. Laws 106–08 (codified at TEX. CODE CRIM. PROC. ANN. art. 39.14).

318. *See* TEX. APPLESEED & TEX. DEF. SERV., *supra* note 127, at ii.

319. *See id.*

320. *Id.* at 5–6.

several important ways, such as obligating prosecutors to provide all covered material to the defense "as soon as practicable" and expanding the scope of what is "discoverable" to any information that is favorable to the defense *without* prosecutorial or law enforcement analysis of materiality as outlined in *Brady*.[321] These changes have not been implemented without cost or obstacle, but learning from what Texas has and has not been able to accomplish under the Act provides important guidance for Pennsylvania in the benefits of and best practices for transitioning to an open-file discovery system.[322]

The Act specifies four broad categories of materials that the defense is entitled to request of the prosecution and mandates that the prosecution produce requested discovery in a timely manner.[323] The Act defines discoverable information as:

> [1] any offense reports, [2] any designated documents, papers, [3] written or recorded statements of the defendant or a witness, including witness statements of law enforcement officers but not including the work product of counsel for the state in the case and their investigators and their notes or report, or [4] any designated books, accounts, letters, photographs, or objects or other tangible things not otherwise privileged that constitute or contain evidence material to any matter involved in the action and that are in the possession, custody, or control of the state or any person under contract with the state.[324]

More broadly, the Act also provides that "the state shall disclose to the defendant any exculpatory, impeachment, or mitigating document, item, or information in the possession, custody, or control of the state that tends to negate the guilt of the defendant or would tend to reduce the punishment for the offense charged."[325] The Act has certain disclosure exceptions with respect to attorney work product and communications between government employees as well as includes provisions requiring defense counsel to redact parts of the discovery before sharing the materials with the defendant.[326] The Act also "allows prosecutors to redact or withhold any portion of a document that they believe is privileged or not discoverable" upon notice to the defense.[327] The defense is then entitled to an in camera review and hearing on the material redacted or withheld.[328] This procedure balances the prosecutorial interest in protecting confidential informant information and work product with the defense interest in ensuring that all discoverable material is made available.[329] Upon "timely

321. *See id.* at iii–iv.

322. *See id.* at v–vi.

323. *Id.* at 9.

324. TEX. CODE CRIM. PROC. ANN. art. 39.14(a) (West 2019).

325. *Id.* art. 39.14(h).

326. *Id.* art. 39.14(a), (c); *see also* TEX. APPLESEED & TEX. DEF. SERV., *supra* note 127, at 9. The Act also includes somewhat more restrictive procedures pertaining to disclosure of certain materials to pro se litigants. *See* TEX. CODE CRIM. PROC. ANN. art. 39.14(d); Gerald S. Reamey, *The Truth Might Set You Free: How the Michael Morton Act Could Fundamentally Change Texas Criminal Discovery, or Not*, 48 TEX. TECH L. REV. 893, 912 (2016).

327. TEX. APPLESEED & TEX. DEF. SERV., *supra* note 127, at 9–10.

328. *Id.* at 10.

329. *Id.*

request" by the defense, the prosecutor must disclose the requested material "as soon as practicable."[330]

Unsurprisingly, the implementation of these widespread changes in disclosure procedure have presented various obstacles across jurisdictions in Texas.[331] A 2015 report on the Act inquired into the experiences of prosecutors, defense attorneys, and police departments and found a variety of challenges to and best practices for its implementation.[332] On a practical level, implementation requires entirely new and expansive procedures for law enforcement.[333] The Act functionally requires police to more thoroughly document their activity—even activities an officer might deem "immaterial" under former *Brady* standards—and to provide the prosecutor with this information in a timely manner.[334] While the Act does not specify the police practices necessitated by its disclosure obligations, the Act *does* include law enforcement agencies within the meaning of the "state" for the purpose of disclosing material within the "possession, custody, or control of the state or anyone under contract with the state."[335] The lack of defined guidance is an obstacle to effective implementation of the Act; where police misinterpret the scope of the Act's requirements, police may not disclose all of the material that they are now obligated to disclose to the prosecutor, and as a result the defense would not have access to that material either.[336] This underscores the need for formalized police procedures to guarantee compliance with the Act.[337] The report on the Act's rollout found that police compliance requires "close communications about practices for preserving and producing evidence" and more concrete guidance to direct law enforcement policy.[338]

From defense attorneys' perspective, ambiguity over the meaning of "as soon as practicable" causes disputes over method of disclosure, and the distribution of costs presents obstacles to the Act's implementation.[339] The aforementioned report found that few prosecutors had drafted policy standards for responding to discovery requests and consequently failed to provide defendants with the proper discovery.[340] Format of disclosure was a source of tension and expense where prosecutors implement more burdensome methods (such as requiring in-office photocopying) compared to those offices that share discovery electronically.[341] The report found that jurisdictions where prosecutor and defense counsels have better and more routine relationships had an

330. TEX. CODE CRIM. PROC. ANN. art. 39.14(a).

331. *See* TEX. APPLESEED & TEX. DEF. SERV., *supra* note 127, at 13–26.

332. *See id.* at ii–vi.

333. *See id.* at 21.

334. *Id.* at 21–22.

335. *Id.* at 21 (quoting TEX. CODE CRIM. PROC. ANN. art. 39.14(a)).

336. *See id.*

337. *See id.*

338. *Id.*

339. *See* TEX. CRIMINAL DEF. LAWYERS ASS'N, THE COST OF COMPLIANCE: A LOOK AT THE FISCAL IMPACT AND PROCESS CHANGES OF THE MICHAEL MORTON ACT 7, 36–39 (2015), http://www.tcdla.com/Images/TCDLA/%20Temporary%20art/MMA%20Final%20Report.pdf [https://perma.cc/DJ3G-6NVL].

340. *See* TEX. APPLESEED & TEX. DEF. SERV., *supra* note 127, at 28.

341. *See id.* at 37–39.

easier time adjusting to the Act's requirements, whereas jurisdictions without such rapport struggled to develop discovery-sharing methods.[342]

2. Implementing Open-File Discovery in Pennsylvania

Pennsylvania can learn from these issues in Texas. If Pennsylvania adopts an open-file discovery system, its provisions should include clear language that (1) establishes a right to discovery at every point after arrest, (2) grants trial courts jurisdiction to enforce motions for discovery against the prosecutor, and (3) grants federal district courts jurisdiction over challenges to discovery by writ of mandamus.[343]

To preemptively address the issues in communication between prosecutors and defense counsel, the Pennsylvania legislature should oversee the implementation of discovery-sharing software and procedures so that individual jurisdictions do not bear the burden of designing discovery-sharing methods and also to ensure uniformity throughout the state.[344] The development of discovery-sharing software and procedures would reduce problems with enforcement by mitigating the physical costs of compliance while preventing jurisdictions from implementing onerous disclosure procedures that could slow or prevent full compliance.[345] By including a provision granting the district court jurisdiction to grant a writ of mandamus to compel discovery, the Pennsylvania Rules of Criminal Procedure could provide an enforcement mechanism that also avoids the delays of jurisdiction litigation, which complicated implementation in Texas.[346]

The Pennsylvania rule should provide explicit police guidance for the recording and disclosing of information and evidence. This guidance would preempt some of the difficulties that Texas police experienced in interpreting and fully complying with the Act.[347] Language in the rule that defines law enforcement's disclosure responsibilities would further facilitate a clear understanding of its obligations with respect to documentation and disclosure.

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342. *See* TEX. CRIMINAL DEF. LAWYERS ASS'N, *supra* note 339, at 15–16.

343. The Michael Morton Act does not specify exactly when the discovery obligation begins. *See* TEX. CODE CRIM. PROC. ANN. art. 39.14 (West 2019). As a result, it is not clear whether the obligation begins at or before formal charging or indictment. *See id.* In certain cases where the trial court has granted the defendant's motion to compel discovery disclosure prior to indictment, the state has challenged the trial court's jurisdiction to grant a pre-indictment motion to compel the Texas Court of Criminal Appeals's jurisdiction regarding issuing a writ of mandamus to reverse the trial court order. *See, e.g.*, Powell v. Hocker, 516. S.W.3d 488, 497 (Tex. Crim. App. 2017) ("Nowhere does the statute contemplate that a trial court should be able to second-guess the legislative judgment . . . . The trial court in this case lacked authority to enter an order that effectively abrogated this unqualified legislative judgment."); Padilla v. State, No. 03-18-00065-CR, 2018 WL 3118542, at *2 (Tex. App. June 26, 2018) (holding that it did not have appellate jurisdiction over defendant's motion to compel discovery because appellate jurisdiction in Texas is "permitted only when [appeals] are specifically authorized by statute").

344. *See* TEX. CRIMINAL DEF. LAWYERS ASS'N, *supra* note 339, at 8–12 (describing various staffing changes, hardware and software purchases, and other fiscal impacts that counties in Texas felt).

345. *See id.* at 26–28 (discussing the cost allocations between the prosecution and defense for discovery production).

346. *See Padilla*, 2018 WL 3118542, at *2.

347. *See* TEX. APPLESEED & TEX. DEF. SERV., *supra* note 127, at 21–25.

Texas's implementation of the Act also demonstrates the importance of providing additional safeguards at the pre-plea and pleading stage.[348] While the Act applied the same rules of discovery to cases that are resolved by a guilty plea, prosecutors in Texas have "ask[ed] defendants to waive their discovery rights in exchange for favorable treatment" in the plea negotiation process.[349] To ensure the protection of defendants who plead, the Pennsylvania rule should proscribe waiver of the right to discovery as a precondition to a negotiated plea.[350] This goal of accurate guilty plea dispositions is undermined if the truth-determining tool—discovery—can be bargained away.[351]

IV. CONCLUSION

Amending the Pennsylvania Rules of Criminal Procedure to mandate open-file discovery beginning at arrest offers Pennsylvania a practical and feasible mechanism to level the playing field in the criminal justice system. This rule would expand the promises of *Brady* to the majority of defendants who never had a trial determine their guilt or innocence. By removing the predisclosure materiality assessment role of the prosecutors and law enforcement, the opportunities for official misconduct are lowered, and defendants and their attorneys are given the opportunity to evaluate the exculpatory, inculpatory, mitigating, or other value of the material. Open-file discovery reduces post hoc materiality challenges so that reviewing courts and defendants are provided the answer to what the outcome would be if certain material were disclosed. With early and complete access to discovery, defendants and their attorneys are better able to estimate the likelihood of conviction at trial and in a better position to negotiate a plea. A well-crafted open-file discovery rule would facilitate cooperation and coordination across adversarial lines that would ultimately make criminal determinations more accurate, fair, and transparent.

348. *See id.* at 27–30 ("The provision of discovery at an early point in criminal proceedings is essential to the operation of a fair, efficient, and accurate justice system.").

349. *Id.* at v.

350. *See id.*

351. *See id.* at 27–28.