Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation

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THE doctrine of criminal waiver currently suffers under a tremendous weight of "theory-guilt."¹ Legal scholars have struggled mightily to explain why, during the course of a criminal prosecution, the defendant may waive most, though not all, of his fundamental constitutional and statutory rights.² Waiver in the disposition of criminal charges is so frequently invoked that commentators have long suggested that "[i]t is waiver of rights that permits the system of criminal justice to work at all."³

¹ Thomas Grey, Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory, 63 S. Cal. L. Rev. 1569, 1569 (1990). I borrow Professor Grey’s phrase to mean the anxious compulsion on the part of jurists and legal scholars, in the face of a theoretically incoherent area of law, to propose monolithic explanatory theories in an effort to bring structure and predictability to that area of law.

² For example, with a guilty plea, a defendant necessarily relinquishes the rights to a jury trial, to the assistance of counsel, to raise a defense, and to confront his or her accusers. See, e.g., Boykin v. Alabama, 395 U.S. 238, 242-44 (1969) (observing that entry of a guilty plea involves waiver of the right against self-incrimination, the right to trial by jury, and the right to confront one’s accusers); United States v. Raynor, 989 F. Supp. 43, 44 (D.D.C. 1997) (same). The act of pleading guilty also automatically forfeits most antecedent claims that a defendant could have raised against the charges. See Tollett v. Henderson, 411 U.S. 258, 266 (1973). Moreover, a plea agreement with the prosecution might include additional waivers of claims that otherwise would have survived the guilty plea, such as of the right to appeal the conviction or sentence. See, e.g., United States v. Navarro-Botello, 912 F.2d 318, 321-22 (9th Cir. 1990) (upholding waiver of right to appeal as part of plea agreement).

³ Michael E. Tigar, Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel, 84 Harv. L. Rev. 1, 8 (1970); see also George E. Dix, Waiver in Criminal Procedure: A Brief for More Careful Analysis, 55 Tex. L. Rev. 193, 194 (1977) (arguing that the waiver doctrine is too inconsistent and needs to be structured to serve a predictive function); William J. Stuntz, Waiving Rights in Criminal Procedure, 75 Va. L. Rev. 761, 762 (1989) (exploring various criminal procedure waiver doctrines and highlighting the problems associated with their use in protecting the interests of criminal defendants).
Despite its ubiquity, most commentators agree that the doctrine of criminal waiver remains in a “state of unnecessary and undesirable confusion.”\(^4\) Caught between the apparent necessity of the practice and the lack of doctrinal coherence to defend it, courts continue to vacillate on the nature and extent of criminal waivers in general, on the justifications for their prevalence, and on what limits if any may be placed on their exercise and barter. This uncertainty has been compounded by sloppy terminology confusing the various types of waiver. Particularly in the context of plea bargaining, the overwhelmingly predominant method of obtaining criminal convictions in the United States,\(^5\) the Supreme Court itself has lurched from one decision to the next without providing meaningful guidance to the lower courts or maintaining any consistent theoretical approach regarding criminal waiver.\(^6\)

Most courts recognize, at least in theory, that while the vast majority of rights may be waived, there are some rights that are not waivable.\(^7\) However, these same courts have been unable to articulate a cogent explanation for this conclusion. In fact, not much has been clarified in the thirty years since the Supreme Court held in a trilogy


5. See, e.g., Brady v. United States, 397 U.S. 742, 752 n.10 (1970) (estimating that between 90-95% of all criminal convictions, and between 70-85% of all felony convictions are by guilty pleas); Roland Acevedo, *Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 Fordham L. Rev. 987, 987 (1995) (estimating that 90% of criminal convictions in the United States are obtained by guilty plea); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 Fordham L. Rev. 2117, 2121 (1998) (estimating that 80-90% of felony indictments in federal courts are disposed of by guilty pleas and/or withdrawal of the charges).

6. See, e.g., Loftus E. Becker, Jr., *Plea Bargaining and the Supreme Court*, 21 Loy. L.A. L. Rev. 757, 760 (1988) (analyzing the Supreme Court's inconsistent treatment of "voluntary" guilty pleas); Dix, supra note 3, at 204 (ascribing the current confusion in the waiver doctrine to its uncritical utilization by the courts, the Supreme Court in particular); Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 Hastings L.J. 957, 1020 (1989) (noting that one of the "most conspicuous features" of current Supreme Court precedent on the issue is the failure to identify any underlying principle for the decisions); Stephen A. Saltzburg, *Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty*, 76 Mich. L. Rev. 1265, 1280 (1978) (commenting on the unsatisfactory state of law respecting the rights which expire as a result of a guilty plea).

7. See, e.g., United States v. Mezzanatto, 513 U.S. 196, 204 (1995) (suggesting that while most protections in a criminal prosecution are presumptively waivable, there may be some that are so integral to the fact-finding process that they cannot be waived, such as the right to conflict-free counsel); United States v. Gambino, 59 F.3d 353, 359-60 (2d Cir. 1995) (joining every circuit that has addressed the issue and holding that because of the great interests in an expeditious criminal trial, a defendant cannot waive the protections of the Speedy Trial Act).
of cases that plea bargains are presumptively constitutional if they are entered into voluntarily and intelligently, and with the assistance of counsel. The Court has subsequently reemphasized the practical necessity of plea bargaining, asserting that it is "an essential part of the process," but has failed to articulate any principled justification for the practice of allowing criminal defendants to lose their most fundamental rights.

Commentators have anxiously scrambled into the void in an attempt to discover a singular theory of why and under what circumstances bargaining away fundamental rights for more lenient prosecutorial treatment is or is not constitutional. Variously drawn from principles of due process, contracts, public policy and economics, these fragmented theories stand in conflict with one another, supporting contradictory outcomes and provide, despite the promises of their proponents and the vehemence of their mutual criticism, rules that apply some of the time, at best.

In light of this uncertainty, criminal waivers such as those included in plea agreements have multiplied without limit. For example,

8. See Parker v. North Carolina, 397 U.S. 790, 796 (1970); McMann v. Richardson, 397 U.S. 759, 772 (1970); Brady, 397 U.S. at 757-58. These cases are collectively referred to as "the Brady Trilogy."
10. See, e.g., Becker, supra note 6, at 760 (criticizing the Supreme Court's lack of principled analysis in deciding cases involving waiver).
federal prosecutors in some jurisdictions recently began to include in their plea bargain offers a requirement that the defendant waive his or her rights under *Brady v. Maryland* and its progeny to mandatory disclosure by the government of material evidence favorable to the defense. Although defense lawyers have argued vigorously against the fairness of such waivers, no court has yet made a definitive ruling on whether they are enforceable. In the Northern District of California, the result has been an impasse between the prosecutors and defenders that has stalled plea negotiations and threatened to bring the normal course of plea bargaining to a "screeching halt." This Article seeks to resolve the constitutionality of this latest plea innovation, but not by employing any singular doctrine. Instead, theories of criminal waiver deriving from the doctrines of unconstitutional conditions, contracts, property and due process, despite their potential contradictions, are each recognized as appropriate theoretical responses in different contexts and are each used to resolve some part of the question presented in the Article. This eclectic, communicative approach is one suggested by the emerging school of legal thought known as Legal Pragmatism, which proposes that legal theory "begin with existing practice" and then consider the range of potential jurisprudential approaches, treating

12. 373 U.S. 83, 87 (1963). Although originally intended to promote fairness in criminal trials, courts have recently extended this duty to disclose "Brady material" to plea bargain adjudications as well. See United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998).


14. See id.


the theories "as perspectives, each of which can add to the understanding of law."\textsuperscript{18} The current climate of uncertainty engendered by a range of partial explanations but a lack of coherence in the law of plea bargains and criminal waiver makes Legal Pragmatism particularly well suited to addressing the question of whether a defendant may waive his or her right to \textit{Brady} material as part of a plea bargain. Notions of free will and paternalism inherent in the question of whether to preclude or permit defendants to bargain away their rights are also central to Legal Pragmatism.\textsuperscript{19} Moreover, Legal Pragmatism is especially sensitive to the "double bind"\textsuperscript{20} faced by defendants deciding to enter into a plea bargain: a rule that prohibited defendants from waiving their \textit{Brady} rights would protect them from prosecutorial coercion but would also deny them a potential bargaining chip in their plea negotiations. Using an approach based upon Legal Pragmatism, it appears that the duty of prosecutors to disclose favorable evidence is one of the few rights that may not be waived as part of a plea bargain. This approach further suggests that the validity of other more established plea bargain waivers, such as the waiver of the right to appeal, should be reconsidered.

Part I of this Article analyzes the constitutionality of plea bargains and their attendant waivers. Part II discusses the scope of the defendant's right to material favorable evidence, the recently articulated duty to disclose such evidence at the plea bargaining stage, and responses to the articulation of that right. In part III, a taxonomy distinguishing among the types of waiver is proposed and various theoretical justifications for criminal waiver are considered and applied in determining whether defendants should be permitted to waive their right to \textit{Brady} material as part of a plea bargain. Finally, Part IV concludes with a return to Legal Pragmatism, and a call to reconsider other waivers presumed to be enforceable, such as that of the right to appeal, under the approach described herein.

\section*{I. PLEA BARGAINS AS CRIMINAL WAIVER}

Evaluating potential limits on plea bargain waivers must begin with plea bargains themselves. The Supreme Court has explained that "[t]he plea bargaining process necessarily exerts pressure on

\textsuperscript{18} \textit{Id.} at 26. The applicable metaphor is a symposium of legal theorists, each bringing a different perspective to the table, reaching consensus after a group discussion. \textit{Id.} at 37-38.

\textsuperscript{19} See, \textit{e.g.}, David Luban, \textit{What's Pragmatic About Legal Pragmatism?}, 18 Cardozo L. Rev. 43, 59 (1996) (illustrating the use of paternalistic arguments by the Supreme Court).

\textsuperscript{20} See, \textit{e.g.}, Radin, \textit{supra} note 16, at 1699-1704 (discussing "the problem of the double bind in the context of contested commodification of sexuality and reproductive capacity").
defendants to plead guilty and to abandon a series of fundamental rights, but we have repeatedly held that the government may encourage a guilty plea by offering substantial benefits in return for the plea.”21 It is this permissiveness toward plea bargaining that has apparently led many courts to assume that all rights are waivable. This part considers the constitutionality of bargained-for pleas and the waiver of additional rights as part of the plea agreement.

The practice of plea bargaining is routinely criticized from all sides. As noted by one commentator: “Scholars have argued for years that the system of plea bargaining is inherently flawed and unfair to defendants. On the other hand, policymakers have attempted to ‘ban’ plea bargaining in response to the public’s loss of faith in a system that allows ‘criminals’ to receive ‘bargains.”’22

The most common criticisms of the practice of plea bargaining are that the threat of much harsher penalties after trial is impermissibly coercive upon defendants and causes them to abandon the procedural protections of trial; that it is hypocritical to use “an elaborate trial process as window dressing, while doing all the real business of the system through the most unelaborate process imaginable;” and that the inequality of relative bargaining strength between the government and the defendant renders the plea bargaining process inaccurate and unfair, especially to poor and unsophisticated defendants.23

Notwithstanding these criticisms, plea bargaining has long been a fixture of criminal adjudication in the United States.24 Plea bargaining “is not some adjunct to the criminal justice system; it is the criminal justice system.”25 The tension between the perceived flaws in the plea bargaining process and its overall ubiquity has led to rampant post hoc justifications by both the courts and the legal academy, including the benefits to both the state and the defendant, such as efficiency and a potential for encouraging rehabilitation; proponents further presume equal bargaining power between parties and characterize the process

22. Douglas D. Guidorizzi, Should We Really “Ban” Plea Bargaining? The Core Concerns of Plea Bargaining Critics, 47 Emory L.J. 753, 753-54 (1998) (footnotes omitted); see also id. at 761 (“Observers criticized plea bargaining both as an incompetent, inefficient, and lazy method of administering justice and as a compromise of a defendant’s right to a jury trial.”) (footnote and internal quotation marks omitted); Schulhofer, supra note 11, at 1979 (“[P]lea bargaining seriously impairs the public interest in effective punishment of crime and in accurate separation of the guilty from the innocent.”).
23. See Scott & Stuntz, Plea Bargaining, supra note 11, at 1912; see also Langbein, supra note 11, at 12-13 (1978) (arguing that plea bargaining is as coercive as medieval torture).
as "merely a choice between unpleasant alternatives that does not drive defendants to false self-condemnation."^{26}

Nevertheless, the validity of plea bargaining as a principled means of criminal adjudication remains unexplained. The ongoing controversy regarding plea bargaining simmering just below the surface is typified by the recent fractured opinion by the Tenth Circuit, sitting en banc, overruling a highly publicized panel decision that had reversed the conviction of a defendant on the grounds that the U.S. Attorney had violated the federal witness tampering statute by offering leniency to a co-defendant as part of a plea bargain in exchange for his testimony.\footnote{27} This case turned into a hotly contested referendum on the validity of plea bargains in which the majority, in order to defend the practice, ended up in the contorted position that the government could not be guilty of witness tampering due to the privilege of sovereign immunity.\footnote{28} The validity of plea bargains and their attendant waivers thus remains an unresolved and anxiety-provoking issue for the courts.

The following section reviews the constitutionality of bargained-for pleas and their inherent waiver of many of a defendant's most fundamental rights. Section B then analyzes additional waivers occurring as part of the plea bargain.

A. Constitutionality of Bargained-for Pleas

*Brady v. United States*\footnote{29} was the first of a landmark trilogy of Supreme Court cases enshrining plea bargaining as a valid mode of criminal adjudication. Brady initially pleaded not guilty to federal

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\footnote{26. Guidorizzi, *supra* note 22, at 761-62 (footnotes omitted).}

\footnote{27. See United States v. Singleton, 165 F.3d 1297, 1298 (10th Cir. 1999) (en banc).}

\footnote{28. Concerned that "[n]o practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence," *id.* at 1301 (citation and internal quotation marks omitted), the en banc majority refused even to consider whether offering leniency to a co-defendant in exchange for his testimony constituted witness tampering on the grounds that the U.S. Attorney was exempt from prosecution due to sovereign immunity. \textit{See id.} at 1300-01. Judge Henry concurred on the grounds that he simply could not believe that Congress could have intended "to criminalize the widespread and common practice of government lawyers." *Id.* at 1303 (Henry, J., concurring). Judge Lucero, joined by Judge Henry, also concurred on the narrow grounds that while the prosecutor was not exempt from the witness tampering statute, offering a lenient plea bargain did not constitute an offense under that statute. \textit{See id.} (Lucero, J., concurring). Judge Kelly, joined by Chief Judge Seymour and Judge Ebel, dissented, suggesting that while, in response to the merits panel decision, prosecutors from coast to coast have sounded "the death knell for the criminal justice system as we know it," *id.* at 1308, the straightforward interpretation of the statute, "which encompasses a prohibition against buying witness testimony with leniency, actually aids the search for truth." *Id.* at 1309 (Kelly, J., dissenting).}

\footnote{29. 397 U.S. 742 (1970). Not to be confused with the other "Brady" case discussed in this Article, *Brady v. Maryland*, 373 U.S. 83 (1963).}
charges of kidnapping, but, upon learning that his co-defendant had confessed and would be testifying against him, changed his plea to guilty to avoid the risk of receiving the death penalty, a punishment that was statutorily inapplicable to a defendant who pleaded guilty.\footnote{30} In his petition for post-conviction relief, Brady argued that his guilty plea was entered solely to avoid the possibility of the death penalty and thus was not voluntary on account of the coercive effects of the sentencing scheme.\footnote{31}

The Supreme Court in \textit{Brady} began with the premise, drawn from familiar concepts of criminal waiver, that “guilty pleas are valid if both ‘voluntary’ and ‘intelligent.’”\footnote{32} Voluntariness in pleading guilty, the Court explained, would be presumed in the absence of coercion.\footnote{33} Although the Court recognized that the sentencing provision of the federal kidnapping statute was the “but for” cause of Brady’s change of plea, it held that this did “not necessarily prove that the plea was coerced and invalid as an involuntary act.”\footnote{34} Instead, the Court suggested that, unlike pleading guilty in response to threats, pleading guilty in response to promises of more lenient treatment is voluntary.\footnote{35}

This supposed distinction between promises and threats in determining the voluntariness of a guilty plea suggested by the Supreme Court in the \textit{Brady} Trilogy would seem to be precluded by \textit{Bram v. United States},\footnote{36} a nineteenth century precedent holding that, “to be admissible, [a confession] must be free and voluntary: that is, it must not be extracted by any ... threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.”\footnote{37} However, the \textit{Brady} Court distinguished \textit{Bram} on the grounds that, unlike Brady, Bram had been

\begin{itemize}
\item 30. \textit{See} \textit{Brady}, 397 U.S. at 743.
\item 31. \textit{Id.} at 744.
\item 32. \textit{Id.} at 741 (citing \textit{Boykin v. Alabama}, 395 U.S. 238, 242 (1969)).
\item 33. \textit{Id.} at 749-50.
\item 34. \textit{Id.} at 750.
\item 35. \textit{Compare id. (“Of course, the agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant.”)}, \textit{with id.} at 751 (“We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant’s desire to accept the certainty or probability of a lesser penalty ...”).
\item 36. 168 U.S. 532 (1897).
\item 37. \textit{Id.} at 542-53.
\end{itemize}
unrepresented by counsel. The Court explained that "the possibly coercive impact of a promise of leniency" was presumptively "dissipated by the presence and advice of counsel." Because Brady "had competent counsel and full opportunity to assess the advantages and disadvantages of a trial as compared with those attending a plea of guilty," his decision to plead, "unlike Bram's confession, was voluntary." Thus, in an end-run around Bram, the Court treated the assistance of counsel as a proxy for voluntariness in pleading, effectively establishing that a counseled plea is presumptively valid.

The second requirement for a valid guilty plea pursuant to the Brady Trilogy is that it be intelligently made with "sufficient awareness of the relevant circumstances and likely consequences." During the previous year, the Court had held that, for a guilty plea to be acceptable, the defendant must possess "an understanding of the law in relation to the facts." The Court had also held in Boykin v. Alabama in order for a trial judge to accept a guilty plea, the record must reflect "an affirmative showing that it was intelligent and voluntary." The reasoning behind this requirement was that "[i]gnorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." The Brady Court invoked these precedents, but then summarily drained them of much of their force, stating that "[t]he rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision." Instead, as with the voluntariness of the plea, the Court held that even a flawed understanding of the facts and circumstances of the case is sufficient...

38. Brady, 397 U.S. at 754.
39. Id. This explanation is closely analogous to that offered in Miranda v. Arizona, 384 U.S. 436 (1966).
40. Brady, 397 U.S. at 754.
41. Id. at 755.
42. See id. at 748.
45. Id. at 242.
46. Id. at 242-43.
47. See Brady, 397 U.S. at 747 (citing Boykin); id. at 748 n.6 (citing McCarthy and Boykin).
48. Id. at 757. The Court clarified just how little intelligence is needed to support a valid plea in the third case of the Brady Trilogy, McMann v. Richardson, in which the Court considered the extent to which a guilty plea may be collaterally attacked on the grounds that it was motivated by a coerced confession: "[T]he decision to plead guilty before the evidence is in frequently involves the making of difficult judgments. All the pertinent facts normally cannot be known unless witnesses are examined and cross-examined in court. Even then the truth will often be in dispute." 397 U.S. 759, 769 (1970).
as long as the decision to plead is "based on reasonably competent advice" of counsel.\footnote{49}

The \textit{Brady} Trilogy marked the decisive moment in the Court's treatment of plea bargains. Although reiterating the form of the voluntariness and intelligence requirements for waiver, the Court substantially undercut any argument that systemic problems such as coercive sentencing schemes or peremptory bargaining tactics were rendering large numbers of guilty pleas invalid. The underlying rationale for the Court's approach in \textit{Brady} was starkly revealed by its recognition that "about 90\%, and perhaps 95\%," of all criminal cases are resolved by guilty pleas.\footnote{50} The Court interpreted these statistics as resulting from plea bargaining's "mutuality of advantage," in which defendants are "no doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury."\footnote{51}

The Court conceded that the prevalence of plea bargains could just as easily be attributed to pervasively coercive effects of the threats and inducements inherent in the plea bargaining process,\footnote{52} but simply stated that it

cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.\footnote{53}

Not having squarely addressed the validity of plea bargaining until after it had become embedded in the criminal justice system,\footnote{54} the Court apparently saw no choice in the \textit{Brady} Trilogy but to embrace it.\footnote{55} Under the twin banners of "mutuality of advantage" and "rehabilitation," the Court definitively proclaimed the constitutionality of bargained-for guilty pleas.

Subsequent Supreme Court cases dealing with plea bargains, however, have been erratic in their application of the principles articulated in the \textit{Brady} Trilogy.\footnote{56} For example, the "rehabilitation" rationale for validating guilty pleas based upon solemn admissions of guilt was abandoned six months later as the Court upheld the plea of a

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\footnote{49. \textit{McMann}, 397 U.S. at 770.}\footnote{50. \textit{Brady}, 397 U.S. at 752 n.10.}\footnote{51. \textit{Id.} at 752.}\footnote{52. \textit{See id.} at 752-53 ("Of course, that the prevalence of guilty pleas is explainable does not necessarily validate those pleas or the system which produces them.".).}\footnote{53. \textit{Id.} at 753.}\footnote{54. \textit{See Guidorizzi, supra note 22, at 762.}}\footnote{55. \textit{See Tigar, supra note 3, at 4.}}\footnote{56. \textit{See Becker, supra note 6, at 760 (comparing the irregularity of the Supreme Court's subsequent cases to "drunks scattering from a bar").}}
\end{flushleft}
defendant who adamantly denied his factual guilt. This rationale
nevertheless "continues to bob up in later opinions,"58 in the
suggestion, for example, that defendants who plead guilty do so
because they really are guilty, and are unlikely to have been led to
"false self-condemnation."59 The Court's mercurial attitude toward its
justifications for the constitutionality of plea bargains makes distilling
enduring principles a difficult exercise. Nevertheless, a few recurrent
themes can be found among the Supreme Court's post-Brady Trilogy
plea bargaining cases.

First, the Court has paid relentless homage to the requirements that
a valid guilty plea be entered voluntarily and intelligently.60 Like a
talisman, all plea bargain cases since the Brady Trilogy have invoked
those prerequisites. Mainly, those terms are treated as legitimating
vessels, filled in each instance with whatever significance the writing
Justice chooses. However, they are occasionally applied with vigor.

In one example, the Court vacated a second-degree murder
conviction based upon a guilty plea, despite "overwhelming evidence
of guilt," on the grounds that the record did not demonstrate that the
defendant had been informed that intent to cause the death of his
victim was an element of the offense.61 Giving rare force to the
voluntariness requirement, the Court held that a plea "could not be
voluntary in the sense that it constituted an intelligent admission that
he committed the offense unless the defendant received 'real notice of
the true nature of the charge against him, the first and most
universally recognized requirement of due process.'"62

A second prominent theme in the plea bargain cases since the
Brady Trilogy is the requirement that a guilty plea be counseled. In
many decisions, this requirement appears to be independent of the
voluntariness and intelligence aspects of the plea.63 Other cases,
however, have expanded on the suggestion in the *Brady* Trilogy that the mere presence of counsel creates a presumption that the defendant's choices are made knowingly and are free from coercion. Along these lines, the Court has stated that defendants are presumptively capable of making an intelligent choice if advised by competent counsel.

Finally, the decisions since the *Brady* Trilogy have continued to be animated by the Court's view of plea bargaining as a practical necessity. For example, the Court suggested in *Santobello v. New York*, as it did in *Brady*, that plea bargaining "is an essential component of the administration of justice," and "is to be encouraged" since, "[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities." Moreover, the Court explained, plea bargaining "is not only an essential part of the process, but a highly desirable part for many reasons," primarily because of its speed and cheapness in disposing of criminal cases.

The Court has further emphasized that, "[w]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked."); Menna v. New York, 423 U.S. 61, 62 n.2 (1975) ("[A] counsel of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." (emphasis in original)); *Santobello*, 404 U.S. at 261 ("It is now clear, for example, that the accused pleading guilty must be counseled, absent a waiver.").

64. See, e.g., *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (stating that a defendant "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards" of competence).

65. See *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). In keeping with this focus on the role of counsel in the defendant's decision whether to plead, the Court in *Hill v. Lockhart*, 474 U.S. 52, 57-60 (1985), applied the standard for ineffective assistance of counsel set in *Strickland v. Washington*, 466 U.S. 668, 687-91 (1984), in holding that a defendant may collaterally attack his otherwise valid guilty plea by demonstrating that his counsel's advice fell below an objective standard of reasonableness, and that he was prejudiced by his counsel's incompetence. See *Hill*, 474 U.S. at 57. To satisfy the prejudice prong, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59.

For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error 'prejudiced' the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea.

67. Id. at 261.
68. See id.
In fact, the Court has even ventured so far as to validate the practice of overcharging defendants in order to persuade them not to exercise their rights to a jury trial, suggesting that without it “the institution of plea negotiation could not survive.”

Gone, clearly, is any attempt to distinguish the prosecution’s promises from its threats in convincing a defendant to plead guilty.

Despite these broad recurrent themes of the voluntariness and intelligence talismans, the importance of assistance of counsel, and the overall necessity of plea bargaining to the functioning of the criminal justice system, the Court’s unsettled plea bargaining cases since the *Brady* Trilogy still “circle like planets around a dim and fuzzy sun.”

The area of greatest disagreement and least adherence to principle has been the loss of otherwise valid claims through pleading guilty.

Part B considers both the automatic loss of antecedent claims upon the act of pleading guilty and the waiver of surviving claims as part of the plea agreement.

**B. Plea Bargain Waivers**

A guilty plea necessarily disclaims the defendant’s rights to a trial by jury with the assistance of counsel and to confront and cross-examine adverse witnesses, as well as the privilege against self-incrimination.

The act of pleading guilty also extinguishes most other non-jurisdictional claims that might have been asserted had the defendant gone to trial. These “antecedent claims” are automatically lost upon the entry of the guilty plea. Moreover, the prosecution may

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69. *Bordenkircher*, 434 U.S. at 361-62 (citation and internal quotation marks omitted); *see also* United States v. Goodwin, 457 U.S. 368, 378 (1982) (“The outcome in *Bordenkircher* was mandated by this Court’s acceptance of plea negotiation as a legitimate process.”).

70. *Goodwin*, 457 U.S. at 379 n.10. Some Justices have nevertheless recognized limits on the practice of plea bargaining: “No court would knowingly permit a prosecutor to agree to accept a defendant’s plea to a lesser charge in exchange for the defendant’s cash payment to the police officers who arrested him. Rather, the prosecutor is permitted to consider only legitimate criminal justice concerns in striking his bargain—concerns such as rehabilitation, allocation of criminal justice resources, the strength of the evidence against the defendant, and the extent of his cooperation with the authorities.” *Town of Newton v. Rumery*, 480 U.S. 386, 401 (1987) (O’Connor, J., concurring).

71. *Becker*, supra note 6, at 775.

72. *See, e.g.,* McMunigal, supra note 6, at 1020 (noting that one of the “most conspicuous features” of existing “Supreme Court precedent on the issue of loss of constitutional rights inherent in the guilty plea” process is “confusion regarding the principles upon which they are based”); Saltzburg, supra note 6, at 1280 (“The state of the law respecting the rights foregone after pleading guilty is obviously unsatisfactory. Nothing in the language of any of the Supreme Court’s cases articulates a rule that helps even slightly in addressing new cases or evaluating the merits of those already decided.”).

73. *See, e.g.,* Fed. R. of Crim. Proc. 11(c)(3) (enumerating the rights that the court must address with a defendant in open court before accepting a guilty plea).
bargain for additional waivers of those few remaining rights that are not automatically lost by pleading guilty. The Supreme Court's lack of doctrinal coherence regarding plea bargain waivers in each of these forms has led to ongoing confusion as to what rights are forfeited by the act of pleading guilty, what surviving rights may be waived as part of the plea agreement, and what rights may never be waived.

1. Automatic Loss of Claims

The Supreme Court introduced the concept of the automatic loss of antecedent claims in *Tollett v. Henderson*, holding that entry of a guilty plea forfeits an accused's right to raise claims of constitutional deprivation that occurred prior to the entry of the guilty plea. Then-Justice Rehnquist acknowledged that, unlike the *Brady* Trilogy cases, the facts giving rise to Henderson's otherwise valid claim, of systematic racial discrimination in the composition of the grand jury that indicted him, were unknown to him or his attorney at the time he entered his plea. Thus, Justice Rehnquist conceded, "[i]f the issue were to be cast solely in terms of 'waiver,' the Court of Appeals was undoubtedly correct in concluding that there had been no such waiver here." Nevertheless, the Court held that Henderson's guilty plea "foreclose[d] independent inquiry into the claim of discrimination in the selection of the grand jury."

The *Tollett* Court reiterated the rule under the *Brady* Trilogy that, to be valid, a guilty plea must be counseled, and voluntarily and intelligently entered. However, the Court then recast the Trilogy as holding that "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." As a result, once "a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of

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75. Id. at 267. The Court in *Tollett* considered the case of a habeas corpus petitioner, convicted of murder and sentenced to 99 years imprisonment based upon his guilty plea, who sought to have his sentence vacated and his plea withdrawn on the grounds that African-Americans had been excluded from the grand jury that indicted him. See id. at 259. The district court found "systematic exclusion" of African-Americans from grand jury service, and the Sixth Circuit held that Henderson could bring his claim because the record did not demonstrate a waiver of his constitutional right not to be indicted by such a grand jury. See id. at 259-60. The Court granted certiorari to determine "whether a state prisoner, pleading guilty with the advice of counsel, may later obtain release through federal habeas corpus by proving only that the indictment to which he pleaded was returned by an unconstitutionally selected grand jury." Id. at 260-61.
76. See id. at 265-66.
77. Id. at 266.
78. Id.
79. See id. at 266-67.
80. Id. at 267.
constitutional rights that occurred prior to the entry of the guilty plea."\(^{81}\) Instead, he may only challenge the voluntary and intelligent nature of the plea and the competence of his counsel in advising him to plead.\(^{82}\)

The Court held that a plea could be sufficiently intelligent even if the defendant was not advised of every potential constitutional claim or defense, concluding instead that as long as counsel's advice to plead guilty was not the result of incompetent counsel, the plea may not be collaterally attacked.\(^{83}\) The Tollett Court thus entirely removed such antecedent claims as racial discrimination in grand jury composition from the ambit of waiver in the sense of the intentional relinquishment of known rights.\(^{84}\)

After Tollett, the Court initially retreated from the proposition that all antecedent constitutional violations are inevitably waived by the entry of a counseled guilty plea. For example, in Blackledge v. Perry\(^{85}\) the Court upheld a collateral attack on an otherwise valid guilty plea entered by a defendant who was reindicted on felony charges following his appeal of a misdemeanor conviction, on the grounds that the very initiation of proceedings against him was presumptively the product of prosecutorial vindictiveness and operated to deny him due process of law.\(^{86}\) The Court similarly held in Menna v. New York\(^{87}\) that by entering a counseled guilty plea a defendant does not waive his right to raise a double jeopardy claim, reasoning that a conviction must be set aside in cases "[w]here the State is precluded by the United States Constitution from haling a defendant into court on a charge."\(^{88}\) While the Court acknowledged that a double jeopardy

\(^{81}\) Id.

\(^{82}\) See id.

\(^{83}\) See id. at 268-69. The Court reached this holding despite the mandate from Brady that guilty pleas "must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Brady v. United States, 397 U.S. 742, 748 (1970) (emphasis added).

\(^{84}\) See Peter Westen, Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure, 75 Mich. L. Rev. 1214, 1218-19 (1977) (observing that under the Tollett rule a guilty plea operates as a forfeiture of all constitutional claims except ineffective counsel and defenses in the actual proceeding); see also Rubin, supra note 4, at 500 ("The Court seemed to be moving toward the position that a valid guilty plea waives the right to appeal on the basis of any constitutional infirmities in the procedure leading to the plea.").


\(^{86}\) Id. at 28. In reaching this conclusion, the Court did not require evidence that the prosecutor had acted "maliciously" or "in bad faith" in seeking a felony indictment. See id.

\(^{87}\) 423 U.S. 61 (1975) (per curiam).

\(^{88}\) Id. at 62 (citing Blackledge v. Perry, 417 U.S. 21, 30 (1974)). Menna, after serving a 30-day contempt sentence for refusing to testify before the grand jury, was reindicted for having refused to testify in connection with the same investigation on a different day. See id. at 61. After arguing unsuccessfully that the second indictment should be dismissed under the Double Jeopardy Clause, Menna pleaded guilty and was again sentenced. See id.
claim may be waived, it refused to accept the argument that the claim is automatically forfeited by a valid guilty plea.\textsuperscript{89}

But by the time the Court had decided \textit{Bordenkircher v. Hayes},\textsuperscript{90} only five years after \textit{Tollett}, the pendulum had swung out and back regarding the automatic forfeiture of antecedent claims without any explanatory principle revealed or any case overruled. In \textit{Bordenkircher}, a state prosecutor carried out a threat made during plea negotiations to reindict Hayes on more serious charges if he did not plead guilty to the offense with which he was originally charged.\textsuperscript{91} The Sixth Circuit agreed with Hayes that because the prosecutor acted vindictively, the defendant could challenge the plea pursuant to \textit{Blackledge v. Perry}.\textsuperscript{92} In reversing, the Supreme Court focused on the accused’s choice to accept or reject the plea agreement and reasoned that competent counsel and procedural safeguards sufficiently protected defendants from prosecutorial “persuasion.”\textsuperscript{93} Despite its acknowledgment that punishing a person for relying on his legal rights would be “patently unconstitutional,” the Court characterized the prosecutor’s conduct as “no more than openly present[ing] the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution.”\textsuperscript{94}

Twenty years after \textit{Bordenkircher}, it still remains unclear whether the Court has completely closed the door on collateral challenges to guilty pleas, apart from attacking their voluntariness or intelligence, or claiming ineffective assistance of counsel in deciding to plea. Some cases seem to suggest so,\textsuperscript{95} but others make clear that \textit{Blackledge v. Perry} is still good law.\textsuperscript{96} The ongoing confusion in this area is typified

\textsuperscript{89} See id. at 63 n.2. The Court observed that “waiver was not the basic ingredient” of the \textit{Brady} Trilogy; rather, the point of the plea bargaining cases is that a counseled guilty plea, if voluntary and intelligent, is such a reliable admission as to remove the issue of factual guilt from the case. Id. at 62 n.2. Because the right not to be placed in double jeopardy prohibits a second prosecution regardless of the validity of factual guilt, a plea does not bar the claim. See id.

\textsuperscript{90} 434 U.S. 357 (1978).

\textsuperscript{91} See id. at 358.

\textsuperscript{92} See id. at 360.

\textsuperscript{93} See id. at 363. Though the Court recognized that the risk associated with trial may have a discouraging effect on the defendant’s decision to preserve his rights, it concluded that this is an inevitable and permissible by-product of a criminal justice system that allows for the plea bargaining process. See id. at 364.

\textsuperscript{94} Id. at 365.

\textsuperscript{95} See, e.g., \textit{Mabry v. Johnson}, 467 U.S. 504, 508 (1984) (“It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked.”).

\textsuperscript{96} For example, in \textit{Thigpen v. Roberts}, 468 U.S. 27 (1984), the prosecution responded to the defendant’s exercise of his right to appeal for a trial \textit{de novo} after his misdemeanor convictions for a fatal traffic accident, by obtaining a felony indictment for manslaughter covering the same conduct. See id. at 28-29. The Supreme Court affirmed the issuance of the writ of habeas corpus on the grounds that the “case is plainly controlled by \textit{Blackledge v. Perry.” Id. at 30. Thus, \textit{Roberts} suggests that a reindictment covering the same conduct but charging more serious
by the Court's treatment of double jeopardy claims following a guilty plea.

After *Menna*, the Court revisited the issue of guilty pleas and double jeopardy claims in *Ricketts v. Adamson*. In that case, the Court upheld the waiver of the Fifth Amendment privilege against double jeopardy even though the plea agreement did not contain the words "double jeopardy," determining that the agreement adequately specified the waiver that would result from a breach of the agreement. Without citing *Menna*, the Court in *Adamson* nevertheless followed its prescription that while the Fifth Amendment protection against double jeopardy is not automatically forfeited by the plea itself, it may be waived as part of a plea bargain, if both the waiver and the plea are counseled, voluntary and intelligent.

The Court again returned to the issue of post-plea double jeopardy claims in *United States v. Broce*, in which the two defendants each moved to vacate one of their two conspiracy convictions after the district court found in a subsequent related case that only a single conspiracy had existed. The Tenth Circuit ultimately affirmed the district court's decision vacating the judgments and sentences on the second conspiracy count, holding that while *Adamson* had "made clear that the protection against double jeopardy is subject to waiver.... [T]he guilty pleas in this case did not themselves constitute such waivers."

In a complete about-face from *Adamson*, Justice Kennedy for the Supreme Court reversed:

> [W]hen the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack.

 offenses in response to the appeal of a conviction remains presumptively vindictive and, notwithstanding *Tollett* and *Bordenkircher*, constitutes valid grounds for challenging a conviction. See id. at 30-31; see also *Haring v. Prosise*, 462 U.S. 306, 320 (1983) ("Our decisions subsequent to *Tollett* make clear that a plea of guilty does not bar the review in habeas corpus proceedings of all claims involving constitutional violations antecedent to a plea of guilty.").

98. See id. at 9-10.
100. See id. at 566-67.
101. Id. at 568-69.
102. Id. at 569. It did not matter that the Broce defendants' counsel did not advise them on double jeopardy issues prior to their pleas. See id. at 572-73 ("Our decisions have not suggested that conscious waiver is necessary with respect to each potential defense relinquished by a plea of guilty. Waiver in that sense is not required."). Their opportunity to challenge the theory of the indictments and to attempt to show the existence of only one conspiracy in a trial-type proceeding, the Court explained, was
Endeavoring to cabin the decisions in *Blackledge* and *Menna* without overruling them, the Court in *Broce* recognized a limited jurisdictional exception to the general rule against collateral challenges "where on the face of the record the court had no power to enter the conviction or impose the sentence," but found it inapplicable to claims of double jeopardy.103 Because the defendants were not otherwise challenging the voluntary and intelligent character of their pleas, the Court held that they were foreclosed from collateral relief.104

Thus, the rule in the area of antecedent claims remains obscure. It appears that most, but not all, non-jurisdictional antecedent claims are automatically forfeited by the defendant's act of pleading guilty. Survival of claims of ineffective assistance of counsel in deciding to plead suggests that non-jurisdictional antecedent claims are not forfeited if they are critical to ensuring the validity of the plea itself. Unfortunately, the Court has articulated little in the way of consistent principles for predicting which claims are forfeited and which survive, and the controversy surrounding claims challenging the validity of guilty pleas and their attendant waivers continues unabated.105

prior to pleading guilty. See id. at 571. The relinquishment of the right to bring a double jeopardy claim derived "not from any inquiry into a defendant's subjective understanding of the range of potential defenses, but from the admissions necessarily made upon entry of a voluntary plea of guilty." Id. at 573-74. Thus, the Court held that while a failure by counsel to provide advice may form the basis of a claim of ineffective assistance of counsel, it cannot serve, in the absence of such a claim, "as the predicate for setting aside a valid plea." Id. at 574.

103. *Id.* at 569. The *Broce* Court conceded that it had held in *Blackledge* that "the potential for prosecutorial vindictiveness against those who seek to exercise their right to appeal raised sufficiently serious due process concerns to require a rule forbidding the State to bring more serious charges against defendants in that position." *Id.* at 574. However, the Court reinterpreted *Menna* as having enunciated an "important qualification" upon *Blackledge* by stating that "a plea of guilty to a charge does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute." *Id.* at 575 (emphasis added) (quoting *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975)). Having confined them to their facts, the Court then attempted to distinguish *Menna* and *Blackledge* on the grounds that, in those cases, the defendants did not "seek further proceedings at which to expand the record with new evidence." *Broce*, 488 U.S. at 575. The *Broce* defendants, by contrast, could not "prove their claim by relying on those indictments and the existing record." *Id.* at 576. Thus, for want of a fully developed factual record, the Court precluded the *Broce* defendants from bringing what would otherwise have been a successful double jeopardy motion. Justice Blackmun, joined by Justice Brennan and Justice Marshall, dissented vigorously on this point. Noting that the critical language in *Menna* was dicta, Justice Blackmun railed that "nothing in *Blackledge* or *Menna* indicates that the general constitutional rule announced in those cases was dependent on the fortuity that the defendants' double jeopardy claims were apparent from the records below without resort to an evidentiary hearing." *Id.* at 582 (Blackmun, J., dissenting).

104. *Id.* at 574.

105. Compare *Bousley v. United States*, 523 U.S. 614, 621 (1998) (holding for the first time, and without explanation or citation to authority, that "even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review"), with *id.* at 629 (Stevens, J., concurring in
2. Bargained-For Waivers

In addition to the rights necessarily lost upon pleading guilty, such as the right to a jury trial and to confrontation, as well as the privilege against self-incrimination, most otherwise valid antecedent claims are automatically forfeited by the act of pleading. Of the few claims that survive the plea, courts have generally permitted their knowing and voluntary waiver as part of a plea or dismissal agreement. For example, though entry of a guilty plea does not bar a subsequent civil action for damages under 42 U.S.C. § 1983 to redress an alleged constitutional violation, the Court has found enforceable a defendant’s agreement with prosecutors to relinquish a valid § 1983 claim upon dismissal of charges.

On the other hand, courts have consistently held that there are some claims that a defendant cannot waive as part of a plea bargain, such as the requirement that the plea be knowing and voluntary, or the right not to be convicted upon a charge that does not state a valid offense. One particularly widespread and—as it still has not yet been addressed by the Supreme Court—controversial plea bargain waiver is that of the right to appeal.

The Supreme Court has repeatedly held that the Constitution does not mandate an appeal in criminal cases. Nevertheless, the statutory right to appeal has approached the status of a fundamental right. Since the Brady Trilogy, every court of appeals that has considered this issue has determined that such waivers are generally

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107. See Newton v. Rumery, 480 U.S. 386, 392-98 (1987). Justice Stevens disagreed that the deliberate and rational character of the agreement was a sufficient basis for finding the agreement enforceable, and analogized it to overt acts of bribery, such as an offer to pay a trooper for not issuing a traffic ticket or contributing to the police department’s retirement fund for dismissal of felony charges. Id. at 408 (Stevens, J., dissenting). Notwithstanding Justice Stevens’s concerns, and the majority’s recognition that “in some cases these agreements may infringe important interests of the criminal defendant and of society as a whole,” the Court upheld the waiver in that instance. Id. at 392.
108. See Rubin, supra note 4, at 493-94.
109. See, e.g., Howard Mintz, Northern District May Face a Plea Bargain Showdown, The Recorder (San Francisco), Mar. 4, 1993, at 1 (describing controversy over proposed waiver of the right to appeal); see also Robert K. Calhoun, Waiver of the Right to Appeal, 23 Hastings Const. L.Q. 127, 130 (1995) (“Recently, the policy of the United States Attorney for the Northern District of California of insisting upon appeal waivers in most plea dispositions resulted in a short-lived, but highly publicized, boycott of indigent appointments by the local defense bar.”).
111. See, e.g., Harlon Leigh Dalton, Taking the Right to Appeal (More or Less) Seriously, 95 Yale L.J. 62, 62 (1985) (“Although its origins are neither constitutional nor ancient, the right has become, in a word, sacrosanct.”).
enforceable. However, the courts have offered little to buttress that result. Recently, some courts have acknowledged limits on waiving the right to appeal. But for the most part, the courts have struggled to explain the precise contours of those limits and their theoretical basis.

The first decisions on the issue recognized no limitations on plea bargain waivers of the right to appeal, asserting merely that if defendants can waive fundamental constitutional rights as part of a plea bargain, “surely they are not precluded from waiving procedural rights granted by statute.” Along these lines, a divided panel of the Fifth Circuit in *United States v. Melancon* explained: “The Supreme Court has repeatedly recognized that a defendant may waive constitutional rights as part of a plea bargaining agreement. It follows that a defendant may also waive statutory rights, including the right to appeal.” The only policy justification offered by the courts in upholding such waivers was to “preserve the finality of judgments and sentences imposed pursuant to valid pleas of guilty.”

Prior to the *Brady* Trilogy, the First Circuit suggested in *Worcester v. Commissioner of Internal Revenue*, 370 F.2d 713 (1st Cir. 1966), that such a waiver would not be enforceable. *Id.* at 718. In that case, the Court considered whether to enforce a taxpayer’s waiver of the right to appeal from his conviction for filing false returns in exchange for the district court’s offer of probation conditioned on that waiver. *See id.* The First Circuit refused to enforce the waiver on the grounds that the district court “was without right to bargain thus with the defendant, or to put a price on an appeal.” *Id.* Although the facts in that case distinguish it from a plea bargain, the First Circuit broadly reasoned:

A defendant’s exercise of a right of appeal must be free and unfettered. Just as it is unfair to... use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice.... It is no answer to say that the defendant need not accept the court’s ‘offer.’ The vice is that vis-à-vis the court he is in an unequal position.

*Id.*

See infra notes 118-25 and accompanying text.

United States v. Wiggins, 905 F.2d 51, 53 (4th Cir. 1990); see also United States v. Ashe, 47 F.3d 770, 775-76 (6th Cir. 1995) (holding that even a constitutional right may be surrendered in an agreement by a knowingly and voluntarily made waiver); United States v. Rutan, 956 F.2d 827, 828 (8th Cir. 1992) (upholding a defendant’s waiver of the right to appeal).

*Rutan*, 972 F.2d at 567 (5th Cir. 1992) (citation omitted). *But see id.* at 571 (Parker, J., concurring) (opining that a defendant can never knowingly and intelligently waive the right to appeal a sentence not yet imposed because “such a ‘waiver’ is inherently uninformed and unintelligent”).

*Rutan*, 956 F.2d at 829. The Ninth Circuit reached a similar result in *United States v. Navarro-Botello* after considering whether “there should be a per se rule invalidating any guilty plea requiring defendants to waive the right to appeal because such a waiver violates both due process and public policy.” 912 F.2d 318, 321 (9th Cir. 1990). On the due process claim, the Ninth Circuit ruled that a waiver of the statutory right to appeal in an otherwise valid plea bargain is generally enforceable, but noted that “a waiver of the right to appeal would not prevent an appeal where the sentence imposed is not in accordance with the negotiated agreement.” *Id.* The Ninth Circuit also found that public policy interests in “finality” and “saving the state time and
Many commentators criticized the decisions uniformly upholding plea bargain waivers of the right to appeal, particularly in light of the Supreme Court's suggestion in *United States v. Mezzanatto* that the same analysis of the enforceability of criminal waivers applies to statutory as well as constitutional rights and the Court's recognition that there are indeed some limits on such waivers. In response, most Courts of Appeals have begun to scrutinize plea bargain waivers of the right to appeal more carefully. For example, in addition to requiring that a waiver of the right to appeal be knowing, voluntary, and on the record, courts have explicitly stated that a breach of the plea agreement by the government, sentencing based on an impermissible factor such as race, or sentencing above the statutory maximum, may give rise to a claim on appeal notwithstanding an otherwise valid waiver of the right to appeal as part of the plea agreement.

The Second Circuit has given particularly close scrutiny to appeal waivers, invalidating some as unknowing or involuntary on their facts. Moreover, while the First and D.C. Circuits have not yet money" supported the enforcement of waivers of the right to appeal. *Id.* at 322. In subsequent cases, however, the Ninth Circuit began suggesting that an otherwise valid waiver of the right to appeal might not bar claims such as ineffective assistance of counsel in deciding to plead. See *United States v. Pruitt*, 32 F.3d 431, 433 (9th Cir. 1994); *United States v. Abarca*, 985 F.2d 1012, 1014 (9th Cir. 1993).

117. *See, e.g.*, Calhoun, *supra* note 109, at 201 (stating that waiver of the right to appeal is in direct conflict with the goals of criminal justice administration); *see also* 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, 655 (1990) (attacking waiver of the right to appeal as offensive to due process, public policy and judicial integrity).

118. *See United States v. Baramdyka*, 95 F.3d 840, 843 (9th Cir. 1996) ("Further, we have recognized that the waiver of a right to appeal may be subject to certain exceptions such as claims involving breach of the plea agreement, racial disparity in sentencing among codefendants or an illegal sentence imposed in excess of a maximum statutory penalty."); *United States v. Schmidt*, 47 F.3d 188, 190 (7th Cir. 1995) ("[D]espite a valid waiver of the right to appeal, a defendant could appeal his sentence if the trial court relied on a constitutionally impermissible factor such as race or if the court sentenced the defendant above the statutory maximum."). Most circuits have also held that waivers of the right to appeal does not have the effect of ineffective assistance of counsel in deciding to plead. See *United States v. Woolley*, 123 F.3d 627, 634-37 (7th Cir. 1997) (considering merits of ineffective assistance of counsel claim); *Baramdyka*, 95 F.3d at 844 ("[S]uch a waiver does not include claims of ineffective assistance of counsel."); *United States v. Henderson*, 72 F.3d 463, 465 (5th Cir. 1995) ("[W]e have previously noted, without deciding the issue, that waivers of rights to appeal may not apply to ineffective assistance of counsel claims."); *see also* Watson v. United States, 165 F.3d 486, 488-89 (6th Cir. 1999) (following the Ninth Circuit's approach). In addition, the Sixth Circuit determined that the government can forfeit its argument that a defendant has waived his appeal by failing to raise the argument in a timely manner. See *Hunter v. United States*, 160 F.3d 1109, 1113 (6th Cir. 1998).

119. *See, e.g.*, *United States v. Goodman*, 165 F.3d 169, 174-75 (2d Cir. 1999) (refusing to enforce a waiver of the right to appeal by a defendant sentenced for a period nearly twice as long as that recommended in the guidelines); *United States v.
addressed the issue, district courts in those circuits have held that plea bargain waivers of the right to appeal are unenforceable as a matter of law on the grounds that they can never be knowing and intelligent.\textsuperscript{120} However, in the absence of clear guidance from the Supreme Court as to whether and under what circumstances rights such as the right to appeal may be waived as part of a plea bargain, most courts have remained in limbo between either fully validating the waivers, and reaping their supposed benefits in terms of cheapness and finality, or absolutely precluding them as unfair to the defendants and detrimental to the public interest.

In sum, there has been no definitive articulation of why some rights may be waived as part of a plea bargain but others may not, and how to distinguish between the two. The act of pleading guilty necessarily disclaims many fundamental rights and automatically forfeits most antecedent claims. Of the surviving claims, it appears that most but not all may be waived as part of the plea agreement. As a result, the courts are without guidance as to how to respond to innovations in the plea bargaining process, such as the requirement that the defendant waive the right to the prosecutor's disclosure of favorable material evidence.

II. THE DUTY TO DISCLOSE EVIDENCE FAVORABLE TO THE ACCUSED

The question considered in this Article is whether a defendant may with a plea agreement waive the right to mandatory disclosure by the prosecution of favorable evidence. Analyzing whether that right to disclosure is among the few unwaivable protections requires an understanding, not only of the scope of the right, but also of its application to the plea bargaining context, which has generated strong reactions by prosecutors and defense counsel alike.

A. Scope of the Duty to Disclose

A constitutional duty upon prosecutors to disclose evidence favorable to defendants was first articulated by the Supreme Court under the Due Process Clause in \textit{Brady v. Maryland}.\textsuperscript{121} The cases

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\textsuperscript{121} 373 U.S. 83 (1963). The Court had previously held in \textit{Jencks v. United States}, 353 U.S. 657 (1957), that a "criminal action must be dismissed when the Government, on the grounds of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial." \textit{Id.} at 672. However, the decision in \textit{Jencks} was grounded not in the Due
following *Brady* have reflected a tension between ensuring fairness in criminal prosecutions and maintaining their adversarial nature. This part traces the development and the scope of the duty to disclose favorable evidence, and the recent responses to its application to the plea bargaining stage of criminal adjudications.

*Brady v. Maryland* established the rule that a prosecutor's pretrial suppression of evidence "favorable to an accused" violates due process. Brady and a co-defendant, Boblit, were both found guilty of first-degree murder and sentenced to death. Brady had taken the stand at trial and admitted his participation in the crime, but claimed that Boblit did the actual killing. In his summation before the jury, Brady's lawyer conceded that Brady was guilty of murder, asking only that the jury not sentence him to death.

Prior to trial, Brady's lawyer had requested that the prosecution allow him to examine any extrajudicial statements made by Boblit. In response, several statements were shown to him, but one in which Boblit admitted the homicide was withheld by the prosecution, and did not come to light until after Brady had been convicted and sentenced.

The *Brady* Court overturned Brady's death sentence and announced the rule that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The Supreme Court reasoned that the issue in Brady's case was "not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." The Court further explained:

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122. See United States v. Bagley, 473 U.S. 667, 675 (1985) ("The *Brady* rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur.").

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

124. See *id.* at 84.

125. See *id.*

126. See *id.*

127. See *id.*

128. See *id.*

129. *Id.* at 87.

130. *Id.* The Court drew support from the rule that permitting unsolicited perjured testimony to go uncorrected by the prosecutor is as much a denial of due process as
A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not the result of guile.\textsuperscript{131}

The \textit{Brady} Court held that material favorable evidence must be disclosed but did not define the standard for determining what evidence is "material." Although Justice Fortas later suggested that the scope of that term might be extremely broad,\textsuperscript{132} the tension between promoting fairness while minimizing the potential for making "the trial less of an adversary contest in the traditional sense"\textsuperscript{133} led the Court to limit its scope as it refined the contours of its holding in \textit{Brady}.

First, in \textit{Giglio v. United States},\textsuperscript{134} the Court unanimously held that the due process right described in \textit{Brady} was violated by a prosecutor's failure to disclose a promise made by a different prosecutor to the government's key witness that he would not be prosecuted if he testified.\textsuperscript{135} The decision in \textit{Giglio} expanded on \textit{Brady} in two important ways: the information at issue did not relate directly to the defendant's guilt or punishment, but was merely evidence that could have been used to impeach the government's witness when he testified that no such promise had been made; and the trial prosecutor did not have actual knowledge of the promise made to the witness by the other prosecutor.\textsuperscript{136}


\textsuperscript{131} \textit{Brady v. Maryland}, 373 U.S. 83, 87-88 (1963) (internal quotation marks omitted).

\textsuperscript{132} See, e.g., \textit{Giles v. Maryland}, 386 U.S. 66, 101-02 (1967) (Fortas, J., concurring) (stating that the government has a constitutional duty "to disclose material in its exclusive possession which is exonerative or helpful to the defense" (emphasis added)).

\textsuperscript{133} Barbara Allen Babcock, \textit{Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel}, 34 Stan. L. Rev. 1133, 1145 (1982); see also \textit{Giles}, 386 U.S. at 116-19 (Harlan, J., dissenting) (suggesting that an interpretation of \textit{Brady} to create a broad, constitutionally required right of discovery "would entirely alter the character and balance of our present systems of criminal justice").

\textsuperscript{134} 405 U.S. 150 (1972) (Powell, J. and Rehnquist, J., took no part in the consideration or decision).

\textsuperscript{135} See \textit{id.} at 150-51.

\textsuperscript{136} See \textit{id.} at 154 ("[W]hether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government.").
be disclosed in terms of relevance, as implied in *Brady*, the Court in *Giglio* without discussion adopted a more rigorous, results-oriented standard, stating that the undisclosed information was material, and a new trial required, only if it "could in any reasonable likelihood have affected the judgment of the jury."137

The Supreme Court revisited the materiality standard for the prosecution's duty to disclose favorable evidence in *United States v. Agurs*.138 Building on the one-stage "reasonable likelihood" definition of materiality set in *Giglio*, the *Agurs* Court erected a multi-tiered standard that shifted depending upon whether the defendant had specifically requested the undisclosed information.139

This awkward edifice teetered for nearly a decade until the Supreme Court finally nailed down the materiality standard in *United States v. Bagley*.140 Bagley, who was convicted of violating federal narcotics and firearms statutes, learned after trial that the prosecution's principal witnesses, two state law enforcement officers, had each signed undisclosed contracts with the Federal Bureau of Alcohol, Tobacco, and Firearms stating that he would "provide information" against Bagley and otherwise assist the ATF in exchange for three hundred dollars.141 The Supreme Court held that because

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137. *Id.* (alteration and internal quotation marks omitted). Although at least one legal scholar has suggested that the reference to "material" evidence in *Brady* had itself implicitly encompassed a "certain quantum of likelihood that the undisclosed evidence would have affected the verdict," *Giglio* explicitly applied this new standard of materiality. Babcock, *supra* note 133, at 1146 n.46.

138. 427 U.S. 97 (1976). Convicted of the second degree murder of a man with whom she struggled over a knife in her motel room, Agurs argued that the prosecution's failure to provide her with information about the man's criminal record—which included convictions for assault and carrying a knife, and would have supported her claim of self-defense—deprived her of a fair trial under the rule of *Brady v. Maryland*. See *id.* at 100.

139. The Court in *Agurs* held that, in cases where a defendant fails to make a specific request, undisclosed evidence is material only if, evaluated in the context of the entire record, it "creates a reasonable doubt that did not otherwise exist." *Id.* at 112. The Court reasoned that "the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal," *id.* at 111, but that, "[u]nless every nondisclosure is regarded as automatic error, the constitutional standard of materiality must impose a higher burden on the defendant" than "the customary harmless-error standard." *Id.* at 112. At the other extreme, where the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known of the perjury, the *Agurs* Court set the standard as the *Giglio* materiality of "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* at 103 (citing *Giglio*, 450 U.S. at 154), since such cases involve not only "prosecutorial misconduct" but "a corruption of the truth-seeking function of the trial process." *Id.* at 104. The *Agurs* Court did not attempt to define the standard of materiality applicable in a case where the defendant does make a specific request, but suggested that it might be more lenient to the defense than in the situation where the defendant makes no request. *Id.* at 106; see also *United States v. Bagley*, 473 U.S. 667, 681 (1985) (discussing the materiality standard in *Agurs*).


141. *Id.* at 670-71.
the information could have been used to impeach Government witnesses, the prosecutor's failure to disclose this evidence violated the right announced in *Brady.*

The *Bagley* Court streamlined the definition of materiality, stating that evidence is material if there is a reasonable doubt that its disclosure to the defense would have led to a different result in the proceeding. This formulation, the Court held, would be "sufficiently flexible to cover the 'no request,' 'general request,' and 'specific request' cases of prosecutorial failure to disclose evidence favorable to the accused."

The Supreme Court recently tweaked this balance between fairness and agonism by further illuminating responsibility of prosecutors "to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." In *Kyles v. Whitley,* Justice Souter for the Court explicitly held that the prosecutor's affirmative duty to disclose evidence favorable to a defendant applies even when the police fail to inform the prosecutors of all they know: "[A]ny argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials."

Thus, since the right was first announced in *Brady v. Maryland,* the Supreme Court has gone on to emphasize that defendants have the right to all favorable evidence that is "material," whether exculpatory

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142. *See id.* at 683. As a preliminary matter, the *Bagley* Court vigorously reaffirmed that impeachment evidence, no less than exculpatory evidence, "falls within the *Brady* rule," emphasizing that it "has rejected any such distinction between impeachment evidence and exculpatory evidence." *Id.* at 676.

143. *Bagley,* 473 U.S. at 682. This materiality standard, which tracks the standard for ineffective assistance of counsel set out in *Strickland v. Washington,* 466 U.S. 668 (1984), "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal," or "that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Kyles v. Whitley,* 514 U.S. 419, 434-35 (1995) (discussing the *Bagley* materiality standard). Nor is there a need for further harmless-error review once a reviewing court has applied the materiality standard. *See id.* at 435. Finally, all of the suppressed evidence is to be "considered collectively, not item by item." *Id.* at 436.

144. *Bagley,* 473 U.S. at 682.


146. *Kyles,* 514 U.S. at 438.
or impeachment, whether requested or not, and whether the prosecutor was actually aware or reasonably should have been aware of the favorable evidence. It is all "Brady evidence," and it is constitutionally indistinguishable, as long as it meets the materiality standard.

The balance struck by the Supreme Court in refining the "materiality" requirement of the evidence that must be turned over ensures that the duty to disclose, while perhaps unpopular with some prosecutors,147 will not unduly compromise the adversary nature of criminal trials.148 Although constructed as a rule of fairness and truth-seeking, an unbounded requirement that the prosecution assist the defense would violate the criminal trial's "central tenet of antagonistic play: In putting forth its best efforts, a team must be assured of helping itself more than its opponent."149 That the Court felt it necessary to encroach upon the adversarial process demonstrates the importance of the disclosure in ensuring fairness in criminal adjudications.

B. Duty to Disclose at Plea Bargaining

While nearly all criminal cases are resolved by guilty plea, the convictions reviewed by the Supreme Court in Brady v. Maryland and its progeny each resulted from trials, arguably leaving open the question of whether the prosecutor's duty to disclose material evidence favorable to the defense applies to plea dispositions. However, commentators have long argued that prosecutors should be required to disclose evidence favorable to the defense at the plea bargain stage.150 The earliest commentary focused on the necessity of pretrial discovery in ensuring that the defendant's guilty plea is voluntary and intelligent.151 It is this rationale that has primarily

147. The Kyles Court advised "anxious" prosecutors to resolve uncertainty to the defendant's benefit. Id. at 438-39. "This is as it should be. Such disclosure will serve to justify trust in the prosecutor as the representative of a sovereignty whose interest in a criminal prosecution is not that it shall win a case, but that justice shall be done." Id. (quoting Berger v. United States, 295 U.S. 78, 88 (1935) (alteration and internal quotation marks omitted)).

148. See Kyles, 514 U.S. at 439.

Unless, indeed, the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial's outcome as to destroy confidence in its result.

See also Bagley, 473 U.S. at 675 n.6 (suggesting that the Brady rule departs from a purely adversarial system of justice).

149. Babcock, supra note 133, at 1145.


151. See Tigar, supra note 3, at 23 (arguing that the prosecution could ensure an uncoerced guilty plea by asking the defendant whether he has been shown any prosecution evidence indicating the strength of the case against him); see also
motivated the courts to hold that the duty to disclose is pertinent not only to trial preparation but also to an accused's decision of whether to plead guilty.

For example, in *Fambo v. Smith*, the first published decision addressing the issue, the trial court recognized a duty of prosecutors to disclose clearly exculpatory evidence to the defendant in the course of plea bargaining. Without such evidence, the court reasoned that it could not satisfy itself that the guilty plea was intelligent and voluntary, and with the competent advice of counsel. Accordingly, the district court held that Fambo was not precluded from raising a post-plea *Brady* claim, but nevertheless upheld Fambo's conviction, finding the constitutional error harmless beyond a reasonable doubt.

Although the Supreme Court has not yet spoken on the government's duty to disclose *Brady* material in plea bargains, each of the courts of appeals that has addressed the issue has followed substantially the same rationale as in *Fambo*. The Sixth Circuit, considering in *Campbell v. Marshall* whether the withholding of *Brady* information "so taint[ed] the plea-taking as to render the guilty plea involuntary or unintelligent," acknowledged that, "in *Tollett* and the

Saltzburg, *supra* note 6, at 1304 (opining that, in light of the constitutional safeguards developed to protect defendants, the prosecution must offer a criminal defendant "an informed choice"); Lee Sheppard, Comment, Disclosure to the Guilty Pleading Defendant: *Brady* v. Maryland and the *Brady* Trilogy, 72 J. Crim. L. & Criminology 165, 179 (1981) ("Disclosure of such evidence must precede the defendant's act of self-conviction if his guilty plea is to be the product of an informed choice between self-conviction and trial."); Rand N. White & Tom E. Wilson, Note, The Preliminary Hearing in California: Adaptive Procedures in a Plea Bargain System of Criminal Justice, 28 Stan L. Rev. 1207, 1216-17 (1976) (comparing criminal pleas to civil settlement and observing that pretrial discovery would ensure that the guilty plea is truly a knowing waiver of rights); Note, Plea Bargaining and the Transformation of the Criminal Process, 90 Harv. L. Rev. 564, 579 (1977) (observing that, coupled with the fear of a heavier sentence after trial and deference to advice of counsel, lack of full pretrial discovery impairs a defendant's ability to make an intelligent choice). At least one early commentator also suggested that the selective and informal discovery that existed in lieu of broad discovery to criminal defendants as a matter of right resulted in impermissibly unequal treatment of defendants depending upon how connected their counsel was to the prosecutor's office. See Albert W. Alschuler, The Defense Attorney's Role in Plea Bargaining, 84 Yale L.J. 1179, 1228-29 (1975).

152. *See* Fambo v. Smith, 433 F. Supp. 590, 598 (W.D.N.Y. 1977), aff'd, 565 F.2d 233 (2d Cir. 1977). Fambo, who was convicted of possessing an explosive device, later learned that the tube of dynamite in question had been made harmless by a sheriff's deputy who had removed the tube's explosive contents and repacked it with sawdust before Fambo possessed it. *Id.* at 592. Fambo had petitioned for a writ of habeas corpus, claiming that his state court conviction was unconstitutional because the prosecution had not disclosed exculpatory facts before the court accepted his guilty plea. *See id.* at 591-92.

153. *See id.* at 599.

154. *See id.* ("[I]t is well established that even where a defendant may not be convicted for the substantive offense because of factual impossibility, a defendant could still be convicted of *attempting* that substantive offense.").

155. 769 F.2d 314, 315 (6th Cir. 1985).
Brady Trilogy, the Supreme Court did not intend to insulate all misconduct of constitutional proportions from judicial scrutiny solely because that misconduct was followed by a plea which otherwise passes constitutional muster as knowing and intelligent."156 Nevertheless, the Sixth Circuit held on the facts of the case that Campbell, like Fambo, had not been prejudiced by the misconduct.157 The Eighth Circuit in White v. United States adopted the Sixth Circuit's interpretation that "the Tollett line of cases does not preclude a collateral attack upon a guilty plea based on a claimed Brady violation,"158 and similarly denied habeas relief on the grounds that White's knowledge of the undisclosed material would not have "affected his decision to forego trial."159

The Second Circuit followed this same approach, holding that a defendant may challenge an otherwise valid guilty plea on the grounds that the prosecution withheld material evidence that would have influenced the defendant's assessment of the case against him and his decision to plead guilty.160 The Tenth Circuit subsequently held that, in light of the Supreme Court's decisions on plea bargains, "as well as the importance to the integrity of our criminal justice system that guilty pleas be knowing and intelligent . . . the prosecution's violation of Brady can render a defendant's plea involuntary."161 The Ninth Circuit adopted a per se rule in Sanchez v. United States providing that, while a valid guilty plea precludes a defendant from later raising "independent claims of constitutional violations," the plea "cannot be deemed intelligent and voluntary if entered without knowledge of

156. Id. at 321.
157. See id. at 322.
158. 858 F.2d 416, 422 (8th Cir. 1988).
159. Id. at 424; see also United States v. Wolczik, 480 F. Supp. 1205, 1211 (W.D. Pa. 1979).

While a defendant's guilty plea must, to be valid, be intelligently made, we are reluctant to impose additional discovery burdens on the Government, i.e., disclosing all Brady material, as a prerequisite for entering into plea negotiations. At the same time, we believe that the Government cannot be permitted to intentionally misrepresent its case to the defendant to insure a guilty plea. Obviously, then, only a case by case approach can be used, and the facts in this case lead us to the conclusion that the guilty plea is valid.

Wolczik, 480 F. Supp. at 1211.

160. See Miller v. Angliker, 848 F.2d 1312, 1320 (2d Cir. 1988) (citing Brady v. United States, 397 U.S. 742, 756 (1970)). The Second Circuit granted habeas relief to the petitioner, who claimed that he would not have pleaded not guilty by reason of insanity had the prosecution not withheld Brady information prior to the entry of his plea. See id. at 1313, 1318-19.

161. United States v. Wright, 43 F.3d 491, 496 (10th Cir. 1994). Although both the Eighth and Tenth Circuits suggested that, "even if a Brady violation is established, habeas relief would clearly be the exception," id. (quoting White, 858 F.2d at 422), the Supreme Court has since clarified that, once a Brady violation is established, "there is no need for further harmless-error review." Kyles v. Whitley, 514 U.S. 419, 435 (1995).
material information withheld by the prosecution.” Finally, in the absence of a Fourth Circuit precedent, the district court for the Eastern District of Virginia in Banks v. United States granted the petition to vacate Banks’ conviction on the grounds that his guilty plea was not voluntary and intelligent without the material favorable evidence withheld by the prosecution.

Thus, the courts have determined that a Brady claim is not among those rights automatically forfeited by a guilty plea because, like the right to counsel, the disclosure of material evidence favorable to the defendant is necessary to ensure that the guilty plea itself is voluntary and intelligent. Under these cases, the materiality standard for disclosure of favorable evidence as applied to guilty pleas is “whether there is a reasonable probability that but for the failure to disclose the Brady material, the defendant would have refused to plead and would have gone to trial.” Moreover, the disclosure requirement at the plea bargain stage like all forms of the Brady right applies to impeachment as well as exculpatory evidence.

Beyond ensuring the voluntariness and intelligence of the guilty plea, commentators have proposed additional rationales in support of preplea disclosure of favorable evidence by the prosecution. Some legal scholars, for example, have emphasized the role of preplea disclosure in enhancing the accuracy of convictions and sentences resulting from plea bargains. Disclosing the Brady material before the defendant decides whether to plead equalizes the bargaining power of the defendant in his negotiations with the prosecutor and reduces the opportunities for unchecked prosecutorial bluffing. Because the inducements to plead guilty are necessarily offered in the most attractive terms when the prosecution’s case is weakest, preplea disclosure of Brady material helps ensure that innocent defendants do not plead guilty merely because they are unaware of the exculpatory information held by the prosecutor.

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162. 50 F.3d 1448, 1453 (9th Cir. 1995) (citation and internal quotation marks omitted).
164. Sanchez, 50 F.3d at 1454 (citing Miller, White, and Campbell).
165. See, e.g., Banks, 920 F. Supp. at 691 ("‘Favorable’ evidence includes not only evidence that is exculpatory but also evidence that serves to impeach the credibility of government witnesses.").
166. See McMunigal, supra note 6, at 959; see also Note, The Prosecutor’s Duty to Disclose to Defendants Pleading Guilty, 99 Harv. L. Rev. 1004, 1018 (1986) ("Application of the Brady v. Maryland duty [to plea bargains] is necessary to combat the threat of inaccurate pleas created by nondisclosure.").
168. See McMunigal, supra note 6, at 985-89; Schulhofer, supra note 11, at 1981.
Other commentators have applied contract analysis in arguing that preplea disclosure is necessary, not just to promote factual accuracy, but to ensure the fairness of the plea bargain as a consensual transaction.\footnote{170} Under such a contract-based approach, the “doctrines of duress and mistake lend strong support to the case for preplea disclosure.”\footnote{171} Finally, some commentators have underscored the importance of preplea disclosure based strictly upon economic efficiency, apart from considerations of either fairness or accuracy.

For example, Richard P. Adelstein, a pioneer in the application of economics to legal analysis, has long advocated broad preplea discovery on the grounds that without it some defendants would refuse to bargain even when bargaining is to their advantage; further, other defendants may concede when they ought not. The result in either case may be that defendants are overcharged, which simultaneously distorts the equation of an offense’s punishment price with its social costs and raises associated moral transaction costs.\footnote{172}

These transaction costs are independent of due process concerns, and are incurred without regard to whether the defendant is factually guilty.\footnote{173}

Critical Legal Studies theorists Mark Tushnet and Jennifer Jaff have characterized plea agreements by parties with asymmetrical knowledge as suboptimal and inefficient, because defendants cannot assess the strength of the prosecution’s evidence the prosecutor has, such as potential witnesses.\footnote{174} Fred Zacharias echoed this concern in noting that disclosure ensures parties’ abilities to preserve their respective interests; specifically, it enables the defense counsel to perform its own investigation, and produce more information for the prosecution to consider for evaluating the case.\footnote{175}

\footnote{170. See Ostrow, supra note 167, at 1608-09; Sheppard, supra note 151, at 201-02.}
\footnote{171. Ostrow, supra note 167, at 1609.}
\footnote{172. Adelstein, supra note 11, at 810 (footnotes omitted). The potential for “market failure” in criminal procedure has also been recognized by Law and Economics advocate, Judge Frank H. Easterbrook. Frank H. Easterbrook, \textit{Criminal Procedure as a Market System}, 12 J. Legal Stud. 289, 290 (1983). Judge Easterbrook, however, dismisses the potential for such market failure in the plea bargaining process as “trivial,” notwithstanding the information costs caused by suppression of \textit{Brady} material. See \textit{id.} at 309.}
\footnote{173. See \textit{id}.}
\footnote{175. See Zacharias, supra note 11, at 1146.}
Thus, in addition to ensuring the voluntariness and intelligence of the guilty plea itself, commentators have advocated such justifications for applying the \textit{Brady} requirement of disclosure of material favorable evidence to the plea bargaining context as promoting factual accuracy, encouraging fairness in the bargaining process, and minimizing the societal costs of suboptimal pleas. While the courts initially focused solely on ensuring the voluntariness and intelligence of the plea, some of these additional rationales have been recognized in the most recent decisions applying \textit{Brady} to plea bargains.\textsuperscript{176}

C. Responses to the Application of the Duty to Disclose to Plea Bargaining

In response to the application of the \textit{Brady} requirements to plea dispositions, federal prosecutors in California and elsewhere have sought waivers from defendants of their right to \textit{Brady} material as part of their plea agreements.\textsuperscript{177} In some cases, prosecutors have proposed quite broad waivers that supplanted disclosure of all evidence including exculpatory evidence relating to factual guilt. Other prosecutors have attempted to craft more targeted waivers.\textsuperscript{178} For example, in \textit{United States v. Reynolds},\textsuperscript{179} the prosecution insisted

\textsuperscript{176} See, e.g., \textit{United States v. Avellino}, 136 F.3d 249, 255 (2d Cir. 1998) (explaining the preplea disclosure is necessary to discourage "impermissible conduct" by law enforcement officials); \textit{Sanchez v. United States}, 50 F.3d 1448, 1453 (9th Cir. 1995) ("[I]f a defendant may not raise a \textit{Brady} claim after a guilty plea, prosecutors may be tempted to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas.")

\textsuperscript{177} See \textit{MacLean}, supra note 13, at 1. Prosecutors outside California as well have tried to undermine the requirements to disclose favorable evidence at the plea bargain stage. See, e.g., \textit{Avellino}, 136 F.3d at 262 (addressing the government’s argument that it was not obligated to comply with \textit{Brady} or \textit{Giglio} in plea bargaining).

\textsuperscript{178} See Erica G. Franklin, Note, Waiving Prosecutorial Disclosure in the Guilty Plea Process: A Debate on the Merits of "Discovery" Waivers, 51 Stan. L. Rev. 567, 568-69 (1999). In the Northern District of California, the standard plea agreement recognized no ongoing duty to provide any further discovery. See, e.g., David E. Rovella, Federal Plea Bargains Draw Fire, Nat’l L.J., Jan. 17, 2000, at A1. In the Southern District of California, the standard plea agreement reaffirms the prosecutor’s ongoing duty to disclose “information establishing the factual innocence of the defendant,” but provides:

The defendant understands that if this case proceeds to trial, the government would be required to provide impeachment information relating to any informants or other witnesses. In addition, if the defendant raised an affirmative defense (for example, entrapment or duress), the government would be required to provide information in its possession that supports such a defense. In return for the government’s promises set forth in this agreement, the defendant waives the right to this information, and agrees not to attempt to withdraw the guilty plea or to file a collateral attack based on the existence of this information.


\textsuperscript{179} No. CR 97-0292 (N.D. Cal. May 6, 1998).
on the following provision as part of the plea agreement of a defendant charged with bank robbery:

The defendant understands that discovery may not have been completed in this case, and that there may be additional discovery to which he would have access if he elected to proceed to trial. The defendant agrees to waive his right to receive this additional discovery which may include, among other things, evidence tending to impeach the credibility of potential witnesses.180

Against the advice of his counsel, Reynolds agreed to the plea bargain with the waiver.181 Reynolds's counsel, however, refused to sign the plea agreement, and at the plea hearing moved that the court strike the waiver provision as unenforceable.182 Although federal prosecutors in San Diego had been using a similar waiver provision for several years without a challenge,183 Reynolds's counsel argued that Brady creates an unwaivable structural protection because, pursuant to the Ninth Circuit's decision in Sanchez, a guilty plea could not be deemed intelligent or voluntary with a waiver of Brady rights.184

Reynolds's counsel claimed that the Supreme Court's recent suggestion, in United States v. Mezzanatto,185 that some otherwise valid waivers might not be enforceable if they impaired the truth-seeking function of trials or the reliability of the factfinding process, or if they resulted in less accurate verdicts, precluded a waiver of Brady rights. He relied also on the Court's statement that a waiver might be unenforceable if it discredited the federal courts, undermined civilized procedure, or violated public policy.186 All of these factors, Reynolds' counsel argued, cut in favor of finding a waiver of Brady rights at the plea bargain stage unenforceable. Moreover, counsel argued, prosecutors are ethically bound to disclose Brady material by the California Rules of Professional Conduct, which provide that "[a] member shall not suppress any evidence that the member or the member's client has a legal obligation to reveal."187

The government responded that the plea agreement context is unique and that Reynolds's plea bargain waiver should be upheld as

180. See MacLean, supra note 13, at 1.
181. See id.
183. See MacLean, supra note 13, at 1.
184. Interview with Larry Kupers, Assistant Federal Public Defender, in San Francisco, California (May 17, 1999) (counsel for Reynolds) [hereinafter Interview with Kupers].
186. See id. at 204, 207.
187. California Rules of Professional Conduct 5-220 (1998); see also United States v. Lopez, 4 F.3d 1455, 1459-61 (9th Cir. 1993) (holding that the California Rules of Professional Conduct apply to federal prosecutors in California).
narrowly tailored to permit nondisclosure only of impeachment evidence, which they suggested was not relevant to a defendant’s decision of whether to plead guilty, notwithstanding the numerous cases and commentaries to the contrary.\footnote{188} Claiming that their office had never advocated “a broad-based \textit{Brady} waiver,” the federal prosecutors nevertheless admitted that in response to the Ninth Circuit’s decision in \textit{Sanchez}, applying \textit{Brady} to plea dispositions, they “started actively thinking about [a waiver].”\footnote{189} Moreover, the timing of the policy to seek \textit{Brady} waivers as part of plea bargains coincided with “embarrassing disclosures that potential \textit{Brady} material had not been given to defendants” in at least two criminal cases in the Northern District of California.\footnote{190}

The California Attorneys for Criminal Justice and the National Association of Criminal Defense Lawyers filed a joint amicus brief in \textit{Reynolds} stressing that in \textit{United States v. Bagley}\footnote{191} the Supreme Court had held that the \textit{Brady} rule requires disclosure of impeachment evidence as well as exculpatory evidence.\footnote{192} Moreover, amici argued that the text of the provision in \textit{Reynolds}, which waives, “among other things, evidence tending to impeach the credibility of potential witnesses,”\footnote{193} would likely be broad enough to encompass all \textit{Brady} material, including exculpatory evidence.

Notwithstanding these arguments, the district court accepted Reynolds’s plea, noting that no published decision in any court addresses the issue of whether the right to \textit{Brady} material may be waived as part of a plea agreement.\footnote{194} However, the district court held open the possibility that if Reynolds were to bring a claim alleging that the prosecutors actually did withhold favorable evidence to which he would have been entitled, the waiver might be found unenforceable.\footnote{195} The court in \textit{Reynolds} thus left unresolved the

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\begin{itemize}
  \item \footnote{188} See Franklin, \textit{supra} note 178, at 575-76.
  \item \footnote{189} MacLean, \textit{supra} note 13, at 1 (quoting George Hardy, Criminal Division Chief, Office of the United States Attorney for the Northern District of California). This was not the first time that the lawyers for the U.S. Attorney and the defense bar in San Francisco had clashed over plea bargain waiver issues. \textit{See} Howard Mintz, \textit{Northern District May Face a Plea Bargain Showdown}, The Recorder (San Francisco), Mar. 4, 1993, at 1 (describing controversy over proposed waiver of the right to appeal); \textit{see also} Calhoun, \textit{supra} note 109, at 130 (discussing the controversy in the Northern District of California over appeal waivers in plea bargain agreements).
  \item \footnote{190} See MacLean, \textit{supra} note 13, at 1 (citing United States v. Siripreachapong, CR 91-0629 VRW, and \textit{United States v. Jimenez-Vargas}, CR 96-0427 FMS).
  \item \footnote{191} \textit{473 U.S. 667} (1985).
  \item \footnote{193} MacLean, \textit{supra} note 13, at 1 (emphasis added).
  \item \footnote{194} \textit{See} Interview with Kupers, \textit{supra} note 184.
  \item \footnote{195} \textit{See id.}
\end{itemize}
question of whether a defendant may be precluded from waiving the right to \textit{Brady} material as part of a plea bargain.

Since \textit{Reynolds}, an impasse has solidified between prosecutors and defenders in Northern California over the waiver of \textit{Brady} rights.\footnote{195 See MacLean, \textit{Waiver Creates Turmoil}, supra note 15, at 1.} Federal Public Defender Barry J. Portman decided that "as a matter of policy, his office would refuse to sign any plea agreement that included such a provision."\footnote{197 See Pamela A. MacLean, \textit{U.S. Wants Defendants in Plea Deals to Waive Rights}, \textit{Daily J.} (San Francisco), Jan. 16, 1998, at 1 [hereinafter MacLean, \textit{U.S. Wants Defendants}; see also Elias, supra note 182, at 4 ("Portman's lawyers are refusing to sign any plea agreement that contains new provisions requiring defendants [to] give up rights that could help uncover what they don't know about the government's case.")].} United States Attorney Robert S. Mueller, however, mandated that all plea agreements include this waiver,\footnote{198 See MacLean, \textit{U.S. Wants Defendants}, supra note 197, at 1.} explaining that they are required by other federal prosecutors around the country.\footnote{199 See \textit{Brady Waivers: Coming Soon to a Courthouse Near You?}, \textit{13 Crim. Prac. Rep.} (BNA) 143, 143 (Apr. 21, 1999).} The prosecutors in Northern California recently dropped the original waiver language specifically targeting \textit{Brady} rights, but now insist on an appeal waiver broad enough to incorporate all post-conviction \textit{Brady} claims.\footnote{200 See id.} Although the issue has become increasingly publicized, the courts have remained unwilling to descend into the doctrinal thicket of plea bargain waivers of \textit{Brady} rights and make a final determination as to their enforceability.\footnote{201 See id.} Meanwhile, in the absence of guiding principles or a methodology for evaluating innovations in the plea bargaining process, the waivers continue to mutate and metastasize.

### III. Limits of Plea Bargain Waivers

With the courts generally in agreement that a \textit{Brady} claim is not forfeited by a guilty plea, the question remains whether the right to disclosure of favorable material evidence may nevertheless be expressly relinquished by the defendant as part of his plea bargain. Answering this question requires a new approach toward understanding the limits of plea bargain waivers.

The bulk of authority amply demonstrates that criminal defendants may waive nearly every constitutional and statutory right that they
possess. However, that there are some limits on criminal waiver has been long advocated by legal theorists, and recently recognized by the Supreme Court in United States v. Mezzanatto. Unfortunately, neither commentators nor the courts have yet articulated a coherent basis for distinguishing between those rights that may be waived and those that may not. On the contrary, as demonstrated by the Court’s decision in Mezzanatto, confusion reigns as to the types of waiver that occur in the criminal process and what theoretical approaches or principles apply in determining whether a particular right may be waived.

In Mezzanatto, the Court upheld a defendant’s agreement with the prosecution to waive Federal Rule of Criminal Procedure 11(e)(6) and Federal Rule of Evidence 410, which exclude from trial all statements made during the plea bargaining process, and to permit the prosecution to use any such statements for impeachment purposes if the defendant were to go to trial and testify. Nevertheless, the Court acknowledged that, although these rules are statutory rather than constitutional in origin, “[t]here may be some evidentiary provisions that are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably discrediting the federal courts.” Unfortunately, the Court gave little in the way of guidance as to how to determine which rights are unwaivable. Two vague hints regarding structural protections and public policy are all the majority in Mezzanatto provided.

The Court began its discussion of potentially unwaivable rights by noting that a defendant may be precluded from waiving his right to conflict-free counsel, and quoting a passage from a Seventh Circuit case, in which Judge Posner hypothesized that “if the parties stipulated to trial by twelve orangutans the defendant’s conviction would be invalid notwithstanding his consent, because some minimum of civilized procedure is required by community feeling regardless of what the defendant wants or is willing to accept.” With these references, the Court suggested that rights that are critical to the

202. See, e.g., Tigar, supra note 3, at 8 (“[T]here may be some procedural incidents of the criminal process which the accused cannot waive.”).
204. See id. at 210.
205. Id. at 204 (alteration and internal quotation marks omitted); see also Peretz v. United States, 501 U.S. 923, 937 (1991) (suggesting that a party may not be able to waive “structural protections”).
206. See Mezzanatto, 513 U.S. at 204 (citing Wheat v. United States, 486 U.S. 153, 162 (1988)).
207. Id. at 204 (quoting United States v. Josefik, 753 F.2d 585, 588 (7th Cir. 1985) (holding that a defendant may waive the rule providing that alternate juror not replacing a regular juror shall be discharged after the jury retires to consider its verdict)).
structure of the criminal justice system would not be waivable by the defendant. 208

The Court next considered the defendant's claim that waiver of Rules 410 and 11(e)(6) would be "fundamentally inconsistent with the Rules' goal of encouraging voluntary settlement." 209 The Ninth Circuit had reasoned along those lines that permitting waiver could have a "chilling effect" on plea bargaining, and would undercut the value of what the defendant has "to sell" as part of the bargaining process. 210 Nevertheless, while allowing that "substantial 'public policy' interests" may "override the presumption of waivability" in some cases, the Supreme Court determined that "there is no basis for concluding that waiver will interfere with the Rules' goal of encouraging plea bargaining." 221

Additional rationales for precluding a waiver were proposed by Justice Souter who, joined by Justice Stevens, dissented on the grounds of legislative intent. 212 Justice Souter agreed with the majority that "[i]f the Rules are assumed to create only a personal right of a defendant, the right arguably finds itself in the company of other personal rights, including constitutional ones, that have been

208. Along these lines, the Mezzanatto Court noted Justice Kennedy's concurrence in United States v. Olano, 507 U.S. 725, 741 (1993) (Kennedy, J., concurring), urging that a party may never waive Federal Rule of Criminal Procedure 24(c), which at that time provided that an alternate juror who does not replace a regular juror "shall be discharged after the jury retires to consider its verdict." Mezzanatto, 513 U.S. at 205 (quoting Fed. R. Crim. Proc. 24(c)); see also United States v. Lamb, 529 F.2d 1153, 1157 (9th Cir. 1975) (holding that parties may not stipulate to a violation of Rule 24(c)). Oddly, the Supreme Court in Mezzanatto relied upon both Josefik, in which the Seventh Circuit held that Rule 24(c) could be waived, and Justice Kennedy's concurrence in Olano, which reached precisely the opposite conclusion. See Mezzanatto, 513 U.S. at 204-05. Rule 24(c) has since been amended to place the dismissal of the alternate in the discretion of the district judge. See Fed. R. Crim. Proc. Rule 24(c) (Supp. 2000). The Court in Mezzanatto asserted, without deciding, that, even if "the requirements of Rule 24(c) are 'the product of a judgment that our jury system should be given a stable and constant structure, one that cannot be varied by a court with or without the consent of the parties,' the plea-statement Rules plainly do not satisfy this standard." Id. at 205 (quoting Justice Kennedy's concurrence in Olano, 507 U.S. at 742) (citation omitted).

209. Id. at 206.

210. Id. at 206 (quoting United States v. Mezzanatto, 998 F.2d 1452, 1455 (9th Cir. 1993)).

211. Id. at 207. Justice Ginsburg in her single paragraph concurrence, joined by Justice O'Connor and Justice Breyer, echoed the "public policy" justification for potentially holding a waiver unenforceable, suggesting that a slightly different waiver agreement permitting the use of plea negotiations statements in the prosecution's case in chief, rather than merely as impeachment evidence, might be unenforceable. Id. at 211 (Ginsburg, J., concurring) ("It may be, however, that a waiver to use such statements in the case in chief would more severely undermine a defendant's incentive to negotiate, and thereby inhibit plea bargaining."). Underscoring the majority opinion's second ground for unwaivability, Justice Ginsburg's terse statement suggests, unfortunately without citation or explanation, that if the waiver agreement did undermine the public policy behind the rule, it may not be enforceable.

212. See id. at 211 (Souter, J., dissenting).
accepted time out of mind as being freely waivable.”

However, Justice Souter suggested that the provisions protecting a defendant against use of statements made in his plea bargaining “create something more than a personal right shielding an individual” and instead “are meant to serve the interest of the federal judicial system.” Thus, Justice Souter argued, Congress determined that the rule is not the defendant’s personal right to waive. Finally, noting that “defendants are generally in no position to challenge demands for these waivers, and the use of waiver provisions as contracts of adhesion has become accepted practice,” Justice Souter concluded by warning that “the majority’s reasoning will provide no principled limit” on the proliferation of waivers during the plea bargaining process.

Thus, from the Court’s most recent statement on the issue, it may be tentatively inferred that rights constituting structural protections or promoting public policy, and possibly those that transcend personal ownership or that are stripped away as part of a contract of adhesion, may not be waived by a criminal defendant. These hints, however, have not been sufficient to equip the lower courts to address the recent innovations in plea bargain waivers foreseen by Justice Souter, such as the waiver of Brady rights. The sections below set out a two-part approach aimed at providing the missing guidance regarding the limits of plea bargain waivers. Section A proposes a taxonomy of criminal waiver, and Section B explores and applies various theoretical limitations on criminal waiver to the issue of Brady claims.

A. Taxonomy of Waiver

As a few astute commentators have noted, a significant part of the current confusion regarding criminal waiver derives from sloppy terminology. This problem remains evident even in the Supreme Court’s most recent decisions. For example, in upholding the defendant’s pre-trial waiver agreement in Mezzanatto, the Court purported to apply a precedent-bound “presumption of waivability.” However, the term “waiver” refers to a broad range of circumstances in which a party loses a right, and the type of waiver considered in Mezzanatto differs fundamentally from the precedents

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213. Id. at 212 (citing Johnson v. Zerbst, 304 U.S. 458, 465 (1938), which held that a defendant may waive his Sixth Amendment right to counsel).
214. Id. at 214.
215. See id. at 215.
216. Id. at 216.
217. Id. at 217.
218. See, e.g., Dix, supra note 3, at 194 (stating that the malleability of the waiver doctrine stems from its vagueness); see also Rubin, supra note 4, at 483-87 (proposing a general theory of waiver); Westen, supra note 84, at 1214-15 (distinguishing criminal waiver from forfeiture).
the Court relied on in deriving that presumption. This confusion in nomenclature has contributed substantially to the difficulties in identifying the limits of criminal waiver.

Early in the majority opinion, the *Mezzanatto* Court cites three cases in support of its statement that “[a] criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution.”\(^{220}\) However, none of these cases establish any “presumption of waivability.” On the contrary, the cited cases emphasize that “courts indulge every reasonable presumption against waiver of fundamental constitutional rights,”\(^{221}\) that courts “do not presume acquiescence in the loss of fundamental rights,”\(^{222}\) and that “[p]resuming waiver from a silent record is impermissible.”\(^{223}\)

The *Mezzanatto* Court’s only cited authority for its reference to a “presumption of waivability” is *Peretz v. United States*,\(^{224}\) in which the Court indeed stated that “[t]he most basic rights of criminal defendants are . . . subject to waiver.”\(^{225}\) In *Peretz*, Justice Stevens for the Court in a five-to-four decision affirmed the felony conviction of a defendant who had consented to voir dire by a magistrate rather than an Article III district judge.\(^{226}\) While the Court had previously held that magistrates lacked explicit statutory authority under the Federal Magistrates Act to conduct voir dire over the objection of a party, the *Peretz* Court construed a clause in the Act referring to “additional duties” to permit the magistrate to do so if neither party objected.\(^{227}\)

Although the Court in *Peretz* labeled the defendant’s failure to object as a “waiver,” none of the cases cited in support of its conclusion that most rights are subject to waiver address the “knowing and voluntary” relinquishment of a right at issue in *Mezzanatto*. Instead, every cited precedent, even if using the term “waiver,”

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220. *Id*. at 201 (citing Ricketts v. Adamson, 483 U.S. 1, 10 (1987) (finding that a double jeopardy defense was waivable by pretrial agreement); Boykin v. Alabama, 395 U.S. 238, 243 (1969) (holding that a knowing and voluntary guilty plea waives privilege against compulsory self-incrimination, right to jury trial, and right to confront one’s accusers); Johnson v. Zerbst, 304 U.S. 458, 465 (1938) (finding that the Sixth Amendment right to counsel may be waived)).

221. *Johnson*, 304 U.S. at 464 (internal quotation marks omitted) (emphasis added).

222. *Id*. at 464 (internal quotation marks omitted) (emphasis added).

223. *Boykin*, 395 U.S. at 242 (internal quotation marks omitted) (emphasis added).


226. See 501 U.S. at 936.

227. See *id*. at 933-34. Significantly, the Court seemed to be driven, as in the plea bargaining context, by practical concerns of judicial efficiency. See *id*. at 929 (noting that magistrates play an important role in achieving judicial efficiency at the federal level).
actually refers to a right forfeited through mere inadvertence or failure to act: failure to object waives the right to be present at all stages of criminal trial; failure to object to closing the courtroom waives the right to public trial; failure to assert the Fourth Amendment waives the right to be free from unlawful searches and seizure; failure to object forfeits a claim of unlawful postarrest delay; failure to object or raise the defense forfeits Fifth Amendment protections.

Thus, the type of “presumptive” loss of rights through failure to act considered in Peretz differs markedly from the type of knowing and voluntary relinquishment of rights addressed in Mezzanatto. Yet, both have interchangeably been called “waiver.” In fact, the term “waiver” is routinely used in at least four distinguishable instances: intentional relinquishment of a known right; forfeiture of a right through failure to take timely steps to assert it; election of one right over another; and alienation of a right by bargaining it away in exchange for some consideration. The first step in deciding whether a particular right may be “waived” is to determine what sort of waiver is at issue. Accordingly, each of the four types of waiver is considered in turn below.

1. Intentional Relinquishment

The type of waiver considered in both Mezzanatto and the Brady Trilogy is “intentional relinquishment.” Such waivers involve the explicit, premeditated and theoretically unilateral decision to forego the benefits of a personal right. As the Court noted in Brady v. United States, waivers of this sort “not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.”

This formulation for “waiver” tracks the oft-quoted definition from the seminal case Johnson v. Zerbst of “an intentional relinquishment or abandonment of a known right or privilege.” In that case, Johnson, convicted along with a co-defendant of counterfeiting, brought a habeas corpus petition claiming that he was

231. See United States v. Figueroa, 818 F.2d 1020, 1025 (1st Cir. 1987).
232. See United States v. Bascao, 742 F.2d 1335, 1365 (11th Cir. 1984); United States v. Coleman, 707 F.2d 374, 376 (9th Cir. 1983).
235. Id. at 748 (citing, inter alia, Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
236. 304 U.S. 458 (1938).
237. Id. at 464 (1938).
denied his Sixth Amendment right to counsel. Upon arraignment, the defendants had pleaded not guilty, and informed the court that they had no lawyer, but responded when asked that they were ready for trial. They conducted their defenses as best they could, but nevertheless were convicted. Following trial, the jailer denied the prisoners’ requests to contact a lawyer. After the lower courts denied Johnson’s petitions for habeas corpus, the Supreme Court granted certiorari to consider under what circumstances a defendant may waive his Sixth Amendment right to assistance of counsel.

Emphasizing the importance of the right to counsel, the Johnson Court conceded that the right may be waived, but concluded that the district court had not made the necessary finding to support such a waiver. The “protecting duty” of the trial court with respect to an unrepresented defendant, the Court explained, “imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused” of his right to counsel. Thus, the Supreme Court held that, while the accused may waive the right to counsel, the trial court must determine whether the record evidences a proper waiver.

In Johnson’s case, the district court made no such determination and in denying his petition for habeas corpus stated merely that it is “unfortunate” if Johnson lost his “right to a new trial through ignorance or negligence, but such misfortune cannot give this Court jurisdiction in a habeas corpus case to review and correct the errors complained of.” The Supreme Court rejected this reasoning, holding instead that “[t]he purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, and the guaranty would be nullified by a determination that an accused’s ignorant failure to claim his rights removes the protection of the Constitution.” The Court remanded for the district court to determine whether Johnson competently and intelligently waived his right to counsel.

There are very few rights that may not be intentionally

238. See id. at 459-60.
239. See id. at 460.
240. See id. at 460-61.
241. See id. at 461.
242. See id. at 459.
243. See id. at 462-63 (explaining that without Sixth Amendment protection, which embraces the right to be heard by counsel, the typical defendant lacks the skill to defend himself against a seasoned prosecutor).
244. See id. at 464.
245. Id. at 465.
246. Id.
247. Id. (internal quotation marks omitted).
248. Id.
249. Id. at 469.
relinquished. Some exceptional rights, such as the Thirteenth Amendment freedom from slavery and the right not to be convicted by a court lacking jurisdiction to hear the charges, may not be waived in any context, even by explicit agreement.\textsuperscript{250} Along these lines, the Supreme Court in \textit{Mezzanatto} noted the suggestion that even if a defendant stipulated to trial by twelve orangutans, his conviction would be invalid notwithstanding his consent.\textsuperscript{251} Other unwaivable rights identified by the Supreme Court include the right to conflict-free representation where there is an actual conflict of interest,\textsuperscript{252} and the right to a unanimous jury verdict in a criminal case.\textsuperscript{253}

In the plea bargaining context, courts have consistently held that a defendant may not waive the requirement that a guilty plea be voluntary and intelligent,\textsuperscript{254} and that it be entered upon the effective assistance of counsel.\textsuperscript{255} In addition, the Ninth Circuit in \textit{United States v. Ruelas}\textsuperscript{256} recently held that, although the defendant effectively waived the right to appeal as part of his plea bargain, he could not waive the right to bring the jurisdictional claim on appeal that the indictment upon which he was convicted failed to allege a valid offense.\textsuperscript{257}

The requirements for intentional relinquishment of a known right set out in \textit{Johnson v. Zerbst}, still a touchstone for most fundamental rights,\textsuperscript{258} were applied to the plea bargaining context in the \textit{Brady}

\begin{itemize}
\item \textsuperscript{250} See Rubin, supra note 4, at 493-94.
\item \textsuperscript{251} See United States v. Mezzanatto, 513 U.S. 196, 204 (1995) (quoting United States v. Josefik, 753 F.2d 585, 588 (7th Cir. 1985)).
\item \textsuperscript{252} See Wheat v. United States, 486 U.S. 153, 162-63 (1988).
\item \textsuperscript{253} See, e.g., United States v. Ullah, 976 F.2d 509, 512 (9th Cir. 1992) ("[T]he requirement of a unanimous verdict is firmly established in our federal system," (citation and internal quotation marks omitted)); United States v. Scalzitti, 578 F.2d 507, 511 (3d Cir. 1978) (noting "the long and unbroken line of federal cases viewing the requirement of unanimity as an essential element of the criminal jury trial as established in the federal system"). Additional rights that may not be waived include the right not to be imprisoned unless charged with and convicted of a crime; the right to have guilt proven beyond a reasonable doubt; the right to have adverse witnesses testify under oath; the right not to be tried unless competent; and the right to be present in the courtroom in capital cases. See Rubin, supra note 4, at 493-94.
\item \textsuperscript{254} See, e.g., United States v. Baramdyka, 95 F.3d 840, 843 (9th Cir. 1996).
\item \textsuperscript{255} See id. at 844.
\item \textsuperscript{256} 106 F.3d 1416 (9th Cir. 1996).
\item \textsuperscript{257} See id. at 1418 (stating that the defendant's waiver of his right to appeal in the plea agreement did not create jurisdiction for the district court to receive the plea).
\item \textsuperscript{258} For example, in addition to the right to counsel, the \textit{Johnson} requirements for intentional relinquishment have been applied to waivers of the right to a jury trial, see Adams v. McCann, 317 U.S. 269, 278 (1942); to confrontation, see Brookhart v. Janis, 384 U.S. 1, 4 (1966); to a speedy trial, see Barker v. Wingo, 407 U.S. 514, 525-26 (1972); to double jeopardy, see Green v. United States, 355 U.S. 184, 191-92 (1957); to trial-type situations, see Smith v. United States, 337 U.S. 137, 149-50 (1949) (compulsory self-incrimination before an administrative agency); Emspak v. United States 349 U.S. 190, 194-98 (1955) (compulsory self-incrimination before a congressional committee); \textit{In re Gault}, 387 U.S. 1, 34 (1967) (waiver of counsel in a juvenile proceeding); and to certain pretrial situations where deemed essential to
Trilogy, and ultimately in *Mezzanatto*, as “knowing and voluntary” waiver.\(^{259}\) *Johnson v. Zerbst* makes clear that such an intentional relinquishment of a right cannot be presumed. It must also be counseled and frequently must be on the record, or at least in writing. However, numerous other situations not requiring a “knowing and voluntary” relinquishment of the right have also been misleadingly called “waiver.”

2. Forfeiture

The Supreme Court has in its more lucid moments acknowledged the difference between intentional relinquishment and forfeiture, the “failure to make the timely assertion of a right.”\(^{260}\) However, grave misunderstanding over this type of waiver nevertheless persists. As discussed above, when the Court in *Peretz* stated that “[t]he most basic rights of criminal defendants are . . . subject to waiver,”\(^{261}\) it was really referring to forfeiture. Nevertheless, the Court in *Mezzanatto* mischaracterized the decision in *Peretz* as articulating a presumption with respect to the intentional relinquishment of a right.\(^{262}\)

Unlike the *Johnson v. Zerbst* type of waiver, forfeiture need not be intentional or conscious, competent or intelligent, counseled or on the record. For example, in *Schneckloth v. Bustamonte*,\(^{263}\) the Supreme Court rejected the requirements for intentional relinquishment of a known right in determining whether a defendant effectively waived his Fourth Amendment rights by consenting to a warrantless search of his automobile.\(^{264}\) Although purporting to analyze the “voluntariness” of Bustamonte’s consent, the Court stated that voluntariness in that context “cannot be taken literally to mean a ‘knowing’ choice.”\(^{265}\) Instead, the Court analogized to principles governing coerced confessions in explaining that the determination of consent “reflect[s] an accommodation of the complex of values implicated in police questioning of a suspect,” including “the need for police questioning.”\(^{266}\)


\(^{260}\) United States v. Olano, 507 U.S. 725, 733 (1993); see also Dix, *supra* note 3, at 209 (distinguishing waiver from the “failure to pursue required procedures for implementing the right at issue or for securing a specific remedy for its violation”).


\(^{262}\) *See supra* notes 220-40 and accompanying text.

\(^{263}\) 412 U.S. 218 (1973).

\(^{264}\) *See id.* at 219.

\(^{265}\) *Id.* at 224.

\(^{266}\) *Id.* at 224-25.
held, the prosecution need not necessarily prove "that the defendant knew he had a right to refuse to answer the questions that were put."\textsuperscript{267} Rather, as applied to consent searches, the trial court should look to "the totality of all the surrounding circumstances\textsuperscript{268} to determine "whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied . . . ."\textsuperscript{269} The courts must perform this inquiry by balancing "two competing concerns . . . the legitimate need for such searches and the equally important requirement of assuring the absence of coercion.\textsuperscript{270} Under this framework, the Court held that Bustamonte need not have been aware of or understood the nature of his right to refuse consent to have lost the protections of the Fourth Amendment.\textsuperscript{271}

Numerous commentators have criticized the Court's suggestion in \textit{Bustamonte} that the perceived need for warrantless searches has anything to do with the defendant's subjective "voluntariness" in waiving his Fourth Amendment rights.\textsuperscript{272} Such policy justifications for limiting the right to be free from unreasonable searches are completely unrelated "to any conscious choice the defendant or his attorney may have made."\textsuperscript{273} Justice Marshall dissented along these lines,\textsuperscript{274} questioning how "one can choose to relinquish a constitutional right—the right to be free of unreasonable searches—without knowing that he has the alternative of refusing to accede to a police request to search."\textsuperscript{275} Ultimately, the Court's decision in \textit{Bustamonte} cannot be understood in terms of waiver as intentional relinquishment of known right,\textsuperscript{276} and instead must be recognized as

\begin{footnotes}
\item[267] \textit{Id.} at 227.
\item[268] \textit{Id.} at 226.
\item[269] \textit{Id.} at 227.
\item[270] \textit{Id.}
\item[271] \textit{See id.} at 232-33. The decision in \textit{Bustamonte} still has force in the Fourth Amendment context. \textit{See}, e.g., \textit{Ohio v. Robinette}, 519 U.S. 33, 39 (1996) (applying \textit{Bustamonte} to hold that the Fourth Amendment does not require that a lawfully seized defendant be advised that he is "free to go" before his consent to search will be recognized as voluntary).
\item[272] \textit{See}, e.g., \textit{Dix}, supra note 3, at 196 (criticizing \textit{Bustamonte}). \textit{Dix} suggests that "[a]lthough the Court ultimately articulated its decision in term of waiver, the considerations it regarded as controlling reveal that the real issue was either the scope of the right to be free from unreasonable searches or the procedure for implementing that right." \textit{Id.} at 197.
\item[273] \textit{Id.} at 209.
\item[274] \textit{See} \textit{Bustamonte}, 412 U.S. at 284-86 (Marshall, J., dissenting). Separate dissents were filed by Justice Douglas, \textit{id.} at 275, and Justice Brennan, \textit{id.} at 276. Justice Blackmun also concurred separately, \textit{id.} at 249, as did Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, who focused on the availability of habeas corpus relief, \textit{id.} at 250.
\item[275] \textit{Id.} at 277 (Marshall, J., dissenting).
\item[276] The only principled explanation for the result in \textit{Bustamonte} is that the Court determined that the intentional relinquishment cases like \textit{Johnson v. Zerbst} were simply inapposite in the Fourth Amendment context, deciding instead that "[o]ur cases do not reflect an uncritical demand for a knowing and intelligent waiver in every
"forfeiture" of the right by failing to assert it in a timely manner, which "occurs by operation of law without regard to the defendant's state of mind."\textsuperscript{277}

In the plea bargaining context, commentators have suggested that, as in \textit{Bustamonte}, the best way to explain the Court's decision in \textit{Tollett} regarding the automatic loss upon pleading guilty of non-jurisdictional antecedent claims is with the concept of forfeiture. In such instances where antecedent claims are automatically lost, "the forfeiture of constitutional defenses is justified not by the deliberate and voluntary consent of the defendant (as is said to be true of waiver), but by the overriding interests of the state."\textsuperscript{278} Naturally, rights that are automatically forfeited by the act of pleading guilty are not available to the defendant for relinquishment as part of his plea agreement.\textsuperscript{279}

situation where a person has failed to invoke a constitutional protection." \textit{Id.} at 235. The Court implied as much by noting that "[w]aiver is a vague term used for a great variety of purposes, good and bad, in the law." \textit{Id.} (internal quotation marks omitted). Citing \textit{Johnson}, the Court further suggested that, "[a]lmost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial." \textit{Id.} at 237. Asserting that "[t]here is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment," \textit{Id.} at 241, the Court held that "[n]othing, either in the purposes behind requiring a 'knowing' and 'intelligent' waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures." \textit{Id.}; see also \textit{United States v. Gagnon}, 470 U.S. 522, 527 (1985) (per curiam) (holding that the right of the defendant to be present in courtroom when the judge conferred with a juror was lost by the defendant's failure to object despite the lack of an explicit waiver on the record). The Court's underlying justifications for this distinction were that the protections of the Fourth Amendment were not designed to promote "the fairness of the trial" or "the very integrity of the fact-finding process," \textit{Bustamonte}, 412 U.S. at 242 (internal quotation marks omitted), and that it would be "unrealistic" to expect police officers to inform suspects of their right to refuse consent before requesting it. \textit{Id.} at 245.

\textsuperscript{277} Westen, \textit{supra} note 84, at 1214. Unlike "waiver," which is based on the concept of free choice, "forfeiture rests on a balance between the defendant's interest in asserting defenses and the state's interest in cutting them off." \textit{Id.} at 1255; see also Dix, \textit{supra} note 3, at 209 (noting that a defendant's conscious choice to forgo invoking a procedural opportunity may provide a stronger basis for precluding his subsequent enforcement of the right).

\textsuperscript{278} Westen, \textit{supra} note 84, at 1238.

\textsuperscript{279} Moreover, rights that may not be intentionally relinquished may nevertheless be forfeited by a failure to assert them. For example, the Eighth Amendment right to be free from cruel and unusual punishment may not be waived in the sense that such a claim once ripe may be brought at any time. \textit{Cf.} \textit{Stewart v. LaGrand}, 526 U.S. 115, 121 (1999) (Stevens, J., dissenting) (expressing doubt as to whether a defendant may consent to execution by "an unacceptably tortuous method"). Yet, if a prisoner fails ever to bring the claim in the proper forum following required procedures, he has effectively forfeited the right. Independent societal interests in the fairness of trials and the maintenance of some civilized standards of criminal justice help ensure that such rights are not forever lost. Nevertheless, one may theoretically choose to be tortured or to live out one's life as a slave and the claims will as a practical matter be "waived."
As discussed at length in Part II.B. above, the courts that have considered the issue have agreed that the right to disclosure of material favorable evidence is one that is not automatically forfeited by a guilty plea. As a result, the “presumption of waivability” at work in the forfeiture context is inapplicable to plea bargain waivers of Brady rights.

3. Election

Another form of waiver, distinct from either intentional relinquishment or forfeiture, is “election.” In the context of contract remedies, “election” occurs when a party “having two coexistent but inconsistent remedies chooses to exercise one, in which event he loses the right thereafter to exercise the other.” For example, in a contract dispute, affirmance of the contract and a demand for damages is an election that precludes disaffirmance of the contract and a prayer for rescission. In this sense, the option of disaffirming the contract is “waived” by choosing to affirm it.

In the context of criminal procedure, the Fifth Amendment privilege against self-incrimination also involves an “election.” The Supreme Court has repeatedly held that, pursuant to the Fifth Amendment, “[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so.” However, in any given prosecution, the same defendant cannot exercise both of those alternative aspects of the Fifth Amendment simultaneously. Like any witness, a defendant who testifies relinquishes the privilege against self-incrimination. By the same token, a defendant who exercises the privilege against self-incrimination as a factual matter has relinquished the opportunity to testify on his or her own behalf. Yet no formal “waiver” of the right to testify is required in order for the defendant to elect to remain silent.

Another example of “election” occurs with the right of self-representation. The Supreme Court in Faretta v. California held that a defendant has a constitutional right to proceed without counsel when he “elects” to do so. As noted by the Court in Faretta,

283. See, e.g., Mitchell v. United States, 526 U.S. 314 (1999) (noting that where a witness testifies he waives the privilege against self-incrimination as to the subject of the testimony).
284. 422 U.S. 806 (1975).
285. Id. at 807. The trial court in that case initially accepted Faretta's waiver of his right to counsel, but, after quizzing him on the hearsay rule and the state law governing the challenge of potential jurors, the judge ruled "that Faretta had not made an intelligent and knowing waiver of his right to the assistance of counsel, and
"[w]hen an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel." However, unlike the other examples of election, the Court decided in *Faretta* that "in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits." Having elements of both intentional relinquishment and forfeiture, election thus constitutes a distinct variety of waiver.

Since the right to the prosecution's disclosure of material favorable evidence is not paired with any mutually exclusive right the exercise of which would relinquish it, election is not the appropriate framework for analyzing *Brady* waivers. Instead, occurring as a part of a plea bargain with the prosecution, such waivers manifest as alienation.

4. Alienation

The transactional nature of some waivers raises the issue of alienability. Many criminal waivers, particularly but not exclusively those associated with plea bargains, occur during a negotiation with the government. In order for a right to be relinquished in such a context, the right must not only be "waivable," but also "alienable," in the sense of exchanging the non-exercise of the right for some consideration, and it must be permissible for the government, rather than simply another private party, to negotiate for such a waiver. Unless all three requirements are met, the right may not properly be

also ruled that Faretta had no constitutional right to conduct his own defense." *Id.* at 809-10. Looking at the history of self-representation in this country, as well as the text of the Sixth Amendment—which "does not provide merely that a defense shall be made for the accused," but "grants to the accused personally the right to make his defense," *id.* at 819—the Supreme Court vacated Faretta's conviction, determining that a defendant has a "constitutional right to conduct his own defense." *Id.* at 836.

286. *Id.* at 835.

287. *Id.* After citing *Johnson v. Zerbst*, the Court explained that "[a]lthough a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with his eyes open." *Id.* (internal quotation marks omitted). This reference to "knowing and voluntary" waiver is misleadingly suggestive of intentional relinquishment. In no other context does electing to exercise a right, rather than intentionally relinquishing one, require such awareness. The difference in the context of self-representation between election and intentional relinquishment is meaningful, since, due to the prosecutor's burden of proof, a defendant may waive the right to counsel and stand mute without attempting to represent himself. On balance, the "knowing and intelligent" requirement in *Faretta* for electing self-representation may best be understood, though it is not explicitly designated, as a competency requirement. A defendant may not exercise his right to self-representation if he is incompetent to do so. The Court suggested as much when it noted that "[t]he record affirmatively shows that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free will." *Id.*

288. See *Kreimer*, *supra* note 4, at 1386.
“waived” as part of a bargain with the government. Thus, the manifestation of waiver as alienation may be seen as a subspecies of intentional relinquishment that places further restrictions on its enforceability.

Some rights that may be intentionally relinquished may nevertheless be “inalienable.” For example, one may purposefully forego the right to vote in an upcoming election by choosing to avoid the polling place on the critical day. Nevertheless, one may not enter into an enforcable contract with a neighbor not to vote in exchange for fifty dollars. This situation is analogous to “market-inalienability,” defined by Margaret Jane Radin as property restrictions on sales but not gifts. Other rights may be freely alienable between private parties, but not in a transaction with the government. Thus, while a contract with one’s grandparents to attend religious services may be enforceable, such an agreement with the government is precluded by the First Amendment. This is true regardless of the voluntariness, awareness or mutual desire of the parties concerned.

In the criminal context, the distinction among alienation, forfeiture, and intentional relinquishment is well illustrated by the limitations on waiving the federal statutory right to a speedy trial. Defendants are protected from undue delays of the prosecution in bringing charges against them both by statute and by the Sixth Amendment. The Supreme Court has long held that the Sixth Amendment right to a “speedy and public trial” may be intentionally relinquished by knowing and voluntary waiver. However, with respect to the federal Speedy Trial Act, every circuit that has examined the issue has determined that a defendant generally “cannot waive his right to a

289. See Kreimer, supra note 4, at 1389-90.
291. Kreimer, supra note 4, at 1391. “Thus, even if a parolee were to agree to a parole conditioned on regular church attendance, the condition would be ineffective, for the government would be barred from seeking such a waiver.” Id. The same is probably true for the right to travel, and the right to choose to have (or not to have) an abortion. However, the government may nevertheless utilize certain incentives in these areas. See Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1415 (1989).
292. See Alschuler, supra note 11, at 698 (questioning whether a criminal defendant should be allowed to choose to accept a sentence of ten years of church attendance rather than 10 years' imprisonment as an intelligent waiver of his First Amendment rights).
294. See, e.g., Barker v. Wingo, 407 U.S. 514, 529 (1972) (upholding a waiver of the Sixth Amendment right to a speedy trial); see also United States v. Geelan, 520 F.2d 585, 587-88 (9th Cir. 1975) (applying the principle of Barker); 21A Am. Jur. 2d Criminal Law § 1043 (1998) (“In order to be effective, a waiver [of the Sixth Amendment right to a speedy trial] must be shown to have been knowing and voluntary on the part of the accused.”).
speedy trial under the Act." The reasoning behind this limitation on the defendant's ability to "waive the time constraints of the Speedy Trial Act is that the public has as great an interest in a prompt criminal trial as has the defendant."

The statute itself nevertheless provides for some exceptions to the non-waivability rule. First, the defendant may forfeit his right to a speedy trial by failing "to move for dismissal prior to trial or entry of a plea of guilty ...." Moreover, under the Act, the speedy trial clock may be tolled with the defendant's consent if the court determines, for example, that tolling serves the "ends of justice." Finally, many circuits have crafted an equitable exception to the non-waiver rule, holding that "where the defendant has induced the district court to misapply the Act," he cannot then rely upon the error to seek dismissal. Taking these exceptions together, a defendant's speedy trial protections under the Act may be forfeited, either by inadvertence or by the act of pleading guilty, and may under some circumstances be intentionally relinquished, but the defendant may not alienate either the statutory or constitutional right to the government in exchange for consideration.

In sum, waivers of additional rights as part of a plea agreement must be analyzed with the recognition of the limitations inherent in the context of bargaining with the government. Thus, the concept of alienation recognizes that certain waivers occur, not as unilateral decisions by the right-holder, but as part of a negotiated transaction with another party, private or public. The transactional nature of this type of waiver raises concerns about the relative knowledge and bargaining strength of the parties. This distinction between alienation and the other forms of waiver is wholly separate from the requirement that a waiver be voluntary and intelligent.

295. United States v. Keith, 42 F.3d 234, 238 (4th Cir. 1994) (listing supportive cases); see also United States v. Gambino, 59 F.3d 353, 359-60 (2d Cir. 1995) (same).
296. Gambino, 59 F.3d at 360; see also United States v. Willis, 958 F.2d 60, 63 (5th Cir. 1992) (refusing to allow a defendant to waive the Act because such waiver would subvert the Act's purpose of protecting society's interest in speedy justice).
297. 18 U.S.C. § 3162(a)(2) (1994); see also Gambino, 59 F.3d at 360. A guilty plea also forfeits the Sixth Amendment right to a speedy trial as a non-jurisdictional antecedent claim. See Nelson v. Hargett, 989 F.2d 847, 850 (5th Cir. 1993).
298. See 18 U.S.C. § 3161(h)(8)(A)(1994); United States v. Saltzman, 984 F.2d 1087, 1091 (10th Cir. 1993); Willis, 958 F.2d at 64.
299. Willis, 958 F.2d at 63; see also Gambino, 59 F.3d at 360; Keith, 42 F.3d at 238-39. However, the courts have limited that exception to deliberate "sandbagging" by the defendant, explaining that "[o]ur holding that the provisions of the Act are non-waivable would be meaningless if we adopted the rule that the defendant waives his ability to move for dismissal of the indictment simply by asking for or agreeing to a continuance." Willis, 958 F.2d at 64.
300. See, e.g., 21A Am. Jur. 2d Criminal Law § 1043 (1998) ("The prosecution may not make the right to a speedy trial an item of barter in plea bargaining situations.").
301. As articulated by one commentator:
The policy that some rights can never be waived and others can be waived
As demonstrated by the Tollett decision, some antecedent claims that would not be alienable to the government as part of a negotiated agreement, such as intentional racial discrimination in the composition of a grand jury, may still be automatically forfeited by the act of pleading guilty. However, for those rights that are not automatically forfeited by pleading, such as the right to disclosure of material favorable evidence, the best analytic framework is alienation. The next section applies four doctrinal disciplines to determine whether a defendant may alienate that right to Brady material as part of a plea agreement.

B. Applying Legal Pragmatism to Determine the Limitations on Alienating Rights to the Government

The courts have yet to recognize any universal theory clarifying the potential limits on a defendant's ability to alienate his rights to the government as part of a plea agreement. In fact, pursuit of a singular theory would miss the point raised by Legal Pragmatism that such problems are best solved by considering multiple theoretical viewpoints. In this section, theoretical constructs from four legal disciplines—unconstitutional conditions, contracts, property and procedural due process—are applied to determine whether a defendant may alienate his rights under Brady v. Maryland and its progeny to disclosure of material favorable evidence. Such plea bargain Brady waivers include scenarios where the prosecution was aware of the favorable evidence at the time of the plea, where the prosecution reasonably should have been aware of the evidence at the time of the plea, and where the evidence first came to light after the plea was entered. In any of these three scenarios, an enforceable Brady waiver would preclude the defendant from withdrawing his or her guilty plea. Each legal discipline considered below points to the same conclusion, that Brady is among the few rights that may not be waived as part of a plea bargain. On a holistic level, this section demonstrates the utility of the Legal Pragmatist approach of simultaneously considering multiple theoretical viewpoints in analyzing whether a right may be alienated to the government as part of a plea agreement.

1. Unconstitutional Conditions

The doctrine of unconstitutional conditions provides that “even if a

only in noncapital cases is not part of the Johnson framework, there being no reason to assume that all the forbidden waivers are not voluntary and knowing. Rather, the doctrine of unwaivable rights limits the operation of that framework.
Rubin, supra note 4, at 494.
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state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights.\(^303\)

Rooted in the Due Process Clause, the doctrine "constrains the ability of a state to impose punishment on an individual for the exercise of a constitutional right," recognizing that "[w]itholding a benefit upon such a condition imposes a penalty on the exercise of the right that is indistinguishable from a punishment imposed directly by the state."\(^304\)

On its face, the doctrine of unconstitutional conditions seems particularly well suited to the analysis of plea bargain waivers. By recognizing the detrimental impacts of the unequal bargaining strength of defendants relative to the prosecution, unconstitutional conditions should be instructive in determining whether rights may be alienated to the prosecution as part of a plea agreement. However, unconstitutional conditions ultimately fails to provide a basis for distinguishing plea bargain waivers that are enforceable from those that are unenforceable. This failure could not be predicted by looking within the four comers of the doctrine itself and points up the danger of fixating on a single theoretical construct.

In modern cases applying the doctrine of unconstitutional conditions, the Supreme Court has struck down various "schemes granting a variety of benefits in return for the individual's waiver of fundamental rights."\(^305\) Of these, numerous cases have addressed how the government's withholding of a benefit can impinge on the Fifth Amendment privilege against self-incrimination. For example, in *Lefkowitz v. Cunningham*, the Supreme Court considered whether a political party officer could be removed from his position by the State of New York, and, by statute, "barred for five years from holding any other party or public office, because he has refused to waive his constitutional privilege against compelled self-incrimination."\(^306\)

Emphasizing that "direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which


\(^{304}\) McCoy & Mirra, *supra* note 11, at 887.

\(^{305}\) Id. at 892.

\(^{306}\) 431 U.S. 801, 802 (1977). The Court began by recalling that in previous cases it had held that "when a State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent criminal prosecution," *id.* at 805 (discussing Garrity v. New Jersey, 385 U.S. 493 (1967)), and that by the same token "a State may not impose substantial penalties" upon a witness, like termination of employment, because the "witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself," *id.* (discussing Gardner v. Broderick, 392 U.S. 273 (1968)). Taken together, the Court explained, "[t]hese cases settle that government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized." *Id.* at 806.
the [Fifth] Amendment forbids," the Court held that, although there is no constitutional or statutory right to serve as a political party official, a State may not condition the benefits of service on the relinquishment of the Fifth Amendment privilege against self-incrimination. Not even a "State's overriding interest in preserving public confidence in the integrity of its political process justifies the constitutional infringement," since citizens may not be coerced into incriminating themselves merely "because it serves a governmental need."

The Court has also recognized that not merely threats of withholding a benefit but also promises of more lenient treatment in exchange for relinquishment of the Fifth Amendment privilege against self-incrimination can constitute impermissible coercion. For example, in Arizona v. Fulminante, a majority of Justices held that the promise of one prisoner to protect another prisoner from physical harm at the hands of other inmates if he confessed to the murder with which he was charged was so coercive as to require overturning his conviction and death sentence. In the form of such a promise, the Court emphasized, coercion "can be mental as well as physical, and... the blood of the accused is not the only hallmark of an unconstitutional inquisition."

Applied to the context of plea bargain waivers, the doctrine of unconstitutional conditions would seem to preclude the government from seeking a waiver of the defendant's rights under Brady v. Maryland. Although the defendant has no right to a plea bargain, the government may not condition the benefit of leniency in the form of a lower sentence or lesser charge upon the defendant's relinquishment of his due process right to the prosecutor's disclosure of material favorable evidence. Whether seen as a threat to withhold the bargain if the defendant refuses to comply or a promise to grant the bargain to induce the defendant to comply, the tactic is impermissibly coercive under the doctrine of unconstitutional conditions.

The problem with the application of the doctrine of unconstitutional conditions to the issue of plea bargain waivers is that it proves too much: All plea bargains arguably should constitute an impermissible constitutional condition. During a plea bargain, the prosecution routinely "offers criminal defendants the benefit of a

307. Id. at 806. Rather, even a more subtle means of persuasion, such as the "threatened loss of such widely sought positions, with their power and perquisites, is inherently coercive." Id. at 807. Induced self-incrimination diminishes reputation in the community and imposes significant "economic consequences." Id. Most importantly, the Court held, it requires one "to forfeit one constitutionally protected right as the price for exercising another." Id. at 807-08.

308. See id.

309. Id. at 808.


311. Id. at 287 (quoting Blackburn v. Alabama, 361 U.S. 199, 206 (1960)).
reduced sentence on the condition that they forgo the exercise of their right to trial and their right to refuse to incriminate themselves." 312 Accordingly, the entire practice of plea bargaining itself "imposes an unconstitutional penalty on the right to trial. 313

In fact, prior to the Brady Trilogy, the Supreme Court appeared poised to invalidate the practice of plea bargaining under the doctrine of unconstitutional conditions. As far back as the late nineteenth century, the Supreme Court had begun to suggest that a conviction could not rest upon a bargained-for guilty plea because an admission of guilt, induced either by threats or promises, is presumptively involuntary. The Court in Bram v. United States 314 held inadmissible a custodial confession, made in response to the state's suggestion that the confession would benefit Bram, because a confession cannot be free and voluntary if extracted through any improper influence, which equally prohibits threats and violence as well as direct or implied promises. 315

Half a century later, the Court in Walker v. Johnston applied this presumption of involuntariness to a defendant who claimed that he had pleaded guilty only after he had been denied a request to see his lawyer and told he would get "twice as great" a sentence if he refused to plead. 316 The Court remanded for a hearing on the claims, holding that if he "did not voluntarily waive his right to counsel, or if he was deceived or coerced by the prosecutor into entering a guilty plea, he was deprived of a constitutional right." 317

More recently, the Court remanded in Machibroda v. United States, when the defendant, after pleading guilty to robbery and receiving a sentence of forty years, challenged his plea as involuntarily induced by the prosecutor's promise that he would get no more than twenty years if he pleaded guilty. 318 The Court held that Machibroda was entitled to a hearing on his claims since a "guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is

312. McCoy & Mirra, supra note 11, at 887.

If the right to trial ... is a fundamental constitutional right, any state attempt to deter its exercise should violate the due process clause of the Fourteenth Amendment unless the state can demonstrate a justification sufficient to meet the stringent 'compelling interest test.' If the right to trial without self-incrimination is fundamental, plea bargaining should be found unconstitutional unless the state is able to show that it is the least restrictive means available to effectuate a compelling state objective.

Id. at 888 (footnotes omitted).

313. Id. at 905; see also Sullivan, supra note 291, at 1502.

314. 168 U.S. 532, 564-65 (1897).

315. Id. at 542-54.

316. 312 U.S. 275, 281 (1941).

317. Id. at 286 (citing Johnson v. Zerbst, 304 U.S. 458 (1934) (defendant must be aware of right to counsel before he can waive that right), and Mooney v. Holohan, 294 U.S. 103 (1935) (conviction cannot be based on prosecution's knowing use of perjury)).

Likewise, the Court held in *Lynumn v. Illinois* that a confession induced by threats that the defendant's children would be taken away if she did not cooperate, combined with promises of lenient treatment if she confessed, was involuntary. In each of these latter cases, the Court simply assumed without explanation that the defendants were entitled to relief if their allegations were proven.

The Court's suggestions that a conviction could not rest upon a bargained-for guilty plea attained their fullest expression in *United States v. Jackson*. The *Jackson* Court invalidated a provision of the Federal Kidnapping Act that provided for the potential imposition of the death penalty for conviction by jury verdict but not by guilty plea. Using the language of unconstitutional conditions, the Supreme Court upheld the district court's determination that because a defendant could assert his right to trial only if he was willing to risk the death penalty, the provision imposed "an impermissible burden upon the exercise of a constitutional right."* Justice Stewart for the Court rejected the Government's argument that any "incidental effect of inducing defendants" not to go to trial was irrelevant since the sentencing differential in the statute actually "operates to mitigate the severity of the punishment." Rather, the Court stated that "[w]hatsoever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights." The question, the Court explained, "is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive."* The answer, according to the Court, was that the sentencing provision was both unnecessary and excessive: "Congress can of course mitigate the severity of capital punishment. The goal of limiting the death penalty to cases in which a jury recommends it is an entirely legitimate one. But that goal can be achieved without penalizing those defendants who plead not guilty and demand jury trial."* Thus, while not purporting to address the constitutionality of

319. *Id.* at 493.
321. *Id.* at 506.
322. See *Id.* at 570 (1968).
323. See *Id.* at 571.
324. *Id.* at 572. However, the judgment of the district court dismissing the indictment was reversed on the grounds that the sentencing provision was "severable from the remainder of the statute." *Id.* at 572.
325. *Id.* at 582.
326. *Id.*
327. *Id.* Recognizing that not "every defendant who enters a guilty plea to a charge under the Act does so involuntarily," the Court nevertheless held that "[[t]he power to reject coerced guilty pleas and involuntary jury waivers might alleviate, but it cannot totally eliminate, the constitutional infirmity in the capital punishment provision of the Federal Kidnapping Act." *Id.* at 583. Justice White, joined by Justice Black,
plea bargains in general, the Court in *Jackson* seemed to suggest that if the practice of plea bargaining had the result of needlessly "'chilling,' burdening,' or 'encouraging the waiver of' the constitutional right to plead not guilty, the system as a whole would be unconstitutional."328

The Court in *Jackson* had reached the doctrinal verge of invalidating plea bargaining across the board. However, by the time *Jackson* was handed down, plea bargains had become a fixed feature of criminal adjudication.329 In any event, *Jackson* forced the moment to its crisis. Just two years later, the Court handed down its trilogy of cases concluding once and for all that plea bargaining, notwithstanding its system of promises and threats, is a presumptively valid and necessary aspect of our criminal justice system.330

The Court in *Brady v. United States* returned to precisely the same kidnapping statute considered in *Jackson*,331 and without explicitly overruling *Jackson*, Justice White, who had dissented in that case, wrote for the majority in *Brady* and turned *Jackson* on its head. Where *Jackson* had suggested that the system of inducements to plead guilty inherent in the Federal Kidnapping Act's sentencing provision was constitutionally impermissible, even while recognizing that not "every defendant who enters a guilty plea to a charge under the Act does so involuntarily,"332 Justice White quoted that passage out of context to suggest just the opposite: that since not every defendant is coerced to plead guilty by the inducements in the Act, guilty pleas remain presumptively valid, as long as they are "both 'voluntary' and 'intelligent.'"333 In effect, Justice White in *Brady* reinterpreted *Jackson* as if his dissent had been the majority opinion, and, in doing

dissented on this point, arguing that, since not every defendant would be affected by the sentencing provision, reliance upon the trial courts to carefully examine the guilty pleas and jury waivers is sufficient "to make sure that they have been neither coerced nor encouraged by the death penalty power in the jury." *Id.* at 592 (White, J., dissenting).

328. Becker, *supra* note 6, at 793 (discussing *Jackson*).
329. See, e.g., Guidorizzi, *supra* note 22, at 762 ("The Supreme Court did not address the constitutionality of plea bargaining until after its establishment as a part of the criminal justice system.").
331. *Id.* at 743.
333. *Brady*, 397 U.S. at 747 (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969)). Where *Jackson* had emphasized that "[a] procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right," *Jackson*, 390 U.S. at 583, Justice White wrote in *Brady*: "Plainly, it seems to us, *Jackson* ruled neither that all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas nor that such encouraged pleas are invalid whether involuntary or not." *Brady*, 397 U.S. at 747; see also Guidorizzi, *supra* note 22, at 762 ("Noting that not every plea made for fear of the death penalty was invalid, the Court stated that *Jackson* merely required that guilty pleas be intelligent and voluntary.").
so, treated plea bargaining as unilateral waiver—unconnected to any external pressures.

The Supreme Court in the Brady Trilogy abruptly repudiated its suggestions in cases leading up to and including Jackson that plea bargains may be unconstitutional. Without any explicit acknowledgment, the Court simply removed plea bargaining (as somehow distinct from confessions) from the jurisprudential ambit of unconstitutional conditions, which seemed to compel a determination that the practice was an impermissible burden on a defendant’s right to go to trial. As noted by one commentator, “[w]hat is remarkable about these opinions is not the result they reached; rather, it is the essential lawlessness of the opinions themselves.”

The Court apparently saw cataclysmic potential in carrying Jackson to its logical conclusion and finding plea bargaining unconstitutional.

A contrary holding would require the States and Federal Government to forbid guilty pleas altogether, to provide a single invariable penalty for each crime defined by the statutes, or to place the sentencing function in a separate authority having no knowledge of the manner in which the conviction in each case was obtained. In any event, it would be necessary to forbid prosecutors and judges to accept guilty pleas to selected counts, to lesser included offenses, or to reduced charges.

Although the Court left itself an out, suggesting that it might later reconsider its decision “if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves,” the Court has never flinched from its determination that plea bargaining must be valid notwithstanding the doctrine of unconstitutional conditions.

Following the Brady Trilogy, the Court briefly revived unconstitutional conditions analysis in the context the forfeiture of antecedent claims by a guilty plea. The Court in Blackledge v. Perry reached back to Jackson to hold that a “person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.”

334. Becker, supra note 6, at 795.
335. Brady, 397 U.S. at 753.
336. Id. at 758. This suggestion is somewhat disingenuous since the Court did not explain how, given the presumptive validity of the plea bargaining, it would ever learn that the defendants were in fact falsely condemning themselves.
337. 417 U.S. 21, 28 (1974). After Perry exercised his statutory right to appeal a misdemeanor assault conviction to the superior court, but before he appeared for his new trial, the prosecutor obtained a new indictment covering the same conduct for which Perry was convicted in the district court but charging Perry with felony assault with intent to kill rather than misdemeanor assault. Id. at 23. Perry pleaded guilty
Blackledge v. Perry, the "functional equivalent of a plea bargaining case," the Court "seemed to imply that the increased sentence imposed after trial because the defendant rejected the bargain was an unconstitutional penalty on the right to trial." Nevertheless, it is unclear whether Blackledge v. Perry retains any force in the plea bargaining context, and in any event how, under the doctrine of unconstitutional conditions, the validity of plea bargain waivers could be distinguished from the validity of the practice of plea bargaining itself.

In sum, under the doctrine of unconstitutional conditions, the prosecution should not be able to seek a plea bargain waiver of the defendant's right to disclosure of material favorable evidence. However, starting with the Brady Trilogy, the Court has resolutely reaffirmed, apparently on a crass accounting of judicial economy, that plea bargaining and its attendant waivers are immune to a claim of unconstitutional conditions. Most recently, the Court in Mezzanatto rejected the argument that an agreement to waive the exclusion of statements made in the course of plea discussions would be "inherently unfair and coercive," and "invite prosecutorial overreaching and abuse" due to the "gross disparity in the relative bargaining power of the parties to a plea agreement," on the grounds that the waiver agreement is "indistinguishable from any of a number of difficult choices that criminal defendants face every day" as part of the plea bargaining process. While throwing the Court's
evasive jurisprudence on plea bargaining into stark relief, unconstitutional conditions on its own fails to distinguish rights that may be waived as part of a plea bargain from those that may not. Instead, other disciplines must be brought to bear.

2. Contracts

Into the doctrinal vacuum created by the Court's removal of plea bargaining from unconstitutional conditions analysis, courts and commentators alike have thrust contract principles.\(^{341}\) Picking up on hints in the Brady Trilogy positing the "mutuality of advantage" inherent in plea bargains,\(^{342}\) the Court in Santobello v. New York explicitly applied contract principles to plea bargaining in deciding that the prosecutor's failure to keep a commitment concerning a sentence recommendation entitled the defendant to a new trial.\(^{343}\)

The justification for plea bargaining, the Santobello Court explained, "presuppose[s] fairness in securing agreement between an accused and a prosecutor."\(^{344}\) As such, pleas that rest "on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration," are acceptable as long as "such promise must be fulfilled."\(^{345}\) Thus, Santobello marked a shift away from treating plea bargains as unsolicited unilateral waivers, as in the Brady Trilogy, to treating them as balanced and fair commercial transactions in which prosecutors and defendants have "bargained' and negotiated for a particular plea."\(^{346}\)

Some legal commentators criticized the Court's contract-based approach, arguing that "the image of plea bargaining as adversarial unknowingly or involuntarily," not alleged in his case, Mezzanatto's waiver agreement was held presumptively "valid and enforceable." Id.\(^ {341}\) See Calhoun, supra note 109, at 150 (suggesting that the failure of the Court to address plea bargain waivers in light of the doctrine of unconstitutional conditions is best explained by the fact that "current theory dictates that the plea bargaining process reflects an arms-length transaction in which the defendant is totally free to accept or reject the government's offer"); McCoy & Mirra, supra note 11, at 910.

The Supreme Court's insistence that plea bargaining is constitutional in spite of the apparent applicability of the unconstitutional conditions doctrine and in spite of the Court's application of that doctrine in closely analogous situations seems attributable to an assumption that plea bargaining is merely a contractual arrangement between a defendant and the state. Id.; see also Westen & Westin, supra note 11, at 471 ("[I]n a legal system where most convictions are based on guilty pleas and most guilty pleas are based on bargained-for promises, the most important right of the criminally accused may be found not in the law of trial procedure, but in the law of contracts.").\(^ {342}\) Brady v. United States, 397 U.S. 742, 752 (1970).\(^ {343}\) 404 U.S. 257, 257-58, 262 (1971).\(^ {344}\) Id. at 261.\(^ {345}\) Id. at 262.\(^ {346}\) Id.; see also Becker, supra note 6, at 825 ("Santobello cannot be explained by assuming that the Court found the plea either involuntary or unintelligent."); Westen & Westin, supra note 11, at 473-76 (discussing contract-based analysis of Santobello).
negotiation leading to contract-like agreements obscures the significant costs current methods of plea bargaining impose on the criminal justice system.\textsuperscript{347} These costs include the unequal treatment of defendants, the undermining of "legislative intent on the correct punishment for defendants convicted of specified crimes," and the elimination of the criminal trial as a "morality play."\textsuperscript{348} Nevertheless, since Santobello, the Court has continued to stress the "give and take of plea bargaining,"\textsuperscript{349} resting its decisions on the explicit assumption that the prosecutor and defense "arguably possess relatively equal bargaining power."\textsuperscript{350}

Other legal commentators have embraced the Court's focus on contract principles as the best way to explain the validity of plea bargaining. For example, Peter Westen and David Westin suggested that the law of contracts was "pertinent to the formulation of a constitutional law of plea agreements on several levels."\textsuperscript{351} Along these lines, Westen and Westin called for the courts to "constitutionalize" the preliminary contractual questions of formation and breach in interpreting and enforcing plea bargains.\textsuperscript{352}

Still other scholars have applied contract theory itself in arguing for the abolition of "any bargained-for allocation of criminal

\textsuperscript{347} Gifford, supra note 11, at 40; see also Tigar, supra note 3, at 9 ("Just as freedom of contract offered a justification for outright robbery by a fortunate few, ranging from employers extracting unconscionable concessions from the unorganized employees to merchants driving unconscionable bargains with their customers, so it has been in the criminal process the theoretical construct in whose name men are said to have voluntarily given up their liberty.").

\textsuperscript{348} See Gifford, supra note 11, at 40-41.

\textsuperscript{349} Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (citations and internal quotation marks omitted); see also Alabama v. Smith, 490 U.S. 794, 802-03 (1989) (noting the "mutual interests that support the practice of plea bargaining").

\textsuperscript{350} Bordenkircher, 434 U.S. at 362 (citation and internal quotation marks omitted). The Court has recognized some limits to contract-based analysis of plea bargains. For example, the defendant in Mabry v. Johnson, charged with burglary and assault, accepted the prosecutor's offer of concurrent 21- and 12-year sentences if he pleaded guilty, 467 U.S. 504, 505-06 (1984). However, prior to entry of the plea, the prosecutor told Johnson "that a mistake had been made and withdrew the offer," proposing instead consecutive 21-year sentences. Id. at 506. Johnson initially rejected the new offer and elected to stand trial, but plea negotiations resumed after the judge declared a mistrial, ultimately resulting in Johnson's acceptance of the prosecutor's second offer. Id. The Supreme Court held that a defendant's acceptance of a prosecutor's proposed plea bargain does not create a constitutional right to have the bargain specifically enforced. See id. at 507-08, 510. Thus, while contract analysis would require that the prosecutor be held to the terms of his offer once accepted by the defendant, the Court concluded that since Johnson ultimately pleaded guilty "with the advice of competent counsel and with full awareness of the consequences," id. at 510, he "was not deprived of his liberty in any fundamentally unfair way," id. at 511.

\textsuperscript{351} Westen & Westin, supra note 11, at 529; see also Easterbrook, supra note 172, at 309 (concluding that the benefits derived by both defendants and prosecutors from plea bargaining makes the process socially desirable).

\textsuperscript{352} Westen & Westin, supra note 11, at 529.
punishment.” For example, Albert Alschuler cited familiar contracts and economics concepts of duress and externalities in arguing that “pretty pictures of well-informed parties striking a rational balance of litigation risks miss an important part of what invariably happens when a system of plea bargaining moves from abstraction to reality.” Rather, as noted by Donald Gifford, “[d]efendants are coerced into pleading guilty because they face the risk of far more severe penalties if tried and convicted than if sentenced after a guilty plea.” In particular, waivers of additional rights as part of the plea agreement have come under fire as “contracts of adhesion.”

Faced with these criticisms, even contract theory advocates have conceded some limits on plea bargain waivers. Westen and Westin, for example, acknowledged that “the state cannot obtain a valid waiver by threatening defendants or their loved ones with physical abuse, or by threats of illegal trial tactics or an illegal sentence.” Echoing the unconstitutional conditions approach, they also suggested that “a guilty plea is invalid if based on an inducement that is so advantageous compared to the alternative value of standing trial that even a defendant who believes himself to be factually innocent would plead guilty.” Thus, they noted, some plea bargain waivers must be precluded under a contract-based approach.

A similarly nuanced contract-based analysis of plea bargains is presented by Robert E. Scott and William J. Stuntz in Plea Bargaining as Contract. Acknowledging that “there are fundamental structural impediments in the plea bargaining context,” Scott and Stuntz nevertheless argue that “[t]hese barriers to efficient bargaining are

354. Alschuler, supra note 11, at 690; see also Gifford, supra note 11, at 38 (arguing that plea bargains are not similar to commercial arms-length agreements because prosecutors substantially dictate the terms in most cases).
355. Gifford, supra note 11, at 39 (footnote omitted).
356. See, e.g., United States v. Mezzanatto, 513 U.S. 196, 216 (1995) (Souter, J., dissenting) (“As the Government conceded during oral argument, defendants are generally in no position to challenge demands for these waivers, and the use of waiver provisions as contracts of adhesion has become accepted practice.”). But see Scott & Stuntz, Plea Bargaining, supra note 11, at 1922 (contrasting plea bargains and traditional contracts of adhesion).
357. Westen & Westin, supra note 11, at 479.
358. Id. at 494 (emphasis omitted).
359. Scott & Stuntz, Plea Bargaining, supra note 11.
360. See id. at 1910; see also id. at 1934 (“Contract norms might justify some constraints, both to reduce the risk of process defects and to enhance the dignitary values associated with an exchange involving the entitlement to personal liberty.”).
not, however, grounds for abolition, but instead suggest more focused reforms of current practices.\textsuperscript{361}

Central to this conditional defense of plea bargaining as contract are the ameliorative effects of such protections drawn from the "law of consumer transactions" as "[e]nhanced disclosure and cooling-off periods."\textsuperscript{362} For plea bargaining to live up to its billing as a "voluntary exchange" that "offers people more choices than they would otherwise enjoy," Scott and Stuntz emphasize that it must be based on "a free, informed, and rational choice."\textsuperscript{363} Preserving the core of this idea, they conclude, "requires rules that prohibit enforcement where individual promises were the product of duress or unconscionable information deficits, or where the parties lacked the capacity and judgment to evaluate the risks being exchanged."\textsuperscript{364} Thus, while not cited explicitly, the prosecution's disclosure of material favorable evidence appears to play an important role in the contract-based defense of plea bargaining proposed by Scott and Stuntz.

Other theorists applying contract analysis to plea bargains have specifically focused on the importance of disclosure in ensuring the validity of the plea bargains.\textsuperscript{365} The justifications for preplea disclosure of favorable evidence under a contracts-based defense include empowering the defendant, producing fairer bargains and advancing societal values.\textsuperscript{366} As these commentators have pointed out, numerous contract principles recognize that disparities in information between the parties can render an agreement unenforceable.\textsuperscript{367} Each of these principles suggests that Brady rights may not be alienated to the government in a plea bargain.

Duress, for example, is a defense to the formation of a contract if one party "can prove that he would not have entered into the contract absent the improperly coercive behavior of the other contracting party."\textsuperscript{368} Accordingly, a plea agreement formed under duress is unenforceable under contract principles.\textsuperscript{369} Some legal scholars have

\begin{itemize}
\item \textsuperscript{361} See \textit{id.} at 1910; see also \textit{id.} at 1913 (If force, fraud and distributional unfairness "are pervasive in the plea bargaining process, then plea bargaining should be abolished—not as a matter of constitutional law, but as a matter of contract law and contract principles.").
\item \textsuperscript{362} \textit{Id.} at 1926. "Indeed, plea bargaining doctrine already uses these to some extent." \textit{Id.} at 1926-27.
\item \textsuperscript{363} See \textit{id.} at 1918.
\item \textsuperscript{364} See \textit{id.}
\item \textsuperscript{365} See, e.g., Ostrow, \textit{supra} note 167, at 1606 ("If accepted as the basis for the legitimacy of the guilty-plea process, the consensual-transaction conception provides a rationale for instituting a broad preplea duty to disclose to the defendant all information that bears on the likelihood of trial conviction.").
\item \textsuperscript{366} See \textit{id.} at 1606-09.
\item \textsuperscript{367} See \textit{id.} at 1609-10 ("[T]he contract-law doctrines of duress and mistake lend strong support to the case for preplea disclosure.").
\item \textsuperscript{368} Scott & Stuntz, \textit{Plea Bargaining}, \textit{supra} note 11, at 1919.
\item \textsuperscript{369} See \textit{id.} at 1920.
\end{itemize}
suggested that the overall imbalance in the relative bargaining strengths of the defendant and the government in the plea bargaining process presents "striking similarities to a contract made under duress." 370

Commentators have argued that, at a minimum, the doctrine of duress "calls for substantial disclosure by the prosecutor." 371 Without preplea disclosure of favorable evidence, the prosecutor can "inflate the pressure to plead guilty by misrepresenting the strength of the government's case; that is, by bluffing." 372 On the other hand, refusing to enforce a waiver of the prosecution's duty to disclose "would diminish the apparent likelihood of threatened punishment and thereby reduce the coercion inherent in the choice confronting the defendant." 373

Another contract defense, the doctrine of unilateral mistake, holds that a contract is voidable at the instance of the mistaken party if "a material mistake by one side either was or plainly should have been known to the other side." 374 A party that lacks material information may void the bargain "if the other engaged in misrepresentation or its functional equivalent." 375 This resembles the situation when the defendant waives the prosecution's duty to disclose Brady material: by exercising superior bargaining power, the prosecution is able to negotiate away its duty to disclose information that must be known by the defendant in order to enter a valid guilty plea.

Thus, as with duress, the contract principle of unilateral mistake "supports the introduction of a disclosure requirement into the plea-bargaining process." 376 The principle of unilateral mistake recognizes that the "assumption of efficient contracting breaks down where the contracting parties cannot reliably exchange important information." 377 Without unwaivable preplea disclosure to minimize the potential for such mistake, the rationale for the constitutionality of a plea bargain as a contract diminishes. As noted by Scott and Stuntz:

370. Ostrow, supra note 167, at 1609. "Taken to its logical conclusion, the analogy between duress and the circumstances of plea bargaining would entail abolition of the plea-negotiation process." Id.
371. See id. at 1609.
372. See id. at 1609-10. "The force of duress increases with the credibility and magnitude of the threat relative to the offer; in particular, the higher the possibility of conviction, the stronger the duress." Id. at 1609.
373. See id. at 1609-10.
375. See id.
376. Ostrow, supra note 167, at 1610; see also Scott & Stuntz, Plea Bargaining, supra note 11, at 1958 n.163 (advocating a "commonsense application of unilateral mistake doctrine: the government could easily have prevented the defendant's error (indeed, the government induced it), and the defendant was accordingly excused from his bargain").
377. Scott & Stuntz, Plea Bargaining, supra note 11, at 1940. "All this argues for a more generous mistake or excuse rule in plea bargaining (on the defendant's side) than in ordinary contract cases." Id. at 1959.
The assumption that contracting parties will reach mutually advantageous and efficient bargains (so long as transaction costs are less than the gains from trade) ignores significant barriers to efficient contracting, barriers found in a wide variety of relationships. Despite the parties' seeming ability to transact at low cost, strategic considerations may block the disclosure of necessary information or inhibit the development of the kinds of credible commitments that are needed for the relationship to go forward.378

The contract principle of unconscionability "describes a defective bargaining process—an unreasonable failure of one party to inform the other about important aspects of the exchange."379 Unconscionability "serves as a kind of backstop, a means of granting relief where defects in the bargaining process, though serious, do not rise to the level of fraud or duress."380 This principle as well is suggestive of the problems that would result if a waiver of preplea disclosure were enforced since the "most common claim of unconscionability is really a claim of fraudulent concealment."381

Under the materiality requirements of Brady and its progeny, the prosecutor's duty to disclose by definition encompasses only the information that is critical to the exchange, information that would have led the defendant to forego the plea agreement and insist on a trial. Thus, a plea bargain containing a Brady waiver appears to be an unconscionable contract. As with the principles of duress and mistake, while plea bargaining in general might otherwise survive a challenge of unconscionability,382 the failure of the prosecution to comply with its duty to disclose favorable evidence within its constructive notice by obtaining the defendant's waiver as part of the bargain would appear to invalidate the plea agreement itself as a matter of contract law.

As noted by the Supreme Court, a contract is also void when its enforcement would violate "public policy."383 As applied to plea agreements, the threshold question of this doctrine is whether the enforced waiver of "constitutional rights impairs to an appreciable extent any of the policies behind the rights involved."384 Policies

378. Id. at 1935.
379. Id. at 1921 n.42.
380. See id. at 1921.
381. Id. at 1922.
382. See id.
383. See Newton v. Rumery, 480 U.S. 386, 392 (1987) ("The relevant principle is well established: 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."); see also Calhoun, supra note 109, at 160 ("The concept that a promise or agreement may be unenforceable at law because its terms conflict with public policy is one which derives from traditional common law principles." (citing Restatement (Second) of Contracts § 178(1) (1981))).
384. Newton, 480 U.S. at 392 n.2 (citation, alterations, and internal quotation marks omitted).
threatened by *Brady* waivers include the fairness and efficiency of criminal adjudications, as well as "the public's need to perceive the criminal justice system as accurate."³⁸⁵ Moreover, the public policy status of preplea disclosure was recently codified by the Citizens Protection Act of 1998, which provides that it shall be "punishable conduct" for any federal prosecutor to "fail promptly to release information that would exonerate a person under indictment."³⁸⁶ Furthermore, the Supreme Court has repeatedly stated that the ethical responsibilities of prosecutors to disclose favorable material evidence to the defense exceeds the due process requirement of *Brady* and its progeny.³⁸⁷ Finally, the affirmative nature of this duty to disclose suggests that a plea agreement that relieved the prosecutor of that duty would arguably constitute fraud.³⁸⁸

Thus, the contract principles of adhesion, duress, mistake, unconscionability, and public policy all suggest that, even if the practice of plea bargaining as a whole can pass constitutional muster under contract analysis, waivers of the right to disclosure of *Brady* material cannot. Accordingly, under a contract-based approach, a defendant may not waive his *Brady* rights as part of a plea bargain.

3. Property

The applicability of property principles to criminal waiver has followed the view that the value of a right, whether constitutional or title to land, includes its alienability.³⁸⁹ In this perspective, a right the exercise of which cannot be bargained in exchange for consideration

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³⁸⁵. David S. Kaplan & Lisa Dixon, Coerced Waiver and Coerced Consent, 74 Denv. U. L. Rev. 941, 953 (1997) (footnote and internal quotation omitted); see also Mezzanotto, 513 U.S. at 204 ("There may be some evidentiary provisions that are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably 'discrediting' the federal courts.").


³⁸⁷. See Kyles v. Whitley, 514 U.S. 419, 437 (1995) ("[T]he rule in *Bagley* (and, hence, in *Brady*) requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate." (citing ABA Standards for Criminal Justice, Prosecution Function and Defense Function 3-3.11(a) (3d. ed. 1993) and Model Rules of Professional Conduct Rule 3.8(d) (1984))); Imbler v. Pachtman, 424 U.S. 409, 427 n.25 (1976) ("[A]fter a conviction the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after-acquired or other information that casts doubt upon the correctness of the conviction." (citing Code of Professional Responsibility EC 7-13 (1969) and ABA Standard § 3.11)); see also Franklin, supra note 178, at 594 (citing Model Code of Professional Responsibility DR 7-103(B)). But see McMunigal, supra note 6, at 1027 (suggesting that existing federal ethical rules and statutes "are clearly inadequate to ensure a guilty pleading defendant the right to disclosure of *Brady* material.").

³⁸⁸. See 37 Am. Jur. 2d Fraud and Deceit § 144 (1968 & 1999 Supp.).

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"is worth less than an otherwise-identical right that may be sold."\textsuperscript{390}

For example, in deciding whether a defendant could waive the procedural rule requiring that alternate jurors be dismissed at the time the jury retires to consider its verdict, Judge Posner referred to the property value of a constitutional right in asking, "If the defendant would prefer to take his chances with the jury in its reconstituted form rather than undergo the expense and uncertainty of a new trial, why should he not be allowed to?"\textsuperscript{391}

However, even such ardent property-rights advocates as Richard Epstein have recognized some limits on the alienability of rights. Epstein acknowledges that "[a]s a first approximation it appears that any restraint upon the power of an owner to alienate his own property should be regarded as impermissible," under concepts of both individual freedom and social utility.\textsuperscript{392} He suggests, however, that "matters cannot be this simple, for everywhere throughout legal culture we find important restrictions upon the power of individuals to alienate their property or labor to third parties in voluntary transactions."\textsuperscript{393}

In fact, many legal theorists have recognized a strong tradition regarding the inalienability of certain rights, stretching back to John Stuart Mill who famously declared: ""The principle of freedom cannot require that [a person] should be free not to be free. It is not freedom to be allowed to alienate [one's] freedom."\textsuperscript{394} The framers themselves proclaimed the inalienability of certain fundamental rights in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; among these are Life, Liberty and the pursuit of Happiness."\textsuperscript{395}

The inalienability of rights, which may be broadly defined as any restriction on the transferability, ownership, or use of the right, is thus

\textsuperscript{390} Sullivan, \textit{supra} note 291, at 1478.

\textsuperscript{391} United States v. Josefik, 753 F.2d 585, 588 (7th Cir. 1985).


\textsuperscript{393} \textit{Id.} at 972. While contending that some restrictions like rent control and fossil fuel price control are the "undesirable outgrowth of interest group politics," Epstein argues that "interest group politics does not supply the entire explanation for restraints on alienation." \textit{Id.} Rather, restraints on alienability have been properly applied in the areas of gun control, liquor, narcotics and drugs, and even to speech activities like selling books on how to build an atom bomb. \textit{See id.} at 974-78.

\textsuperscript{394} Alschuler, \textit{supra} note 11, at 697 (quoting J. Mill, Utilitarianism, Liberty And Representative Government 213 (A.D. Lindsay ed. 1951)); \textit{see also} Sullivan, \textit{supra} note 291, at 1476-77 ("[S]ome constitutional rights are inalienable, and therefore may not be surrendered even through voluntary exchange.").

\textsuperscript{395} The United States Declaration of Independence, para. 2 (1776); \textit{see also} Kreimer, \textit{supra} note 4, at 1386 n.337 (citing Townsend v. Townsend, 7 Tenn. (Peck) 1, 12 (1821) ("[C]onstitutional rights are vested, unexchangeable, and unalienable."); and Insurance Co. v. Morse, 87 U.S. (20 Wall.) 443, 451 (1874) ("A man may not barter away his life or his freedom, or his substantial rights.").
a traditional and pervasive concept. It recognizes that there are certain rights so fundamental that, although they may be forfeited through inadvertence or conduct inconsistent with their assertion, they may not be transferred, sold, relinquished or given away; "in short, they are rights that a person cannot waive." 396

Although inalienability has been self-effacingly called "the step-child of law and economics," 397 it is particularly well-suited to the constitutional analysis of rights that are not merely relinquished but are affirmatively traded to the government as in a plea bargain. Contract analysis, by contrast, is more limited in its responsiveness to the dynamics of such an exchange. 398

Thus, while contract analysis has been the dominant theoretical construct applied to plea bargaining, property theory provides an alternative rationale for why some rights may not be relinquished as part of a plea agreement with the government.

To be sure, it is not enough merely to assert that some rights are so fundamental that they cannot be alienated. That would invite the wholesale setting off limits of "favorite" rights. Instead, some rationale must be proposed for determining which rights should be inalienable. Building on the groundbreaking work of Guido Calabresi and A. Douglas Melamed on inalienability in the area of pollution control, 399 Susan Rose-Ackerman has articulated such a rationale for the inalienability of certain rights. 400 Rose-Ackerman starts with "the supposition that unencumbered market trades are desirable unless we can locate a valid reason for their restriction," rejecting "the idea that

396. Kreimer, supra note 4, at 1389. "Even when a right is waivable, there may be aspects of the alienation of the right that would overcome any presumption of legitimacy arising from a desire to vindicate individual choice." Id.; see also Peter Westen, Forfeiture By Guilty Plea—A Reply, 76 Mich. L. Rev. 1308, 1335 (1978) ("But that does not mean that they are rights he cannot lose. On the contrary, the framers of the Declaration understood, as Locke and Blackstone understood before them, that while the rights to life and liberty cannot be alienated, they can be forfeited by conduct inconsistent with their assertion.").

397. Susan Rose-Ackerman, Inalienability and the Theory of Property Rights, 85 Colum. L. Rev. 931, 931 (1985). "Too often, economists note the existence of restrictions on transferability, ownership, and use, only to dismiss them as obviously inefficient constraints on market trades." Id.

398. As noted by Aschuler:

Contract of course is always a device by which people restrict their future actions. If one would uphold any contract in any situation, he must believe that it is freedom to be allowed to alienate one's freedom, at least up to a point. If the preservation of future autonomy were truly more important than the realization of present desire, all contracts would be forbidden; and although Mill certainly did not intend this result, his formulation offered no useful distinction between the restrictions of future autonomy that he would approve and those that he would condemn.

Aschuler, supra note 11, at 698.


400. Rose-Ackerman, supra note 397, at 931.
markets are inherently coercive.” Nevertheless, she suggests that "some forms of inalienability do have valid public policy justifications in a democratic market society." Of the rationales she sets forth in defense of inalienability, at least two are especially relevant to plea bargains waivers of the right to disclosure of favorable evidence: economic efficiency and "the responsible functioning of a democratic state.

Some theorists, such as Margaret Jane Radin, have criticized Rose-Ackerman's approach for being "couched almost exclusively in market rhetoric." Radin argues persuasively that the justifications for inalienability should not be limited to economic rationales, and should instead reflect a greater conception of "personhood." Nevertheless, even Rose-Ackerman's narrowly tailored justifications for inalienability amply demonstrate that a defendant should not be able to waive as part of a plea bargain the prosecution's duty to disclose Brady material.

Efficiency rationales for inalienability, Rose-Ackerman suggests, are "second-best" responses to market failures that arise because of externalities that do not lend themselves to collective measurement, such as imperfect information, prisoner's dilemmas, free rider problems, and the cost of administering alternative policies. For example, the economic efficiency of market transactions is reduced

401. Id. at 932.
402. Id.
403. Id. at 932-33. A third rationale for inalienability proposed by Rose-Ackerman is distribution: "While analysts primarily concerned with efficiency may view a policy's redistributive impact as an unwelcome side effect, sometimes the distributive effects of a rule will be its primary justification." Id. at 940; see also Kreimer, supra note 4, at 1390 ("Even when there are no effects on third parties, it may be that we have constitutional preferences regarding the distribution of the right in question."). Other theorists, like Epstein, question this rationale, suggesting that the distributional justification for inalienability is "unsound," and concluding that "[r]ules restraining alienation are best accounted for, both positively and normatively, by the need to control problems of external harm and the common pool. In essence the restraint on alienation is a substitute for direct remedies for misuse when these are costly and uncertain to administer." Epstein, supra note 392, at 990; see also Sullivan, supra note 291, at 1483 ("Making rights inalienable in exchange for benefits may or may not improve the welfare of the beneficiary class; it depends on whether the government would continue or discontinue the benefit in the absence of the condition.").
404. Radin, supra note 290, at 1870.
405. Id. at 1903-04. Radin's description of the "double bind," such as the one created by prohibiting the alienation of sexual and reproductive services without addressing the needs that lead some women to try to sell those services, id. at 1915-16, seems at first glance to apply to the issue of plea bargain waivers. With defendants in an unequal negotiating position relative to the prosecution, will not prohibiting them from using one of their bargaining chips place them in a worse position? However, unlike sexual and reproductive services, the right to disclosure of favorable evidence is neither personal to the defendant nor tied up in his or her "personhood." Rather, Brady rights are structural protections owed by the prosecutor to society.
406. See Rose-Ackerman, supra note 397, at 938; see also Calabresi & Melamed, supra note 399, at 1111.
when "third parties would be willing to pay to obtain the benefits or to avoid the harms imposed on them, but because they are not part of the transaction, benefits are too low and costs are too high." Justice Kennedy recognized this problem when he suggested in his concurring opinion in United States v. Olano that significant "systemic costs" would result from enforcing a waiver of the rule requiring that alternate jurors be dismissed when the jury retires. Thus, although efficiency objectives may seem at first glance to be undermined by restraints on the alienability of rights, "closer analysis suggests that there are instances, perhaps many, in which economic efficiency is more closely approximated by such limitations."

Particularly in the context of plea bargaining, difficulties of coordination may cause resources to be allocated inefficiently. For example, while many contract-centered plea bargaining advocates focus on the presumed ability of an individual defendant to accept or reject a plea offer, property theory recognizes that, "[w]here constitutional rightholders would prefer to keep their rights rather than exchange them for government benefits as a general rule, they will nonetheless bargain singly with government to give them up." The potential efficiency of plea transactions is further restricted when the defendant lacks information that is relevant to the potential plea agreement. Since markets are hindered by imperfect information, relieving the government of its duty to disclose material favorable evidence makes the plea bargaining process less

407. Rose-Ackerman, supra note 397, at 938; see also Kreimer, supra note 4, at 1389 ("[T]he transfer of the right from one party to another might have undesirable ramifications for other members of society."). As explained by Calabresi and Melamed, if Taney wanted to sell himself into slavery, Marshall may be harmed "simply because [he] is a sensitive man who is made unhappy by seeing slaves." Calabresi & Melamed, supra note 399, at 1112. Marshall could pay Taney not to sell his freedom, but "because Marshall is not one but many individuals, freeloader and information costs make such transactions practically impossible." Id. "The state must, therefore, either ignore the external costs to Marshall, or if it judges them great enough, forbid the transaction that gave rise to them by making Taney's freedom inalienable." Id.

409. Id. at 742 (Kennedy, J., concurring).
410. Calabresi & Melamed, supra note 399, at 1111.
411. See Rose-Ackerman, supra note 397, at 939-40.
412. Sullivan, supra note 291, at 1482. They do so because they lack information about others' preferences, or to "freeload on others' individual decisions to retain their rights." Id. Institutional externalities as well may undercut the ability of an individual defendant to accept or reject a plea offer. For example, a District of Columbia attorney was suspended from practice because of his unwillingness to allow criminal clients to plead guilty. See Loren Singer, D.C. Won't Reinstate Lawyer Who Opposes Plea Bargains, West's Legal News 10312, 1996 WL 552055, at *1 (Oct. 1, 1996). The lawyer explained that he "believes that attorney-assisted guilty pleas are unconstitutional because 'systemic pressures' prompt clients to plead guilty." Id. As a result, he was not permitted to advise defendants not to accept the government's plea offers.
413. See Rose-Ackerman, supra note 397, at 939.
economically efficient. Thus, restricting the alienability of the defendant's right to the prosecution's disclosure of material favorable evidence would help promote the economic efficiencies of plea transactions.414

Rose-Ackerman's considerations of citizenship and "the responsible functioning of a democratic state" also support restrictions on the alienability of the Brady right to preplea disclosure. Although "[i]nalienability is frequently justified not as an ideal policy but as a second-best response to the messiness and complexity of the world,"415 Rose-Ackerman notes, even without transaction costs few people would tolerate the sale of political votes.416 Epstein agrees, proposing that "[p]rohibiting the sale of votes is thus a low-cost way of preventing these extreme forms of abuse."417

Calabresi and Melamed cast this rationale for inalienability in terms of paternalism, including both "self paternalism and true paternalism."418 Self paternalism, they explain, "may cause us to require certain conditions to exist before we allow a sale of an entitlement; and it may help explain many situations of inalienability, like the invalidity of contracts entered into when drunk, or under undue influence or coercion."419 True paternalism, on the other hand, is based on a belief that "the most efficient pie is no longer that which costless bargains would achieve, because a person may be better off if he is prohibited from bargaining."420 These paternalistic rationales for alienability have elicited spirited objections suggesting "that the conceptions of the good life from which such choices flow should be personal, not collective."421 However, as noted by Kathleen Sullivan, the very existence of constitutional rights, "unlike consumer tastes or preferences, results from the prior 'paternalistic' act of enacting a Constitution."422

A potentially less controversial way of viewing this rationale is as an implicit limitation of non-ownership. Rose-Ackerman, for example, recognizes that "problems arise in controlling the opportunistic behavior of a person who purports to act on behalf of another."423 To the extent that the right in question is not the exclusive property of

414. Some might argue that the most "efficient" means of criminal adjudication would be to lock up the most defendants as quickly as possible. However, this argument ignores the gross inefficiencies and societal costs of punishing the innocent. Under such a facile approach, the most efficient step would be to jettison the Bill of Rights itself.
415. Id. at 969.
416. Id.
417. Epstein, supra note 392, at 988.
418. Calabresi & Melamed, supra note 399, at 1113.
419. Id.
420. Id. at 1114.
421. Sullivan, supra note 291, at 1480.
422. Id.
423. Rose-Ackerman, supra note 397, at 940.
the person seeking to barter it, alienation is properly prohibited. Along these lines, Justice Souter emphasized in his dissent in *Mezzanatto* that a defendant cannot waive a rule that does not serve merely as his "personal right," but rather was "meant to serve the interest of the federal judicial system." Thus, if preplea disclosure is viewed as the right of the society that accepts plea bargains in lieu of trials, then it is not the defendant's personal right to waive. In this formulation, the right to receive disclosure may be exercised but not alienated by the defendant.

Viewing the right from the other direction, one might instead ask whether the government should be permitted to contract out of its duty to provide preplea disclosure. Laurence H. Tribe proposes that, where rights are linked to affirmative duties, they are "relational and systemic" and "necessarily inalienable: individuals cannot waive them because individuals are not their sole focus." "This sort of right," Tribe explains, should be "inalienable because the relationships its enforcement secures would otherwise be too vulnerable to destruction by private bargains."

Along these lines, the disclosure of material favorable evidence has been characterized by the Supreme Court not merely as a right of the defendant but as the "affirmative duty" of the prosecution under the Due Process Clause. Moreover, as noted above, that duty is also both an ethical and a statutory obligation of the prosecution. In other words, the prosecutor's institutional duty to disclose favorable material evidence is owed not merely to the defendant personally but to society as a whole. Because that duty is broader than the defendant's personal right, the defendant may not relieve the prosecutor of it, even through consensual transaction.

This recognition that such "structural protections" are inalienable can be found in cases cited by the Supreme Court in *Mezzanatto*. In *Peretz v. United States*, the Court noted that a litigant may not waive Article III structural protections. Likewise, the Court in *United States v. Wheat* held that a defendant may not waive his right to conflict free representation on the grounds that "[n]ot only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by

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424. 513 U.S. at 214 (Souter, J., dissenting); see also supra notes 294-300 and accompanying text.
426. *Id.* at 335.
428. See *id.* at 432-41.
430. *Id.* at 937.
unregulated multiple representation.”

Allowing such a waiver, Chief Justice Rehnquist explained, “not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge.”

Thus, under both efficiency and structural rationales, Brady rights should be inalienable. Due to the information gains resulting from the prosecutor’s duty to disclose material favorable evidence, prohibiting defendants from waiving the right would promote the efficiency of criminal adjudications. Moreover, as a structural right, it is simply not the defendant’s right to alienate; “an individual decision to waive it is irrelevant.”

As the Supreme Court noted in Commodity Futures Trading Commission, when such structural protections “are at issue, notions of consent and waiver cannot be dispositive because [they] serve institutional interests that the parties cannot be expected to protect.”

4. Procedural Due Process

Many courts have explicitly recognized broad due process limitations on the application of contract principles to plea bargains. For example, the Fourth Circuit in Cooper v. United States held that a defendant has a constitutional right to expect that a formally advanced governmental plea proposal will not be revoked without sufficient reason on the grounds that, in the plea bargaining context, “the constitutional right to ‘fairness’ [is] wider in scope than that defined by the law of contract.”

Commentators have likewise developed theories regarding plea bargains and criminal waiver based upon procedural due process and

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432. Id. at 160.
433. Id. at 162 (quoting United States v. Dolan, 570 F.2d 1177, 1184 (3d Cir. 1978)).
434. Kreimer, supra note 4, at 1387; see also Sullivan, supra note 291, at 1479 (explaining that Kreimer “has proposed that the inalienability of a right generally should constitute an alternative ground for invalidating a conditioned benefit in the absence of coercion. Kreimer suggests that grounds for inalienability may include the effects of alienation of constitutional rights on ‘the structure and power of government,’ ‘the structure of society,’ and ‘other members of society.’”).
436. Id. at 851.
437. 594 F.2d 12 (4th Cir. 1979).

Courts that view plea agreements as contracts may find that a particular agreement denies the defendant due process if it violates traditional contract principles. Other courts, declining to treat plea agreements as enforceable contracts, will nevertheless scrutinize them to see if they violate that fundamental fairness guaranteed by the due process clause.

Id.
fundamental fairness. In each instance, the prosecution’s disclosure under *Brady* of favorable material evidence is portrayed as an essential component of the plea bargaining process, without which the process would be invalid.

Thomas R. McCoy and Michael J. Mirra have proposed a due process explanation for the Supreme Court’s ongoing support of the practice of plea bargaining. Contending that it is impossible to reconcile the Court’s contract-based defense of plea bargaining with “its continued commitment to the unconstitutional conditions doctrine,” 439 McCoy and Mirra suggest instead that “the Court’s consistent endorsement of plea bargaining in the face of the unconstitutional conditions doctrine is best understood as an implicit due process holding that plea bargaining is a constitutionally adequate alternative procedure for the determination of guilt.” 440 Thus, under the theory put forward by McCoy and Mirra, “the Court’s plea bargaining cases are understandable as holdings that plea bargaining provides the procedural accuracy required by due process, without offending other constitutional interests arising from substantive due process notions of fundamental fairness.” 441

Additional waivers as part of the plea agreement ought to be acceptable under such a due process approach to the extent that the waivers do not undermine the fundamental fairness of the proceeding. 442 However, McCoy and Mirra repeatedly emphasize the importance of the prosecutor’s disclosure of material favorable evidence in ensuring that plea bargaining comports with the minimal level of due process:

Because the defendant bases his choice of plea ultimately on the subjective assessment of his chances of conviction, the state can make the bargain appear more attractive to him by encouraging him to overestimate his chance of conviction at trial. Thus, manipulation of the defendant’s perception of his chance of conviction can create a substantial risk of incremental inaccuracy. *Procedural due process requires that defendants be given the information and assistance*

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The Supreme Court’s insistence that plea bargaining is constitutional in spite of the apparent applicability of the unconstitutional conditions doctrine and in spite of the Court’s application of that doctrine in closely analogous situations seems attributable to an assumption that plea bargaining is merely a contractual arrangement between a defendant and the state.

*Id.* at 910.

440. *Id.* at 915.

441. See *id.* at 916 n.131.

442. *Cf.* Saltzburg, *supra* note 6, at 1277 n.62 (“I doubt whether the defendant could waive the right to fundamentally fair procedures in a criminal case, since the very concept of waiver itself assumes a context in which it can fairly be determined that someone is validly giving up something.”).
necessary to make a reasonably reliable assessment of their chance of conviction at trial.\footnote{McCoy & Mirra, supra note 11, at 933 (emphasis added).}

Under this formulation, while plea bargaining in general comports with due process sufficient to pass constitutional muster, a waiver of the right to preplea \textit{Brady} disclosure would not.\footnote{See id. In the plainest possible terms, a defendant must be told what facts the state must prove to convict him of the crime charged, and he must be fully informed of the evidence available to the state and the defense on those factual issues. Thus, all the opportunities for discovery and construction of defenses usually available to a defendant prior to or during trial must be made available to a defendant before he is confronted with plea bargaining negotiations. Id.} Moreover, without preplea disclosure, the entire plea bargaining process would fail as fundamentally unfair. Thus, the constitutionality of plea bargaining itself depends on the availability of preplea disclosure.\footnote{Id. See McCoy & Mirra, supra note 11, at 933 n.173. All constitutionally mandated pretrial discovery must be extended to benefit the defendant prior to arraignment and choice of plea. For example, the state must disclose any evidence that would have created a reasonable doubt if introduced at trial. Otherwise, defendants whose guilt would not be supported by the evidence at trial will plead guilty because the prosecution has hidden the weaknesses of its case. A prosecutor's concealment of exonerating evidence or his use of falsified evidence during plea negotiations would cause erroneous guilty pleas in the same manner that these illegal practices lead to erroneous convictions at trial. Id.}

Edward L. Rubin, in proposing a “general theory” of waiver, similarly focuses on a due process standard. Rubin argues that for all “adjudication-related” waivers, such as plea bargains, “courts should require that the functional equivalent of due process protection be provided in the interaction between parties.”\footnote{Rubin, supra note 4, at 538.} This due process standard as applied to plea bargains “would protect against the dangers of waivers; under a rigorous application of such a standard, a waiver would be no more likely to produce injustice than would a full-scale procedure.”\footnote{Id.}

Using the basic measure for due process applied by Rubin, a plea bargain waiver “is valid only when the equivalent of notice and a hearing is provided by the interaction between the parties themselves.”\footnote{Id. at 539.} In this context, Rubin, like McCoy and Mirra, stresses the importance of preplea disclosure in ensuring the fundamental fairness of the entire plea bargaining process. The right to preplea disclosure cannot be waived, he argues, because “[t]he functional equivalent of notice is the presentation of certain information to the
party being asked to execute the waiver." Again, without preplea disclosure, plea bargaining itself would fail under the due process standard.

The fundamental fairness approaches proposed by Rubin and McCoy and Mirra echo both the structural integrity rationale for inalienability under property theory and the public policy rationale for finding a transaction invalid under contract theory. Recent scholarship attempting to reconcile the "doctrinal disarray" of unconstitutional conditions, as well, has applied a similar "systemic approach." Thus, all four theoretical disciplines considered in this section raise common themes supporting the inalienability of Brady rights.

Moreover, as noted above, an explicit purpose of the prosecution's duty to disclose favorable material evidence is to permit defense counsel to provide competent advice to the defendant. The suppression of such evidence by the prosecution, therefore, precludes defense counsel from providing effective assistance to the defendant in deciding whether to plead guilty, and renders the guilty plea itself presumptively invalid. This point is especially critical in light of the Supreme Court's placement of primary, if not exclusive, reliance on assistance of counsel in ensuring that a defendant's guilty plea is voluntary and intelligent. The connection between assistance of counsel and preplea disclosure of material favorable evidence is further underscored by the fact that the standard for materiality under Bagley mirrors the Strickland standard for effective assistance of counsel: "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Thus, if the undisclosed evidence is material under the definition in Bagley, the defendant has necessarily been prejudiced by the denial of effective assistance of counsel under Strickland.

Finally, it is worth recalling that the duty of the prosecutor to disclose material, favorable evidence articulated in Brady and its progeny is itself a due process requirement. If, as determined by the courts of appeals that have considered the issue, the right to preplea

449. Id.; see also Sheppard, supra note 151, at 166 (noting the inherent unfairness in plea bargaining when vital information is peculiarly within the knowledge and possession of the prosecutor).
450. See Sullivan, supra note 291, at 1417. Such an approach, Sullivan argues, recognizes that "the preferred constitutional liberties at stake in unconstitutional conditions cases do not simply protect individual rightholders piecemeal. Instead, they also help determine the overall distribution of power between government and rightholders generally, and among classes of rightholders." Id. at 1490.
451. See supra Part II.A.
452. See Sheppard, supra note 151, at 188-89.
453. See supra text accompanying notes 76-161.
disclosure is necessary to ensure due process in the disposition of the
criminal charges against the defendant, then it cannot be
relinquished without a denial of due process. Ultimately, because
preplea disclosure is required to ensure that a guilty plea comports
with due process, then it cannot be waived without the plea itself
being invalidated.

IV. CONCLUSION: APPEAL WAIVERS REVISITED

This Article has proposed a new approach for analyzing the
enforceability of plea bargain waivers. The first part of this approach
is a taxonomy intended to clarify the various types of criminal waiver.
Section III.A identified four species of waiver: intentional
relinquishment; forfeiture; election; and alienation. Whether a
particular right may be "waived" as part of a plea agreement depends
at the outset upon the variety of waiver applicable to that right.

Although the four kinds of waiver are distinct, they can be
understood as a series of narrowing questions by a court looking back
at a criminal adjudication to determine if there was a defect that calls
for reversal of the defendant's conviction or sentence. After
identifying the scope of the right at issue, the conditions for its(exercise and any effects from other applicable interests, the court
can then examine the circumstances under which the right was lost or
denied. Did the defendant's failure to exercise a right result in its
forfeiture? This might occur on account of negligence or a lack of due
diligence, or on account of acts inconsistent with the assertion of the
right. Did the defendant's decision to exercise one right result in the
defendant's election of that right to the exclusion of another right? If
not, did the defendant intentionally relinquish the right by unilateral
act, or did he alienate the right by agreeing not to exercise it as part of
a bargain, either with another private party or with the government?
By following this progression, a court can determine which variety of
waiver is applicable.

Notwithstanding this systematic approach, however, determining
the applicable type of waiver can be tricky in practice. As
demonstrated by the Supreme Court's vacillation on whether a double
jeopardy claim is automatically forfeited by a guilty plea or is instead
a surviving claim that may nevertheless be alienated as part of a plea
agreement, the appropriate form of waiver analysis to apply to a
claim brought after a defendant's otherwise valid plea may not always
be obvious. Although it appears that the non-jurisdictional

456. See supra Part II.B.
457. This would include whether the defendant was divested of the right due to
prior misconduct. For example, the prior commission of a felony may cause the
defendant to lose the right to bear arms or to vote in elections.
458. See supra notes 87-183 and accompanying text.
antecedent claims that survive the act of pleading guilty are those, like the rights to Brady material and effective assistance of counsel, necessary to ensure that the plea itself is knowing and voluntary, the Supreme Court has never expressly articulated anything close to such a rule. Nevertheless, recognizing the distinctions among the four types of waivers will at a minimum help to ensure that the right at issue is not improperly subjected to a generic “presumption of waivability.”

Having determined the circumstances under which the right was supposedly lost, the court can then consider whether such a loss is enforceable.

The second part of the approach applied in Part III.B of this Article addresses the question of whether to enforce the loss of a particular right with a communicative model of consensus through dialogue. By concurrently applying different and potentially inconsistent theories with the understanding that no one theory is dispositive but that all may have useful insights to add to the analysis, this model avoids any dogmatic adherence to a single theoretical construct and instead strives to simulate the combined wisdom of a symposium of legal theorists. The legitimation of such an approach is the major contribution of Legal Pragmatism.

Recognizing that “pragmatism is the implicit working theory of most good lawyers,” proponents and critics alike have suggested that this contribution is somewhat “banal.” An understandable criticism of Legal Pragmatism is that it “does not supply distinctive standards for constructing or evaluating theories, but instead admonishes thinkers to adhere to standards that they already accept.”

460. Grey, supra note 16, at 26 (“Unlike the other recent jurisprudential approaches, legal pragmatism is inclusive, treating the current theories as perspectives, each of which can add to the understanding of law.”).

As against the jurisprudential grand theorists—the proponents of law-and-economics, hermeneutics, committed critique, and updated natural law—pragmatists remind lawyers that their activities are complex and multifarious, and unlikely to be completely accounted for by any single theory, however compelling its application in any particular context. As against the much more numerous anti-theoretical lawyers, pragmatists argue that the grand theories, if understood as partial perspectives, do not cancel each other out, but rather that each of them has something to contribute to the understanding of law.

Id. at 37-38.
461. Grey, supra note 1, at 1590.
462. See Thomas C. Grey, Holmes and Legal Pragmatism, 41 Stan. L. Rev. 787, 814 (1989) (“At its most abstract level [pragmatism] concludes in truisms: Law is more a matter of experience than of logic, and experience is tradition interpreted with one eye on coherence and another on policy.”); see also Steven D. Smith, The Pursuit of Pragmatism, 100 Yale L.J. 409, 429 (1990) (criticizing pragmatists for failing to offer methods for theorizing, other than those already existing); see generally Rorty, supra note 16, at 1811.
463. Smith, supra note 462, at 446.
And yet, it does more than that. What Legal Pragmatism offers is "freedom from theory-guilt." As noted by Thomas Grey, "pragmatist jurisprudence is a theoretical middle way between grand theorizing and anti-intellectual business-as-usual." Along these lines, Grey argues that "the best response to neglect of theory is not pragmatist jurisprudential sermonizing, but concrete demonstrations of how theoretical approaches can help solve practical problems." Applying theoretical approaches drawn from the doctrines of unconstitutional conditions, contracts, property and procedural due process, this Article has shown that a waiver of the right to disclosure of material favorable evidence cannot be enforceable.

Daniel Farber explains that the eclectic spirit of Legal Pragmatism "provides no reason to exclude consideration of original intent, precedent, philosophy, social science, or anything else that might be appropriate and helpful in resolving a hard case. Ideally, all of these factors point to the same outcome." In the case of the plea bargain waiver of Brady rights, all of the factors do point to the same outcome. However, even where the plea bargain innovation's validity is not as plainly discernable as the Brady waiver because all factors may not point to the same outcome, Legal Pragmatism still provides a useful approach for making the best decision possible under the circumstances.

The remainder of this Article briefly revisits the issue of plea bargain waivers of the right to appeal. Although a majority of courts have held that most appeal waivers are presumptively enforceable, the theoretical justification for this result has been shaky at best. Recognizing this problem, some courts have recently begun carefully scrutinizing plea bargain appeal waivers. An approach in the spirit of Legal Pragmatism would greatly facilitate those efforts.

As discussed above, while the Supreme Court has long held that imposing a chilling penalty upon a defendant's exercise of his "'statutory right of appeal or collateral remedy would be... a violation of due process of law," most courts have determined that

464. Rorty, supra note 16, at 1815 (citing Grey, supra note 1, at 1569).
466. Id.
468. See id.
469. Such a reconsideration of the validity of plea bargain waivers of the right to appeal are particularly ripe in light of the 1999 amendment to the Federal Rule of Criminal Procedure 11(c)(6), which was added to include in the required plea colloquy 'the terms of any provision in a plea agreement waiving the right to appeal or collaterally attack the sentence.' The advisory committee notes accompanying the 1999 amendment to Rule 11 explain: "Although a number of federal courts have approved the ability of a defendant to enter into such waiver agreements, the Committee takes no position on the underlying validity of such waivers."
as a general matter defendants can waive their rights to appeal as part of a plea bargain.\textsuperscript{471} However, the articulated justifications for the enforceability of appeal waiver have progressed only slightly from the facile assertion rejected by the Supreme Court in \textit{Mezzanatto} that since a defendant can waive many constitutional rights as part of a plea bargain it necessarily follows that he can also waive any statutory right.

For example, Ninth Circuit Judge Alex Kozinski, dissenting in \textit{United States v. Gonzalez} from the Ninth Circuit's denial of the government's motion to dismiss the defendant's appeal on the ground that the right to appeal had been waived as part of the plea bargain, offers only a superficial contract defense for the enforceability of appeal waivers.\textsuperscript{472} Citing Judge Easterbrook for the conclusion that "[p]lea bargains are an important—indeed an essential—component of our criminal justice system; they provide vast benefits to the government, to our courts, to the public and to criminal defendants,"\textsuperscript{473} Judge Kozinski argues that the waiver must be upheld under a hornbook contract formulation since "[t]he defendant breaches the contract when he nevertheless files a notice of appeal after agreeing not to do so, thereby denying the government, the public, and the courts the benefit of the plea agreement."\textsuperscript{474}

Judge Easterbrook himself presents for the Seventh Circuit in \textit{United States v. Wenger} only a slightly more nuanced Law and Economics justification for the enforceability of plea bargain appeal waivers.\textsuperscript{475} Judge Easterbrook begins by mocking the defendant's claim that his waiver was not knowing or voluntary since it was not attended by "elaborate warnings after the fashion of those used for the most vital constitutional rights,"\textsuperscript{476} stating that "other rights may be surrendered without warnings of any kind and with considerably less formality."\textsuperscript{477} Judge Easterbrook places the right to appeal "in the latter category—not simply because it depends on a statute rather than the Constitution but because it has long been seen as the kind of

\textsuperscript{395} U.S. 711, 724 (1969) (omission in original)).

\textsuperscript{471} \textit{See} Calhoun, \textit{supra} note 109, at 148-49 ("[E]arly cases invalidating appeal waivers on due process 'chill' theory simply cannot be squared with current due process doctrine as articulated by the Supreme Court.").

\textsuperscript{472} 981 F.2d 1037, 1040, 1042 (9th Cir. 1992) (Kozinski, J., dissenting) (contending that contract law standards apply to plea bargain agreements because they are products of bargained-for exchange).


\textsuperscript{474} \textit{Id.}

\textsuperscript{475} 58 F.3d 280, 283 (7th Cir. 1995).

\textsuperscript{476} \textit{Wenger}, 58 F.3d at 281 (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938), and Federal Rule of Criminal Procedure 11(c)).

\textsuperscript{477} \textit{Wenger}, 58 F.3d at 281 (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (Fourth Amendment right to privacy), and United States v. Mezzanatto, 513 U.S. 196 (1995) (right to exclude from evidence proffer made as part of plea negotiations)).
right that depends on assertion,” adding that a “litigant who does not take a timely appeal has forfeited any entitlement to appellate review.” In suggesting that the right to appeal may be lost as part of a plea bargain due to mere inadvertence, Judge Easterbrook thus commits the common taxonomic error of conflating the alienation and forfeiture aspects of waiver.

Judge Easterbrook goes on to assert that “[r]ight holders are better off if they can choose between exercising the right and exchanging [it] for something they value more highly.” However, as discussed above at length, unfettered alienation of certain rights can make the criminal justice “market” less rather than more efficient. Moreover, Judge Easterbrook’s argument completely ignores the error-correcting role that appeals play in ensuring the structural integrity of criminal adjudications. In fact, most circuits, including the Seventh, have since held that a waiver of the right to appeal is not enforceable with respect to such claims as ineffective assistance of counsel in deciding to plead.

The Second Circuit recently began to apply a more developed contract-based approach to appeal waivers. As a preliminary matter, the Second Circuit has insisted, in determining whether to enforce plea bargain waivers of the right to appeal, that the waivers be both knowing and voluntary, and that the waiver provision of any plea agreement be construed narrowly. Moreover, the Second Circuit has taken seriously the public policy limitations on contract enforceability as applied to appeal waivers. Along these lines, the Second Circuit has explicitly considered “institutional and societal values,” as well as the integrity of the courts and the legitimacy of the sentencing process, in determining whether to enforce appeal waivers.

The Second Circuit, nevertheless, has refused to invalidate most appeal waivers, explaining that “[i]t is not our intention to hamper or restrict parties’ ability to enter pleas, so long as the agreement does not result in a serious detriment to important public or private

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478. Wenger, 58 F.3d at 282.
479. Id. (citing Mezzanatto, 513 U.S. at 208).
480. See United States v. Woolley, 123 F.3d 627, 634-37 (7th Cir. 1997); United States v. Baramdyka, 95 F.3d 840, 844 (9th Cir. 1996); United States v. Henderson, 72 F.3d 463, 465 (5th Cir. 1995); Watson v. United States, 165 F.3d 486, 489 (6th Cir. 1999).
481. See United States v. Ready, 82 F.3d 551, 555-56 (2d Cir. 1996); cf. United States v. Rosa, 123 F.3d 94, 98 (2d Cir. 1997) (noting that the analogy between plea agreements and contract law is imperfect and, therefore, cannot be strictly applied).
482. Ready, 82 F.3d at 556.
483. See United States v. Yemitan, 70 F.3d 746, 748 (2d Cir. 1995) (noting that public policy constraints applicable in contract law are equally applicable to plea agreements); see also United States v. Rosa, 123 F.3d 94, 98 (same).
484. Ready, 82 F.3d at 555.
485. See id. at 556.
interests, and we thus ordinarily enforce these waiver provisions." 486 However, the Second Circuit has categorically forbidden certain types of appeal waivers. For example, the Second Circuit has repeatedly stated that it will not enforce a waiver of the defendant's right to appeal a sentence that has not been adequately explained by the district court, 487 or a sentence based on racial or ethnic bias, 488 or the defendant's naturalized status. 489 The Second Circuit has also stated that it will not enforce an appeal waiver where the government has breached the terms of the plea agreement, 490 or where the defendant claims ineffective assistance of counsel in deciding to plead. 491

Most recently, the Second Circuit has carefully scrutinized innovative appeal waivers providing that the defendant is forbidden not only from appealing "a sentence falling within a range explicitly stipulated within the agreement itself," 492 but from appealing any sentence as long as it is "within or below the applicable Sentencing Guidelines range as determined by the Court." 493 In United States v. Rosa the Second Circuit expressed serious reservations about such an "unorthodox" appeal waiver, 494 noting with concern that the estimated range in the plea agreement provides "no protection to the defendant" and "presents grave dangers and implicates both constitutional questions and ordinary principles of fairness and justice." 495

Recognizing that "the waiver provision used by the Government in this case leaves a criminal defendant entirely to the mercy of the sentencing court," 496 particularly with regard to upward departures for

486. Rosa, 123 F.3d at 97; see also Yemitan, 70 F.3d at 748 ("If this waiver does not preclude a challenge to the sentence as unlawful, then the covenant not to appeal becomes meaningless and would cease to have value as a bargaining chip in the hands of defendants.").
487. See Yemitan, 70 F.3d at 748 (reaching this conclusion without deciding it on the facts).
488. See Rosa, 123 F.3d at 98; Yemitan, 70 F.3d at 748.
489. See United States v. Jacobson, 15 F.3d 19, 22-23 (2d Cir. 1994).
490. See Rosa, 123 F.3d at 98.
491. See id.
492. See id. at 96.
493. See id. at 99 (quoting Rosa's plea agreement) (emphasis in original).
494. See id. In Rosa, a defendant charged with firearm offenses agreed to plead guilty in exchange for an estimated sentence of 15 to 21 months based upon a federal sentencing guideline offense level of 14. Id. at 96. The Probation Department's Pre-Sentence Report, however, recommended sentencing at an offense level of 22 based upon uncharged "relevant conduct," and the court ultimately sentenced Rosa to 27 months, the low end of offense level 18. Id. Although Rosa's plea bargain contained a provision waiving the right to appeal, he challenged the increase in the offense level from 14 to 18 and the commensurate increase in the duration of his sentence. Id. at 96-97. The plea agreement provided: "The defendant agrees not to file an appeal in the event that the Court imposes a sentence within or below the applicable Sentencing Guideline range as determined by the Court." Id.
495. Id. at 99.
496. Id.
"relevant conduct," the court in Rosa rejected the government's "economic efficiency argument" that in exchange for its "attractive offers, it ought to be assured that it will not have to engage in protracted appellate litigation," on the grounds that "the relevant conduct provision of the Guidelines can make illusory what appears in advance to be a good deal."\textsuperscript{497} The court further suggested that it would be hard for such a broad waiver to be "made knowingly and voluntarily" since it "is complex, and may be ambiguous and confusing to a defendant."\textsuperscript{498}

Nevertheless, the Rosa court held that the waiver provision was not "facially invalid,"\textsuperscript{499} concluding that "[i]ts terms will not automatically achieve an unfair result, and it does not inherently violate the Constitution."\textsuperscript{500} Instead, the court decided to review appeal waivers on a case-by-case basis.\textsuperscript{501} The Rosa court recognized that such careful scrutiny would negate "much of the benefit that the Government receives from the waiver provision, i.e., deterrence of appeals and savings in the time and expense of appeal,"\textsuperscript{502} and recommended that the government reconsider the use of such waivers.\textsuperscript{503}

Giving credence to this recommendation, the Second Circuit has twice gone on to invalidate this type of appeal waiver as applied. First, in United States v. Martinez-Rios, the Second Circuit considered the same appeal waiver provision as in Rosa, but this time held that the waiver was "ineffective" because the record did not demonstrate that "the defendants understood and knowingly agreed to this unusual

\begin{footnotes}
\item[497] Id. at 100.
\item[498] Id.
\item[499] Id. at 101.
\item[500] Id.
\item[501] Id.
\item[502] Id. at 101 n.7.
\item[503] Id. (urging the U.S. Attorney's office to follow the court's comments in drafting future plea agreements); see also Comment, Criminal Law—Plea Agreements—Second Circuit Upholds Plea Provision That Waives Appeal Without Fixed Sentence Range, 111 Harv. L. Rev. 1116, 1121 (1998) (criticizing the court for its failure to impose a categorical rule requiring that appeal waivers contain a specified sentence range).
\end{footnotes}
form of appellate waiver.” Then, in United States v. Goodman, the Second Circuit held unenforceable an appellate waiver provision even broader than that considered in Rosa and Martinez-Rios.

The waiver in Goodman purported “to deny the defendant any appellate challenge not only to the selection of an applicable guideline range but also to any upward departure from that range, as long as the statutory maximum is not exceeded.” Declining to decide “whether this broad form of waiver might ever be enforceable,” the Second Circuit held merely that “it is not enforceable in this case.” Nevertheless, with Goodman, the Second Circuit seemed to move a step beyond its case-by-case approach, and a step closer to an across the board ban of at least that type of appeal waiver.

Such an across the board ban on broad plea bargain appeal waivers is currently in effect in the District of Columbia. Although the D.C. Circuit itself has not yet spoken on the issue, the D.C. district court has repeatedly held that plea agreement provisions waiving both direct and collateral appeals “on any ground whatsoever” are facially unenforceable since as a matter of law they cannot be knowing and voluntary. In doing so, the D.C. district court judges have relied principally on Fifth Circuit Judge Parker’s concurrence in United States v. Melancon, which provides the best articulation to date of a Legal Pragmatist approach to appeal waivers.

The majority in Melancon recited in tired syllogism: “The right to

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504. 143 F.3d 662, 668-69 (2d Cir. 1998).
505. See 165 F.3d 169, 174 (2d. Cir. 1999).
506. Id.
507. Id. Taking the “close look” prescribed by Rosa, the court in Goodman noted, first, that the defendant “received very little benefit in exchange for her plea of guilty” to the one count changed by the government, since none other could have been charged. Id. Second, “although Goodman obtained the Government’s agreement to recommend a four-level downward adjustment for her role in the offense and a two-level adjustment for acceptance of responsibility, she received neither at sentencing.” Id. Third, the district court misstated the terms of the waiver provision during allocution, suggesting that Goodman retained the right to appeal her sentence if the court departed upward or chose a different offense level. See id. Finally, the court noted that “the discrepancy between the sentence imposed—30 months in prison—and the predicted sentencing range—10 to 16 months—is substantial.” Id. “In light of all these circumstances,” the court held, “we will not enforce the broad form of waiver in this case, one that would subject the defendant to a virtually unbounded risk of error or abuse by the sentencing court.” Id. at 175 (quoting United States v. Rosa, 123 F.3d 94, 99 (2d Cir. 1997)).
508. See United States v. Johnson, 992 F. Supp. 437, 439 (D.D.C. 1997) (noting that at the time of the plea, the defendant cannot know that he may be waiving his right to appeal an illegal or improper sentence); United States v. Raynor, 989 F. Supp. 43, 44 (D.D.C. 1997) (concluding that a waiver of the defendant’s right to appeal his sentence before it is imposed is by definition uninformed and unintelligent).
509. See Johnson, 992 F. Supp. at 439 (quoting United States v. Melancon, 972 F.2d 566, 571 (5th Cir. 1992) (Parker, J., concurring)); see also United States v. Melancon, 972 F.2d 566, 570 (5th Cir. 1992) (Parker, J., concurring) (“I concur specially because I cannot dissent. This panel is bound by the unpublished, per curiam opinion, United States v. Sierra.”).
appeal is a statutory right, not a constitutional right. The Supreme Court has held that a defendant may waive constitutional rights as part of a plea bargaining agreement, so, clearly, a defendant may also waive the statutory right to appeal."\(^{510}\) Judge Parker dissented on several compelling grounds, including that an appeal waiver can never be knowing and intelligent,\(^{511}\) that its enforcement is contrary to the public interest,\(^{512}\) that it is void both as an "unconstitutional condition"\(^{513}\) and as presenting a realistic likelihood of "prosecutorial vindictiveness,"\(^{514}\) that the costs of its enforcement outweigh its benefits,\(^{515}\) and that, unlike plea bargains in general, appeal waivers are "devoid of systemic or societal value."\(^{516}\)

Following Judge Parker's dissent in *Melancon*, the D.C. district court has added that the "glaring inequality" of appeal waivers that do not limit the government's right to appeal a sentence are impermissible contracts of adhesion,\(^{517}\) that such unconditional appeal

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510. 972 F.2d 566, 567 (5th Cir. 1992) (citations omitted).
511. *See id.* at 571 ("I do not think that a defendant can ever knowingly and intelligently waive, as part of a plea agreement, the right to appeal a sentence that has yet to be imposed at the time he or she enters into the plea agreement; such a 'waiver' is inherently uninformed and unintelligent.").
512. Judge Parker argued that the statutory right to appeal, "along with the Sentencing Guidelines themselves, speak directly to the power of the federal courts and should be read as imposing limitations upon individual and judicial authority. Such limitations cannot be 'waived' by parties." *Id.* at 573; *see also id.* at 574-75 (contrasting non-waivability of the Speedy Trial Act and plea bargains, both of which protect the systemic value of speedy justice, with a defendant's waiver of review, which offends the goals of the Sentencing Guidelines).
513. *Id.* at 578; *see also Dyer & Judge, supra* note 117, at 657 (urging universal invalidation of appeal waivers on the grounds that they violate the due process doctrine of unconstitutional conditions). *But see Calhoun, supra* note 109, at 150 (arguing that the doctrine of unconstitutional conditions "is ill-suited to application to" waivers of the right to appeal since it has been consistently rejected by the Supreme Court in the plea bargaining context).
514. *Melancon, 972 F.2d at 578. But see Calhoun, supra* note 109, at 151 (noting the limitations of applying the doctrine of vindictive prosecution to the appeal waiver context since "the Court has been quite unequivocal in its declared intent to distinguish plea bargaining practice from the rule established in the vindictiveness line of cases").
515. "[F]ar from *decreasing* the Court's workload in this area of the criminal law," Judge Parker argued, "the Sierra rule appears certain to *increase* it" regarding whether the waiver of the right to appeal was voluntary and intelligent in the absence of a Rule 11 requirement. *Melancon, 972 F.2d at 579*. Moreover, Judge Parker added, "[a]ny small 'gain' in 'speed,' 'economy,' or 'finality' derived from Sierra's continued sovereignty is overwhelmed by the rule's exorbitant, unacceptable cost to judicial and congressional integrity, and individual constitutional rights." *Id.* (citations omitted).
516. *Id.*. "Certainly, the (due process violation) risks run by the Sierra Waiver are *not necessary* to the survival of the generally beneficial institution of plea negotiation." *Id.; see also Dyer & Judge, supra* note 117, at 661 (arguing that waiver of appellate rights is not a necessary element in the plea bargaining process).
 waivers are fatally overbroad,\textsuperscript{518} and that they are void for public policy reasons.\textsuperscript{519} Along these lines, Robert K. Calhoun recently presented a fully developed public policy argument for the unenforceability of plea bargain waivers of the right to appeal.\textsuperscript{520} Most recently, United States District Judge Gertner issued a carefully reasoned and thorough opinion invalidating a narrow appeal waiver as against public policy.\textsuperscript{521} Although the issue of appeal waivers is not as clear-cut as \textit{Brady} waivers, these arguments call into question the

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\textsuperscript{518} See \textit{Johnson}, 992 F. Supp at 439 n.3 ("Presently under the government's plea agreement, a defendant could not appeal even from a sentence that was cruel and unusual in the Eighth Amendment sense."). The court in \textit{Raynor} further noted that "the government itself concedes that certain of defendants' rights were not meant to be waived, and it therefore admits that the waiver provision in the plea agreements in this case is not even an accurate statement of the law." 989 F. Supp. at 46. The \textit{Raynor} court then quoted an October 1995 memorandum from Acting Assistant Attorney General John C. Keeney stating:

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A sentencing appeal waiver provision does not waive all claims on appeal. The courts of appeals have held that certain constitutional and statutory claims survive a sentencing appeal waiver in a plea agreement. For example, a defendant's claim that he was denied the effective assistance of counsel at sentencing, United States v. Attar, [38 F.3d 727 (4th Cir. 1994)]; that he was sentenced on this basis of his race, United States v. Jacobson, 15 F.3d 19 (2d Cir. 1994); or that his sentence exceeded the statutory maximum, United States v. Marin, 961 F.2d 493, 496 (4th Cir. 1992), will be reviewed on the merits by a court of appeals despite the existence of a sentencing appeal waiver in a plea agreement.
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\textit{Id.}

\textsuperscript{519} \textit{Johnson}, 992 F. Supp. at 439 ("[A] defendant's waiver of the right to appeal from an improper sentence runs contrary to the very purpose underlying the Sentencing Guidelines."); see also \textit{Dyer & Judge, supra} note 117, at 654 ("[P]ublic policy forbids prosecutors from insulating themselves from review by bargaining away defendants' rights to appeal.").

\textsuperscript{520} Calhoun challenges policy arguments raised in favor of plea bargain waivers of the right to appeal, including the claims that the courts are currently being overwhelmed by frivolous appeals, that precluding the waiver would deny defendants an important bargaining chip in their plea negotiations, that the interests of defendants who plead guilty are already adequately safeguarded, and that the waivers promote finality. See \textit{Calhoun, supra} note 109, at 179-200. Concluding that a public policy challenge to appeal waivers has a better chance of success than the due process challenge, Calhoun argues that the reliability of appellate review helps ensure "procedural fairness" through its error correction function. \textit{Id.} at 213. He also argues that appeals "serve a variety of broader, 'institutional' purposes which include the articulation and systematic development of the law, the assurance that the law will be applied with some degree of uniformity and, finally, the legitimation of the criminal justice system in the eyes of the public." \textit{Id.} In response to the policy arguments in favor of appeal waivers, he contends that in fact most appeals are not frivolous. See \textit{Id.} at 214. Calhoun also responds that, far from being a valuable bargaining chip, the defendant's waiver of his right to appeal is treated as "the price of admission to plea bargain." \textit{Id.} at 215. Finally, he argues that even if the waivers promote finality and efficiency, it is "at the cost of other important goals—most notably, accuracy and fairness of adjudication." \textit{Id.}

\textsuperscript{521} See United States v. Perez, 46 F.Supp. 2d 59, 60-61 & n.3 (D. Mass. 1999) (noting the absence of controlling First Circuit precedent, and striking a narrow appeal waiver from the defendant’s plea agreement on the grounds that the provision is unlawful and against public policy).
majority rule that such waivers are presumptively valid. While beyond the scope of this Article, the resolution of the issue of appeal waivers, no less than *Brady* waivers, would benefit from a healthy dose of Legal Pragmatism.

The market for plea bargains is highly adaptive. We can expect that innovations in plea agreement waivers will become both more numerous and more frequent. However, the courts have thus far been ill prepared to deal with these innovations. Deprived of any reasoned explanation from the Supreme Court for the validity of plea bargaining itself, the fine tuning of individual plea agreement waivers has until recently been all but nonexistent. The approach proposed in this Article of precision in taxonomy and pragmatism in applying legal theory provides a flexible and comprehensive methodology for weighing the validity of plea bargain waivers.
Notes & Observations