PLEADING FOR PRE-BARGAIN DISCLOSURE IN STATE LEGAL ETHICS

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ABSTRACT

Plea bargains dispose of over 97% of criminal matters in the United States' criminal justice system. Proponents of plea bargaining typically justify the practice under the "shadow of trial" theory, claiming that plea bargains reflect predicted trial outcomes minus a discount for the prosecutorial resources saved. But scholars challenge this theory because other factors influence whether a defendant will enter a plea bargain. Among many are attorney competence, workloads, and legal resources. Yet a largely overlooked gap is that state ethics rules undermine the theory responsible for the legitimacy of plea bargaining.

Each state has enacted a similar variation of Model Rule 3.8(d), which requires prosecutors to "timely disclose" evidence that tends to negate guilt. American Bar Association guidance on the meaning of the rule is advisory—not binding—which has led to a situation where states interpret prosecutorial disclosure obligations differently. If the date of trial is not close, some states do not require prosecutors to disclose evidence before defendants accept or deny plea offers. But the actual practices of prosecutors and defenders indicate different results of when disclosure occurs and how they understand the law. Qualitative data collected from interviews in nineteen states reveal that prosecutors and defenders disagree on what disclosure obligations exist and whether nondisclosure problems occur in the first place. Given these findings, defendants may enter plea bargains unaware of the prosecution's evidence.

To align ethics rules with the dominant theory used to justify plea bargaining, this Article suggests that states should require prosecutors to disclose exculpatory evidence before plea negotiations conclude. Even then, if current disclosure rules were to apply before defendants plead guilty, their scope does not reach far enough. Ethics rules remain silent on the prosecutorial obligation to disclose evidence that proves guilt of the

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accused. A defendant cannot meaningfully bargain if withheld exculpatory or inculpatory evidence leads to a false estimate of conviction. Instead, professional conduct codes can make defenders, prosecutors, and the public share a common understanding of disclosure responsibilities. States can hold prosecutors personally accountable and the accused can better predict trial outcomes when ethical disclosure rules factor into the shadow of trial.

TABLE OF CONTENTS

INTRODUCTION

Plea bargaining plays a prominent role in the United States' criminal justice system.[1] Scholars who support plea bargaining justify the institution under the "shadow of trial" theory.[2] This theory holds that plea

1. Less than 3% of criminal matters proceed to trial, see U.S. SENT'G COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2015 4 (2016) ("In fiscal year 2015 the vast majority of offenders (97.1%) pleaded guilty."); Erica Goode, *Stronger Hand for Judges in the 'Bazaar' of Plea Deals*, N.Y. TIMES (Mar. 22, 2012), https://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html ("Courtroom trials, the stuff of television dramas, almost never take place."). With over 97% of criminal matters ending with a plea, the Supreme Court even recognizes that plea bargaining "*is* the criminal justice system." Missouri v. Frye, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)); *see* Bordenkircher v. Hayes, 434 U.S. 357, 361 (1978) ("[T]he guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system.").

2. *See, e.g.*, Stephanos Bibas, *Designing Plea Bargaining from the Ground Up: Accuracy and Fairness Without Trials as Backstops*, 57 WM. & MARY L. REV. 1055, 1060 (2016) [hereinafter *Designing*] ("[O]bservers generally assume[] that plea bargaining occur[s] in the shadow of trial. That is, they assume[] that jury trials exert[] an outsized influence because plea bargaining both rationally forecast[s] the probability of conviction and likely sentence and result[s] in deals proportionate to those rational expectations."); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2465 (2004) [hereinafter *Shadow*] ("This model also looms large in recent plea-bargaining literature. Frank Easterbrook, Robert Scott, Bill Stuntz, and other scholars treat plea bargaining as just another case of bargaining in the shadow of expected trial outcomes."); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992) [hereinafter *Compromise*] ("[B]oth sides . . . bargain as bilateral monopolists . . . in the shadow of legal rules that work suspiciously like price controls.").

agreements mirror the likelihood of conviction at trial, minus a discount[3] for prosecutorial resources saved from the secured convictions.[4]

Over the years, scholars have pointed to at least twenty-four likely reasons why plea bargains diverge from the ideal when settling in the shadow of the law.[5] There are other variables than merely the expected outcome of litigation.[6] This Article reveals another factor that the shadow of trial theory does not consider.

State codes of professional conduct do not correspond with the shadow of trial theory. Ethics rules in each state require prosecutors to "make timely disclosure" of known evidence or information "that tends to negate the guilt of the accused . . . ."[7] Although states word their prosecutorial disclosure obligations the same,[8] states interpret the phrase "timely disclosure" differently.[9] As three states read ethics obligations in tandem with current trial discovery laws,[10] the rules require prosecutors to disclose evidence closer to trial, as opposed to earlier when a defendant may decide

3. Russell D. Covey, *Signaling and Plea Bargaining's Innocence Problem*, 66 WASH. & LEE L. REV. 73, 74 (2009) ("The dominant theoretical model of plea bargaining—so-called 'trial shadow theory'—predicts that, once charged, innocent and guilty persons alike almost always act rationally by pleading guilty rather than contesting guilt at trial.").

4. Scott & Stuntz, *supra* note 1, at 1948 ("[D]efendants—whether guilty or innocent—are offered a sentence based upon the prosecutor's estimate of the strength of the case at the time of bargaining plus the expected savings in transaction costs from shifting prosecutorial efforts to pleas rather than trials.").

5. *See, e.g.*, *Shadow*, *supra* note 2, at 2464 (noting that many factors can influence plea bargains in addition to predicted trial outcomes, such as: (1) agency costs, (2) attorney competence, (3) attorney compensation, (4) attorney workloads, (5) legal resources, (6) heightened sentencing laws, (7) laws that permit information asymmetry, (8) overconfidence, (9) denial, (10) discounting, (11) risk preferences, (12) loss aversion, (13) framing, and (14) anchoring); Alexandra Natapoff, *Gideon Skepticism*, 70 WASH. & LEE L. REV. 1049, 1051 (2013) (claiming that defendants plead guilty to avoid (15) racial and other biases, or to avoid the loss of (16) jobs, (17) homes, or (18) children by remaining incarcerated under bail laws); William N. Eskridge, Jr., *Law and the Construction of the Closet: American Regulation of Same-Sex Intimacy, 1880-1946*, 82 IOWA L. REV. 1007, 1032 (1997) (attributing plea bargains to (19) the defendant's desire to avoid trial publicity); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984) (identifying how (20) disparities in financial resources influence a plea bargain or similar settlements); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1270, 1313 (1975) [hereinafter *Defense Attorney's Role*] (noting factors that influence plea bargains, include (21) "what mood the prosecutor is in" and (22) the parties' "long and largely subjective experience" in plea negotiations, and (23) unavoidable bureaucratic pressures and conflicts of interest for defense attorneys); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 106–07 (1968) [hereinafter *Prosecutor's Role*] (discussing that (24) perverse personal and political incentives in securing convictions as a prosecutor influence a plea bargain).

6. *Shadow*, *supra* note 2, at 2469 ("Plea bargains do not simply reflect expected trial outcomes minus some proportional discount. Many other structural factors influence bargains. Sometimes these factors help or hurt certain classes of defendants; in other cases, the effects are more idiosyncratic.").

7. MODEL RULES OF PRO. CONDUCT r. 3.8(d) (AM. BAR ASS'N 2020). Eight states require prosecutors to disclose exculpatory information at any time during plea bargains and trial, three states only require disclosure when a defendant denies a plea deal and decides to proceed to trial, and thirty-nine states have not clearly addressed when prosecutors must disclose this evidence. *See infra* Part II.

8. *See infra* note 33 and accompanying text.

9. *See infra* Part II (including Table 1 that shows when states require prosecutors to disclose exculpatory information under ethics rules).

10. *See infra* Part II (explaining that some state ethics rules only require disclosure after a defendant denies a plea deal and decides to proceed to trial because of the obligations imposed by other state laws).

on a plea offer.[11] Simply put, some states do not require prosecutors to disclose evidence before plea-bargain negotiations conclude.[12] Yet, the rules on the books differ from what happens in practice and how prosecutors and defenders understand ethics rules.

Interviews with prosecutors and defenders in nineteen states indicate disagreement on when prosecutors must disclose evidence.[13] When a defendant is charged with a crime and enters plea-bargain negotiations, prosecutors from various jurisdictions claim to turn over evidence immediately, whether motivated to protect themselves from a misconduct allegation or to avoid an unfair plea.[14] But defenders disagree, stating that prosecutors withhold evidence and that there are not clear standards prompting disclosure before their clients take a plea bargain.[15]

Even if prosecutors already go beyond state ethical disclosure rules, the lack of consensus on how prosecutors act indicates that there are unpredictable outcomes in plea bargains. Without standardized ethics requirements, the door remains open for prosecutors to deprive defense counsel of necessary information that would help the accused make an informed choice on whether to proceed to trial. If plea bargaining is to be consistent with its dominant theory, state ethics rules should not limit their scope to trial discovery. But current disclosure obligations under state ethics rules do not reach far enough. Ethics rules only cover the evidence "that tends to negate the guilt of the accused," not support it.[16] Defendants cannot reasonably anticipate trial outcomes if prosecutors withhold inculpatory evidence.

If states do not apply ethics rules on disclosure to plea bargains and do not extend the prosecutor's disclosure obligation to inculpatory evidence, uninformed defendants cannot meaningfully predict trial outcomes

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11. For example, Pennsylvania disclosure obligations only apply weeks after a first appearance in court. *See* 234 PA. CODE RULE 573 (2013) ("In all court cases, on request by the defendant, . . . the Commonwealth shall disclose . . . [a]ny evidence favorable to the accused that is material either to guilt or to punishment, and is within the possession or control of the attorney for the Commonwealth.").

12. *See infra* Part II (identifying that Ohio, Pennsylvania, and Tennessee do not require disclosure before plea bargains conclude).

13. Forty qualitative interviews were conducted with prosecutors and defense attorneys in Arizona, California, Colorado, Connecticut, Florida, Illinois, Indiana, Maryland, Massachusetts, Michigan, Missouri, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Tennessee, and Texas.

14. *See infra* Section III.A (discussing the prosecutors' rationale for disclosing evidence before a defendant pleads guilty).

15. *See* Telephone Interview with Mich. App. Def. Att'y 1 (Feb. 26, 2021) (on file with author) [hereinafter Mich. App. Def. Att'y 1] ("There are not clear or commanding rules that require the DA to give us things that can help or even hurt our clients before they enter into a deal. Meanwhile, because clients don't want to wait for trial, we try our best to inform them on the best decision given the limited evidence we know."). *But see* Telephone Interview with Mich. Chief Assistant Prosecutor (Mar. 15, 2021) (on file with author) [hereinafter Mich. Chief Assistant Prosecutor] ("Our policy is to immediately disclose exculpatory and inculpatory evidence.").

16. MODEL RULES OF PROF. CONDUCT r. 3.8(d) (AM. BAR ASS'N 2020) (emphasis added) ("[Prosecutors shall] make timely disclosure to the defense of all evidence or information known to the prosecutor that *tends to negate the guilt of the accused*.") (emphasis added).

and bargain away their right to trial. The disagreement between prosecutors and defenders requires a commonly understood disclosure standard—one aligned with the predominant shadow of trial theory. Instead of ethics rules that require disclosure based on how close a case is to trial,[17] states should obligate prosecutors under what this Article terms "pre-bargain disclosure," which would require prosecutors to disclose *both* exculpatory and inculpatory evidence before defendants accept or deny a plea offer.

Part I briefly discusses the shadow of trial theory. Part II provides a fifty-state survey that identifies the different times at which states require disclosure before trial. Part III explores how the ethics rules on the books differ from the rules in action. Part IV explores how the lack of ethics obligations on prosecutorial disclosure undermines the shadow of trial theory. Lastly, Part V recommends that ethics rules require prosecutors to abide by pre-bargain disclosure.

I. BARGAINING BEYOND THE SHADOW OF TRIAL

Additional factors influence a plea negotiation beyond the anticipated product of litigation, prompting plea bargains to depart from the shadow of trial theory.[18] Defendants may plead guilty because they cannot afford bail before trial, or because they cannot stay in jail and risk losing their jobs, homes, or children.[19] "If [a] defendant wants to avoid publicity [of litigation] as much as possible, a trial may entail a greater cost."[20] Even innocent defendants may want to avoid the risk that "they may be sentenced in ways that bear little relation to their personal culpability under mandatory minimum sentencing laws or overly harsh guidelines, or by judges who exercise their discretion subtly affected by racial or other biases."[21]

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17. *See infra* Part II.

18. *See Shadow*, *supra* note 2, at 2465, 2469–70 ("[B]argains reflect much more than just the merits. These structural distortions produce inequities, overpunishing some defendants and underpunishing others based on wealth and other legally irrelevant characteristics.").

19. Natapoff, *supra* note 5, at 1051 (identifying other reasons that defendants are incentivized to take a plea bargain); *see Shadow*, *supra* note 2, at 2468 ("Rather than basing sentences on the need for deterrence, retribution, incapacitation, or rehabilitation, plea bargaining effectively bases sentences in part on wealth, sex, age, education, intelligence, and confidence. Though trials allocate punishment imperfectly, plea bargaining adds another layer of distortions that warp the fair allocation of punishment.").

20. 2 CRIMINAL LAW ADVOCACY § 39.01(4)(d)(iv) (2022); *see* Eskridge, *supra* note 5, at 1032 ("The high conviction rates are probably attributable to a combination of factors: . . . [including] the desire of defendants to plea bargain to avoid publicity . . . .").

21. Natapoff, *supra* note 5, at 1051–52 (identifying risks of sentencing at trial that do not revolve around the merits of a given claim).

Other considerations can impact plea bargains.[22] Lack of information, insufficient legal resources,[23] or poor attorney competence may alter the bargain.[24] Lawyers' self-interests may conflict with their clients' interests.[25] Bail rules and pretrial detention can influence whether there is a quick acceptance of a plea.[26] Additionally, behavioral law and economics literature expose prosecutors and defense counsel as irrational human decision-makers.[27] Not every decision is perfectly rational: attorneys can act overconfident, which will change how they approach denying an offer, discounting a sentence, or negotiating other strategies that make up a plea-bargain decision.[28]

Many scholars recognize that the shadow of trial theory is incomplete.[29] As the legal profession continues to consider outside factors in addition to the outcome of a trial, the shadow of trial theory becomes less prominent. This Article focuses on one additional topic that skews a plea-bargain: disclosure under state ethics rules.

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22. *See Defense Attorney's Role*, *supra* note 5, at 1270 ("[Upon asking about how a plea bargain is created or what goes into the decision, the] usual response was a shrug and a statement that 'it all depends on what the defendant looks like, who the judge is, and what mood the prosecutor is in.' It seems possible that no one really understands the plea-negotiation process, and if anyone does, it is only because of his own long and largely subjective experience.").

23. *See* Fiss, *supra* note 5, at 1076 ("[D]isparities in resources between the parties can influence the settlement in three ways. First, the poorer party may be less able to amass and analyze the information needed to predict the *outcome of the litigation*, and thus be disadvantaged in the bargaining process. . . . [T]he poorer party might be forced to settle because he does not have the resources to finance the litigation, to cover either his own projected expenses, such as his lawyer's time, or the expenses his opponent can impose through the manipulation of procedural mechanisms such as discovery.") (emphasis added).

24. *Designing*, *supra* note 2, at 1060–61 (citing BENJAMIN H. BARTON & STEPHANOS BIBAS, REBOOTING JUSTICE 28–30 (2017)) ("[D]efense lawyers are often shockingly overworked, shamefully underfunded, and sometimes incompetent. They have little ability to mount independent investigations and vigorous defenses, leaving the outcome to ride on the quality of police work."); *Shadow*, *supra* note 2, at 2467 ("[T]here are many structural impediments that distort bargaining in various cases. Poor lawyering, agency costs, and lawyers' self-interest are prime examples, as are bail rules and pretrial detention.").

25. *Shadow*, *supra* note 2, at 2467; Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992) ("There is, accordingly, a potential for conflicts of interest or, in the language of economics, a problem of agency costs. The proposition that a mutually agreed-upon exchange presumptively enhances the welfare of both parties collapses, absent reason to believe that the agents are acting in the interest of their principals.").

26. *See Shadow*, *supra* note 2, at 2492–93 ("[E]ven an acquittal at trial can be a hollow victory, as there is no way to restore the days already spent in jail. The defendant's best-case scenario becomes not zero days in jail, but the length of time already served."); Telephone Interview with Colo. Deputy Pub. Def. (Feb. 24, 2021) [hereinafter Colo. Deputy Pub. Def. 2] ("Sometimes prosecutors offer probation and a get out of jail card with a plea bargain. Because it would take a couple of weeks in jail until the defender's office figures out information proving innocence, our clients take the plea. This happens on [a] monthly basis.").

27. *Shadow*, *supra* note 2, at 2467 ("Recent scholarship on negotiation and behavioral law and economics, however, undercuts this strong assumption of rationality. Instead, overconfidence, self-serving biases, framing, denial mechanisms, anchoring, discount rates, and risk preferences all skew bargains.").

28. *Id.*

29. *See supra* note 5 and accompanying text.

II. PROSECUTORIAL DUTIES TO DISCLOSE EXCULPATORY EVIDENCE

The American Bar Association's (ABA) Model Rule 3.8(d) states that "[t]he prosecutor in a criminal case shall . . . make *timely disclosure* to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused . . . ."[30] The ABA opines that this disclosure should occur before a defendant enters a plea deal "to enable defense counsel to advise the defendant regarding whether to plead guilty."[31] But ABA opinions are only advisory.[32]

Although states are free to modify their rules, most have copied Model Rule 3.8(d) verbatim.[33] While the words in state ethics rules match, application of the rules varies. Some states follow the ABA's approach to prosecutorial disclosure and require prosecutors to disclose evidence as soon as reasonably practicable.[34] But other states only apply the duty to disclose exculpatory evidence once the defendant proceeds closer to trial.[35] Table 1 identifies where states fall on ethical disclosure requirements.

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30. MODEL RULES OF PRO. CONDUCT r. 3.8(d) (AM. BAR ASS'N 2020) (emphasis added); *see* CPR POL'Y IMPLEMENTATION COMM., AM. BAR ASS'N, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR (Nov. 2021) (including state variations of ABA Rule 3.8).

31. ABA Comm. on Ethics & Pro. Resp., Formal Op. 09-454, at 6 (2009). The ABA's opinion explains that prosecutors must disclose exculpatory evidence "early enough so that the information can be used effectively" by defense counsel. *Id.* Given that the defense counsel can get more use out of favorable evidence the sooner it is received, the ABA recommends that prosecutors should disclose "as soon as reasonably practical" upon a prosecutor's actual knowledge of exculpatory information. *Id.*

32. *Publications: Model Rules of Professional Conduct*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/ (last visited Oct. 5, 2022) ("ABA Formal Opinions are not binding authority in any jurisdiction without adoption in such a jurisdiction. They are persuasive authority and express policy of the American Bar Association.").

33. The following states have worded their Rule 3.8(d) variations the exact same as the ABA: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia, Wisconsin, Wyoming. CPR POL'Y IMPLEMENTATION COMM., *supra* note 30. The following states worded their Rule 3.8(d) variations with slight differences, but each requires the timely disclosure to the defense of all evidence known: Alabama, California, Georgia, Louisiana, Maine, Michigan, New Jersey, New York, North Carolina, North Dakota, Ohio, South Dakota, Utah, Washington. *Id.*

34. *See* Larsen v. Utah State Bar (*In re* Larsen), 379 P.3d 1209, 1215 (Utah 2016) (requiring disclosure before a defendant decides on a plea offer).

35. *See In re* Petition to Stay the Effectiveness of Formal Ethics Op. 2017-F-163, 582 S.W.3d 200, 209 (Tenn. 2019) (refusing to require a higher ethical obligation for prosecutorial disclosure than what the Constitution requires to avoid conflict).

Required Before Defendant Decides on Plea Offer	Not Required Before Defendant Decides on Plea Offer	Requirements Not Clearly Addressed	
Colorado[36]	Ohio[44]	Alabama	Michigan
Delaware[37]	Pennsylvania[45]	Alaska	Minnesota
Nevada[38]	Tennessee[46]	Arizona	Mississippi
New York[39]		Arkansas[47]	Missouri
South Carolina[40]		California	Montana
Texas[41]		Connecticut	Nebraska
Utah[42]		Florida	New Hampshire
Virginia[43]		Georgia	New Jersey
		Hawaii	New Mexico
		Idaho	North Carolina
		Illinois	North Dakota
		Indiana	Oklahoma
		Iowa	Oregon
		Kansas	Rhode Island[48]
		Kentucky	South Dakota
		Louisiana	Vermont
		Maine	Washington
		Maryland	West Virginia
		Massachusetts	Wisconsin
			Wyoming

TABLE 1. *State Survey of Legal Ethics Duty to "Timely Disclose" Evidence*

36. Colorado prosecutors must disclose exculpatory evidence before a preliminary hearing if it is practicable and feasible to do so. *See In re* Att'y C, 47 P.3d 1167, 1172 (Colo. 2002).

37. *See* State v. Coverdale, 2017 WL 1405815, at *29 (Del. Super. Ct.) (explaining that Delaware courts may rescind plea agreements if a "prosecutor's misbehavior preceding the entry of the plea was grave and the integrity of the plea bargaining process was impacted").

38. Nevada prosecutors must disclose exculpatory evidence in accord with ABA standards. *See* United States v. Acosta, 357 F. Supp. 2d 1228, 1232–35 (D. Nev. 2005).

39. The New York City Bar Association extends its rule to all information that may assist in plea negotiations. N.Y.C. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2016-3 (2016).

40. South Carolina recognizes that the professional conduct rules apply prior to a defendant pleading guilty. *See In re* Grant, 541 S.E.2d 540, 540 (S.C. 2001).

41. Texas applies its rule before pleas are made. *See* Schultz v. Comm'n for Lawyer Discipline of the State Bar of Texas, No. 55649, 2015 WL 9855916, at *8, *12 (Tex. Bd. Disp. App. Dec. 17, 2015).

42. Utah ethics rules require prosecutors to make disclosures as soon as practicable, even before a defendant's decision to plea. *See* Larsen v. Utah State Bar (*In re* Larsen), 379 P.3d 1209, 1215 (Utah 2016).

43. The Virginia Legal Ethics Committee stated that the timely disclosure of exculpatory evidence, as required by its variation of 3.8(d), is broader than the disclosure mandated by *Brady*. Va. Legal Ethics Comm., Legal Ethics Op. 1862 (2012) (citing Brady v. Maryland, 373 U.S. 83 (1963)).

44. *See* Disciplinary Counsel v. Kellogg-Martin, 923 N.E.2d 125, 131 (Ohio 2010) (discussing that Ohio prosecutors are "not required to disclose impeachment evidence" before defendants plead guilty or enter guilty pleas if they never go to trial).

45. *See* Commonwealth v. Friedenberger, No. 1054 WDA 2013, 2014 WL 10920398, at *4 (Pa. Super. Ct. 2014) (holding that "no case or rule exists in Pennsylvania mandating a prosecutor to disclose" evidence before a plea bargain).

46. Tennessee has declined to apply "timely" in its ethics rules to plea bargains because *Brady* does not apply to plea bargains in Tennessee. *See In re* Petition to Stay the Effectiveness of Ethics Op. 2017-F-163, 582 S.W.3d 200, 209 (Tenn. 2019).

47. There may be reason to believe that the Arkansas rule extends to plea bargains. *See* Cook v. State, 68 S.W.3d 308, 315 (Ark. Ct. App. 2002) (Griffen, J., concurring) (requiring Arkansas to

As demonstrated by Rule 3.8(d)'s interpretations in Table 1, eight states require prosecutors to disclose evidence before plea-bargain negotiations conclude, three states limit disclosure obligations to trial discovery requirements, and thirty-nine states have not clearly addressed the question.

Some states do not require disclosure in plea-bargain negotiations that take place before trial discovery. This allows defendants to enter plea bargains with the prosecution's evidence remaining undisclosed.[49] But survey results from prosecutors indicate that what actually happens in practice goes beyond the rule as written. Part III explores when prosecutors actually disclose information from the viewpoints of both prosecutors and defense attorneys around the country.

III. ETHICS DISCLOSURE RULES IN ACTION

While ethics rules on the books trend towards limited pretrial disclosure obligations, the rules as practiced are in dispute. There is not a common understanding on whether prosecutors disclose information before the accused accepts or denies a plea offer. In forty interviews with attorneys in nineteen states around the country,[50] prosecutors and defenders disagreed about when prosecutors disclose evidence and whether a disclosure problem exists.

Survey results indicate that prosecutors abide by "golden" ethics standards—trained to turn over evidence immediately under a policy of "disclose, disclose, disclose" for various reasons, including avoiding discipline.[51] But defense attorneys indicate that there are not clear discovery rules in pretrial plea negotiations and that states should discipline prosecutors if they do not disclose evidence before negotiations conclude.[52] This Part explores what happens outside of state ethics rules' minimum prosecutorial standards.

"disclose its evidence to the defendant in time for the defendant to make beneficial use of the information.").

48. Rhode Island courts have not clearly stated whether ethical rules apply pretrial. *But see* State v. DiPrete, 710 A.2d 1266, 1283 (R.I. 1998) (Bourcier, J., dissenting) (reasoning that by failing to provide evidence before trial, a prosecutor "utterly failed to abide by [Rule 3.8(d)] of professional conduct").

49. *See Friedenberger*, 2014 WL 10920398, at *4. For example, Pennsylvania limits disclosure to trials because lower courts are "without authority to promulgate procedural rules." *Id.*

50. *See supra* note 13.

51. *See, e.g.*, Telephone Interview with Tex. Prosecutor (Jan. 28, 2021) [hereinafter Tex. Prosecutor] ("Even if at an [in]opportune moment, prosecutors disclose evidence to defense counsel and their judges, and they do this as loud as they can so as to avoid nightmare situations.").

52. *See* Mich. App. Def. Att'y 1, *supra* note 15 ("There are not clear or commanding rules that require the DA to give us things that can help or even hurt our clients before they enter into a deal. Meanwhile, because clients don't want to wait for trial, we try our best to inform them on the best decision given the limited evidence we know.").

A. The Golden Standard of "Disclose, Disclose, Disclose"

State ethics rules on disclosure are an afterthought for most prosecutors[53] partly because prosecutors already follow local and federal policies that include comprehensive disclosure requirements.[54] Prosecutors claim to disclose evidence long before discovery laws require them to do so[55] to comply with office policies and because nondisclosure is "not worth the trouble."[56] As one prosecutor explained, "To have less sleepless nights, senior staff train new, young prosecutors to turn all their evidence over. If the prosecutors lose, they lose. To withhold evidence is more of an aggravation that prosecutors don't need to deal with."[57] Like a game of "hot potato," if prosecutors obtain exculpatory or inculpatory evidence, they are trained to hand the files over to defense counsel immediately in most cases.[58] Transparency is the goal in various prosecutor offices around the

53. *See* Telephone Interview with Mass. Assistant Dist. Att'y (Apr. 1, 2021) [hereinafter Mass. Assistant Dist. Att'y] ("We have to review and sign that we understand our ethics obligations every year in this office. But that policy is pretty specific to this office. I didn't have it in the other two I worked in. But there is just an assumption that we are following Massachusetts's ethics laws by disclosing all evidence. Everything we know, defense counsel knows."); Telephone Interview with former Fla. state prosecutor and current Fla. Assistant U.S. Att'y 1 (Feb. 16, 2021) [hereinafter Fla. Assistant U.S. Att'y 1] ("We don't really talk about ethics. But we do talk about discovery rules under the criminal procedure rules and the constitutional *Brady* standards."); Telephone Interview with former N.J. Assistant U.S. Att'y (Jan. 28, 2021) [hereinafter N.J. Assistant U.S. Att'y] ("Training is much less focused on ethics. We mainly focus on *Brady* and *Giglio* constitutional obligations.") (citing Giglio v. United States, 405 U.S. 150 (1972)); Tex. Prosecutor, *supra* note 51 ("There are multiple trainings on discovery, but this training really focuses on disclosure in the context of *Brady* and *Giglio*.").

54. *See* Fla. Assistant U.S. Att'y 1, *supra* note 53 ("Prosecutors are trained to send out evidence that may be favorable to the accused. No thought about it. Favorable, exonerating, exculpatory evidence that makes the defendant happy—it goes to defense counsel."); Telephone Interview with Brian Sinnett, Dist. Att'y, Adams Cnty., Pa. (Feb. 19, 2021) [hereinafter DA Brian Sinnett] ("I'm not aware of an ethics rule that requires us to do something more than our office policies."); Telephone Interview with Tenn. Assistant Dist. Att'y (Feb. 22, 2021) [hereinafter Tenn. Assistant Dist. Att'y] ("Our office policy supplements our constitutional and ethics obligations. We created this to virtually ensure we do not get into trouble."); Telephone Interview with Conn. Assistant U.S. Att'y (Feb. 4, 2021) [hereinafter Conn. Assistant U.S. Att'y] ("Federal prosecutors do not really keep the Connecticut ethics rules in mind. In fact, there are a lot of federal prosecutors that are not admitted to Connecticut and think there is no point in looking to local rules. Federal prosecutors really just follow their own guidance under DOJ standards, which should be the same, if not more than other requirements.").

55. *See, e.g.*, Telephone Interview with Nev. Chief Deputy Dist. Att'y (Feb. 20, 2021) [hereinafter Nev. Chief Deputy Dist. Att'y] ("Disclosure statutes in place under Nevada only require disclosure for minimal things that are outlined in the statutes. But our prosecutors do more. We go above and beyond and disclose before statutes require us to because we do not want public defenders to later come back and say we did not turn over XYZ.").

56. Fla. Assistant U.S. Att'y 1, *supra* note 53 ("The young attorneys don't know when to turn things over. It is not worth any problems.").

57. *Id.*

58. Mich. Chief Assistant Prosecutor, *supra* note 15 ("First, we are trained to document everything. Second, we make sure defense counsel knows about the evidence, and this includes non-*Brady* evidence too. I refer the information to law enforcement to investigate. It's like hot potato, gone!").

country,[59] and the high expectations that accompany prosecutors greatly drive this value.[60]

Prosecutors claim to disclose both exculpatory and inculpatory evidence to defense counsel before the accused decide to accept or forgo plea offers.[61] For example, in some prosecutor offices, senior staff train prosecutors "to send out evidence that may be favorable to the accused. No thought about it. Favorable, exonerating, exculpatory, evidence that makes the defendant happy—it goes to defense counsel."[62]

For federal prosecutors, ethics requirements on disclosure are coupled with nationwide guidance and standardized office training.[63] The U.S. Department of Justice requires that prosecutors disclose exculpatory and inculpatory information in "advance of trial."[64] Assistant U.S. Attorneys are trained to immediately turn exculpatory evidence over to the defense at any point after a defendant is charged.[65] But pre-indictment, before a defendant is charged, the prosecutor's duty to disclose information is only

59. Telephone Interview with Ariz. Assistant Att'y Gen. (Mar. 4, 2021) ("We are trained to be as transparent as possible. We disclose everything, and disclose almost anything, just not work product or identities when someone can get hurt."); Mich. Chief Assistant Prosecutor, *supra* note 15 ("We would never have any reason to withhold exculpatory information. We are as transparent as possible.").

60. Telephone Interview with Mo. Assistant U.S. Att'y (Feb. 2, 2021) [hereinafter Mo. Assistant U.S. Att'y] ("One time, foreign prosecutors came to the U.S. and asked us how much defense counsel had to pay or bribe a prosecutor to disclose evidence. This was a big wake-up call. I responded, 'In America, it is our duty to disclose exculpatory evidence for free.' The public entrusts us with a privilege to serve and protect them. That is something we do not take lightly.").

61. N.J. Assistant U.S. Att'y, *supra* note 53 ("We are not really trained specifically to what must be disclosed in plea bargains. That said, we always turn over *Brady* and *Giglio* evidence, and even inculpatory evidence if we think that the defense counsel can make effective use of it."); Telephone Interview with N.Y. Assistant U.S. Att'y (Jan. 28, 2021) [hereinafter N.Y. Assistant U.S. Att'y] ("It's not that often you will find a prosecutor withholds evidence. We are trained to disclose almost everything.").

62. Fla. Assistant U.S. Att'y 1, *supra* note 53.

63. U.S. Dep't of Just., Just. Manual § 9-5.000 (2020); *see* Conn. Assistant U.S. Att'y, *supra* note 54 ("[T]he DOJ 'Justice Manual' goes further than constitutional obligations.").

64. U.S. Dep't of Just., Just. Manual § 9-5.000 (2020) (requiring disclosure in advance of trial but not providing an exact time frame of when that takes place) (citing Weatherford v. Bursey, 429 U.S. 545, 559 (1997); United States v. Farley, 2 F.3d 645, 654 (6th Cir. 1993)).

65. Conn. Assistant U.S. Att'y, *supra* note 54 ("[P]ost-indictment, disclosure is front-loaded."); Telephone Interview with Ind. Assistant U.S. Att'y (Feb. 4, 2021) [hereinafter Ind. Assistant U.S. Att'y] ("It is only at post-indictment where prosecutors disclose anything. This is federal practice."); Telephone Interview with Md. Assistant U.S. Att'y (Feb. 2, 2021) [hereinafter Md. Assistant U.S. Att'y] ("If plea negotiations take place post-indictment, . . . discovery obligations kick in. If plea negotiations take place preindictment, there are no discovery obligations. Here, prosecutors do not have to turn over anything.").

voluntary.[66] Nonetheless, federal prosecutors assure that they will not pursue a case unless they have strong evidence that proves guilt.[67]

Additionally, federal prosecutors refuse to hold onto evidence until they have to disclose it for trial.[68] Instead, they disclose non-privileged information that is material to the case.[69] Federal prosecutors also have ethics offices to advise them on potential disclosure issues.[70] Most of the time, the prosecution files "evidence ex parte with the court, and the judge makes an ad hoc decision [on] whether" the prosecution should disclose the evidence to defense counsel.[71]

While state prosecutors may not have standardized policies and training in place like at the federal level, they still disclose evidence under a similar timeline.[72] Even though plea bargains occur as early as before a preliminary hearing, many district attorney offices have policies that require prosecutors to provide as much information up front, unless there are other justifications to withhold evidence.[73] Some district attorney offices have systems in place to hold prosecutors accountable and protect them from wrongful withholding claims. One district attorney explained that "managerial staff require all prosecutors in the office to document the evidence, disclose the evidence to defense counsel, and document that they disclosed the evidence."[74]

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66. Telephone Interview with Cal. Assistant U.S. Att'y 1 (Feb. 5, 2021) [hereinafter Cal. Assistant U.S. Att'y 1] ("Sometimes prosecutors disclose some information so that there can be a negotiation, but there are no discovery or disclosure obligations for even exculpatory information. It really becomes an ethical question whether to charge at this point."); Telephone Interview with Cal. Assistant U.S. Att'y 2 (Feb. 13, 2021) [hereinafter Cal. Assistant U.S. Att'y 2] ("Preindictment, there is no discovery because the investigation is still ongoing. We cannot confirm or deny the existence of an investigation, let alone the evidence.").

67. Cal. Assistant U.S. Att'y 1, *supra* note 66 ("AUSAs will not really pursue cases where a person appears innocent. We often have very damning evidence. DAs even make fun of me. DAs say, 'Oh, what, no videotaped confession? I guess you will let the guy go!'").

68. Telephone Interview with Pa. Assistant U.S. Att'y (Feb. 26, 2021) [hereinafter Pa. Assistant U.S. Att'y] ("Because prosecutors have to disclose exculpatory evidence at some point, it is really a matter of playing a game of chicken with yourself. If I fail to make a deal, I have to turn it over, and may lose the case in the end anyways."); Md. Assistant U.S. Att'y, *supra* note 65 ("It is possible a prosecutor can get the defendant to plead guilty once, but what if in the next case the negotiations go postconviction? The defense will figure out then if the discovery goes through with exculpatory evidence. Then the prosecutor's credibility is hurt, and defense counsel will hold a grudge.").

69. Pa. Assistant U.S. Att'y, *supra* note 68 ("Even with additional DOJ guidance, there is a lack of clarity on whether we need to disclose *Brady* information while we negotiate a plea bargain. But we still are told to disclose any material and nonprivileged information.").

70. N.J. Assistant U.S. Att'y, *supra* note 53 ("The first rule on ethics is: Don't act on your own. Federal prosecutors are trained to communicate with a direct supervisor or ethics advisor.").

71. Mo. Assistant U.S. Att'y, *supra* note 60. Prosecutors typically let the court know what information they do not want to disclose to avoid any later misconduct allegations. *Id.*

72. Telephone Interview with Or. Deputy Dist. Att'y (Feb. 16, 2021) [hereinafter Or. Deputy Dist. Att'y] ("Evidence really is floating in a cloud until arraignment, but in Oregon, the defendants cannot plead guilty until then anyways. Police reports, digital records, and all discovery packets are shared with both parties. What we have, they have, at least in my county.").

73. Telephone Interview with John Adams, Dist. Att'y, Berks Cnty., Pa. (Feb. 16, 2021) [hereinafter DA John Adams]. Other reasons may include protecting the identity of a witness or safeguarding information with the court's approval.

74. DA Brian Sinnett, *supra* note 54 ("This applies to all of our evidence.").

Even in offices that do not have formal office policies on disclosure,[75] assistant district attorneys tend to disclose all material evidence, and defense counsel and judges commonly remind prosecutors of their obligations.[76] As one prosecutor described:

> The prosecution faces pressure from all sides. Even if a prosecutor does not have a specific office policy, prosecutors do not want a disclosure problem to arise and have their judges request that the prosecution disclose the evidence. It gives the prosecution a bad look. And even if someone is a brand-new prosecutor, the defense counsel also asks for all evidence.[77]

Some prosecutors recognize that disclosure standards were not always so "defendant-friendly."[78] But things have changed over time.[79] This has been partly attributed to newly elected district attorneys with innovative office policies.[80] Prosecutors claim that new laws and office policies in various states require almost immediate disclosure, with defendants informed of the evidence for and against them.[81] With this as the trend, district attorney candidates campaign on their ability to right evidentiary wrongs and to be transparent with case-related information.[82]

There are other reasons why state and federal prosecutors disclose evidence before defendants decide whether to accept a plea bargain. First, prosecutors do not want the failure to disclose exculpatory evidence to result in a dismissal of the case.[83] Likewise, prosecutors state they do not

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75. Mass. Assistant Dist. Att'y, *supra* note 53 ("We operate under an open file type system, but there is not a formal training on disclosing all the evidence . . . at least in the three Massachusetts DA offices I worked in.").

76. *Id.*

77. *Id.*

78. Cal. Assistant U.S. Att'y 1, *supra* note 66 ("The California Bar has fought really hard to make the process defendant-friendly.").

79. Nev. Chief Deputy Dist. Att'y, *supra* note 55 ("Prosecutors in Las Vegas are trained to disclose all evidence. A lot of public defenders might be under the impression that we are still an old cowboy or farmer community, and still operate with the same mistakes that we once did. But that is not the case.").

80. DA John Adams, *supra* note 73 ("Before I was the DA, there were significant problems. The former DA did not provide witness reports, and this led to false convictions. I would never permit my staff to withhold exculpatory information."); Telephone Interview with Alan Tauber, First Assistant, Phila. Def. Ass'n (Mar. 15, 2021) [hereinafter First Assistant Alan Tauber] ("It was not unusual to find out that *Brady* evidence was withheld in the 80s through the early 2000s. The prosecutor siege mentality was to defend law enforcement and win at all costs. It was only in 2017 when Larry Krazner became the DA that things changed. This is an example of the power of the DA impacting justice. The politics really matters.").

81. Telephone Interview with N.Y. Assistant Dist. Att'y (Mar. 4, 2021) [hereinafter N.Y. Assistant Dist. Att'y] ("We disclose both exculpatory and inculpatory information before any plea bargains are decided, even nonmaterial things that hurt our witnesses.").

82. First Assistant Alan Tauber, *supra* note 80 ("District Attorney Larry Krazner campaigned on both reversing false convictions and promoting transparency with opposing counsel. He has kept his word. The Philadelphia Conviction Integrity Unit is legitimate and aggressive. The culture now leans towards transparency, as opposed to deception. Prosecutors will disclose evidence, even if not material, like bad character evidence about a police officer on the case.").

83. Cal. Assistant U.S. Att'y 1, *supra* note 66 ("When prosecutors don't disclose inculpatory information, the defense can make a motion to suppress some evidence at trial or the case is dismissed with prejudice so the prosecution cannot file again.").

withhold inculpatory evidence because they do not want courts to exclude evidence or dismiss a case if a matter proceeds to trial.[84]

Second, prosecutors seek to avoid misconduct allegations that they did not disclose evidence.[85] "Federal prosecutors have their own Professional Responsibility Department, which can reprimand and withhold salaries for ethical violations."[86] In rare situations for both state and federal prosecutors, a judge or state bar association can sanction prosecutors and revoke their licenses.[87]

Third, because prosecutors regularly appear in front of the same judges and defense attorneys, they want to avoid any reputational harm that may hinder their career.[88] Some regions or counties are small and assistant district attorneys do not want word to spread in the legal community that they were once unethical.[89] Tarnished reputations stick with prosecutors throughout their careers, whether they stay in a district attorney's office or leave to work elsewhere.[90]

Lastly, prosecutors understand that their job is to seek justice, not convictions.[91] Prosecutors recognize that accused individuals' liberties are

84. N.Y. Assistant Dist. Att'y, *supra* note 81 ("If something inculpatory is never turned over, and the prosecutor knows about it, the court may suppress the evidence, or the case may be dismissed entirely if the defendant is prejudiced. This is not just about us losing a case. The families of a murder victim may never get redress. So, we disclose in the interests of everyone.").

85. *See, e.g.*, N.Y. Assistant U.S. Att'y, *supra* note 61 ("In all situations, turn it over. We always remember that the law license is on the line. It is a sliding scale, but if it is close, we don't risk it.").

86. Federal offices have their own ethics office that advises prosecutors on how to approach or avoid ethical dilemmas. Telephone Interview with Fla. Assistant U.S. Att'y 2 (Jan. 28, 2021) [hereinafter Fla. Assistant U.S. Att'y 2].

87. Md. Assistant U.S. Att'y, *supra* note 65 ("Other repercussions include law license revocation, and it could be a crime altogether."). *But see* Telephone Interview with former Pa. Assistant U.S. Att'y (Feb. 4, 2021) [hereinafter Former Pa. Assistant U.S. Att'y] ("Let me tell you, it is so unlikely that a prosecutor will lose their license for something like this. First of all, it is extremely hard to permanently lose a law license in Pennsylvania. A prosecutor is never truly disbarred, even if one forges someone else's name for inducing a plea bargain, the prosecutor can later be a lawyer once they ask for their license back.").

88. *See, e.g.*, Tex. Prosecutor, *supra* note 51 ("Prosecutors don't make any additional money for taking down the bad guy. What stops them from withholding is the fact that they need to protect their career. Risking your relationship with the judge, defense counsel, and the public; it would be unwise to take that kind of shot to your career."); Md. Assistant U.S. Att'y, *supra* note 65 ("Really, some of it comes down to defense counsel making you look bad. Most of the time when they ask for evidence, it is not exculpatory. But we still disclose it. There are other times where prosecutors make inadvertent or unknowing mistakes. In all, prosecutors just disclose information to avoid a blow to their reputation. We want to avoid being the bad prosecutor in the newspaper."). Despite these claims, depending on context, cases may arise where prosecutors have greater reputation-based incentives to withhold exculpatory or inculpatory evidence. This is especially true in the criminal context, where many competing factors influence how a case proceeds, political or otherwise.

89. *See, e.g.*, Mass. Assistant Dist. Att'y, *supra* note 53 ("We appear in front of the same judges over and over again. I work in a small region and people talk. If one word gets out that you were unethical, you're done.").

90. *Id.* ("The bad reputation stays with you too. Whether you stay in the DA's office or go to private practice, that's it, done.").

91. *See, e.g.*, *id.* ("We are too busy to focus on conviction numbers. We want to keep criminals off the street and the public safe. The reality is that a lot of these criminals are repeat offenders. You will get them the next time if you don't have the evidence."); Mich. Chief Assistant Prosecutor, *supra* note 15 ("We are held to a higher standard than everyone in the legal profession. We have a duty to

at stake and disclose evidence to promote a fair playing field with defense attorneys.[92] The heightened ethical standards that prosecutors hold themselves to is aptly summed up by one prosecutor:

> As prosecutors, we are bound by our state ethics laws. Not to sound too corny, but we are administers of justice. Given the nature of our role, the public holds us above and beyond the standards of other lawyers. There is no wiggle room. We have no client. We serve justice on behalf of the people of the state, and that requires that we do more in terms of disclosure. If we have some evidence that makes us say, "Oh crap, there goes all that work," we turn it over. At the end of the day, we do not try to get convictions. We try to perform a public service.[93]

Many state laws and systems are now in place to accomplish early, pre-bargain disclosure. For example, some states have open-file requirements like in some counties in Florida[94] and Oregon,[95] or allow defenders to interview the prosecution's witnesses before trial takes place like in New Mexico.[96] Some district attorney offices even train their staff not to accept anything from the police or an investigation unless the police sign a form that acknowledges that the police turned over all evidence.[97] Thanks to enhanced technology, states have implemented e-discovery systems that allow defense counsel to access evidence with fewer things misplaced or forgotten.[98] Moreover, states have reformed their criminal procedure requirements to promote transparency. For example, New York recently enhanced its disclosure obligations to accord with its state ethics

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Michigan, and we respect the rights of any particular defendant. After all, we hold people's liberties, and this keeps us up at night."); Conn. Assistant U.S. Att'y, *supra* note 54 ("When prosecutors stumble across evidence later, they notify the court, and either explain why the evidence was not material and should not have bearing on the case, or explain why the information is just coming about now. Either way, prosecutors do not want the court to feel like they are trying to hide the ball.").

92. Mo. Assistant U.S. Att'y, *supra* note 60 ("Prosecutors don't want to be in the position where defense counsel and the court ask them why they didn't disclose information. What can they say at that point? There is *no* justification. Criminal trials are supposed to be on a level playing field.").

93. N.Y. Assistant Dist. Att'y, *supra* note 81.

94. Fla. Assistant U.S. Att'y 1, *supra* note 53 ("Florida is unique. In our county, we have an open-file discovery system. That means if we have it, defense counsel can get it.").

95. Or. Deputy Dist. Att'y, *supra* note 72 ("Oregon is open file for the most part . . . .").

96. Telephone Interview with Doug Wilber, Assistant Pub. Def., N.M. (Feb. 11, 2021) ("Unique to New Mexico's rules, is that public defenders have the right to interview all the witnesses prior to trial during the preliminary hearings. This is often when they find what evidence is missing and come across disclosure issues. But in federal courts, no discovery is allowed until right before trial. Meaning, finding the missing evidence through interviewing witnesses is not even an option.").

97. Tenn. Assistant Dist. Att'y, *supra* note 54 ("We require the police to say that everything has been turned over to us before they actually turn it over.").

98. Telephone Interview with Colo. Assistant Dist. Att'y (Mar. 26, 2021) [hereinafter Colo. Assistant Dist. Att'y] ("Systemically, Colorado prosecutors are set up to disclose information. Unlike other big states, we only have twenty-two elected DAs to get in a room, so we can easily decide on disclosure policies. We have funding. We also have less material to train about disclosure because we have an automated case management system. Law enforcement must submit their files to an online system. The prosecution reviews the information, and thereafter, if it is not privileged, the evidence is automatically transferred to the defense. This means less evidence is misplaced or forgotten.").

rules, which require prosecutors to disclose relevant evidence soon after the police place someone accused of a crime in jail.[99]

Whether to avoid misconduct allegations or to comply with a policy or rule, prosecutors claim to follow a golden standard. Although there are inadvertent accidents,[100] prosecutors claim to divulge evidence to the best of their abilities.[101] Defenders see it differently.

B. The Lack of Common Understanding on Disclosure Standards

Defenders claim there is a disclosure problem before defendants accept a plea offer. The defense does not know if prosecutors disclose all information because, in the majority of states, there are "not clear or commanding" obligations that require prosecutors to disclose evidence *before* the accused make decisions on plea bargains.[102] Rules of criminal procedure do not account for pre-bargain disclosure in most states,[103] and prosecutors do not go out of their way to turn over evidence before their deadlines.[104] If rules or courts permit prosecutors to procrastinate, prosecutors

99. N.Y. Assistant Dist. Att'y, *supra* note 81 ("As of January 1, 2020, New York requires prosecutors to disclose all items that are material and relevant to a case within twenty days of incarceration. We are required to turn everything over with a plea offer. This creates more work upfront to get everything from police."); *see* N.Y. CRIM. PROC. LAW § 245.25 (McKinney 2022) (containing the earlier disclosure rules). The discussions that led to New York creating its criminal procedure laws stem from the similar discussions about the interpretations of its state ethics rules. *Compare* Telephone Interview with N.Y. Senior Assistant Pub. Def. (Mar. 23, 2021) [hereinafter N.Y. Senior Assistant Pub. Def.] ("The new laws in New York require[] disclosure of all evidence in the possession of the government. Inculpatory evidence must be turned over too. And prosecutors must hand it all over well in time for plea bargain offers to come in. We now can counsel our clients. This is exactly what public defenders in New York have been asking for since our ethics laws a few years back. Non-disclosure is an injustice."), *with* N.Y. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2016-3 (2016) (extending New York's ethics disclosure rule "to information that could assist the defense 'in other ways, such as plea negotiations.'").

100. *See, e.g.*, Mass. Assistant Dist. Att'y, *supra* note 53 ("An intentional act is a lot different than an inadvertent mistake. I had 800 cases in my first year. If I made any mistakes on disclosure, they were not intentional. Intentional nondisclosures do not happen often. There is some information we don't have access to. A police force may be private, and we can't get the evidence. There may also be third parties or information that we don't know about.").

101. *See* Conn. Assistant U.S. Att'y, *supra* note 54 ("When disclosure accidents happen, most of the time they are *not deliberate*. In a perfect world, prosecutors would disclose evidence."); Former Pa. Assistant U.S. Att'y, *supra* note 87 ("Nowadays, there are common narratives about evil prosecutors who scheme just to get their conviction record on track. This is not completely true. The complete majority of wrongly withheld information accidents are inadvertent.").

102. *See supra* note 15 and accompanying text.

103. Telephone Interview with Colo. Deputy Pub. Def. 1 (Feb. 12, 2021) [hereinafter Colo. Deputy Pub. Def. 1] ("Colorado has a Rule 16 disclosure statute, which requires a continuous obligation to provide discovery. But the requirement is generally within twenty-one days after the first hearing, and frankly, the rule does not have much teeth. There is no timeline and no obligation to disclose evidence before a plea concludes if it takes place far from trial. Because of the lack of accountability, there is no real requirement, or maybe there is under Rule 16, but again, there is no enforcement."). *But see* Colo. Assistant Dist. Att'y, *supra* note 98 ("Colorado has Rule 16 of Criminal Procedure, which sets out clearly what is owed to the defense. We turn things over before the defense accepts our plea offers. And in Colorado, disclosure obligations are really well-defined by case law.").

104. Telephone Interview with Pa. Assistant Pub. Def. (Feb. 12, 2021) [hereinafter Pa. Assistant Pub. Def.] ("If the court makes a deadline to disclose evidence, I never have seen prosecutors hand discovery in before the deadline. Criminal Procedure rules do not really kick in during plea bargains unless the case looks like it's going to trial."). *But see* Telephone Interview with Pa. Assistant Dist. Att'y (Feb. 19, 2021) ("We turn evidence immediately over to defense counsel. A million things happen as we get closer to trial, but evidence is always disclosed. This happens [in] every case.").

may turn over both exculpatory and inculpatory evidence much closer to trial—later than when defenders need the evidence to inform their clients on how to proceed with a plea offer. As one public defender explained:

> Prosecutors hold things back until right before trial. If the evidence is exculpatory, it might be too late to take a plea bargain. Sometimes it is inculpatory material, and this makes our case much less winnable. It's irritating. This is information that we could have looked into to assess its credibility. When you go to trial, you want to have a shot. But later, the court won't reduce our clients' sentences, and even though our clients can still plead guilty, the prosecutors offer much less than before. The prosecutors don't release the information they have, and they also don't push their agents to obtain it in the first place.[105]

If prosecutors do not disclose evidence, defenders claim they cannot inform their clients to accept a plea bargain knowingly and voluntarily.[106] Nonetheless, defense counsel walk into plea agreements not fully confident that their clients get the best deals considering what the parties expect at trial.[107]

Defenders cannot determine whether prosecutors disclose all relevant evidence in plea-bargain negotiations.[108] After a criminal case is pleaded away, most attorneys do not investigate further or reopen a case.[109] But defenders still learn about information after an accepted plea by either the

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105. Telephone Interview with Ariz. Assistant Fed. Pub. Def. (Mar. 5, 2021) [hereinafter Ariz. Assistant Fed. Pub. Def.]. *But see* Ariz. Assistant Att'y Gen., *supra* note 59 ("We don't leave anything open for appeal. If we offer a plea bargain, we disclose the evidence we have. Most of the time, this is before trial, but we can offer pleas after trial starts.").

106. *See* N.Y. Senior Assistant Pub. Def., *supra* note 99 ("You cannot advise a client and the client cannot make an informed decision without exculpatory or inculpatory evidence. You can't knowingly and voluntarily waive your right to trial."); Pa. Assistant Pub. Def., *supra* note 104 ("Sometimes the prosecution makes an offer but I just respond, 'I don't have full evidence. How can I properly inform my client of the risks at trial if I don't know what is going to happen then?'").

107. Colo. Deputy Pub. Def. 2, *supra* note 26 ("The DA's office discloses information so we can base a plea bargain off of what we think would happen later if we didn't take the offer, but there is not 100% confidence that we have everything."); Colo. Deputy Pub. Def. 1, *supra* note 103 ("I have had cases that are defensible, and in return, we get offered a decent deal. In the background, we think: 'Why is it a good deal?' But either way, we agree.").

108. Telephone Interview with Fla. Chief Assistant Pub. Def. (Mar, 26, 2021) ("We don't like taking pleas at the arraignment because we don't know about all the evidence out there, but we get offered these 'one day take it or leave it' deals all the time. If they make a plea offer, we have a duty to convey the plea to the client. But we are not in the position to advise the client, and we do not recommend it. The default is to take the plea. Unknown and withheld information is a general problem with *Brady v. Maryland*. When you are a defense attorney, you don't know what you don't know. But in plea deals, disclosure problems are not brought up a dime a dozen like in trial because we don't know how to bring the issue forward. Prosecutors have an obligation to affirmatively disclose information. Once in a while we will get a leak that information was withheld.").

109. *See, e.g.*, Colo. Deputy Pub. Def. 1, *supra* note 103 ("We may not get any evidence if a plea bargain concludes. The evidence that comes in later may be a police report, an eyewitness statement, bad identification, or a victim recantation. Some prosecutors even close their files out and never even provide what they had. Although, there is one DA that follows the ethics disclosure rule a lot. Sometimes the DA sends an email about discovery, but it is too close to plea, and so, it is not worth a fight."); Assistant Pub. Def. Doug Wilber, *supra* note 96 ("If a disclosure problem were to arise after a plea agreement, I never would have found out about it. In fact, I could never have found out about it. If the plea is over, the case is done.").

prosecutors or happenstance.[110] First, defenders state that some prosecutors disclose information after a bargain that the defense should have had at the outset of plea negotiations.[111] Next, defenders find out about withheld information from a leak within the prosecutor's office or "word on the street."[112] But even after the defense discovers that the prosecution withheld evidence, prosecutors push back, arguing that the evidence was not material and, therefore, they were not obligated to disclose it.[113]

Even if defense counsel discovers exculpatory evidence after their clients accept plea bargains, defenders cannot practically do anything.[114] When defendants accept plea deals, they are locked in: defendants typically do not want to challenge their lenient sentence on the chance they will get higher penalties or worse treatment.[115] Defenders cannot go to a judge because there is no prejudice on the case—the case ended and the defendants waived their discovery rights to trial.[116] Even if their clients did want to appeal, sometimes defenders receive the information too late.[117]

There are few repercussions for prosecutors who withhold evidence.[118] Although defenders recognize sanctions under state codes of ethics,[119] courts do not enforce the rules and impose sanctions unless they are

110. Telephone Interview with Rasheed Alexander, Chief Deputy Pub. Def., Cal. (Mar. 23, 2021) [hereinafter Pub. Def. Rasheed Alexander] ("Unfortunately, if there is *Brady* material, we do not know if it exists after a plea deal. We really depend on the prosecution. But we might do an investigation and stumble across it.").

111. Colo. Deputy Pub. Def. 1, *supra* note 103 ("Frequently after we accept a plea bargain, we get a discovery packet uploaded to our online system three weeks later. I can't tell you how many times I get an email with evidence submitted after the pleas are accepted. But the case is closed; there is nothing I can do.").

112. Telephone Interview with Mich. App. Def. Att'y 2 (Feb. 23, 2021) [hereinafter Mich. App. Def. Att'y 2] ("We don't know what we don't know. Fortunately, we do have a full time investigator on the staff that looks into any discrepancies. Most of the time we rely on word of mouth around the neighborhood to see if there was any withheld evidence, but this is hard to come by."); Telephone Interview with Keri Klein, Pub. Def., Cal. (Mar. 15, 2021) [hereinafter Pub. Def. Keri Klein] ("Unless there is a big or complex case or someone from the prosecution knows about withheld information and tells us, we don't find out. And we can't request what we don't know.").

113. Pub. Def. Keri Klein, *supra* note 112 ("Even if it was malicious, the response we get from the prosecution when we find out about withheld evidence is: 'This is not material *Brady* evidence' or 'I didn't know about it.' Prosecutors get out of trouble all the time. It's pretty hard to prove malicious withholding unless the prosecutors themselves prepare the evidence folder."); Assistant Pub. Def. Doug Wilber, *supra* note 96 ("When defense counsel does find out about evidence, the State always argues that the evidence is not material.").

114. Colo. Deputy Pub. Def. 1, *supra* note 103 ("The client got a good deal, like probation, and so the client does not believe it is worth putting up a fight against the DA. If we bring it to a judge, we are not 'prejudiced' anymore because the case is over.").

115. *See id.*

116. *See id.*

117. Telephone Interview with Mich. Pub. Def. (Mar. 8, 2021) [hereinafter Mich. Pub. Def.] ("You don't know what you don't have until it's too late to appeal.").

118. Former Pa. Assistant U.S. Att'y, *supra* note 87 ("Sure, there is the possibility of losing your license or being subject to public reprimand, but if the system does not catch it, then no one will think about it. The punishment matters less if there is no belief of punishment in the first place.").

119. Pub. Def. Rasheed Alexander, *supra* note 110 ("The judge can choose the repercussion: the attorney can be sanctioned; evidence can be excluded; the judge can instruct under a lay jury instruction; the evidence can be used to get a better resolution."); Assistant Pub. Def. Doug Wilber, *supra* note 96 ("What's funny though, is a defense attorney actually had a disclosure issue in a plea bargain

minimal, like a small fine or public reprimand.[120] Courts prefer to not let matters "get personal," and defenders do not have the incentive to bring ethics claims.[121] Defense attorneys do not request disclosure under ethics rules because the rules do not provide procedural remedies.[122]

Even when a prosecutor knowingly withholds relevant information, "defense attorneys have pause about going for a prosecutor's bar card."[123] As one defense attorney put it:

> As mad and frustrated as defense attorneys may get, I don't know of any public or private defender who would go after a prosecutor's law license. There is fear. Clients are already terrified of the police and are absolutely not interested in rocking the boat. Our clients are not going to get better plea offers; there is no money in it for them; and they might get the police watching them even more closely under a lens. And there is also nothing in it for public defenders. Our reputation is on the line. Defenders don't want to make enemies; the whole DA office may turn against you.[124]

In sum, prosecutors and defenders disagree about what disclosure standards are in place and whether disclosure problems exist. There are cases where prosecutors withhold evidence, and this undisclosed information remains unknown. This leads defenders to warn that the legal profession does not know how significant the nondisclosure problem is.[125]

IV. ETHICS RULES UNDERMINE THE SHADOW OF TRIAL THEORY

The shadow of trial theory fails to account for the dearth of state ethics rules regarding plea bargaining. Indeed, most states do not obligate prosecutors to disclose exculpatory or inculpatory evidence before the accused accepts or denies a plea offer.[126] There are two ways that state codes

here not too long ago. The evidence was definitely exculpatory—the brother of the deceased made a statement that the defendant acted in self-defense. Even so, the detective didn't put it in the report and the court went into a debate about what the rules require. It was clear that not disclosing it immediately was an ethical issue and the court fined the prosecutor $200.").

120. Ariz. Assistant Fed. Pub. Def., *supra* note 105 ("No ethics committees hold prosecutors accountable for withheld information in a plea bargain. That is unheard of. You might get a judge to call their supervisor and say 'I didn't like it, please counsel them,' but that is the extent of the punishment."); Mich. Pub. Def., *supra* note 117 ("Courts might issue a public reprimand, if anything, but almost never impose license sanctions. Defenders don't use these grievances as a way to harass our opposing counsel.").

121. Assistant Pub. Def. Doug Wilber, *supra* note 96 ("It is rare that ethics rules come up at all. The courts even note that there are not many blatant errors. Public defenders just don't utilize them a lot. As a practical matter, it does not work well to frame disclosure under ethics rules. Most judges are very weary of ethical issues and prefer to say, 'Let's not get personal.' Also, most of the time, the political situation for state judges and DAs make them focused on reelection.").

122. *See id.*

123. Pa. Assistant Pub. Def., *supra* note 104.

124. *Id.*

125. Telephone Interview with Cal. Pub. Def. (Mar. 22, 2021) ("There is no real check on disclosure. People should know the truth that evidence may not be disclosed. To what extent the problem is, we don't know.").

126. *See supra* Part II (identifying a trend for states to not apply ethics rules on disclosure before a defendant decides on a plea bargain unless the case is close to trial).

of professional conduct contribute to uninformed pleas and undermine trial outcome assessments.

First, as previously discussed in Part II, there is a trend for states to only require prosecutors to disclose exculpatory evidence upon the eve of trial, not beforehand in plea-bargain negotiations.[127] Defendants cannot anticipate what lies ahead in a trial if prosecutors withhold exculpatory evidence in plea negotiations.

Second, the codes of ethics on prosecutorial disclosure fall short. All states, and even the ABA for that matter, fail to address the ethical duty to disclose evidence that tends to prove guilt.[128] As will be discussed in more detail, the accused face risks in plea negotiations and at trial when prosecutors withhold such evidence.

Drawing from conversations with defenders and prosecutors in various states to fully understand the shortcomings of ethics rules, this Part concludes that plea bargains cannot accurately reflect predicted trial outcomes if the rules do not require prosecutors to disclose material information.

A. Trends for Non-Disclosure of Exculpatory Evidence in Plea Negotiations

New interpretations of state ethics rules on prosecutorial disclosure undermine the shadow of trial theory. For a defendant to predict his success at trial and a defender to bargain down a sentence during plea negotiations, prosecutors should turn over evidence that tends to negate the accused's guilt before plea negotiations conclude.[129] But as states decline to interpret ethics rules to require disclosure before defendants decide on a plea offer, defendants continue to enter pleas uninformed and unaware of what trial outcomes lie ahead.

Such occurrences unravel plea bargaining's foundations. As discussed in Part I, scholars generally justify plea bargains because they settle in the shadow of predicted trial outcomes.[130] The shadow of trial theory presumes that prosecutors and defendants can reach an agreement based

127. *See supra* Part II.

128. There is no obligation of disclosing information that tends to prove guilt of the accused under ABA Model Rule 3.8, which includes all special ethical responsibilities of a prosecutor. The only requirement on disclosing evidence is Rule 3.8(d), which requires disclosure of "all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense." *See* MODEL RULES OF PRO. CONDUCT r. 3.8(d) (AM. BAR ASS'N 2020). State variations have not gone further by requiring the disclosure of inculpatory evidence.

129. *See id.* (requiring prosecutors to timely disclose evidence "that tends to negate the guilt of the accused. . . .").

130. *See, e.g.*, *Designing*, *supra* note 2, at 1060; *Shadow*, *supra* note 2, at 2466 ("By and large, though, scholars view the shadow of trial as the overwhelming determinant of plea bargaining. Implicitly, they treat other factors as minor refinements to a basically sound model."); Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 28 (1987) ("[S]ettlements reflect the parties' wealth or some variable other than the anticipated outcome of trial.").

on a forecast of what a trial might hold.[131] But predictions can only go as far as what is known.

Shadow of trial proponents mostly assume that parties will consider "all the evidence that will come in at trial, and then some."[132] Prosecutors, who come from a wealth of experience, know what evidence is most likely to separate guilt from innocence when they offer a bargain.[133] While supporters expect that knowledge to spur "adroit decision-making,"[134] these assumptions are inaccurate if prosecutors fail to disclose information.

Evidence creates a basis for estimates of trial, and "[l]awyers with the best evidence of innocence secure the dismissal of charges (or attractive pleas) . . . ."[135] With this in mind, shadow of trial proponents improperly assume such evidence was disclosed. The theory does not consider that defense counsel has unequal access to evidence, nor does it consider that the prosecution may withhold information because of the lack of disclosure obligations. Defense counsel, like tarot fortune tellers, cannot predict their clients' futures if they cannot see all the cards on the table.

This is not to say that prosecutors always withhold evidence.[136] But because public defenders disagree with prosecutors on what current standards are in place,[137] states should create ethical standards to help prosecutors and defenders see eye to eye. There is little deterrence value if all that stands in the way of unethical nondisclosure is informal prosecutor-office training.

With defenders' perception of disclosure in mind, there remain substantial discovery problems in plea bargains if prosecutors withhold information that tends to negate guilt. At the outset, the accused may receive a higher criminal sentence because the defendant accepted a plea bargain without the prosecution's exculpatory evidence factored into plea

131. *Shadow*, *supra* note 2, at 2465 ("[Academics and other proponents] endorse plea bargaining because they presume that bargains largely reflect the substantive outcomes that would have occurred at trial anyway, minus some fixed discount.").

132. *Compromise*, *supra* note 2, at 1971 ("The persons doing the considering are knowledgeable; prosecutors are more likely than jurors to discount eyewitness accounts, and prosecutors know from experience which details are most likely to separate guilt from innocence. The full panoply of information plus sophisticated actors are the standard ingredients of adroit decisionmaking.").

133. *Id.*

134. *See id.*

135. *Id.* at 1972 ("Prosecutors shop for pleas (or cases to drop), winnowing the portfolio for trial.").

136. *See supra* Part III. Some district attorneys go so far as to say that they would have to "fire" their staff if they unethically withheld any information that the defense would need. *See* DA John Adams, *supra* note 73. The policy of some state prosecutors includes documenting evidence, disclosing evidence, and then documenting that they disclosed the evidence. DA Brian Sinnett, *supra* note 54.

137. Assistant Pub. Def. Doug Wilber, *supra* note 96 ("It is not clear what prosecutors have to disclose in plea bargains. There are mandatory disclosure rules by the state and the generic rule is that any material favorable to the defendants must be disclosed as compliant under the Due Process Clause. Sure, *Brady* applies prior to trial but that is not necessarily during plea bargains."); Pa. Assistant Pub. Def., *supra* note 104 ("We have accepted the situation that there is no disclosure for the most part.").

negotiations.[138] Had the defendant known of the evidence, they could have bargained for a reduced sentence, or if the evidence was highly probative of innocence, they could have dropped the sentence completely. Further, the exculpatory evidence will remain hidden when a defendant pleads guilty. With such evidence essentially lost, the legal profession cannot know the extent of disclosure problems in plea bargains.[139] The next examples highlight these issues.

Suppose a witness picked out the accused, Andrew, in a lineup for a gas station robbery. Andrew did not commit the robbery, but because the prosecution shows Andrew inculpatory evidence and offers a bargain of a lenient misdemeanor sentence, he accepts the plea deal. Little did Andrew know, the prosecution had video evidence of the gas station doors that identified that the height of the actual robber was five feet, nine inches. Andrew, who stands a little over six feet, could have used this evidence to prove misidentification. Instead, he accepted a deal uninformed of the proper evidence against him. Not only did Andrew bargain for a higher sentence than he should have received, but quite possibly, he could have got off altogether.[140]

While evidence may have the potential to negate guilt, not all evidence has high probative value. Suppose Andrew accepts the plea, and rather than the prior video evidence, the prosecution instead had a witness statement from the cashier that they saw the robber jump into an old, silver Toyota Camry and drive off. Andrew, the registered owner of a new, red SUV may attempt to argue for misidentification. This evidence is unlike the height of the robber in the past example. A variety of other explanations may explain the discrepancy: Andrew could have the Camry as an unregistered vehicle, could have borrowed the car, or could have even stolen the vehicle. Not all evidence is a smoking gun. Although the evidence

138. For other information on why actually innocent defendants plead guilty, *see Designing*, *supra* note 2, at 1059–60 ("[T]he recent wave of DNA exonerations has revealed many guilty-plea convictions of defendants who are factually innocent. Though perhaps hard to believe, innocent people sometimes buckle under the overwhelming pressures and incentives to plead guilty."); *Shadow*, *supra* note 2, at 2494 ("[D]efendants who are innocent, mentally ill, or were intoxicated during the crime may have little private information about the state's evidence."); Roger Koppl & Meghan Sacks, *The Criminal Justice System Creates Incentives for False Convictions*, 32 CRIM. JUST. ETHICS 126, 142 (2013) ("Unfortunately, the interrogation, designed as a psychologically coercive and manipulative technique, leads not only the guilty to confess, but also the innocent. The existence of false confessions due to psychologically coercive police interrogations is well documented.").

139. *See, e.g.*, Mich. App. Def. Att'y 2, *supra* note 112 ("It is really difficult to find *Brady* violations after a plea bargain ends a matter.").

140. For a real example of prosecutors withholding evidence during plea negotiations, see *The Innocence Files: The Prosecution: Wrong Place, Wrong Time* (Netflix Apr. 15, 2020) (documenting the prosecution offering a bargain but withholding direct evidence that someone else committed the crime other than Chester Hollman, who was convicted of robbery and second degree homicide); *see also* First Assistant Alan Tauber, *supra* note 80 ("In investigating the exoneration case, we looked into Chester's files. One of the first file[s] I pulled out was a memo by a police officer. The night of the murder, the police apparently got an anonymous tip with a lot of identifying detail that did not match Chester. But all this evidence was buried. The investigator and I texted it and emailed it immediately to three people who we trusted. This was the smoking gun and I was not going to lose it.").

would be of marginal value, defense counsel still could have further investigated, and Andrew may have obtained a more lenient sentence.

The probative value of evidence may differentiate the bargain's impact, but as demonstrated in both examples, there remain two problems of equal degree. First, withheld information skews the negotiation process. This proposition directly challenges the shadow of trial theory proponents who presuppose that the plea-bargaining system possesses a similar ability to distinguish guilt from innocence.[141]

Plea-bargain discovery is not comprehensive. Currently, other obligations do not explicitly require disclosure during the plea-bargain stage. Criminal discovery is minimal and frequently waived by defendants.[142] For federal prosecutors, they may deny the defense access to witnesses' names or statements until trial.[143] Federal Rule of Criminal Procedure 16 requires the disclosure of only a handful of things upon a defendant's request and this information gets disclosed much closer to trial, even the day before in some cases.[144] Constitutional obligations also do not require disclosure of evidence during plea bargains.[145] Thus, because of the lack of disclosure obligations on the books, plea negotiation is inferior to trial at distinguishing guilt from innocence.[146]

Second, not only are pleas ineffective models for negotiation but accepted pleas also permit the government to hide withheld evidence forever. Current constitutional and procedural obligations limit the duty to disclose exculpatory evidence closer to when a trial begins, which is later than when plea bargains can take place.[147] After defendants enter plea bargains,

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141. *Compromise*, *supra* note 2, at 1970–71 (Judge Frank Easterbrook challenges Robert Scott and William Stuntz by claiming that they have "identified a problem with plea bargaining only if negotiation is inferior to trial at distinguishing guilt from innocence.").

142. *Designing*, *supra* note 2, at 1064 (noting that there is a lack of discovery before defendants accept plea bargains) (citing BARTON & BIBAS, *supra* note 24, at 17–30); Frank H. Easterbrook, *Plea Bargaining is a Shadow Market*, 51 DUQ. L. REV. 551, 555 (2013) [hereinafter *Shadow Market*] ("Disclosure is one of those entitlements that may be waived—and, as *Ruiz* observed, the constitutional entitlement to exculpatory information is a trial right rather than a discovery right.") (citing United States v. Ruiz, 536 U.S. 622 (2002)).

143. Jencks Act, 18 U.S.C. § 3500(a) (allowing prosecutors to withhold government witness statements "until said witness has testified on direct examination in the trial of the case").

144. Pa. Assistant Pub. Def., *supra* note 104 ("It is popular for prosecutors to pass over discovery a night or two before trial, and all the defense counsel can do is hope for the judge to give them a continuance."); *see* FED. R. CRIM. P. 16.

145. United States v. Ruiz, 536 U.S. 622, 629–33 (2002) (rejecting a defendant's constitutional right to impeachment or affirmative-defense evidence before a plea bargain negotiation concludes); *see* Michael Nasser Petegorsky, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 FORDHAM L. REV. 3599, 3602 (2013) (discussing the current circuit split on whether defendants have a constitutional right to receive *Brady* exculpatory evidence before plea bargain negotiations conclude).

146. *Compromise*, *supra* note 2, at 1970–71 (reasoning that the task of determining "the guilty from the innocent is not a flaw in the bargaining process but a flaw of trial," which itself comes "with a variety of rules that exclude probative evidence thought to mislead jurors who may not be perfect Bayesians").

147. Pa. Assistant Pub. Def., *supra* note 104 (stating that the rules on criminal procedure do not apply to plea bargains unless the case is close to trial); *see Designing*, *supra* note 2, at 1064 n.36 (citing Jencks Act, 18 U.S.C. § 3500(a); FED. R. CRIM. P. 16(a); *Ruiz*, 536 U.S. at 629–33) ("The federal approach is typical in denying access to witnesses' names or statements until trial.").

both the prosecution and defense counsel close the case, and the evidence disappears as a matter of pleading.[148] Consequentially, the legal profession will not find out if there is a problem that prosecutors withhold exculpatory information. And if the legal profession cannot accurately identify a problem, it cannot reasonably implement a solution.

This is not to say that defense counsel never finds out about evidence after a plea bargain is accepted.[149] Yet, after a case closes, defenders cannot practically do anything if their clients do not want to rechallenge the prosecution.[150] Disclosure in the criminal justice system then relies on the discretion of prosecutors. At least presently, prosecutors who bargain pleas in most criminal matters can withhold evidence with few repercussions.[151]

The accused cannot make accurate trial forecasts if they do not have evidence that informs them of their possible success at trial. A plea negotiation involves intensified asymmetric information problems—a model much inferior to determining guilt or innocence than trial.[152] What is worse are the unknowns that accompany an accepted plea. Upon pleading guilty, exculpatory evidence is forever lost, with the defendant locked into a higher sentence than they would have received had they known of the evidence withheld by the prosecution.[153]

As will later be discussed in Part V, state ethics rules (which already account for the disclosure of exculpatory evidence) should require disclosure earlier in most criminal matters. Such evidence is essential if the shadow of trial theory remains the dominant justification for over 97% of the criminal justice system.[154] But before this Article discusses a solution, another disclosure issue indicates that other reform is needed in state ethics rules.

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148. Pub. Def. Doug Wilber, *supra* note 96; Colo. Deputy Pub. Def. 1, *supra* note 103.

149. Colo. Deputy Pub. Def. 1, *supra* note 103 ("Sometimes after, we get a discovery packet uploaded to our online system three or so weeks later after the pleas are accepted.").

150. *Id.* ("The client got a good deal, like probation, and so the client does not believe it is worth putting up a fight against the DA. If we bring it to a judge, we are not 'prejudiced' anymore because the case is over.").

151. *See* Mich. Chief Assistant Prosecutor, *supra* note 15 ("It's funny, I do the training, so I know all about disclosure responsibilities. You'd think I'd also know about what happens if prosecutors don't disclose during a plea bargain? But I really don't. I have never seen anything happen in real life. In advocating for their clients, defenders say a lot of things about our handling of the evidence that are accusatory. The only thing that comes to mind are *Brady* violations, which we can lose immunity and the case. But it's been so long since it's happened and that really applies more to trial than before when we offer initial plea deals.").

152. *Shadow*, *supra* note 2, at 2493–96, 2499.

153. Corinna Barrett Lain, *Accuracy Where It Matters:* Brady v. Maryland *in the Plea Bargaining Context*, 80 WASH. U.L.Q. 1, 34–37 (2002).

154. *See supra* note 1.

B. There Is No Ethics Obligation to Disclose Inculpatory Evidence

There is an additional disclosure problem in state ethics rules that undermines plea bargaining's fundamental theory.[155] The obligation to disclose evidence that tends to *prove* guilt is not found in Model Rule 3.8(d) or any state variation. Further, there are no constitutional obligations to disclose inculpatory evidence in plea bargains,[156] and as discussed above, most criminal procedure requirements only require prosecutors to disclose close to trial.[157]

At first, it may seem counterintuitive for someone accused of a crime to *want* to receive inculpatory evidence. And prosecutors are presumed to disclose inculpatory information, as doing so is a "way to induce pleas" or "bring[] the sides together" for the agreement.[158] When it comes to evidence that proves guilt during plea bargaining, it may even be fair to assume "what innocent defendants do not know will not hurt them."[159] But hidden evidence can still cause significant harm in a plea negotiation and later on at trial.[160] To comply with the shadow of trial theory, upon the

155. If plea bargains are supposed to reflect predicted trial outcomes, then inculpatory evidence, in addition to exculpatory evidence, should be available to the defense. *See Designing*, *supra* note 2, at 1070–71 ("Also, police and prosecutors should greatly expand their information sharing with defense lawyers early on, disclosing not only exculpatory material (required by *Brady* and *Giglio*), but also most of the inculpatory material. This change would result in something much closer to an open-file discovery system in advance of plea bargaining, except that there would be safeguards against witness tampering.").

156. *See Ruiz*, 536 U.S. at 630, 633 (discussing the obligation of disclosing material impeachment evidence); *see* Giglio v. United States, 405 U.S. 150, 154–55 (1972) (discussing the obligation of disclosing material evidence that tends to negate guilt); Brady v. Maryland, 373 U.S. 83, 86–87 (1963) (discussing the obligation of disclosing evidence "favorable to an accused").

157. *Designing*, *supra* note 2, at 1064 (citing Jencks Act, 18 U.S.C. § 3500(a); FED. R. CRIM. P. 16(a); *Ruiz*, 536 U.S. at 629–33); Nev. Chief Deputy Dist. Att'y, *supra* note 55 ("There are not requirements to turn over inculpatory evidence outside of criminal procedure for hearings, but we do this anyways. Police statements, among other things, are not per se required to be disclosed. The statute is actually really minimal, and the requirements concerning both inculpatory and exculpatory information really only apply sooner to trial."); Pa. Assistant U.S. Att'y, *supra* note 68 ("There is no obligation to disclose inculpatory information to the defense. That said, when we deal with sharks as opposing defense counsel, we need to button-up a strong case against them. This is not to say that we turn everything over. This depends partly on the defense counsel. If you are dealing with a knucklehead on the other side, then there is no point in handing over information because they likely won't know how to make good use of the information. And for information like interview memos, we keep that to ourselves."); Colo. Deputy Pub. Def. 1, *supra* note 103 ("Not going to lie, Rule 16 violations happen in *every* case I go to trial. Most of the time, the DA is not at fault per se, but is responsible for what the police have. The prosecutors say, 'It's the police's fault for not turning over the evidence.' But the DAs are not on the police trying to get the evidence. Us defenders talk among ourselves about the easy way to fix it: 'Get the DAs on the police.'").

158. *Shadow Market*, *supra* note 142, at 555; *see* Pa. Assistant U.S. Att'y, *supra* note 68 ("When prosecutors bring a case against someone, we tend to add a lot of color into the notice of conviction. We lay out the charges and add as much evidence as we want in there to make our case and incentivize a plea.").

159. Lain, *supra* note 153, at 36 ("Thus, while innocent defendants may overestimate the chance of conviction at trial because they know about inculpatory evidence but not exculpatory or impeaching evidence, their ignorance of inculpatory evidence alone is unlikely to have the same [e]ffect.").

160. *But see id.* ("In sum, when it comes to the strengths in a prosecutor's case (at least during plea bargaining), what innocent defendants do not know will not hurt them.").

actual knowledge of evidence,[161] prosecutors should disclose all evidence—good and bad—so defendants can meaningfully bargain.[162]

With inculpatory information, the accused could better predict the likelihood of conviction at trial. For instance, defendants could know fully the risk of going to trial and accept a plea bargain to avoid litigation. The accused would also have the opportunity to challenge and attempt to explain away the evidence against them rather than enter into a plea bargain with no knowledge of how to respond to the prosecution's charges. Alternatively, the defendants may be confident and proceed to trial if the inculpatory evidence is not highly probative of guilt.

Problems arise when the prosecution withholds inculpatory evidence and defendants deny offers to plead guilty. If there is a lack of evidence against defendants, they may be more likely to take their chances at trial.[163] But if prosecutors did not disclose inculpatory evidence prior to the end of negotiations, the defendants may have unknowingly forgone a favorable bargain for a heightened sentence.[164] The defendants would be susceptible to a prosecutor's late pretrial surprise of evidence that proves guilt. The illustration that follows identifies the consequences of withheld inculpatory evidence through the eyes of both innocent and guilty defendants.

When prosecutors withhold inculpatory evidence in plea-bargain negotiations, defendants may face significant challenges at trial regardless of whether they are actually innocent or guilty. Suppose a victim, Blake, sat on a park bench while a white man who was five feet, nine inches tall with dark hair assaulted him. Blake selected the accused, Andrew, out of a lineup. Andrew did not commit the assault, but the police booked Andrew in jail while he wore a red Gap hoodie. Andrew knew he was innocent and therefore confidently rejected the prosecutor's plea offer. Unbeknownst to

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161. For clarification, there remains the possibility that prosecutors are not aware of evidence that proves a defendant's guilt. Suppose a prosecutor offers a plea bargain that does not include unknown inculpatory evidence in the estimate of conviction. In that case, the nondisclosed information may result in a windfall for a defendant who wants a lenient sentence because the plea bargain would otherwise be less forgiving than if more evidence were to incriminate the accused. But because prosecutorial disclosure in variations of Model Rule 3.8(d) only applies to evidence that a prosecutor is aware of, discussion in this section will focus on inculpatory evidence the prosecutor knows.

162. *See Designing*, *supra* note 2, at 1070 ("[P]olice and prosecutors should greatly expand their information sharing with defense lawyers early on . . . ."); *cf.* David Aaron, Note, *Ethics, Law Enforcement, and Fair Dealing: A Prosecutor's Duty to Disclose Nonevidentiary Information*, 67 FORDHAM L. REV. 3005, 3007 (1999) ("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.").

163. *See* Lain, *supra* note 153, at 35–36 (discussing the implications of an innocent defendant not receiving inculpatory evidence).

164. Defendants who go to trial and lose often receive more substantial, disproportionate sentences than both Congress and the prosecutor might think appropriate for crimes "because the longer sentences exist on the books largely for bargaining purposes." Rachel E. Barkow, *Separation Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006). *See* F. Andrew Hessick III & Reshma Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 201–03 (2002) ("However, even the innocent sometimes pleads guilty because the probability of conviction is great, fearing that if found guilty, he will face a heavier sentence than what he would have received had he entered a plea.").

Andrew, the prosecution had an eyewitness statement that the assailant wore a red Gap hoodie. The prosecutor provided this evidence the day before trial, and the court noted that the defense counsel still had time to make use of it.[165]

In a situation like this, the introduction of evidence probative of guilt forces the defense counsel to adjust their trial strategy. Instead of before, when little circumstantial evidence connected Andrew to the assault, now, his red Gap hoodie ties him to the case by its drawstrings. Not only is this unfair to the defense counsel and defendant at trial, but the consequences of litigation were not fully understood at the time of the plea offer. Andrew could have accepted the plea deal, but he did not because he was unaware of the evidence of his red Gap hoodie. He was unable to predict the shadow of trial. His defense counsel could not investigate the evidence.[166] And as here, even though Andrew was innocent of the crime, the great risk of disproportionate punishment exposes him to a heightened sentence.[167]

Even if Andrew *had* committed the crime, the prosecution still mistreated him by withholding the inculpatory information. If Andrew is culpable, it is proper for his actions to lead to an appropriate punishment or rehabilitation. Yet, because of heightened criminal sentences, Andrew would likely receive a conviction much higher than what he deserves.[168] Had he known about the evidence during the plea bargain, he would have been more likely to accurately predict the outcome of trial.

Inculpatory information, while not always helpful, may harm defendants if withheld by prosecutors during plea negotiations. If bargains are to reflect the outcome of future litigation, a bargain itself must consider the anticipated consequences of a trial. Whether inculpatory or exculpatory, the shadow of trial theory requires prosecutors to disclose evidence so defendants can meaningfully predict trial outcomes.

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165. *See* Pa. Assistant Pub. Def., *supra* note 104 ("Let's say there is a video or something that the prosecution turns over the day of trial. The judge may just ask defense counsel, 'Well, can you watch it right now to prepare?' In all, getting discovery feels like a gift if it ever happens; the reality is that it does not happen too often."); *see also* Colo. Deputy Pub. Def. 1, *supra* note 103 ("When disclosure problems occur, it's complicated. There are very few ways to do anything against the DAs, except by making the judge mad at them. But even that won't change anything. The judge will say that the defense can still make use of the evidence at trial, or may grant a continuance, but nothing happens to the prosecutor professionally."); *see also* N.J. Assistant U.S. Att'y, *supra* note 53 ("Some judges will let anything go. If prosecutors disclose information later right before trial, for instance, and not in pleas, judges are flexible because the defense counsel can still make effective use of it.").

166. Defense counsel cannot practically investigate information prior to trial if they do not receive inculpatory information until a few days before trial. *See* Ariz. Assistant Fed. Pub. Def., *supra* note 105.

167. *See* Lain, *supra* note 153, at 36 (discussing the implications of an innocent defendant not receiving inculpatory evidence); *see also* North Carolina v. Alford, 400 U.S. 25, 37–39 (1970) (condoning the idea of an innocent person pleading guilty).

168. *See* Lain, *supra* note 153, at 23–25.

V. ACCOUNTING FOR PROSECUTORIAL DISCLOSURE IN TRIAL'S SHADOW

Ethics rules on the books diverge from bargaining in the shadow of trial. Some states do not obligate prosecutors to disclose evidence before plea bargaining concludes.[169] The rules as practiced lead to contradictory results because prosecutors and defenders disagree over what disclosure obligations are in place and followed.[170] These rifts signal that a commonly understood disclosure standard is needed—one that immediately helps the prosecution and defense see eye to eye and aligns with the shadow of trial theory. If attorneys are to have a code of ethics, it surely should apply to the 97% of criminal matters that end in plea bargains, not just the 3% that proceed to trial.[171] And if the legal profession is to have a code of ethics system based around plea bargains, the obligations it imposes ought to be consistent with the institution's justifications.[172] Thus, ethics rules should require pre-bargain disclosure in which prosecutors disclose exculpatory and inculpatory evidence before defendants accept or deny plea offers.

The shadow of trial theory maintains that defendants bargain their right to trial away upon the prediction of their likelihood of success or failure at trial.[173] On the books and from defense attorney viewpoints, defendants are ill informed—unable to predict, let alone guess, whether a plea bargain best suits their interests.[174] As discussed in Part IV, defendants cannot evaluate the outcome of trial if they do not know about exculpatory and inculpatory evidence, readily available from but withheld by the prosecution.[175] Ethics rules trend towards no pre-bargain disclosure obligations,[176] while what actually happens in practice may align with the shadow of trial theory. That is, if what prosecutors claim is true.

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169. *See, e.g.*, Disciplinary Couns. v. Kellogg–Martin, 923 N.E.2d 125, 130–31 (Ohio 2010) ("[T]he state is not required to disclose impeachment evidence to a defendant before the defendant pleads guilty."); *see also* Commonwealth v. Friedenberger, No. 1054 WDA 2013, 2014 WL 10920398, at *4 (Pa. Super. Ct. 2014) (discussing that prosecutors in Pennsylvania do not have to disclose evidence before a plea bargain); *see also In re* Petition to Stay the Effectiveness of Formal Ethics Op. 2017-F-163, 582 S.W.3d 200, 209–11 (Tenn. 2019) (outlining Tennessee's decision to not apply "timely" in its ethics rules to plea bargains because *Brady* does not apply to plea bargains in Tennessee).

170. *See supra* note 15 and accompanying text.

171. *See supra* note 1 and accompanying text.

172. *See generally* Covey, *supra* note 3, at 74, 77–79 (discussing the dominant theoretical model of plea bargaining); *see also* Lucian E. Dervan, *The Surprising Lessons from Plea Bargaining in Shadow Terror*, 27 GA. ST. U.L. REV. 239, 251–53 (2011) (providing an overview of the literature behind the shadow of trial theory).

173. *Shadow*, *supra* note 2, at 2465 (discussing how the shadow of trial theory works); Scott & Stuntz, *supra* note 1, at 1948 (formulating the shadow of trial theory).

174. *See* Colo. Deputy Pub. Def. 1, *supra* note 103 ("Even damning evidence is not turned over at plea bargains, which can be really scary if the client ends up going to trial."); *see also* Pa. Assistant Pub. Def., *supra* note 104 ("Prosecutors do not have to turn over evidence until after preliminary hearings. Before that, they don't have to give defense counsel anything. They may let defenders see 'ownership permission forms' for stealing a car or something like that, but most of the time they don't do a thing.").

175. *See supra* Part IV.

176. *See* discussion *supra* Part II.

Ethics rules should match what prosecutors contend is already common practice. Many prosecutors, state and federal, hold themselves to internalized golden standards—those more akin to open-file discovery systems—even during preliminary plea-bargain negotiations.[177] As identified in Part III, prosecutors generally are trained to disclose everything they obtain from law enforcement and other sources to avoid misconduct allegations,[178] protect reputation,[179] and ensure a fair, just process.[180] The ethics rules as practiced then tend to go further than the rules on the books,[181] and the survey's results of pre-bargain disclosure practices align with the shadow of trial theory.[182] Because prosecutors claim to go beyond their obligations and disclose both exculpatory and inculpatory evidence, more

177. *See* Tex. Prosecutor, *supra* note 51 ("When prosecutors come across exculpatory evidence, the rule of thumb taught in training is 'disclose, disclose, disclose!' This training is hammered in early."); *see also* Mo. Assistant U.S. Att'y, *supra* note 60 ("Prosecutors are raised to turn evidence over immediately. When I get it, defense counsel gets it. The evidence gets processed and I give that to the defense counsel. Trust me, it is a heck of a lot easier this way."); *see also* Md. Assistant U.S. Att'y, *supra* note 65 ("Prosecutors gather *a lot* of evidence (search warrants, documents, etc.), and must get every piece logged into discovery and sent to defense counsel."); *see also* Conn. Assistant U.S. Att'y, *supra* note 54 ("The easy answer: Turn the evidence over, and it's not a hard call."); *see also* Ind. Assistant U.S. Att'y, *supra* note 65 ("Even if evidence just casts doubt, like another witness saying contrary information, this is exculpatory [evidence] that prosecutors must hand over."); *see also* Cal. Assistant U.S. Att'y 1, *supra* note 66 ("[A]t any point after a defendant is charged, prosecutors must turn exculpatory evidence over right away if it relates. The California Bar has fought really hard to make the process defendant-friendly. Plus, most prosecutors are better off when they show their cards . . . . [E]ven when evidence is not relevant, the higher-ups may still say to turn it over."); *see also* Or. Deputy Dist. Att'y, *supra* note 72 ("We pretty much have an open-file system. Our police reports and discovery packets are shared with the defense counsel as soon as we get it."); *see also* Tenn. Assistant Dist. Att'y, *supra* note 54 ("We have an open-file discovery system, and then some.").

178. *See, e.g.*, Fla. Assistant U.S. Att'y 2, *supra* note 86 ("If prosecutors don't disclose information and sit on it, that eventually comes back to haunt them because defense counsel will give them hell. It is true that *Brady* does not materialize until trial, but prosecutors still don't withhold the information. There is not the feeling of 'no trial, no harm, no foul.'").

179. *See, e.g.*, Telephone Interview with Ill. Pub. Def. (Feb. 23, 2021) [hereinafter Ill. Pub. Def.] ("It would be outrageously scandalous if prosecutors did not disclose exculpatory information, like evidence of someone else doing the crime."); *see also, e.g.*, Pa. Assistant U.S. Att'y, *supra* note 68 ("What's worse, I'll hurt my credibility. We need people to trust what we are saying, not just think we are posturing and bluffing a case. Do I want to potentially put myself in a bad position with the Bar, opposing counsel, and the court? Probably not. This is a big consideration for prosecutors' decisions to withhold or disclose evidence.").

180. *See, e.g.*, Pa. Assistant U.S. Att'y, *supra* note 68 ("If this is a good case that is worth bringing, prosecutors disclose the evidence and say the evidence, while exculpatory, does not matter in the larger scheme of the case for XYZ reasons. The defense needs to make good use of the information.").

181. *Compare In re* Petition to Stay the Effectiveness of Formal Ethics Op. 2017-F-163, 582 S.W.3d 200, 209 (Tenn. 2019) (declining to extend Tennessee ethics rules on disclosure to plea bargains because *Brady* does not apply to plea bargains), *with* Tenn. Assistant Dist. Att'y, *supra* note 54 ("We disclose everything. Everything, and yeah, that applies during plea bargaining."). *Compare Friedenberger*, No. 1054 WDA 2013, 2014 WL 10920398, at *4 (concluding that there is no precedent or law in Pennsylvania that requires a prosecutor to disclose evidence before a plea bargain concludes), *with* DA John Adams, *supra* note 73 ("Anything we have, we absolutely provide to the defense. Absolutely."), *and* DA Brian Sinnett, *supra* note 54 ("Our [policy is to] document the evidence, disclose the evidence to defense counsel, and document that [we] disclosed the evidence. This applies to all of our evidence.").

182. *See* Scott & Stuntz, *supra* note 1, at 1948–49 (providing a brief explanation of plea bargaining's justifying theory).

defendants can make realistic predictions of what trial may hold for them based on the information available to both parties.[183]

The problem then turns to how the legal profession can communicate the standards in place for prosecutors to disclose evidence to defense counsel through more than just prosecutor office policies. For states to establish clear disclosure standards and to hold all prosecutors to the same standards as those interviewed,[184] ethics rules can represent the disclosure practices that prosecutors claim they already follow.

Prosecutors' common practice should be the standard. Defense counsel and their clients would welcome more transparency and well-informed decisions to proceed to trial or plead guilty. Prosecutors, too, would support the concept because a standard that requires pre-bargain disclosure is already an administrative exercise. And, although it cannot be known if prosecutors stretch the facts about how much evidence they disclose, reform of state ethics rules would make any bluff a reality.

Ethics rules provide a way to clarify disclosure obligations that serve the public's interests.[185] Codes of professional responsibility across the fifty states "are designed to provide guidance to lawyers . . . . "[186] The rules task the profession with the "responsibility to assure that its regulations are conceived in the public's interest and not in furtherance of parochial or self-interested concerns of the bar."[187] The rules further provide the profession's framework for the law's ethical practice and that lawyers must strive "to improve the law and the legal profession . . . ."[188]

The question then arises why ethics rules should lead the charge[189] when codes of ethics do not, by themselves, provide causes of action for

183. *See Shadow*, *supra* note 2, at 2465 ("[T]he classic shadow-of-trial model predicts that the likelihood of conviction at trial and the likely post-trial sentence largely determine plea bargains.").

184. This is not to say that *all* prosecutors have the policy to "disclose, disclose, disclose." *Contra* Tex. Prosecutor, *supra* note 51. Rather, that because the standards in place tend to endorse the early discovery of exculpatory and inculpatory information in many offices around the country, this practice should be recognized in legal ethics standards not yet in place. For those interviewed, no prosecutors indicated that there was less of a standard or that it was common practice to withhold information to maintain a strong bargaining position.

185. *See generally* Aaron, *supra* note 162 (discussing the relationship between law and ethics).

186. MODEL RULES OF PRO. CONDUCT pmbl. ¶ 20 (AM. BAR ASS'N 2020) (discussing the purpose of legal ethics rules).

187. *Id.* at ¶ 12 (stating that ethics rules are for the public's interest and are not necessarily meant to serve lawyers).

188. *Id.* at ¶¶ 6–7 (providing that ethics rules are meant to improve over time).

189. Historically, states have resolved some of the prosecutorial disclosure problems by enacting ethics rules. As such, this Article aims at tackling disclosure problems in the conventional way that states approach these problems. But from survey interviews with public defense attorneys around the country, this approach is not working, with one reason being because the ethics rules do not clearly apply to plea negotiations that take place before trial discovery. Therefore, to strengthen the current infrastructure of state ethics rules, states could require pre-bargain disclosure.

civil liability or standing for procedural recourse.[190] The answers are one of principle and another of practicality.

Principally, codes of professional responsibility represent the legal profession. They are what the public understands as protection from conflicts of interest,[191] unreasonable attorney fees,[192] and other abuses of power. The rules reinforce the perception that lawyers serve the public with safeguards for client communications,[193] insecurities,[194] and property.[195] The rules assure the public that a prosecutor fulfills the role of "a minister of justice," affords a defendant procedural justice, bases guilt on sufficient evidence, and adheres to special precautions "to prevent and to rectify the conviction of innocent persons."[196]

Prosecutors undermine this sense of protection when they avoid disclosure obligations in the 97% of criminal matters that end in plea bargains.[197] Instead, ethics rules should represent the disclosure practices that prosecutors purportedly hold themselves to and that defenders seek.[198]

There are also practical benefits to pursue prosecutorial disclosure transparency through ethics rules. The legal profession can communicate the exact obligations prosecutors face and discipline the very actors who cause misconduct.[199] With this in mind, state ethics rules provide a means

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190. MODEL RULES OF PRO. CONDUCT pmbl. ¶ 20 (AM. BAR ASS'N 2020) ("Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.").

191. MODEL RULES OF PRO. CONDUCT r. 1.7–1.11 (AM. BAR ASS'N 2020) (containing rules on professional responsibility about conflicts of interest with former and current clients, government officials, and others).

192. *Id.* at r. 1.5 (subjecting attorneys to fee restrictions to protect their clients).

193. *Id.* at r. 1.6 (listing ethics rules on the confidentiality of information).

194. *Id.* at r. 1.14 (listing the requirements that lawyers must consider for clients with a diminished capacity); *id.* at r. 1.8(j) ("A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.").

195. *Id.* at r. 1.15 (requiring the safekeeping of client property).

196. *Id.* at r. 3.8 cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

197. *See supra* note 1 and accompanying text.

198. *See* Stephanos Bibas, *Bringing Moral Values into a Flawed Plea-Bargaining System*, 88 CORNELL L. REV. 1425, 1432 (2003) [hereinafter *Moral Values*] (suggesting that the existence of plea bargaining should prompt the legal profession to make the institution promote good morals).

199. MODEL RULES OF PRO. CONDUCT pmbl. ¶ 12 (AM. BAR ASS'N 2020) ("Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves."); *id.* at ¶ 16 ("Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings.").

to combine prosecutors' constitutional,[200] procedural,[201] or office policy[202] requirements and to make clear what obligations prosecutors abide by to the public.

Such advances will also give ethics law—the paper tiger—more teeth.[203] The legal profession self-governs.[204] The ultimate authority over the legal profession is mainly vested in the courts, and more direction and disciplinary tools will arm courts respectively.[205] If ethics rules cast a broader net and hold prosecutors accountable, judges and attorneys would have more opportunity to report professional misconduct[206] and maintain the profession's integrity for misconduct not clearly reached by the current disclosure rules.[207]

This is not to say that the legal profession should not pursue disclosure by other means. The current issues with statutes that overcharge defendants,[208] the criminal procedure rules that do not apply to plea

200. *See, e.g.*, United States v. Ruiz, 536 U.S. 622, 633 (2022) (requiring the disclosure of material impeachment evidence for trial); Giglio v. United States, 405 U.S. 150, 154–55 (1972) (requiring the disclosure of material evidence that tends to negate guilt for trial); Brady v. Maryland, 373 U.S. 83, 87 (1963) (requiring the disclosure of "evidence favorable to an accused" for trial).

201. *See, e.g.*, Jencks Act, 18 U.S.C. § 3500(a) (restricting the compelled disclosure of government witness statements until direct examination during trial); FED. R. CRIM. P. 16 (including discovery obligations for prosecutors and defense counsel).

202. *See, e.g.*, U.S. Dep't of Just., Just. Manual § 9-5.000 (2020) (providing guidance to U.S. attorneys on the disclosure of information).

203. *See* Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for* Brady *Violations: A Paper Tiger*, 65 N.C. L. REV. 693, 697 (1987) ("The result is a disciplinary system that, on its face, appears to be a deterrent to prosecutorial misconduct, but which has had its salutary impact seriously weakened by a failure of enforcement. Because the other available sanctions for *Brady*-type misconduct, such as removal from office or contempt citations, are rarely if ever used, and because the development of strict materiality standards has lessened the chance that a conviction will be reversed because of this misconduct, at present insufficient incentive exists for a prosecutor to refrain from *Brady*-type misconduct.").

204. MODEL RULES OF PRO. CONDUCT pmbl. ¶ 10 (AM. BAR ASS'N 2020) ("The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement.").

205. *Id.* ("This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.").

206. *Id.* at r. 8.3(a) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.").

207. *See supra* Part II.

208. *See* Lain, *supra* note 153, at 35–36 (discussing the implications of an innocent defendant not receiving inculpatory evidence); *Shadow Market*, *supra* note 142, at 554 (citing Albert W. Alschuler, Lafler *&* Frye*: Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 692–95 (2013)) ("Similarly, if, like Professor Alschuler, you think the plea decision is defective because it was made in the shadow of abusive prosecutions and Draconian sentences following conviction at trial, you should fix that problem rather than try to interfere with defendants' ability to make the best they can of a bad position."); *Prosecutor's Role*, *supra* note 5, at 104 ("Whatever its dangers, most defense attorneys concede that overcharging serves its basic purpose. Defendants are encouraged to plead guilty, and judicial and prosecutorial resources are thereby conserved.").

bargains,[209] the need for police reform,[210] and the lack of defense[211] and prosecutorial resources[212] all intertwine and, if addressed, can strengthen the shadow of trial theory because defendants could better predict trial outcomes.[213]

States can pursue other reforms to address disclosure problems, but ethics rules should not be absent from the conversation—the rules can lead it. Prosecutors are duty bound toward standards beyond other lawyers.[214] The legal profession's ethics rules inform the public about how it interacts with them, and the profession should strive to improve those rules[215] in the public's interests.[216] Prosecutors and defenders can see eye to eye if ethics rules clearly announce under what disclosure standards prosecutors should conduct themselves.[217]

To demonstrate to the legal profession and the public that prosecutors' disclosure practices are ethically sound, the ethics rules on the books should reflect a disclosure standard in accord with bargaining in the shadow of trial. States should no longer limit prosecutorial disclosure to trial discovery requirements that do not consider plea-bargained matters in the criminal justice system.[218] States should instead require pre-bargain

209. *See* Colo. Deputy Pub. Def. 1, *supra* note 103; *see supra* note 147 and accompanying text.

210. There are current challenges surrounding police investigations and the collection of evidence. Police do not turn over all evidence, which then leads to inadvertent withholdings by prosecutors. *See, e.g.*, Ill. Pub. Def., *supra* note 179 ("If you read the papers, the Chicago Police Department is kind of garbage; they have a lot of problems with obtaining and handing over evidence. That gives prosecutors some room to hide."); Nev. Chief Deputy Dist. Att'y, *supra* note 55 ("Now there are surely times that we do not disclose everything. Most of the time this is inadvertent where we don't know of the evidence.").

211. *Designing*, *supra* note 2, at 1060–61 (citing BARTON & BIBAS, *supra* note 24, at 17–30) (noting there are heavy caseloads and a lack of legal resources).

212. *See* Colo. Deputy Pub. Def. 2, *supra* note 26 ("Prosecutor offices have huge caseloads, which often makes it impossible for them to conduct investigations in each case. Mistakes happen a lot. They are less sinister, but not less problematic. The DAs scramble when these disclosure problems happen."). Further, this lack of prosecutorial resources leads to disclosure problems over evidence that they do not have. *See* Mich. App. Def. Att'y 1, *supra* note 15 ("There is a lack of initiative. Prosecutors can say they are 'open-file' all day, but that won't fix the investigation problems that precede their filing. It is often the case that the prosecutors' file does not include materials from other parts of the government.").

213. *See Designing*, *supra* note 2, at 1072 (citing Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1959 (1992)) ("To bargain intelligently, [defendants] must first estimate the strength of the prosecution's case to forecast the likelihood of conviction and sentence.").

214. Aaron, *supra* note 162, at 3040 ("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.").

215. MODEL RULES OF PRO. CONDUCT pmbl. ¶¶ 6–7 (AM. BAR ASS'N 2020) (providing the goal to improve ethics rules as time goes on).

216. *Id.* at ¶ 12 (assuring that legal ethics "are conceived in the public interest").

217. *See Moral Values*, *supra* note 198, at 1432 ("As long as plea bargaining exists, we can and should try to make it send more clear, honest, and straightforward moral messages.").

218. *See supra* notes 10–11 and accompanying text.

disclosure of non-protected[219] exculpatory and inculpatory evidence that informs defendants on the likelihood of success in future litigation.

CONCLUSION

This Article offers one additional consideration that undermines plea bargaining's shadow of trial theory: ethics rules on prosecutorial disclosure do not help the accused accurately predict the outcome of trial before they decide on a plea offer. On the books across the fifty states, there is a trend to allow prosecutors to withhold exculpatory evidence from the accused prior to the acceptance or denial of a plea bargain unless a case proceeds closer to trial. Additionally, no state includes an ethics requirement for prosecutors to disclose inculpatory evidence. Moreover, the rules as practiced cause a lack of a common understanding between the prosecution and the defense on when and whether prosecutors actually disclose material information.

These findings confirm that those concerned with criminal justice and false convictions should reexamine prosecutorial disclosure requirements to ensure that prosecutors do not withhold evidence to the accused's detriment.[220] These findings also indicate that it is time to fundamentally redesign disclosure obligations around plea bargains (which account for over 97% of criminal matters) instead of trial (which only account for about 3%).[221]

Given this, state ethics rules should require pre-bargain disclosure. The reworked rules would ethically bind prosecutors to divulge both exculpatory *and* inculpatory evidence before a defendant decides to accept or deny a plea bargain, irrespective of current discovery rules that do not apply until later in the trial process. Although there remain systemic

219. To clarify, the ethics rules requiring the disclosure of exculpatory and inculpatory evidence does not mean that prosecutors must turn over *all* evidence. *See* MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 3 (AM. BAR ASS'N 2020) ("The exception in paragraph (d) recognizes that a prosecutor may seek an appropriate protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or to the public interest."). Thus, prosecutors could continue to seek protective orders to protect an informant or avoid the tampering of evidence. *See, e.g.*, Cal. Assistant U.S. Att'y 2, *supra* note 66 ("There are some caveats to disclosure. Every case is different. AUSAs are trained to disclose as much as possible but have to assess what the issues are. Sometimes you have a defendant with three charges, but don't have enough info to charge the defendant with the second and third scheme. The investigations are still ongoing, and sometimes prosecutors must make a tactical decision to withhold information to avoid tampering. Other times there are multiple defendants involved in a case, and you don't want to reveal information to one, that they could reveal to another. And other times, we don't disclose who our informants are to protect a 'snitch' in prison. Most of the time, we say to ourselves 'I'm going to delay disclosing this report because I don't want the defense to harm the investigation.' In the past, AUSAs have disclosed the evidence while also telling the defense to not contact potential witnesses. But the defense interferes anyways. Prosecutors avoid this altogether now.").

220. How is the legal profession even to realize disclosure problems if most cases plead away? *See, e.g.*, Pa. Assistant Pub. Def., *supra* note 104 ("I don't know how we would find out if disclosure problems occurred. I mean, how would we know? Prosecutors don't turn over discovery if the case closes. Prosecutors are not going above and beyond. The evidence disappears. They probably don't even know what is in their discovery most of the time. And if they did have something that they don't turn over, the court won't do anything except recant the plea.").

221. *See supra* note 1 and accompanying text.

problems to disclosure, ethics, and the criminal justice system that future scholarship can continue to monitor and address,[222] for now, state reform on ethics rules can afford prosecutors and defenders a common understanding of when the legal profession holds prosecutors accountable to disclose evidence to the accused.

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222. *See supra* notes 164, 201 (changing heightened sentencing); *see also supra* notes 10–11, 202 (applying current discovery obligations earlier during plea bargains before trial); *see also supra* notes 211–12 (addressing the lack of defense and prosecutorial resources); *see also supra* notes 155, 157, 210 (reforming disclosure processes for police). Some defense counsel state that prosecutors unethically withholding evidence is part of a larger picture, and that there are systemic problems with the relationship between the prosecution and police. *See, e.g.*, Ill. Pub. Def., *supra* note 179 ("There is a systemic challenge with the relationship between prosecutors and the Chicago Police Department."); Assistant Pub. Def. Doug Wilber, *supra* note 96 ("There have been times where the prosecution or police wouldn't turn over previous written statements of witnesses in addition to testimony. The defense counsel wanted both, but sometimes weren't getting them all. And there have been cases where the police told them *not* to write anything down because defense counsel could use that against them. The felonies are more heavily investigated, so evidence is more likely to show up in support of both sides."); *see also supra* notes 121–23 and accompanying text (noting the lack of ethics complaints brought against violating prosecutors).