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Cover Page Footnote

The author thanks his family and Professor Bruce A. Green for their support and assistance in writing this Note.

NOTES

ETHICS, LAW ENFORCEMENT, AND FAIR DEALING: A PROSECUTOR'S DUTY TO DISCLOSE NONEVIDENTIARY INFORMATION

*David Aaron**

> The difference between the true lawyer and those men who consider the law merely a trade is that the latter seek to find ways to . . . violate the moral standards of society without overstepping the letter of the law, while the former look for principles . . . within the limits of the spirit of the law in common moral standards. [1]

INTRODUCTION

Legal and ethical codes maintain a general standard of professional conduct among attorneys. For example, law and ethics prohibit lawyers from making false statements of material fact,[2] communicating with individuals represented by counsel,[3] and offering false evidence[4] while representing their clients. Existing rules, however, leave gray areas of ungoverned conduct. This lack of regulation requires attorneys to consider their own morality as well as their desire to compete with their peers when confronted with a variety of dilemmas.

The following hypothetical examples illustrate the shortcomings of contemporary codes. In one instance, a prosecutor has indicted a defendant for a homicide. Describing the strength of her case, the prosecutor informs the defense attorney that in addition to circumstantial evidence, the government has located a reliable eyewitness to the crime. She offers a plea agreement to a reduced charge and a shorter sentence. Later in the week, the prosecutor is unable to contact the eyewitness. Upon investigation, she learns that he has died,[5] significantly diminishing the strength of her case. The defense attorney informs the prosecutor that the defendant has decided to accept the plea offer and avoid the risk of a conviction at trial and a longer sentence. The prosecutor must consider whether to inform the defendant that the eyewitness is unavailable.[6]

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* The author thanks his family and Professor Bruce A. Green for their support and assistance in writing this Note.

1. Piero Calamandrei, Eulogy of Judges 62 (1942).
2. *See* Model Rules of Professional Conduct Rule 4.1(a) (1998).
3. *See id.* Rule 4.2.
4. *See id.* Rule 3.3(a)(4).
5. Alternatively, the witness might have become unavailable or unwilling to testify.
6. In 1994, a Deputy County Attorney ("DCA") presented a similar question to the Arizona Bar Association. *See* Arizona State Bar Ethics Opinion 94-07, at 1 (Mar. 18, 1994). The arresting officer in a case died shortly after testifying at a preliminary

In another case, a defendant is preparing to testify after the prosecution has rested. She is ready to offer the same alibi she presented to the prosecutor during pretrial conferences. The prosecutor's paralegal enters and quietly informs the prosecutor that the defendant's alibi witness has disappeared, or that a witness who could rebut the defendant's alibi testimony has surfaced.[7] Similarly, a defendant's prospective alibi witness might confess to the prosecutor that he or she had agreed to lie for the defendant, but has decided to tell the truth when called to testify. The prosecutor must determine what, if any, information to disclose to the defendant.

None of the above is discoverable material. The death of a witness does not constitute evidence.[8] Even if a witness's death were evidence, it would not amount to exculpatory evidence, as it would not be "material either to guilt or to punishment."[9] Similarly, allowing a defendant to develop a trial strategy based upon an incorrect assumption that the circumstances of a case have not changed will only be considered an ethical violation if the prosecutor affirmatively created the misconception.[10] Furthermore, in contrast to disclosure of exculpatory evidence, disclosure of any of the above information would not prevent a factually inaccurate conviction from occurring.[11] Knowledge of the eyewitness's death or absence would allow the defendant to escape punishment as a result of chance, and disclosing the alibi witness information would only protect the defendant's ability to calculate his or her perjury. Following this reasoning, courts have de-

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hearing. *See id.* The DCA inquired as to his duty to inform the defendant of this development, as the defendant was considering a plea offer the DCA made prior to the officer's death. *See id.* The ethics panel determined that while Ethical Rule 3.8(d) might mandate disclosure, strict disclosure requirements under state criminal procedure law obviated the need to resolve the question of an ethical obligation. *See id.* at 6. The panel noted that the Arizona Rules of Criminal Procedure contain "especially broad requirements for disclosure." *Id.* at 5. The ethical issues discussed in this Note are implicated when applicable criminal procedure law does not mandate disclosure.

7. The witness is not in government custody in this hypothetical example.

8. *See* Fed. R. Evid. 401 (defining "relevant evidence"); United States v. Bagley, 473 U.S. 667, 684 (1985) (holding that evidence is material when there is a reasonable probability that disclosure would have resulted in a different result at trial); People v. Jones, 375 N.E.2d 41, 43 (N.Y. 1978) ("[T]he circumstance that the testimony of [a] complaining witness [is] no longer available . . . [is] not evidence at all. . . . Rather, . . . [it] would merely have been one of the factors . . . to be weighed by defendant in reaching his decision [to plead guilty.]").

9. *Jones*, 375 N.E.2d at 43 (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)).

10. *See* People v. Rice, 505 N.E.2d 618, 619 (N.Y. 1987).

11. *See, e.g.*, Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 Hastings L.J. 957, 1026 (1989) (arguing that receipt of exculpatory evidence by a defendant prior to his or her plea will reduce pressure for innocent defendant to plead guilty).

clined to extend the due process doctrine of *Brady v. Maryland*[12] to the disclosure of nonevidentiary facts.

Awareness of these facts, however, could determine a defendant's future. A rational actor offered a choice will seek to maximize his or her benefit based on all available information. In deciding whether to plead guilty, thereby waiving the constitutional right to trial,[13] or whether to testify, thereby waiving the constitutional right against self-incrimination,[14] a rational defendant assesses the risks and rewards accompanying either choice.[15] Although some facts may not constitute evidence, their disclosure may nevertheless be essential to a defendant's informed decision. In the interests of fair dealing and consistency with existing professional standards, therefore, this Note proposes an ethical duty requiring prosecutors to disclose nonevidentiary information that would allow a defendant to make an informed tactical decision. Withholding such information exploits the prosecutor's superior access to information, undermines the prosecutor's special duty to do justice, and is inconsistent with the philosophy of lawyers' professional ethics.

While the law is settled on this subject, prosecutors as well as defense attorneys disagree as to whether professional ethics impose a further duty upon prosecutors.[16] Contemporary legal and ethical rules do not adequately define a prosecutor's obligation to disclose nonevidentiary information to his or her adversary. Prosecutorial "bluffing" and other withholding tactics can therefore not be evaluated against any universal standard; they occur within a "normative no-man's land" ungoverned by posited rules.[17] The existence of this ungoverned territory does not comport with the ideals of our legal and ethical systems and indicates that further disclosure rules are necessary to fill the gaps in existing regulation.

This Note examines the principles underlying existing legal and ethical standards for pretrial and nonevidentiary disclosure. The general ethical duty of candor sheds some light on the question of whether a prosecutor should make such "strategic" as well as evidentiary disclo-

12. 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment . . . ."). For a discussion of *Brady*, see *infra* Part II.B.2.

13. *See* U.S. Const. amend. VI.

14. *See* U.S. Const. amend. V.

15. *See* Daniel Frome Kaplan, Comment, *Where Promises End: Prosecutorial Adherence to Sentence Recommendation Commitments in Plea Bargains*, 52 U. Chi. L. Rev. 751, 769 (1985).

16. *See* William F. McDonald et al., *Prosecutorial Bluffing and the Case Against Plea-Bargaining*, *in* Plea-Bargaining 1, 3-4 (William F. McDonald & James A. Cramer eds., 1980) [hereinafter McDonald et al., *Prosecutorial Bluffing*]; Interviews with Prosecutors "A" and "B." Counsel are referred to anonymously to allow unrestricted answers.

17. McDonald et al., *Prosecutorial Bluffing*, *supra* note 16, at 3. "[T]he essence of bluffing is to pretend that one is in a stronger position than one actually is." *Id.* at 3.

sures. The law and ethics of negotiation in the civil context also provide some guideposts. The prosecutor's special duty to do justice, however, as well as varying concepts of the role and purpose of negotiated dispositions in criminal law, introduce unique considerations in defining the ethical obligations governing prosecutors.

Part I of this Note analyzes lawyers' general ethical responsibilities, explains current regulation of disclosure, and reviews criticism of disclosure requirements in the civil arena. This part examines the emphasis on good faith in civil law, which has generated rules and proposals that can contribute to an understanding of fairness in criminal adjudication. Part II discusses the purpose of the criminal justice system, which provides the framework within which ethical considerations will operate, and distinguishes the prosecutor's role from the role of other attorneys. This part traces the history of the principles reflected in *Brady v. Maryland*,[18] its precursors, and its progeny, and analyzes the dual policy objectives underlying prosecutors' legal obligations: fairness to defendants and effective law enforcement. This part discusses prosecutors' special ethical responsibilities, which impose duties beyond those mandated by constitutional jurisprudence and rules of criminal procedure. The policy foundations of prosecutors' special obligation to seek justice bolster arguments for mandating honorable conduct, while the need to implement criminal sanctions counsels against overly broad requirements. Part III offers arguments for and against further disclosure in the criminal context. This Note concludes that a new ethical standard would add consistency to existing standards of professional responsibility.

I. THE ROLE OF LEGAL ETHICS

Ethical codes may extend attorneys' responsibilities beyond the requirements imposed by constitutional and statutory obligations. This part discusses the sources of legal ethics, as well as the substance of current and proposed obligations, in order to define the purpose and scope of an additional duty.

A. *The Origins of Professional Ethics*

Professional ethics may derive from fundamental morality: "It is inherent in the concept of an ethic, as a principle of good conduct, that it is morally binding on the conscience of the professional, and not merely a rule of the game adopted because other players observe (or fail to adopt) the same rule."[19] In addition, lawyers owe a duty to one another: "[I]t is the desire for the respect and confidence of the members of his profession and of the society which he serves that should

18. 373 U.S. 83 (1963).

19. Alvin B. Rubin, *A Causerie on Lawyers' Ethics in Negotiation*, 35 La. L. Rev. 577, 589 (1975) [hereinafter Rubin, *Causerie*].

provide to a lawyer the incentive for the highest possible degree of ethical conduct."[20] Furthermore, the bar's legitimacy as a self-regulating and licensed profession relies upon its enforcement of a code of moral and honorable conduct. Adherence to standards "higher than mere law observance"[21] is implicit in the concept of a licensed profession.[22] The societal interest of a republic requires an independent bar; self-regulation is essential to freedom from governmental control, which in turn "preserv[es] government under law."[23] The grant of independence from external regulation imposes a duty to ensure that attorneys act consistently with the public interest.[24] Existing codes, however, are deficient in their regulation of many strategic and tactical practices of attorneys in general and of prosecutors in particular.

B. *Current Disclosure Obligations*

As Professor Geoffery Hazard has observed, "[t]he present regulation of lawyers' trustworthiness is modest."[25] Particularly in negotiation, ethical standards of honesty are sparse. While current practice condemns outright lying,[26] "good faith negotiation does not require total disclosure."[27] The American Bar Association recently rejected a proposal requiring an attorney to correct misapprehensions of fact or law arising from a previous representation by the attorney or the attorney's client.[28]

The Canons of Ethics, drafted in 1908, required attorneys to conduct themselves with candor and fairness in their dealings with judges as well as other attorneys.[29] The Model Code of Professional Responsibility, however, omitted the requirement from its regulation of conduct among lawyers.[30] The Model Code prohibits lawyers from knowingly making false statements of law or fact,[31] participating in the

20. Model Code of Professional Responsibility pmbl. (1980).

21. Rubin, *Causerie*, *supra* note 19, at 593.

22. *See id.*

23. Model Rules of Professional Conduct pmbl. (1998); *see also* The Federalist No. 78, at 437 (Alexander Hamilton) (Penguin Books ed., 1987) ("'[T]here is no liberty if the power of judging be not separated from the legislative and executive powers.' And . . . liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments . . . ." (citation omitted)).

24. *See* Model Rules of Professional Conduct pmbl.

25. Geoffrey C. Hazard, Jr., *The Lawyer's Obligation to Be Trustworthy When Dealing with Opposing Parties*, 33 S.C. L. Rev. 181, 188 (1981).

26. *See* Model Code of Professional Responsibility DR 7-102(A)(5) (1980).

27. R. Fisher & W. Ury, Getting to Yes: Negotiating Agreement Without Giving in 140 (1981) (quoted in McMunigal, *supra* note 11, at 1023).

28. *See* McMunigal, *supra* note 11, at 1024 & n.200.

29. Canons of Professional Ethics Canon 22 (1908).

30. *See* Rubin, *Causerie*, *supra* note 19, at 579 (noting the absence of duty from Model Code, specifically EC 7-38).

31. *See* Model Code of Professional Responsibility DR 7-102(A)(5).

creation or preservation of evidence that they know is false,[32] and counseling or assisting their clients in fraudulent or illegal conduct.[33] Beyond requiring attorneys to obey laws governing disclosure[34] and rectify frauds perpetrated by their clients upon persons or tribunals,[35] however, the Model Code only proscribes false representation and does not impose an affirmative duty to disclose information.[36]

The ABA specifically chose to omit a requirement of truth in negotiations from the Model Rules of Professional Conduct.[37] The Model Rules prohibit attorneys from making false statements of material law or fact to third persons and require lawyers to disclose material facts when necessary to avoid assisting their clients in committing a fraudulent or criminal act.[38] These limited disclosure obligations, however, are subject to the rule of confidentiality,[39] and the comment to Rule 4.1 limits the definition of statements of fact.[40] The comment also specifies that attorneys have no general affirmative disclosure obligation to opposing parties.[41] In pretrial procedure, the Model Rules simply require adherence to the laws of discovery.[42] Furthermore, as several commentators have noted, the Model Rules are drafted primarily to regulate attorney conduct in litigation and do not translate well into an extrajudicial context, resulting in a dearth of binding principles governing fairness in negotiation.[43]

Members of the bar have not achieved a consensus regarding disclosure requirements in civil negotiation.[44] The ABA Commission on Evaluation of Professional Standards, or Kutak Commission, proposed rules governing the subject in 1981.[45] The proposed Rule 4.1 required in part that a lawyer disclose a fact under "circumstances [in which] failure to make the disclosure is equivalent to making a mate-

32. *See id.* DR 7-102(A)(6).

33. *See id.* DR 7-102(A)(7).

34. *See id.* DR 7-102(A)(3).

35. *See id.* DR 7-102(B)(1). This obligation does not supersede attorney-client privilege. *See id.*

36. *See* Hazard, *supra* note 25, at 189.

37. *See* Center for Prof'l Responsibility, American Bar Ass'n, The Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates 145-47 (1987).

38. *See* Model Rules of Professional Conduct Rule 4.1 (1983).

39. *See id.*

40. *See id.* Rule 4.1 cmt. 2.

41. *See id.* Rule 4.1 cmt. 1.

42. *See id.* Rule 3.4.

43. *See* Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. Tex. L. Rev. 407, 409-10 (1997); Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. Rev. 493, 529 (1989).

44. *See* Hazard, *supra* note 25, at 192; McMunigal, *supra* note 11, at 1024.

45. *See* Hazard, *supra* note 25, at 190-91.

rial misrepresentation . . . ."[46] The Commission also discussed mandating that a lawyer "be fair in dealing with other participants"[47] in negotiation and that he or she disclose material facts, "even if adverse, when disclosure is . . . [n]ecessary to correct a manifest misapprehension of fact or law resulting from a previous representation made by the lawyer . . . ."[48] The Commission designed these proposals to ensure that a lawyer who acted as the instrument of a transaction would also maintain the transaction's integrity.[49] The bar, however, "vehemently" opposed and rejected these proposals;[50] lawyers objected to a requirement that attorneys be "fair."[51]

C. *Critiques and Proposals*

A proposal for disclosure requirements never passed because of the "lack of a firm professional consensus regarding the standard of openness that should govern lawyers' dealings with others . . . ."[52] Lawyers do not share a uniform conception of fairness;[53] in the absence of ethical regulation, therefore, each lawyer may decide questions of disclosure differently. Moreover, attorneys' goals in negotiation do not always include fairness. Practitioners often consider "misdirection" to be a component of effective negotiation.[54] The pressure to zealously advocate a client's position intensifies the pressure on an attorney to lie to or misdirect another party.[55] Typical justifications for engaging in such misdirection "proceed from an initial but unspoken assumption—that being less than truthful is acceptable conduct for a member of the legal profession."[56] As many commentators have argued, the failure of ethical regulation to impose a strong disincentive to such dishonest behavior is inconsistent with societal and professional expectations of lawyer conduct.[57]

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46. ABA Comm. on Evaluation of Professional Standards, Model Rules of Professional Conduct Rule 4.1(b)(1) (Proposed Final Draft, May 30, 1981), *quoted in* Hazard, *supra* note 25, at 190.

47. ABA Comm. on Evaluation of Professional Standards, Model Rules of Professional Conduct Rule 4.2(a) (Discussion Draft, Jan. 30, 1980), *cited in* McMunigal, *supra* note 11, at 1024 & n.200.

48. *Id.* Rule 4.2(b).

49. *See* Hazard, *supra* note 25, at 192 (citation omitted).

50. *See id.*; Model Rules of Professional Conduct Rule 4.1 (1998) (omitting proposed obligation).

51. *See* Hazard, *supra* note 25, at 192.

52. *Id.* at 193.

53. *See id.*

54. *See* Michael H. Rubin, *The Ethics of Negotiations: Are There Any?*, 56 La. L. Rev 447, 457 (1995) [hereinafter Rubin, *Ethics of Negotiations*].

55. *See* Gerald B. Wetlaufer, *The Ethics of Lying in Negotiations*, 75 Iowa L. Rev. 1219, 1272 (1990).

56. Rubin, *Ethics of Negotiations*, *supra* note 54, at 458.

57. *See, e.g.*, Rubin, *Causerie*, *supra* note 19, at 584 ("None would apparently deny that honesty and good faith in the sale of a house or a security implies telling the truth

Proposals for regulating attorney conduct in civil negotiation are relevant to criminal procedure; similar to plea bargaining, negotiation and alternative dispute resolution ("ADR") have become routine means of case disposition[58] while remaining less regulated than litigation practice. Commentators' proposals proceed from the proposition that fairness and honesty are essential both to lawyers' professional honor as well as to efficient and equitable results.[59] As discussed below, applying these principles to the criminal context would arguably promote fairness to defendants and the pursuit of justice.[60]

While ADR's proponents shared common goals and values during the practice's nascent period, the growing quantity and diversity of ADR practitioners and their policies raise a need for ethical regulation to preserve fairness and justice in the practice.[61] Legitimacy and public confidence depend upon the regulation of informal case resolution practices by ethical standards that extend further than those requiring candor in formal court settings.[62]

The proposed Rule 4.1, which the ABA narrowed, and Rule 4.2, which the Kutak Commission ultimately rejected,[63] represent the most formal efforts to bolster ethical standards of fair dealing. Proceeding from the premise that lawyers' societal function is to achieve the "just termination of disputes,"[64] some commentators propose similar standards: "*The lawyer must act honestly and in good faith*"[65] and "*may not accept a result that is unconscionably unfair to the other party.*"[66] Recalling the simple language of Canon 22,[67] these standards impose duties to society and to the legal profession rather than to clients.[68] Other scholars offer practical guidance: attorneys should not make misleading statements or remain silent regarding misstatements that create incorrect impressions in their dealings with other parties if their conduct would differ in the presence of a judge.[69]

Until the legal profession adopts such a principle, however, the default rules of contract law govern lawyers' negotiations. Plea bargaining shares some characteristics of contract and settlement negotiation, and courts treat plea agreements as similar to contracts in some re-

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and not withholding information. But the Code does not exact that sort of integrity from lawyers . . . .").

58. *See* Menkel-Meadow, *supra* note 43, at 408.

59. *See id.* at 448-49; Rubin, *Causerie*, *supra* note 19, at 589.

60. *See infra* Part III.A.3.

61. *See* Menkel-Meadow, *supra* note 43, at 448-49.

62. *See id.* at 419.

63. *See supra* notes 45-51 and accompanying text.

64. Rubin, *Causerie*, *supra* note 19, at 589.

65. *Id.*

66. *Id.* at 591.

67. *See supra* note 29 and accompanying text.

68. *See* Rubin, *Causerie*, *supra* note 19, at 592.

69. *See* Rubin, *Ethics of Negotiations*, *supra* note 54, at 476.

spects.[70] The regulation of civil contract negotiation and ADR may therefore provide guidance in developing ethical rules for plea bargaining. The next section briefly discusses disclosure obligations in contract negotiations.

D. *Duties Under Contract Law*

The classical view of contract law held that a party could not avoid honoring a transaction as a result of the other party's nondisclosure of material information when the complaining party could have discovered the information through investigation. In *Laidlaw v. Organ*,[71] the Supreme Court, emphasizing the doctrine of *caveat emptor*, ruled that a buyer's failure to inform a seller of the end of the War of 1812, which increased the market value of the seller's goods, did not allow the seller to void the transaction.[72] Noting that "the sphere of morality is more extensive than the limits of civil jurisdiction,"[73] the Court held that parties have no disclosure obligation to each other "*where the means of intelligence are equally accessible to both* . . . ."[74]

Cicero anticipated a similar dilemma in the first century B.C.E., positing a grain merchant who traveled to a town suffering from famine.[75] The merchant knew that other grain sellers would arrive soon, and Cicero asked whether the merchant should inform the townspeople, thereby lowering the price they would pay for his grain, or remain silent.[76] Cicero decided the merchant should fully disclose to the town:

> Holding things back does not always amount to concealment; but it does when you want people, for your own profit, to be kept in the dark about something which *you* know and would be useful for *them* to know. . . . [T]he sort of person who practises [sic] [this kind of concealment] . . . is the reverse of open, straightforward, fair, and honest: he is a shifty, deep, artful, treacherous, malevolent, underhand, sly, habitual rogue.[77]

Informed consent requires, at minimum, equal access to information by the parties to a bargain. Honest negotiators will not exploit knowledge that others could not discover, and a bargain premised upon such exploitation will not generally be enforceable. Chief Justice Marshall's opinion in *Laidlaw* emphasized that a reasonable investigation

70. *See* Santobello v. New York, 404 U.S. 257, 263 (1971) (Douglas, J., concurring); *infra* Part III.A.3.

71. 15 U.S. (2 Wheat.) 178 (1817).

72. *See id.* at 193.

73. *Id.*

74. *Id.* at 195 (emphasis added).

75. *See* Cicero, *On Duties III*, *in* Selected Works 157, 177 (Michael Grant trans., Penguin Books 1971) (44 B.C.E.).

76. *See id.*

77. *Id.* at 180.

would have revealed the signing of the Treaty of Ghent;[78] the parties had comparable access to the information in question.[79]

The modern view, as reflected in the Restatement (Second) of Contracts, provides for relief when a party's nondisclosure transgresses standards of good faith and fair dealing.[80] Fairness requires disclosure of a fact that would affect the other party's decisions and to which the other party does not have access.[81] Disclosure obligations therefore acquire significance when two parties with unequal access to information enter into an agreement that relies on informed consent for its legitimacy.

Obligations in civil negotiation, however, developed within the paradigm of parity between the parties' negotiating power. In contrast, bargaining in the criminal context only occurs after the state has exerted its coercive power over the defendant, and the defendant is not at liberty to simply walk away from the negotiation. Furthermore, unlike civil negotiation, the criminal justice system is not intended to maximize each party's benefit, and implicates concerns alien to contract law. Part II discusses the unique context of criminal law and its implications for disclosure obligations.

II. Disclosure Standards in the Criminal Context

Prosecutors' unique mandate to seek justice, rather than simply to advocate their cases,[82] adds ethical restraints upon their behavior.[83] This part begins by discussing the unique interests of the criminal justice system, then examines the legal disclosure obligations and special ethical considerations prosecutors bear. This part further suggests that while the rules and ethics of civil negotiation and discovery may not be transferable to the criminal arena in their entirety, the value of fair bargaining, which informs current obligations and permeates proposals for further regulation, should generate an ethical obligation for prosecutors to act honorably in influencing defendants' tactical decisions. The goal of fairness should appeal to prosecutors' special duty to seek justice, but cannot crowd out the other goals of the criminal justice system.

78. Treaty of Peace and Amity, Dec. 24, 1814 (U.S.-U.K.), 8 Stat. 218 (ending the War of 1812).

79. *See Laidlaw*, 15 U.S. at 195.

80. *See* Restatement (Second) of Contracts § 161(b) (1981).

81. *See* W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 106 (5th ed. 1984).

82. *See* Model Code of Professional Responsibility DR 7-103, EC 7-13 (1980); Model Rules of Professional Conduct Rule 3.8 cmt. 1 (1998); Standards Relating to the Administration of Criminal Justice Standard 3-1.2(c) (1992).

83. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 Fordham L. Rev. 2117, 2131 (1998) ("Because the prosecutor is, in principle, looking for a 'fair' price rather than the highest price, arguments couched in terms of justice will have more currency than they might in a purely economic negotiation.").

A. *The Interests of Criminal Procedure Law*

American criminal procedure law has historically balanced the values of personal autonomy and dignity against the need to effectively enforce substantive criminal laws.[84] Criminal adjudication, in contrast to civil litigation, does not resolve disputes between private parties; it punishes offenders and deters future misconduct.[85] Furthermore, the criminal justice system is not a purely adversarial process. Unlike a civil case, a criminal prosecution does not simply match one zealous advocate against another. The prosecutor represents society, and consequently is responsible for protecting the due process rights of every individual, including the defendant, as well as for securing accurate convictions.[86] The government must deter and punish criminal activity, but is bound to do so consistently with statutory requirements and the limits of due process of law.[87]

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84. Herbert L. Packer, The Limits of the Criminal Sanction 153, 165 (1968). Mississippi, for example, has defined the interests served by its criminal justice system as follows:

> (1)(a) The prosecutorial interest, including the prompt detection and investigation of offenses and the speedy and vigorous apprehension and prosecution and punishment of offenders;
>
> (b) The victim's interest, including respect for the personal tragedy . . . suffered by the victims of offenders;
>
> (c) The defense interest, including respect for the presumption of innocence of persons accused of offenses and those whose liberty interests are at risk, guaranteeing to each accused person the effective assistance of competent, loyal and independent counsel, and assuring that each such person is prosecuted and punished only as may be found consistent with due process of law;
>
> (d) The state's justice interest, which includes administration of its criminal justice system, so as to secure the just, fair, speedy, and efficient adjustment and final adjudication of each charge formally made, to protect the innocent, and to punish offenders;
>
> (e) The state's prevention and deterrence interests, which include reducing the number and degree of offenses as much as is reasonably practicable . . . .

Mississippi Statewide Public Defender System Act, Miss. Code Ann. § 25-32-33 (1998).

85. *See infra* notes 88, 89 and accompanying text.

86. *See* Standards Relating to the Administration of Criminal Justice 3-1.2(b)–(c) (1992).

87. The Framers of the Constitution recognized that a government must wield sufficient coercive power to enforce its laws. *See* The Federalist, *supra* note 23, No. 15, at 149 (Alexander Hamilton) ("It is essential to the idea of a law that it be attended with a sanction . . . . If there be no penalty . . . the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation."). Alexander Hamilton observed that one purpose of the state is to effectively implement just laws: "Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice without constraint." *Id.* In creating the United States government, the Framers criticized the Articles of Confederation for entrusting the government with inadequate enforcement power. *See, e.g.*, Letter from George Washington to John Jay (Aug. 1, 1786), *reprinted in* 2 Great Issues in American History 82, 82 (Richard Hofstadter ed., 1958) ("We have errors to cor-

One purpose of American criminal procedure is therefore to advance the goals of substantive criminal law. This includes obtaining convictions of criminal offenders through the discovery of empirical facts, or "truth-seeking," combined with a finding of moral culpability.[88] Criminal procedure must also promote the goals of punishment, which may include retribution against an offender, deterrence against the offender's recidivism or against commission of similar acts by others, isolating a dangerous individual from society, or rehabilitating an offender.[89]

The criminal justice system combines the necessities of detection, conviction, and punishment of offenders with respect for individual autonomy and dignity.[90] Due process jurisprudence therefore restricts the government's ability to investigate crimes and convict offenders in order to preserve civil liberties.[91] Some limitations promote the accuracy of convictions by compelling the government to prove its case fairly.[92] The government bears a general duty to step out of the adversarial context to avoid convicting an innocent defendant.[93] For ex-

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rect. We have probably had too good an opinion of human nature in forming our confederation. Experience has taught us, that men will not adopt and carry into execution measures the best calculated for their own good, without the intervention of a coercive power."); *see also* The Federalist, *supra* note 23, No. 21, at 173 (Alexander Hamilton) ("The next most palpable defect of the existing Confederation is the total want of a SANCTION to its laws."). The survival of the Republic required a government with the authority to use coercion to implement its directives.

88. *See* N.Y. Penal Law § 1.05(1), (3) (McKinney 1998) (identifying purposes of criminal law as prohibiting conduct that unjustifiably harms or threatens individual or public interests and defining the acts and requisite *mens rea* which constitute offenses); Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 Geo. L.J. 185, 197-98 (1983) (discussing moral as well as factual evaluation of criminal defendants' conduct).

89. *See* N.Y. Penal Law § 1.05(5), (6) (defining purposes of providing for victim and community response when appropriate, and of deterrence, rehabilitation, and confinement); Arenella, *supra* note 88, at 198-99; Leon Pearl, *A Case Against the Kantian Retributivist Theory of Punishment: A Response to Professor Pugsley*, 11 Hofstra L. Rev. 273, 274, 288-89 (1982) (describing the moral justification of punishment in retributivist theories); Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 Yale L.J. 315, 334, 337-38 (1984) [hereinafter Seidman, *Utilitarian Theory*] (discussing the utilitarian goals of deterring crime by imposing costs of criminal acts that outweigh their benefits to individual offenders and of minimizing the total cost of crime and crime prevention).

90. *See infra* notes 98-108, 151-58 and accompanying text.

91. *See infra* Part II.B.2.

92. *See, e.g.*, Brady v. Maryland, 373 U.S. 83, 86-87 (1963) (requiring disclosure of exculpatory evidence); Jencks v. United States, 353 U.S. 657, 668-69 (1957) (entitling defendants to copies of prosecution witnesses' prior written or recorded statements).

93. *See* Berger v. United States, 295 U.S. 78, 88 (1935) (describing prosecutors' "twofold aim . . . that guilt shall not escape or innocence suffer"); Robert M. Ireland, *Privately Funded Prosecution of Crime in the Nineteenth-Century United States*, 39 Am. J. Legal Hist. 43, 53-54 (1995) (describing criticism of private prosecutors' acceptance of "'blood money' in return for a pledge to seek a conviction no matter what the evidence proved" and arguments that a private prosecutor is "inspired by his fee

ample, constitutional law prohibits the government from introducing the identification testimony of a witness who has been exposed to an unduly suggestive out-of-court identification procedure.[94] Due process further requires that a defendant have access to representation by competent counsel,[95] prior statements of government witnesses,[96] and potentially exculpatory evidence[97] in order to prevent the government's use of its superior power to obtain an inaccurate conviction.

While promoting accurate enforcement of the criminal law is one goal of procedural due process, "the fairness of the state-individual interaction in the criminal process cannot be defined solely in terms of procedures that contribute to good substantive criminal law results."[98] Criminal procedure law must implement substantive law in a manner that legitimizes the government's monopoly of the use of coercive force.[99] The Fourth and Fifth Amendments, for example, introduce concerns independent of the accuracy of results. The Fourth Amendment protects areas of privacy into which the government may not unreasonably intrude.[100] The Fifth Amendment promotes individual dignity and autonomy,[101] reflecting a "respect for the inviolability of the human personality"[102] that distinguishes the American criminal justice system from the inquisitorial methods of the Star Chamber.[103] Criminal procedure law protects these rights against government

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and not by a pursuit of justice"); Stephen P. Jones, Note, *The Prosecutor's Constitutional Duty to Disclose Exculpatory Evidence*, 25 U. Mem. L. Rev. 735, 736-37 (1995).

94. *See* Stovall v. Denno, 388 U.S. 293, 302 (1967).

95. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (holding that defendants charged with serious crimes are entitled to representation provided by the state).

96. *See Jencks*, 353 U.S. at 668-69 (holding that the confrontation clause requires disclosure of prosecution witnesses' prior written or recorded statements to facilitate cross-examination regarding inconsistencies).

97. *See infra* Part II.B.2.

98. Arenella, *supra* note 88, at 202; *see* Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values"*, 60 Cornell L. Rev. 1, 51 (1974) ("[I]n legal ordering, man does not live by results alone.").

99. In *Olmstead v. United States*, 277 U.S. 438 (1928), Justice Brandeis observed:

> In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. . . . Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law . . . . To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.

Id. at 485 (Brandeis, J., dissenting).

100. *See* Payton v. New York, 445 U.S. 573, 583-90 (1980) (enforcing Fourth Amendment protection of the home); Katz v. United States, 389 U.S. 347, 350-53 (1967) (protecting the privacy of oral communications); Schmerber v. California, 384 U.S. 757, 766-72 (1966) (applying protection to physical privacy and dignity).

101. *See* William A. Nelson, *The New Inquisition: State Compulsion of Therapeutic Confessions*, 20 Vt. L. Rev. 951, 996 (1996).

102. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

103. *See* Nelson, *supra* note 101, at 996.

transgression, sometimes forfeiting the search for truth in the process.[104]

An individual criminal adjudication thus combines a particularized fact-finding with a "proxy battle[ ] over issues of social policy."[105] The goals of law enforcement and protecting civil liberties coexist in criminal procedure.[106] Criminal procedure law implements the coercive power of the government while also regulating the state's exercise of force. Prosecutors' double mandate of enforcing criminal laws and seeking justice promotes both interests of the criminal justice system.[107] As agents of government and society, prosecutors must "accommodate the tensions between the protection of individual rights and the state's need to detect and punish criminal activity . . . ."[108]

B. *Prosecutors' Legal Disclosure Obligations*

Prosecutors are subject to constitutional, statutory, and regulatory duties beyond those governing the legal profession in general as a result of their dual role. Criminal disclosure regulation reflects the dichotomy of interests within criminal procedure law. Although criminal procedure law does not require extensive disclosure, the philosophy underlying current regulation emphasizes fairness to all defendants. The narrow scope of existing requirements, however, reflects a policy judgment favoring restricting criminal defendants' discovery rights further than those of civil litigants. While current disclosure duties reflect a concern for defendants' rights, they also account for the need for an effective criminal justice system; any proposal for a new requirement, then, must satisfy these dual objectives.

1. Statutory and Regulatory Obligations

While constitutional jurisprudence defines several discovery rights of defendants, legislation and rules require additional disclosure by prosecutors.[109] The Federal Rules of Criminal Procedure ("Criminal Rules") establish a minimum standard of disclosure that courts may increase during trial at their discretion.[110] The limited discovery re-

104. *See infra* notes 151-58 and accompanying text.

105. Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 Colum. L. Rev. 436, 442 (1980) [hereinafter Seidman, *Continuity and Change*].

106. *See* Packer, *supra* note 84, at 153.

107. *See* United States v. Bagley, 473 U.S. 667, 675 n.6 (1985) ("[T]he prosecutor's role transcends that of an adversary: he 'is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.'" (quoting Berger v. United States, 295 U.S. 78, 88 (1935))).

108. Arenella, *supra* note 88, at 187.

109. *See* Frank W. Miller et al., Criminal Justice Administration: Cases and Materials 780 (4th ed. 1991).

110. *See* Fed. R. Crim. P. 16; *see also* United States v. Nobles, 422 U.S. 225, 234-36 (1975) (holding that Rule 16 does not control a court's judgment at trial, and that the

quirements of criminal procedure statutes reflect a policy judgment against affording criminal defendants the broad access to information to which parties in civil litigation are entitled.[111]

The Criminal Rules require an indictment to present a "plain, concise and definite written statement of the essential facts constituting the offense charged."[112] Defendants may request a bill of particulars to amplify the elements alleged in an indictment.[113] Defendants may not use the bill to investigate or discover evidence the government might use to prove its case; clarifications are generally confined to basic facts such as the date, time, and place of the alleged crime, the identity of the alleged victim, and the general manner in which the crime is alleged to have been committed.[114] The Criminal Rules also require the government to provide the defendant with copies of any written or recorded statements he or she made to law enforcement officers, his or her testimony in grand jury and pretrial proceedings,[115] and his or her criminal record.[116] Further, prosecutors must give the defendant an opportunity to copy or inspect documents,[117] tangible objects,[118] and test reports[119] that the government intends to introduce in its case-in-chief. These obligations continue as the prosecutor obtains additional discoverable material.[120] The defendant is also entitled to Jencks Act material, which consists of copies of any statements made by government witnesses, but only after each witness's direct examination.[121] The Criminal Rules allow a defendant to request notice of the government's intent to use material that is discov-

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Jencks Act limitation on a trial court's discretion did not convert Rule 16 into a general limitation on the court's decision-making authority at trial).

111. *See infra* notes 126-30 and accompanying text.

112. Fed. R. Crim. P. 7(c)(1).

113. *See id.* Rule 7(f). A bill of particulars specifies "the nature of the charge pending against [the defendant], thereby enabling defendant to prepare for trial, to prevent surprise, and to interpose a plea of double jeopardy should he be prosecuted a second time for the same offense." United States v. Bortnovsky, 820 F.2d 572, 574 (2d Cir. 1987).

114. *See* United States v. Villanueva, No. 91 Cr. 976, 1992 WL 77573, at *3 (S.D.N.Y. Mar. 23, 1992); United States v. Guerrerio, 670 F. Supp. 1215, 1224 (S.D.N.Y. 1987) ("The test is not whether the particulars sought would be *useful* to the defense. Rather, a more appropriate inquiry is whether the information in question is *necessary* to the defense."); Harry I. Subin et al., *The Criminal Process: Prosecution and Defense Functions* § 14.3(a)(2), at 217 (1993).

115. *See* Fed. R. Crim. P. 16(a)(1)(A).

116. *See id.* Rule 16(a)(1)(B).

117. *See id.* Rule 16(a)(1)(C).

118. *See id.*

119. *See id.* Rule 16(a)(1)(D).

120. *See id.* Rule 16(c).

121. *See id.* Rule 26.2(a). The term "Jencks Act" material is derived from the decision in *Jencks v. United States*, 353 U.S. 657, 668-69 (1957) (entitling defendants to copies of prosecution witnesses' prior written or recorded statements). Prosecutors may, and often do, provide witness statements prior to trial according to the policies of their offices and individual judges. *See* Subin et al., *supra* note 114, § 14.5(a)(3), at 221.

erable under Rule 16[122] to facilitate a pretrial motion to suppress.[123] The Criminal Rules do not mandate disclosure of government witnesses' identities or statements other than Jencks Act material.[124] State rules governing criminal procedure may enhance prosecutors' disclosure obligations. New York, for example, requires prosecutors to notify defendants of the People's intent to offer testimony of a witness who identified the defendant as the perpetrator of a crime.[125]

The Criminal Rules require significantly less pretrial discovery than the Federal Rules of Civil Procedure ("Civil Rules").[126] The criminal and civil rules both emphasize efficiency. Whereas the Civil Rules are drafted upon the premise that "litigation should be based on open access to all relevant information,"[127] criminal procedure law restricts discovery to protect prosecution witnesses and limit witness tampering, subornation of perjury, and fabrication of evidence.[128] The reduced requirements for prosecutorial disclosure also mitigate the effect of the prosecutor's heavier burden of proof;[129] "it is not only the defendant who is entitled to a fair trial. Society, too, represented by

122. *See supra* notes 115-20 and accompanying text.

123. *See* Fed. R. Crim. P. 12(d).

124. *See id.* Rule 16(a)(2). Other obligations, such as *Brady v. Maryland* concerns, may require further disclosure.

125. *See* N.Y. Crim. Proc. Law § 710.30(1)(b) (McKinney 1995).

126. *See* Subin et al., *supra* note 114, § 14.2, at 216. In general, the Civil Rules entitle litigants to discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . including . . . any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." Fed. R. Civ. P. 26(b)(1). Parties to a civil matter may obtain information through interrogatories, *see id.* Rule 33, demands for document production, *see id.* Rule 34, and sworn depositions, *see id.* Rule 30. The court must give advance approval only for physical or mental examinations of a party or third person. *See id.* Rule 35; Richard L. Marcus et al., Civil Procedure: A Modern Approach 326 (2d ed. 1995). The general exemptions from civil discovery are confined to attorney-client privilege, *see* Fed. R. Civ. P. 26(b)(1), attorney work product, *see id.* Rule 26(b)(3), and a judge's exercise of discretion to protect a "party or person from annoyance, embarrassment, oppression, or undue burden or expense," *id.* Rule 26(c).

127. Joseph W. Glannon, Civil Procedure: Examples and Explanations 325 (3d ed. 1997). The Civil Rules reflect the Advisory Committee's conclusion that exchange of information is conducive to fairness in trials and settlements. *See* Fed. R. Civ. P. § V, Depositions and Discovery, advisory committee's explanatory statement concerning 1970 Amendments to Discovery Rules. Unlike an indictment in a criminal action, which a prosecutor generally seeks upon belief that there is sufficient evidence to prove the case beyond a reasonable doubt, *see* Subin et al., *supra* note 114, § 14.1, at 214, the pleadings commencing a civil action present a skeletal case that discovery will "flesh out." *See* Glannon, *supra*, at 301. Civil discovery rules are therefore designed to give each side a full understanding of the case and mandate a greater scope of information exchange than the criminal rules.

128. *See, e.g.*, State v. Eads, 166 N.W.2d 766, 769 (Iowa 1969) (rejecting defendant's argument for greater discovery due to the possibility of increasing the defendant's opportunity to produce perjured testimony, fabricate evidence, or bribe or intimidate witnesses, and noting that broad disclosure would provide the defendant with an unfair advantage because the state could not compel discovery from the defendant).

129. *See* Subin et al., *supra* note 114, § 14.2, at 216.

the prosecution, has an equal right to one."[130] These considerations limit the disclosure to which criminal defendants are entitled prior to trial.

2. Due Process Jurisprudence

In *Mooney v. Holohan*,[131] the Supreme Court held that a prosecutor who knowingly used perjured testimony and suppressed impeachment evidence violated the defendant's right to due process by deliberately deceiving the court and jury.[132] The Court rejected the California Attorney General's argument that a prosecutor's acts only deny due process when they deprive a defendant of the rights to receive notice of charges and to have an opportunity to present evidence and be heard.[133] Finding that the knowing use of perjury and suppression of impeachment testimony undermined the purpose of the criminal justice process, the Court emphasized that "safeguarding the liberty of the citizen against deprivation through the action of the state[ ] embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions."[134] The Court broadly stated the rule that the knowing use of perjured testimony and the suppression of favorable evidence violated a defendant's constitutional rights in *Pyle v. Kansas*.[135]

In the 1950s, following *Pyle* and *Mooney*, the Third Circuit issued several decisions holding that the suppression of evidence favorable to a defendant constituted a deprivation of due process on its own.[136] In *Napue v. Illinois*,[137] the Supreme Court similarly extended *Mooney*, holding that the prosecution's failure to correct false evidence, even when unsolicited, deprived the defendant of due process.[138]

Building on this earlier jurisprudence, the Supreme Court ruled in *Brady v. Maryland*[139] that regardless of good or bad faith, the prosecution's failure to disclose evidence favorable to a defendant upon request violates due process "where the evidence is material either to

130. *Eads*, 166 N.W.2d at 771.
131. 294 U.S. 103 (1935).
132. *See id.* at 112-13.
133. *See id.* at 112.
134. *Id.*
135. 317 U.S. 213, 215-16 (1942).
136. *See* United States *ex rel.* Thompson v. Dye, 221 F.2d 763, 765 (3d Cir. 1955); United States *ex rel.* Almeida v. Baldi, 195 F.2d 815, 820 (3d Cir. 1952) ("The suppression of evidence favorable to [the defendant] was a denial of due process.").
137. 360 U.S. 264 (1959).
138. *See id.* at 269. In response to a question on direct examination, a witness whom the Assistant United States Attorney (AUSA) had promised lenience testified that he had not been offered any consideration in return for his testimony. *See id.* at 265. The AUSA did not correct the witness's statement. *See id.* The Court held that the government's knowing use of false testimony to obtain a "tainted conviction" offended "any concept of ordered liberty." *Id.* at 269.
139. 373 U.S. 83 (1963).

guilt or to punishment . . . ."[140] The Court agreed with the court of appeals that suppression of any exculpatory evidence denies the fairness guaranteed by the Due Process clause when requested by the defendant.[141] Justice Douglas, writing for the majority, explained that "[t]he principle of *Mooney v. Holohan* is . . . avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[142] The Court sought to avoid casting the prosecutor "in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not 'the result of guile.'"[143] These "standards of justice" therefore apply not only to the motivations underlying a prosecutor's actions or inactions, but also to their consequences.

The Court refined its due process disclosure analysis in several cases following *Brady*. In *United States v. Agurs*,[144] the Court confirmed that a prosecutor bears an affirmative duty to disclose exculpatory evidence in the absence of a specific request by the defendant.[145] In *Agurs* and subsequent cases,[146] the Court also developed the materiality standard for the disclosure requirement.[147] In *United States v. Bagley*,[148] the Court discerned a uniform test for the materiality of exculpatory evidence: evidence is material when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[149] Exculpatory evidence includes information that could impeach the credibility of a government witness.[150]

While disclosure obligations under *Brady* primarily ensure that a defendant receives a full opportunity to disprove his or her factual guilt, constitutional criminal procedure requirements do not focus exclusively upon promoting accurate convictions. Constitutional law introduces concerns extraneous to individual fact-findings and adjudications when a societal interest limits the government's exercise of power. For example, the exclusionary rule, derived from *Weeks v.*

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140. *Id.* at 87.

141. *See id.* at 86.

142. *Id.* at 87.

143. *Id.* at 88 (quoting Brady v. State, 174 A.2d 167, 169 (Md. 1961)).

144. 427 U.S. 97 (1976).

145. *See id.* at 111-12.

146. *See* Strickland v. Washington, 466 U.S. 668 (1984); United States v. Valenzuela-Bernal, 458 U.S. 858 (1982).

147. *See* United States v. Bagley, 473 U.S. 667, 681-82 (1985) (discussing the evolution of the materiality standard).

148. *Id.*

149. *Id.* at 682.

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

United States[151] and *Mapp v. Ohio*,[152] imposes a deterrent against government misconduct and unreasonable invasion of civil rights.[153] While questions of reliability at least partially informed early prohibitions against the government's use of involuntary confessions, *Weeks*, *Mapp*, and other exclusionary rules punish the government regardless of the effect of investigative misconduct upon the reliability of evidence.[154] The *Weeks* and *Mapp* rules introduce factors extraneous to an individual defendant's factual guilt or innocence into a criminal adjudication. The *Mapp* opinion cited concern for judicial integrity[155] and a need to enforce restrictions upon government invasion of individual privacy[156] as support for the exclusion of the fruits of an improper search. The exclusion of evidence seized during a warrantless arrest of a defendant in the defendant's residence,[157] for example, elevates an individual's right to privacy and security of his or her home above the fact-finding value of reliable evidence. The Constitution, the Bill of Rights, and due process jurisprudence reflect commitments to fairness and dignity "even when they impair procedure's guilt-determination function."[158]

Fairness is essential to the legitimacy of plea negotiations as well as trials. The Supreme Court has recognized that plea bargaining is susceptible to abuses of power, and that regulating the practice could protect its integrity and fairness.[159] A trial court may therefore only accept a guilty plea if a defendant offers it voluntarily and intelligently.[160] Absent misrepresentation or improper conduct by the government, a defendant's mistaken evaluation of the strength of the prosecution's case is insufficient to invalidate a plea agreement.[161] Although the "voluntary and intelligent" standard is low,[162] the Court

151. 232 U.S. 383, 393-94 (1914) (excluding evidence obtained in violation of the Constitution from trial).

152. 367 U.S. 643, 655 (1961) (extending the exclusionary rule to state courts).

153. *See* Miller et al., *supra* note 109, at 17.

154. *See id.* The practice of using criminal procedure to deter government misconduct is most commonly associated with the Warren Court. *See* Arenella, *supra* note 88, at 189 ("The Warren Court acted as the system's moral conscience by articulating the ideals that should regulate the conduct of criminal justice officials in investigating criminal activity and adjudicating guilt."). The Burger Court, however, "continued to sacrifice the truth in individual cases on the altar of broader social goals." Seidman, *Continuity and Change*, *supra* note 105, at 446; *see, e.g.*, Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (applying *Miranda* rule to custodial interrogations occurring outside police stations).

155. *See Mapp*, 367 U.S. at 659 (citing Elkins v. United States, 364 U.S. 206, 222 (1960)).

156. *See id.* at 660.

157. *See* Payton v. New York, 445 U.S. 573, 588-89 (1980).

158. Arenella, *supra* note 88, at 202.

159. *See* Brady v. United States, 397 U.S. 742, 757-58 (1970).

160. *See id.* at 748.

161. *See id.* at 757.

162. *See* Note, *The Prosecutor's Duty to Disclose to Defendants Pleading Guilty*, 99 Harv. L. Rev. 1004, 1008-09 (1986) (noting that nearly all pleas could meet the stan-

emphasized that plea bargaining "presuppose[s] fairness in securing agreement between an accused and a prosecutor"[163] in holding that prosecutorial misconduct can invalidate a guilty plea.[164] Some circuit courts have therefore held that applying the "voluntary and intelligent" standard to guilty pleas requires a prosecutor to disclose material discoverable under *Brady v. Maryland* to defendants pleading guilty.[165]

As noted earlier,[166] the New York Court of Appeals declined to extend the *Brady v. Maryland* doctrine to suppression of non-exculpatory and nonevidentiary material.[167] The court found neither any case law[168] nor any ethical standard[169] imposing such an affirmative duty in the absence of a query by the defendant. The court construed the prohibition against prosecutors knowingly making false representations during plea negotiations[170] as possibly extending to "misleading silence when there is an affirmative duty of disclosure,"[171] but found no guidance in ethical standards in determining when such an affirmative duty exists.[172] In refusing to find an ethical obligation for the prosecutor to update the information based upon which a defendant decides to plead guilty, the court noted that a "fundamental concern of the criminal justice system, of course, is that an innocent defendant shall not be convicted; not that a possibly guilty actor shall escape conviction because the People are not able to establish his guilt."[173]

This statement, however, is not entirely consistent with the Supreme Court's emphasis on fairness for its own sake: "[O]ur system of . . . justice suffers when any accused is treated unfairly."[174] The value of fairness in criminal justice as well as the necessity of fairness among parties to plea bargaining[175] warrant additional measures to ensure good faith dealing. The concept that prosecutors bear different re-

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dard, as a plea would be "voluntary" unless it was the product of threatened or actual physical harm, overbearing coercion, or the defendant's irrationality, and would be "intelligent" as long as the defendant had the advice of counsel and demonstrated a basic understanding of the consequences of the plea).

163. Santobello v. New York, 404 U.S. 257, 261 (1971).

164. *See id.*

165. *See* United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998); Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995); White v. United States, 858 F.2d 416, 422 (8th Cir. 1988); Campbell v. Marshall, 769 F.2d 314, 321 (6th Cir. 1985). Discoverable information remains restricted to material exculpatory evidence. *See Avellino*, 136 F.3d at 255.

166. *See supra* note 8 and accompanying text.

167. *See* People v. Jones, 375 N.E.2d 41, 43-44 (N.Y. 1978).

168. *See id.* at 43-44.

169. *See id.* at 44.

170. *See* Standards Relating to the Prosecution Function and the Defense Function Standard 4.1(c) (1971).

171. *Jones*, 375 N.E.2d at 44.

172. *See id.*

173. *Id.*

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

175. *See* Santobello v. New York, 404 U.S. 257, 261 (1971).

sponsibilities than private advocates is implicit throughout due process jurisprudence. This difference is also reflected in prosecutors' ethical duties, which are discussed below.

C. *Special Ethical Duties of Prosecutors*

"The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach."[176] Ethical and legal standards peculiar to prosecutors maintain the boundaries of the State's exercise of power and the integrity of the criminal justice system. Prosecutors, who "wield[ ] the most terrible instruments of government,"[177] have historically incurred greater ethical duties than other attorneys. The State's "interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . . [W]hile [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones."[178] A prosecutor therefore bears the dual ethical duties of zealous advocacy and seeking justice.[179] As representatives of the citizens of a state or the nation, prosecutors are bound to guard the rights of both the accused and society.[180]

Ethical concerns extending beyond due process may require prosecutorial disclosure of nonevidentiary material independent of constitutional constraints. For example, in *People v. Rice*,[181] the New York Court of Appeals found that a prosecutor's dissembling aimed at affecting a defendant's trial tactics did not warrant a per se rule of reversal, but did constitute a serious ethical violation.[182] The prosecutor in *Rice* had deliberately misled the defendant, who was charged with murder, attempted murder, and robbery, into believing that one of his victims was alive and available to testify.[183] The court declined to reverse the conviction because of the overwhelming evidence of the defendant's guilt and the defendant's failure to show prejudice as a result of the prosecutor's deceit.[184] Despite finding no reversible error and refusing to adopt a per se rule of reversal under such circumstances, however, the court found that the prosecutor had violated his ethical duties both as an attorney in general[185] and as a prosecutor in

176. People v. Savvides, 136 N.E.2d 853, 854 (N.Y. 1956).

177. Martin v. Merola, 532 F.2d 191, 196 (2d Cir. 1976) (Lumbard, J., concurring) (quoting Felix Frankfurter, Letter, N.Y. Times, Mar. 4, 1941).

178. Berger v. United States, 295 U.S. 78, 88 (1935).

179. *See* Standards Relating to the Administration of Criminal Justice Standard 3-1.2(b), (c) (1992); Model Code of Professional Responsibility EC 7-13 (1980); Canons of Professional Ethics Canon 5 (1908).

180. *See* Monroe H. Freedman, Understanding Lawyers' Ethics 214 (1990).

181. 505 N.E.2d 618 (N.Y. 1987).

182. *See id.* at 619.

183. *See id.* at 618-19.

184. *See id.* at 619.

185. *See id.* (citing *In re* Padilla, 491 N.Y.S.2d 630 (App. Div. 1985)); Model Code of Professional Responsibility DR 7-102(A)(3), (5); (B)(2) (1980).

particular.[186] Similarly, the concurring opinion in *Dick v. Scroggy*[187] noted that the prosecutor probably committed an ethical violation when he represented the victim of a drunk driving accident in a civil suit against the defendant, whom he had previously convicted in the criminal case arising from the same incident.[188] The misconduct, however, did not present a constitutional violation warranting reversal of the defendant's conviction.[189] Ethics therefore extend professional obligations beyond the limits imposed by law; ethical rules may condemn a prosecutor's acts as "an unforgivable abuse of the public trust in which the public's overriding interest in the fair operation of its criminal justice system, an interest prosecutors are sworn to uphold,"[190] independently of constitutional and statutory restraints.[191]

All attorneys are required to exhibit candor in the course of the legal process.[192] The duty of candor supersedes the duty of zealous advocacy; both the Model Rules of Professional Conduct and the Model Code of Professional Responsibility absolutely prohibit attorneys from knowingly making false statements of fact or law.[193] In some cases, failure to make a disclosure may constitute an affirmative misrepresentation.[194]

Ethical standards emphasize prosecutors' special responsibilities but note relatively few specific duties, leading some scholars to question whether existing ethical codes sufficiently define the constraints imposed by prosecutors' dual obligations.[195] For example, ethics prevent prosecutors from instituting or allowing the continuing pendancy of unsupported criminal charges[196] and require them to consider the public interest and the interests of justice in determining whether to file otherwise valid charges.[197] Furthermore, prosecutors must take reasonable steps to ensure that the accused have been advised of their

186. *See Rice*, 505 N.E.2d at 619 (citing Model Code of Professional Responsibility EC 7-13; Standards for Criminal Justice Standard 3-1.1 (1992)).

187. 882 F.2d 192 (6th Cir. 1989).

188. *See id.* at 199 (Celebrezze, J., concurring).

189. *See id.* (Celebrezze, J., concurring).

190. *See id.* at 198 (Celebrezze, J., concurring).

191. *See* Annotated Code of Professional Responsibility DR-7-103(B) cmt. (1979) ("It appears possible, therefore, that a prosecutor may comply with the constitutional standards set forth in *Brady* and *Agurs* and still be in violation of DR 7-103(B).").

192. *See* Model Code of Professional Responsibility DR 7-102(A) (1980); Model Rules of Professional Conduct Rule 3.3 & cmts. 1, 2 (1998).

193. *See* Model Code of Professional Responsibility DR 7-102(A)(5); Model Rules of Professional Conduct Rule 3.3 (a)(1).

194. *See* Model Rules of Professional Responsibility Rule 3.3 cmt. 2. The Rules do not indicate in which situations this occurs.

195. *See, e.g.*, Freedman, *supra* note 180, at 215 (challenging the adequacy of the Model Code, Model Rules, and Standards).

196. *See* Model Code of Professional Responsibility DR 7-103(A); Model Rules of Professional Conduct Rule 3.8(a); Standards Relating to the Administration of Criminal Justice Standard 3-3.9(a) (1992).

197. *See* Model Code of Professional Responsibility EC 7-13(2); Standards Relating to the Administration of Criminal Justice Standard 3-3.9(b).

right to counsel and have had the opportunity to obtain counsel.[198] Ethics codes also incorporate the *Brady v. Maryland* obligation to make timely disclosure to defendants of the existence of exculpatory evidence.[199]

The codes reflect a belief that the prosecution, because of its power, access, and dual duties, must satisfy an elevated standard of fairness and honesty.[200] The government must exercise its monopoly on the legitimate use of coercive force in a manner which does not sacrifice fairness on an individual level. Ethical codes, however, leave many exercises of prosecutorial power unregulated and unrestrained. They do little to resolve the ambiguity remaining within *Brady* doctrine regarding prosecutorial responsibility for preplea disclosure.[201] Commentators have described the remaining vagueness as "striking,"[202] particularly because plea bargaining has emerged as the most frequent process of arriving at dispositions of criminal cases.[203] Rather than operating under an "undefined obligation to 'do justice,'"[204] prosecutors conducting this process require specific ethical guidance. Part III proposes that the ethical rules be amended to address this concern.

III. A Proposal to Add a Disclosure Obligation

As the law and ethics governing prosecutors reflect, the fundamental value of justice in the enforcement of criminal law urges greater protection for defendants confronting a state actor with superior knowledge and bargaining power. The principle of fairness underlying civil negotiation and contract formation suggests that information exchange is essential to a defendant's informed decision to waive rights. A defendant's evaluation of the government's case may be critical to his or her decision to plead guilty; a defendant may waive the right to trial based on such an assessment without admitting his or her guilt.[205] The importance of honesty and candor to the regulation of the legal profession also supports proposals requiring openness of

198. *See* Model Rules of Professional Conduct Rule 3.8(b). Note that *Miranda v. Arizona*, 384 U.S. 436, 479 (1966), already requires law enforcement to protect these rights.

199. *See* Model Code of Professional Responsibility DR 7-103(B); Model Rules of Professional Conduct Rule 3.8(d).

200. *See* Model Rules of Professional Conduct Rule 3.8 cmt. 1; Standards Relating to the Administration of Criminal Justice Standards 3-1.2(b), (c).

201. *See* McMunigal, *supra* note 11, at 1024-25.

202. *Id.* at 958.

203. *See id.*; Rebecca Hollander-Blumoff, Note, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 Harv. Negotiation L. Rev. 115, 116-17 & n.7 (1997) (citing studies estimating that approximately 90% of criminal cases in the United States end in guilty pleas); Lynch, *supra* note 83, at 2124 (describing the trial system as "largely vestigial").

204. Fred C. Zacharias, *Justice in Plea Bargaining*, 39 Wm. & Mary L. Rev. 1121, 1123 (1998).

205. *See* North Carolina v. Alford, 400 U.S. 25, 37-38 (1969).

prosecutors and other attorneys. The function of the criminal justice system in society and the role of plea bargaining, however, argue against an absolute rule mandating disclosure of all information. A new disclosure obligation must therefore reconcile the goals of protecting the integrity of the profession, securing the bargaining rights of defendants, and permitting the effective punishment and prevention of crime.

A. *Support for an Additional Duty*

The lack of consensus regarding nonevidentiary disclosure indicates the necessity of ethical guidance, particularly in light of the variety of pressures influencing prosecutors' decisions.[206] Furthermore, the prevalence of plea negotiation as a means of case disposition[207] suggests that the standards of the practice should be brought into accordance with courtroom conduct.

1. Professional Responsibility

Arguments for further ethical disclosure obligations derive from two sources: the value of honor in the legal profession and concern for the integrity of the criminal justice system. If attorneys do not conduct themselves honorably, arguments for self-regulation will lose their meaning. Moreover, augmenting lawyers' confidence in each other will facilitate negotiation. Furthermore, legal ethics must promote our criminal justice system's promises of fairness to defendants and justice of convictions.

Morality, responsibility to the profession, and maintenance of independence weigh in favor of holding attorneys to a standard of honesty in practice. Maintaining silence in order to lead a party to a false conclusion is generally considered misleading or dishonest conduct.[208] Cicero, tracing the historical requirement of honesty and good faith in bargaining to the Roman Twelve Tables, distilled these guiding principles: "[T]hat I be not deceived and defrauded because of you and because of trust in you. . . . [and that] between honest men there must be honest dealing and no deception."[209] Permitting such misdirection among attorneys is inconsistent with the bar's aspiration to truthful and honorable conduct.

As commentators and the drafters of ethical rules argue, attorneys' and the public's confidence in the values of legal practitioners is essen-

206. *See infra* notes 243-49 and accompanying text.

207. *See supra* note 203.

208. *See, e.g.*, Aeschylus, Prometheus Bound 58 (Paul Roche trans., Bolchazy-Carducci 1990) (condemning "disguise" as well as false statements); 2 Nehama Leibowitz, Studies in Shemot (Exodus) 445 (Aryeh Newman trans., The World Zionist Organization 1981) (discussing Biblical and Talmudic prohibitions against dishonesty).

209. Cicero, *supra* note 75, at 185.

tial in a society premised upon the rule of law.[210] As members of a selective profession, lawyers should hold each other to a heightened standard of conduct.[211] Without a coherent code of ethics, attorneys would be nothing more than "hired guns," and the legal system would reward duplicitous behavior. Ethical rules allow lawyers, to a reasonable extent, to trust one another, facilitating productive negotiation and efficient use of time and resources.

Furthermore, the independence of the bar, while necessary to protect liberty,[212] must be legitimized by its members' adherence to rules of honorable conduct.[213] Lawyers serve society's interest in justice; the legal system is a means to the just resolution of disputes and the protection of rights. This is inconsistent with the use of legal training to exploit unfair advantages, conceal dishonesty, or obtain unconscionable results. Prosecutors, as other lawyers, therefore owe society a duty to deal with defendants in good faith.

A prosecutor's silence can be particularly misleading in the context of his or her prior statements and actions. Arrest, arraignment, or indictment may appear as a prosecutor's assertion that the government has a strong enough case to win at trial. Alternatively, a prosecutor may describe the government's evidence to a defendant in a pretrial conference, or answer in the negative when asked if the government knows of a witness who would contradict the defendant's alibi. Although the prosecutor may make these statements or representations honestly and truthfully, a defendant may construe his or her subsequent silence regarding these points as signifying that the status of the government's case has remained unchanged. A prosecutor's duty to disabuse a defendant of a misapprehension of the facts will depend upon the prosecutor's role in creating the misconception.[214]

2. The Integrity of the Criminal Justice System

As the agents who implement the government's coercive power, prosecutors owe a further duty to ensure the delivery of justice.[215] Society is entitled to convictions that it believes are just, and individuals are entitled to fairness within the system.[216] Due process jurisprudence[217] and special ethical regulation of prosecutorial conduct[218] re-

210. *See* Model Rules of Professional Conduct pmbl. (1998); Freedman, *supra* note 180, at 2.
211. *See* Rubin, *Causerie*, *supra* note 19, at 589.
212. *See supra* notes 23-24 and accompanying text.
213. *See* Rubin, *Causerie*, *supra* note 19, at 588-89.
214. *See infra* Part III.C.
215. *See supra* Part II.C.
216. *See* Arenella, *supra* note 88, at 202 (discussing the public legitimation function of the criminal justice system); *supra* notes 99-108 and accompanying text.
217. *See supra* Part II.A, B.2.
218. *See supra* Part II.C.

flect a desire to restrain the power of government. The pursuit of justice therefore balances the goals of punishing and preventing antisocial behavior against respect for individual rights.[219]

The doctrine of *Brady v. Maryland*[220] protects a criminal defendant's right to information tending to disprove his or her guilt in order to imbue criminal adjudication with the fundamental fairness guaranteed by the Due Process Clause. The government's superior investigative resources are essential to effective law enforcement, but must not lend the prosecution an unfair advantage.[221] The distinctions between evidentiary and non-evidentiary information, and between exculpatory and non-exculpatory material, do not change the fact that a prosecutor obtains information, to which a defendant likely has no access, by virtue of the superior power of government. The information is material to a defendant's decision-making process; the result of the hypothetical plea negotiation, for example, would be affected by the defendant's knowledge of the relative weakness of the government's case.[222] The absence of a witness will not affirmatively exculpate a defendant, but it will shape that defendant's analysis and decision to waive his or her rights.

Furthermore, convicting guilty defendants is not the only function of criminal procedure law; fair treatment of the accused lies at the core of due process.[223] Equitable treatment is as vital to justice in plea agreements as it is to justice in convictions at trial. A prosecutor's misdirection or withholding of information in order to affect a defendant's tactical calculations at trial or in plea negotiation exploits the government's superior power. Because negotiation between a prosecutor and a defendant assumes good faith,[224] a defendant's misapprehension of the case against him or her, even when not the result of a prosecutor's deliberate action, unfairly leads the defendant to make a miscalculated decision.

The emergence of plea negotiation as the most common procedure of case disposition demands greater regulation. Some commentators suggest that plea bargaining has evolved into a "de facto administrative process"[225] by which prosecutors adjudicate guilt and determine punishment. Although the "best" prosecutors' offices instill a sense of fairness in their attorneys, there is little oversight of plea bargaining in these or other offices.[226] The plea process occurs outside the presence of a judge, and the court does not engage in extensive investigation of

219. *See supra* Part II.A.
220. 373 U.S. 83 (1963).
221. *See supra* Part II.
222. *See supra* notes 8, 15 and accompanying text.
223. *See supra* Part II.A, B.2.
224. *See* Santobello v. New York, 404 U.S. 257, 261 (1971).
225. Lynch, *supra* note 83, at 2144.
226. *See id.* at 2149.

the facts of a case when parties enter a plea agreement.[227] The vast majority of cases are therefore disposed of without judicial participation or strict regulation.

The absence of formal regulation of plea negotiation is a result of society's ideological refusal to acknowledge prosecutors' de facto adjudicative role.[228] The extension of the *Brady v. Maryland* rule to plea agreements[229] may indicate a recognition of the prosecutor's essential assumption of the role of fact-finder in the plea process. While this extension represents progress toward adequate regulation, it still leaves significant areas of prosecutorial tactics outside the scope of both judicial purview and professional ethics. As plea bargaining essentially replaces trials in most cases,[230] a defendant's right to know the strength of the case against him or her, including what the prosecutor will actually be able to present in the event of a trial, becomes increasingly important.

Adding a disclosure obligation would also promote the goal of justice by reducing the extent to which defendants' bargaining power varies with the quality of their representation.[231] An overworked or inexperienced defense counsel will likely overlook the need to constantly inquire whether each of a prosecutor's statements remains accurate. Asking, for example, whether an eyewitness is still alive prior to accepting a plea offer is not a uniform practice even among seasoned attorneys.[232] Furthermore, defense attorneys often have an interest in saving time by encouraging their clients to plead guilty and may prematurely advise their clients to accept offers.[233] Requiring prosecutors to disclose certain nonevidentiary information, particularly when a prosecutor's prior statement has become inaccurate due to changed circumstances, would facilitate defendants' personal strategic choices.

The variety of institutional and political pressures motivating prosecutors' behavior,[234] and disagreement among prosecutors as to where to draw lines of propriety[235] present further arguments in favor of adding an ethical duty. Binding all prosecutors to the same course of

227. *See* Eleanor J. Ostrow, Comment, *The Case for Preplea Disclosure*, 90 Yale L.J. 1581, 1601 (1981).

228. *See* Lynch, *supra* note 83, at 2124.

229. *See supra* note 165 and accompanying text.

230. *See supra* note 203.

231. *See* Ostrow, *supra* note 227, at 1587-88.

232. Interview with Defense Counsel "A." *See supra* note 16. Defense Counsel "A" is a former prosecutor who is unaware of any colleagues who make such inquiry of prosecutors.

233. *See* Ostrow, *supra* note 227, at 1588.

234. *See infra* notes 243-49 and accompanying text.

235. *See* McDonald et al., *Prosecutorial Bluffing*, *supra* note 16, at 3 (describing the lack of consensus among prosecutors regarding the extent to which a prosecutor may pretend his or her case is stronger than it is during plea negotiations).

action guarantees each that a morally honest course of action will not cause damage to their careers.

3. Principles of Negotiation and Contract Law

The fairness and bargaining principles of contract law[236] have some application within the criminal context. While plea negotiations will invariably involve duress as a result of the government's exertion of coercive force, greater prosecutorial disclosure can mitigate the effects of duress as well as unilateral mistake upon a defendant's decision.[237]

While plea bargains are not perfectly analogous to contract negotiations, the two systems bear several similarities. Modifying plea bargaining practice may instill it with a similar value of fairness, while still appropriate to criminal justice, to that found in the law and ethics of contracts.

Several common characteristics suggest that civil negotiation and contract theory can apply to plea bargaining.[238] First, courts frequently approach a plea agreement as a settlement contract.[239] Similar to civil parties, the prosecutor and the defendant each evaluate the strength of their cases and the potential outcome at trial.[240] Procedural rights, the strength of evidence, factual innocence or guilt, and possible punishment all inform the parties' estimates.[241] Similar to civil parties, each party to a plea negotiation acts upon all available information to assess his or her case and accordingly establish goals and limits for the negotiation.[242] Availability of information is therefore essential to the effectiveness of this process.

A second similarity between attorneys negotiating in the civil and criminal contexts is the variety of principles' and agents' motivations.[243] Conflicting incentives may bar agreements even when a mutually acceptable solution exists. Prosecutors may be disproportionately subject to these inconsistencies. Primarily, prosecutors must pursue the goals of increasing public safety and reducing crime.[244] They must also consider public perception of plea agreements, which may appear too lenient, too harsh, too frequent, or too rare.[245] Furthermore, loyalty or a sense of obligation to law enforcement agencies

236. *See supra* Part I.D.

237. *See* Ostrow, *supra* note 227, at 1609-10.

238. *See* Hollander-Blumoff, *supra* note 203, at 147.

239. *See* Santobello v. New York, 404 U.S. 257, 262 (1971); Rubin, *Causerie*, *supra* note 19, at 587.

240. *See* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50, 59-61 (1968).

241. *See* William F. McDonald, Plea Bargaining: Critical Issues and Common Practices 63-70 (1985) [hereinafter McDonald, Critical Issues].

242. *See* Kaplan, *supra* note 15, at 768-69.

243. *See* Hollander-Blumoff, *supra* note 203, at 126; Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 Yale L.J. 1979, 1987-88 (1992).

244. *See* Hollander-Blumoff, *supra* note 203, at 130.

245. *See id.* at 131.

or agents may induce prosecutors either to ensure a conviction by accepting a plea or to seek the maximum penalty by bringing a case to trial.[246] In addition, crime victims' desires can influence prosecutors in either direction.[247] Many prosecutors also act with the goal of promoting the ideals of justice and morality, thereby dissuading them from accepting a plea that carries an insufficient sentence.[248] Moreover, institutional pressures such as supervisors' goals and preferences, as well as the electorate's demand for high conviction rates and reduced spending levels, exert significant influence over prosecutors' decisions.[249] All of these forces may align against the value of dealing fairly with a defendant and thereby risking a trial or reduced plea agreement. In the absence of an affirmative disclosure duty, these forces will likely prevail.

A third analogy between the civil and criminal negotiation systems is the effect that trust among advocates exerts on the bargaining process. Informal cooperative relationships increase the efficiency of plea bargaining and facilitate some bilateral information exchange.[250] The quality of relationships may also have an impact upon the final plea; attorneys' attitudes toward dealing with each other affect the extent to which they will listen to each other and credit what the other presents.[251]

Moreover, arguments appealing to fairness in negotiation should sound at least as strongly in the criminal context. The validity of civil settlements relies upon the informed consent of the parties. Ideally, a criminal defendant who waives constitutional rights will also do so deliberately and meaningfully. Furthermore, prosecutors bear the same professional responsibilities as civil attorneys, as well as the additional duty to act in the interest of justice.

Applying the principles of the bargaining model can buttress the fairness, and therefore the integrity, of the practice of law in general and the criminal justice system in particular. The importance of good faith in the criminal justice system is reflected in both the due process concern for fundamental fairness[252] and the prosecutor's ethical duty to seek justice.[253] Fairness is a basic precept in the law of negotiation and contract as well;[254] the requirement of informed consent balances the advantages of each bargaining party. A negotiation or contract model of extrajudicial interaction among parties to a criminal case

246. *See* McDonald, Critical Issues, *supra* note 241, at 69.
247. *See* Hollander-Blumoff, *supra* note 203, at 132-33.
248. *See id.* at 133.
249. *See* Schulhofer, *supra* note 243, at 1987; Ostrow, *supra* note 227, at 1586.
250. *See* Hollander-Blumoff, *supra* note 203, at 135-36.
251. *See id.* at 137-45 (citing empirical examples).
252. *See supra* Part II.B.2.
253. *See supra* note 82 and accompanying text.
254. *See supra* Part I.D.

suggests that disclosure in criminal law, as in civil proceedings, can increase the level of fairness to defendants.

Similar to contracting parties, each side in a plea agreement makes concessions or promises performance in exchange for consideration. A defendant waives his or her constitutional rights to a jury trial, to confront his or her accusers, and against self-incrimination[255] in exchange for a prosecutor's enforceable promises.[256] The defendant's consent to this bargain may be more significant than his or her confession to a crime; a court may accept a guilty plea when the defendant denies criminal responsibility but waives his or her rights voluntarily and intelligently.[257] Both the prosecutor and the defendant determine whether to enter into a plea agreement, and what terms they will accept, based upon their assessments of the likelihood of conviction at trial and probable sentence.[258] A defendant must have a "meaningful opportunity to make a rational prediction"[259] in order to make a voluntary and intelligent decision to waive his or her fundamental rights.

A disclosure duty would ensure that the power of the prosecutor and the influence of defense counsel do not limit this "meaningful opportunity." It would allow a defendant to personally assess the risks of trial and to bargain for adequate consideration in return for his or her waiver.[260] It would also mitigate the duress inherent in the defendant's position. In contract law, a party who enters into an agreement in response to a threat may void the transaction.[261] While the threat of coercive force is inherent in the enforcement of criminal law, a prosecutor's overrepresentation of the strength of the government's case increases the pressure on the defendant to accept an unfavorable bargain.[262]

255. *See* Boykin v. Alabama, 395 U.S. 238, 243 (1969).

256. *See* Santobello v. New York, 404 U.S. 257, 262-63 (1971) (holding that either prosecution must honor promise offered as incentive to plea or defendant must be allowed to withdraw plea).

257. *See* North Carolina v. Alford, 400 U.S. 25, 36-38 (1970).

258. *See* Ostrow, *supra* note 227, at 1605.

259. *Id.* (citing Nagel and Neef, *Plea Bargaining, Decision Theory, and Equilibrium Models: Part II*, 52 Ind. L.J. 1, 43-44 (1976).

260. *See id.* at 1608-09.

261. *See* Charles L. Knapp & Nathan M. Crystal, Problems in Contract Law: Cases and Materials 601 (3d ed. 1993). Contract law offers a remedy for duress, or a "wrongful threat which overcomes the free will of a party." John D. Calamari and Joseph M. Perillo, The Law of Contracts 308-09 (4th ed. 1998). A party who has entered into a contract as a result of such duress may void the contract. *See id.* at 320. A party who has entered into a contract because of economic duress, and who has no reasonable alternative to accepting the contract, such as a trial, may also elect to void the contract. *See id.* at 309, 320.

262. *See* Ostrow, *supra* note 227, at 1609.

B. *Arguments in Favor of Restricting the New Duty*

The purposes of criminal law are to avenge antisocial acts, to reduce crime by isolating perpetrators of criminal activity, and to discourage others from engaging in similar behavior.[263] As the criminal procedure law illustrates, defendants must receive a fair opportunity to defend themselves.[264] The government must prove its case beyond a reasonable doubt[265] and may not conceal evidence which could support a defendant's case.[266] This does not, however, require prosecutors to open their entire files to criminal defendants. Limitations upon prosecutors' disclosure duties allow the government to effectively achieve the goals of criminal justice.[267]

Civil and criminal negotiation bear significant distinctions as a result of their different purposes. Unlike civil cases, the criminal justice system is not designed to maximize each party's benefit. Furthermore, while parties in both processes assess their preferences and likely outcomes at trial,[268] the criminal justice system imposes limitations on the bargaining process. First, the civil settlement model assumes that both parties have equal access to information, whereas discovery is limited in plea bargaining.[269] Second, in contrast to civil parties' ability to settle upon any agreement or dollar amount, a prosecutor and a defendant must generally concur on either innocence or conviction of some offense.[270] Statutes may restrict the range of offenses to which an indicted defendant may plead.[271] Furthermore, even a plea to a reduced charge will result in stigma and the risk of incarceration or other penal sanction.[272] Third, the factors the parties to plea bargaining weigh in deciding whether to accept an offer are less easily quantifiable than the generally pecuniary goals of civil litigants; a prosecutor seeks to satisfy societal desires for revenge, deterrence, and fairness while a defendant acts to reduce jail time, social stigma, and collateral damage to his or her personal life.[273] Finally, the coercive power of the prosecutor and the general disequilibrium

263. *See supra* Part II.A.

264. *See supra* Part II.B.

265. *See In re* Winship, 397 U.S. 358, 361 (1970) (tracing the "reasonable doubt" standard to the late eighteenth century).

266. *See supra* Part II.B.2.

267. *See supra* Part II.B.1.

268. *See* Zacharias, *supra* note 204, at 1129.

269. *See id.* at 1129-31. Professor Zacharias adds that in practice, the two systems may be more similar. *See id.* at 1131 n.27 (describing information asymmetries in civil litigation, which results in parties settling cases prior to full factual disclosure).

270. *See id.* at 1132; McMunigal, *supra* note 11, at 1026.

271. *See, e.g.*, N.Y. Crim. Proc. Law § 220.10(5) (McKinney 1993 & Supp. 1999) (establishing limits upon classes of felonies to which defendants may plead guilty).

272. *See* McMunigal, *supra* note 11, at 1026; Zacharias, *supra* note 204, at 1132.

273. *See* Zacharias, *supra* note 204, at 1132.

between the government and the defendant challenge the assertion that a plea bargain is a voluntary agreement or contract.[274]

Furthermore, as discussed above,[275] the purposes of the criminal and civil justice systems are different. The civil system is oriented toward efficient resolution of disputes among private parties.[276] In contrast, criminal law implements the coercive power of the government.[277] Efficiency of case disposition is an important, but not paramount, concern. Criminal justice satisfies society's desire for revenge upon those who engage in antisocial behavior and imposes disincentives against committing harmful acts.[278] Fairness to defendants is essential, but effective *ex post* punishment and *ex ante* discouragement of criminal activity are necessary to an orderly society of law.[279] The government must remain capable of enforcing the law within the bounds of consistency, accuracy, and due process.

Permitting nondisclosure does not necessarily constitute condoning dishonesty. A prosecutor's honest representation that he or she has a case that could succeed at trial frequently remains valid in the scenario of a missing or unwilling witness.[280] The results of trials are never certain or predictable; "an innocent individual can be successfully prosecuted even with quite flimsy evidence[,] . . . [while] there is no such thing as a truly dead-bang case."[281] The initiation of a prosecution therefore does not indicate a prosecutor's precise calculation of a specific likelihood of conviction.[282] As long as a prosecutor's statements and responses to questions are true and timely, there is no breach of honesty.

Furthermore, requiring extensive disclosure of nonevidentiary, nonexculpatory information would subvert the purpose of criminal procedure. The Criminal Rules reflect a policy which protects the criminal justice system from witness tampering and successful perjury.[283] While a defendant has a constitutional right to testify,[284] there

274. *See id.* at 1133-34.

275. *See supra* notes 126-30 and accompanying text.

276. *See* Fed. R. Civ. P. 1.

277. *See, e.g.*, John Stuart Mill, On Liberty 97 (Alburey Castell ed., Harlan Davidson 1947) (1859) ("It is one of the undisputed functions of government to take precautions against crime before it has been committed, as well as to detect and punish it afterwards.").

278. *See, e.g.*, John Locke, Two Treatises of Government 272 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (discussing purpose of punishment under law); *supra* note 89 and accompanying text.

279. *See* Seidman, *Utilitarian Theory*, *supra* note 89, at 337; The Federalist, *supra* note 23, No. 15, at 149, No. 80, at 445 (Alexander Hamilton); Letter from George Washington to John Jay (Aug. 1, 1786), *reprinted in* 2 Great Issues in American History, *supra* note 87, at 82.

280. *See* McDonald et al., *Prosecutorial Bluffing*, *supra* note 16, at 7.

281. *Id.*

282. *See id.* (describing prosecutors' knowledge that "there are no cases with a zero probability of conviction" and "[t]here is nothing certain").

283. *See supra* note 128 and accompanying text.

is no right to testify falsely.[285] The disclosure of witnesses who could expose the defendant's dishonesty only becomes an issue if a defendant intends to lie. Facilitating calculated decisions of whether to commit or suborn perjury would be inconsistent with basic principles of the legal system.[286]

Moreover, automatically revealing the death, disappearance, or non-cooperation of a witness could allow a factually guilty defendant to escape full punishment simply because of chance. Unlike *Brady v. Maryland*[287] and other doctrines which courts apply to ensure the accuracy of convictions and pleas, this type of disclosure would most likely produce results inconsistent with the facts of a crime. As the *Jones* court emphasized, "a fundamental concern of the criminal justice system, of course, is that an innocent defendant shall not be convicted; not that a possibly guilty actor shall escape conviction because the People are not able to establish his guilt."[288] The obligations that courts impose upon prosecutors in the interest of fairness provide a defendant with a full opportunity to argue his or her innocence. They do not serve to provide the defendant with advantages beyond full knowledge of the procedural integrity of the case against him or her and evidence which he or she may use as a defense.

While the contract principles of full disclosure and candor are admirable in that context, the civil negotiation model is not a perfect analogy to the criminal justice system. Criminal justice is not designed to maximize the benefit of each party; it serves to implement society's rules of conduct.[289] This implementation can be fair without requiring full disclosure of the prosecution's case. The goal of the system is to achieve convictions which are just and accurate,[290] and the disclosure owed to defendants under current obligations promotes this goal. Furthermore, a defendant does not voluntarily engage in plea negotiations; the government has already brought its coercive force to bear upon him or her. This further indicates that the intent of the system is not to advance the interests of the defendant, but rather to promote the government's interest within the bounds of the law.

C. *Proposal*

Two lines of analysis suggest that an additional duty to disclose would contribute to the fairness of the criminal justice system and to

284. *See* Rock v. Arkansas, 483 U.S. 44, 51-53 (1987) (finding a fundamental constitutional right of a criminal defendant to testify implicit in the Fifth, Sixth, and Fourteenth Amendments); Ferguson v. Georgia, 365 U.S. 570, 573-82 (1961) (describing history of criminal defendants' right to testify).

285. *See* United States v. Grayson, 438 U.S. 41, 54 (1978).

286. *See supra* notes 88-97 and accompanying text.

287. 373 U.S. 83 (1963).

288. People v. Jones, 375 N.E.2d 41, 44 (N.Y. 1978).

289. *See supra* Part II.A, B.2.

290. *See supra* Part II.B.2.

the integrity of legal ethics. One, based upon contract and negotiation practice, emphasizes the importance of information to parties who make calculated sacrifices in exchange for benefits.[291] The other, based upon the value of justice in criminal law, draws from the spirit of due process jurisprudence[292] and the prosecutor's unique role as an advocate for just results.[293] Furthermore, the arguments reinforce each other; if all attorneys should undertake to achieve fairness to both sides in contracts and negotiations, then prosecutors' special duty should hold them to at least as high a standard.[294]

Considered alone, this model would support a broad duty for prosecutors to disclose all information which could influence a defendant's strategic decisions. The case for an additional obligation, however, must be tempered by the concerns and goals of the criminal justice system. The system identifies and punishes the guilty.[295] Whereas many disclosure obligations refine the truth-seeking function of criminal justice,[296] this new obligation could prevent accurate results. The proposal must therefore ensure the honor of prosecutorial conduct while preserving the legitimate power of the criminal justice system. The standard should impose an affirmative duty upon a prosecutor to correct a defendant's assessment of his or her case when the prosecutor's prior statements or omissions, although accurate when made, no longer reflect the facts. This obligation would allow prosecutors to continue to engage in the same tactical and strategic practices that they currently employ at the outset of a case. It would simply prevent them from allowing a situation which they may not create at the commencement of a prosecution to develop during the pendancy of an action.

An ethical rule to enforce such an obligation could, for example, require that:

1. Prosecutors shall correct any statement or representation of fact made by them, or by their office, to a defendant, when such statement or representation, although accurate when made, has become inaccurate due to factors exclusively within the prosecutor's means of intelligence or not reasonably discoverable by the defendant.
2. Nothing in this rule shall be construed to require a prosecutor to disclose to a defendant that the defendant's intended fraud upon the court has been discovered or can be rebutted.

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291. *See supra* Part III.A.3.
292. *See supra* Part II.B.2.
293. *See supra* Part II.B.2, C.
294. *See supra* note 83 and accompanying text.
295. *See supra* Part II.A.
296. *See supra* Part II.B.2.

Part 1 of the rule satisfies the value of fair dealing discussed in this Note, combining the values in *Laidlaw* and the Restatement[297] with the limitations imposed by the interests of the criminal justice system.[298] Part 2 prevents the rule from creating an incentive for a defendant to present false testimony or evidence; a defendant's knowledge of a requirement for a prosecutor to warn him that such a deception would not succeed would likely encourage attempts at perjury. Furthermore, catching a defendant or witness in a lie is sufficient to impeach his or her credibility and a prosecutor should be permitted to expose a defendant's or witness's dishonesty.

Although it is difficult to argue in favor of a rule which would further impede prosecutors in their pursuit of convicting substantively guilty defendants, such measures have been deemed legally or ethically necessary in the past.[299] Adding to prosecutors' duties would undoubtedly cause more cases to proceed to trial. A greater duty would also likely result in a greater number of factually guilty defendants remaining unconvicted, a consequence also incurred by doctrines such as the exclusionary rule, the Jencks Act,[300] and *Brady v. Maryland*.[301] In contrast to these precedents and subsequent proposals to apply their analyses to plea bargaining, however, the duty proposed in this Note would do little to ensure the accuracy of plea or trial results. It would primarily protect a defendant's right to make an informed decision and consistently regulate attorney conduct.

CONCLUSION

The positive effects of additional ethical duties can outweigh the hardship they impose upon the administration of criminal justice. In the small-scale analysis, by universally mandating a single course of action, ethical rules assure each prosecutor that he or she engages in the same course of conduct as his or her peers. Uniformity relieves each individual of the need to reconcile an uncertain moral and ethical dilemma which may pit honesty and honor against zealousness and professional competition. Similarly, permitting prosecutors to withhold decision-influencing information allows the voting public's demand for convictions to reward morally marginal conduct; requiring prosecutors to disclose such information liberates a prosecutor's office from public pressure. On a greater scale, adding a duty can fill a logical gap in existing ethical standards, thereby contributing to the integrity, coherence, and consistency of both professional legal ethics and the criminal justice system. This lends greater legitimacy to both of

297. *See supra* Part I.D.
298. *See supra* Part II.
299. *See supra* Part II.B.2.
300. 18 U.S.C. § 3500 (1994); *see supra* note 121.
301. 373 U.S. 83 (1963); *see supra* Part II.B.2.

the self-regulating tradition of the legal profession and the trial and plea bargaining processes.

Accuracy of results is not the only rationale for imposing obligations upon prosecutors; as attorneys and agents of the government, they are responsible for just and honorable conduct. The general legal community's rejection of fairness as a requirement, which has undoubtedly contributed to the negative popular image of lawyers, does not indicate that such a standard would be inappropriate for prosecutors. Prosecutors are bound to standards beyond those of other attorneys based upon an obligation to seek justice. This duty is an essential counterweight to the government's superior investigative and coercive power; society's right to legitimate convictions and a defendant's rights to fair treatment demand it. In the interests of honor and justice, a prosecutor should not allow a defendant's misapprehensions to remain uncorrected when the prosecutor has contributed, directly or indirectly, to that misperception. Even though the prosecutor never lied, he or she made statements upon which a defendant must base a fundamental and personal decision. The defendant, lacking the superior resources of the government, is entitled to a prosecutor's assurance that his or her representations remain accurate, when such is the case, or to disclosure of new facts when the prior representations have become misleading. Moreover, society is entitled to a high standard of ethical behavior by prosecutors, to whom it entrusts the coercive power of the state, and by attorneys in general, upon whom it confers the privilege of self-government.