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The Case for Preplea Disclosure*

Eleanor J. Ostrow†

Trial is the paradigmatic process for administering criminal justice in the United States. Its hallmark is the set of constitutional and statutory rights that serve as obstacles to conviction.¹ Even though these rights weight the trial process in the defendant's favor, few defendants choose to stand trial. Most convictions result from guilty pleas.²

The guilty-plea process, unlike the trial process, is not weighted to disadvantage conviction. No elaborate set of constitutional and statutory protections surrounds the defendant's threshold decision whether or not to stand trial.³ Rather, the primary obstacle to conviction by plea is the defendant's

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1. Among the constitutional rights available to federal and state defendants who stand trial are the right to trial by jury, Duncan v. Louisiana, 391 U.S. 145 (1968), the right to confront one's accusers, Pointer v. Texas, 380 U.S. 400 (1965), the right to avoid self-incrimination, Malloy v. Hogan, 378 U.S. 1 (1964), and the right to be convicted only under a high standard of proof, In re Winship, 397 U.S. 358, 364 (1970) (beyond a reasonable doubt standard constitutionally required).

2. Other rights respond less to the need to protect innocent defendants than to other requirements of a fair criminal process. These include the right to be charged by a grand jury selected without racial discrimination, Castaneda v. Partida, 430 U.S. 482 (1977), and the right not to be convicted on the basis of unconstitutionally seized evidence, Mapp v. Ohio, 367 U.S. 643 (1961).

3. The statutory right of primary significance for this Comment is the right to pretrial discovery. Most jurisdictions have statutes authorizing pretrial discovery, many of which are patterned after Fed. R. Crim. P. 16. See Y. Kamisar, W. LaFave, & J. Israel, Modern Criminal Procedure 1154-59 (5th ed. 1980). In the federal courts, the Jencks Act, 18 U.S.C. § 3500 (1976 & Supp. 1979), requires prosecutors to disclose the prior statements of a trial witness once that witness has completed testifying.

2. See ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty 1-2 (App. Draft 1968) (estimates that 95% of convictions in some localities are by plea) [hereinafter cited as ABA Plea Standards]; H. Miller, W. McDonald, & J. Cramer, Plea Bargaining in the United States 22 (1978) (estimates that 70% to 90% of convictions in most jurisdictions are by plea).

own perception of his chance of acquittal. Indeed, the preponderance of guilty-plea convictions is due chiefly to prosecutors implicitly and explicitly offering defendants advantages that appear to outweigh that chance.

The Supreme Court has recognized that the defendant’s assessment of the likelihood of acquittal plays a critical role in guarding against inaccurate and unfair convictions. Yet no court has enunciated standards for prosecutorial behavior to ensure that the defendant’s opportunity to make that assessment is meaningful. Thus, although prior to a plea the defendant is entitled to be informed of the elements of the charges against him and to understand that by pleading guilty he waives some constitutional rights, he is not entitled to prosecutorial disclosure of the evidence available to convict him. The defendant is thereby deprived of the information he most needs for a rational evaluation of his chances of acquittal. Moreover, the evidence available for conviction, unlike legal information about the charges or about constitutional rights, is exclusively in the prosecutor’s possession, is costly to discover by independent investigation, and cannot


6. A defendant is entitled to know that his plea of guilty waives his right to a jury trial, his privilege against self-incrimination, and his right of confrontation. Boykin v. Alabama, 395 U.S. 238, 243 (1969). This information is important because it protects factually innocent defendants from pleading guilty on the mistaken belief that trial will not offer them the procedural safeguards they will need in order to establish their innocence. See Westen & Westin, A Constitutional Law of Remedies for Broken Plea Bargains, 66 Calif. L. Rev. 471, 503 (1978). Despite the importance of this information, the Supreme Court has, subsequent to Boykin, upheld guilty pleas by defendants who had not been advised on the record of the rights waived. See North Carolina v. Alford, 400 U.S. 25, 28-29 (1970); Brady v. United States, 397 U.S. 742, 756 (1970). In light of these later cases, some lower federal and state courts have read Boykin not to require specific articulation of waived rights. See, e.g., Wilkins v. Erickson, 505 F.2d 761, 763 (9th Cir. 1974); State v. Turner, 186 Neb. 424, 425, 183 N.W.2d 763, 765 (1971); Edwards v. State, 51 Wis. 2d 231, 234, 186 N.W.2d 193, 195 (1971).

Even if Boykin is read to require articulation on the record of the rights waived, however, the case made specific reference only to the defendant’s right to trial by jury, privilege against self-incrimination, and right to confront witnesses. Pleading guilty also deprives defendants of a large number of other rights. See Tigar, The Supreme Court, 1969 Term—Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel, 84 Harv. L. Rev. 1, 20 (1970) (listing constitutional rights waived, including right to challenge unlawful search or coerced confession and right to attack insufficient indictment or composition of grand jury).

7. Mandatory preplea disclosure has rarely, and then only narrowly, been recognized. See Comment, Preplea Discovery: Guilty Pleas and the Likelihood of Conviction at Trial, 119 U. Pa. L. Rev. 527, 528 n.7 (1971); note 157 infra (noting recent cases recognizing duty to disclose exculpatory evidence). Several commentators have criticized this absence of a preplea disclosure duty. See, e.g., Fletcher, Pretrial Discovery in State Criminal Cases, 12 Stan. L. Rev. 293, 316-19 (1960); Comment, supra, at 529-35.
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readily be supplied by defense counsel. In short, disclosure of evidence is critical to the fairness of the guilty-plea process.

This Comment presents the case for preplea disclosure. It first describes the ways in which the imbalance of information in plea bargaining threatens the fairness of that process, and argues that some disclosure is needed to prevent the identified abuses. To define the proper role for disclosure in the guilty-plea process, the Comment then examines both the actual operation of the bargaining process and three competing conceptions of the legitimating function of plea bargaining—to replicate trial results, to achieve factual accuracy, and to generate transactions to which both parties have given meaningful consent. After rejecting the first two conceptions as inaccurate characterizations of the guilty-plea process, and concluding that the consensual-transaction conception provides both an accurate characterization of plea bargaining and a foundation for disclosure reforms, the Comment argues that disclosure must be broad in scope to ensure the defendant a meaningful opportunity to assess his chances of acquittal, and thereby to make meaningful the consent on which the legitimacy of plea bargaining rests. Finally, the Comment considers the effects of broad preplea disclosure both on guilty-plea practices and on trials. It concludes that the proposed reform would not have substantial or unacceptable effects on the number or expeditiousness of guilty pleas, but would lead to the acceptable—even desirable—consequence of more disclosure before trial than current law requires.

I. The Consequences of the Informational Imbalance

In the American criminal justice system, the prosecutor has much greater access to the information available for conviction than does the defendant. That imbalance in information poses a threat to the fairness of plea bargaining. In contrast, the defendant's counsel can supply much other information, including information about the elements of the crimes charged, the rights waived by pleading guilty, judicial attitudes in the jurisdiction, and sentencing and parole practices. Because the government has the burden of proving the defendant guilty beyond a reasonable doubt, it is only the prosecutor's case that always affects the trial outcome. Only if that case appears strong enough to put the defendant in danger of conviction does the defendant's information become relevant to the trial outcome. At the first stage, then, trial outcome depends only on the prosecutor's information that will be available for conviction at trial.

8. In contrast, the defendant's counsel can supply much other information, including information about the elements of the crimes charged, the rights waived by pleading guilty, judicial attitudes in the jurisdiction, and sentencing and parole practices.

9. Because the government has the burden of proving the defendant guilty beyond a reasonable doubt, it is only the prosecutor's case that always affects the trial outcome. Only if that case appears strong enough to put the defendant in danger of conviction does the defendant's information become relevant to the trial outcome. At the first stage, then, trial outcome depends only on the prosecutor's information that will be available for conviction at trial.

10. The severity of the imbalance of information varies considerably with the resources made available to defense counsel. Wealthy defendants can often narrow—or even close—the informational gap. Moreover, some indigent defendants are more adequately informed than most defendants who can afford private counsel: some urban public defender offices, unlike most private defense attorneys, employ investigators as permanent staff members, see Alschuler, The Defense Attorney's Role in Plea Bargaining, 84 YALE L.J. 1179, 1229 n.139 (1975), and most defendants who can pay for private counsel cannot afford the added expense of an investigator, see Steinberg, The Responsibility of the Defense Lawyer in Criminal Cases, 12 SYRACUSE L. REV. 442, 443 (1961) (defendant seldom has resources to hire investigators or experts, or to pay for attorney's airfare to visit distant witnesses or other sources of evidence); Steinberg & Paulsen, A Conversation with Defense Counsel on Problems
and accuracy of the criminal process. Although current law addresses the threatened inequities in the trial process, it affords little relief to defendants who face the serious problems caused by the informational imbalance in the guilty-plea process. Among these problems are bluffing by prosecutors and inadequate representation by defense attorneys, both of which adversely affect the defendant's ability to evaluate his chances for acquittal and arguably rise to the level of misconduct. Neither abuse can be prevented by the adoption and enforcement of any objective standards to ensure that the prosecutor and the defense counsel accurately assess the probability of conviction. By contrast, direct measures to correct the informational imbalance in the guilty-plea process hold out the possibility of eliminating most of the abuses.

A. Bluffing by the Prosecution

Confronted with a defendant who is uninformed about the evidence available or likely to be available for trial, a prosecutor may bluff or mislead the defendant about the strength of the government's case. The prosecutor may thereby obtain a plea from, or a stiffer sentence for, the defendant than would otherwise be possible.

Bluffing about the information available for trial is advantageous to the prosecutor if the government's case has either of two weaknesses. First, the prosecutor may have so little evidence that, even if all of it were

of a Criminal Defense, PRAC. LAW., May 1961, at 25, 28 (without money, defense is deprived of laboratory tests, photographs, copies of documents, necessary medical examinations, and depositions). Even reasonably wealthy defendants, when confronting such sophisticated prosecutorial machines as the federal government, are at a significant disadvantage. See Steinberg, supra, at 443 (on government's side are prosecutor and assistants, police officers, detectives, FBI agents, tax sleuths, ballistics experts, wiretappers, doctors, scientists, and handwriting experts).

Financial resources aside, the defendant generally has poorer access to witnesses and relevant records. Not only does the prosecutor have procedural tools to encourage or even to compel witnesses to come forth, see Steinberg, supra, at 443 (prosecutor can send summons to fetch witness, send detective to question or bring in witness, and obtain sworn testimony at grand jury proceeding), but most people are more willing to cooperate with the government than with a defendant, see Louisell, Criminal Discovery: Dilemma Real or Apparent? 49 CALIF. L. REV. 56, 87 (1961) (neutral witnesses more likely to overcome natural reluctance to get involved in legal proceedings for prosecution than defense); Steinberg & Paulsen, supra, at 27 (whereas witnesses consider it respectable to cooperate with prosecutors, they do not like to get involved with preparation for criminal defense).


12. See Brady v. Maryland, 373 U.S. 83 (1963) (right to fair trial includes right to disclosure of exculpatory evidence material to guilt or punishment). To supplement the constitutional requirement, most jurisdictions have either common-law or statutory provisions for pretrial discovery. See note 1 supra.

13. See note 7 supra.

14. In addition, bluffing may benefit the prosecutor by saving resources when the case is not sufficiently important—for political or other reasons—to go to trial. Insufficient importance of this sort is not an informational weakness.
presented at trial, the defendant would not be found guilty beyond a reasonable doubt. Especially if the evidence suffices to establish probable cause, the prosecutor may be tempted to misrepresent the factual sufficiency of her case.\textsuperscript{15} Second, the prosecutor may have evidence that is sufficient to persuade a factfinder of the defendant’s guilt beyond a reasonable doubt, but that cannot all be presented at trial. Faced with practical weaknesses such as the unavailability of a witness for trial or the loss or destruction of evidence, or with constitutional weaknesses such as the unlawfulness of a search or the involuntariness of a confession, the prosecutor, convinced that the defendant is in fact guilty, may misrepresent the legal sufficiency of her case. Bluffing in these circumstances is frequent because prosecutors commonly believe that obtaining pleas from factually guilty but legally innocent defendants\textsuperscript{16} is a major legitimate advantage of plea bargaining.\textsuperscript{17}

Bluffing by prosecutors may take many forms. The most blatant form is the bringing of charges against a defendant on evidence that will not, because of factual or legal weaknesses, be sufficient to convict at trial.\textsuperscript{18} A

15. Prosecutors condemn the filing of wholly unsupported charges, see McDonald, Cramer, & Rossman, \textit{Prosecutorial Bluffing and the Case against Plea-Bargaining}, in \textit{Plea-Bargaining} 1, 4 (W. McDonald & J. Cramer eds. 1980), but prosecutors regularly file charges in cases in which the evidence is not likely to satisfy the burden of proof, see \textit{id.} at 4-5. Cf. Alschuler, \textit{supra} note 11, at 63 (prosecutors often offer unusual concessions in one-witness identification cases).

16. A defendant is factually guilty if he actually committed the offenses charged. By contrast, a defendant is legally guilty if he is convicted after a factual determination made in procedurally regular fashion and by authorites acting within competences duly allocated to them. Furthermore, he is not to be held guilty, even though the factual determination is or might be adverse to him, if various rules designed to protect him and to safeguard the integrity of the process are not given effect.


In light of the above definitions, factual guilt can never be fully known, and legal guilt cannot be fully ascertained until a defendant stands trial. See \textit{id.} at 122. In this Comment, however, legal and factual guilt are treated as requiring only a high probability of legal and factual guilt in their extreme senses. Moreover, although “legal guilt” might be used to characterize defendants convicted by plea, this Comment uses the term only in reference to trial conviction. See \textit{id.} at 123 (defendants who plead guilty should be considered legally guilty if there is likelihood of conviction at hypothetical trial); cf. Church, \textit{In Defense of “Bargain Justice,”} 13 \textit{LAW & SOC’Y REV.} 509, 516 (1979) (legal innocence is merely attorney’s prediction of trial outcome).

17. See Alschuler, \textit{supra} note 11, at 62-63 (personal belief in defendant’s factual guilt underlies decision to increase pressures to plead guilty when case is weak); McDonald, Cramer, & Rossman, \textit{supra} note 15, at 7-9 (prosecutors believe factually guilty defendants should not escape conviction because of administrative or logistical errors, but deny that distinction between factual and legal guilt underlies decision to bluff).

18. This prosecutorial practice constitutes overcharging to whatever extent the charges are filed primarily to facilitate negotiation of a plea favorable to the prosecutor and not to anticipate accurately the offenses the prosecutor will try to prove at trial. See Alschuler, \textit{supra} note 11, at 86-87.
second obvious form of bluffing is the refusal to dismiss charges that were supportable when filed, but due to subsequent intervening events, are no longer supported by evidence sufficient to convict. Such practices, which are themselves misrepresentations, are likely to be accompanied by the prosecutor’s attempting to induce a guilty plea by leading the defendant to believe that the government has evidence sufficiently convincing to merit trial.

Misrepresentations of these sorts may be motivated other than by bad faith or vindictiveness. Although prosecutors have little excuse for filing inadequately supported charges, they are under strong institutional pressures not to move for dismissal once charges have been filed. These pressures are of two kinds. First, many prosecutors’ offices expect their staffs to maintain high conviction rates, and unlike not bringing charges, a dismissal of charges affects those rates. Second, a dismissal of charges may be reviewed both by superiors and by critics outside the office, who may characterize the prosecutor’s initial decision to file charges as an error of judgment. That prospect makes a decision to move for dismissal of charges more difficult than a decision not to bring them, because the latter decision is subject to much more limited review.

Whatever the motivation, bluffing by prosecutors may take forms much less blatant than outright lies in the service of unsupportable charges. One of the more subtle kinds of bluffing is setting a trial date before the case is ready; another is failing to inform the defendant of changes favorable to

Prosecutors may file charges more severe than the evidence is likely to support even without regard to plea bargaining leverage. They may file such charges in good faith, seeking to prepare for the remote possibility that the evidence will materialize. See L. Weinreb, Denial of Justice 58 (1977).


20. Prosecutors engage in this practice regularly, if not frequently. See Law Enforcement in the Metropolis, supra note 19, at 132-35; McDonald, Cramer, & Rossman, supra note 15, at 5. In particular, prosecutors do not hesitate to hide weaknesses caused by administrative error. Id.

21. See McDonald, Cramer, & Rossman, supra note 15, at 10 (table 1-1) (listing good-faith reasons why prosecutors initially overrepresent their cases).


him in the status of evidence already disclosed to him. Even merely offering a defendant a sentence or charge reduction is a form of bluffing when the implication it carries is false—namely, that the government's case would actually support a stiffer sentence or a higher charge than that incorporated in the offer. Because accepting a defense attorney's offer of a plea bargain carries the same implication, the prosecutor's acceptance of the offer should likewise be viewed as passive bluffing whenever the implication is false. The last two descriptions of bluffing may not seem, on the surface, to involve misrepresentation of the government's case; because a plea bargain, however, is attractive to a defendant only insofar as it reduces his actual exposure to punishment, a prosecutor's extending or accepting an offer of a plea bargain makes sense only if she intends the defendant to believe that trial is likely to result in a stiffer punishment than that incorporated in the plea bargain. When that suggestion is false, the prosecutor should be recognized as actively or passively seeking to mislead the defendant about the strengths and weaknesses of the government's case. This form of bluffing, like the others, forces the defendant to bargain on the basis of false information.

B. Inadequate Defense Counsel

Prosecutorial bluffing is not the only abuse permitted by a guilty-plea process that does not mandate disclosure. The imbalance in information that tempts the prosecutor to bluff also provides a fertile environment for questionable conduct on the part of defense attorneys. Public defenders, like prosecutors, are faced with overwhelming caseloads, and private attorneys for low-income defendants have strong financial incentives to dispose of cases quickly. Moreover, the system itself provides incentives for

25. See McDonald, Cramer, & Rossman, supra note 15, at 18 (table 1-3); id. at 20. At least one court has condemned this behavior. People v. Jones, 44 N.Y.2d 76, 375 N.E.2d 41, 404 N.Y.S.2d 85, cert. denied, 439 U.S. 846 (1978) (upholding guilty-plea conviction although prosecutor failed to disclose death of eyewitness after having already disclosed witness as part of state's case).
26. See p. 1594 infra.
28. See Alschuler, supra note 10, at 1210 (public defenders have "grinding, overwhelming" caseloads); cf. Y. KAMISAR, W. LAFAVE, & J. ISRAEL, supra note 1, at 11-12 (extraordinarily heavy caseloads affect every aspect of criminal justice system and lead to emphasis on routine decisionmaking).
29. See Alschuler, supra note 10, at 1182 (economic success achieved either by using reputation as trial lawyer to attract wealthy clients, or by handling large volume of low-income defendants, which necessitates seeking plea dispositions); Levin, supra note 22, at 92 (because fee charged low-income defendants cannot be increased above low level, defense attorneys seek to minimize time devoted to cases); cf. M. FEELEY, THE PROCESS IS THE PUNISHMENT 186 (1979) (study of lower court in New Haven, Connecticut) (some private defense attorneys charge flat rate regardless of services provided or
defense attorneys to please prosecutors. An attorney's cooperation with a prosecutor in a particular case may induce the prosecutor to confer benefits on the attorney, such as increased disclosure in that case. In addition, many defense attorneys have a continuing relationship with prosecutors that is more reciprocal than adversarial; in such a relationship, concessions on behalf of one client may be traded for advantages on behalf of another.

For these reasons, a defense attorney may seek, without full regard for the defendant's interests, to persuade his client to plead guilty. In particular, the defense attorney may misrepresent to his client the chances for acquittal at trial. With the defendant relying heavily on his attorney's opinion about the advisability of proposed plea bargains, defense counsel's misrepresentations utterly undermine the defendant's ability to protect his own interests.

C. The Failure of Objective Standards to Protect the Defendant's Interests

Both the prosecutor and the defense attorney rest their decisions about what to tell the defendant on their assessments of the probability of conviction. At one end of the probability scale is the case that is so weak that it very likely would not survive a motion for a directed verdict. In such a case, the charges filed clearly do not warrant a conviction, and their very existence may mislead or bluff the defendant into believing that the government has a case against him. At this end of the scale, any
willingness on the part of defense counsel to plea bargain would constitute inadequate representation. At the other end of the probability scale is the case that is so strong that it is almost certainly sufficient to elicit a guilty verdict on the charges filed. At this end of the scale, bluffing is not a problem because no misrepresentation by the prosecutor could lead the defendant to overestimate his chances of conviction. Similarly, inadequate defense counsel is not a problem because, at this extreme, conviction is virtually certain whatever counsel does.

Most cases lie between the two poles, where conviction is possible but not certain. Perhaps there is a specific probability of conviction below which any prosecutorial offer of a plea bargain would constitute bluffing and any defense-counsel willingness to plea bargain would constitute inadequate representation. Even if such a threshold probability exists, however, the probability of conviction in any particular case cannot be determined with even minimal accuracy. It is often impossible to disprove a prosecutor’s representations that the case is ready for trial, even if the admissible evidence is of questionable strength. Nor can a defense attorney’s assertion that the government has a strong case often be challenged as a misrepresentation. Thus, there is little hope of developing objective criteria by which to police the reliability of a prosecutor’s or a defense counsel’s representations to the defendant of the strength of the government’s case. The only way the criminal process may be able to guard against misleading representations to the defendant is to allow the defendant to make his own evaluation of the likelihood of conviction.

In sum, prosecutors and defense attorneys commonly make low-visibil-

36. At least two studies have attempted to predict the probability of conviction at trial. J. EISENSTEIN & H. JACOB, FELONY JUSTICE 173-311 (1977); Rhodes, Plea Bargaining: Its Effect on Sentencing and Convictions in the District of Columbia, 70 J. CRIM. L. & CRIMINOLOGY 360 (1979). About the difficulties of making such predictions, Rhodes wrote:

Once cases have been accepted for prosecution, it is difficult to predict whether they will lead to a conviction at trial. Perhaps this can be attributed to the vagaries of judges and juries; perhaps the quality of evidence, especially witness testimony, cannot be accurately assessed until the time of the trial; or perhaps the variables, or their measurement, used in this analysis fail to capture what is important in convincing a judge or a jury of guilt. Id. at 369-70 (footnote omitted). Eisenstein and Jacob similarly concluded that predictions of the chance of acquittal in a particular case are highly unreliable. J. EISENSTEIN & H. JACOB, supra, at 241-43.

Despite the difficulties of predicting the outcome of a particular case, Rhodes concluded:

If all guilty plea cases went to trial, the percentage of prosecutions leading to conviction would fall from eighty-seven percent to sixty-six percent (assault), ninety-three percent to eighty-two percent (robbery), ninety-one percent to sixty-eight percent (larceny), and ninety-two percent to sixty-eight percent (burglary).

Id. at 370 (footnote omitted). In another statistical study of the implicit rate of acquittal, Finkelstein estimated that in districts with high guilty-plea rates, as many as one-third of all defendants pleading guilty would have escaped conviction had they refused to plead. Finkelstein, supra note 27, at 309.

37. Many prosecutors feel justified in overrepresenting the strength of their cases because of the possibility that a weak case will become stronger. See McDonald, Cramer, & Rossman, supra note 15, at 4-5.
ity decisions that jeopardize the defendant's interests. The legitimacy of those decisions depends on how accurately the probability of conviction is assessed. Yet the subjective quality of those assessments makes it almost impossible for third parties to police the conduct of individual prosecutors and defense attorneys. With an increased flow of information to the defendant, however, the defendant can protect himself to some extent against abuses of power by prosecutors and defense attorneys. Although disclosure may not ensure wholly fair dealing by prosecutors or fully committed representation by defense attorneys, it permits the defendant to make an independent evaluation of the strength of the case against him and thus to challenge the prosecutor's and the defense attorney's representations about the advisability of a plea bargain.

Some disclosure is therefore needed to prevent abuses in plea bargaining. To determine whether and how much disclosure should be required, it is necessary to examine the actual operation and the various legitimating conceptions of the guilty-plea process. That analysis indicates that a requirement of very broad disclosure can justifiably be introduced to address the problems caused by the imbalance in information.

II. The Basis of Legitimacy for the Guilty-Plea Process

The guilty-plea process is, on its face, a process that is intended to and does in fact produce consensual transactions. Because it is part of the criminal justice system, however, plea bargaining might also be thought to serve the systemic goals of generating accurate determinations of factual guilt and legal guilt. Although there is little consensus about the values that the guilty-plea process should be made to serve, a demonstration that plea bargaining serves either of these systemic goals, or the goal of achieving meaningful consent to the resulting bargains, would lend considerable legitimacy to the process. Such a demonstration would also pro-
vide direction for reforms: the process should be made to serve increasingly well those goals on which its legitimacy rests.

Corresponding to each of the three legitimating goals is a conception of the guilty-plea process that asserts that the primary function of the plea process is to serve that goal. Two of the conceptions of the plea process look beyond the bargaining that takes place and identify functions of the process other than the production of consensual transactions. Under the first conception, the primary function of the guilty-plea process is to replicate the conviction results that would be obtained at trial; that is, to generate accurate determinations of legal guilt. If this conception were functionally accurate, one would expect to find counterparts in the plea process to many of the evidentiary and procedural rules that govern at trial. Under the second conception of the guilty-plea process, the primary function of plea bargaining is to achieve accurate determinations of factual guilt. If this conception accurately characterized the function of the plea process, one would expect to find counterparts to those elements of an inquisitorial system that best serve accuracy. The third conception of the guilty-plea process views it as the bargaining process that it pa-

42. See, e.g., Church, supra note 16, at 512 (properly constructed plea bargaining system should approximate probable results of trial); Comment, supra note 7, at 529 (same); Note, Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas, 112 U. Pa. L. Rev. 865, 882 (1964) (if plea bargained convictions could approximate trial outcomes, criticism of system would diminish substantially).

43. Model guilty-plea laws, some federal courts, and at least four states have adopted conditional guilty pleas in order to preserve Fourth and Fifth Amendment rights for defendants who plead guilty. See Note, supra note 3, at 565-66 nn.9-11.

44. See, e.g., H. PACKER, supra note 16, at 158-63 (guilty plea is focal device of crime-control model of criminal process); Hyman, Philosophical Implications of Plea Bargaining: Some Comments, 13 LAW & SOC'Y REV. 565, 565 (1979) (plea bargains are less offensive when guilt is reasonably certain); White, supra note 30, at 458-62 (plea bargaining guidelines should reflect sensitivity to probable guilt or innocence of defendant, not merely relative chances of acquittal or conviction).

45. The criminal justice systems of civil-law nations provide a model for inquisitorial modes of factual determination. Although civil-law systems do not incorporate guilty pleas in their criminal processes, see Goldstein & Marcus, The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany, 87 YALE L.J. 240, 244 (1977), there are enough similarities that comparisons are profitable. Among the similar features are the judge’s direct questioning of the defendant unconstrained by any privilege against self-incrimination, the judge’s active participation in the conviction of the defendant, and the admissibility of all relevant evidence regardless of extraneous constraints such as those imposed by constitutional rights or by rules against prejudice. See Damaska, supra note 41, at 514-25 (civil law generally does not recognize exclusionary rules barring hearsay, prejudicial evidence, or evidence illegally obtained).

It is noteworthy, therefore, that in civil-law systems, “the defendant and his counsel acquire, before the case comes up for trial, an unlimited right to inspect the whole investigative dossier.” Id. at 533; see Langbein, Land Without Plea Bargaining: How the Germans Do It, 78 MICH. L. REV. 204, 207-08 (1979). The defendant must also reveal evidence to the prosecution. See Damaska, supra note 41, at 533-36. Civil-law systems view open disclosure as promoting the accuracy of the truth-seeking process; one commentator has also seen it as compensating the defendant for the relative lack of procedural safeguards. See id. at 534-35 & 535 n. 64.
tently is. Under this conception, the primary function of the plea process is to produce agreements to which the government and the defendant have both given meaningful consent. If this conception were functionally accurate, one would expect to find counterparts in the plea process to the rules of contract law that seek to protect the consensual character of transactions.

To provide an acceptable basis for the legitimacy of plea bargaining, a conception of the guilty-plea process must identify as functions of the process functions that the current plea process by and large actually serves; to the extent that the process does not now perfectly serve the identified functions, the conception must show how current practices can be reformed. This section argues that of the three conceptions of the plea process that correspond to the three legitimating goals, only the consensual-transaction conception either accurately characterizes the actual functions

46. Several commentators have concentrated their analysis and defense of plea bargaining on the extent to which the bargains produced are consensual. See, e.g., Brunk, The Problem of Voluntariness and Coercion in the Negotiated Plea, 13 LAW & SOC'Y REV. 527 (1979) (defending plea bargaining against charges that it is intrinsically coercive); Hyman, supra note 40, at 4-5 (describing plea bargaining as negotiation and recommending that reforms of plea bargaining should stress congruity between bargaining and trial process). The consensual-transaction conception of the guilty-plea process singles out consent as the primary value in the plea process.

Although plea bargaining has been criticized for diluting the adversarial system, see, e.g., Note, The Unconstitutionality of Plea Bargaining, 83 HARV. L. REV. 1387, 1395-98 (1970), some commentators who focus on the defendant's consent praise plea bargaining for its cooperative quality, see Note, Plea Bargaining and the Transformation of the Criminal Process, 90 HARV. L. REV. 564, 576-77 (1977) (plea bargaining offers defendant opportunity to participate in criminal process) [hereinafter cited as Note, Transformation]; cf. Enker, Perspectives on Plea Bargaining, in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 108, 113, app. A (1967) (compromise in plea bargaining, not trial adjudication, may be best way to prove elements of crime based on personal responsibility or other values).

47. Courts and commentators have expressly used the analogy between plea bargains and contracts. E.g., Blackledge v. Allison, 431 U.S. 63, 75 n.6 (1977) (analogizing court's authority in guilty-plea case to authority exercised in application of parol evidence rule); Cooper v. United States, 594 F.2d 12, 17 (4th Cir. 1979) ("Analyses from contract law will usually provide a reliable inclusive test for the existence of constitutional right and violation."); F. ZIMRING & R. FRASE, THE CRIMINAL JUSTICE SYSTEM 587 (1980) (asking if plea bargains should be subject to constitutional equivalent of unconscionability doctrine of U.C.C. § 2-302); Hyman, supra note 40, at 16-17 (litigation over whether defendant received expected benefits from plea reflects notion of guilty plea as contract); Kipnis, supra note 22, at 96 (plea bargains have many features of commercial contract); Westen & Westin, supra note 6, at 528-38 (because Supreme Court has implicitly recognized constitutional protection for defendants' expectations arising from plea bargains, commercial contract law should be applied in guilty-plea cases).

Many other cases have used contract terminology and relied on contract principles. E.g., Santobello v. New York, 404 U.S. 257, 260-63 (1971) (defendant is entitled to remedy for broken plea bargain; sentencing court left with discretion to choose between remedies of withdrawal of plea or "specific performance"); see note 115 infra (citing cases).

48. Developing a conception of plea bargaining that accurately identifies the values that legitimate the process does not preclude criticism of plea bargaining on the ground that the identified values are inadequate to justify a practice that defeats the more general aims of the criminal justice system. Because plea bargaining is constitutional, see Santobello v. New York, 404 U.S. 257, 260-61 (1971), and unlikely to be eliminated in the near future, reform efforts must rest on a clear understanding of what values the plea process serves now and can be made to serve even better.
of the guilty-plea process or suggests reforms that can make the characterization accurate. Analyzing the operation of plea bargaining reveals that the plea process involves little of what the trial-replication and factual-accuracy conceptions lead one to expect, and that neither conception can be made accurate as a functional description by readily available reforms of the process. As a consequence, the consensual-transaction conception is the only adequate foundation for the legitimacy of plea bargaining.

A. **The Operation of the Guilty-Plea Process**

A plea bargain is struck when the defendant agrees to plead guilty in return for an inducement offered by the prosecution. The benefit received by the prosecution is the avoidance of the uncertainty, delay, and expense of trial. The benefits most often obtained by the defendant are a favorable sentence recommendation, dismissal of charges, and the opportunity to plead to a lesser included offense.49

Although many plea bargains result from explicit, particularized negotiations between the prosecution and the defense, some plea bargains are the product of implicit arrangements incorporated formally or informally into the criminal justice system. Such implicitly negotiated plea bargains most commonly occur in jurisdictions whose judges routinely impose lower sentences on guilty-plea defendants than on trial defendants. In that situation, the defendant, if informed of this sentencing practice, may be induced to plead guilty without any encouragement from the prosecutor.50

Those elements of the criminal process that are intended to encourage or to reward guilty pleas are not the only ones that have that effect. Many other elements of the process, though not designed for the purpose, operate to induce pleas of guilty;51 at a minimum, expected relief from such systemic pressures enhances the value of any bargain implicitly or explicitly offered to the defendant. Perhaps the most common pressure of this sort is felt by the indigent defendant who cannot make bail when arrested on charges unlikely to bring a punishment more serious than probation or a minimal prison sentence. Under these circumstances, the defendant may spend more time in jail before trial than he would if he pleaded, and that prospect may exert great pressure on the defendant to plead guilty.52

49. Among other prosecutorial inducements are promises not to prosecute codefendants, promises to incarcerate defendants or codefendants in particular prisons, agreements to prosecute defendants or codefendants in juvenile court, agreements not to oppose probation, and promises of immunity with regard to other charges pending or not yet filed. See Note, supra note 42, at 866 n.7.


51. The Supreme Court has recognized that the impact of implicit inducements differs little from that of explicit inducements. See Brady v. United States, 397 U.S. 742, 751 (1970).

52. See M. FEELEY, supra note 29, at 206 (noting "chilling effect" of pretrial detention on defendants who cannot make bail); White, supra note 30, at 444, 450 (correlation between pretrial deten-
Among the other unintended inducements to plead guilty are the high financial costs and personal embarrassment of a public trial.\textsuperscript{53}

Implicit inducements to plead guilty pervade the criminal process; they exist wherever unacknowledged practices or unspoken understandings lead defendants to expect some benefit in return for a plea. Because implicit plea bargaining thus eludes scrutiny,\textsuperscript{44} it is futile to try to distinguish between negotiated and non-negotiated pleas.\textsuperscript{45} The effects of plea bargaining on a decision to plead are indistinguishable from the effects of implicit inducements; for analytical purposes, therefore, every guilty plea should be treated as an induced plea.

Although some defendants plead guilty without regard to any assessment of the likely trial results,\textsuperscript{46} defendants typically consider a plea bargain desirable only to the extent that it promises to reduce their exposure to punishment after trial.\textsuperscript{57} That exposure is the particular sentence likely to follow a verdict of guilty,\textsuperscript{58} discounted by the chances of an acquittal.\textsuperscript{59}

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A defendant seeks a plea bargain incorporating a sentence less onerous than the discounted trial sentence as he estimates it, and the prosecutor offers pleas bargains tailored to her estimate of that discounted sentence. Typically, that is, the defendant’s consent to a particular plea bargain depends directly on his assessment of the strengths and weaknesses of the government’s proof for the charges originally filed, just as the prosecutor’s offer of a particular plea bargain depends directly on her assessment of those same strengths and weaknesses. By contrast, neither the defendant nor the prosecutor is much, if at all, concerned with the evidentiary support for the charges to which the defendant ultimately pleads guilty.

B. Three Conceptions of the Guilty-Plea Process

The literature on guilty pleas has given rise to three conceptions of the guilty-plea process. One asserts that the primary function of the process is the replication of trial results, the second that its primary function is the achievement of factual accuracy, the third that its primary function is the production of consensual transactions. Of the three conceptions, neither the first nor the second accurately describes the guilty-plea process or suggests simple reforms to increase the extent to which the process serves the identified functions. The consensual-transaction conception does both, and in doing so, provides a foundation for requiring preplea disclosure.

1. Trial Replication

Some courts and commentators have suggested that the legitimacy of the guilty-plea process derives from its success in replicating the results of

ing, Decision Theory, and Equilibrium Models: Part I, 51 IND. L.J. 987, 991-93 (1976); Nagel & Neef, Plea Bargaining, Decision Theory, and Equilibrium Models: Part II, 52 IND. L.J. 1, 1 (1976) [hereinafter cited as Nagel & Neef (pt. 2)]; Zeisel, The Offer That Cannot Be Refused, in F. ZIMRING & R. FRASE, supra note 47, at 558-59. A more sophisticated version of the defendant’s calculation would require estimation of a complete probability distribution, with probabilities assigned to a range of possible penalties. Nothing is lost by using the simple product formula, however, because even in the simpler version, the defendant needs information to assess a probability.

60. The higher the discounted trial sentence as the prosecutor estimates it, the higher the penalty she seeks in a plea bargain. See Rossman, McDonald, & Cramer, Some Patterns and Determinants of Plea-Bargaining Decisions: A Simulation and Quasi-Experiment, in PLEA-BARGAINING 77, 92 (W. McDonald & J. Cramer eds. 1980); White, supra note 30, at 450-51; cf. Alschuler, supra note 11, at 59 (strength of state’s case is relevant consideration in prosecutor’s decision to plea bargain); Note, supra note 42, at 901 (85% of prosecutors polled found that weaknesses in state’s case provided significant inducement to plea bargain).

61. Because the defendant is primarily concerned with the strength of the prosecutor’s proof for the charges originally filed, the information sought by the defendant is distinct from the information making up the factual basis for a plea. On appeal, a defendant may concern himself with the factual basis for his plea in order to challenge the constitutional or statutory adequacy of the plea. Nevertheless, the presence or absence of an adequate factual basis has no necessary bearing on the quality of his consent to plead guilty.
In this view, the primary legitimating function of the plea process is the same as that of trial: the accurate determination of legal guilt. The guilty-plea process should convict those defendants who would be convicted at trial and should not convict those who would be acquitted at trial.

This conception of the guilty-plea process is inaccurate. The guilty-plea process cannot be understood as serving to replicate the results of trial: whereas the trial process is, by definition, competent to distinguish factual from legal guilt, the current law on guilty pleas does not give effect to that distinction. In fact, the present system persists in convicting defendants who would not be convicted at trial.

Evidence sufficient to establish legal guilt must be admissible at trial, must be constitutionally seized, and must satisfy a high standard of proof. The factual basis that is typically required for acceptance of a guilty plea, however, need not satisfy any of these three requirements of legal guilt. Neither the Supreme Court nor the Federal Rules of Criminal Procedure prescribe standards of admissibility. Hearsay testimony and unconstitutionally seized evidence, for example, suffice to support a plea; in fact, a summary of the government's case by the prosecutor is often enough. In addition, few jurisdictions have established any standard of proof. Because the defendant's admission of guilt, which is highly unreli-

62. See note 42 supra. This conception adds a descriptive component to the prescriptions of those commentators who recommend reform of the plea process to make it more accurately reflect trial results.

63. One commentator has suggested a reform of the factual-basis requirement that would result in a guilty-plea proceeding that could accurately be described as a mini-trial. See Barkai, Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas But Innocent Defendants? 126 U. PA. L. REV. 88, 140-41 (1977) (directed verdict standard is appropriate evidentiary threshold for factual basis determination).

64. See note 36 supra.

65. The federal courts and many state courts require a factual basis for acceptance of a plea. See FED. R. CRIM. P. 11(f); Barkai, supra note 63, at 89 n.6. Whether the Constitution similarly requires a factual basis for every plea is an open question. In North Carolina v. Alford, 400 U.S. 25 (1970), the Supreme Court held that an admission of facts constituting a factual basis for the crimes pleaded was not an essential element of a constitutional plea. Although not squarely holding that an independent factual basis was always needed in the absence of the defendant's admission, the Court relied heavily, in finding the guilty plea voluntary and intelligent, on the factual showing the state had made at the plea hearing. Id. at 38.


67. See FED. R. CRIM. P. 11 (Advisory Committee Notes to 1974 Amendments) (inquiry of attorneys or examination of pre-sentence report might suffice); Barkai, supra note 63, at 118-20. One commentator has suggested that Alford could have been given a more restrictive interpretation because the procedure used was, as required by state law, more a mini-trial than a plea proceeding. See Uviller, Pleading Guilty: A Critique of Four Models, 41 LAW & CONTEMP. PROB. 102, 121 (1977).

68. See FED. R. CRIM. P. 11(f) (not specifying standard of proof for factual-basis showing); Barkai, supra note 63, at 122-27 (describing state and federal law). The American Bar Association has proposed requiring a factual basis unaccompanied by a standard of proof. ABA PLEA STANDARDS,
able, typically constitutes the principal evidence for the plea’s factual basis, the absence of a standard of proof is a particularly striking indication that the factual basis requirement is an inadequate substitute for the formal evidentiary showing required at trial.

With respect to other rights entailed by a commitment to the standard of legal guilt, the guilty-plea process is an equally poor substitute for trial. For example, the Supreme Court has drastically narrowed the scope of legal challenges that must be allowed following a guilty plea. In fact, guilty pleas may constitutionally be treated as waivers of most of the rights available to trial defendants, and current practice treats them as such. The Supreme Court has also declined to require a full articulation of those rights at the plea hearing, even though such a requirement would help provide the defendant an adequate opportunity to assess his legal guilt prior to conviction. Under present law, in short, the guilty-plea process guarantees to the defendant few of the rights that render trial an instrument for the determination of legal guilt. For that reason, and because pleas by legally innocent defendants are common, the guilty-plea process cannot now be viewed as functioning to replicate the results of trial.

Furthermore, it is unlikely that the guilty-plea process can be reformed to make the trial-replication conception even moderately accurate. Stringent standards might be set for the character and amount of proof needed to establish a factual basis for a plea, but negotiated pleas would continue to respond to the uncertainties involved in predicting trial outcomes. Prediction of trial results can never adequately substitute for trial as a means

supra note 2, at 30-34. By contrast, the American Law Institute has proposed a standard requiring “reasonable cause”; that is, evidence sufficient to support a guilty verdict. MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.4(3) (1975) (cross-reference to definition of “reasonable cause” in § 330.5(3)).

69. Once a defendant decides that he is best off with a certain plea bargain, he has little incentive not to supply the needed factual basis. Moreover, defense counsel is likely to advise him to admit guilt. See Note, Transformation, supra note 46, at 574-75.

70. See Menna v. New York, 423 U.S. 61, 62 n.2 (1975) (voluntary and intelligent admission removes issue of factual guilt from case).

71. Some language in the Advisory Committee notes to the Federal Rules suggests that the factual-basis requirement was never intended to provide a check on the conviction of legally innocent defendants. See FED. R. CRIM. P. 11(f) (Advisory Committee Notes to 1966 Amendment) (requirement is intended to enable judge to ensure that defendant’s conception of his offense corresponds to legal definition of crime); Barkai, supra note 63, at 95-97 (many courts use factual-basis requirement only to ensure that defendant understands offense pleaded to).

72. See note 3 supra.

73. One commentator has characterized the deprivation of rights suffered by defendants pleading guilty as a forfeiture rather than a waiver. See Westen, Away from Waiver, supra note 3, at 1214-15.

74. See id. at 1219; Bishop, Waivers in Pleas of Guilty, 60 F.R.D. 513 (1974) (reviewing law on waivers affected by guilty pleas).

75. See note 6 supra.

76. See note 27 supra.
of determining legal guilt: key influences on trial outcome, such as jury composition, legal representation, and witness availability, cannot be accurately predicted. Negotiated pleas would also remain dependent on the inducements offered by prosecutors, and both the Supreme Court's recognition that the offer of inducements is an essential element of the plea-bargaining process and the current practice of offering greater inducements as conviction becomes less likely testify to the great disparity between the actual guilty-plea process and the process entailed by the ideal of trial-replication.

2. Factual Accuracy

Because factual guilt is of concern to the criminal justice system, the legitimacy of the guilty-plea process might be thought to derive from the ability of that process to arrive at accurate determinations of factual guilt. The Supreme Court has praised the accuracy of the guilty-plea process, and some commentators have proposed reforms to make the process more exclusively concerned with factual guilt. Moreover, a conception of the guilty-plea process that identifies the accurate determination of factual guilt as its primary function can offer an explanation for the constitutional requirement that every plea be intelligently made: the requirement, it can be argued, helps to ensure the accuracy of the charges pleaded to. This conception gives a similar account of the factual-basis requirement

78. Rather than allocating to the guilty-plea process only the defendants most likely to be convicted, present prosecutorial practices seek to trigger defendants' consent in the weakest cases. See note 60 supra. If guilty pleas are intended to replicate trial results, the practice of offering more favorable inducements as convictions after trial appear less probable further undermines the appropriateness of using the defendant's consent as a mechanism to allocate defendants between the two processes of conviction.
79. Accuracy is becoming an increasingly important value for the trial process as well. See Manson v. Brathwaite, 432 U.S. 98, 112-13 (1977) (rejecting per se rule for constitutional identification in part because rule might result in factual error); Stone v. Powell, 428 U.S. 465, 490 (1976) ("ultimate question of guilt or innocence" should be central concern in criminal proceeding); Cover & Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 YALE L.J. 1035, 1068-1100 (Burger Court decisions stress factual guilt as concern of criminal justice system). But see Seldman, Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure, 80 COLUM. L. REV. 436, 437 (1980) ("[The Burger Court's] criminal procedure decisions are not consistent with guilt-or-innocence model of criminal justice.")
80. In Menna v. New York, 423 U.S. 61 (1975) (per curiam), the Court stated that "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." Id. at 62 n.2 (emphasis in original); cf. Note, supra note 46, at 1397 (administrative determinations may be more reliable than those made by judge or jury).
81. E.g., White, supra note 30, at 458 (plea bargaining guidelines should reflect sensitivity to probable guilt or innocence of defendant and not relative chance of acquittal).
82. See Westen & Westin, supra note 6, at 501-03 (intelligence standard, which ensures notice of charges and of procedural safeguards that are available at trial, guards against inaccurate guilty pleas). But see id. at 503-04 (notice of guilty plea's consequences that is required by intelligence standard "cannot be explained by any possible interest in the accuracy of guilty pleas").

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for the acceptance of a plea.  

The principal support for the factual-accuracy conception, however, comes from the resemblances between the guilty-plea process and inquisitorial processes, whose hallmark is an overriding concern with the accuracy of factual determinations. Inquisitorial systems ignore the accusatorial system's distinction between factual and legal guilt. In such systems, defendants rarely exercise their privilege against self-incrimination, judges take an active part in the trial process, and all relevant evidence is considered in the fact-finding process; all relevant evidence is also available for scrutiny by both parties. In addition, judges often rely more heavily on the dossier compiled by the prosecutor than on testimony given by witnesses at a hearing. The plea process is similar in several respects. The parties at the plea hearing do not face each other as adversaries, and no rigid rules govern what evidence may be considered in establishing the factual basis for the plea. Indeed, the plea hearing provides for direct participation by the judge and permits the factual determination to be based largely on the defendant's admissions or on the prosecutor's file. The factual-accuracy conception infers from these similarities that the primary function of the guilty-plea process is, like that of inquisitorial processes, the accurate determination of factual guilt.

83. Some language in the Advisory Committee notes suggests that the factual-basis requirement helps ensure that the judge accepts a guilty plea only under circumstances that enable the judge to determine that the defendant is in fact guilty of the crimes pleaded to. See Fed. R. Crim. P. 11(f) (Advisory Committee Notes to 1974 Amendment). But cf. note 71 supra (other language in Advisory Committee notes indicates that factual accuracy not primary concern of factual-basis requirement).

84. Although the analogy between guilty pleas and inquisitorial systems has been recognized, Goldstein, Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure, 26 Stan. L. Rev. 1009, 1022-23 (1974), commentators differ on whether plea bargaining is practiced in civil-law nations, compare Goldstein & Marcus, supra note 45, at 269-84 (plea bargaining is practiced in France, Germany, and Italy) with Langbein, supra note 45, at 206-12 (Germans do not engage in plea bargaining).

85. See Damaska, supra note 41, at 578-87 (nonadversary process more committed to search for truth than Anglo-American process).

86. See id. at 533.

87. See Goldstein, supra note 84, at 1018-19; Langbein, supra note 45, at 207-08.

88. The prosecutor's case may be presented to the judge through a witness's summary, see North Carolina v. Alford, 400 U.S. 25, 28 (1970) (court heard testimony of police officer who summarized state's case; defendant did not admit guilt), through the pre-sentence report, or through statements made directly by the prosecutor. See Fed. R. Crim. P. 11(f) (Advisory Committee Notes to 1974 Amendment).

89. A few jurisdictions offer the defendant a third alternative to trial or guilty plea: plead not guilty and stand trial in an abbreviated form. Abbreviated trials of this sort are commonly associated with the Los Angeles courts. See Mather, Some Determinants of the Method of Case Disposition: Decision-Making By Public Defenders in Los Angeles, 8 Law & Soc'y Rev. 187 (1973) (study of Los Angeles courts). In abbreviated trials, judges base their determinations on transcripts of preliminary hearings, as well as on any additional evidence or arguments submitted. These proceedings are considered substitutes for guilty pleas and often incorporate sentence bargains. Sometimes prosecutors use these proceedings to dispose of a case by acquittal rather than by dismissal, if dismissal cannot be justified to superiors. Id. at 202.

Occasionally, abbreviated trials are semi-adversarial in nature, the defendant choosing to concede
Despite the similarities to inquisitorial fact-finding processes, however, the guilty-plea process cannot be understood as functioning primarily, or even to any significant degree, to achieve factual accuracy. One reason is that the guilty-plea process differs from inquisitorial processes in respects that are important for the pursuit of accuracy in determining factual guilt. For example, whereas the law governing guilty pleas does not incorporate any standard of proof, inquisitorial systems set a high standard. In addition, whereas guilty-plea law does not require disclosure of the prosecutor's file, inquisitorial systems require the prosecutor to open her file to the defendant and to the judge. In some inquisitorial systems, too, government officials are under a statutory duty to investigate exculpatory and inculpatory evidence, a duty that has only insubstantial counterparts in the guilty-plea process.

A second, more important reason for the inadequacy of the factual-accuracy conception of the guilty-plea process is that plea negotiations and guilty-plea hearings in fact reward conduct that promotes inaccuracy. The content of plea negotiations depends chiefly on the parties' subjective views of the chances of trial conviction; neither party is concerned with the likelihood that the defendant actually committed the offense pleaded.

Indeed, the offense of which the defendant is convicted commonly differs from the offense committed. It is the consequences of the plea, not the factual basis for it, that the prosecutor and the defendant seek to agree on.
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When an agreement has been reached and the defendant pleads in court, the hearing judge typically honors the plea bargain with only cursory examination of its accuracy. Although the factual basis for a plea must be established either by an admission of guilt or by independent evidence, neither the Constitution nor the Federal Rules of Criminal Procedure lays down any standard of proof to ensure the reliability of the factual support. Most important, an admission by a defendant pleading guilty is highly unreliable evidence: the judge typically does not probe the defendant’s recital of facts, and the defendant has a strong incentive to lie. Finally, not only is the factual-basis showing immune from any standard of proof, but neither the Constitution nor any statute establishes guidelines for the types of evidence that may contribute to that showing. In fact, the factual-basis requirement is designed not to transform the plea hearing into a fact-finding proceeding, but to enable the judge to ensure that the defendant’s conception of his offense corresponds to the legal definition of the crime.

The guilty-plea process, therefore, cannot now be understood as functioning to achieve accuracy in the determination of factual guilt. It is also unlikely that the process can be reformed by relatively simple measures to make the factual-accuracy conception substantially more accurate. In addition to requiring disclosure of the prosecutor’s file in order to lay all evidence open to examination, the law would have to establish a standard of proof and rules of evidence for the inquiry into factual guilt, and the judge would have to take a more active role in challenging the recital of facts agreed to by the prosecutor and the defendant. Although such reforms might improve the accuracy of the plea process without altering its fundamental character, it is doubtful that any reform could eliminate judicial reliance on false admissions by the defendant without abolishing the guilty plea itself. Moreover, it is unlikely that any reform of the law could change the content of plea negotiations: regardless of the reform, the prosecutor and the defendant would not focus on the factual accuracy of the charged filed; they would continue to rely on their estimates of the probability of trial conviction on the charges filed, and to bargain about the consequences of conviction on the charges pleaded to. For those rea-

96. See notes 65 & 70 supra.
97. See note 68 supra.
98. See note 69 supra.
99. See notes 67 & 68 supra.
100. See note 71 supra.
101. Because an admission can remove the issue of factual guilt from a case, see note 70 supra, and because defendants are typically willing to supply one, see note 69 supra, the plea process relies heavily on admissions, see North Carolina v. Alford, 400 U.S. 25, 32 (1970) (pleas typically accompanied by admission of guilt).
102. See pp. 1594-95 supra.
sons, no reform of the guilty-plea process seems likely both to preserve the character of the process and to render the factual-accuracy conception adequate as an account of the legitimating goal of the process.

3. **Consensual Transactions**

In contrast to the trial-replication and factual-accuracy conceptions of the guilty-plea process, the consensual-transaction conception seeks the legitimating function of the process in its most obvious features. The essential role of consent in pleading guilty and the focus on exchange in negotiating a plea define the character of the plea-bargaining process. Recognizing these defining characteristics, the consensual-transaction conception of the guilty-plea process rejects the attempts to locate the legitimacy of the process in systemic concerns with factual and legal guilt. This conception is superior to the trial-replication and factual-accuracy conceptions because it is reasonably accurate as a characterization of the function of the plea process and because, to the extent that the process does not now perfectly serve the identified goal, reforms can readily improve it.

Case law supports the emphasis on the defendant’s consent as the primary basis for the legitimacy of plea bargaining. First, the idea of consent underlies the constitutional mandate that guilty pleas be voluntary and intelligent.\(^{103}\) As elaborated in the *Brady* trilogy,\(^{104}\) both conditions are intended to guarantee the defendant a meaningful opportunity to make a rational choice among the alternatives he faces.\(^{105}\) Second, in *North Carolina v. Alford*\(^ {106}\) the Supreme Court relied heavily on the defendant’s consent as the primary justification for accepting negotiated pleas. *Alford* is important because it represents a departure from the Court’s traditional

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105. Although the Supreme Court has never fully explained the meaning of voluntariness, the *Brady* trilogy suggests that voluntariness incorporates the notion that the circumstances surrounding the defendant’s decision to waive trial should allow for his rational evaluation of the advantages of pleading guilty over those of trial. See *Brady v. United States*, 397 U.S. 742, 750 (1970) (noting no evidence that “Brady was so gripped by fear” that he could not, with counsel, rationally weigh advantages of trial against those of guilty plea); *id.* at 748 n.6 (because assistance of counsel critical to intelligent assessment of relative advantages of guilty plea, uncounseled pleas scrutinized with special care); *id.* at 754 (court found “no hazard of an impulsive and improvident response to a seeming but unreal advantage”).

The intelligence requirement also helps the defendant assess the value of his alternatives by ensuring that he receives information with which to assess his chances of acquittal, such as notice of the critical elements of the charges against him, *Henderson v. Morgan*, 426 U.S. 637, 645, 647 n.18 (1976), and notice of the procedural safeguards available at trial, *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). See note 82 supra (notice of charges and of procedural safeguards of trial protects against inaccurate prediction).

notion that a guilty plea must be composed of both an admission of guilt and consent to conviction. In upholding the guilty-plea conviction, the Court recognized that the defendant’s proclamation of innocence created a factual and legal dispute between the government and the defendant, a dispute that remained unresolved even after the conviction. Relying in part on the existence of an independent factual basis, however, the Court held that despite the dispute, the conviction was constitutional because the plea was voluntarily and intelligently made. That holding implied that the constitutional legitimacy of a guilty plea does not require that the factual predicate be either undisputed or established by trial; it was enough in Alford that the defendant gave his consent.

Subsequent to Alford, the Supreme Court explicitly acknowledged and approved the practice of plea bargaining. In Santobello v. New York, the Court officially recognized that defendants often plead guilty in reliance on promises made by prosecutors; it therefore held that the validity of the resulting guilty-plea conviction depends on the performance of those promises. In observing that the defendant’s consent to plead guilty was inextricably tied to a promise made by the prosecutor, the Supreme Court invoked the idea of contract as the foundation for the legitimacy of guilty-plea convictions. Indeed, although the Supreme Court has not formally characterized the plea bargain as a legally enforceable contract, it has explicitly drawn on the law of contracts to formulate the law of guilty pleas. Several state and lower courts have followed suit and one cir-
The circuit court has even held that the law of guilty pleas fully incorporates, though extends beyond, the law of contracts. Commentators, too, have used contract principles to analyze and to criticize the plea-bargaining process.

Case law and commentary are not the only sources of support for the consensual-transaction conception of the guilty-plea process; direct comparison with the two competing conceptions also provides support. One important reason to prefer the consensual-transaction conception is that it takes into account all phases of the guilty-plea process as it currently exists: negotiations between the prosecutor and the defendant, agreement on the terms of the plea bargain, and performance of the specified obligations by the prosecutor and the defendant. The trial-replication and factual-accuracy conceptions, by contrast, focus on the results of plea bargaining to the exclusion of the bargaining process itself.

A second important characteristic of the consensual-transaction conception is that it accounts, in terms of the goals of the guilty-plea process, for the means by which the criminal justice system allocates defendants to that process. If guilty pleas are seen as contractual arrangements, legitimate because the parties have willingly consented to summary conviction proceedings, defendants who plead guilty may sensibly, even obviously, be viewed as different in one important respect from defendants who do not plead guilty: those who plead were promised consideration sufficiently valuable to compensate them for surrendering their chance to be acquitted, whereas those who go to trial were not. In contrast, if the legitimacy of guilty-plea convictions is seen as deriving from their replication of trial results or from their factual accuracy, it remains unclear what distinguishes defendants who plead guilty from those who do not. Neither the trial-replication nor the factual-accuracy conception of the guilty-plea pro-

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117. See note 47 supra.
118. See Kipnis, supra note 22, at 97-100 (plea bargaining akin to contract made at point of gun).
119. See note 139 infra (describing possible unconscionability restriction on bargain terms).
120. See Santobello v. New York, 404 U.S. 257, 262 (1971) (defendant entitled to remedy for broken plea bargain). That only defendants, and not prosecutors, are entitled to enforcement of the terms of the bargain does not defeat the contractual analogy. Rather, it has been suggested, the doctrine of unilateral contracts explains the disparity in entitlements. See Westen & Westin, supra note 6, at 525 n.189 (consideration given to prosecutors is not promise to plead guilty, but performance in so pleading).
process justifies using the defendant’s and the prosecutor’s choice as an allocation mechanism.121

A final advantage of the consensual-transaction conception of the guilty-plea process is that it preserves and incorporates the priority of values associated with the trial process. In this respect, it resembles the trial-replication conception. The consensual-transaction conception incorporates the distinction between legal and factual guilt by recognizing that, in pleading guilty, the defendant sacrifices legal protections associated with trial and can therefore legitimately seek some consideration in return for the sacrifice. Like the trial-replication conception, this conception identifies as the goal of the plea process one that encourages the process, when it errs, to do so on the side of guilty defendants; rather than leave abuses of power unchecked or risk conviction of factually innocent defendants, it weights the process in favor of defendants.

Despite that similarity, the consensual-transaction conception is superior to the trial-replication conception. Whereas the latter seeks to preserve the values of trial by objectively comparing the results of the guilty-plea process to those of the trial process, the former relies on the subjective medium of the defendant’s assessment and consent to reflect the likely results of trial. Because no objective standards are available to predict particular trial results with reasonable certainty,122 the trial-replication conception provides no effective way to identify and correct erroneous convictions. In contrast, the consensual-transaction conception directs courts to examine, not the probability of conviction, but the defendant’s opportunity to make his own rational assessment of the chances of trial conviction.123 Because any plea bargain depends on both the prosecutor’s and the defendant’s predictions of the chances of trial conviction, the terms of the guilty plea are likely to reflect an accurate assessment of the defendant’s legal guilt—as long, that is, as the defendant has had a meaningful opportunity to make a rational prediction.124 Moreover, the task of guar-

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121. In fact, because legal guilt is more difficult to establish than factual guilt, there is no reason to think that defendants would choose to enter the plea process if that process accurately determined factual guilt. In contrast, if the trial-replication conception were accurate, defendants would not have an incentive always to avoid the plea process. This conception, however, does not explain the use of the defendant’s choice as an allocation mechanism: the defendant may be induced by the prosecutor to plead guilty precisely when acquittal at trial is likely. See note 60 supra.
122. See note 36 supra.
123. Under the contract conception, courts need not endeavor to assess the likelihood of the defendant’s conviction at trial. The bargain’s terms distribute to the parties the risk of error that the guilty plea misrepresents that likelihood. Compare Brady v. United States, 397 U.S. 742, 756-57 (1970) (guilty plea not unsound because defendant’s “calculus misapprehended the quality of the State’s case”) with 3 A. Corbin, Corbin on Contracts § 598, at 585 (1960) (error in probability determination is not ground for rescission when risk is consciously assumed).
124. See Nagel & Neef (pt. 2), supra note 59, at 43-44 (when information is shared by both prosecution and defense, plea bargain is likely to reflect more accurate perception of probability of conviction). That the results of the guilty plea process may reflect the likelihood of trial convictions
anteeing that the defendant has that opportunity is judicially manageable, especially if the guilty-plea process is reformed in obvious ways suggested by the consensual-transaction conception. In particular, disclosure of relevant information to the defendant would make the plea process serve even better than it now does the goal of producing agreements to which the defendant has given meaningful consent.

III. The Role of Disclosure

In large part because there is no other way to prevent the abuses due to an informational imbalance in the criminal justice system, most observers agree that some measure of prosecutorial disclosure is a condition of the validity of guilty-plea convictions. Disagreement exists primarily over the appropriate scope of disclosure. Whereas courts have recognized only a narrowly drawn duty to disclose exculpatory evidence, several commentators have proposed a broader duty. If accepted as the basis for the legitimacy of the guilty-plea process, the consensual-transaction conception provides a rationale for instituting a broad preplea duty to disclose to the defendant all information that bears on the likelihood of trial conviction.

does not imply that the same defendants who would be acquitted at trial would escape guilty-plea conviction. Rather, it means that the guilty-plea conviction would reflect the probabilities of trial conviction in the size of the sentence discount and in this manner would pay respect to the values underlying the trial process.

125. See pp. 1584-88 supra (prosecutorial bluffing and inadequate defense counsel take advantage of informational imbalance).


127. E.g., MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 320.3(1) (1975); Church, supra note 16, at 512; Goldstein, supra note 103, at 701; Hyman, supra note 40, at 67; Nagel & Neef (pt. 2), supra note 59, at 38, 38 n.70, 43-44.

128. The trial-replication and factual-accuracy conceptions of guilty-plea convictions might also require some degree of prosecutorial disclosure, but neither would be likely to require disclosure nearly as broad as the contractual conception. For example, the trial-replication conception might simply adopt the present duty to disclose during trial, thus requiring disclosure of exculpatory evidence that is material to guilt or punishment. Brady v. Maryland, 373 U.S. 83, 87 (1963). If plea hearings were considered fact-finding hearings roughly equivalent to inquisitorial proceedings, one might argue for adoption of the civil-law practice of broad disclosure of inculpatory and exculpatory evidence. On the other hand, one commentator has suggested that a commitment to a "search for truth" would dispose of any reason for broad disclosure of matters having an impact on the persuasiveness of the prosecution's case. Uviller, supra note 56, at 114 (defendant's confession of culpability is not affected by weaknesses in prosecution's independent proof).
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A. The Justification for Disclosure

When informed of the evidence likely to be available at trial, the defendant can decide, with the benefit of a full evaluation of the likelihood of his acquittal, whether or not to stand trial. That opportunity to assess the likelihood of acquittal may be the defendant's only protection against prosecutorial and defense counsel power. Mandating disclosure would ensure the defendant that protection. It would also make the defendant's consent more meaningful by promoting fairer bargains. In addition, a disclosure requirement would correct violations of some basic principles of contract law made relevant to the legitimacy of plea bargaining by the adoption of the consensual-transaction conception of the guilty-plea process.

1. Empowering the Defendant

In many circumstances, the defendant’s loss of an opportunity to make an accurate prediction of trial results is equivalent to the loss of the only effective safeguard against false or unfair conviction. Unlike trial, which places numerous obstacles on the path to successful prosecution of the defendant, the guilty-plea process sets up few effective formal barriers to conviction. Review of a guilty plea for voluntariness, intelligence, and a factual basis rarely uncovers grounds for rejecting the plea. Indeed, the defendant’s decision to plead guilty virtually guarantees his subsequent conviction. Consequently, the only effective check on the prosecutor’s

129. See note 1 supra.
130. See L. Weinreb, supra note 18, at 77-78 (actual plea of guilty is "a perfunctory exercise in which formalities triumph over substance"); Note, supra note 46, at 1394 (without increased commitment of judicial resources to investigation, unlikely that plea hearing will uncover inaccuracies in counseled plea).

The intelligence standard is satisfied by a record that includes only a perfunctory statement by the judge of only some of the defendant's constitutional rights. See note 6 supra. The requirement of voluntariness is currently satisfied by a plea offered under any circumstances short of physical or mental coercion; it is not violated by a plea offered under circumstances in which the advantages of pleading guilty are of uncertain value. See Brady v. United States, 397 U.S. 742, 757 (1970). The factual-basis requirement is apparently satisfied by a minimal evidentiary showing and provides virtually no protection to the defendant, who is typically prepared to make whatever admissions are needed to guarantee acceptance of his plea. See note 69 supra.
131. Although judges have the discretion to reject guilty pleas on grounds other than constitutional infirmity or inadequate factual basis, Santobello v. New York, 404 U.S. 257, 262 (1971) (defendant has “no absolute right to have a guilty plea accepted,” and court may reject one “in exercise of sound judicial discretion”); Lynch v. Overholser, 369 U.S. 705, 719 (1962) (defendant has no “absolute right” to have guilty plea accepted), courts have generally taken a limited view of such discretion, advocating deference to the prosecution's judgment of the public interest. See United States v. Cowan, 524 F.2d 504, 512-15 (5th Cir. 1975), cert. denied, 425 U.S. 971 (1976) (trial court exceeded bounds of its discretion in denying dismissal of charges and thereby frustrating plea agreement where prosecution gave substantial reasons for dismissal and plea bargain not found to be clearly contrary to public interest); United States v. Ammidown, 497 F.2d 615, 621-22 (D.C. Cir. 1973) (noting presumption that U.S. Attorney's determination is to be followed "in the overwhelming number of cases," held that trial court abused its discretion in rejecting plea to reduced charges with-
power to obtain a conviction by plea, and on the defense attorney’s readiness to plead, is the defendant’s own decision to hold out for a chance of acquittal.

When making that decision, the defendant relies primarily on his assessment of the strengths and weaknesses of the evidence likely to be presented at trial. Typically, however, the defendant’s ability to make that assessment is severely restricted by his relative lack of investigative resources. Disclosure directly to the defendant of information bearing on the likelihood of acquittal is therefore required to guarantee the defendant meaningful protection against prosecutorial and defense counsel power and abuse.

2. Producing Fairer Bargains

In addition to protecting the defendant against prosecutorial power, a disclosure requirement would result in the striking of bargains that are fairer to the defendant: they would more adequately compensate him for what he gives up. If a defendant has less information than the prosecutor from which to calculate the probability of conviction, the prosecutor may obtain a plea bargain more favorable to the government than the defendant might have agreed to if more fully informed. Insufficient information forces the defendant to assess his chances of acquittal on the basis of independently acquired information mixed with unfounded guesses made in the face of uncertainty. Reliance on independently acquired information may lead the defendant to believe that his chances of acquittal are lower than in fact they are and may therefore result in his consenting to a bargain that he erroneously believes compensates him for surrendering the possibility of acquittal. In addition, uncertainty may lead the defendant to accept conditions he would otherwise reject: he may be highly risk-averse, he is unable to evaluate information that, if disclosed, might count in his favor, and he has no opportunity to prepare a defensive strategy, whomever the information would favor. Of course, the defendant’s predicament is made even worse whenever the prosecutor engages in bluffing and thereby skews further the defendant’s estimate of his chances of acquittal in order to induce him to accept a plea bargain.

Disclosure of information relevant to evaluating the probability of acquittal both giving statement of reasons and finding agreement in conflict with public interest).
quittal would permit the defendant to insist on consideration commensurate with his surrender of a chance of acquittal. The defendant receives as consideration the difference between the discounted trial outcome and the penalty set in the plea bargain. Overestimation of the discounted trial outcome makes the consideration appear larger than it actually is, thus inducing the defendant to accept a higher penalty. Increased disclosure would discourage such overestimation and thereby produce fairer bargains. As a result, the consent that the defendant gives when he pleads would be freer and more fully informed, and in that sense, more meaningful.\footnote{Disclosure may also make the plea process more accurate at determining legal guilt. In part because defendants, when deprived of relevant information, overestimate the expected sentence differential between trial and plea, the guilty-plea process inadequately guards against the conviction of legally innocent defendants. See Parker v. North Carolina, 397 U.S. 790, 809 (1970) (Brennan, J., dissenting); Bailey v. MacDougall, 392 F.2d 155, 158 n.7 (4th Cir.), cert. denied, 393 U.S. 847 (1968); Alschuler, \emph{supra} note 11, at 62-63.}{135}

3. \textit{Minimizing Duress and Mistake}

Adoption of the consensual-transaction conception of the guilty-plea process makes it appropriate to criticize any element of the process by using those principles of contract law that seek to guarantee meaningful consent. In particular, the contract-law doctrines of duress and mistake lend strong support to the case for preplea disclosure.

Viewed as a consensual transaction, a plea bargain bears striking similarities to a contract made under duress.\footnote{Duress is a complete defense to performance of a contract, see \textsc{Restatement (Second) of Contracts} §§ 316-317 (Tent. Draft No. II, 1976), and would consequently provide every defendant with a defense to his guilty plea conviction.}{137} Taken to its logical conclusion, the analogy between duress and the circumstances of plea bargaining would entail abolition of the plea-negotiation process.\footnote{\textit{Id.} at 100-01.}{136} Short of abolishing plea bargaining, however, the doctrine of duress calls for substantial disclosure by the prosecutor.

The exemplar of duress is the contract made at gunpoint. The gunman's victim is coerced to consent to an agreement by the threat of severe harm. A defendant who is offered a plea bargain is in a similar predicament. By accepting the offer, he can limit his punishment to a certain smaller penalty. Yet he is forced to make the choice under the threat that a substantially greater sentence might be imposed should he stand trial. The force of duress increases with the credibility and magnitude of the threat relative to the offer; in particular, the higher the possibility of conviction, the stronger the duress. The prosecutor can therefore inflate the pressure to plead guilty by misrepresenting the strength of the govern-

\footnote{See Kipnis, \emph{supra} note 22, at 96-101.}
ment's case; that is, by bluffing.\textsuperscript{138}

Under such circumstances, prosecutorial disclosure of relevant information would diminish the apparent likelihood of the threatened punishment and thereby reduce the coercion inherent in the choice confronting the defendant. Of course, disclosure would not aid the defendant who is very likely to be convicted and severely punished.\textsuperscript{139} Frequently, however, it is precisely when their cases are weakest that prosecutors offer the greatest sentence reductions, thus increasing the threat of the possible trial sentence. In those cases, disclosure would substantially reduce the apparently great disparity between the penalty offered and the likely trial result. Although the existence of systemic pressures to plead guilty\textsuperscript{140} make it impossible to eliminate elements of duress altogether, disclosure can significantly reduce the extent and degree of duress in the guilty-plea process.\textsuperscript{141}

Like the law of duress, the contract doctrine of unilateral mistake supports the introduction of a disclosure requirement into the plea-bargaining process. The law of unilateral mistake has long grappled with the problem of contracts made between parties with unequal access to relevant information. The case law offers seemingly conflicting positions on whether a party with superior information has a duty to disclose material facts to a less informed party.\textsuperscript{142} The two strains of cases may be reconciled, however, by the principle that a party possessing material information must disclose it if the information was acquired casually, but not if

\textsuperscript{138} See pp. 1584-87 supra. As trial conviction appears more certain, the sentence likely to follow trial is subject to a smaller discount, and the disparity between the negotiated sentence and the trial sentence therefore increases.

\textsuperscript{139} Perhaps the equivalent of an unconscionability rule might be invoked to protect the defendant from the threat presented by genuinely excessive disparities in sentence alternatives. See F. ZIMRING & R. FRASE, supra note 47, at 587 (suggesting possibility of applying equivalent of U.C.C. § 2-302 to plea process). Alternatively, charging guidelines might be instituted incorporating a prohibition against offering excessive charge reductions. See Schulte, Credit Process of Sentencing, 128 U. PA. L. REV. 733, 792-93 (1980) (proposing guidelines for charge reductions that would guard against offering greatest reductions to defendants whose factual guilt is doubtful). In this manner, disclosure and an unconscionability principle together might police against prosecutors offering a plea bargain that “cannot be refused.” See Zeisel, supra note 59, at 558 (chapter titled “The Offer That Cannot Be Refused”).

\textsuperscript{140} See pp. 1593-94 supra.

\textsuperscript{141} Although grounded in tort and not contract, the law of informed consent offers additional support for a requirement that superior information gatherers make disclosures to ensure the consensual quality of the underlying transaction. See Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 154 Cal. App. 2d 560, 578, 317 P.2d 170, 181 (Dist. Ct. App. 1957) (physicians violate their duty to patients when they withhold any facts required “to form the basis of an intelligent consent” to proposed treatment). Guilty pleas are analogous to consent to medical treatment in at least three respects: the relationship between the parties is more grave than a commercial relationship; the defendant, like the patient, is making a stressful decision of overwhelming importance for his whole life; and the prosecutor, like the doctor, possesses superior knowledge. One potentially significant difference is that the doctor's responsibilities are entirely to his patient, whereas the prosecutor's responsibilities are at least as much to the public as to the defendant.

\textsuperscript{142} See 3 A. CORBIN, supra note 123, § 608, at 669-70.
the information was the fruit of a deliberate search. This principle permits superior information gatherers to be compensated for the costs of their searches, but does not mandate extension of a bonus to those information gatherers who came by their information without special search expenditures.

At first glance, prosecutors may appear to fall in the category of deliberate information gatherers. As such, they would be entitled to the value of the fruits of their search, and the principle of unilateral mistake would not compel them to disclose their superior information because to do so would deprive them of its value. Despite the initial plausibility of this view, however, a close look at the rationale for the distinction between deliberate and casual information gatherers suggests that the fruits of prosecutorial investigations should be disclosed to defendants.

The rule distinguishing deliberate from casual information gatherers attempts to reduce the total cost of information without reducing the overall quantity of information gathered. Thus, although disclosure of the fruits of deliberate searches made by superior information gatherers would reduce the cost to other parties, and hence the overall cost, of acquiring that information, the rule does not require disclosure under those circumstances because to do so would diminish or destroy the gatherer’s incentive to undertake the search. In contrast, the rule does require disclosure by casual information gatherers because they would engage in the activity that produces the information whether or not they expected to receive a benefit for discovering it. In other words, the rule of disclosure in the law of unilateral mistake distinguishes those information gatherers who need a special incentive to gather the information from those who do not.

If, therefore, the prosecutor would undertake investigations into the evidence available for trial without regard to the existence of a duty to disclose the fruits of those investigations, the prosecutor should be obliged to disclose that information to the defendant. Any other result would unnecessarily increase the costs of the system—both the costs the defendant would have to incur to collect the information himself and the costs to society of convicting defendants who are legally innocent. That a duty to disclose can operate only in one direction does not affect this conclusion.

144. Id. at 33.
145. Id. at 14.
146. Id. at 15-16. A classic example of casually acquired information is a contractor’s discovery of an error in a bid upon routine comparison with the other bids received. Id. at 32.
147. Game theorists, as well as other observers of the guilty plea system, have argued that increased sharing of information during plea bargaining would tend to produce results that more closely approximate the results of trial. See Nagel & Neef (pt. 2), supra note 59, at 43-44; Church, supra note 16, at 512-13.
Because even a defendant with superior information cannot constitutionally be required to make extensive disclosures, the costs that result from the defendant's nondisclosure, including the costs of prosecutorial investigations, must be seen as necessary to prevent violations of constitutional rights that would be still more costly. In any case, even unilateral disclosure would decrease costs without reducing the quantity of evidence produced—provided that prosecutors are subject to incentives to gather the information independent of their having to disclose what they collect.

There are several reasons to believe that even a broad obligation to disclose would not dramatically weaken the incentives that currently motivate prosecutors to undertake searches for relevant evidence prior to plea bargaining. First, prosecutors have a legal duty to collect some evidence before filing charges or appearing at a preliminary hearing or before a grand jury, and there is growing support for increasing the rigor of this duty. Some courts have even suggested that under certain circumstances prosecutors are legally obligated to assist in the discovery of exculpatory evidence.

In addition to the legal duty, there are practical reasons that prosecutors would collect evidence prior to plea bargaining despite broad disclosure policies. Case files and police reports provide prosecutors with substantial information at an early stage in the prosecution without any


149. The amount of evidence necessary to justify filing of criminal charges is not expressly provided for by law. See Y. KAMISAR, W. LAFAVE, & J. ISRAEL, supra note 1, at 907-08. “Probable cause,” however, has been suggested as the appropriate standard. See ABA CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULE 7-103A (1969).

Moreover, in most jurisdictions prosecutors must possess sufficient evidence to satisfy the evidentiary standards applicable at a preliminary hearing or before a grand jury. Most jurisdictions adopt a probable-cause standard for preliminary hearings and require presentation of a prima facie case to grand juries. See Y. KAMISAR, W. LAFAVE, & J. ISRAEL, supra note 1, at 989-92.


151. See, e.g., CONN. RULES OF CT. § 741(6) (1980) (granting defense right to conduct own scientific tests on physical evidence obtained by prosecution); Barnard v. Henderson, 514 F.2d 744, 746 (5th Cir. 1975) (defendant has constitutional right to have own ballistics expert examine alleged murder weapon); Warren v. State, 292 Ala. 71, 75, 288 So. 2d 826, 830 (1973) (defendant entitled to independent testing of substance underlying charge for narcotics possession). One commentator has suggested that the Supreme Court establish rules encouraging complete investigations prior to plea bargaining. Saltzburger, supra note 3, at 1282.
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special prosecutorial inquiries. Moreover, prosecutors have an incentive to search for incriminating evidence even though they thereby run the risk of discovering evidentiary weaknesses as a by-product of their investigations. Prosecutions rely heavily on disclosing their strong evidence to obtain favorable plea bargains. Were they intentionally to forego collecting evidence for fear of discovering weaknesses that would have to be disclosed, they would lose a considerable portion of their power to obtain favorable plea agreements. Defendants could demand higher concessions or would simply stall negotiations long enough to force prosecutors to undertake investigations in preparation for trial. Thus, even if they were subject to a duty to disclose, prosecutors would continue to search for incriminating evidence in order to ensure early and favorable disposition of cases.

How to maintain prosecutorial incentives to discover evidence that exculpates, rather than inculpates, the defendant is at first glance a more difficult problem. Nonetheless, there is good reason to believe that introduction of a broad disclosure obligation would not significantly alter present prosecutorial practices. First, many prosecutors already recognize a duty to disclose exculpatory evidence during plea bargaining. Second, because one of the principal advantages of plea bargains is the avoidance of costly investigations, many prosecutors currently postpone pursuing exculpatory leads until necessary for trial preparation. Thus, exculpatory leads are not often pursued if the defendant pleads guilty. As a consequence, a disclosure requirement would be unlikely to reduce current prosecutorial efforts to conduct preplea exculpatory investigations.

A final reason for requiring disclosure under the law of unilateral mistake is that to do so may well increase general investigative efforts, not decrease them. Prohibiting prosecutors from hiding weaknesses in their cases may give them an incentive to search for additional evidence to compensate for those weaknesses. That incentive would be strongest when the government's case is weakest, that is, when further investigation is most

152. See L. Weinreb, supra note 18, at 58 (police report is most significant source of prosecutor's information). Even when case files and police reports did not provide particularly detailed information about the quality of evidence available, such as the particular stories told by witnesses or the results of scientific tests, the disclosure of information constituting investigative leads would give rise to some speculation about the strengths and weaknesses of the government's case and would deter the prosecutor from presenting her case as more fully developed than it actually is.

153. See Alschuler, supra note 11, at 66 n.47.

154. See McDonald, Cramer, & Rossman, supra note 15, at 6-7 (prosecutors feel obliged to disclose information indicating factual innocence); Comment, Brady v. Maryland and the Prosecutor's Duty to Disclose, 40 U. Chi. L. Rev. 112, 136-37 (1972) (prosecutors disclose evidence favorable to defendant more often than Brady requires partly out of sense of duty).

155. See Westen, supra note 3, at 1324 n.57 (key purpose of plea bargaining is to avoid necessity of making extensive preparations required for trial). But see Saltzburg, supra note 3, at 1282 (not clear that prosecutor plea bargains before investigations are complete).
warranted and mistakes most need to be avoided. Disclosure may therefore be more likely to reduce the costs of mistake in the plea process than to raise them.

B. The Scope of Disclosure

The scope of obligatory disclosure must be defined by reference to the functions that a disclosure requirement in the guilty-plea process is designed to serve. Among those functions are checking prosecutorial power and neutralizing inadequate defense counsel, producing fairer bargains and thereby making the defendant's consent more meaningful, and minimizing both the duress inherent in the plea-bargaining system and the costs of mistake caused by an imbalance in information. Mandatory disclosure serves all of those functions by enhancing the defendant's opportunity to assess the likely results of trial. The duty to disclose must therefore be broad enough to guarantee the fullest possible opportunity to make an accurate assessment. That requirement entails a broad duty to disclose.

Broad mandatory disclosure represents a marked departure from the current case law on preplea disclosure. Courts have generally looked to the case law on pretrial disclosure156 for guidance in giving content to a duty of preplea disclosure.157 As a result, courts have addressed only the problem of nondisclosure of exculpatory evidence.158 They have not yet squarely faced the problem of defining a standard for review of guilty-

156. See Brady v. Maryland, 373 U.S. 83 (1963) (right to fair trial entitles defendant to disclosure of exculpatory evidence material to guilt or punishment). In United States v. Agurs, 427 U.S. 97 (1976), the Court gave content to the standard of materiality proposed in Brady. Agurs established three different tests for materiality applicable in three different trial contexts: when the prosecution's case includes perjured testimony, the suppression is material if “there is any reasonable likelihood that the false testimony could have affected the judgment of the jury,” id. at 103 (footnote omitted); when the defense has previously requested the omitted evidence, the evidence is material if it “might have affected the outcome of the trial,” id. at 104; when the defense makes no request or a general request for Brady material, the suppression is material if it “creates a reasonable doubt that did not otherwise exist,” id. at 112.

Justice Marshall argued in dissent that because the last test sets a high threshold of materiality, it must be understood as focusing on the judge's assessment of the defendant's guilt and not on the jury's judgment. Id. at 117-18. The majority's reference to the trial judge's opinion of the defendant's guilt supports Justice Marshall's characterization of the third test. After identifying the materiality test appropriate for use in Agurs, which involved an appeal from a jury trial, the Court wrote:

It is . . . the standard which the trial judge applied in this case. He evaluated the significance of Sewell's prior criminal record in the context of the full trial which he recalled in detail . . . . [T]he trial judge indicated his unqualified opinion that respondent was guilty . . . .

[T]he trial judge remained convinced of respondent's guilt beyond a reasonable doubt . . . .

Id. at 113-14.


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plea convictions, a problem distinct from the disclosure problem that arises when reviewing trial convictions.\textsuperscript{159}

Although a disclosure requirement restricted to exculpatory evidence has been criticized as too narrow a rule even for trial,\textsuperscript{160} there is at least some reason to single out exculpatory evidence for disclosure in the trial context. Whereas the trial defendant can be certain that the government's inculpatory evidence will be disclosed to him and to the factfinder some time prior to conviction, if only because the government must present its case at trial, he cannot be certain, absent a policy of mandatory disclosure, ever to receive exculpatory evidence from the prosecutor. By contrast, at the plea-negotiation stage, the prosecutor may not disclose either inculpatory or exculpatory evidence to the defendant unless subject to a disclosure duty. If the defendant pleads guilty, therefore, neither he nor the court may ever have the opportunity to inspect the strengths and weaknesses of the evidence that the prosecutor would have presented at trial. Denial of that opportunity leaves the defendant without the information he needs in order to make an accurate assessment of likely trial results. In the guilty-plea context, disclosure of exculpatory evidence is not enough.

To fulfill the purposes of preplea disclosure, the duty to disclose should reach all evidence that is material to the defendant's chance of acquittal. The prosecutor should therefore be required to disclose all evidence likely to be presented at trial, whether the evidence tends to inculpate or exculpate the defendant. The prosecutor should also have to disclose any evidence, such as impeachment evidence, that strengthens or weakens the reliability of material evidence. In addition, the prosecutor should be obliged

\textsuperscript{159} One possible exception is Fambo v. Smith, 565 F.2d 233 (2d Cir. 1977). Although the Second Circuit did not articulate a standard of review, it suggested considerations that are relevant to review of the constitutionality of guilty-plea convictions.

In Fambo, the Second Circuit affirmed a guilty-plea conviction for possession of dynamite where the prosecutor had not previously disclosed that the police had destroyed the dynamite before the date cited in the charge to which the defendant pleaded guilty. The Court noted that there was a factual basis for the charge of conviction, that the defendant got what he bargained for, and that he was guilty of the charge for which he was sentenced. \textit{id.} at 235. The Court also pointed out that the destruction of the evidence would not have proved fatal to the prosecution's proof, that Fambo had indisputably possessed the dynamite on \textit{or about} the date in the indictment, \textit{id.}, and that Fambo never contended that he was prejudiced by his ignorance of the dynamite's unavailability for trial, \textit{id.} at 235 n.2.

These considerations lend themselves to two different constructions of the appropriate standard of review. The court's reliance on the indisputability of Fambo's possession of dynamite reflects its concern with the factual accuracy of the conviction and suggests a narrow standard of review consistent with the current law on trial disclosure. \textit{See} note 156 \textit{supra}. At a minimum, disclosures regarding the availability of evidence at trial would not be required under this standard of review.

A second construction of \textit{Fambo} suggests a broader standard of review, comporting with that proposed in this Comment. The court's reference to Fambo's failure to claim prejudice from the nondisclosure of the unavailability of evidence, and its conclusion that the destruction of the dynamite would not have proved fatal to the prosecution's proof, reflect a concern with the impact of the undisclosed information on the defendant's prediction of the likely trial outcome.

\textsuperscript{160} \textit{E.g.}, Comment, \textit{supra} note 154, at 135-40.
to give the defendant any information that bears on the availability or admissibility of evidence at trial, as well as any information that may lead to the discovery of admissible evidence. Finally, because it is the penalty actually imposed that the defendant principally cares about, the prosecutor should also be required to inform the defendant of whatever information she may make available to a sentencing judge.

This broad duty of disclosure should be enforced on review of guilty-

161. But see People v. Jones, 44 N.Y.2d 76, 82-83, 375 N.E.2d 41, 44-45, 404 N.Y.S.2d 85, 89, cert. denied, 439 U.S. 846 (1978) (failure to disclose death of complaining witness does not constitute nondisclosure of exculpatory evidence and therefore, where defendant did not protest his innocence, does not constitute denial of due process).

The reluctance of courts to require disclosure of information pertaining to the unavailability of evidence for trial is particularly striking when the evidence in question has been previously disclosed to the defendant as part of the prosecutor's proof, as in Jones, id. at 78-79, 375 N.E.2d at 42, 404 N.Y.S.2d at 86. Under such circumstances, there is little difference between nondisclosure and misrepresentation on the part of the prosecutor. But cf. id. at 81, 375 N.E.2d at 44, 404 N.Y.S.2d at 88 (all reported instances of prosecutorial deceit involved positive misrepresentations; none considered effect of silence only). Affirmance of guilty-plea convictions despite such prosecutorial conduct can be explained as a response to courts' preoccupation with the factual accuracy of the conviction. Because the unavailability of evidence does not affect its persuasive force, nondisclosure of such information does not threaten the accuracy of the guilty plea. See id. at 82, 375 N.E.2d at 44-45, 404 N.Y.S.2d at 89.

162. Courts have generally refused to consider disclosure of exculpatory leads to be within the Brady rule of disclosure, although such leads are arguably exculpatory and material to guilt. Cf. Comment, supra note 154, at 118 (challenges to convictions generally fail when claim is that disclosure was belated).

163. This information primarily includes evidence of mitigating or aggravating circumstances surrounding the charged offenses, regardless of their relevance to the matters that would be at issue at trial. Cf. Brady v. Maryland, 373 U.S. 83, 84-85 (1963) (suppression of evidence that was material to punishment, but not to guilt or innocence, violated due process). It need not include material not exclusively within the possession of the prosecutor. Therefore, although knowledge of sentencing and parole criteria is necessary to make an accurate sentence prediction, such information is not within the disclosure duty because it is public and equally available to prosecutors and defense attorneys. See, e.g., United States Parole Commission Paroling Policy Guidelines, 28 C.F.R. § 2.20 (1980); United States v. Cardi, 519 F.2d 309, 314 n.3 (7th Cir. 1975) (imposing sentence, judge may consider activities underlying charges of which defendant was acquitted). Even if it becomes apparent that defense attorneys are not advising their clients of the consequences of such criteria, the court, not the prosecutor, should disseminate such legal information.

Disclosure of mitigating and aggravating circumstances surrounding the crimes charged has particular significance for defendants pleading guilty in jurisdictions where sentencing and parole decisions are made according to real-offense criteria. See, e.g., United States Parole Commission Paroling Policy Guidelines, 28 C.F.R. § 2.20(d) (1980). Real-offense criteria take into consideration the facts involved in the actual offense committed regardless of their relevance to the charges of convictions. The consequence is that defendants often receive sentences whose severity is consistent more with the offense initially charged than with the reduced charges or sentence recommendation underlying the plea bargain. See Alschuler, Sentencing Reform and Parole Release Guidelines, 51 U. COLO. L. REV. 237, 241 (1980).

In these cases, the unwary defendant is partially deprived of the benefit of his bargain. See id. at 241-42 (highly likely that defendants view real-offense sentencing as undermining their benefits from plea bargain). But see id. at 241 (Parole Commission believes plea bargain's purpose is to limit range of possible punishment). If the defendant is aware of what evidence sentencing judges or parole boards are likely to possess, see Project, Parole Release Decisionmaking and the Sentencing Process, 84 YALE L.J. 810, 879 (1975) (federal probation authorities normally obtain factual description of offense from U.S. Attorneys), he can more accurately predict the sentence or parole termination date he is likely to receive; he can then use that prediction in deciding whether to plead guilty. In this manner, broad disclosure can mitigate the unfavorable consequences real offense criteria have for the consensual nature of the plea bargain.

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plea convictions by a stringent standard. Because the duty is designed to guarantee the defendant a full opportunity to assess the likely trial results, and therefore to insist on adequate consideration for his plea, any failure to disclose information should be deemed a material breach of the prosecutor's duty if disclosure of that information would have so altered the defendant's assessment of his chance of acquittal that he might not have accepted the terms of the plea agreement. In applying this standard, reviewing courts should adopt a strong presumption that any undisclosed information affected the terms of the agreement. Judgments in hindsight that the undisclosed information was merely cumulative or evenly balanced should not be allowed to rebut the presumption that the defendant's view of his alternative would have been influenced by his knowing the information. Only so strong a standard can enforce the duty to disclose by preventing prosecutors from routinely asserting harmless error.

IV. The Consequences of Preplea Disclosure

The proposed duty to disclose might evolve into a requirement that prosecutors open their files to the defense. The acceptability of so broad a disclosure duty depends ultimately on the effects it would have on both the plea process and the trial process. Those effects, of course, cannot be fully known without actual experience with a duty to disclose. Nonetheless, some analysis of the likely consequences is possible. That analysis indicates not only that prosecutors are likely to maintain present investigative efforts, but also that both the effects on the plea process and the effects on trial disclosure are likely to be acceptable.

164. To provide an adequate record for review, written summaries or copies of all information disclosed to the defendant should be filed with the clerk of the court.

165. This standard for enforcement of the disclosure duty leaves enforcement relying to some extent on the ability of interested parties to catch prosecutors with undisclosed information. Like duties of pretrial disclosure, a preplea disclosure duty must rely on that uncertain mechanism for enforcement: a mechanism that intruded more on prosecutors' functions would probably be unwise and burdensome to courts. Cf. Note, A Defendant's Right to Inspect Pretrial Congressional Testimony of Government Witnesses, 80 YALE L.J. 1388, 1402 n. 67 (1971) (in camera judicial inspection of evidence would require great time expenditure for judge to make accurate materiality determination and might compromise judicial impartiality).

In addition, this standard does not permit prosecutors to excuse nondisclosure because of a need to protect witnesses—even if the need could be proved to a judge's satisfaction. The consensual-transaction conception of the guilty-plea process makes this result unavoidable because it demands that the defendant have the opportunity to assess the likely trial results, which depend on the availability of witnesses, their willingness to attend, and the defendant's ability to force and prepare for a confrontation with those witnesses. When witnesses need protection, the prosecutor can force the defendant to stand trial, thereby delaying disclosure of the witnesses' names and addresses. See p. 1621 infra.

166. See pp. 1612-13 supra.
A. Effects on the Plea Process

Broad preplea disclosure might reduce the leverage of prosecutors and therefore result in fewer convictions by guilty plea. Even if that is so, however, the reduction that might occur is unlikely to be objectionable. In the present system, the defendants most likely to be granted the privilege of disclosure are those against whom prosecutors have strong cases\(^{167}\) and those who are represented by defense attorneys trusted or liked by the prosecution.\(^{168}\) Thus, it is generally only when the government's case is weak or when the defense attorney is handling the case vigorously and not cooperating with the prosecutor that evidence remains undisclosed. A disclosure duty would therefore have its principal effect on guilty-plea rates in these two circumstances. In both situations, however, the change of current practices would be justified. Weak cases, of course, present precisely the circumstances under which disclosure is most needed. And cases in which the privilege of disclosure is denied because of a special rapport between the defense attorney and the prosecutor represent arbitrariness in the guilty-plea system at its worst.\(^{169}\)

Although whatever decline preplea disclosure may cause in the number of guilty pleas would therefore be justified, there are good reasons to believe that no substantial decline would occur. In many cases, prosecutors already open their files to the defense.\(^{170}\) In addition, many risk-averse defendants would continue to plead guilty despite disclosures of significant weaknesses in the government's case.\(^{171}\) Finally, many of the inducements to plead guilty offered by the criminal justice system are valuable independent of the defendant's likelihood of acquittal;\(^{172}\) a duty to disclose would not affect these inducements.\(^{173}\)

If introducing a disclosure duty is likely to affect the number of guilty pleas in justifiable and insubstantial ways, it is also likely to cause no substantial increase in delay in the plea process. There is already much disclosure in the plea process.\(^{174}\) Moreover, unlike civil discovery, which
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often consumes vast amounts of litigation time,\textsuperscript{175} the disclosure process that would result from introduction of a disclosure requirement would be simple and easily managed. The standard for disclosure would be simple,\textsuperscript{176} so compliance with a defendant's motion to compel the prosecutor to open her file would be easy, and disclosure in the plea process, unlike discovery in civil litigation, would be limited to one party.\textsuperscript{177} In addition, both the defense attorney and the prosecutor have incentives to prevent delay.\textsuperscript{178} Finally, nothing in the proposed standard for the disclosure obligation would preclude judicial development of mechanisms to prevent undue delay.\textsuperscript{179}

B. Effects on the Trial Process

Introducing into the guilty-plea process a broad prosecutorial duty to disclose would significantly extend current requirements for pretrial disclosure.\textsuperscript{180} In fact, although some differences in the scope of mandatory pretrial and preplea disclosure might be preserved, recognizing the defendant's right to broad preplea disclosure might turn out, in most cases, to be equivalent to giving him a right to equally broad pretrial disclosure.\textsuperscript{181} Nevertheless, that a policy of broad preplea disclosure might effect such drastic changes in the law of pretrial disclosure is not an insurmountable objection to adopting the policy.

First, because most convictions result from guilty pleas,\textsuperscript{182} eliminating the serious unfairness in the plea process should take precedence over the aim of preserving pretrial disclosure law. More important, both the crimi-


\textsuperscript{176} See p. 1616 supra (duty violated by nondisclosure of any information that might have altered defendant's agreement to bargain's terms).

\textsuperscript{177} See, e.g., FED. R. CIV. P. 30, 31 (party may take oral or written deposition of "any person"); FED. R. CIV. P. 45 (subpoena against any person issued on request of party).

\textsuperscript{178} See notes 28 & 29 supra (prosecutors seek to avoid delay and cost; defendants seek to reduce time spent on case).

\textsuperscript{179} The standard would be consistent with courts having authority to manage disclosure similar to the authority of the federal courts to manage civil discovery. See FED. R. CIV. P. 37 (court has broad discretion to decide if noncompliance with discovery request permissible).

\textsuperscript{180} See note 156 supra (disclosure duty limited to excluyatory, material evidence).

\textsuperscript{181} Some defendants who negotiate in good faith, and thereby legitimately obtain the right to broad disclosure, might fail to reach a plea agreement with the prosecutor and consequently stand trial with the benefit of much more information than would normally be available. Other defendants, fully intending to go to trial, might nevertheless use the pretext of plea negotiations to discover evidence possessed by the prosecution. To maintain good relations with the prosecutor's office, however, many defense attorneys would not intentionally misuse the right to preplea disclosure as a pretrial discovery device. See Alschuler, supra note 11, at 66 (prosecutor knows certain defense attorneys will not use plea negotiations as trial discovery device).

\textsuperscript{182} See note 2 supra.
nal trial's efficiency and its ability to uncover the truth would in all likelihood be promoted by increasing the breadth of mandatory disclosure. In criminal cases as in civil cases, sharing information before trial can sharpen relevant issues, eliminate surprise, expose untenable arguments, and suggest fruitful evidentiary investigations. Despite these advantages, however, critics of broad criminal disclosure have noted three risks of increasing the defendant's access to the prosecution's evidence: they point out that doing so might increase the incidence of fabricated and perjurious defenses, might unfairly disadvantage the government, which is deprived by the Fifth Amendment of reciprocal access to the defendant's case, and might lead to the harassment of witnesses.

The first two criticisms fail to justify rejection of broad preplea disclosure. First, there is no reliable evidence that disclosure would lead to an increase in fabricated defenses; in fact, disclosure would very likely deter perjury by exposing fabricated evidence to a more thorough inquiry. Second, any asymmetry in disclosure duties resulting from Fifth Amendment protection would hardly be severe. The prosecutor is entitled to

183. Some commentators have suggested that a right to broad disclosure during criminal proceedings might be granted constitutional status. See Comment, supra note 154, at 135-40 (suggesting that open-file rule might be adopted by extending Brady); Comment, supra note 11, at 492 (Agurs standard of materiality too narrow to ensure fair trial). The right might also be implemented by means of discovery rules or legislation. See Brennan, The Criminal Prosecution: Sporting Event or Quest for the Truth? 1963 WASH. U.L.Q. 279, 286-88; Fletcher, supra note 7, at 316-19; Comment, supra note 154, at 140. The latter course seems wiser because it would allow for greater flexibility in defining the duty and in modifying it as experience with preplea disclosure grew.

184. See Greyhound Lines, Inc. v. Miller, 402 F.2d 134, 143 (8th Cir. 1968) (purpose of civil discovery is to narrow issues and to eliminate surprise); Brennan, supra note 183, at 287 (criminal discovery will sharpen issues, marshal evidence, and expose untenable arguments).


186. See United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923) (Hand, J.) (defendants have strong advantage over government even without discovery).

187. In 1975, Congress enacted amendments to the Federal Rules of Criminal Procedure, Federal Rules of Criminal Procedure Amendments Act of 1975, Pub. L. No. 94-64, 89 Stat. 370 (1975), but only after a provision for the exchange of witnesses' names and addresses three days prior to trial was removed from the bill in conference. See H.R. REP. No. 94-414, 94th Cong., 1st Sess. 12 (1975). The conference committee report explained: "Discouragement of witnesses and improper contacts directed at influencing their testimony, were deemed paramount concerns ... " Id.

188. See Brennan, supra note 183, at 290; Fletcher, supra note 7, at 310 & n.72; Rice, Criminal Defense Discovery: A Prelude to Justice or an Interlude for Abuse? 45 Miss. L.J. 887, 897-99 (1974); Speck, The Use of Discovery in United States District Courts, 60 YALE L.J. 1132, 1154 (1951). One commentator has pointed out that whether or not discovery increases perjury, the relevant inquiry is whether the increase in perjury outweighs the advantages of discovery for the search for truth. Fletcher, supra note 7, at 305.

189. See Fletcher, supra note 7, at 311 (very process of discovery deters perjury: for example, depositions pin down story of witness who might otherwise successfully offer perjurious testimony at trial).
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some discovery from the defendant, and both grand jury inquiries and police interrogations give the prosecutor considerable access to the defendant's evidence. Most important, any difference in disclosure duties would be offset in part by the difference in information-gathering abilities: the prosecutor's control of the investigation is likely to result in the gathering of information favorable to the government.

Unlike the first two criticisms, the third cannot be rebutted. Broad mandatory disclosure would, as the critics suggest, be undesirable in those cases where there is a particularly high risk that the defendant will threaten or harass a prosecution witness (or someone else). Legitimate concern with the safety of prospective witnesses, however, does not warrant depriving all defendants of the fruits of disclosure. Rather, a prosecutor should be permitted to refrain from making disclosures if she believes that witnesses are in danger. In such a case, however, the defendant should not be permitted to plead guilty. In that way, no defendant would be convicted on the strength of evidence that would not be presented in court.

190. See, e.g., FED. R. CRIM. P. 12.1, 16(b) (providing for disclosure to prosecutor of key elements of alibi defense and reciprocal discovery of documents, tangible objects, and reports of examination and tests).

191. See Comment, supra note 154, at 138. To the extent that the opportunity for discovery is not wholly reciprocal, the extra burden carried by the prosecutor is consistent with the intent of the Fifth Amendment. Id.

192. See note 10 supra (evidence collected by prosecutor likely to be skewed in favor of government).

193. Defendants have no absolute right to have their guilty pleas accepted, though the extent of judicial discretion to reject a plea is unclear. See note 131 supra. Even under the public-interest standard enunciated in United States v. Ammidown, 497 F.2d 615, 622-24 (D.C. Cir. 1973), a guilty plea might be rejected for lack of disclosure if fairness to the defendant were considered in the public interest.

The prosecutor need not be required to decide whether to plea bargain with the defendant or to exercise her right to suppress certain evidence at the initiation of the prosecution. The prosecutor might engage in negotiations with the defendant without first making full disclosures of material information. Later on, perhaps after selected disclosures have been made, the prosecutor would have a better sense of how likely she is to reach a favorable plea agreement with the defendant. The prosecutor thus need not be required to decide whether to make full disclosures or to force a trial until shortly before the plea hearing, provided that the defendant has a reasonable time to consider the impact of the final disclosures.

194. A broad disclosure duty might threaten continuing investigations, such as those into white-collar and organized crime, that are intended to lead to multiple prosecutions. The duty of disclosure proposed in this Comment, however, would not render such investigations ineffective. It would permit a prosecutor to reveal to a defendant whose prosecution resulted from a continuing investigation only the information that is relevant to his chances of acquittal and to exclude other information, especially information whose disclosure would jeopardize other prosecutions.

Permitting the prosecutor thus to refrain from full disclosure of the complete investigation is not likely to lead to prosecutorial abuse. Any information not disclosed to one defendant because the prosecutor believed that its disclosure would jeopardize prosecution of a second defendant would eventually be disclosed to the second defendant and thus be on the record. See note 164 supra. The first defendant could inspect that record for information that had not been disclosed to him but that was material to his chances of acquittal.
Conclusion

The present criminal justice system offers defendants many inducements to plead guilty, but affords them only minimal safeguards against unfair and inaccurate convictions. Moreover, prosecutors and defense attorneys can abuse the interests of defendants by taking advantage of the imbalance in information that pervades the criminal process. Despite these inadequacies, the current guilty-plea process, which gains what legitimacy it has from the defendant's consent to waive trial, does not require that the defendant be given a meaningful opportunity to make his consent fully informed.

To exercise his consent rationally and to protect himself against unfair and inaccurate conviction, the defendant must be given an opportunity to assess his chances of acquittal and thus to evaluate the consideration being given in return for his plea. The information needed for making such an assessment is commonly within the exclusive possession of the prosecutor. A commitment to the notion of consent therefore requires that the prosecutor provide the defendant with that information.

Requiring disclosure broad enough to provide defendants with a sufficient opportunity to assess the likelihood of acquittal would in many cases be equivalent to instituting an obligatory open file system. Such a system, however, would not be drastically different from present prosecutorial practices. Broad disclosure would have few if any adverse consequences for the plea and trial processes.

The American criminal justice system purports to weight the process of conviction to favor acquittal of innocent defendants. Although it has sacrificed some efficiency in the trial process to achieve this objective, it has maintained an alternative conviction process that favors the prosecution. Broad obligatory preplea disclosure would be an important remedy for some of the inequities in the present criminal justice system and would thereby help save from obsolescence the values enshrined in the trial process.