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PRICELESS PROCESS: NONNEGOTIABLE FEATURES OF CRIMINAL LITIGATION

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In this Article, Professor Nancy King develops an approach for determining when judges should block the efforts of criminal litigants to bypass constitutional and statutory requirements other than those already traded freely in traditional plea bargains. Devices for classifying nonnegotiable requirements, including the concept of "jurisdictional error," have lost their utility. Clearer rules about which deals are enforceable and which are not would increase certainty in bargaining and reduce disparate treatment of similarly situated defendants. King argues that the interests of third parties or the public may justify restrictions on bargains in criminal procedure, and she traces the stubborn persistence of barriers to free trade in rights and process in this age of plea bargaining. To judge whether or not interference is warranted today, two inquiries must be made. First, a court must identify what public or third-party interests are threatened by a litigant's bargain. Second, a court should assess whether the protection of those interests requires the relief proposed, or whether, instead, alternative remedies are available to adequately protect the interests threatened by enforcement of the parties' agreement. King applies this approach to a number of controversial bargains, including agreements in which a defendant waives structural protections of the Constitution, the right to the effective assistance of counsel, factual accuracy and legislative limits on sentencing, the right to a speedy trial, and the protections of the Eighth Amendment.

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INTRODUCTION

Since the 1970s when the Supreme Court placed its stamp of approval on plea bargaining, a remarkable development has taken place in criminal procedure. Almost every feature of the criminal litigation process, including rights and requirements previously considered inalienable, have become

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bargaining chips. Through plea agreements, sentencing agreements, and other stipulations, defendants may now sell rights, such as the opportunity to appeal a conviction or sentence or the right to adjudication before a court that has authority to preside.

The novelty and frequency of procedural circumvention by agreement has generated confusion and closely divided opinions in both federal and state courts. Trade-offs that are accepted by some trial judges are rejected by others. Appellate courts, too, divide over whether certain agreements may be enforced. The disorder is illustrated by a recent proposal to amend Rule 11 of the Federal Rules of Criminal Procedure (Rule 11). The Judicial Conference has recommended that district judges be required during plea proceedings to determine that the defendant "understands . . . the terms of any provision [in his plea or sentencing agreement] . . . waiving the right to appeal or to collaterally attack [his] sentence," but commented that by proposing such a requirement it "takes no position on the underlying validity of such waivers."[1] The array of situations in which a defendant may actually be able to maintain a claim on appeal despite an express waiver of that ability has led to baffling and conflicting admonitions from trial judges who try to inform defendants of exactly what their waivers mean.[2]

In this Article, I examine when and how courts should regulate this marketplace of concessions in punishment and procedure, given the general acceptance of plea bargaining. I offer a middle ground between opponents and advocates of unfettered exchange in process rights. Some arguments that might have justified the regulation of the trades discussed in this Article

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1. Letter from the Chair of the Advisory Committee on Federal Rules of Criminal Procedure to the Chair of the Standing Committee (May, 15, 1998), *in* 65 Crim. L. Rep. (BNA) 140, 141 (May 5, 1999).

2. Consider the advisement of the right to appeal recommended by the Committee on Criminal Law of the Judicial Conference of the United States to judges and probations officers:

> You can appeal your conviction if you believe that your guilty plea was somehow unlawful or involuntary, or if there is some other fundamental defect in the proceedings not waived by your guilty plea. You also have a statutory right to appeal your sentence under certain circumstances, particularly if you think the sentence is contrary to law. (However, a defendant may waive those rights as part of a plea agreement, and you have entered into a plea agreement which waives some or all of your rights to appeal the sentence itself. Such waivers are generally enforceable, but if you believe the waiver is unenforceable, you can present that theory to the appellate court.)

Catharine M. Goodwin, *Summary: 1996 Committee on Criminal Law Memo or Waivers of Appeal and Advisement of the Right to Appeal*, 10 FED. SENTENCING REP. 212, 213 (1998); *see also* United States v. Martinez, 143 F.3d 1266, 1272 (9th Cir. 1998) (rejecting the defendant's claim that because the trial judge assured him of his right to appeal, he could appeal notwithstanding his appeal waiver).

have been precluded by the embrace of plea bargaining. For example, the incommensurability between the benefits of waiver and the value of a constitutionally proscribed process[3] has not persuaded courts to reject plea agreements that swap rights for government concessions. Nor have courts credited arguments that the sale of just punishment at a discount to those defendants willing to sacrifice their trial rights has unacceptably dehumanizing consequences for citizens, or an irreversibly corrosive effect on the integrity and effectiveness of the criminal law.[4] Attacks on plea bargaining as coercive or simply unfair are also dismissed as frivolous. Instead, plea bargaining is widely supported by the belief that any harm to the public or to third parties from the enforcement of plea bargains is outweighed by the benefits of enforcement.[5]

In this climate, it is curious to find judges and commentators raising "public policy" concerns about the inevitable extension of bargaining in criminal procedure to rights long viewed as less central to the criminal process than trial rights, such as the right to appeal or rights at sentencing. That judges do object at all suggests that they recognize the importance that these nontrial rights have assumed as trial substitutes. More importantly, judicial reluctance to approve or enforce appeal waivers and other novel bargains demonstrates that many judges remain committed to enforcing what they believe is the public's will against the parties' preferences. To use the

3. *See* Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 675–80 (1981) (arguing that we continue to "adhere, in some measure, to Kant's view that 'justice ceases to be justice if it can be bought for a price,'" and stating that "it is simply impermissible to balance the virtues of trial against the economic costs of trial," and that "a just sentence must be the product of a just process—one that focuses 'on the merits' rather than on extraneous social objectives"); *see also* Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849 (1987) (exploring incommensurability as a justification for inalienability). *But see* Richard A. Epstein, *Are Values Incommensurable, or Is Utility the Ruler of the World?*, 1995 UTAH L. REV. 683 (rejecting the incommensurability theory).

4. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989) (reviewing several theories advanced to justify rules banning the alienation of constitutional rights—paternalism, efficiency, distribution, and personhood—and endorsing only distribution concerns as a basis for a doctrine of unconstitutional conditions); *see also* Randall Barnett, *Contract Remedies and Inalienable Rights*, 4 SOC. PHIL. & POL'Y 179 (1986); G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 431, 452, 504–05 (1993) (reviewing the Court's treatment of claims of inalienability over the years and concluding that "the modern Court has expressly rejected the notion that public policy defenses may be based on judicial preferences of any kind, moral or otherwise," and that the Court "draws its arguments with increasing frequency from a utilitarian, law and economics perspective," assuming that "society as a whole will be better off if the contract is enforced").

5. *See, e.g.*, sources cited *infra* notes 7, 12, 62, 65, 68, 69.

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language and reasoning of efficiency and contract increasingly adopted by courts to evaluate agreements between the prosecution and the defense in criminal cases, negative externalities may continue to warrant the regulation of agreements in the criminal process.[6]

This Article develops an approach for determining when judges should block the efforts of criminal litigants to bypass constitutional and statutory requirements other than those already traded freely in traditional plea bargains. It involves two separate inquiries. First, a court must identify what public or third-party interests, if any, are threatened by a litigant's bargain. The second and much more difficult task is to decide which, if any, of the many methods available for controlling such an agreement should be used to protect those public or third-party interests. This analysis sheds light on a problem that for decades has been obscured by rote adherence to precedent based on premises discarded long ago and by reliance on the hollow phrase "jurisdictional error" as a proxy for inalienability.

A focus on the particular interests threatened when parties bypass legal process, combined with attention to the alternative methods of protecting those interests, produces two useful guidelines for courts to follow when examining whether or not to disrupt a negotiated agreement in a criminal case. First, courts should not override knowing and voluntary agreements by parties in criminal cases to evade legislated rules, absent a legislative command to the contrary. Second, rules of constitutional stature protecting interests that may differ from those of the parties should not be subject to evasion by the consent of the parties unless effective enforcement mechanisms exist to protect such interests. Applying this analysis to some of the more controversial agreements troubling courts today reveals that at least two types of constitutional interests require ongoing enforcement by courts at all levels despite litigant preferences: the public's interest in maintaining the constitutionally proscribed balance of power between the three branches of government, between federal and state government, and between states; and the public's interest in enforcement of the substantive protections of the Eighth Amendment prohibiting cruel and unusual methods and amounts of punishment.

6. *See, e.g.*, United States v. Mezzanatto, 513 U.S. 196, 208 (1995). For classic explanations of negative externality as a justification for rules of inalienability, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1112 (1972) (suggesting large scale social costs and morally offensive practices such as contracts for enslavement as two examples of external costs that may justify inalienability), and Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970 (1985).

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I. TRENDS IN THE REGULATION OF BARGAINING: LEARNING FROM THE PAST

A. Bargaining Today

> [P]recluding waiver can only stifle the market for plea bargains. A defendant can "maximize" what he has to "sell" only if he is permitted to offer what the prosecutor is most interested in buying.[7]

A prosecutor's primary concessions are her promise to forego or reduce charges against the defendant or another person, and her promise to recommend a more lenient sentence.[8] A prosecutor may also promise to provide protection to the defendant or another person, or promise not to seek the forfeiture of particular assets owned by the defendant. The advent of presumptive sentencing schemes that provide more ammunition for challenging sentences on appeal, such as the United States Sentencing Guidelines,[9] have also added value to the prosecutor's promise to stipulate to certain facts or factors at sentencing, or to refrain from appealing a sentence.[10]

Defendants, meanwhile, have diversified what they are willing to promise prosecutors in exchange for these concessions. Short of foregoing trial altogether, defendants can make trials more economical or less risky for prosecutors by agreeing to a variery of stipulations or by waiving particular rules, including statutes that mandate certain fact-finders, that require unanimous verdicts, or that require the defendant to be present. Whether or not he goes to trial, a defendant may promise to furnish information or testimony for the prosecution of others that he might otherwise keep to himself.[11] A defendant may add credibility to his promise to cooperate and to the

7. *Mezzanatto*, 513 U.S. at 208 (discussing waiver of FED. R. EVID. 410); *see also* Daniel C. Richman, *Bargaining About Future Jeopardy*, 49 VAND. L. REV. 1181, 1237 (1996) ("[I]n a criminal justice system in which plea bargaining is the dominant mode of adjudication, the chief significance of a much vaunted constitutional right may lie in its value as a bargaining chip . . . .").

8. Some, but not all, federal district judges will accept what are known as "(e)(1)(C)" pleas—guilty pleas conditioned upon the judge's acceptance of the specific sentence agreed on by the parties. *See* FED. R. CRIM. P. 11(e)(1)(C).

9. U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL (West 1998).

10. *See, e.g.*, BNA, CRIMINAL PRACTICE MANUAL § 71.101[6] (1996) (listing a variety of concessions by the government that may be included in a plea agreement, including agreements recommending that the defendant be released pending sentencing, agreements limiting the content of facts presented at plea hearings to "omit . . . sordid details," agreements to transfer the case to juvenile court, and agreements to avoid sharing information with jurisdictions that may seek to prosecute the defendant).

11. *See generally* Graham Hughes, *Agreements for Cooperation in Criminal Cases*, 45 VAND. L. REV. 1 (1992); Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69 (1995).

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information he provides by waiving evidentiary rules that bar the prosecution from using that information should he fail to keep his promise.[12] The defendant may agree to trade the opportunity he would otherwise have to obtain complete dismissal on one charge—waiving his rights to bring motions prior to trial for anticipated or existing violations of his rights—in exchange for the government's promise of a lower sentence on another charge. Also, a defendant may be able to secure more lenient treatment by consenting to the forfeiture of assets, or by making restitution to the victim.[13] Finally, in jurisdictions where appellate case loads have risen and appellate scrutiny of sentences has intensified, prosecutors may covet the defendant's waiver of his right to appeal his sentence as well as his conviction. Some prosecutors consider a defendant's promise not to appeal a sentence to be worth a charge or sentence concession, despite the defendant's insistence on trial.[14]

B. Inalienability and the Rise of Bargaining

> The public has an interest in [a defendant's] life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused . . . .[15]

> The substantial constitution of the legal tribunal and the fundamental mode of its proceeding are not within the power of the parties.[16]

Litigants in criminal cases have not always enjoyed today's freedom to swap procedural features of the criminal justice system for leniency. Courts

12. *See Mezzanatto*, 513 U.S. at 208; *see also* United States v. Burch, 156 F.3d 1315, 1319–23 (D.C. Cir. 1998) (extending the rationale of *Mezzanatto* to uphold waiver of the right to suppress statements made during plea negotiations should those negotiations either fall through or result in an agreement thereafter breached by the defendant); Eric Rasmusen, Mezzanatto *and the Economics of Self-Incrimination*, 19 CARDOZO L. REV. 1541 (1998).

13. *See, e.g.*, BNA, *supra* note 10, § 71.101[7] (collecting cases).

14. *See infra* notes 29, 112 and accompanying text.

15. Hopt v. Utah, 110 U.S. 574, 579 (1884).

16. *See Ex parte* McClusky, 40 F. 71, 75 (D. Ark. 1889). In *McClusky*, the court explained why a defendant cannot agree to waive indictment by a grand jury:

> [T]he proceeding is one against the [C]onstitution and laws of the United States; one unknown to such laws; one created by the mere voluntary act of the parties; and it is, in effect, an attempt to adopt a species of arbitration to settle the question whether the petitioners have been guilty of offenses against the United States. This is not the way to ascertain this fact.

Id. at 76.

of the nineteenth century would have ridiculed the idea that an accused and a prosecutor could dicker over what kind of break the defendant deserves for waiving a piece of the criminal process. The problem for courts was not, at least initially, allowing the states' representatives to *trade* punishment for procedure; the first hurdle was recognizing that procedure could be bypassed at all, for any reason. For many rights, waiver simply was not permissible, with or without consideration. Variations from the process required by law doomed convictions; the defendant's consent to a flawed proceeding did not remove the flaw.[17] In civil as well as in criminal cases, parties functioned within procedures they may have preferred to shed.

The contrast between the older presumption that procedural rights were not alienable and the present presumption that they are is quite striking. To understand when, if ever, judges today should adhere to the former philosophy and deny to parties the ability to trade in procedure, it is useful to review briefly how and why judicial control over litigant autonomy in procedural matters once flourished, then withered away.

1. Whose Right Is It?

Decisions from the mid-1800s through the 1930s show a gradual replacement of the view that procedural deficiencies harm all citizens with the alternative notion that the procedural features of the criminal justice system are designed primarily to protect the interests of individual defendants. Although it seems natural for us today to talk about rights *belonging* to the defendant—his to do with what he will—the same understanding did not come naturally to early nineteenth-century judges.[18]

This shift in thinking about procedure as the privilege of an individual rather than as a public good is unmistakable, but reasons for that shift are less distinct. In particular, it is not clear whether the abandonment of the idea of rights as "public" promoted judicial acceptance of the waiver of rights in the criminal process or vice versa. Plea bargaining began to take hold late in the nineteenth century after the individualization of rights

17. For examples, see *infra* notes 31–35, 49, 51, 57–58. *See also* Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 22–24 (1979) (reporting cases that suggest the Court's hostility to waivers of procedural rights).

18. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *133; 4 *id.* at *189; JOSEPH RAZ, *Rights and Individual Well-Being*, *in* ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 29 (1994); B.A. Richards, *Inalienable Rights: Recent Criticism and Old Doctrine*, 29 PHIL. & PHENOMENOLOGICAL RES. 391 (1969).

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began,[19] which suggests that waiver was an outgrowth of the changed philosophy. But it is also possible that judges who were keen on enforcing the growing number of defense waivers during this period found the explanation of rights as personal to be a convenient justification for enforcement. In any event, as illustrated by the examples in Part I.C, below, the defendant's newfound ability to waive rights in criminal procedure seems to be closely linked to the relatively novel assumption that those rights were the defendant's alone to waive.

2. The Demise of Paternalism

One barrier to waiver in earlier decades was the judicial concern that defendants would be unfairly duped into trading off "their" valuable rights without understanding the harm they risked by doing so. The provision of defense counsel alleviated this concern.[20] With defense counsel standing by to protect the interests of the accused, courts expressed an assurance that the risk of killing and imprisoning the innocent was greatly reduced. Relieved of the duty to protect the defendant from his own bad judgment, courts could not as easily justify disturbing agreements to forego procedural protections.[21]

3. Efficiency and Estoppel

Judicial willingness to accept waivers of procedure in the late 1800s and early 1900s was also prompted by the pressing practical need to streamline an increasingly cumbersome process.[22] Indeed, the period has been

19. *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 252, 390–92 (1993); Alschuler, *supra* note 17, at 19–26; Peter Westen, *Forfeiture by Guilty Plea—A Reply*, 76 MICH. L. REV. 1308, 1335 (1978) (arguing that prior to the nineteenth century legal thinkers adhered to the view that "rights are inalienable; that they cannot be lost through consent; and that they can be lost, if at all, only through conduct").

20. *See* WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 24–26 (1955) (noting that the assistance of counsel gradually became more common during the nineteenth century).

21. *See, e.g.*, Patton v. United States, 281 U.S. 276, 306–08 (1930) (discussed *infra* at notes 45–48); People v. Epps, 334 N.E.2d 566, 571 (N.Y. 1975) (noting that New York's transition to the modern view that the right to be present was subject to waivet was completed when the Court of Appeals of New York "noted that in view of the development of the right to counsel and the abandonment of trials by ordeal or battle, there appeared no reason for considering this right nonwaivable"). On the decline of paternalism in the law generally, see David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519 (1988).

22. *See, e.g.*, DAVID J. BODENHAMER, FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY 84–88 (1992).

termed by one historian a "revolution in criminal justice, one that made administrative efficiency, not rights, the touchstone of law."[23] Some appellate judges were reluctant at first to endorse efficiency and party autonomy to the same degree as trial judges.[24] But the expansion of both appellate and collateral review, the heightened concern for finality and efficiency, and the ability to delegate to defense counsel the duty to protect a defendant from his own bad judgment inevitably led appellate courts to conclude that a criminal defendant should be stuck with his agreement to refrain from raising waived issues on appeal. Judges did not hide their impatience with defendants who would consent to error at the trial level only to object to a resulting conviction or sentence that did not meet with their expectations. Courts then, as now, expressed concern that failure to enforce such waivers would encourage "sandbagging" by defendants and their counsel.[25]

These efficiency and estoppel concerns have arisen at different times for different rights. As described in the next part, even before the turn of the century state courts were beginning to accept litigants' efforts to bypass the requirements that trial be conducted before a jury and with the defendant's constant presence. The due process revolution of the 1940s through the 1960s put considerable pressure on the Supreme Court to constrain the scope of rights newly applied to state courts, thus providing a partial expla-

23. *Id.* at 68.

24. *See id.* at 86–87 (noting that in the late 1800s and early 1900s state appellate judges and academics were disturbed or shocked by agreements between the prosecution and the defense to trade charging or sentencing concessions for waivers of fundamental rights).

25. *See, e.g.*, People v. Scott, 22 N.W. 274, 275 (Mich. 1885) (stating that the "notion that an accused party may at pleasure object [to] the want of qualification in a juror for the first time after the verdict against him has no . . . basis in law or reason"); State v. Gorman, 129 N.W. 589, 590 (Minn. 1911) (upholding a guilty verdict delivered after the midtrial flight of the defendant, and noting that the "defendant cannot take advantage of his own willful wrong to defeat the ends of justice"); Miller v. State, 218 N.W. 743, 743–44 (Neb. 1928) (considering an appeal following a trial during which the defense and the prosecution agreed in open court to continue without a sick juror, rejecting the defendant's argument that his waiver was illegal, and reasoning that a "defendant should not be permitted to speculate and take the chance of a verdict, favorable to himself, which would be a protection to him, and be relieved of liability in the event of an adverse verdict"); *see also* Fay v. Noia, 372 U.S. 391 (1963) (finding that a deliberate bypass of the opportunity to raise error forfeits the ability to raise the claim in habeas proceedings); United States v. Lowry, 971 F.2d 55, 63 (7th Cir. 1992) (finding that unless the waiver was enforced, "a defendant would lose nothing by waiving his right . . . since he could always allege [a violation of that right] if convicted"); People *ex rel.* Walsh, 27 N.Y.S.2d 273, 275–76 (1941). In *Walsh*, the court upheld the conviction after the defendant waived the right to have his plea take place in open court, stating:

> [I]t appears little short of ridiculous to me that the defendant should now be permitted, at this late date, to take advantage of a situation that he himself brought about. He should be held to the position which he has assumed and upon which he requested and secured a personal advantage.

Id. at 276.

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nation for the Court's decisions regarding waiver of rights under the Fourth and Fifth Amendments and its endorsement in the 1970s of plea bargaining itself.[26]

Yet the increased constitutional oversight of state court decisions does not explain the decisions of the past decade in which courts have found, for the first time, that formerly unwaivable rights are subject to waiver. Instead, this recent testing of the limits of negotiated procedure is linked to the explosion in criminal appeals and the increased costs of defending those appeals.[27]

A heavy appellate case load provides prosecutors with an increased incentive to obtain waivers and provides appellate judges with an increased incentive to uphold them. In federal court, the United States Sentencing Guidelines have accelerated this process. Prior to the guidelines, few federal defendants appealed their sentences. Appeal was considered futile, given the extremely deferential standard of review. A defendant's offer to relinquish

26. *See* Joseph L. Hoffman & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 67, 77–78; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 62–63 (1997) (noting that "virtually all the law related to guilty pleas" developed after the Warren Court). An increase in concern for husbanding resources and a decrease in paternalism toward the accused have been cited by scholars as key elements in the rise of plea bargaining. *See* Alschuler, *supra* note 17, at 38–39; John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261, 265–68 (1979) (discussing factors that influenced the development of plea bargaining).

For additional explanations of reasons for the rise in plea bargaining, see Malcolm D. Holmes et al., *Plea Bargaining Policy and State District Court Caseloads: An Interrupted Time Series Analysis*, 26 LAW & SOC'Y REV. 139, 140 (1992) (collecting sources that have emphasized factors including the "increased specialization and professionalism of police, prosecutors, and defense attorneys, the growing complexity of the criminal trial, and the organizational relationships and norms shared by courtroom actors"). *See also* John F. Padgett, *Plea Bargaining and Prohibition in the Federal Courts, 1908–1934*, 24 LAW & SOC'Y REV. 413 (1990).

27. *See, e.g.*, Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HASTINGS CONST. L.Q. 127, 131–34 (1995) (documenting changes in criminal appeals); Justice William F. Rylaarsdam, *The Crisis of Volume in California's Appellate Courts: A Reaction to* Justice in the Balance 2020 *and a Proposal to Reduce the Number of Nonmeritorious Appeals*, 32 LOY. L.A. L. REV. 63, 70–71 (1998) (reporting a 69% increase in criminal appeals in California when comparing 1986–87 data to data from 1996–97). In New York, as in most states, the doctrine surrounding the waiver of claims on appeal is developing at a furious pace. *See* People v. Hidalgo, 698 N.E.2d 46, 46 (N.Y. 1998) (holding that a defendant who did not know his specific sentence at the time he waived his right to appeal was barred from challenging the sentence as harsh and excessive); People v. Muniz, 696 N.E.2d 182, 186 (N.Y. 1998) (holding that the defendant waived his right to claim on appeal that double jeopardy barred his conviction and sentence for first-degree manslaughter); People v. Priester, 682 N.Y.S.2d 242, 243 (App. Div. 1998) (holding that the defendant could not challenge the voluntariness of his guilty plea because he expressly waived his right to appeal any court ruling); People v. Shea, 679 N.Y.S.2d 428, 429–30 (App. Div. 1998) (holding that if the judge fails to explain the maximum sentence, a waiver of the right to appeal does not include a waiver of sentence severity); People v. Mingues, 681 N.Y.S.2d 802 (Sup. Ct. 1998) (holding that the defendant's waiver of the right to appeal included claims of ineffective assistance of counsel unless a claim waived affected the voluntariness of the plea).

his right to appeal his preguidelines sentence in exchange for a more lenient sentence recommendation would have been laughable.[28] The prosecutor would still have to try the case, gaining very little from the defendant's concession. Today, with intensive appellate review of the sentencing process, federal sentencing errors are much more costly to defend, and the defendant's waiver of his right to appeal his sentence is valuable enough to the prosecutor to prompt concessions, even after trial.[29]

Indeed, the market for some rights may yet emerge, as the costs of enforcing those rights change. Consider, for example, the right to a general verdict. Presently, bargains involving partial guilty pleas or the waiver of the right to a general verdict are not common. They have occurred in cases in which the defendant perceives a benefit from agreeing to accept as proven certain elements of a criminal offense, and the prosecutor values not having to prove those elements at trial.[30] Another procedural feature that has yet to be traded openly is the standard of proof. A prosecutor today would probably not be interested in exchanging a charge or sentence concession for the ability to try a case using a lower standard of proof because the value to the prosecutor of a lower standard of proof is probably much less than the value of other defense concessions readily available, such as the waiver of trial, of a jury, or of a potentially dispositive pretrial claim. There may be future cases in which a prosecutor would be unable to secure one of these more valuable concessions from the defense and might therefore wish to bargain for an agreement to try the case using the preponderance rather than the reasonable doubt standard.

In sum, the acceptance of individual ownership of procedural rights, the confidence in a defendant's capacity to make sound decisions with the aid of counsel, the increased incentives of prosecutors and judges to streamline the criminal process, and the reluctance of judges to provide defendants with relief from their own promises all contributed to the presumption today—so different from that of years past—that criminal defendants can

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28. *See, e.g.*, WAYNE LAFAVE, JEROLD ISRAEL, & NANCY KING, CRIMINAL PROCEDURE § 26.3 (2d ed. forthcoming 1999).

29. *See, e.g.*, John C. Keeney, *Memorandum: Use of Sentencing Appeal Waiver to Reduce the Number of Sentencing Appeals*, 10 FED. SENTENCING REP. 209, 210 (1998).

30. *See, e.g.*, Bonilla-Romero v. United States, 933 F.2d 86 (1st Cir. 1991); State v. Jaroma, 660 A.2d 1131, 1133 (N.H. 1995) (discussing a "stipulation" to admit two elements of the offense—that the property was not the defendant's and was worth over $1000—in exchange for dismissal of 21 other charges, and rejecting the claim of the defendant on appeal that he was entitled, prior to stipulation, to the same advice that defendants who plead guilty receive). Indeed, if trials can be "bifurcated" into separate trials on separate elements, as in *People v. Cline*, 71 Cal. Rptr. 2d 41 (1998), and if the defendant and the prosecutor can agree to waive the jury in favor of a judge, why can't they agree to a "partial guilty plea" combined with a trial of the remaining elements?

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bargain away just about anything. A few examples will serve as useful illustrations of this fundamental change.

C. Examples of the Transformation of Inalienable Rights into Bargaining Chips

1. The Jury

Consider first the ability of a defendant to waive a jury and be tried before a judge alone. The idea that the jury right could become the subject of an agreement between the prosecutor and the defendant was abhorrent to nineteenth-century judges.[31] The leading case for the proposition that a defendant could not consent to a trial by less than twelve jurors, or a trial before a judge alone, *Cancemi v. People*,[32] reasoned that the waiver of a jury trial is a matter that is "not within the discretion or control of the parties accused . . . ."[33] Rather, the "state and the public are concerned that neither life or liberty shall be affected 'without due process of law.'"[34] In federal courts, trial by jury was considered a feature of the Constitution that "relate[d] to the frame of government and therefore [was] not subject to the control of the parties."[35] The Sixth Amendment's language that granted to

31. *See* Hill v. People, 16 Mich. 351, 357 (1868).

> The doctrine rests upon assent; in other words, . . . upon contract. . . .
>
> But a criminal prosecution, in which the people in their sovereign capacity prosecute for a crime against the laws of the whole society, and seek to subject the defendant to punishment, must, it seems to us, be considered as a proceeding *in invitum*, against the will of the defendant throughout, so far as relates to a question of this kind, or any question as to the legal constitution of the court or jury by which he is to be tried. It would be adding materially to the generally recognized force of the obligation of contracts to hold that a defendant charged with a crime might, without a trial, enter into a binding contract with the prosecuting attorney (representing the state) to go to the penitentiary for a certain number of years in satisfaction for the offense. And yet it would approximate such a position, to hold that he might be bound by a contract providing for a trial before a court or jury unknown to the constitution or the laws, the result of which trial might be to place him in the same penitentiary.

Id.; *see also* Townsend v. Townsend, 7 Tenn. (Peck) 1, 12 (1821) ("Constitutional rights are vested, unexchangeable, and unalienable [sic]. They belong to posterity as well as to the present generation. We may use and enjoy, but not transfer them; and every such condition is utterly void."); Alschuler, *supra* note 3, at 716–17 (stating that his arguments against plea bargaining "come straight from the nineteenth century," and quoting *Hill*).

32. 18 N.Y. 128 (1858).

33. *Id.* at 137.

34. *Id.*; *see also* Susan C. Towne, *The Historical Origin of Bench Trial for Serious Crime*, 26 AM. J. LEGAL HIST. 123, 152–54 (1982) (collecting similar cases).

35. *See* Dickinson v. United States, 159 F. 801, 809–11 (1st Cir. 1908) (rejecting the government's claim that the right to object to an illegal reduction in the number of jurors could be

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"the accused" the right to trial did not "supplant" the mandatory language of Article III.[36]

By the turn of the century, however, courts were under considerable pressure to allow for some variation on the jury trial of Blackstone's day. Parties in criminal cases were consenting to all sorts of departures from the common law jury process, most of which were tested eventually in courts of appeal by convicted defendants.[37] In particular, jury size requirements were frequently relaxed. When not enough jurors were available, or a juror fell ill during the trial, both sides in the criminal case had incentives to forge ahead rather than start all over again.[38] The bench trial was also considered a desirable option by some defendants, who felt that "the chances of a fair, objective result at the hands of a jury [were] no more favorable than in the ancient proof by battle or ordeal."[39]

Some appellate courts refused to grant new trials to defendants who had expressly consented to bench trials or other variations on the jury but who nevertheless sought relief following conviction. The "obvious meaning" of the jury provisions, these courts argued, was to

> secure to . . . persons accused of crime, *as individuals*, the right and privilege of having their causes heard and determined by a jury; and it is difficult to see how the principles of liberty and self-government, or the interests of the body politic, can in any way be put in jeopardy by a waiver of that right.[40]

Pointing out that other rights embodied in the Sixth Amendment, even other aspects of the right to a jury, were subject to waiver at common law, courts reasoned that the size of the jury and the jury itself should be dispensable.[41]

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waived); *see also* Home Ins. Co. v. Morse, 87 U.S. 445, 451 (1874) (stating in dictum that a jury of less than 12 is not permissible).

36. *See* Callan v. Wilson, 127 U.S. 540, 549 (1888).

37. *See, e.g.*, Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796–1996*, 94 MICH. L. REV. 2673, 2726–27 (1996).

38. *See, e.g.*, *Dickinson*, 159 F. at 812–14 (Aldrich, J., dissenting). In this case, where two jurors were unable to complete the trial, Judge Aldrich stated:

> [I]f the constitutional safeguard is so hard and fast that an accused, who has been subjected to a constitutional trial for three months, cannot waive a fractional part of the right which he has enjoyed in order to save his substantial right and get a result, but must be subjected to the burdens of another trial with perhaps the same dilemma, it will become an instrument of oppression rather than one of protection, and thus the preventive would become something worse than the apprehended danger.

Id. at 814.

39. S. Chesterfield Oppenheim, *Waiver of Trial by Jury in Criminal Cases*, 25 MICH. L. REV. 695, 696 (1927).

40. State v. Worden, 46 Conn. 349, 364 (1878) (emphasis added).

41. *See, e.g.*, Queenan v. Oklahoma, 190 U.S. 548, 551–52 (1903) (finding that the right to a jury that is impartial could be dispensed with by consent, because the ability to waive an

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By the mid-1920s these arguments, combined with the perceived need to relieve "the distressing congestion in the criminal dockets,"[42] had persuaded most state courts to accept jury waivers.[43] Federal courts followed suit. In 1930, about the time that Prohibition trials were becoming a burden on the lower courts,[44] the Supreme Court held in *Patton v. United States*[45] that the jury was not "part of the frame of government" but instead was included "primarily for the protection of the accused . . . which he may forego at his election."[46] The accused's need for the jury itself was not as great as it had been at the framing, the Court explained, since the conditions that justified the rule against waiver—the ban against testimony by the defendant, the lack of access to representation by counsel, and the punishment of attaint and forfeiture—had "ceased to exist."[47] There no longer was reason to insist that a jury step in to protect the defendant, because he was capable of protecting himself through testimony and counsel.[48]

2. Presence

Another striking example of how the changing conception of a right paralleled a defendant's ability to waive that right is the Court's treatment of waivers of the defendant's right to be present. In 1884 in a passage that

objection to a disqualified juror was part of the settled practice of the common law); Oppenheim, *supra* note 39, at 703 n.25 (collecting cases, and noting that "it is generally held that an accused may consent to depositions or former testimony of a deceased or absent witness, thereby relinquishing the constitutional right of confrontation with witnesses"). Critics of the rigid ban against jury waiver also argued that the rule was not justified as a matter of originalism, poking holes in the claims of those who insisted that bench trials were unknown in colonial America. *See* Oppenheim, *supra* note 39, at 697–98 (noting that trial by bench was recognized early on in Massachusetts and Maryland).

42. Oppenheim, *supra* note 39, at 696.

43. *See id.* at 707 (concluding, after conducting an exhaustive case study published in 1927, that only "a small minority of courts have declared waiver invalid on the ground that the typical constitutional limitation expresses a strong public policy in favor of juty trial as the sole method available to the accused").

44. *See* KENNETH M. MURCHISON, FEDERAL CRIMINAL LAW DOCTRINES: THE FORGOTTEN INFLUENCE OF NATIONAL PROHIBITION 173 (1994); Alschuler, *supra* note 17, at 32.

45. 281 U.S. 276 (1930).

46. *Id.* at 299.

47. *See id.* at 306–07.

48. *See id.* at 307–08. The need to protect the defendant's heirs from wrongful disinheritance through attaint, before forfeiture of estate had been outlawed, had been considered a justification for interference with the defendant's decision to forego protective procedural rights. *See also* Dickinson v. United States, 159 F. 801, 821 (1st Cir. 1908) (Aldrich, J., dissenting) (noting that "in a very large sense the reason for [withholding the ability to waive the jury] was that conviction of crime, under the old English system, operated to outlaw and to attaint the blood and to work a forfeiture of official titles of inheritance, thus affecting the rights of third parties").

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deserves lengthy quotation, the Supreme Court explained in *Hopt v. Utah*[49] why a new trial was required in a case in which the judge allowed some of the jurors to be selected out of the presence of the defendant, albeit with the defendant's consent.

> The argument [that the accused may waive the right to presence] necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment.... That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused.... The great end of punishment is not the expiation or atonement of the offence committed, but the prevention of future offences of the same kind. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the Legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution.[50]

Thus, the presence of the defendant was considered to be a prerequisite to jurisdiction under the common law, essential to the public's interest in just punishment, and not subject to waiver by the parties.[51] Eventually, an exception was recognized in noncapital cases for defendants who absconded during trial.[52] By 1915, the Court distinguished *Hopt* as based on a local statute not binding on the states and upheld a Georgia practice allowing a defendant to waive his right to be present when the jury delivers its verdict.[53] By 1934, the lofty claims of *Hopt* as to the inability to waive pres-

49. 110 U.S. 574 (1884).

50. *Id.* at 579 (citation omitted).

51. For example, in *Lewis v. United States*, 146 U.S. 370 (1892), the Court explained that "it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during trial." *Id.* at 372. *See generally* James G. Starkey, *Trial* In Abstentia, 53 ST. JOHN'S L. REV. 721 (1979).

52. *See* Diaz v. United States, 223 U.S. 442, 455 (1912). The necessity for such a rule was expressed well by a frustrated juror, who protested after the judge asked the jury to be "patient" until the defendant could be located. Addressing the judge, the juror asked, "Well, this seems to be a rather peculiar proceeding. Suppose the defendant does not show up for several days, or weeks; what then? Are we to remain prisoners?" State v. Gorman, 129 N.W. 589, 589 (Minn. 1911).

53. *See* Frank v. Magnum, 237 U.S. 309, 341–43 (1915) (stating that the right to presence is "but an incident of the right of trial by jury; and since the State may, without infringing the

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ence were dismissed by Justice Cardozo, writing for the Court, as "dictum, and no more."[54] Several subsequent cases have recognized that the Constitution guarantees a state defendant the right to be present but have reiterated the principle that a defendant may forfeit his right to be present by failing to show up or by disrupting the proceedings. Notably, however, the defendant-centered model has not yet entirely replaced former modes of thinking about the right to be present. The Supreme Court has reserved judgment on the conditions, if any, under which a defendant could waive the constitutional right to be present in capital cases.[55]

3. Limitations Periods

As *Hopt* illustrates, the mandatory nature of procedure has not been limited to protections embodied in the United States Constitution or the constitutions of the several states. Statutory procedures and defenses now negotiable were once nonnegotiable. The right not to be prosecuted for a crime after the statute of limitations period has expired, in particular, is another excellent example of the transition from mandatory to negotiable procedure. Unlike the ability to waive a jury trial or the right to be present, judicial approval of waiver of the limitations defense came late in the twentieth century. Indeed, some state courts have only recently reached the

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Fourteenth Amendment, abolish trial by jury, it may limit the effect to be given to an error respecting one of the incidents of such trial").

54. *See* Snyder v. Massachusetts, 291 U.S. 97, 117 (1934).

55. *See* Crosby v. United States, 506 U.S. 255, 261 (1993). Although, lower courts have divided over whether anything remains of the inalienability rule of *Hopt* and *Lewis*, its future is bleak. Some courts have argued that there is no principled basis for limiting to noncapital offenses a defendant's ability to waive the right of presence, nor any basis for excluding presence from the panoply of rights subject to waiver by capital defendants. *See, e.g.*, Campbell v. Wood, 18 F.3d 662 (9th Cir. 1994) (en banc) (holding that a defendant in a capital case may waive his right to be present through a rational decision to waive or by disruptive conduct); State v. Amaya-Ruiz, 800 P.2d 1260, 1283 (Ariz. 1990) (en banc) (holding that the right to waive presence extends to presentence hearings in capital cases, and recognizing that the Supreme Court decisions precluding waiver of presence at trial in capital cases were "ripe for reconsideration"); People v. Robertson, 767 P.2d 1109, 1134 (Cal. 1989) (en banc) (holding that presence may be waived, and noting that there is "no sufficient reason not to permit a capital defendant to waive the right to be present"). *But see* Proffitt v. Wainwright, 685 F.2d 1227, 1258 (11th Cir. 1982), *modified*, 706 F.2d 311 (11th Cir. 1983) (noting in dictum that the Court has indicated that the issue of waiver of presence in a capital case may be subject to reconsideration but has not expressly overruled its decisions in *Diaz* and *Hopt*); Hall v. Wainwright, 733 F.2d 766, 775 (11th Cir. 1984) (interpreting *Proffitt* in dictum to hold that "a defendant may not waive his presence at any critical stage of his trial"). The Court also has yet to consider the constitutionality of commencing a felony trial without a defendant. *See* LAFAVE, ISRAEL, & KING, *supra* note 28, § 24.2(b); Starkey, *supra* note 51, at 724–33 (collecting cases on the commencement of trial without the defendant).

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issue.[56] The traditional rule was that a defendant could not waive the operation of the statute of limitations; a court had no power to prosecute a person for a crime once the limitations period expired.[57] A handful of states continue to consider the timeliness of a charge to be part of the court's "subject matter jurisdiction" and thus unwaivable.[58] But most courts have abandoned this rule, allowing a defendant to waive a valid or potentially valid limitations defense to one charge in order to avoid conviction on another charge carrying a higher penalty that is not time-barred.[59] Rejecting prior assumptions that proceeding on time-barred offenses was beyond the authority of the court, judges now emphasize that the limitations defense primarily benefits the defendant, rejecting arguments that public policy reasons require a rule of inalienability.[60]

II. SENSIBLE REGULATION OF NEGOTIATED PROCEDURE TODAY

A. A Proposed Approach: Narrowly Tailored Protection of Selected Interests of Nonparties

Any evaluation of when today's courts should discourage or disable parties from negotiating novel waivers of procedure should build upon these historical developments. Paternalism, a significant motivating factor in nineteenth-century decisions to ban waivers, continues to have a role to play in the policing of waivers in criminal procedure today. A court should not enforce a waiver, negotiated or not, if the court lacks confidence in the defendant's understanding of what he is waiving or in his willingness to agree to the waiver. The provision of counsel has alleviated this concern, but paternalism may justify interference with the purported preferences of the parties when a court is not convinced of (1) the competency of counsel's

56. *See, e.g.*, Cowan v. Superior Court, 926 P.2d 438, 441 (Cal. 1996); State v. Timoteo, 952 P.2d 865 (Haw. 1997); People v. Eaton, 459 N.W.2d 86 (Mich. App. 1990), *aff'd*, 479 N.W.2d 639 (Mich. 1992); People v. Gooden, 542 N.Y.S.2d 757 (App. Div. 1989); James v. Galetka, 965 P.2d 567 (Utah Ct. App. 1998); Smith v. State, 871 P.2d 186 (Wyo. 1994).

57. *See* Cuykendall v. Doe, 105 N.W. 698, 701 (Iowa 1906) (stating in dictum that a defendant cannot waive the statute of limitations). *See generally* Alan L. Adelstein, *Conflict of the Criminal Statute of Limitations with Lesser Offenses at Trial*, 37 WM. & MARY L. REV. 199, 208–09 nn.30–36 (1995) (collecting cases).

58. *See Timoteo*, 952 P.2d at 877–78 (Ramil, J., dissenting) (collecting cases from five states). *See generally* PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 2.02(b) (Supp. 1995).

59. *See Timoteo*, 952 P.2d at 871 n.9 (collecting cases from nine circuits and 17 states).

60. *See, e.g.*, *Cowan*, 926 P.2d at 442; *see also* Major Michael E. Klein, United States v. Weasler *and the Bargained Waiver of Unlawful Command Influence Motions: Common Sense or Heresy*, 1998 ARMY LAW. 3, 3–16 (tracing a similar development in military courts' treatment of the alienability of the defense of unlawful command influence).

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assistance, (2) the defendant's competency to reject or accept counsel's advice,[61] (3) the defendant's understanding of what he is waiving, or (4) the absence of constitutionally cognizable coercion. In such cases, sufficient regulation would be provided by review for ineffective assistance and by prophylactic protections (such as those required by Rule 11) that are designed to promote defense understanding and to protect the defendant from duress, extortion, and the like.[62]

Banning waiver altogether, however, is not necessary to protect the defendant from himself. Rather, it resembles drafting the accused as an unwilling soldier in the fight against error in the criminal process, forcing him to assume a risk that he may have preferred to minimize through a negotiated settlement.[63] Instead, rules banning or disrupting knowing and

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61. A defendant who is incompetent at the time he agrees to a plea bargain cannot be held to that agreement, even if he purports to waive his right to challenge the agreement based on incompetency. *See* Godinez v. Moran, 509 U.S. 389, 400–02 (1993) (upholding a standard for competency to waive the right to counsel that is no more exacting than the standard for pleading guilty and waiving the right to trial); Pate v. Robinson, 383 U.S. 375, 384 (1966) (finding that "it is contradictoty to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity"); Shapiro, *supra* note 21, at 528–29 (discussing the distinction between capacity and consent).

62. *See, e.g.*, Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 320 (1983) (defending "the requirement of a factual basis" for a guilty plea on this ground).

It is important at this point to distinguish bargained-for waivers from claims that are merely forfeited by the failure to raise them properly. A court should be more willing to grant postconviction relief to a defendant whose actions resemble forfeiture or acquiescence than it is to grant relief to a defendant who has made a knowing and voluntary waiver. Providing relief for plain, but not waived, error ensures that a defendant has not given up a right by mistake. For this reason, relief may be available for a defendant who forfeits, but does not waive, a claim. *See* United States v. Olano, 507 U.S. 725, 732–33 (1993) (specifying that plain error relief is not available for waived errors as opposed to unraised errors); United States v. Jones, 108 F.3d 668 (6th Cir. 1997). On the other hand, there is some support for the position that rights may be forfeited but not waived. The idea here is that even if the right is not the defendant's to waive (precluding enforcement of overt waivers), for efficiency reasons courts may nevertheless insist that a defendant take appropriate action to assert the right in a timely way. *Cf.* Richards, *supra* note 18, at 398–99 (explaining that the founders believed that "inalienable rights" were subject to forfeiture by conduct (the commission of crime) but not subject to waiver). As a practical matter, however, a rule permitting forfeiture but forbidding waiver may be unenforceable. Should the prosecutor and defense counsel both desire to evade an "unwaivable" requirement, they would only have to agree that the defendant would conveniently forfeit that requirement, disguising the forbidden waiver as forfeiture.

63. *See* Bruce A. Green, *"Through a Glass, Darkly": How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 COLUM. L. REV. 1201, 1247 (1989) ("A proceeding is just as likely to be deemed fair if the defendant gets the process that he insists on, even if that process is generally not considered to be in the best interests of a criminal accused."); Rasmusen, *supra* note 12, at 1574 ("[B]anning a practice that benefits defendants just because it does not benefit them enough would not be doing them a favor."). *But cf.* Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 766 (1983) ("Making an entitlement inalienable is a draconian, but

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voluntary waivers require justification separate from paternalism. As judges of the nineteenth century understood, a procedural right may serve a variety of social or public goals that will not always coincide with the preferences of defense and prosecution. Today, as then—even accepting plea bargaining as the governing norm—regulating waiver makes sense as a means to protect public or third-parry interests that are advanced by the government's adherence to procedural requirements. Regulation of the waiver of a potentially nonnegotiable right must be tailored to the specific third-party or public interests that the right protects.[64]

B. Trumping Party Preferences: A Justification

Before turning in more detail to the options available to courts as enforcers of third-party interests in the criminal process, and to specific applications of my proposed analysis, let me anticipate potential objections to reliance on public or third-party interests as a basis for interfering with the autonomy of parties to settle criminal cases. Some would argue that the process of resolving criminal cases is, as a descriptive matter, strictly a two-party affair, precluding the recognition of external effects.[65] But this posi-

sometimes efficient, way to protect its possessor against fraud or deception . . . ."); Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229 (1998).

64. The argument I advance thus differs from that of Professor Peter Westen, who has asserted that *all* rights, even subject matter jurisdiction, should be subject to waiver by defendants. *See* Westen, *supra* note 19, at 1331. Westen argues, however, that the only basis for rejecting a change of heart by a once-waiving defendant is proof that the prosecutor's chances of convicting the defendant have been impaired by the passage of time or other events following the defendant's initial waiver. *See* Peter Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214, 1258 (1977); *see also* Westen, *supra* note 19, at 1321–22 (advocating that courts should examine whether the "belated assertion [of claims] impairs the ability of the prosecution to sustain its burden of proof at trial"). I agree that detrimental reliance by the prosecution on a defendant's waiver is an important consideration in any judicial decision to enforce, disregard, or modify an earlier agreement. Indeed, significant costs are incurred by the government in granting sentence or charge concessions and proceeding to judgment, rather than proceeding directly to trial. I suggest here that there are additional reasons for discouraging, preventing, and disregarding agreements by criminal litigants to circumvent procedure, reasons that are completely unrelated to changes in the prosecution's ability to secure a conviction.

65. *See* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1916–17 (1992) (dismissing third-party interests as irrelevant in the regulation of plea bargaining, and arguing that "[i]f our system were based on the notion that the relevant entitlements are externalized" then "bedrock rules," such as the ability of defendants to plead guilty or confess if they wish and the ability of prosecutors to control the decision to charge, "would have to be altered"). As my historical analysis above suggests, I disagree with this characterization of what forms the bedrock of our criminal justice system. Indeed, the fresher stratum on the evolving topography of criminal justice is not the *presence* of concern for third-party effects, but the *decline* in concern for third-party effects. *See, e.g.*, Alschuler, *supra* note 3. Nevertheless, Professors Stuntz and Scott have demonstrated quite persuasively why at least a presumption of alienability

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tion ignores the variety of limits on party autonomy, discussed in the next part, that have endured even in the new paradigm of negotiated procedure. The power to veto plea bargains, for example, is directed not only toward regulating the *process* of bargaining, but also toward the *terms* of the bargain. There are some deals—an agreement to circumvent subject matter jurisdiction[66] or an agreement to be sentenced by orangutans,[67] for example—that even the strongest advocates of the efficiency model of plea bargaining would refuse to accept. What makes such startling agreements unenforceable is not necessarily some error in the bargaining process, or concern for the sanity or autonomy of one party or another. They are suspect because of the harm such agreements cause to an interest or value independent of the preferences of the defendant and the prosecution. In criminal procedure, as in contract law, the parties still cannot always get what they want.[68]

Even those who value the public's interests in the criminal process as an important determinant of waiver rules may believe these concerns are always advanced by facilitating knowing and voluntary agreements between the prosecution and the defense and always injured by interfering with party preferences.[69] Not surprisingly, it is difficult to reconcile this view with the

should exist for rights in criminal litigation today. *See also* William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 778–86 (1989) (arguing that the interests of third parties protected by Fourth, Fifth, and Sixth Amendment rights explain why the rules regarding waiver of such rights are *relaxed* (not restricted, as I argue here) in criminal procedure, because right-holding defendants are not meant to maximize their enjoyment of the relevant entitlement, but only to assert entitlements when needed to protect third parties).

66. *See infra* note 99 and accompanying text.

67. *See* United States v. Mezzanatto, 513 U.S. 196, 204 (1995) (upholding the waiver of a court rule and an evidence rule that bar the admissibility of statements made during plea negotiations, distinguishing an agreement to waive a judge or jury and be tried by orangutans, and noting that "'some minimum of civilized procedure is required *by community feeling* regardless of what the defendant wants or is willing to accept'" (quoting United States v. Josefik, 753 F.2d 585, 588 (7th Cir. 1985) (emphasis added))).

68. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981) ("A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."); U.C.C. § 2-302(1) (1994) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract . . . ."). The Supreme Court continues to treat plea bargains like contracts. *See, e.g.*, United States v. Hyde, 520 U.S. 670, 678 (1997) (using contract law to explain why a defendant cannot withdraw his plea without a fair and just reason unless the plea agreement is first rejected by the court (citing JOHN D. CALAMARI & JOSEPH M. PERILLOW, CONTRACTS 441 (3d ed. 1987), and A. CORBIN, 3 CORBIN ON CONTRACTS 17 (1960))).

69. This argument takes two forms. One is a claim about relative expertise: The prosecutor is a better agent for the public interest than the judge who would interfere with the prosecutor's choices. The other is a claim about the efficiency of bargaining generally. *See, e.g.*, People v. Hidalgo, 698 N.E.2d 46, 47 (N.Y. 1998) (noting that the public interest is maximized by efficient plea bargaining); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 529 (3d ed. 1986) (stating

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remaining enclaves of the older understanding of due process as inalienable, described below in Part II.C. Rather than dismiss these remnants as obsolete, it is appropriate to examine the reasons for their stubborn survival in the new world of negotiated criminal procedure.

A third objection to allowing third-party concerns to negate agreements by the parties in criminal cases is that courts are unable to identify when "public policy" is injured.[70] Recitations of the need to consider the "public interest" appear repeatedly and with maddeningly little explanation in cases considering the acceptance or rejection of negotiated settlements.[71] As Professor Albert W. Alschuler has argued, "broadly conceived in terms

that "[p]lea bargaining takes place because negotiation is a cheaper way of resolving controversies than litigation"); Scott & Stuntz, *supra* note 65, at 1915 n.18 (noting that the public is not harmed by plea bargaining because the alternatives to plea bargaining all require more expense per case, and that prosecutors would continue to be bad representatives of the public interest in exercising discretion to charge if bargaining were abolished). Under this view, the only waivers that are worth regulating are those that may actually inhibit plea bargaining itself. *See also* John Gleeson, *Sentence Bargaining Under the Guidelines*, 8 FED. SENTENCING REP. 314, 314 (1996) (noting that allowing for open circumvention will "eliminate unnecessary litigation" and be "fairer and more honest"); *cf. Mezzanatto*, 513 U.S. at 207 (rejecting the defendant's argument that settlement would be encouraged by precluding negotiation over an issue that may be particularly important to one of the parties to the transaction); Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478, 488–89 (1981) (noting that bargaining (1) minimizes costs, (2) may save time, (3) reduces risk, (4) maintains good will, and (5) allows for a broader ranger of remedies than those available by adjudication); Jack B. Weinstein & Nicholas R. Turner, *The Cost of Avoiding Injustice by Guideline Circumventions*, 9 FED. SENTENCING REP. 298, 299 (1997) (pointing out that when circumvention of the law must occur sub rosa rather than openly, criminal adjudication becomes "more haphazard, chaotic, and unpredictable").

70. *See, e.g.*, Patton v. United States, 281 U.S. 276, 306 (1930) (rejecting the argument that allowing federal defendants to waive their right to jury trial would be against public policy, and stating that "the public policy of one generation may not, under the changed conditions, be the puhlic policy of another"); United States v. Gonzalez, 58 F.3d 459, 463 (9th Cir. 1995) (noting that the court is "not in a position to second-guess" the prosecutor's "determination [of] the public interest," and reversing the trial court's order denying the prosecution's motion to dismiss).

71. *See* Town of Newton v. Rumery, 480 U.S. 386, 392 (1987) ("[A] promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."); Gannett Co. v. DePasquale, 443 U.S. 368, 438 (1979) (Blackmun, J., concurring in part and dissenting in part) (stating that parties must not be given "complete discretion to dispose of the public's interest as they see fit"); People v. Welch, 3 Cal. Rptr. 2d 636, 641 (Ct. App. 1992) (noting that "a defendant may consent to an invalid probation condition which infringes on an interest that is personal . . . , but may not consent to a probation condition which is invalid because it contravenes an overriding public interest," and giving as examples of "nonwaivable probation conditions which are void for reasons of public policy," "banishment and avoidance of nonmarital pregnancy" (interpreting CAL. CIV. CODE § 3513 (West 1997) ("[L]aw established for a public reason cannot be contravened by a private agreement."))); People v. Muniz, 696 N.E.2d 182, 185–86 (N.Y. 1998) (stating that the "guiding principle . . . is plain: where the plea allocution demonstrates a knowing, voluntary and intelligent waiver of the right to appeal, intended comprehensively to cover all aspects of the case, and no constitutional or statutory mandate or public policy concern prohibits its acceptance, the waiver will be upheld").

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of social aspirations," the idea of "externality" could bar traditional plea bargaining.[72] That courts continue to consider the externality of public interest sufficient to regulate waivers in some instances, but not sufficient to bar the routine trade of trial rights for charge and sentence breaks, suggests that a narrower conception of public-interest-as-externality is at work. Careful inquiry into the particular harms that flow from different types of agreements may remove much of the mystery of vague references to "public policy," first by identifying exactly what is troublesome about a given waiver, second by classifying each policy threatened by that waiver as one that is or is not subject to legislative amendment, and third by examining alternatives for enforcement.

Finally, some have argued that regulating bargaining may be a futile exercise, given the inability of the judiciary to force the executive to prosecute a charge it would prefer to abandon.[73] The prosecutor negotiates unencumbered by judicial scrutiny if she is willing to forego charges altogether. Precharge agreements granting the defendant informal immunity from some charges in exchange for waivers of rights on remaining charges would be virtually unreviewable as well if the defendant, prosecutor, and defense counsel conspired to conceal such agreements from the court. And should a court refuse to dismiss a charge once filed, a prosecutor could achieve the result rejected by the judge simply by doing a bad job and securing an acquittal.[74] There is no proof, however, that such deliberate sabotage occurs with any regularity at the conviction stage.[75] The prosecutor may anticipate barriers to a negotiated penalty at the sentencing stage

72. *See* Alschuler, *supra* note 3, at 699.

73. *See* Gleeson, *supra* note 69, at 314 (arguing that even if a court rejects an agreement, the prosecution could simply dismiss under FED. R. CRIM. P. 48 (Rule 48), or charge bargain, which is rarely rejected).

74. *See, e.g.*, State *ex rel.* Koppy v. Graff, 484 N.W.2d 855, 857 (N.D. 1992) ("'The court is powerless to compel a prosecutor to proceed in a case that he believes does not warrant prosecution. If the court refused consent to dismiss, the prosecutor in his opening statement to the jury and in his presentation of evidence can indicate [that acquittal is appropriate].'" (quoting 3A CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 812 (2d ed. 1982) (citations omitted))); William T. Pizzi, *Fact-Bargaining: An American Phenomenon*, 8 FED. SENTENCING REP. 336, 337 (1996) (noting that "there are structural reasons that make it much harder for judges to reject bargains offered by the parties," including the fact that "parties have far greater control over the presentation of the case in the United States than in other Western countries").

75. *See* ABRAHAM S. GOLDSTEIN, THE PASSIVE JUDICIARY 56 (1981) (arguing that the futility problem is exaggerated and that there is "no reason to assume prosecutors will ignore either that body of law or their legal obligations with regard to 'presentation of evidence,'" given both the court's ability to order a mistrial should a prosecutor neglect his ethical obligations and the prosecutor's exposure "to the risk of disciplinary proceedings"); Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 961–65 (1983).

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as well, but at this point the trial judge retains more control and need not defer to the discretion of the executive.[76]

C. The Menu of Regulatory Options

Assuming that courts may justifiably interfere with agreements by parties to dispense with features of the criminal process when those agreements threaten public or third-party interests, there are a number of alternative methods of protecting those interests.

1. Controlling Evasion Prior to Judgment: The Power of the Trial Judge to Reject Pleas and Dismissals

The first obstacle to party autonomy is the trial judge. In all jurisdictions, the judiciary retains at least limited authority to review and reject plea agreements, negotiated dismissals, and other stipulations.[77] While trial judges are reluctant to exercise their power to force a prosecutor and a defendant to abandon their preferred solution, sometimes judges balk when particular deals strike them as unacceptable. Judges more readily reject sentence agreements than charge bargains, considering the selection of an appropriate sentence to be within their special domain, and the selection of the appropriate charge to be within the exclusive power of the executive.[78] Even when retaining the power to set the sentence, however, a judge may decide to block a charge agreement as too lenient, too harsh (as with agreements involving appeal waivers), or otherwise objectionable.[79]

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76. *See infra* text accompanying note 78. *But see* Interview with Paul Larned, Senior Probation Officer, Eastern District of Michigan (Oct. 8, 1998) (suggesting that in many cases when an assistant U.S. attorney and defense counsel anticipate that the trial judge will reject their joint recommendation for reduced punishment, they will obtain the same sentence through the use of a downward departure for substantial assistance, which as a practical matter cannot be questioned by the judge or by the probation officer).

77. *See, e.g.*, Santobello v. New York, 404 U.S. 257, 262 (1971) (noting that a defendant has "no absolute right to have a guilty plea accepted").

78. *See, e.g.*, United States v. Robertson, 45 F.3d 1423, 1438–39 (10th Cir. 1995) (finding that the trial judge's rejection of the defendant's plea agreement was an abuse of discretion, reasoning that while it is permissible for a trial judge to refuse to go along with a negotiated sentence, because judges retain the ultimate power to set the sentence within the limits set by the legislature, rejecting charge bargains interferes unduly with the executive function).

79. The prosecutor or the defendant may seek interlocutory review of a trial judge's decision to reject a plea bargain, or a defendant may appeal his conviction or his sentence after a trial forced by the rejection of a bargain. *See, e.g.*, Sandy v. District Court, 935 P.2d 1148, 1152 (Nev. 1997) (granting an interlocutory writ reversing the trial court's rejection of a plea agreement, and remanding for proper application of the standard for rejecting a plea). *But see* United States v. Carrigan, 778 F.2d 1454, 1465–66 (10th Cir. 1985) (finding that neither the government nor the

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Alternatively, a trial judge may regulate agreements between the prosecution and the defense by denying a prosecutor's motion to dismiss a charge if the dismissal is exchanged for some concession by the defendant, usually on another charge. Unlike the absolute power to dismiss granted to prosecutors in the nineteenth century,[80] modern rules governing the prosecutor's

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defendant may appeal under 28 U.S.C. § 1291 (1994) a judge's rejection of a proposed plea, as the judge's ruling is not a final judgment).

Cases overturning a trial judge's decision to reject an agreement include *United States v. Miller*, 722 F.2d 562, 565 (9th Cir. 1983) (holding that a judge may not reject an entire category of plea bargains—here, all one-count pleas to multicount indictments—but must consider each agreement separately), *United States v. Ammidown*, 497 F.2d 615, 622 (D.C. Cir. 1973) (reversing the trial judge's decision to reject a plea of second-degree murder by a defendant who hired another to rape and kill his wife, in return for his testimony in the prosecution of the killer, and holding that in order to reject a plea agreement the judge must provide reasons justifying the refusal, such as concern about government harassment of the defendant, or "blatant and extreme" incursions on judicial sentencing authority), *State v. Bilse*, 581 A.2d 518, 522–23 (N.J. Super. Ct. Law Div. 1990) (holding that a trial judge may condemn the prosecutor's agreement as a trespass on judicial authority only in a "blatant and extreme case" or when the prosecutor abuses his discretion or contravenes the law, and noting that the "court should not substitute its judgment as to the relative merits of a proffered plea agreement unless clearly warranted by the facts readily available to the court through the presentence report"), and *Myers v. Frazier*, 319 S.E.2d 782, 790–91 (W. Va. 1984) (declaring guidelines for accepting or rejecting a plea, including consideration of "the seriousness of the criminal charges and the character and background of the defendant," the "perception" of the "general public," "the interests of the victim," and the "prosecutorial interest" secured).

For a sampling of cases approving the trial judge's decision to reject a bargain, see *United States v. Foy*, 28 F.3d 464, 472 (5th Cir. 1994) (noting that no statute, rule, or guideline requires "a statement of reasons for rejecting a plea agreement," and holding that rejection is proper so long as the record "renders the basis of the decision reasonably apparent to the reviewing court and a decision on that basis is within the district court's discretion," such as rejection on the basis of "undue leniency"), *United States v. Cox*, 923 F.2d 519, 524–25 (7th Cir. 1991) (approving of a refusal to allow a defendant to plead guilty when the defendant continues to claim that he is innocent of any crime but is pleading to avoid trial on the charged crimes, and noting that "'the public might well not understand or accept the fact that a defendant who denied his guilt was nonetheless placed in a position of pleading guilty and going to jail'" (quoting United States v. Bednarski, 455 F.2d 364, 366 (1st Cir. 1971))), *United States. v. Moore*, 637 F.2d 1194, 1196 (8th Cir. 1981) (per curiam) (upholding the judge's rejection of a plea, even when the judge gave no explanation at all for the refusal, and noting that the limits on a trial court's ability to reject plea agreements articulated in *Ammidown* preceded the 1974 amendments to FED. R. CRIM. P. 11 (Rule 11) that gave judges more discretion), *State v. Perez*, 457 N.W.2d 448, 453 (Neb. 1990) (noting that a defendant has no right to have his plea of guilty accepted, even if voluntarily and intelligently made), and *State v. Roubik*, 404 N.W.2d 105, 106–07 (Wis. Ct. App. 1987) (reviewing and upholding the decision of the trial judge to reject a plea agreement using an abuse of discretion standard, and finding that the judge's conclusion that the agreement provided inadequate deterrence was a sufficient reason for rejecting the agreement).

80. *See* The Confiscation Cases, 74 U.S. 454, 458 (1868) (noting that the district attorney had complete control over the suits before they were transferred to the Supreme Court, so that "he might, if he had seen fit, have discontinued them at any stage of the proceedings prior to the appeals"). On the history of *nolle prosequi*, see *Billis v. State*, 800 P.2d 401, 418–20 (Wyo. 1990) (collecting case authority from the 1980s), and GOLDSTEIN, *supra* note 75, at 12–15. *See also* Easterbrook, *supra* note 62, at 305 (noting that absolute discretion to dismiss is a "logical complement

motion to dismiss, such as Rule 48 of the Federal Rules of Criminal Procedure, allow judges limited power to reject the preference of the prosecutor.[81] A trial judge may also reject stipulations waiving procedures during trial or sentencing.

2. Controlling Evasion Prior to Judgment: Intervention and Interlocutory Appeal

Should trial judges fail or choose not to interfere with agreements to circumvent procedure, other prejudgment controls are available to protect public or third-parry interests. In particular, third-party intervention at the trial level may provide a check on the parties' preferences. For example,

to the discretion not to prosecute," allows "prosecutors to correct their own mistakes and to conserve resources," and "permits supervisory prosecutors to exercise some measure of control over subordinates").

81. Rejection of a prosecutor's motion to dismiss is considered an abuse of discretion unless the prosecutor appears to be harassing the defendant through repeated aborted prosecutions, or otherwise attempting to dismiss the charges in "bad-faith." *Compare* Rinaldi v. United States, 434 U.S. 22, 31–32 (1977) (holding that a judge cannot refuse to grant the government's post-trial dismissal motion because of a belated realization that the prosecution violated the "Petite policy" governing federal prosecutions following state prosecutions, and reasoning that "'no societal interest would be vindicated by punishing further a defendant who has already been convicted and has received a substantial sentence in state court and who, the Department has determined, should not have been prosecuted by the federal government'" (quoting the Solicitor General, Memorandum for the United States 3, 7 (1959))), United States v. Gonzalez, 58 F.3d 459, 463–64 (9th Cir. 1995) (noting that a judge may refuse a motion to dismiss only in exceptional circumstances "clearly contrary to manifest public interest," finding that the judge should have accepted the prosecutor's decision that the defendant's cooperation was a sufficient basis for dismissal, and noting that "[t]he determination of the public interest . . . is for the prosecutor to make" (citation omitted)), Dawsey v. Virgin Islands, 931 F. Supp. 397, 404–05 (D.V.I. 1996) (upholding dismissal, and stating that "[w]ithout some credible evidence of the kind of improper prosecutorial motivation which indicates a betrayal of the public interest, e.g., bribery or other corruption, personal dislike for rhe victim, interference with the sentencing function of the court, '[n]either this court on appeal nor the trial court may properly reassess the prosecutor's evaluation of the public interest'" (quoting United States v. Hamm, 659 F.2d 624, 631 (5th Cir. 1981))), State *ex rel.* Koppy v. Graff, 484 N.W.2d 855, 858–59 (N.D. 1992) (granting the writ sought by the district attorney to compel the trial court to issue an order dismissing the charge, and noting that there was an allegation of harassment but no hearing or finding of misconduct that could support a denial of the state's motion or a dismissal with prejudice), *with* United States v. Hayden, 860 F.2d 1483, 1488–89 (9th Cir. 1988) (concluding that a dismissal motion was made in bad faith when the prosecutor used it to avoid the consequences of the judge's ruling denying a motion to continue), United States v. Derr, 726 F.2d 617, 619 (10th Cir. 1984) (finding that it was bad faith for the prosecutor to dismiss because he was unprepared for trial), United States v. Weber, 721 F.2d 266, 268 (9th Cir. 1983) (per curiam) (holding that dismissal was against the public interest when the prosecutor sought dismissal in order to attend a social event rather than go to trial), Ciry of Lakewood v. Pfeifer, 613 N.E.2d 1079, 1082 (Ohio Ct. App. 1992) (affirming denial of a motion to dismiss a criminal complaint, and noting that "to require the rrial court to simply accede to the prosecutor's conclusory assertion of insufficient evidence would completely nullify the 'leave of court' and 'good cause' provisions of Rule 48(a) and [the governing statute]").

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should a trial judge approve an agreement by the defendant and the prosecutor to hold a secret trial, the Supreme Court has identified ready and willing champions of the public interest threatened by such evasion—journalists and their news organizations—and granted to them the independent constitutional right to intervene and block the bargain.[82] The perennial attempt to add a Victims' Rights Amendment to the Constitution[83] may enlist crime victims and their families as watchdogs of procedural bargains as well, relieving judges of the sole responsibility for spotting deals that are unlawfully lenient or harsh, that license undue delay, or that permit the defendant to plead guilty to a lesser, fictitious offense. Federal probation officers are charged by statute with the duty to collect and report information to the court that a court may consider in sentencing, thereby exposing baseless allegations by the parties.[84]

Of course, third parties will not be perfect protectors of the public interest. For example, consider how the decisions of news organizations to pursue rights of access are warped by revenue goals. Nevertheless, oversight by third parties of the prosecutor's assessment of the public interest could deter some agreements sufficiently to obviate the need for appellate courts to grant to *defendants* relief on appeal from their own agreements.

Another option for controlling harmful agreements not adequately policed by a single trial judge would be to mandate approval of certain agreements by more than one judge (just as certain injunctions require the concurrence of more than one judge).[85] Although a focus on the sufficiency of third-party controls may not produce a consensus about the need for additional deterrence through the invalidation of agreements on appeal, it does

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82. *See* Press Enter. Co. v. Superior Court, 478 U.S. 1, 6–13 (1986) (holding that the media has a limited First Amendment right to attend proceedings that have been ordered closed upon an unopposed motion by the defense); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); *see also* Washington Post v. Robinson, 935 F.2d 282, 288 (D.C. Cir. 1991) (recognizing a general right of access to plea agreements unless there are compelling reasons to withhold access); Oregonian Publ'g Co. v. District Court, 920 F.2d 1462 (9th Cir. 1990) (vacating an agreement prohibiting the disclosure of plea bargain terms to the press); Akhil Reed Amar, *Foreword: Sixth Amendment First Principles*, 84 GEO. L.J. 641, 679–81 (1996) (reviewing the public's interest in open proceedings and the origins of the public trial right in the Sixth Amendment); *cf.* Shapiro, *supra* note 21, at 573 (noting that the waiver of constitutional rights "might harm nonparties in ways that seem plainly within the scope of constitutional guaranties" and that the "willingness of the courts to expand notions of standing in the first amendment area reflects an awareness of the interests of third persons and the public generally in unrestricted speech").

83. *See generally* Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691 (1997).

84. *See infra* text accompanying note 187.

85. *See* 17 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4235 (2d ed. 1988).

direct courts' attention to the interests that matter—those unrepresented in negotiations.

3. Collateral Actions by Third Parties

Short of intervention, another possible constraint on bargaining exists whenever the defendant's decision to submit to an illegal proceeding or penalty threatens the interests of a definable third party, group, or institution. The provision of remedies to that third party outside the context of any particular prosecution addresses the harm caused by the parties' settled solution directly, case-by-case, and avoids barring all waivers of that type. To give just one example, a defendant and a prosecutor may agree that a defendant will forfeit certain assets to the government in return for some concession. If those assets do not actually belong to the defendant, courts could leave the deal intact but permit the true owner to seek to recover the property or damages from the government. Or consider the agreement of a defendant not to testify in favor of a codefendant, in return for a charge or sentence concession. Should the codefendant be tried and the defendant refuse to testify, the codefendant could object successfully to the enforcement of the deal as a violation of his right to compulsory process, deterring similar agreements in the future.[86]

4. Appellate or Collateral Relief for Defendants Who Change Their Minds

Postjudgment relief remains the most visible method of regulating disfavored bargains. Whenever a defendant receives this type of relief, of course, he is acting as an enforcer of the interests of third parties, deterring future bargains by others, since he has already received the benefit of his own bargain. If the remedy for an illegal or unenforceable plea bargain is to vacate the agreement and return the parties to the status quo, a defendant who has avoided a higher charge or a higher sentence in return for the questionable waiver normally would not anticipate any benefit from challenging the agreement, because either a successful or an unsuccessful challenge would permit the prosecutor to pursue the higher charge or sentence anew.[87]

86. *See* Bhagwat v. Maryland, 658 A.2d 244, 249 (Md. Ct. Spec. App. 1995) (collecting cases); *see also* State v. Fisher, 859 P.2d 179, 183–84 (Ariz. 1993) (finding that a defendant may challenge his conviction based on the testimony of a witness who had previously entered into a plea agreement to testify in accordance with statements given police).

87. If unsuccessful, the defendant's challenge could be considered a breach of the defendant's agreement. *See* Ricketts v. Adamson, 483 U.S. 1 (1987); United States v. Salemo, 81 F.3d 1453, 1462 (9th Cir. 1996) (stating that the defendant had "not cited, nor have we discovered,

Recent rulings make defense challenges to negotiated agreements more attractive by allowing the defendant to keep the prosecutor's concessions while invalidating only unenforceable aspects of the agreement.[88]

D. Selecting the Best Option

Given the range of methods available to remedy the harms caused when parties circumvent procedural requirements and to deter undesirable agreements, an appellate court need not assume that the only, or even the best, means available to vindicate public interests undermined by the parties' agreement is an order voiding the agreement and returning the parties to their prebargaining positions. Rather, two other assumptions are in order.

First, although the judiciary is responsible for defining conditions under which parties may evade constitutional rules, courts should presume that the responsibility for policing the evasion of *statutory* requirements rests initially with the legislature, not the courts. Because the interests recognized and protected by statutory requirements are not of constitutional stature, legislatures are free to encourage, prohibit, or regulate waiver. Should waiver of a particular rule become more frequent than the legislature concludes is appropriate, it can require that appellate courts enforce that rule regardless of party preferences, or it can adopt other forms of regulation such as those described above in Part II.C. Without such a statement from the legislature, it is fair to assume that it acquiesces in the degree to which parties use the statutory right as a bargaining chip. With bargaining now at the very heart of the criminal justice process, it makes little sense to assume that in the absence of clarifying legislative action, a right can be raised despite a negotiated promise not to raise it. This may have been an appropriate premise in the mid-1800s, or even before the legality of bargaining was

any principle of contract law that would require the Government to perform its obligations pursuant to a plea agreement, following breach of the agreement by the defendant"). If a defendant succeeds in challenging an agreement, normally rhe parties are returned to the trial court and the status quo that existed before the agreement. *See, e.g.*, Patterson v. State, 660 So. 2d 966, 968–69 (Miss. 1995) (vacating an agreement to an invalid sentence, and noting that the parties should be returned to their positions before the agreement, with the state baving the right to seek the death penalty and the defendant the right to contest it before a jury). *But cf.* Ty Alper, Note, *The Danger of Winning: Contract Law Ramifications of Successful* Bailey *Challenges for Plea-Convicted Defendants*, 72 N.Y.U. L. REV. 841 (1997) (arguing that prosecutors should not be allowed to reinstate charges for defendants waging successful collateral attacks on the validity of their convictions).

88. *See* United States v. Goodman, 165 F.3d 169 (2d Cir. 1999); United States v. Martinez-Rios, 143 F.3d 662, 669 (2d Cir. 1998) (severing an invalid appeal waiver provision and proceeding to the merits of the appeal, and noting but not adopting an alternative remedy of giving the government the choice between foregoing the appellate waiver provision and having the entire agreement vacated).

firmly established in the 1970s. But for well over twenty years, negotiated procedure in criminal cases has been the norm. Absent legislative action that clarifies the intent of the legislature regarding waiver, it is more reasonable to assume that the legislature considers its statutory guarantees to be subject to negotiation by the parties.[89]

A second principle applies to the plight of an appellate court faced with a defendant who seeks relief from a knowing and voluntary bargain to evade a constitutional rule, a bargain that he now claims is void as against public policy. For reasons discussed earlier, including the importance of the finality of settlements, courts normally should not disturb a conviction or sentence that results from a knowing and voluntary agreement by the parties.[90] Relief should be available only if other controls provide insufficient deterrence to counter the parties' incentives to enter into forbidden bargains or fail to ameliorate the harm created by the parties' evasion of a constitutional command.[91] As I argue in the parts that follow, this analysis will vary depending on the type of error at stake. An approach that conditions relief for defendants who trade away entitlements upon the absence of alternative means of protecting third-party interests injured by the trade would have two important consequences. It would require courts to define, specifically, who is injured when criminal litigants agree to bypass the law, and it would focus attention on the existence of remedies for that injury other than relief for defendants who have changed their minds. It may even prompt courts to consider how their decisions about standing to object to criminal statutes and proceedings may affect the negotiability of error in the criminal process.

89. *See* United States v. Mezzanatto, 513 U.S. 196, 201 (1995) (noting that "absent some affirmative indication of Congress' intent to preclude waiver, we have presumed that statutory provisions are subject to waiver by voluntary agreement of the parties"); *see also* Shell, *supra* note 4, at 485–86 (collecting similar cases and concluding that the presumption of waivability is now accepted).

90. Recognition that granting relief may encourage sandbagging is quite common in opinions denying a defendant relief following an express waiver. *See* United States v. Baucum, 80 F.3d 539, 544 (D.C. Cir. 1996) (arguing that allowing review would "place a burden on trial courts to make threshold constitutional determinations without the benefit of briefing and argument," and would threaten the "finality of criminal rulings"); *see also* Freytag v. Commissioner, 501 U.S. 868, 900 (1991) (Scalia, J., concurring) (noting that the "maxim *volenti non fit injuria* has strong appeal in human affairs").

91. As Professor Richard Epstein has explained, "The proper office for restraints on alienation is to provide indirect control over external harms *when direct means of control are ineffective to the task.*" Epstein, *supra* note 6, at 970 (emphasis added).

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III. DEFINING NONNEGOTIABLE ERROR—DESCRIPTIONS THAT FAIL

The error-by-error analysis I advocate here would not be necessary if there were categories that described with some predictability *groups* of errors that should not be subject to waiver. The categories that seem to surface most frequently in discussions of invalid deals are (1) "jurisdictional" defects generally; (2) defects in "subject matter jurisdiction"; (3) the right to appeal, generally; and (4) errors that might occur in the future. None of these categories provides any useful guidance.

A. "Jurisdictional Error"

"The error is jurisdictional"—this is probably the most common explanation given by courts for considering a claim that was once waived by a convicted defendant.[92] The longevity of such an indeterminate concept is remarkable, especially considering the beating it has taken both on and off the Court. Decades ago, the Court discarded the concept of jurisdictional error as a limit on claims cognizable in federal habeas corpus proceedings. It recognized that its attempt to enlarge and yet to constrain the meaning of "jurisdictional error" in that context had failed. Once the Court chose to describe mob domination and the lack of counsel as jurisdictional defects,[93] the distinction between constitutional and jurisdictional error blurred beyond recognition. Eventually the Court abandoned the pretense of trying to dress up ordinary errors of constitutional criminal procedure as defects in jurisdiction, preferring instead to construe the habeas corpus statute as reaching a wide variety of constitutional errors.[94] During the 1980s, the Court again distanced itself from its former reliance on jurisdictional error when determining which claims are forfeited by guilty pleas. As the Court's

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92. *See, e.g.*, United States v. Cordero, 42 F.3d 697, 699 (1st Cir. 1994) ("[A] jurisdictional defect is one that calls into doubt a court's power to entertain a matter, not one that merely calls into doubt the sufficiency or quantum of proof relating to guilt."). State courts of appeal seem to rely more heavily than federal courts on the concept of jurisdictional error as a dividing line between error that can be waived either expressly or by guilty plea and error that is not waivable.

93. *See* Johnson v. Zerbst, 304 U.S. 458 (1938) (recognizing lack of counsel as a jurisdictional error); Moore v. Dempsey, 261 U.S. 86 (1923) (recognizing mob domination as a jurisdictional error); *see also* Anne Woolhandler, *Demodeling Habeas*, 45 STAN. L. REV. 575 (1993) (reviewing the Court's various uses of the term "jurisdictional" during the nineteenth century).

94. *See* Waley v. Johnston, 316 U.S. 101 (1942); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 495 (1963).

conservative membership expanded, the scope of jurisdictional error shrank, and fewer and fewer claims survived the defendant's plea of guilty.[95]

Regrettably, the Court's opinions still have not provided clear guidance as to whether the Justices today consider the concept of jurisdiction to offer a meaningful method of distinguishing between claims that are subject to waiver and those that are not. As recently as 1994, in *Custis v. United States*[96] the Court stated that an uncounseled conviction was subject to collateral attack by a defendant facing a higher sentence based on that conviction because it involved jurisdictional error. Needless to say, this resurrection of the concept of jurisdictional error generated protests by the dissenters that the Court felt compelled to "re-embrace" a futile concept "fraught . . . with difficulties."[97] Defined only by the postconviction consequences of its presence and lacking independent content, jurisdictional error is a dead end. Clearly another concept is needed to serve as a coherent expression of what features of a particular error render it appropriate for review despite express waiver by the parties.[98]

B. Defects in "Subject Matter Jurisdiction"

Unlike the catch-all term "jurisdiction," "subject matter jurisdiction" is commonly assumed to describe something unique and easily identifiable, and it tops most judges' lists of nonnegotiable requirements.[99] But the term

95. *See* LAFAVE, ISRAEL, & KING, *supra* note 28, § 21.6(a); Westen, *supra* note 19, at 1330 n.74 (listing cases that examine whether the error is jurisdictional); *see also* Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887, 934–36 (1980) (arguing that a defendant who pleads guilty should have the opportunity to raise and litigate procedural due process attacks on the state's trial procedures, such as deficiencies in jury selection or in the provision of counsel). "Jurisdiction" to enter an order also is a prerequisite to granting that order validity for double jeopardy purposes. Here, too, courts have found "jurisdiction" to be a "jurisprudential greased pig." Boyd v. Meachum, 77 F.3d 60, 64 (2d Cir. 1996).

96. 511 U.S. 485 (1994).

97. *Id.* at 509–10 (Souter, J., dissenting).

98. It "simply begs the question" to rely on the concept of "jurisdiction," or on an equally unenlightening term such as "fundamental" or "structural." LAFAVE, ISRAEL, & KING, *supra* note 28, § 21.6(a); *see also* Bator, *supra* note 94, at 470.

> Once the concept of "jurisdiction" is taken beyond the question of the court's competence to deal with the class of offenses charged and the person of the prisoner, it becomes a less than luminous beacon. How is one to tell which errors cause a court to lose jurisdiction and which do not, which render a judgment void and which do not?

Id.; *cf.* Westen, *supra* note 19, at 1330 ("Fortunately, the Supreme Court itself has eschewed the talismanic notion of jurisdictional error. In Judge Henry Friendly's inimitable phrase, the Court has declined to 'kiss the jurisdictional book.'" (quoting Henry J. Friendly, *Is Innocence Irrelevant?*, 38 U. CHI. L. REV. 142, 151 (1970))).

99. *See, e.g.*, Patton v. United States, 281 U.S. 276, 300–05 (1930) (distinguishing subject matter jurisdiction as nonwaivable); Cowan v. Superior Court, 926 P.2d 438, 441–42 (Cal. 1996) (upholding a waiver of the statute of limitations defense, and distinguishing waiver of subject mat-

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"subject matter jurisdiction" carries a multitude of meanings, embracing such a varied and ill-defined set of requirements that it too fails as a useful description of what is nonnegotiable in criminal litigation.

Allegations of defective subject matter jurisdiction, according to some courts, include claims that the government lacked the power to create the criminal sanction under which a defendant is being prosecuted, and claims that the criminal statute imposes punishment retroactively in violation of the Ex Post Facto Clause,[100] violates equal protection guarantees, or is vague or overbroad. As I argue later in this Article, agreements to tolerate such errors threaten very different injuries and have not received uniform treatment in the courts.[101]

Even when subject matter jurisdiction is limited to a court's authority to adjudicate a particular criminal charge, its dimensions remain hazy. Conceivably, a prosecutor and a defendant could agree to adjudication by the wrong sovereign—in the wrong state, in federal court instead of state court, or in federal or state court instead of tribal court. Or the parties' agreement may include a promise not to challenge the conviction if the charge was adjudicated in the wrong court within the correct judicial system—in juvenile court instead of criminal court or vice versa, in a court of limited jurisdiction that had no power to adjudicate a felony charge, or in a military court powerless to adjudicate a charge against a civilian.[102] A variety of

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ter jurisdiction). Consider also the comments of Justice Scalia, concurring in *Freytag v. Commissioner*, 501 U.S. 868 (1991):

> Must a judgment already rendered be set aside because of an alleged structural error to which the losing party did not properly object? There is no reason in principle why that should always be so. It will sometimes be so—not, however, because the error was structural, but because, whether structural or not, it deprived the federal court of its requisite subject-matter jurisdiction. Such an error may be raised by a party, and indeed must be noticed *sua sponte* by a court, at all points in the litigation. . . . Since such a jurisdictional defect deprives not only the initial court but also the appellate court of its power over the case or controversy, to permit the appellate court to ignore it because of waiver would be to give the waiver legitimating, as opposed to merely remedial, effect, i.e., the effect of approving, *ex ante*, unlawful action by the appellate court itself. . . .
>
> I would not extend that nonwaiver rule—a traditional rule in its application to Article III courts, and understandably extended to other federal adjudicative tribunals—to structural defects that do not call into question the jurisdiction of the forum.

Id. at 896–98.

100. U.S. CONST. art. I, § 9, cl. 3.

101. *See infra* text accompanying notes 207–215.

102. I exclude for purposes of this discussion venue cases in which the law specifies which locality (district or county) within the correct sovereign has jurisdiction over a prosecution. Most courts have considered venue waivable for some time. *See, e.g.*, People v. Burgess, 946 P.2d 565, 569 (Colo. Ct. App. 1997) (contrasting the power of any district court to adjudicate crimes committed wholly or partially within the territorial boundaries of the state, which is unwaivable, with venue, which "is for the benefit of defendants and may be waived"); Smith v. State, 695 A.2d 575, 580 (Md. Ct. Spec. App. 1997) (noting that because the appellate court did not object to the

interests are protected by these very different requirements, and there is no consensus on whether an agreement to evade any of them can be enforced.

A third category of error sometimes treated as a defect in subject matter jurisdiction arises in cases in which the charge is in the correct judicial system and in the correct court, but the initiation or continuation of the case (or the court's particular action) is not authorized by law. These deficiencies are sometimes referred to as "justiciability" questions and include timeliness requirements[103] and the authority of the prosecutor.[104] Several courts continue to treat the failure of the charging instrument to characterize an offense as a "jurisdictional" error that can be raised at any time.[105] Federal courts, for example, have split over whether a defect in subject matter jurisdiction exists when a prosecutor fails to comply with the statutory requirement to notify a defendant of a prior conviction if the prosecutor will later request an enhanced sentence based on that conviction.[106] Also in this category are requirements that a "case or controversy" exist for a court to decide (standing, ripeness, and mootness requirements), or, for appellate courts, a final judgment to review.[107]

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jurisdiction of the circuit court, which had jurisdiction for all crimes committed in Maryland, but objected only to the proper venue, the defendant's concession that venue was proper waived the error); Omalza v. State, 911 P.2d 286, 294 (Okla. Crim. App. 1995) (finding that venue, although a constitutional right, may be waived, but jurisdiction may not). *But see* Wolfenbarger v. Commonwealth, 936 S.W.2d 770, 773–74 (Ky. Ct. App. 1996) (reversing, although reluctantly, a conviction because of the trial court's assent to the parties' request to hold the trial in the wrong county at the hospital where the defendant was a patient, and noting that the territorial jurisdiction of the court was an issue that could not be waived).

103. *See, e.g.*, People v. Smith, 475 N.W.2d 333, 336–40 (Mich. 1991) (discussing whether violations of statutory speedy trial rights are jurisdictional).

104. *See, e.g.*, United States v. Navarro, 972 F. Supp. 1296 (E.D. Cal. 1997) (holding that an unauthorized prosecutor is a defect in subject matter jurisdiction).

105. *See, e.g.*, Johnson v. State, 459 S.E.2d 840, 841 (S.C. 1995) (vacating in part a plea-based conviction and sentence for grand larceny because the indictment failed to allege theft of property over $200, and hence the court lacked subject matter jurisdiction). There is some evidence that this rigid pleading requirement in criminal cases is historically based. Before court records were regularly kept, the only way to determine what crime a person had been convicted of committing was to examine the charging instrument. Despite the development of other means of determining this information, states continue to treat errors in charging instruments as nonwaivable. *See* LAFAVE, ISRAEL, & KING, *supra* note 28, § 19.1.

106. *See* Harris v. United States, 149 F.3d 1304, 1306–07 (11th Cir. 1998) (collecting cases); United States v. Ruelas, 106 F.3d 1416, 1418 (9th Cir. 1996) (finding that a waiver of the right to appeal does not "confer jurisdiction on the district court to receive the plea," and thus that the defendant may still raise jurisdictional questions such as whether the indictment failed to charge an offense).

107. Federal authority to review state criminal proceedings also seems to fall into this category. For example, the Supreme Court will only review a state decision after it is assured that there is a federal question at stake. *See, e.g.*, Sochor v. Florida, 504 U.S. 527, 534 n.86 (1992) (noting that the state's defense that the decision below was based on an independent state ground

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Given the variety of errors that have been considered defects in subject matter jurisdiction and the ongoing confusion about whether they deserve that title, the judicial assumption that the term "subject matter jurisdiction" is any more definitive than other categories of error is curious indeed. Asking whether an error implicates the subject matter jurisdiction of the court is nearly as pointless as examining whether an error is jurisdictional. Rather, we must closely examine the interests protected by each procedural rule—jurisdictional or not—in order to determine whether those interests mandate fidelity despite deliberate evasion by the parties.

C. Waivers of the Right to the Review of Error

As appeals in criminal cases, particularly sentence appeals, have become more frequent and more costly, many prosecutors have adopted appeal waivers as a useful method of avoiding appeal entirely. Provisions by which defendants waive the right to seek review now range from broad promises not to challenge conviction or sentence on any basis in any forum[108] to narrow promises not to appeal certain enumerated claims under certain specified conditions.[109] Because a defendant already forfeits his right to raise

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"goes to our jurisdiction and therefore cannot be waived"); Michigan v. Long, 463 U.S. 1032, 1041 (1983).

108. *See, e.g.*, United States v. Michelsen, 141 F.3d 867 (8th Cir. 1998).

> Defendant hereby waives any right to raise and/or appeal and/or file any post-conviction writs of habeas corpus or coram nobis concerning any and all motions, defenses, probable cause determinations, and objections which defendant has asserted or could assert to this prosecution and to the Court's entry of judgment against defendant and imposition of sentence . . . .

Id. at 869. Similarly, in *United States v. Tutt*, No. 90-345, 1998 U.S. App. LEXIS 23775, at *6 (6th Cir. Sept. 18, 1998) (per curiam), the court found that that defendant had waived

> any right to raise and/or file post-conviction motions or petitions, including writs of habeas corpus, concerning matters pertaining to the within prosecution including but not limited to: filing of motions, consideration of defenses, understanding of charges, voluntary nature of plea, effectiveness of counsel, probable cause determinations and objections to the Court's entry of judgment and sentencing of the defendant,

retaining only the right to appeal if the court imposed a sentence "exceeding the statutory maximum" or constituting an "upward departure from the guideline range" established in the plea agreement. *Id.* at 31–32; *see also* United States v. Schuman, 127 F.3d 815, 817 (9th Cir. 1997) (finding that the defendant had waived "any right to appeal or collaterally attack the conviction and sentence"); People v. Panizzon, 913 P.2d 1061, 1069 (Cal. 1996) (describing the defendant's agreement to "'waive and give up my right to appeal from the sentence I will receive in this case . . . and . . . to appeal the denial of any and all motions made and denied in my case'"); Allen v. Thomas, 161 F.3d. 667, 668–71 (11th Cir. 1998) (refusing to uphold an agreement not to pursue at least some forms of relief from life imprisonment in exchange for the state's waiver of the death penalty).

109. *See generally* Goodwin, supra note 2, at 212–13. The ABA Criminal Justice Section has become sufficiently apprehensive ahout the routine practice of including in every federal plea

many claims of error by pleading guilty, appeal waivers limit the ability of the defendant to appeal or raise on collateral review claims not already forfeited by the plea: (1) objections to the sentence, (2) challenges to the plea itself, such as claims that it was not knowing or voluntary, or that the defendant had unconstitutionally bad advice from his lawyer,[110] and (3) a narrowing category of challenges that in the past courts have held survive the defendant's knowing and voluntary guilty plea, including claims of discriminatory prosecution.[111]

Defendants may agree to waive the right to appeal even if they go to trial. A defendant convicted after trial may decide that the prosecution's recommendation of a lower sentence is worth giving up the right to appeal his conviction, his sentence, or both.[112] A less frequently reported rype of waiver can occur *during* trial or pretrial proceedings, when the defendant and the government agree that it is in their interest to dispense with a certain procedure so long as the defendant waives any right to appeal his conviction based on the absence of that procedure.[113]

Some courts have argued that public policy mandates that defendants must retain the ability to seek appellate review despite waiver.[114] But argu-

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agreement an "unconditional waiver of appellate and habeas rights" that it recommended that the ABA urge the Department of Justice to

> adopt a uniform policy whereby language will be included in plea agreements containing sentencing rights waivers providing (1) that the defendant reserves the right to file a direct appeal of an upward departure from the applicable guideline range recommended by the government pursuant to the plea agreement and (2) that if the United States appeals the defendant's sentence, the defendant is released from the waiver.

See Recommendation from the American Bar Association Criminal Justice Section Report to the House of Delegates (1997) (on file with author); *see also* David E. Carney, Note, *Waiver of the Right to Appeal Sentencing in Plea Agreements with the Federal Government*, 40 WM. & MARY L. REV. 1019, 1022–23 (1999) (tracing the rise of appeal waivers).

110. *See, e.g.*, People v. Rodriguez, 480 N.W.2d 287, 291 (Mich. Ct. App. 1991).

111. *See, e.g.*, LAFAVE, ISRAEL, & KING, *supra* note 28, § 21.6(a) (discussing the rights waived or forfeited by a guilty plea).

112. *See, e.g.*, State v. Nichols, 493 N.E.2d 677, 679–81 (Ill. App. Ct. 1986) (upholding a plea agreement concerning a contemporaneous prosecution but negotiated after trial and conviction on one charge, whereby the prosecutor would recommend a lower sentence on the charge already tried in exchange for both the defendant's waiver of the right to appeal the sentence and a plea of guilty to the untried charge); Cubbage v. State, 498 A.2d 632, 632–38 (Md. Ct. App. 1985); People v. Seaberg, 541 N.E.2d 1022, 1026 (N.Y. 1989); Calhoun, *supra* note 27, at 133 n.32, 202–06 (listing recent examples of sentence waivers after trial).

113. *See infra* note 151.

114. Indeed, both sides of the debate over the propriety of appeal waivers claim public policy is on their side. *Compare* United States v. Raynor, 989 F. Supp. 43, 49 (D.D.C. 1997) (rejecting a bargain by which the defendant, but not the government, would waive the right to appeal an illegal sentence), Majors v. State, 568 N.E.2d 1065, 1067–68 (Ind. Ct. App. 1991) (holding that a provision in a plea agreement waiving the right to seek postconviction relief was unenforceable), Hood v. State, 890 P.2d 797, 798 (Nev. 1995) (per curiam) ("It would be unconscionable for the state to attempt to insulate a conviction from collateral constitutional review by conditioning its

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ments for banning all appeal waivers as against public policy have fallen flat in most courts, and for good reason. Appellate review simply does not have indispensable value *regardless of the claim waived.*[115] Any given waiver can be quite trivial—the defendant's decision to give up the right to appeal an otherwise preserved hearsay objection, for example. And so long as appellate review remains available for those defendants who preserve, rather than waive, their objections, enforcing appeal waivers does not undercut the enforcement role of reviewing courts any more than other rules limiting the review of unraised error.[116] Unless a court is willing to value appellate review

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willingness to enter into plea negotiations on a defendant's waiver of the right to pursue post-conviction remedies."), Calhoun, *supra* note 27, at 194 (arguing that a variety of public policy concerns raised by appeal waivers far outweigh the public policy goals advanced by them), Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1451 (1997) ("Without the discipline of review, the positive law of sentencing that has been created at the systemwide level can be overlooked, ignored, or misunderstood by trial judges—all with impunity."), *and* Gregory M. Dyer & Brendan Judge, Note, *Criminal Defendants' Waiver of the Right to Appeal—An Unacceptable Condition of a Negotiated Sentence or Plea Bargain*, 65 NOTRE DAME L. REV. 649 (1990), *with* United States v. Michelsen, 141 F.3d 867, 873 (8th Cir. 1998).

> [D]efendants will be better served if they are . . . empowered with a legitimate opportunity to choose between exercising [appellate] rights and exchanging them for something they value more highly, such as a recommendation by the government for a lenient sentence. . . . [T]hus plea agreements including such waivers are strongly supported by public policy.

Id.

115. It would be simple enough to argue that because the right of review generally is of legislative rather than constitutional stature, it would be up to the legislature to designate the circumstances under which appellate review can be waived, and that absent such a designation, waiver is permissible. *Cf.* United States v. Woolley, 123 F.3d 627, 631–32 (7th Cir. 1997); People v. Charles, 217 Cal. Rptr. 402, 405–06 (Ct. App. 1985) (using this argument when upholding a waiver of the right to appeal); *Seaberg*, 541 N.E.2d at 1024 (using similar reasoning to uphold a waiver on appeal). But the constitutional status of the right to review in criminal cases is not clear-cut. While the Court continues to maintain that there is no constitutional right to appeal, the constitutional status of access to the writ of habeas corpus continues to be debated. Also, access to some appellate or postconviction review is essential for the protection of at least one important constitutional right: the effective assistance of trial counsel. In addition, the rules surrounding waiver and the review of constitutional error may themselves carry constitutional status. *See, e.g.*, Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 5 (1994) (arguing that the Court's holding in *Chapman v. California*, 386 U.S. 18 (1967), regarding harmless error review of constitutional error is constitutional common law); *cf.* United States v. Olano, 507 U.S. 725, 733 (1993) ("Whether a particular right is waivable; . . . whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake."). Consequently, I prefer not to argue that the right to review under any circumstance is a matter of legislative grace and stop there. Rather, a claim-by-claim analysis is appropriate.

116. Courts often express concern that once enforced regularly, appeal waivers may reduce the deterrence against lawless action by prosecutors and judges that is provided by the threat of appellate reversal. Prosecutors or judges could come to *expect* to escape the scrutiny of appellate courts for certain transgressions. However, this scenario rests on the questionable prediction that unless review of error is always available, deterrence will decay irreparably. This assumption has

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of any error over the potential benefits of settlement and finality, the propriety of waiving the right to appeal depends on which appellate claims the defendant agrees to waive. Thus, once again, the category offers no shortcut that would make claim-by-claim analysis unnecessary.

D. Waiver of the Ability to Object to Future Error

One final category of particularly controversial waivers deserves separate attention. Some courts refuse to uphold a defendant's promise to waive the right to challenge his conviction or sentence based on any error that has not yet occurred at the time of waiver. Giving up the opportunity to object to hypothetical events in the future, it is argued, is inherently "unintelligent" and coercive.

Courts are rejecting these waivers for the wrong reasons. A waiver must not be enforced if a defendant lacks adequate information about what he is waiving. But insufficient information about future irregularity is not inevitable. Rather, if every waiver of future violations is banned, it must be banned because defendants have no authority to license participants in the criminal justice system to engage in certain forms of illegality that injure the public

already been rejected by the Court's embrace of harmless error and procedural default rules. Even if appeal waivers do cause a momentary rise in the incidence of illegality, defendants and their counsel deciding whether to agree to waive the right to object to that illegality should take that higher risk into account, either by refusing to waive the opportunity for relief based on that error or by extracting more valuable concessions. Professor Daniel Richman expressed it this way: "The defendant really loses little by giving [an assurance not to appeal a sentence that exceeds the statutory maximum], since the plea system in that courthouse will shut down (at least temporarily) if a judge goes over the maximum, or even changes her sentencing patterns." Letter from Daniel Richman to Nancy King (April 6, 1999) (on file with author). *See generally* Richman, *supra* note 7 (discussing informal limits on bargaining); Erica G. Franklin, Comment, *Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery" Waivers*, 51 STAN. L. REV. 567, 568–69 (1999) (reporting that the federal public defenders have refused to sign agreements containing what they believe are waivers of the right to raise *Brady v. Maryland*, 373 U.S. 83 (1963), claims). If parries continue to bargain despite known risks, then the error may be one society is willing to live with. Only by examining the specific error at issue could one decide if the parties' preferences are worth trumping.

Other courts have objected to asymmetric agreements in which the defendants waive their right to appeal but the prosecutors retain theirs. It is feared that this, in turn, will create a lopsided body of law on sentencing skewed in favor of the government. *See* United States v. Guevara, 941 F.2d 1299 (4th Cir. 1991) (reading into the agreement the government's waiver of the right to appeal); *Raynor*, 989 F. Supp. at 44–45 (quoting a Justice Department memorandum urging prosecutors to reserve the government's right to appeal). There is no empirical measure of the incidence of asymmetric or symmetric appeal waivers. The lopsided effect, however, is not likely to materialize so long as a significant number of defendants continue to challenge sentencing error on appeal. Besides, the direction and strength of the effects of asymmetric appeal can vary. *See generally* Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1 (1990).

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or third parties. Not all rights and procedures discarded by advance agreement between a defendant and a prosecutor are theirs alone to discard. Coherent regulation of waivers must look to the nature of what is waived rather than to the timing of the waiver.

For example, many courts continue to invalidate defense waivers of the right to appeal a sentence that the court has not yet set, reasoning that a defendant could never knowingly waive his right to appeal his sentence if it has not been pronounced.[117] It is understandable that courts would refuse to allow or to enforce such a waiver because the defendant either did not anticipate or failed to understand the significance of what he was waiving. But information about the risk of future error is not impossible to obtain. The appropriate solution is to adjust disclosures and warnings prior to waiver, not to deny defendants and prosecutors the ability to trade off even remote risks of future error for other concessions. A court or a legislature concerned that defendants are making bad predictions should insist on adequate procedures to ensure voluntary and intelligent waivers.

Risks of future error, however enormous or remote, can be identified and explained. An intelligent lawyer should have the ability to specify and communicate to a defendant potential claims, even those claims that have yet to materialize. Conceivably, a defendant could agree to be stuck with his sentence even if the prosecutor lies to the judge about the defendant's record, or the sentencing statute is struck down as unconstitutional on its face, or the judge is drunk, racist, vindictive, or on the take.[118] *So long as the*

117. *See Raynor*, 989 F. Supp. at 43 (rejecting a plea agreement whereby the defendant would waive "the right to appeal any sentence within the maximum provided in the statutes of conviction . . . or on any ground whatever," as well as the "right to challenge the sentence or the manner in which it was determined in any collateral attack"); People v. Panizzon, 913 P.2d 1061, 1070–71 (Cal. 1996) (interpreting cases in which a plea agreement included a waiver of appeal narrow enough so that the defendant could not fairly be said to have knowingly waived the grounds raised on appeal, and distinguishing the case before it as involving a bargain that waived any right to appeal); People v. Vargas, 17 Cal. Rptr. 2d 445, 451 (Ct. App. 1993) (holding that a defendant cannot waive the unknown); *see also* ABA, STANDARDS FOR CRIMINAL JUSTICE § 14-1.4(a) (1997) (requiring that the defendant at a plea proceeding be advised that "by pleading guilty the defendant generally waives the right to appeal except the right to appeal a motion that has been made, ruled upon, and expressly reserved for appeal, and *the right to appeal an illegal or unauthorized sentence*") (emphasis added); Calhoun, *supra* note 27, at 202–06 (arguing that such waivers are invalid as inherently unintelligent, because "there is simply no way the accused can be viewed as knowing what he is giving up as a part of his waiver because it has not been determined at the time the plea is entered").

118. *Cf.* United States v. Hoctel, 154 F.3d 506 (5th Cir. 1998) (enforcing on appeal the defendant's waiver of his right to appeal the trial court's denial of his motion to recuse the trial judge). But consider this unusual case: *People v. Aponte*, 629 N.Y.S.2d 773, 776 (App. Div. 1995) (vacating a conviction despite a guilty plea upon finding that after the defendant pled guilty to manslaughter, the judge at sentencing "enhanced" his conviction to second-degree murder, and terming this "jurisdictional" error).

defendant is informed of the risk, he cannot claim that he *did not know* he was risking an error by waiving the right to appeal his sentence. Frankly, the waiver forms presently in use by some U.S. Attorneys offices that purport to waive "any and all" claims fail to identify potential claims with the kind of specificity that would put the defendant on notice of what he was waiving. Adequate notice may require not only lengthier boilerplate but also lengthier plea proceedings. The problem, however, is not that the waived claims are unripe, but that they are left completely undefined.

Nor is there a persuasive basis for concluding that the probability that future error will materialize is so much more difficult to estimate than other probabilities commonly assessed by defendants and their counsel that it should be considered inherently "unknowable."[119] A knowing waiver of the right to appeal a sentence need not require actual knowledge of the sentence or its exact legal deficiencies any more than a waiver of the right to proceed with unconflicted counsel requires actual knowledge of the specific errors a conflict of interest will produce, or a waiver of the right to protest a potentially unspeedy trial requires actual knowledge of the expected trial date or the prejudice that may result from delay.[120] Instead, by consenting in advance to abide by a proceeding fraught with potential error, a defendant is adequately informed when he understands the *range of risk* that he is assuming by giving up his chance to appeal that error.[121] A defendant can

119. *See, e.g.*, United States v. Rosa, 123 F.3d 94, 99–101 (2d Cir. 1997) (upholding a waiver of the right to challenge a future sentence by which "defendant assumes a virtually unbounded risk of error or abuse by the sentencing court," but only after close scrutiny of the defendant's understanding and analysis of the particular claim waived); United States v. Rutan, 956 F.2d 827, 829 (8th Cir. 1992) (reasoning that "while [a] defendant [does] not know her specific sentence at the time of the waiver, she [does] acknowledge the sentencing options the trial court could impose"). *But see* Bruce Mann & Thomas J. Holdych, *When Lemons Are Better Than Lemonade: The Case Against Mandatory Used Car Warranties*, 15 YALE L. & POL'Y REV. 1, 20 (1996) (noting the "difficulty in processing information about low probability events and events that involve a very low cost").

120. *See, e.g.*, Stephen A. Saltzburg, *Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty*, 76 MICH. L. REV. 1265, 1300–01 (1978).

121. In their defense of plea bargaining, Professors Scott and Stuntz explain this idea: "The parties . . . do not actually trade the entitlements per se; instead they exchange the risks that future contingencies may materialize ex post that will lead one or the other to regret the ex ante bargain." Scott & Stuntz, *supra* note 65, at 1914. The unknown quantities of a plea bargain were described in an opinion by the Sixth Circuit, concluding that the prosecutor did not violate *Brady* by failing, before the defendant's guilty plea to murder, to disclose the victim's possession of a gun:

> [A] plea decision is not made with any perfect knowledge of the results were a trial to be held. Both [the defendant] and his attorney had to know that if they proceeded to trial, any number of events might have intervened to affect the final outcome. Favorable or unfavorable rulings on the evidence might have been rendered; witnesses favorable to the defense or to the prosecution may have died awaiting trial or have become otherwise unavailable. New witnesses might have come forward; known witnesses might have recanted. . . . These are trial's unknown risks and dangers which the plea bargaining pro-

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waive ex ante his future ability to challenge potential error even if he or his attorney cannot predict with accuracy, at the time of waiver, exactly which errors will occur and when, so long as he is aware of the type of error that may occur and the likelihood of its occurring. The point is not that we should permit defendants to submit themselves to horribly defective sentences. Rather, courts should not assume that waivers of claims of future error are *necessarily* uninformed.

Nor should agreements by which defendants waive the right to challenge a future sentence be invalidated as coerced.[122] The case for coercion in this context appears no more persuasive than in other plea bargaining contexts. A defendant is not "without choice" in entering into a plea agreement that contains a waiver of the right to appeal future error any more than he is without choice in accepting other types of trades offered by the prosecutor. The prosecutor's offer may indeed be standardized and present the defendant with a choice in a "take it or leave it" fashion.[123] Yet the defendant is free to proceed without the prosecutor's concession, be it a sentencing recommendation, a charge reduction, or something else.[124] Indeed, repeated defense reluctance to enter into such waivers may lead prosecutors to lobby for greater use of agreements conditioned upon judicial acceptance of the sentence agreed to by the parties.[125]

Concern for the defendant's welfare may justify yet another objection to these waivers—namely, that any defendant who would deliberately take a chance on the good intentions of the judge and the prosecutor and risk this magnitude of error lacks the mental competency to make decisions of

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> cess seeks to remove. By entering the plea [the defendant] was foregoing the possibility that any such events would have resulted in a not guilty verdict.

Campbell v. Marshall, 769 F.2d 314, 324 (6th Cir. 1985).

122. *See, e.g.*, *Raynor*, 989 F. Supp. at 49 (terming a plea agreement a "one-sided contract of adhesion"); *cf.* United States v. Goodman, 165 F.3d 169, 174 (2d Cir. 1999) (invalidating an appeal waiver because the defendant "received very little benefit in exchange for her plea of guilty" and because the "discrepancy between the sentence imposed . . . and the predicted sentencing range" was "substantial"). For arguments that bargains over certain entitlements are involuntary because of coercion, see GOLDSTEIN, *supra* note 75, at 64; Rubin, *supra* note 69, at 490; and Shapiro, *supra* note 21, at 524–25. *Cf.* Kronman, *supra* note 63, at 771 (noting that adhesion contracts in which one side holds the greater bargaining power are objectionable when the imbalance "offends our conception of distributive fairness").

123. *See, e.g.*, Carney, *supra* note 109, at 1033 (characterizing appeal waivers in federal court as "not a bargaining chip in a poker game, but the ante required even to sit at the table").

124. Overcharging may be a problem, but it should only serve as a basis for invalidating agreements to waive future error if there is reason to believe that prosecutors overcharge to obtain this kind of concession more frequently than they overcharge to obtain other more conventional concessions, which are not considered coerced.

125. *See* Carney, *supra* note 109, at 1033–34.

this sort.[126] Yet if courts are prepared to presume incompetency here, they should be prepared to make the same inference in equally appalling circumstances. For example, defendants are allowed to represent themselves after being informed of the probable disaster of such a choice, and their bad judgment is not considered evidence of incompetency. Nor are defendants considered incompetent because they prefer to waive their ability to challenge future errors of their attorneys when they agree to representation by an attorney with a conflict of interest. Even "death volunteers," who waive the right to raise a known, existing, good defense to a death sentence, are treated as intelligent agents.[127] None of these incredibly risky choices is considered sufficient, on its own, to rebut the presumption of competency.

The more persuasive objection to enforcing a waiver of the right to appeal a future sentence is based not on paternalism towards the defendant, who will either receive the benefit of his bargain or be able to claim breach,[128] but instead on the effect such a waiver may have on the interests of nonparties. Once again, this effect varies depending on the claim waived, rendering overbroad any rule barring the enforcement of all waivers of future error.

IV. A SAMPLING OF CONTROVERSIAL BARGAINS

A. The Separation of Powers: The Proper Court

A defendant charged with committing a federal felony has the right, grounded in both statute and Article III, to have a district judge (established by Article III as part of the judicial branch), not a magistrate (appointed under Article I as an arm of Congress), adjudicate the charges against him.[129] The defendant nevertheless may prefer to litigate before a magistrate in hopes of a more favorable or expeditious outcome. Likewise, a prosecutor might prefer an alternative tribunal for parallel reasons. In these situations, both the prosecutor and the defendant may agree to discard the mandate of Article III.

126. The standard of competency for waiving counsel and trial is well established. It is quite minimal and does not depend on a numher of deficiencies that may lead a defendant to make a poor decision, including passivity, gullibility, inability to communicate, impatience, bad memoty, lack of good judgment, inexperience, or stubbornness. There is little basis for recognizing these as reasons not to honor waivers of the right to appeal future error while not recognizing them as reasons to void waivers of the rights to counsel and trial.

127. *See* sources cited *infra* notes 196, 199.

128. *See* United States v. Gonzalez, 981 F.2d 1037, 1041–42 (9th Cir. 1992) (holding that a defendant may raise breach of a plea agreement by the government on appeal, despite a no-appeal provision).

129. The power of U.S. magistrates is delineated by statute in 28 U.S.C. § 636 (1994).

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The issue of whether parties can bargain over this type of error has yet to be resolved by the Supreme Court and continues to divide lower courts.[130] The Court has suggested this sort of error would not be subject to waiver in dicta in *Commodity Futures Trading Commission v. Schor*.[131] Several members of the Court expressed a different view, again in dicta, in *Peretz v. United States*,[132] a case in which the Court upheld a felony conviction despite the defendant's agreement to submit to jury selection before a magistrate rather than an Article III judge. The majority suggested that the Article III entitlement to adjudication in a district court is a personal right subject to waiver like any other right.[133] Three dissenting justices protested that Article

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130. *Compare* United States v. Dees, 125 F.3d 261, 267 (5th Cir. 1997) (reaching sua sponte, despite the defendant's waiver of the right to challenge his conviction on any ground, the question whether the magistrate had jurisdiction to take the defendant's guilty plea, as well as noting that the structural guarantees of Article III are not subject to waiver, but concluding that "the taking of a guilty plea by a magistrate judge does not threaten the exclusive Article III power of a district court to preside over a felony trial"), Bingman v. Ward, 100 F.3d 653, 658 (9th Cir. 1996) (vacating a contempt order issued by a magistrate), *id.* ("Congress has explicitly provided that these criminal contempt proceedings must be conducted by district judges. . . . Congress has not given magistrate judges that jurisdiction and no one—not the parties, not the district court, not this court—can confer that jurisdiction upon them. We think that is apodictic."), *and* United States v. Judge, 944 F.2d 523, 525 (9th Cir. 1991) ("[L]itigants cannot confer [subject matter] jurisdiction by consent where none exists."), *with* United States v. Mortensen, 860 F.2d 948, 950–51 (9th Cir. 1988) (holding that a defendant who waives his Article III right to a district judge cannot revoke or withdraw that consent prior to trial).

131. 478 U.S. 833 (1986) (considering a civil litigant's constitutional challenge to the scope of the authority of the Commodity Futures Trading Commission (CFTC)). The Court's holding was in the alternative: declaring that the civil litigant had waived any *personal* protection Article III provided him, then declaring that Congress's decision to delegate this adjudication to the CFTC did not raise separation of powers concerns, given the "degree of judicial control saved to the federal courts . . . as well as the congressional purpose behind the jurisdictional delegation, the demonstrated need for the delegation, and the limited nature of the delegation." *Id.* at 855 (citation omitted). The Court warned:

> This is not to say, of course, that if Congress created a phalanx of non-Article III tribunals equipped to handle the entire business of the Article III courts without any Article III supervision or control and without evidence of valid and specific legislative necessities, the fact that the parties had the election to proceed in their forum of choice would necessarily save the scheme from constitutional attack.

Id. Article III "also serves as 'an inseparable element of the constitutional system of checks and balances,'" the Court explained, so that "the parties cannot by consent cure the constitutional difficulty for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction beyond the limitations imposed by Article III." *Id.* at 850–51 (quoting Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982)). These "limitations serve institutional interests that the parties cannot be expected to protect." *Id.* at 851.

132. 501 U.S. 923 (1991).

133. *See id.* at 929 n.6 (stating that the Article III guarantee of an independent and impartial adjudication by the federal judiciaty "serves to protect primarily personal, rather than structural, interests"). The Court declined to decide whether a defendant has a constitutional right to an Article III judge at jury selection. "Even assuming that a litigant may not waive structural protections provided by Article III," the Court stated, Article III's limits were not violated,

III's protections are jurisdictional and are not subject to waiver by the parties, so that the defendant's consent is irrelevant to the constitutional question.[134] Justice Scalia, also in dissent, argued that constitutional limits on the authority of a magistrate are not subject to waiver.[135]

Applying the two-step analysis I advance in this Article, this question can be resolved by first examining the public interest harmed by evading the mandate of Article III, and then considering whether alternative methods of protecting that interest exist. The nonparty interest threatened by the evasion of Article III is no less than one of the most fundamental features of our democracy: the limits provided by an independent judiciary on the excesses of the legislative and executive branches. Courts upholding agreements to shift the adjudication of felony cases to magistrates in effect allow the executive to pay the defendant for the opportunity to insulate the imposition of punishment from independent judicial control.

The pressures to delegate more power to magistrates are quite strong. To Congress, magistrates may be cheaper and "more politically servient" than district judges.[136] District judges are happy to clear their dockets and may therefore lack incentives to police unconstitutional delegation to magistrates. The executive branch has no particular reason to stick with district judges if magistrates can provide satisfactory resolutions with equal efficiency and finality. Thus, not only are trial judges inadequate overseers of the public's interest, but also no third-party watchdog exists to encourage strict adherence to the divisions of authoriry between the judicial and the legislative branches.[137] The only remedy available to deter a trial judge from

because "'the entire process takes place under the district court's total control and jurisdiction.'" *Id.* at 937 (quoting United States v. Raddatz, 447 U.S. 667, 681 (1980)).

134. *See id.* at 950 (Marshall, J., dissenting).

135. *See id.* at 955–56 (Scalia, J., dissenting). The same day the Court decided *Peretz v. United States*, it handed down *Freytag v. Commissioner*, 501 U.S. 868 (1991), in which it considered a civil litigant's challenge under the Appointment Clause, U.S. CONST. art. II, § 2, cl. 2, to the validity of a tax court proceeding, even though the objection had not been raised below, because of "'the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers.'" *Id.* at 879 (quoting Gliddon Co. v. Zadanok, 370 U.S. 530, 536 (1941)). While the Court did not address a bargained-for waiver of an Appointments Clause error, its language suggested that this type of error would require review. Justice Scalia disagreed on this point and argued that "Appointments Clause claims" are subject to waiver because they are "nonjurisdictional." *See id.* at 893–94 (Scalia, J., concurring); *see also* Insurance Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) (explaining in dicta that subject matter jurisdiction "is an Art[icle] III as well as a statutory requirement" and that "it functions as a restriction on federal power, and contributes to the characterization of the federal sovereign," so "[t]he consent of the parties is irrelevant").

136. *See* United States v. Dees, 125 F.3d 261, 267 n.6 (5th Cir. 1997).

137. *See Peretz*, 501 U.S. at 950 (Marshall, J., dissenting) (stating that parties cannot be expected to protect the important interest in preventing the emasculation of constitutional courts); *see also* Clinton v. City of New York, 524 U.S. 417, 421 (1998) (Kennedy, J., concurring)

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unlawfully delegating her power is for other judges to step in and demand that the result reached by the unauthorized adjudication be vacated.[138]

For similar reasons, parties must not be able to evade the Appointments Clause[139] or the "case and controversy" requirement in Article III. Standing, mootness, and ripeness rules, to the extent that they protect this requirement, all implicate the separation of powers because they "define the role assigned to the judiciary . . . to assure that the federal courts will not intrude into areas committed to the other branches of government."[140] Allowing any of the three branches to acquire or delegate more power than is permissible under the Constitution poses a risk that cannot be controlled except by vigorous policing of bright lines.

A different approach is warranted should a trial judge choose to accept or delegate authority that a *statute* forbids but that the Constitution *permits*. Circumvention of statutory rules by parties injures legislative authority, and the legislature is free to adjust the extent to which evasion is permitted. This arises not only when federal litigants opt for magistrates, but in a variety of other cases involving the defendant's consent to be tried or convicted by the wrong court. Considerable controversy now exists, for example, over

("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.").

138. Likewise, a court-martial of a civilian may exceed the authority of Congress to "make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8. When objected to, unauthorized courts-martial of civilians have been considered jurisdictional errors, important enough to warrant relief despite clear evidence of guilt. *See, e.g.*, Kinsella v. Singleton, 361 U.S. 234, 240 (1960) (holding that the Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18, does not enable Congress to broaden the term "land and naval Forces" to include civilian dependents accompanying members of the armed forces overseas); United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 15–23 (1955) (noting that "any expansion of court-martial jurisdiction . . . necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals"). Theoretically, a defendant may wish to dispense with the constitutional limits on congressional authority and agree to an unauthorized court-martial. Such a waiver should never be honored, for the same reasons that courts must avoid agreements to delegate power in excess of constitutional limits to magistrates. While the subjects of courts-martial have often protested the authority of military courts to prosecute them, I have not yet found a reported decision in which the subject of a court-martial willingly placed himself in the militaty system when he did not belong there.

139. *See, e.g.*, *Freytag*, 501 U.S. at 877–78 (exercising discretion to hear a waived claim based on the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2).

140. Flast v. Cohen, 392 U.S. 83, 95 (1968); *see also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).

> The doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features . . . it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.

Id. at 239.

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whether a reviewing court may give effect to a juvenile defendant's agreement to adjudication in adult court.[141] Like the deliberate departures from statutory commands in the magistrate cases, these agreements, and the willingness of judges to abide by them, threaten not constitutional concerns but legislative choices. A legislature that perceives that its preferences for adjudication are being narrowed unduly by plea bargaining or other agreements of the parties may choose to amend or modify the scope of juvenile court jurisdiction or regulate the conditions under which these requirements can be waived.

B. Opting for the Wrong Sovereign: Waiving Territorial Jurisdiction or the Limits of Federal Power

For similar reasons, parties should not be allowed to discard opportunistically the constitutional balance between the authority of separate states, or between state and federal power. An agreement to accept adjudication of a crime in the courts of one sovereign, when the power to prosecute that crime rests only in another sovereign, should never be enforced. This conclusion follows again from the type of harm that is threatened by intersovereign disputes and from the lack of alternative remedies for deterring or preventing such harm.

This problem is most likely to arise in a federal case in which the defendant has agreed to waive a Commerce Clause[142] challenge to a federal statute, like the challenge discussed in *United States v. Lopez*.[143] The constitutional flaw accepted by the parties in such a case is the absence of federal power to act, a defect that infringes the collective power of the states, rather than the rights of an individual defendant. Parties to a criminal case

141. *Compare In re* Sealed Case, 131 F.3d 208, 210–11 (D.C. Cir. 1997) (finding that federal subject matter jurisdiction depends upon certification in accordance with § 5032 of the Juvenile Justice and Delinquency Prevention Act of 1974, 18 U.S.C. § 5032 (1994)), State v. Frazier, 811 P.2d 1240, 1246–47 (Kan. 1991) (vacating the defendant's conviction in adult court after he himself misrepresented that he was older than he was), *and* State v. Wilson, 652 N.E.2d 196, 199 (Ohio 1995) (holding that "absent a proper bindover procedure pursuant to [statute], the juvenile court has the exclusive subject matter jurisdiction over any case concerning a child who is alleged to be a delinquent" and that this exclusive jurisdiction "cannot be waived"), *with* State v. Kelley, 537 A.2d 483, 488 (Conn. 1988) (upholding a conviction after the parties consented to trial in adult court, and likening the requirements to venue rather than to jurisdiction), *and* Twyman v. State, 459 N.E.2d 705, 709–11 (Ind. 1984) (collecting cases holding that a defendant's deliberate misrepresentation of his age waives his or her right to be treated as a juvenile, and characterizing the age requirement for adult court as a requirement of personal, not subject matter, jurisdiction). *See generally* Donna M. Bishop & Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281 (1991).

142. U.S. CONST. art. I, § 8, cl. 3.

143. 514 U.S. 549 (1995).

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who agree to accept punishment under a statute that violates *Lopez* threaten to upset the calibrated balance of power that the framers had the foresight to establish, a division as vital to the survival of our constitutional system as the separation of powers between coordinate branches.

As for remedies, no one at the bargaining table represents the public's constitutional interest in maintaining state power. Intangible concerns for comity are unlikely to be policed by the state whose exclusive authority is stolen by the parties. A state may actually be happy (in the short run, at least) to allow the federal government to take over the responsibility and expense of prosecuting an offender it would otherwise have to prosecute. Without the means, or even the incentive, to challenge such a statute on their own, states must rely on federal judges to step in, regardless of the preferences of the parties, to correct federal encroachment.[144] Because the limits of sovereignty are not subject to regulation by the legislature, courts must remain the referees in such turf skirmishes.[145]

Some courts have objected that it would be unreasonably burdensome for courts to police, sua sponte, the *Lopez* problem in the face of acquiescence by the parties.[146] Assuming courts will trump party preferences on some issues,[147] efficiency is a particularly unpersuasive reason to reject sua sponte review of whether a federal criminal statute on its face falls outside

144. *See* United States v. Walker, 59 F.3d 1196, 1198 (11th Cir. 1995) (treating such challenges as not subject to waiver). *But see* United States v. Martin, 147 F.3d 529, 531–33 (7th Cir. 1998) (holding that a defendant's guilty plea to a federal criminal statute waives the right to insist that the government prove the interstate commerce element of the offense, as well as the right to raise a *Lopez* challenge after conviction); United States v. Baucum, 80 F.3d 539, 541–43 (D.C. Cir. 1996) (per curiam) (holding that a challenge to a sentence enhancement "schoolyard statute" was waived by the defendant's failure to raise it earlier). By contrast, states that expressly agree to prosecute a criminal case improperly removed to federal court under the federal officer removal statute, 28 U.S.C. § 1442(a)(1), do have an opportunity to value the consequent infringement on state power. Because of the burden such removal places on state resources and autonomy, states are more likely to police this division of power. *See* Mesa v. California, 489 U.S. 121 (1989); *cf.* North Carolina v. Ivory, 906 F.2d 999 (4th Cir. 1990) (holding that failure to object in the trial court to the improper removal of a state prosecution of a U.S. marine does not bar relief on appeal).

145. Although it is not very likely, the parties may also agree that a crime that should be prosecuted in one state will be prosecuted in another. For one rare example, see *McDonald v. State*, 487 A.2d 306 (Md. App. Ct. 1985). *See also* Nielsen v. Oregon, 212 U.S. 315, 320–21 (1909) (holding that although two states were granted "concurrent jurisdiction" over river waters, one state cannot punish acts that violate its criminal law when those acts were committed within the territory of another state, which did not prohibit such acts); State v. McLaughlin, 606 N.E.2d 1357, 1359 (N.Y. 1992) ("[T]erritorial jurisdiction . . . goes to the very essence of the State's power to prosecute and . . . may never be waived."). Like Commerce Clause violations, state territorial jurisdiction violations should not be subject to waiver.

146. *See Baucum*, 80 F.3d at 541 (explaining why the defendant's assertion that a constitutional defect should divest the court of its original jurisdiction is burdensome).

147. The independent state ground doctrine, for example. *See, e.g.*, Sochor v. Florida, 504 U.S. 527, 534 (1992).

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the power of Congress. Such challenges involve the application of law to information accessible to courts with or without the earnest advocacy of adversaries, and they can be recognized and resolved on a statute-by-statute basis.[148]

C. Trading Away the Right to the Effective Assistance of Counsel

The idea of swapping the right to competent counsel for a charge or sentencing break has proved particularly troubling for courts.[149] An enforce-

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148. *See, e.g.*, United States v. Owens, 159 F.3d 221 (6th Cir. 1998); United States v. Franklyn, 157 F.3d 90 (2d Cir. 1998).

It is important to note that certain deceptively similar deals do not raise the same kinds of risks. The prosecution of nationals of other countries in violation of treaty or international law, for example, also threatens settled divisions of authority between sovereigns, but those divisions are, for the most part, subject to congressional control. Thus, Congress can also control the extent to which its commands can be disregarded. Similarly, illegal state or federal prosecutions of tribal members for crimes committed on Indian territory, or tribal prosecutions unauthorized by law, also raise the competing sovereign concern. Here, too, Congress retains control over the allocation of punishment between tribes, the states, and the federal government. As with other statutory requirements, the extent to which parties can waive the boundaries of tribal sovereignty could be left to legislative regulation. *Compare* United States v. Wadena, 152 F.3d 831, 842 (8th Cir. 1998) (holding that a federal court had subject matter jurisdiction to prosecute the defendant, an Indian charged with tribal election fraud, and collecting cases, over the argument of a dissenter that subject matter jurisdiction was lacking), *with* Smith v. Moffett, 947 F.2d 442, 445 (10th Cir. 1991) (reaching a claim of failure to exhaust tribal remedies, noting that even though concerns of comity are not a jurisdictional bar, the court must recognize them sua sponte, and finding "[t]he congressional concern with promoting tribal sovereignty . . . sufficiently important to warrant our notice in this case"). *See generally* Jon M. Sands, *Indian Crimes and Federal Courts*, 11 FED. SENTENCING REP. 153 (1998). Also, tribes themselves may be able to intervene to protect their interests. *See* Walker v. Rushing, 898 F.2d 672, 675 (8th Cir. 1990).

149. *Compare* Jones v. United States, 167 F.3d 1142 (7th Cir. 1999) (holding that a plea agreement waived the right to raise ineffective assistance on direct appeal, but that the defendant can raise ineffective assistance of counsel in a motion under 18 U.S.C. § 2255), United States v. Taylor, 139 F.3d 924, 931 (D.C. Cir. 1998) (rejecting the government's argument that the defendant had waived his ineffective assistance claim, and noting that "Taylor's appeal relies on events of which he was not then aware [at the time of agreeing to waive his right to appeal] or that occurred after he had assured the district court that he was satisfied with his trial counsel"), United States v. Henderson, 72 F.3d 463, 465 (5th Cir. 1995) (finding that waivers of rights to appeal "may not apply to ineffective assistance of counsel claims"), United States v. Attar, 38 F.3d 727 (4th Cir. 1994), and United States v. Pruitt, 32 F.3d 431, 433 (9th Cir. 1994) ("We doubt that a plea agreement could waive a claim of ineffective assistance of counsel based on counsel's erroneously unprofessional inducement of the defendant to plead guilty or accept a particular plea bargain."), *with* United States v. Keeter, 130 F.3d 297, 299–301 (7th Cir. 1997) (upholding the defendant's sentence despite the incompetent performance of his attorney). In *Keeter*, the defendant waived his right to the effective assistance of counsel by electing to proceed with unprepared counsel at sentencing (instead of opting for a month's continuance and new counsel) even after counsel revealed that he was not ready to represent the defendant at sentencing and the "judge bawled out [the attorney] and ordered him to refund part of his fee." *See Keeter*, 130 F.3d at 299. By opting for immediate sentencing with his existing attorney, the court explained, the defendant was able to secure the benefit of moving from the local jail to the federal prison. "No criminal

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able promise not to claim ineffective assistance is quite valuable to the government. Not only is a claim of ineffective assistance one of the few claims that courts will assume are *not* forfeited by a guilty plea, but it also often serves as a basis for collateral attack when other claims are barred as defaulted.[150] To secure a prosecutor's concession, a defendant may abandon the ability to challenge designated decisions of his counsel made prior to or during trial[151] as part of a plea or sentencing agreement. Or a defendant may trade the ability to seek relief based on potential deficiencies in representation by entering an agreement that includes the waiver of his right to appeal both conviction and sentence on *any* ground.

Some courts have concluded that they can enforce waivers of ineffectiveness claims, but only waivers of the right to object to "prior acts or omissions of counsel of which [the defendant] reasonably could or should have known."[152] Bargaining over the right to object to future action and advice, under this theory, is forbidden.[153] This distinction is artificially limiting.

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defendant may avoid an explicit waiver, unless the waiver was involuntary. . . . A claim that has been waived 'is not reviewable, even for plain error,' because the waiver means that there has been no error at all." *Id.* at 300 (quoting United States v. Penny, 60 F.3d 1257, 1261 (7th Cir. 1995)); *see also* Ross v. Wainwright, 738 F.2d 1217, 1221 (11th Cir. 1984) (holding that a constitutional right to effective counsel "can be waived if 'competently and intelligently' made," and upholding a waiver at trial of later claims of ineffective assistance of counsel, when counsel and client together agreed not to make any statements or test or present any evidence whatsoever at trial (quoting Johnson v. Zerbst, 304 U.S. 458 (1938))); People v. Mingues, 681 N.Y.S.2d 802 (1998) (holding that the defendant's waiver of the right to appeal included claims of ineffective assistance of counsel and must be enforced unless the error affected the voluntariness of the plea); People v. Victor, No. 76294, 1999 N.Y. App. Div. LEXIS 7521 (App. Div. June 24, 1999) (holding that a knowing and voluntary guilty plea precludes review of an ineffective assistance claim); Jones v. State, 353 N.W.2d 781, 783 (S.D. 1984) ("[W]e recognize that a criminal defendant may waive his right to adequate and effective assistance of counsel, as long as the waiver is made voluntarily, knowingly, and intelligently.").

150. *See generally* LAFAVE, ISRAEL, & KING, *supra* note 28, § 28.4(e).

151. Consider a trial in which a defendant perceives an advantage in waiving an important procedural right, such as the right to be present. A prosecutor can avoid being whipsawed on appeal by securing, in addition to the defendant's waiver of any claim based on the denial of the right to be present, his waiver of the ability to raise any claim that defense counsel was ineffective in *allowing* the defendant to waive his right to be present. *See* Campbell v. Wood, 18 F.3d 662, 673 (9th Cir. 1994) (en banc) ("Correctly anticipating that Campbell would claim that his attorneys were ineffective in allowing him to waive his presence, the prosecutor secured, in open court, Campbell's waiver of any claim that counsel was deficient in allowing him to waive his presence at jury selection.").

152. *See Taylor*, 139 F.3d at 931.

153. *See id.* (arguing that even if the defendant could waive claims of ineffective assistance based on conditions known to him at the time, including his trial counsel's drug abuse, he "could not have foreseen trial counsel's conduct in plea negotiations with the government and was unaware of trial counsel's alleged conflicts when he affirmed the adequacy of his representation"); *see also* People v. Vargas, 17 Cal. Rptr. 2d 445, 451 (Ct. App. 1993) (finding that although the defendant waived his right to appeal any error occurring prior to his waiver, including his objection to the ineffective assistance of counsel, the court did "not mean to imply that a defendant

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Defendants should be able to waive their ability to object to the future as well as the past conduct of their representatives. For a defendant who is willing to gamble on the probability that his counsel will provide effective assistance, waiving the right to raise a claim of ineffective assistance might be just the ticket for a great deal. Courts already enforce prospective waivers of ineffective assistance claims due to conflicts of interest,[154] and a defendant may forfeit by misconduct his right to claim at a later time ineffective assistance of counsel.[155] Indeed, the defendant may waive, prospectively,

may never *specifically* waive prospective error," since a general waiver of appeal rights cannot reasonably be construed as including waiver of the right to appeal "any unforeseen or unknown future error"). The same distinction seems to have been adopted by states that prohibit attorneys from entering into agreements with their clients to waive civil malpractice claims prospectively, while enforcing releases for malpractice that has already occurred. Committee on Legal Ethics of the W. Va. State Bar v. Cometti, 430 S.E.2d 320, 328 (W. Va. 1993) (noting that although a waiver of prospective malpractice would not be enforceable in West Virginia, citing W. VA. CODE § 30-2-11 (1998), a retrospective waiver is permitted so long as the lawyer advises the client in writing that consultation with an independent attorney should be undertaken).

154. *See, e.g.*, Gomez v. Ahitow, 29 F.3d 1128, 1135–36 (7th Cir. 1994) (enforcing the defendant's waiver of the right to object to ineffective assistance of counsel due to conflict of interest); Tyson v. District Court, 891 P.2d 984, 991 (Colo. 1995); *see also* United States v. Martinez, 143 F.3d 1266, 1269 (9th Cir. 1998) (holding that the waiver applied to all conflicts foreseeable at the time of the hearing); LaGrand v. Stewart, 133 F.3d 1253, 1269 (9th Cir. 1998) (holding that by waiving the offer of new counsel after being informed that keeping trial counsel as counsel for federal habeas could lead to a conflict regarding the making of ineffective assistance claims, the defendant waived the benefits of new representation). Consider also *United States v. Lowry*, 971 F.2d 55, 61–63 (7th Cir. 1992), where the defendant was held to have waived any claims of ineffective assistance based on his counsel's conflict of interest arising from the government's announced investigation of the attorney. "To hold otherwise would be to render the waiver meaningless; a defendant would lose nothing by waiving his right and sticking with counsel who had a conflict, since he could always allege 'ineffective assistance' if convicted." *Id.* at 63. The court held that the "'defendant knew enough to make the choice an informed one—a rational reconciliation of risks and gains that are in the main understood. A choice may be intelligent and voluntary in this sense even though made without potentially-important information,'" and the court further noted that "[t]he risks were fairly obvious." *Id.* at 62 (quoting United States v. Roth, 860 F.2d 1382, 1387–88 (7th Cir. 1988)).

155. *See, e.g.*, United States *ex rel.* Kleba v. McGinnis, 796 F.2d 947, 957 (7th Cir. 1986) (rejecting the defendant's claim based on counsel's failure to determine a witness's whereabouts, because the defendant failed to make counsel aware of the potential witness); *see also* Hall v. Washington, 106 F.3d 742, 750–51 (7th Cir. 1997) (finding that no such forfeiture occurred in this case, and distinguishing other cases). Similarly, courts have refused to consider ineffective assistance claims by defendants who ordered their counsel to take the action alleged to constitute ineffective assistance, reasoning that granting relief in such cases could lead to manipulation by defendants. *See* Trimble v. State, 693 S.W.2d 267, 276–79 (Mo. Ct. App. 1985) (finding that the defendant gave "strong and unequivocal direction to counsel to refrain from action" and therefore that the defendant's counsel was not ineffective); Laura A. Rosenwald, Note, *Death Wish: What Washington Courts Should Do When a Capital Defendant Wants to Die*, 68 WASH. L. REV. 735, 749 n.106 (1993) (stating that relief "could enable any defendant to avoid a death sentence by simply withholding all mitigating evidence, and then successfully appealing on the ground that counsel should have offered such evidence," and collecting cases).

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the right to any assistance at all.[156] In each situation, the defendant can only estimate the nature and magnitude of his risk taking, yet we allow him to take that risk.

Waivers of the right to raise ineffective assistance claims do raise a unique concern for the defendant. When the defendant waives any other sort of claim or right, we expect his counsel to advise him about the risks of waiver. A defense attorney, however, has an inherent conflict of interest in advising a defendant about the merits of waiving charges of ineffectiveness.[157] Indeed, the conflict presented by these waivers is striking enough that at least one state's ethics code prohibits attorneys from entering into plea bargains in which the defendant waives his right to seek appellate and postconviction relief for ineffective assistance of counsel.[158] But this concern suggests only that courts would have ample justification to insist that such waivers be surrounded with safeguards to counteract this information gap, not that courts should deprive defendants of the ability to bargain entirely.[159] Independent advice from a different attorney is considered adequate protection when a defendant seeks to waive a future conflict of interest or a malpractice claim; outside advice should be adequate in this context as well.[160] A rational defendant with conflict-free advice about the

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156. *See* Faretta v. California, 422 U.S. 806, 834 (1975) ("The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage."). Arguably, noble "virtues of self-reliance" motivate the right to waive counsel altogether, while less noble, opportunistic hopes of buying some advantage by giving up a claim on appeal are what motivates waivers of ineffective assistance claims. *See id.* But both waivers undoubtedly include the goal of minimizing punishment.

157. *See, e.g.*, Easterbrook, *supra* note 62, at 309 (noting that defense lawyers may use plea bargaining to hide sloth or fraud).

158. *See* United States v. Dorsey, No. 92-5445, 1993 U.S. App. LEXIS 22047, at *4–*7 (4th Cir. Aug. 31, 1993) (rejecting the government's motion to dismiss the appeal, reasoning that the defendant by a general appeal waiver did not waive the right to claim on appeal that the incompetency of his counsel induced him to execute an invalid plea agreement, but finding that the plea agreement was not invalid just because it may have violated state law, N.C. RULES OF PROFESSIONAL CONDUCT 129 (1997) (barring attorneys from "negotiating plea agreements that waive a defendant's right to seek appellate and postconviction relief for ineffective assistance"), because although the agreement may have violated state law, it did not violate federal law).

159. *See, e.g.*, *Lowry*, 971 F.2d at 61–62 (examining the circumstances of a waiver of conflict-free counsel carefully); Ross v. Wainwright, 738 F.2d 1217, 1221 (11th Cir. 1984) (requiring that procedures "akin to" Rule 11 be followed for waiver of claims of ineffective assistance (quoting von Moltke v. Gillies, 332 U.S. 708, 723 (1947))).

160. *See, e.g.*, United States v. Lussier, 71 F.3d 456, 462 (2d Cir. 1995) (holding that a valid waiver of a conflict of interest claim requires advance opportunity to consult with independent counsel if desired); *see also* W. VA. RULES OF PROFESSIONAL CONDUCT 1.8(h) (1995).

> A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented

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risk he is taking may prefer to run that risk rather than forego the sentencing or charge break he could obtain by waiving the right to effective counsel.[161]

Assuming these legitimate defendant-centered concerns are addressed, there remain other reasons, unrelated to the defendant's interests, that opponents of ineffectiveness waivers argue should justify banning such agreements. Chief Justice Burger, for example, argued in his dissent in *Faretta v. California*[162] that allowing defendants to forego counsel undermines the integrity of the justice system.[163] This concern for the impact of allowing defendants to proceed without effective assistance persuaded a majority of justices in *Wheat v. United States*[164] to uphold the rejection of the defendant's preference for conflicted counsel. For the majority, rejection of the defendant's preference was necessary to ensure that "legal proceedings appear fair to all who observe them."[165]

> client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

Id.; *cf.* Disciplinary Counsel v. Clavner, 674 N.E.2d 1369, 1370 (Ohio 1997) (per curiam) (finding that an attorney should not have obtained releases from clients for malpractice in allowing entry of a default judgment without first informing them that they were in an adversarial relationship with her and that they had a right to consult independent counsel before agreeing to the releases); Leonard E. Gross, *Contractual Limitations on Attorney Malpractice Liability: An Economic Approach*, 75 KY. L.J. 793, 804–05 (1987).

161. Indeed, the Second Circuit has adopted a "rational person" test for this purpose. *See* United States v. Fulton, 5 F.3d 605, 613 (2d Cir. 1993) (rejecting the validity of a waiver of conflict of interest and ineffective assistance in a case in which defense counsel was implicated by a government witness in the defendant's trial as being a coconspirator in heroin distribution, and finding that "no rational defendant would knowingly and intelligently be represented by a lawyer whose conduct was guided largely by a desire for self-preservation"). The court explained that so long as the defendant was adequately informed about what he was risking, judges have no duty to protect him from that risk unless "no rational defendant" would take it. The test was noted favorably by the Ninth Circuit in *United States v. Martinez*, 143 F.3d 1266 (9th Cir. 1998), where the court upheld a waiver of conflict-free counsel after determining that the defendant's waiver was not "'so egregious that no rational defendant would knowingly and voluntarily desire the attorney's representation.'" *Id.* at 1270 (quoting *Lussier*, 71 F.3d at 461).

162. 422 U.S. 806 (1975)

163. *See id.* at 839 (Burger, C.J., dissenting).

> "[J]ustice, in the broadest sense of that term" and the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel. The damage thus inflicted is not mitigated by the lame explanation that the defendant simply availed himself of the "freedom" "to go to jail under his own banner . . . ."

Id. (quoting United States *ex rel.* Maldonado v. Renno, 348 F.2d 12, 15 (2d Cir. 1965)).

164. 486 U.S. 153 (1988).

165. Professors William Stuntz and Pamela Karlan have each persuasively demonstrated that a concern for interests other than those of the defendant is the only satisfactory explanation for the Court's decision in *Wheat* to uphold the trial court's decision to disallow waiver of the conflict-free counsel. The Court's decision to permit trial courts to bar such waivers is best understood as a recognition that waivers of conflict-free counsel implicate third-party interests, public interests other than the defendant's own. Rejecting a waiver of conflict-free counsel may prevent defendants from obstructing the criminal investigation, and ultimately the truth, through collu-

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It is problematic to base rules barring the alienation of the right to counsel on something as indefinite as the integrity of the system or the appearance of fairness, while rejecting the same arguments when raised against plea bargains. After all, integrity and fairness could just as easily justify a ban on the negotiated waiver of any procedural provision that a court considers essential. Conversely, depending on one's view, fairness and integrity could also require the enforcement of all knowing and voluntary agreements. To avoid this minefield, but to accommodate both traditional plea bargaining and a role for limits on waivers for some rights, it is useful to break down more specifically the public interests put at risk when a defendant accepts potentially bad advice in exchange for government concessions.

First, entering into a waiver of the right to effective assistance "'constitutes a breach of professional ethics.'"[166] But the damage to the *profession* does not necessarily require that defendants who once waive their claims be able to reclaim them on appeal. The interest in ensuring that attorneys conduct themselves professionally has at least a potential third-party enforcer at the ready. Professional disciplinary sanctions by state bar enforcement agencies, with or without courts, could punish the attorneys directly while leaving the parties with their bargain. While it may seem anomalous to allow judges to enforce an agreement against a party but to punish his lawyer for entering into it, the approach is not unlike denying a defendant standing to object to the admission of evidence against him that was illegally seized from others while allowing the others to seek relief elsewhere. Professional enforcement, however, has never been forthcoming, either because bar authorities do not consider waived misconduct unethical or because they lack adequate enforcement resources.[167] Nevertheless, it is not obvious why the ethics of counsel in criminal cases rise to a constitutional (as opposed to a legislative) problem once the defendant waives whatever stake he has personally in his lawyer's professional behavior.

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sion. As Professor Karlan put it, the Court rejected the right of a defendant to waive conflict-free assistance in order to "temper somewhat the socially undesirable effects" of joint representation. *See* Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 696 (1992); *see also* Stuntz, *supra* note 65, at 798 ("A rule that denies the ability to waive conflict concerns to a white-collar defendant in, say, a bid-rigging conspiracy case seems hard to justify as a means of protecting the defendant."); Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407, 419–21 (1998) (arguing that overriding such waivers may be justified as a means to advance efficient resolution of conflict claims, accurate adjudication, or the appearance of fairness).

166. *See* United States v. Ready, 82 F.3d 551, 556 (2d Cir. 1996) (quoting *Wheat*, 486 U.S. at 162); *see also supra* note 158 and accompanying text (describing a state rule barring such waivers).

167. *See, e.g.*, Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 208 (1997).

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Second, allowing a defendant to waive what could be a valid claim of ineffective assistance of counsel has another negative consequence: It may facilitate the punishment of an actually innocent defendant,[168] threatening the public interest in accurate and reliable criminal adjudication. As I argue in the next part, however, defendants should be able to consent to punishment for crimes they did not commit in order to secure charging or sentencing concessions from the government for crimes they have committed.[169] The public's interest in the accuracy of criminal judgments does not warrant judicial interference with negotiated resolutions in criminal cases.

D. Waiving Accuracy: Trading in Falsehoods and Waiving Legislative Limits on Sentences

Parties in criminal cases sometimes find it advantageous to circumvent the legislature's choices regarding which penalties should follow which acts. They may agree to disregard the law by accepting the imposition of (or the risk that the judge will impose) a sentence higher or lower than the sentence authorized for the crime of conviction. Alternatively, they may choose to bargain over facts rather than law, adjusting the story of the defendant's conduct so that it fits the negotiated penalty. This misrepresentation of the facts takes two forms: a guilty plea to a crime that did not take place in order to avoid conviction on a more serious charge; and "fact bargaining" through which parties stipulate to a script of questionable accuracy at sentencing, thereby circumventing mandatory minimum sentences or other enhancements tied to the presence or absence of particular facts.[170] Although parties

168. *See* Karlan, *supra* note 165, at 690 ("When the defendant has not enjoyed competent, loyal representation, the assumption that his vigilance has adequately protected the system's interest in avoiding [erroneous convictions] breaks down.").

169. Express waivers of claims like the one in *Brady v. United States*, 397 U.S. 742 (1970), should be treated like express waivers of claims of ineffective assistance of counsel. Allowing a defendant to forego the chance to object to the prosecutor's failure to disclose exculpatory information threatens the same injury as allowing a defendant to opt for an incompetent lawyer. Both operate to deprive the defendant of information about the pros and cons of the deal he is offered (a paternalistic concern), promote unethical behavior by attorneys (a public concern), and threaten the conviction of the innocent (another public concern).

170. *See, e.g.*, Frank O. Bowman, III, *To Tell the Truth: The Problem of Prosecutorial "Manipulation" of Sentencing Facts*, 8 FED. SENTENCING REP. 324 (1996). Classic examples of agreements to plead guilty to something other than what really happened include the defendant who pleads guilty to daytime burglary in order to avoid the higher sentence for burglary at night, and the defendant who pleads guilty to voluntary manslaughter for a killing he did not suspect would be committed by a co-felon. *See* Bousley v. United States, 523 U.S. 614, 634 (1988) (Scalia, J., dissenting) (noting that "defendants plead guilty to charges that . . . perhaps could not be proved—in order to avoid conviction on charges of which they are 'actually guilty,' which carry a harsher penalty," and giving manslaughter as an example).

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often use these techniques to *reduce* punishment below the penalty otherwise required by law for the crime of conviction, defendants sometimes agree to a sentence more severe than that allowed under the law for the crime of conviction in return for immunity from higher charges.

These cases sometimes come to light when the defendant finds himself facing incarceration after violating probation. For example, a convicted sex offender recently agreed to a sentence bargain including probation, with a year in jail plus the potential of three years in prison should he violate the terms of his probation. State law authorized only two years for violation of probation in the defendant's situation. Later, the defendant violated probation and the agreed-upon three-year sentence became a reality, prompting him to seek relief from his own "illegal" deal. The California Court of Appeal granted the defendant's request for relief on appeal, dismissing the parties' "creativity" and explaining that "the parties may not enter into a negotiated disposition . . . which specifies a sentence not authorized by law," "even if it is fair under the circumstances."[171]

Presently, as the California case illustrates, these deals remain risky for litigants. Trial judges who learn of the parties' efforts to manipulate the facts or the law may be happy to join in while others may refuse, sending the parties back to the bargaining table. Even when bargains for unlawfully or fictitiously low or high penalties survive scrutiny by trial judges, they may not be upheld on appeal. Although many appellate courts reject defendants' efforts to challenge their own fictitious and illegal agreements on appeal,[172]

At trial, a defendant may stipulate to factual matters in exchange for the prosecutor's promise of a lenient sentence recommendation should conviction result. *See* State v. Carlisle, 527 P.2d 278 (Ariz. 1974) (en banc) (enforcing a promise by the prosecutor and the judge that, in return for the defendant's submitting his case for trial by the court, the judge would consider the case on the basis of the preliminary hearing transcript); Sturgis v. State, 336 A.2d 803, 807 (Md. Ct. Spec. App. 1975) (holding enforceable an agreement by the prosecutor that, in return for the defendant's submission of the case for trial on a stipulated record, the prosecutor would make no sentencing recommendation).

171. *See* People v. Velasquez, 81 Cal. Rptr. 2d 647, 648–49 (Ct. App. 1999); *see also* Cheney v. State, 640 So. 2d 103, 104 (Fla. Ct. App. 1994) (remanding to allow the prosecution to opt for prosecuting the defendant either on the original charges or for a lowered sentence, accepting the defendant's claim that because his sentence included 18 months in jail or at the "Drug Farm" it violated the one-year-in-jail statutory limit, and rejecting the state's argument that the defendant "bargained for his probation" and should not be permitted to "accept and enjoy" his bargain and "then challenge it as illegal after violating its terms").

172. Federal courts, in particular, sometimes point to sentencing provisions through which Congress seems to recognize that parties may prefer to withhold facts from the trial court or agree to an illegal sentence. *See* United States v. Barnes, 83 F.3d 934, 941 (7th Cir. 1996) (finding that a plea agreement to a specific sentence under FED. R. CRIM. P. 11(e)(1)(c) binds the defendant to even an illegal sentence); United States v. Boatner, 966 F.2d 1575, 1578–79 (11th Cir. 1992) (holding that the government can enter into a binding agreement with a defendant to resrrict the facts upon which the substantive offense is based, here an agreement that only two ounces of

others, like the California court, invalidate waivers and review convictions and sentences that defendants later allege lack a factual basis[173] or exceed legislative authority.[174]

cocaine would be considered for sentencing purposes); United States v. Shorteeth, 887 F.2d 253, 256–57 (10th Cir. 1989) (finding that U.S. SENTENCING GUIDELINES § 1B1.8(a) prohibits the court from considering certain, presumably reliable, information when provided as part of a cooperation agreement, unless explicitly mentioned in the plea agreement); *see also* People v. Jackson, 694 P.2d 736, 742 (Cal. 1985) (en banc) (allowing a defendant "in connection with a plea bargain to plead guilty to an offense with which he was not charged, and which the prosecution cannot prove, so long as it is reasonably related to defendant's conduct"); People v. Johnson, 181 N.W.2d 425, 429 (Mich. Ct. App. 1970) (finding no need for a factual basis if the plea is to a lesser offense); People v. Martinez, 611 N.E.2d 277, 278 (N.Y. 1993) (mem.) (stating, in dictum, "[w]e will allow a defendant to plead to a nonexistent crime in satisfaction of an indictment charging a crime with a heavier penalty"); People v. Foster, 225 N.E.2d 200, 202 (N.Y. 1967) (upholding a guilty plea to a legally impossible crime).

173. *See* United States v. Cox, 923 F.2d 519, 524–25 (7th Cir. 1991) (collecting cases, noting that systemic legitimacy concerns are raised when a defendant claims to be innocent of one crime of conviction but pleads to avoid trial on uncharged crimes, and stating that "'the public might well not understand or accept the fact that a defendant who denied his guilt was nonetheless placed in a position of pleading guilty and going to jail'" (quoting United States v. Bednarksi, 445 F.2d 364, 366 (1st Cir. 1971))); State v. Watton, 793 P.2d 80, 85 (Ariz. 1990) (en banc) (upholding the conviction but remanding the case to the trial court to allow the defendant an opportunity to challenge sentencing facts, stating that "public policy forbids counsel from bargaining away defendant's opportunity to correct inaccuracies in a presentence report and to verify that the court has complete and accurate information at sentencing"); People v. Johnson, 675 N.E.2d 1217, 1219 (N.Y. 1996) (mem.) (deciding not to allow a plea to one count of delivery in exchange for dismissal of two counts of possession, and reasoning that courts can accept guilty pleas to fictitious lesser offenses but not to crimes of "equal or higher grade or degree"); State v. McQuay, 452 N.W.2d 377, 381 (Wis. 1990) (upholding a plea agreement, and noting in dictum that it would be against public policy for a prosecutor and a defendant to agree not to reveal certain information to the judge at sentencing). *See generally* Gleeson, *supra* note 69; Felicia Sarner, *"Fact Bargaining" Under the Sentencing Guidelines: The Role of the Probation Department*, 8 FED. SENTENCING REP. 328 (1996).

174. Thus, a federal defendant sentenced under the guidelines who waives his "right to appeal his sentence" may not protest that his sentence exceeded the sentence authorized by the *Sentencing Guidelines*, but will still be able to argue that his sentence exceeds the term authorized by statute for the crime of conviction. *See, e.g.*, United States v. Michelsen, 141 F.3d 867 (8th Cir. 1998) (stating in dictum that waiver does not prevent a challenge to a sentence in excess of the maximum statutory penalty), *cert. denied*, 119 S. Ct. 363 (1998); United States v. Feichtinger, 105 F.3d 1188, 1190 (7th Cir. 1997) ("A waiver of appeal rights . . . will not be enforced . . . if the judge sentenced a defendant in excess of the statutory maximum sentence for the crime committed."); United States v. Marin, 961 F.2d 493 (4th Cir. 1992) (holding that waiver does not prevent a challenge to a sentence in excess of the maximum statutory penalty). *See generally* John M. Dick, Note, *Allowing Sentence Bargains to Fall Outside of the Guidelines Without Valid Departures: It Is Time for the Commission to Act*, 48 HASTINGS L.J. 1017 (1997) (documenting the split among federal courts considering the legality of accepting plea bargains to unauthorized sentences). For examples involving state defendants, see *People v. Velasquez*, 81 Cal. Rptr. 2d 647 (Ct. App. 1999) (holding that the parties may not enter into an agreement that specifies a sentence not authorized by law), *Patterson v. State*, 660 So. 2d 966 (Miss. 1995) (voiding an agreement under which the prosecution gave up the right to seek the death penalty in return for the defendant's agreement to be sentenced to life without parole, when precluding parole was not authorized by statute, over the dissent's argument that the agreement promoted public policy by preserving judicial resources,

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The Supreme Court has yet to state clearly its position on this issue. In *Libretti v. United States*,[175] the majority sidestepped the defendant's claim that his agreement with the government was unenforceable because his stipulation to a factual basis for the forfeiture of assets was false. Only Justice Stevens reached the issue in his dissent, declaring that the law "defines the outer boundaries of a permissible forfeiture" and that a court is "not free to exceed those boundaries solely because a defendant has agreed to permit it to do so."[176]

Undoubtedly, endorsing direct circumvention of the factual basis for convictions and sentences risks a number of harmful effects. First, as Professor Abraham Goldstein has argued, "[t]he distorting effect of inaccurate pleas . . . make[s] the world of crime and corrections a world of fictions."[177] Empirical claims about the general incidence of certain forms of criminal behavior based upon convictions and sentences become "suspect," as do criminal histories of individual offenders.[178] Second, the deterrent effect and moral authority of the criminal law may suffer if the public's trust in the judicial system depends on the general belief that criminal judgments are accurate reflections of what really happens.[179] Attorneys and judges who knowingly distort facts violate ethical standards and degrade the reputation of the legal profession. Finally, circumvention of legislated requirements directly undercuts the legislature's ability to regulate the imposition of criminal liability and punishment.

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protecting citizens, and allowing victims closure), *People v. Callahan*, 604 N.E.2d 108, 112 (N.Y. 1992) (recognizing that challenges to the legality of the sentence imposed are one category of appellate claims that may not be waived, and reaching but rejecting the defendant's argument that the imposition of restitution as part of his sentence was illegal).

175. 516 U.S. 29 (1995).

176. *Id.* at 55 (Stevens, J., dissenting); *cf.* United States v. Herndon, 982 F.2d 1411, 1416–17 (10th Cir. 1992) (enforcing a stipulation to forfeiture, despite the defendant's claim that it lacked factual basis).

177. GOLDSTEIN, *supra* note 75, at 44.

178. *See id.* at 44–46; *see also* DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 100–02 (Frank J. Remington ed., 1966) (showing how pleas mislabel conduct); Alschuler, *supra* note 17, at 6 (noting the public loss of trust in the system due to the hypocrisy of false pleas).

179. *See* Abraham S. Goldstein, *Converging Criminal Justice Systems: Guilty Pleas and the Public Interest*, 49 SMU L. REV. 567, 573 (1996) (arguing that public suspicions about the processes of justice "inevitably, do serious damage to the symbolic, deterrent, and correctional functions of criminal law"); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 16–17 (1978) (arguing that plea bargaining weakens the moral force of the criminal law); Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1366–67 (1985) ("We need a belief that the punishment is factually justified, a belief that will permit the courts, with our approval, to impose sanctions without second thoughts."); Peter Westen & David Westin, *A Constitutional Law of Remedies for Broken Plea Bargains*, 66 CAL. L. REV. 471, 491 n.78 (1978) ("[T]he interest in institutional legitimacy would be fully protected . . . by adequate protection of the accuracy of rhe plea.").

Yet, these public and third-party harms have not been considered to be *constitutionally* protected from circumvention by the parties. Neither the Due Process Clause[180] nor the Eighth Amendment prohibits punishment of a person who is innocent of the crime of conviction but consents to punishment nonetheless.[181] Factual distortions are routinely tolerated in other circumstances indistinguishable on any meaningful basis from the negotiated conviction or sentence,[182] and federal courts have consistently rejected claims by defendants that their rights to due process were violated by unsubstantiated pleas of guilt, so long as those pleas were voluntary and intelligent.[183] Unless we are willing to rethink the factual basis requirement as an independent constitutional mandate, the interests upset by a consenting but actually innocent defendant are for the legislature to protect.

A court may nevertheless choose to examine an agreement to circumvent the law or misrepresent the facts more carefully than other sorts of agreements in order to insure that there is some rational basis for the defendant's choice to waive the law's limits, a rational basis being one that would support a knowing and voluntary choice.[184] Without some sort of concession from the prosecutor, it is fair to assume that there is no legitimate basis for a defendant to admit that he is guilty of a crime he did not really commit. In other words, courts might justifiably bar any agreement to distort the truth or to discard statutory limits on punishment *unless* that agreement is part of an explicit bargain to avoid punishment at least as

180. U.S. CONST. amend. V.

181. In dictum, however, the Court has "assumed" that the Constitution may protect a capital defendant from *execution* upon a "truly persuasive demonstration of actual innocence," despite having been found guilty beyond a reasonable doubt at a fair trial. *See* Herrera v. Collins, 506 U.S. 390 (1993); *see also* Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997) (en banc) (stating that to qualify for relief under *Herrera*, a petitioner must prove that he is probably innocent).

182. Consider, for example, sanctions for discovery violations by the defense, work-product protection for the government, rules allowing for the joinder of offenses despite the prejudicial effect of multiple charges on jury decisions, evidentiary rules prohibiting the introduction of reliable evidence by the defense, and various rules barring the review of error. Courts are also prohibited from interfering with a prosecutor's discretion not to charge, or with the jury's decision to acquit, no matter how strong the evidence of guilt, preserving decisions that undermine any appearance that criminal judgments represent reality. *See* Jerold H. Israel, *Cornerstones of the Judicial Process*, 2 KAN. J.L. & PUB. POL'Y 5, 11–12 (1993) (discussing a variety of ways in which the goal of accuracy is sacrificed in the criminal process for other values). Also weighing in favor of allowing parties in criminal litigation to consent to inaccurate convictions and sentences is the established practice of allowing the same freedom to civil litigants. *See, e.g.*, Stewart v. Peters, 958 F.2d 1379, 1385 (7th Cir. 1992) ("A guilty plea is no more involuntary because the defendant believes he is innocent than the settlement of a civil lawsuit is involuntary because the defendant refuses to admit liability and may believe in all sincerity that he is not liable in the least.").

183. *See, e.g.*, Meyers v. Gillis, 93 F.3d 1147, 1151–52 (3d Cir. 1996) (collecting cases).

184. *See supra* note 161.

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severe as the penalty the defendant agrees to receive.[185] To protect against prosecutorial overreaching, a court could additionally require that the prosecution present a factual basis that would support the greater exposure avoided by the agreement.[186] Significantly, the factual basis would be required as a litmus test for lack of coercion, rather than for the sake of accuracy itself.

Should the legislature disagree with the degree to which the executive and the judiciary are circumventing its limits on what conduct should be punished and how, it could reduce the incidence of evasion by providing procedures to enhance the factual accuracy of bargained-for convictions and sentences. Congress, for example, has already provided some protection against fact bargaining in federal sentencing by requiring third-party scrutiny of factual stipulations. Probation officers in some districts serve as "guardians of the Guidelines," independently investigating and providing facts relevant to sentencing, even to the point of defending factual assertions as the "'third adversary' in the courtroom."[187] Also, victims can be enlisted as fact checkers of sorts.

Yet these controls may have little protective effect if the trial judge is inclined to go along with party preferences anyway. Judges may welcome fact bargaining because it furnishes a "low-visibility" means of imposing penalties that they believe are more suitable than those required by law,[188] or because it permits them to dispense with the "time-consuming nuisance" of fact finding during the sentencing hearing.[189] Additional legislative

185. *Cf.* ABA, *supra* note 117, § 14-1.6 (requiring that the factual basis ensures that the defendant actually committed a crime at least as serious as the one to which he is willing to plead).

186. *Cf.* Bousley v. United States, 523 U.S. 614 (1998) (noting that in order to raise a defaulted claim on collateral review, where there is evidence that "the government has foregone more serious charges in the course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges").

187. *See* Jerry D. Denzlinger & David E. Miller, *The Federal Probation Officer: Life Before and After Guideline Sentencing*, FED. PROBATION, Dec. 1991, at 49, 51; *see also* Michael Tonry, *The Success of Judge Frankel's Sentencing Commission*, 64 U. COLO. L. REV. 713, 715 (1993) (referring to probation officers as "guardians of the Guidelines"); Sharon M. Bunzel, Note, *The Probation Officer and the Federal Sentencing Guidelines: Strange Philosophical Bedfellows*, 104 YALE L.J. 933, 934, 962–63 (1995) (describing probation officers as "the Guidelines' guardians").

188. *See also* Steven J. Schulhofer & Irene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and its Dynamics in the Post-*Mistretta *Period*, 91 NW. U. L. REV. 1294, 1300–12 (1997) (concluding that "the accountability requirements built into the Guidelines sometimes do not constrain the participants, but instead drive them to evade accountability altogether").

189. *See id.* at 1300 & nn.37–38; *see also* Letter from Francesca D. Bowman, Chair, Probation Officers Advisory Group to the United States, to Honorable Richard P. Conaboy, Chairman, United States Sentencing Commission (Jan. 30, 1996), *reprinted in Probation Officers Advisory Group Survey*, 8 FED. SENTENCING REP. 303, 305–06 (1996) (stating that in most cases, the sentencing judge defers to a plea agreement); *id.* at 305, 306 (noting the frequency with which federal judges defer to the parties' agreed-upon version of the facts, rather than using the facts provided by

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measures, such as a rule requiring appellate courts to grant relief sua sponte[190] or whenever the defendant changes his mind,[191] or even the direct manipulation of prosecutors' budgets, might be needed to regulate this type of agreement effectively.[192] In any event, legislators, not courts, should decide whether such steps are warranted.

E. Waiving the Protections of the Eighth Amendment

Cases in which a defendant elects to submit to punishment arguably forbidden by the Eighth Amendment present another recurring dilemma. A defendant may waive the ability to later challenge (1) a method of punishment as "cruel and unusual,"[193] (2) his fine as excessive,[194] or (3) the sentence in his case as so grossly disproportionate as to be cruel and unusual.[195] Defen-

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the probation office, and noting that only 56% of the districts responding reported that facts were accurate and complete in a majority of cases); Kate Stith & Jose A. Cabranes, *Judging Under the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1247, 1262–63 (1997) (noting that "some judges have directed probation officers to limit their investigations to the facts as stipulated by the parties").

190. *See, e.g.*, State v. Unruh, 946 P.2d 1369, 1370 (Kan. 1997) (noting that the plea agreement was not authorized by law, and citing a statute that prohibits a prosecutor from entering into "'any agreement *to decline* to use a prior drug conviction of the defendant to elevate or enhance the severity level of a drug crime as provided in [certain statutes] or make any agreement to exclude any prior conviction from the criminal history of the defendant'" (emphasis in original) (quoting KAN. STAT. ANN. 21-4713(f) (1998))).

191. *See, e.g.*, Ballweber v. State, 457 N.W.2d 215 (Minn. Ct. App. 1990).

192. Legislatures may very well choose not to control every slippage in accuracy in this way. *See, e.g.*, Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 51–52 (1988) (noting that legislative repair of bargaining practices will not be forthcoming or swift enough to modify prosecutorial behavior).

193. Consider *Stewart v. LaGrand*, 119 S. Ct. 1018, 1020 (1999) (per curiam), in which the Supreme Court reversed a decision of the Ninth Circuit that declared that "Eighth Amendment protections may not be waived, at least in the areas of capital punishment." LaGrand v. Stewart, 173 F.3d 1144, 1148 (9th Cir. 1999). The Court reasoned that for it to hold that it could ignore the waiver of a claim that lethal gas violated the Eighth Amendment would be applying a "new rule" of procedure in violation of *Teague v. Lane*, 490 U.S. 1031 (1989) (mem.). *See Stewart*, 119 S. Ct. at 1020. Justice Stevens dissented, stating that "the answer to the question whether a capital defendant may consent to be executed by an unacceptably torturous method of execution is by no means clear." *Id.* at 1021 (Stevens, J., dissenting); *see also* Libretti v. United States, 516 U.S. 29, 43 (1995) (noting that the Court has not yet "determine[d] the precise scope of a district court's independent obligation, if any, to inquire into the propriety of a stipulated asset forfeiture embodied in a plea agreement" to prevent imposition of unconstitutional punishment).

194. *See infra* note 198.

195. *See infra* note 198. A defendant may also waive his right to challenge the conditions of his confinement as cruel and unusual. Prison conditions cases pose an interesting question for alienability rules. These challenges are not raised against a judgment, as on appeal or in habeas, but in separate civil suits. I do not reach in this Article the propriety of the court's decision to include prison conditions under the rubric of "punishments" regulated by the Eighth Amendment. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825 (1994) (debating whether punishment includes conditions other than the ones imposed by a judge as part of a sentence); Helling v. McKinney, 509 U.S. 25 (1993) (same).

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dants may also elect to forego procedures designed to insure that the penalty of death meets Eighth Amendment requirements—by stipulating to the sentence of death, waiving the right to present mitigating evidence at the sentencing hearing, or waiving appellate and postconviction review of the sentencing decision.[196]

Predictably, the Court continues to debate the extent to which the scope of these protections is dictated by historical practice. Despite persistent arguments from some corners of the Court, the majority has regularly looked past histoty when applying the Eighth Amendment's limits. Contemporary social norms, namely "evolving standards of decency"[197] and interjurisdictional comparisons,[198] now govern the amendment's reach. Thus, the amendment not only protects the defendant from becoming the target of indecent acts but also protects society from the degrading effects of tolerating barbarous penalties.

However, as an externality, the community's interest in prohibiting indecent punishment is as slippery a slope as other public interests dismissed by the Court in its plea bargaining decisions, namely the public interest in fairness or the interest in the integrity of the justice system. At some level, the social and moral decay brought about by selling off other important procedural rights is no different from that which follows from tolerance of barbaric punishment. Put differently, if extracting waivers of trial rights with charge and sentence concessions is not indecent, on what basis can we say that it violates our standards of decency to enforce gratuitous waivers of Eighth Amendment prohibitions? Indeed, does consent by the recipient not turn what would otherwise be a cruel and unusual punishment into an acceptable one? Carving out the public's interest in preserving Eighth Amendment compliance as uniquely nonnegotiable, then, requires some basis for distinguishing that interest from other public interests too amorphous to serve as a basis for inalienability rules.

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196. *See, e.g.*, State v. Ashworth, 706 N.E.2d 1231 (Ohio 1999). An estimated 12% of death row defendants seek to hasten their own executions by waiving the opportunity for review. *See* Christy Chandler, Note, *Voluntary Executions*, 50 STAN. L. REV. 1897, 1902 (1998).

197. *See* Hudson v. McMillian, 503 U.S. 1 (1992); Stanford v. Kentucky, 492 U.S. 361, 369–72 (1989); Penry v. Lynaugh, 492 U.S. 302 (1989); Edmund v. Florida, 458 U.S. 782, 788–96 (1982).

198. *See* United States v. Bajakajian, 525 U.S. 321 (1998) (setting the standard for evaluating excessive fines); Harmelin v. Michigan, 501 U.S. 957 (1991) (expressing the view of six justices that the Eighth Amendment contains a proportionality limit on noncapital sentences, three of them citing *Solem v. Helm* for the standard, three stating that the type of analysis in *Solem* was appropriate only when a threshold comparison of the crime to the sentence suggests gross disproportionality); Solem v. Helm, 463 U.S. 277, 303 (1983) (finding that a mandatory sentence of life without parole for a seventh minor nonviolent felony was "significantly disproportionate" and thus invalid under the Eighth Amendment, and comparing the sentence to sentences imposed for the same crime in other jurisdictions).

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One useful way to draw a line here would be to rely on the now famous maxim that "death is different." Bargains involving capital punishment are different in two senses. First, the irrevocability of the sentence justifies greater oversight than would be acceptable in noncapital cases.[199] Second, unlike the noncapital defendant who when pleading guilty might at least expect sentencing concessions in return for his waiver, the death volunteer receives no lesser penalty in exchange for his promise to forego trial or death-sentencing procedures, so prophylactic protection may be justified out of concern for the defendant.[200] This distinction suggests not only that a court should ban enforcement of an agreement by a defendant to be executed for the crime of rape, or an agreement by an adult defendant to be executed for a murder he committed at age thirteen, but also that a court could refuse to uphold a defendant's consent to be executed without appellate review of his death sentence or the presentation of mitigating evidence.

Alternatively, a distinction could be drawn between procedural requirements of the Eighth Amendment, which would be subject to waiver, and substantive requirements of the Eighth Amendment, which would not. By "substantive requirements," I mean rules that ban the imposition of certain penalties for certain crimes, no matter what procedure is followed prior to imposition. The Court's own precedent seems to be consistent with this distinction.[201] Indeed, one explanation for the Court's recent willingness to enforce waiver of Eighth Amendment *process* rights in death cases[202] may be that the procedural requirements for death sentencing—declared by the Court in the past twenty-five years to be part of the Eighth Amendment's mandate—are personal to the defendant. The public's separate interest in

199. *See generally* Chandler, *supra* note 196; G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860 (1983); Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 869–71 (1987).

200. *Cf.* People v. Chadd, 621 P.2d 837 (Cal. 1981) (prohibiting acceptance of a guilty plea to capital murder without the consent of defense counsel); *cf. also* Kronman, *supra* note 63, at 777–80 (arguing that what makes contracts to enter into slavery objectionable is not that we cannot be sure the contract was free from coercion, but that such agreements pose a "special threat . . . to the promisor's integrity or self-respect").

201. *See* Whitmore v. Arkansas, 495 U.S. 149 (1990) (holding that appellate review could be waived, over the protests of dissenters who asserted that mandatory review of capital sentences is required in order to "protect society's fundamental interest in ensuring that the coercive power of the State is not employed in a manner that shocks the community's conscience or undermines the integrity of our criminal justice system"); Stewart v. LaGrand, 119 S.Ct. 1018, 1020 (1999) (per curiam) (suggesting that a rule of inalienability would be a "new" rule); *see also* Commonwealth v. Fahy, 700 A.2d 1256, 1259–60 (Pa. 1997) (holding that the defendant's voluntary waiver of all appellate review was valid and that by appealing counsel was acting without authority); Ann Althouse, *Standing, in Fluffy Slippers*, 77 VA. L. REV. 1188 (1991); Mark Hansen, *Death's Advocate: Defense Lawyer Seeks Execution—at Her Client's Request*, A.B.A. J., Dec. 1998, at 22.

202. *In re* Kemmler, 136 U.S. 436, 447 (1890).

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prohibiting a defendant from submitting himself to punishment that is so "inhuman and barbarous" as to be cruel and unusual may not extend to these procedural requirements. But it should include at the least the interest in prohibiting methods of punishment that the Court has determined are unconstitutional for any offense,[203] and probably those penalties that are grossly disproportionate for certain crimes. For unless we are prepared to freeze Eighth Amendment standards in the eighteenth century, those standards must refer outward to contemporary notions of decency, however amorphous and changing, to this limited extent.

Absent a handy third-party enforcer for this societal interest in ensuring that the government refrain from inflicting cruel and unusual punishment, agreements by defendants to submit to such penalties must never be enforced. In the words of Justice Marshall, "[a] defendant's voluntary submission to a barbaric punishment does not ameliorate the harm that imposing such a punishment causes to our basic societal values and to the integrity of our system of justice."[204] While a defendant, a prosecutor, and even a trial judge may agree that the best resolution of a particular case would be to submit the defendant to torture, such as rape, castration, or caning, this type of agreement must never be enforced.[205] Like the prohibition against even knowing and voluntary contracts for slavery, or the refusal to recognize consent as a defense to murder,[206] a ban on the alienation of these

203. *Cf. Harmelin*, 501 U.S. at 976 ("Wrenched out of its common-law context, and applied to the actions of a legislature, [the Cruel and Unusual Punishment Clause, U.S. CONST. amend. VIII, today] disables the Legislature from authorizing particular forms or 'modes' of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed.").

204. *Whitmore*, 495 U.S. at 173 (Marshall, J., dissenting). *Compare* United States v. Dean, 80 F.3d 1535, 1542 (11th Cir. 1996) (reaching the defendant's challenge to the forfeiture of his assets under the Excessive Fines Clause, U.S. CONST. amend. VIII, and noting that a "defendant's consent to an unjust or illegal punishment should not be ratified by the court"), *modified*, 87 F.3d 1212 (11th Cir. 1996), *and* United States v. Howle, 166 F.3d 1166, 1169 n.5 (11th Cir. 1999) (explaining in dictum that "[i]n extreme circumstances—for instance, if the district court had sentenced [the defendant] to a public flogging—due process may require that an appeal be heard despite a previous waiver"), *with* People v. Panizzon, 913 P.2d 1061 (Cal. 1996) (holding that the defendant waived his right to challenge his sentence as disproportionate under the Eighth Amendment).

205. *See* William Green, *DepoProvera, Castration, and the Probation of Rape Offenders: Statutory and Constitutional Issues*, 12 U. DAYTON L. REV. 1 (1986); Karen J. Rebish, *Nipping the Problem in the Bud: The Constitutionality of California's Castration Law*, 16 N.Y.L. SCH. J. HUM. RTS. 507 (1998). For a collection of cases upholding shaming penalties and rejecting challenges under the Cruel and Unusual Punishment Clause, see Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 646 n.226 (1996).

206. *See* Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 123 (1996) (arguing that although for some crimes, consent makes an "action right when it would otherwise be wrong," or can "defeat[] any rights on the part of others (including the person consenting) that the actor not do the wrong act," some acts remain criminal regardless of consent by the victim because the societal interest in enforcing the prohibition of that behavior is weakened if it can be circumvented by mere agreement); *see also* MONT. CODE ANN. § 45-2-211(2)(d) (1987) (providing

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outward-looking guarantees of the Eighth Amendment is necessary to protect greater social values from the more narrow interests of the parties.

F. Waiving Facial Constitutional Challenges to the Statute Defining the Offense or Providing Punishment

Recently, a panel of the U.S. Court of Appeals for the D.C. Circuit expressed surprise at discovering that there is no "universally accepted answer to the question . . . [:] Is a facial challenge to the constitutionality of a criminal statute a jurisdictional question which can be raised at any time?"[207] Given the wide array of statutory defects raised by criminal defendants—that a statute is unconstitutionally vague[208] or overbroad,[209] violates the First Amendment,[210] the Ex Post Facto Clause, or the Equal Protection Clause,[211] or exceeds the power of Congress under the Commerce Clause—it is no wonder that courts have not arrived at a uniform answer to this question.

As discussed earlier, a Commerce Clause violation should be nonnegotiable, because the limits on federal power vis-a-vis the states are particularly in need of bright-line enforcement in order to protect interests of the public in maintaining state power, interests that differ from those of the litigants and that are particularly unlikely to be enforced by trial judges or other third parties. By contrast, the Ex Post Facto Clause protects the interests of individual defendants in freedom from retroactive punishment.[212] Thus, there is less reason to limit the efforts of defendants to negotiate for

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that consent is no defense if it "is against public policy to permit the conduct of the resulting harm, even thought consented to"); Shapiro, *supra* note 21, at 574–75 (arguing that the only instance in which the Constitution has been construed to prohibit waiver "relates to the prohibition of slavery," and collecting efforts "to explain this exception on nonparernalistic grounds," including protecting people from being slave owners).

207. *See* United States v. Baucum, 80 F.3d 539, 540 (D.C. Cir. 1996) (per curiam).

208. *Cf.* United States v. Layne, 43 F.3d 127, 135 (5th Cir. 1995) (holding that defendants can forfeit a vagueness challenge); United States v. Mebane, 839 F.2d 230 (4th Cir. 1988) (same).

209. *Cf.* United States v. Snelenberger, 24 F.3d 799, 803 (6th Cir. 1994) (finding that an overbreadth challenge is waived if not raised).

210. *Cf.* Haynes v. United States, 390 U.S. 85 (1968) (holding that a statute requiring registration of an illegal firearm violated the Fifth Amendment, and allowing the defendant to raise the Fifth Amendment claim despite having pled guilty).

211. U.S. CONST. amend XIV, § 1; *see, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964).

212. *See, e.g.*, Miller v. Florida, 482 U.S. 423 (1987); Calder v. Bull, 3 U.S. 386, 390 (1798) (characterizing the protection as "an additional bulwark in favour of the *personal* security of the subject, to protect *his person* from punishment by legislative acts, having a retrospective operation") (emphasis added).

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concessions using a promise not to challenge a statute that may violate the Ex Post Facto Clause.[213]

Negotiated agreements to forego facial equal protection challenges to criminal statutes, too, probably should be enforced.[214] While tolerating the imposition of punishment under a discriminatory statute clearly has third-parry effects, an equal protection flaw differs from the nonnegotiable features discussed earlier in an important respect: Members of the unequally disadvantaged group who are not yet charged or sentenced under such statutes are nevertheless able to identify and attack such statutes with civil actions seeking injunctive relief or declaratory judgments.[215] Likewise, statutes that violate the First Amendment do not do so in the abstract, but rather they violate the free speech, freedom of religion, or freedom of association rights of identifiable individuals or groups. Again, standing doctrine and the scope of permissible waiver are joined at the hip. The key question for courts deciding whether to endorse or enforce negotiated waivers of the right to challenge a discriminatory statute, then, is not whether the flaw in the statute is somehow more fundamental than other, waivable constitutional errors. Instead, it is whether the third-party interests protected by

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213. *Compare* United States v. Waters, 23 F.3d 29 (2d Cir. 1994) (holding that a defendant can waive an Ex Post Facto Clause challenge), *with* United States v. Rosa, 123 F.3d 94, 101 (2d Cir. 1997) (noting in dictum that the court "will certainly often be willing to set aside [an appeal] waiver and accept appeal when constitutional concerns are implicated, whether those concerns be related to a particular constitutional provision such as the Ex Post Facto Clause, or whether it simply appears that the ultimate sentence is so far beyond the anticipated range that to deny the right of appeal would raise serious questions of fundamental fairness"), State v. Bean, 474 N.W.2d 116 (Iowa Ct. App. 1991) (holding that ex post facto judgments are void and may be attacked and vacated at any time, and vacating such a judgment and finding that the trial court was without authority to enter the judgment and sentence for an act that was not a crime at the time of its commission, even though the defendant had pleaded guilty to the crime), *and* Lewis v. Class, 565 N.W.2d 61 (S.D. 1997) (limiting state collateral relief to reviewing convictions for jurisdictional error, and reviewing a conviction for an ex post facto violation after the defendant had pleaded guilty to the crime).

214. *See* United States v. Cupa-Guillen, 34 F.3d 860 (9th Cir. 1994) (finding a facial equal protection challenge to have been waived); Chandler v. Jones, 813 F.2d 773 (6th Cir. 1987); Cavanaugh v. District of Columbia, 441 F.2d 1039 (D.C. Cir. 1971).

215. See, for example, the recent success of the Fraternal Order of Police in challenging on equal protection grounds recent amendments to the federal criminal code that make it illegal to provide a firearm to a person convicted of a misdemeanor crime of domestic violence (a class that includes no small number of police officers). Fraternal Order of Police v. United States, 159 F.3d 1362 (D.C. Cir. 1998) (per curiam); *cf.* Pamela S. Karlan, *Fee Shifting in Criminal Cases*, 71 CHI.-KENT L. REV. 583, 591–92 (1995) (arguing that just as plaintiffs who successfully challenge the constitutionality of a criminal statute in a declaratory judgment action would receive attorneys fees, if the same challenge succeeds in the course of a criminal prosecution, fees are due as well, because both the plaintiff and the criminal defendant have assumed "the cost of raising a constitutional challenge when the benefit to society as a whole is the same").

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allowing the defendant to raise the challenge he once waived can be adequately protected by other means.

G. Waiving the Right to a Speedy Trial

As the final procedural right in the list of troublesome waivers examined here, consider the right to a speedy trial. Through agreement, a defendant may waive his right to a speedy trial, protected by the Constitution and by statute, either by agreeing not to contest a specified past or future delay or by agreeing never to raise any speedy trial claim.[216] Some courts continue to deprive such agreements of their effectiveness by refusing to enforce them on appeal.[217] Let us set aside for the moment the regulation of statutory rights to speedy trial, assuming that legislatures have the ability to calibrate the degree to which those rights are waived or asserted, and concentrate on the Sixth Amendment right.

Limits on the ability of a criminal defendant to bargain for concessions by giving up a speedy trial claim seem to be motivated in some cases by misplaced judicial concern for the defendant. New York courts, in particular, have reasoned that speedy trial claims must not be subject to negotiation because the defendant should not be forced by the state to choose between pleading guilry and being deprived of his defense by delay.[218] The supposition here is apparently that the compulsion for innocent persons to plead guilty will be unduly intense when presented with such a waiver. The

216. *Compare, e.g.*, Mason v. State, 932 P.2d 1377, 1378 (Colo. 1997) (noting the defendant's specification that a trial could be held as late as "any time within [six] months after the date of the waiver"), *with* United States v. Twitty, 107 F.3d 1482 (11th Cir. 1997) (noting that three defendants executed an indefinite waiver, while one defendant waived his right only through a specified date).

217. *See, e.g.*, United States v. Willis, 958 F.2d 60, 63 (5th Cir. 1992) (reaffirming that the "central intent" of the Speedy Trial Act, 18 U.S.C. § 3161 (1994), is "to protect society's interests," and thus, "that the provisions of the Act are not waivable by the defendant"); Eubanks v. Humphrey, 972 S.W.2d 234 (Ark. 1998); People v. Callahan, 604 N.E.2d 108, 113 (N.Y. 1992) (forbidding bargained-for waivers of speedy trial claims on appeal, but noting that a defendant may forfeit a speedy trial claim on appeal by abandoning the claim in the trial court prior to its determination). Most courts, however, will refuse to entertain speedy trial claims under either the Sixth Amendment, state law, or statute, once waived expressly as part of a plea agreement. *See* NEB. REV. STAT. § 29-1209 (1989) (interpreted in State v. Gibbs, 470 N.W.2d 558 (Neb. 1991)); United States v. Bohn, 956 F.2d 208 (9th Cir. 1992) (holding that Speedy Trial Act violations are waived by a guilty plea); People v. Fleming, 900 P.2d 19 (Colo. 1995) (en banc) (collecting cases finding that a guilty plea will waive speedy trial rights under the Uniform Mandatoty Disposition of Detainers Act, COLO. REV. STAT. ANN. § 16-14-101 (1999)); State v. Martin, 493 N.W.2d 223 (S.D. 1992) (interpreting a state statute on speedy trial rights). In some states, the plea colloquy must include an admonition by the judge that by his guilty plea, a defendant waives his right to a speedy trial. *See, e.g.*, Maloney v. State, 684 N.E.2d 488 (Ind. 1997).

218. *See* Callahan, 604 N.E.2d at 113.

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rationale must be that the choice that confronts the innocent defendant is unfair: Either he waives his fundamental right to a speedy trial, or he risks the delay, the prospect of prejudice to his defense from that delay, and then the inability to gain relief on this basis following conviction.[219] But the same sort of coercion exists any time a defendant faces the choice between negotiating a settlement and risking a flawed proceeding with an outcome that may or may not be voided on appeal. The concern that an innocent defendant would be unduly coerced into pleading guilty would be better addressed by ensuring that any waiver by the defendant is knowing and voluntary, rather than by banning all such waivers.[220]

Once again, a rule of inalienability makes sense only as a means of protecting public or third-party interests from both parties. The Supreme Court itself suggested that such interests exist when in *Barker v. Wingo*[221] it noted that "there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused."[222] Delay creates an incentive for prosecutors to negotiate discounts, increases the costs to society of incarcerating pretrial detainees and supporting their families, creates an opportunity for defendants awaiting trial to commit other crimes or flee, and "may have a detrimental effect on rehabilitation."[223] Certainly these are harms that prosecutors and defendants could undervalue or ignore in their negotiations. Indeed, prosecutors and defendants may each perceive delay to be in their best interests.[224] If *Barker* is right, and the Sixth Amendment protects these interests in addition to the personal interest of the defendant in avoiding an unreliable conviction or sentence, pretrial detention, or injury to reputation due to delay,[225] then courts have good reason to regulate waivers of speedy trial rights, given the lack of

219. This argument, which allows forfeiture but not waiver, is no more persuasive with speedy trial rights than with a host of other rights. *See* Freytag v. Commissioner, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., dissenting) ("A right that cannot be waived cannot be forfeited by other means . . . but the converse is not true.").

220. For example, some states require a written or on-the-record waiver. *See, e.g.*, State v. King, 637 N.E.2d 903 (Ohio 1994) (holding an oral waiver to be ineffective and requiring a written waiver).

221. 407 U.S. 514 (1972).

222. *Id.* at 519.

223. *See id.* at 519–20.

224. For example, a prosecutor could desire more time to prepare, seek to complete other more important cases first, or hope to secure a witness presently unavailable, while a defendant simultaneously may wish to postpone incarceration as long as possible or hope that prosecution witnesses will lose effectiveness with time.

225. *See, e.g.*, AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 96–116 (1997).

alternative methods of sufficiently protecting these external concerns.[226] If instead *Barker* reflects a view of the Sixth Amendment that no longer survives, then an entirely different conclusion is in order. Indeed, there is reason to believe that the view of the right to a speedy trial as a public good rather than an individual privilege is headed for the same discard bin as the reasoning of *Hopt* and *Cancemi* that denied parties the ability to negotiate their way around the jury or the presence requirement. Denuded of its public character, the constitutional right to a speedy trial is just another bargaining chip for the defense.

CONCLUSION

If the agreements discussed in this Article appear unseemly, perhaps the problem is not so much the rights being traded but the very idea of bargaining in the context of criminal justice. Bargaining rests on the still controversial premise that the defendant and the prosecutor possess comparable power and access to information. More fundamentally, when the prosecutor and the defendant trade due process for due punishment, one has the sense that they are bartering over things that are not really theirs to begin with. At least that was the sense of courts long ago, before the public law of crime was overwhelmed by the private law of contract. Already, it is almost as if the Constitution is not the supreme law of the land, but merely an expensive option-package that a defendant can purchase if he does not want the models available on the lot for a discount. And there appears to be no political or judicial will to reduce the incentives for prosecutors, or defense counsel, to promise to give up whatever concessions they can credibly deliver. Bargaining will persist and expand without drastic changes in the ways that criminal justice is funded, cases are processed, or rights conceived.

Absent this kind of fundamental shift in the regulation of bargaining, courts should be self-conscious about the extent to which they allow contract law to swallow the criminal process, and attentive to ways in which the system in place may be improved. Increasing certainty in bargaining and reducing disparate treatment of similarly situated defendants is one step

226. Neither intervention nor civil suits are an option for victims or those who must bear the costs of delay—they have no standing to disrupt an agreement to delay criminal proceedings nor a plausible claim for damages. Trial judges are not likely to be any more vigorous in forcing parties to trial in order to protect the public interest from unconstitutional delay. On the contrary, experience with the Speedy Trial Act has shown that its provisions have prompted dramatic changes in the speed with which district judges process criminal cases. The Constitution provides no constitutionally based remedy for these public interests (e.g., a Victims Rights Amendment).

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in this direction.[227] Both goals are advanced by clearer rules about which deals are enforceable and which are not, and what information must be conveyed to a defendant before a waiver of a particular entitlement will be presumed to be intelligent. With standardized default rules, parties could bargain over presumptively enforceable contract terms, terms that would trigger judicial scrutiny only upon a showing of gross deviation.[228] The concept of jurisdictional error and rules such as Rule 11 of the Federal Rules of Criminal Procedure managed to provide default standards for some time following the recognition of plea bargaining. But rapidly changing bargaining practices in criminal cases can no longer be managed by these clumsy tools. This Article offers a reasoned method for developing and testing new default rules as various features of the criminal process are offered up for trade in criminal cases.

227. *See, e.g.*, Gleeson, *supra* note 69, at 314 (arguing that prosecutors and defendants should be able to overtly (as opposed to covertly) compromise on the guideline range in a plea agreement because such agreements "eliminate unnecessary litigation" and "are fairer and more honest"); Weinstein & Turner, *supra* note 69, at 299 ("The invisibility and inconsistency [of relief by circumvention] make sentencing more haphazard, chaotic and unpredictable . . . .").

228. *See, e.g.*, Richman, *supra* note 7, at 1211–37 (advocating default rules for interpreting plea bargain terms concerning future jeopardy).

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