

2015

## The Emperor's New Clothes: Intellectual Dishonesty and the Unconstitutionality of Plea Bargaining

Robert Schehr

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### Recommended Citation

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# THE EMPEROR'S NEW CLOTHES: INTELLECTUAL DISHONESTY AND THE UNCONSTITUTIONALITY OF PLEA-BARGAINING

*By Dr. Robert Schehr\**

## ABSTRACT

*United States Supreme Court and jurisprudential rationalizations for the constitutionality, centrality, and finality of plea-bargaining signify intellectual dishonesty, ignorance of human behavior and decision-making, and a state-sanctioned threat to personhood and liberty in the United States of America. It is the Author's purpose to expose the imperious practice of plea-bargaining for what it is—a cynical and intellectually dishonest institutional remedy for an unwieldy judicial system that has knowingly rationalized the practice to facilitate expedient resolution of ever-increasing caseloads. In order to establish plea practice as constitutional, the Supreme Court was forced to employ a jurisprudential discourse that shifted from the due-process language found in criminal law, especially the protections afforded by the Fifth and Sixth Amendments, towards contract law where defendants personifying homo economicus are “free” to negotiate away their rights. Beginning in 1930, and again in 1970, the Supreme Court applied an entirely novel standard to the adjudication of criminal cases, and it rationalized its decision on the need for efficiency. What is at stake is nothing less than the integrity of the Constitution, the Bill of Rights, and whatever still remains of an American sense of personhood under the law. The erosion of our rights that are so intimately associated with freedom due to plea-bargaining is an unprecedented injustice that cannot continue.*

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## I. INTRODUCTION

“It is the obvious which is so difficult to see most of the time. People say, ‘It’s as plain as the nose on your face.’ But how much of the nose on your face can you see, unless someone holds a mirror up to you?”<sup>1</sup>

Sometimes we are so eager to believe that we ignore what is as plain as the nose on our face. Such is the case with rationalizations legitimizing plea-bargaining. By now the data is well known. While the practice of plea-bargaining extends to common law and the English court’s application of leniency,<sup>2</sup> in the United States, the roots of plea-bargaining lie in the Puritan practice of “Admonition” leading to reconciliation.<sup>3</sup> Plea-bargaining gained traction in the early nineteenth century, primarily with regard to adjudication of alcohol-related crimes and homicide.<sup>4</sup> By the early twentieth century, as many as 90% of all criminal cases were being pleaded.<sup>5</sup> Today that figure has increased in some jurisdictions to more than 95%.<sup>6</sup> Still, confusion about the efficacy and constitutionality of plea-bargaining persists, especially since plea-bargaining has come to define the way justice is administered in the United States. Scores of insightful law review articles have attempted to explain the pros and cons of our plea system, and in some ways, this will be just one more. However, while the Author shares many of the views espoused by the critics of plea-bargaining, the Author’s analysis of pleas brings to bear the additional theoretical tools afforded by a historical approach to pleas, combined with analysis of legal theory, sociological insights into constituted subjects, and both cognitive psychology and neuropsychology. This Arti-

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1. ISAAC ASIMOV, I, ROBOT 201 (Bantam Dell 2004) (1950).

2. See e.g., John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC’Y REV. 261, 262 (1978) (“When we turn back to the period before the middle of the eighteenth century, we find that common law trial procedure exhibited a degree of efficiency that we now expect only of our nontrial procedure.”); *id.* at 267, n.8 (“The crown witness typically did confess his own crime in the course of testifying against his accomplices, and in this sense it can be said that he exchanged his confessions for the prosecutor’s leniency.”).

3. See e.g., Mary E. Vogel, *The Social Origins of Plea Bargaining: Conflict and the Law in the Process of State Formation, 1830-1860*, 33 LAW & SOC’Y REV. 161, 191 n.41 (1999) (“According to traditional Puritan practice, ‘admonition’ brought leniency in the form of forgiveness and reconciliation but not necessarily an easing of punishment per se. In fact, incarceration was intended not primarily to resocialize and rehabilitate but to remove one from corrupting influences and through isolated reflection to come to reconnection with God’s grace and penitence.”).

4. See MARY E. VOGEL, COERCION TO COMPROMISE: PLEA BARGAINING, THE COURTS, AND THE MAKING OF POLITICAL AUTHORITY 3–35 (2007); GEORGE FISHER, PLEA BARGAINING’S TRIUMPH 19–39 (2003).

5. Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 33 (1979).

6. See, e.g., *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”); *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (using the same language as *Lafler*, 132 S. Ct. at 1388).

cle focuses primarily on contextualizing existing plea case law within cultural mandates for efficiency to show that plea-bargaining fundamentally violates the United States Constitution. The analysis rests on the common-law assumption of the pre-political nature of rights that stand a priori before legislative and juridic privileges.

Section II introduces the problem with plea-bargaining and provides contemporary commentary about it. Section III introduces the most important United States Supreme Court and federal appeals court decisions that address plea-bargaining. Section IV summarizes the doctrine of unconstitutional conditions and plea waivers. Section V applies the doctrine of unconstitutional conditions to pleas but does so within the context of a historical detour through our natural-law heritage. And Section VI concludes and suggests a way forward.

## II. THE EMPEROR AND THE PLEA

Fables help us make sense of complex problems by distancing us from direct involvement with the problem under review while intimately linking us with our ancestral knowledge production, relation to power, cultural capital, and habitus. For example, with the adjudication of pleas, “‘complexities’ are introduced as a means of obfuscation,” especially when “a matter of elementary justice or principle is at issue.”<sup>7</sup> Through fables, we can achieve clarity by stepping back and looking at a contemporary problem through a familiar human-family lens. Folklore helps us understand the cultural threads that subconsciously connect the experiences of human beings across the millennia.

In 1837, Danish author Hans Christian Andersen penned *The Emperor's New Clothes*, based on a Spanish fable dating to the fourteenth century.<sup>8</sup> In *The Emperor's New Clothes*, Andersen tells the tale of an emperor who was something of a dandy.<sup>9</sup> He loved new and ostentatious garments, and he would spend countless hours fancying his likeness before a mirror.<sup>10</sup> One day, two swindlers approached the emperor with an extraordinary offer. “[T]hey knew how to make the finest cloth imaginable. Not only were the colors and the patterns extraordinarily beautiful, but in addition, this material had the amazing property that it was to be invisible to anyone who was incompetent or stupid.”<sup>11</sup>

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7. CHRISTOPHER HITCHENS, LETTERS TO A YOUNG CONTRARIAN 47 (2009).

8. Hans Christian Andersen, *The Emperor's New Clothes*, in THE EMPEROR'S NEW CLOTHES AND OTHER TALES OF AARNE-THOMPSON-UTHER TYPE 1620 (D.L. Ashliman ed., 1999–2014) (1837), available at <http://www.pitt.edu/~dash/type1620.html> (citing as Andersen's source the fourteenth-century Spanish story “The Invisible Cloth”).

9. *Id.*

10. *Id.*

11. *Id.*

*The Emperor's New Clothes* transgresses time and aptly captures our current approach to plea-bargaining. Regardless of who the institutional actor is—the police officer, prosecutor, probation officer, defense attorney, judge, or the United States Supreme Court—each participates in a fraudulent charade masquerading as justice. And, as explained in this Article, each of these actors is responsible in varying degrees for propping up this unworkable and unconstitutional system, largely through a proliferation of intellectual dishonesty. For each, in its own way, senses that the plea-bargaining process requires a firm suspension of disbelief and a commitment to never publicly admit what is known to be true for fear of being labeled incompetent or stupid. Each actor believes as a matter of faith that plea-bargaining is necessarily driven by case-management, resources, and time pressures. And while that is most certainly true, the more penetrating question relates to whether any of these pressures sufficiently warrants usurpation of our personhood and suppression of the substantive and procedural rights guaranteed by the United States Constitution. Colorado Federal District Court Judge Thomas Kelly Kane addressed this question on June 28, 2012, when he rejected a plea agreement that required the defendant to waive his right to appeal.<sup>12</sup> Judge Kane declared: “Prioritizing efficiency at the expense of the individual exercise of constitutional rights applies to the guilty and the innocent alike, and sacrificing constitutional rights on the altar of efficiency is of dubious legality.”<sup>13</sup>

Judge Kane has exposed the Emperor. His opinion unveils the irrational, unconstitutional, utilitarian, substantive, and procedural rationalizations primarily found in case law that are called upon to justify plea-bargaining. And he is not alone. In a May 2014 interview, Manhattan Federal Judge Jed Rakoff was quoted as saying, “The current [plea] process is totally different from what the founding fathers had in mind.”<sup>14</sup> Judge Rakoff proposed greater involvement of junior judges in the plea process as a way to ameliorate prosecutorial overreach.<sup>15</sup> His proposal stems from the recognition that “prosecutors armed with harsh mandatory minimum sentences [would be] less able to bully defendants.”<sup>16</sup> Under Judge Rakoff’s plan, junior judges would hear evidence and make plea recommendations.<sup>17</sup>

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12. *United States v. Vanderwerff*, No. 12-CR-00069, 2012 WL 2514933, at \*5–6 (D. Colo. June 28, 2012).

13. *Id.* at \*4.

14. Daniel Beekman, *Judge: Fix Broken Plea-Deal System*, N.Y. DAILY NEWS, May 27, 2014, at 12, available at <http://www.nydailynews.com/news/crime/judge-plea-deal-process-fixed-article-1.1806358>.

15. *Id.*

16. *Id.*

17. *Id.* While there are very few details revealed in the Daily News article, it appears that Judge Rakoff is proposing a directed verdict standard. If so, he and the Author will be making the same recommendation for at least one way to improve upon contemporary plea practice.

In two Supreme Court decisions from March 2012, the Court acknowledged the ubiquity of pleas.<sup>18</sup> In *Lafler v. Cooper*, Justice Kennedy admitted, “[C]riminal justice today is for the most part a system of pleas, not a system of trials.”<sup>19</sup> And, as Justice Scalia writing in the dissent explained, the Supreme Court has “elevate[d] plea bargaining from a necessary evil to a constitutional entitlement.”<sup>20</sup> This Article aims to expose the imperious practice of plea-bargaining for what it is—a cynical and intellectually dishonest institutional remedy for an unwieldy judicial system that has knowingly rationalized the practice to facilitate expedient resolution of ever-increasing caseloads.

The plea system is so distorted that former criminal defense attorney turned legal academic, Josh Bowers, makes the astonishing claim that “plea bargaining may be the best way for an *innocent* defendant to minimize wrongful punishment.”<sup>21</sup> Gross systemic failure at the point of crime-scene investigation (arrest bias), and prosecutorial charging decisions (charge bias, dismissal aversion, trial bias), are coupled with defendants’ process costs (e.g., waiting, pecuniary loss, inconvenience, and uncertainty), lead Bowers to conclude that, “[i]n low-stakes cases plea bargaining is of near-categorical benefit to innocent defendants, because the process costs of proceeding to trial often dwarf plea prices.”<sup>22</sup> In an essay replete with remarkable brow-furrowing statements, Bowers asserts, “If it is normatively appropriate for the innocent to plead guilty in low-stakes cases, and rational—albeit normatively problematic for reasons unrelated to guilt and innocence—for the innocent to plead guilty in high-stakes cases, then the system must provide effective avenues for innocent defendants to plead guilty.”<sup>23</sup> To which Bowers offers “regularization and systemic acceptance of a common—though neither uniform nor conventionally welcome—underground practice: permitting innocent defendants to offer false on-the-record admissions of guilt.”<sup>24</sup> Because our criminal justice system is so deplorable and injurious to the point where defendants’ process costs outweigh the harm accrued from taking a plea, Bowers would rather see his innocent clients plead guilty than to experience the degradation, humiliation, and systemic violence that would accrue by seeking an acquittal at trial.<sup>25</sup> The Author finds Bowers’s recommendations to be fundamentally flawed and an indication

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18. *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) (“Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.”); *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (using the same language as *Lafler* opinion).

19. *Lafler*, 132 S. Ct. at 1388.

20. *Id.* at 1397 (Scalia, J., dissenting).

21. Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1132 (2008).

22. *Id.*

23. *Id.* at 1123.

24. *Id.*

25. *See id.* at 1119–24.

of just how desperate lawyers and legal academics have become. Ours truly is a Sisyphean effort to render justice from this swelling encumbrance characterized by systemic expediency and intellectual dishonesty.<sup>26</sup>

Recently an exasperated Professor Albert Alschuler, responding to the Supreme Court's decisions in *Lafler* and *Frye*, concluded, "Now, however, the criminal justice system has gone off the tracks, and the rails themselves have disappeared."<sup>27</sup> The system has become so broken according to Alschuler that "the time may have come for criminal justice scholars to abandon the search for ways to make the criminal justice system fair and principled. The principal mission today should be to make it less awful."<sup>28</sup> With great admiration for Alschuler (and a thorough understanding and more than a little angst-ridden commiserating with his palpable discontent), so long as human beings make decisions, they can, through reasoned argument, be influenced to make proper decisions. In steadfastly maneuvering to create a "less awful" criminal-justice system, we may just bump headlong into systemic change. However, in order for that to happen, we will have to unearth the tracks that have long gone missing and avoid careening into the ever-intensifying whirlpool.<sup>29</sup> To that end, the Author joins Professor Stephanos Bibas, who in response to Bowers's anguished recommendation, said the following:

It is awfully tempting to give in to the punishment assembly line, to make it speedier and more efficient and surrender any pretense of doing justice. But our conscience cannot brook that. We must fight; we must continue to proclaim our commitment to exonerating the innocent, however inconsistent we are in pursuing that in practice.<sup>30</sup>

One of the reasons for systemic stasis is the prevalence of groupthink; the rationalizations for it signify a strong human tendency. Besides, plea-bargaining benefits defense attorneys, prosecu-

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26. See generally Robert Schehr, *Shedding the Burden of Sisyphus: International Law and Wrongful Conviction in the United States*, 28 B.C. THIRD WORLD L.J. 129 (2008) (exploring and calling for the use of mythology, like the story of Sisyphus in Greek mythology, as a theoretical framework in which society can better adopt and apply international human rights law while incorporating local cultural values).

27. Albert W. Alschuler, *Lafler and Frye: Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 706 (2013).

28. *Id.* at 707.

29. This is a loosely based reference to Justice Sutherland's famous "rock and a whirlpool" analogy. *Frost v. R.R. Comm'n of Cal.*, 271 U.S. 583, 593 (1926) ("In reality, the carrier is given no choice except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.").

30. Stephanos Bibas, Response, *Exacerbating Injustice*, 157 U. PA. L. REV. ONLINE 53, 57 (2008).

tors, and quite often defendants.<sup>31</sup> But the Author joins the late Christopher Hitchens in his contention that:

It is true that the odds in favor of stupidity or superstition or unchecked authority seem intimidating and that vast stretches of human time have seemingly elapsed with no successful challenge to these things. *But it is no less true that there is an ineradicable instinct to see beyond, or through, these tyrannical conditions.*<sup>32</sup>

History is replete with examples of those who refuse to accept the hypocritical or the unjust.<sup>33</sup> It is the role of the disputant, the rebel, the clever, and the truth-seeker to unmask the Emperor. Their disputations are juxtaposed to the normative platitudes offered up by judges, lawyers, and politicians who recycle well-worn phrases like, “efficiency and necessity,” “voluntary contract,” “free will,” “rational actor,” “presumption of innocence,” “due process,” “public policy,” “just result,” and “voluntary waiver of rights.” Each concept is an empty signifier that must be infused with meaning.<sup>34</sup> As a matter of legal currency, it is the Court’s responsibility to provide us with that meaning.<sup>35</sup> With regard to plea-bargaining, the Court has donned the cloak of the weaver and has seen fit to provide a rationalization for plea-bargaining that is driven by the effects of heavy case loads while scurrilously masquerading as defenders of constitutionally protected rights. As Justice Kennedy explained in *Frye*, “To note the prevalence of plea bargaining is not to criticize it. The potential to conserve valuable resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties.”<sup>36</sup> In both *Lafler* and *Frye*, the Supreme Court spuriously situated plea-bargaining as an equitable contract, one where defendants often “game the system.”<sup>37</sup> To which Alschuler has

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31. See e.g., *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (“The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties.”).

32. HITCHENS, *supra* note 7, at 27 (emphasis added).

33. George Orwell, Oscar Wilde, Rosa Luxemburg, John Stuart Mill, Karl Marx, Rosa Parks, Martin Luther King, Jr. are each good examples. For his part, Marx indicated that his favorite epigram was *de omnibus disputandum*—“everything must be doubted”. *Id.* at 29. For Stuart Mill, it was the free thinker who provided the dialectic necessary to understand normative thought. *Id.* Oscar Wilde believed that no map was complete that failed to include Utopia. *Id.* at 32.

34. See generally 1–8 CHARLES SANDERS PEIRCE, COLLECTED PAPERS OF CHARLES SANDERS PEIRCE (Charles Hartshorne et al. eds., Harvard Univ. Press 1931–1958); JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri Chakravorty Spivak trans., Johns Hopkins Univ. Press corrected ed. 1998); JACQUES LACAN, ÉCRITS (Alan Sheridan trans., Routledge 1977); FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (Wade Baskin et al. trans., Fontana Press 1974) (1916).

35. ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000).

36. *Frye*, 132 S. Ct. at 1407.

37. See *id.* (“To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining



remarked, “This process . . . benefits both parties only in the sense that a gunman’s demand for your money or your life benefits you as well as the gunman.”<sup>38</sup> True, the fortunate defendant in a plea context receives a benefit, but only after having been threatened with far harsher punishment upon prospective conviction at trial (a topic addressed in greater detail in Section III). Anyone seriously suggesting that choice exists in this context is at a minimum naive, and at worst manifestly dishonest.

To those critics who claim that eliminating or severely restricting plea-bargaining would significantly reduce the benefits accruing to defendants, the Author joins the staff at the University of Pennsylvania Law Review who wrote in a Comment in November of 1968 that,

Ruling out bargained pleas, however, will not prevent the prosecutor from gratuitously using his discretion to reduce indictments. Furthermore, the real focus should be on changing the laws, not on perpetuating a system that may erratically alleviate their effect. While in some cases the prosecutor may be stuck with unrealistically aggravated charges not reducible under the proposed rule, he will soon learn to make well advised decisions about which charges to prosecute. *A system freed of plea bargaining would eventually be more beneficial to defendants because the constitutional rights to trial could be exercised in an atmosphere that is in fact free.*<sup>39</sup>

The editors of the Pennsylvania Law Review were barking up the same constitutional tree as asserted in the following pages. They were correct in 1968, and their assessment of plea-bargaining is even more prescient now.

The juridical legitimacy of plea-bargaining rests upon a house of cards. Court decisions over the course of the last century signify a disingenuous intellectual darting between the solid colonnades of substantive and procedural law established by the United States Constitution and the Bill of Rights. Careful not to advance too near to these

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is.” (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1912 (1992)); *id.* (“[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial.” (quoting Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 *STANFORD L. REV.* 989, 1034 (2006))); *Lafler*, 132 S. Ct. at 1387 (“The favorable sentence that eluded the defendant in the criminal proceeding appears to be the sentence he or others in his position would have received in the ordinary course, absent the failings of counsel” (referencing Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 *CAL. L. REV.* 1117, 1138 (2011) (“The expected post-trial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less a bargain.”))).

38. Alschuler, *supra* note 27, at 686.

39. Comment, *Another Look at Unconstitutional Conditions*, 117 *U. PA. L. REV.* 144, 180 (1968) (emphasis added).

pillars of due process for fear of weakening the foundation on which plea-bargaining rests, the Supreme Court has seen fit to sediment a practice of inducements through plea offers that leads to the abdication of defendants' constitutional rights. At stake is the integrity of the Constitution, the Bill of Rights, the Judiciary, the Jury, State power and hegemony, and whatever still remains of an American sense of personhood under the law. This is because rights are intimately associated with freedom.<sup>40</sup> According to Lakoff, human rights, like those expressed in the Constitution and the Bill of Rights, are intimately tied to our common sense of freedom.<sup>41</sup> These rights are inalienable. They can neither be given away, nor can they be taken away. Justice requires freedom. Only those who are free to exercise their rights to proper defense can experience justice. The inability to exercise the rights guaranteed by the Constitution and the Bill of Rights (in criminal matters, the Fifth and Sixth Amendments) leads to atrophy and quite possibly the practical elimination of those rights as experienced in everyday adjudication settings. When the powers of the state overbear the will of its subjects, freedom no longer exists. Lakoff puts it this way: "[A] threat to free will is a threat to freedom, the imposition of a dangerous worldview without public awareness. When free will itself is threatened, that is the ultimate threat to freedom."<sup>42</sup>

The institution of plea-bargaining is structured as a power imbalance that tests the mettle of those who succumb to it. And, as the Author will demonstrate in subsequent publications on this topic, our cognitive decision-making skills,<sup>43</sup> cultural capital, and habitus,<sup>44</sup> posi-

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40. See GEORGE LAKOFF, WHOSE FREEDOM?: THE BATTLE OVER AMERICA'S MOST IMPORTANT IDEA 3-4 (2006).

41. *Id.* at 133-48.

42. *Id.* at 62.

43. While not the purpose of this essay, scores of publications addressing this topic will be cited in a subsequent analysis for support of the view that human beings are far from rational decision-makers. In short, when combined with a sociological analysis, cognitive psychology and neuropsychology make it plain that the Supreme Court's reliance upon the "knowing and voluntary" prong are naive assumptions that have no bearing in social science. With regard to cognitive science, see for example, Chun Siong Soon, Marcel Brass, Hans-Jochen Heinze & John-Dylan Haynes, *Unconscious Determinants of Free Decisions in the Human Brain*, NATURE NEUROSCIENCE (Apr. 13, 2008), [http://www.rifters.com/real/articles/NatureNeuroScience\\_Soon\\_et\\_al.pdf](http://www.rifters.com/real/articles/NatureNeuroScience_Soon_et_al.pdf) (study finding that the decision-making process in the brain begins before it enters a person's "free" decision-making awareness); Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 NW. U. L. REV. 1115, 1115-16 (2002) (examining how "prospect theory" rather than the more traditionally relied upon "rational choice theory" can be used to analyze people's legal decisions and behavior); Herbert Simon, *Invariants of Human Behavior*, 41 ANN. REV. PSYCHOL. 1, 16-17 (1990), available at <http://www.annualreviews.org/doi/pdf/10.1146/annurev.ps.41.020190.000245> ("[P]eople are adaptive systems, whose behavior is highly flexible."); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000) (arguing that

tion us differently relative to the authority of the prosecutor in a plea setting, thereby threatening our free will decision-making.

Critics may contend that the preservation of free will is precisely the point of plea-bargaining. That is, by permitting defendants to engage in a contractual negotiation of a plea, they are at liberty to determine their own course of action. In this scenario, the plea-bargaining process *enhances* free will. However, this assumption is incorrect. The structural conditions constituting the plea negotiation remove any semblance of neutrality and equitable bargaining conditions, thereby making pretense to “free will” nakedly ideological. One additional point is necessary. Lakoff’s use of free will requires that human beings are provided conditions that level the playing field relative to those in power. Human rights do this, and they enable us to determine from within the protective web of rights the path that most enhances our liberty options. However, plea-bargaining usurps those inalienable rights guaranteed by the Bill of Rights to protect the powerless from the overzealous application of state power. While power imbalances have always constituted the exercise of state authority,<sup>45</sup> with plea-bargaining, the subject confronting prosecutorial authority has fewer constitutional protections than those who would exercise their right to trial. And despite pretenses to liberal-economic notions of equity among adversaries freely engaging in the negotiation of a contract, without rights protections a defendant is clearly not “free” to engage prosecutors on equitable adversarial grounds. As a constitutional matter, the magnitude of the plea-bargaining practice threatens American ideals of freedom and fails to produce justice.

This Article seeks answers to two sets of questions: First, whether the doctrine of unconstitutional conditions should apply to plea-bargaining. Second, whether the Supreme Court’s rationale for the constitutionality of pleas, that a plea is a contract that is constitutional if it meets the knowing and voluntary criteria, is correct or appropriate.

With regard to the first question—those that apply to unconstitutional conditions—the following questions appear germane. First, “Are the Fifth and Sixth Amendment rights inalienable?” If they are inalienable (“unalienable” in the Declaration of Independence), then they can neither be taken away by the state, *nor can the rights holder give them away*. So in a plea-offer context, no matter how attractive the inducement offered by the state, a defendant does not have the right to give away her rights—they are immutable. Second, “Does the Due Process Clause found in both the Fifth and Fourteenth Amendments provide the procedural pathway necessary to challenge the con-

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“rational choice theory” which dominates the legal field’s conception of decision-making is inadequate).

44. See generally PIERRE BOURDIEU, *DISTINCTION* (Richard Nice trans., 1984).

45. See generally JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT* (2008).

stitutionality of pleas?” The Author thinks that the answer is yes, but getting to yes requires some work. Third, “When a suspect engages the state upon arrest, does the presumption of innocence prevail?” It is supposed to, but given what we know about the plea-bargaining process, the Author is not convinced that it does.<sup>46</sup> This is an extremely important question because the prosecutor’s presentment at a Grand Jury is these days a *fait accompli*—it is a done deal for the state.<sup>47</sup> That means that it is really not that difficult to obtain an indictment, even if the suspect is innocent.

The practice of plea-bargaining in the United States has institutionalized upside-down justice. It serves as a dubious substitute for a system of law that was plainly established in the Constitution and Bill of Rights to preserve personhood and the balance of power. A plea bargain requires the defendant to relinquish her Fifth and Sixth Amendment Rights.<sup>48</sup>

Following Lithwick, the Fifth Amendment was the American juridic response to abolishing conventional inquisitorial practices in the British Courts of the Star Chamber and High Commission (1487–1641).<sup>49</sup> In each, inquisition induced involuntary confessions by requiring defendants to testify to any and all questions put to them, practices that often resorted to torture as a means of prevailing upon the recalcitrant

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46. See *Taylor v. Kentucky*, 436 U.S. 478, 480–90 (1978) (holding that the trial court’s refusal to give petitioner’s requested instruction on the presumption of innocence violated his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment).

47. Roger Roots, *If It’s Not a Runaway, It’s Not a Real Grand Jury*, 33 CREIGHTON L. REV. 821, 827 (2000) (citing data indicating that 99% of cases brought by federal prosecutors to grand juries resulted in indictments, “[a]ccording to TRAC, of 785 federal grand juries in 1991, grand jurors voted against the prosecutor in only sixteen of the 25,943 matters presented to them, a rate of 99.9% agreement.”).

48. The Fifth Amendment to the United States Constitution says:

No person shall be held to answer for a capital, or otherwise infamous crimes, unless on presentment or indictment of a Grand Jury, except in cases arising in land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself*, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V (emphasis added). The Sixth Amendment reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

49. Dalia Lithwick, *Where Did the Fifth Amendment Come From?*, SLATE (Feb. 12, 2002, 3:36 PM), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2002/02/where\\_did\\_the\\_fifth\\_amendment\\_come\\_from.html](http://www.slate.com/articles/news_and_politics/explainer/2002/02/where_did_the_fifth_amendment_come_from.html).

to speak.<sup>50</sup> Recognizing the excesses of these courts, eighteenth-century English common law adopted the principal of *nemo tenetur seipsum accusare*, which stipulated that no man should be required to testify against himself.<sup>51</sup> The principal of *nemo tenetur seipsum accusare* was adopted by nine of the founding colonies prior to the establishment of the United States.<sup>52</sup> The significance of the Fifth Amendment lies in “protecting the innocent inarticulate defendant, who might be made to look guilty if subject to crafty questioning from a trained inquisitor.”<sup>53</sup> Given what we know about contemporary suspect interviews and despite the Supreme Court’s decision in *Miranda v. Arizona*,<sup>54</sup> it is apparent that over the course of the last two centuries, but since the 1970s in particular, the spirit and profound protection afforded by the Fifth Amendment has been defiled by those who value expediency over protecting personhood and preserving the balance of power.

For the Framers, trial by a jury comprised of one’s peers was fundamental to the formation of a democratic state, so much so that it appears in both the Constitution and the Bill of Rights. Article III of the Constitution states that, “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”<sup>55</sup> The Fifth Amendment is important here too, since it provides presentment to a grand jury, and due process of law.<sup>56</sup> The Sixth and Seventh Amendments to the Constitution further clarify Article III.<sup>57</sup> It is pretty clear that the Framers viewed a trial by jury as fundamentally important with regard to questions of fairness and equity. However, as discussed below, what was clear from our founding until 1898, when Justice Harlan’s majority opinion affirmed the unconstitutionality of waiving a jury trial,<sup>58</sup> would by 1930 become an anachronism.<sup>59</sup>

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50. *Id.*

51. *Id.* The Latin maxim reads: “No man is bound to accuse himself.” *Id.*

52. *Id.*

53. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 116 (1998).

54. *Miranda v. Arizona*, 384 U.S. 436, 442–43 (1966).

55. U.S. CONST. art. III, § 2.

56. U.S. CONST. amend. V.

57. U.S. CONST. amend. VI; see *supra* note 48 for the text of the Amendment. The Seventh Amendment reads:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

58. *Thompson v. Utah*, 170 U.S. 343, 355 (1898), *overruled by* *Collins v. Youngblood*, 497 U.S. 37 (1990).

59. *Patton v. United States*, 281 U.S. 276 (1930), *abrogated by* *Williams v. Florida*, 399 U.S. 78 (1970).

## III. THE PLEA-BARGAIN CASES

This Section discusses two categories of cases: first, the cases that form the foundation of plea-bargaining jurisprudence in the United States and, second, the cases that have addressed the question of plea waivers. This Section begins with a brief account of pertinent cases originating in 1893 and ending in 1969. A separate Section will discuss the United States Supreme Court decisions emanating from the 1970s, as it was this decade that produced the now fully ensconced plea jurisprudence.

A. *Voluntariness: Supreme Court Decisions from 1893 to 1969*

Beginning in the eighteenth century with the case of *Rex v. Warickshall*, the English Court concluded that involuntary confessions were inherently unreliable.<sup>60</sup> However, should a confessant point police officers in the direction of inculpatory evidence, that evidence could be used to establish the reliability of the confession and used against the defendant. So long as constables could assure the court that they had not engaged in conduct generating the “promise of favor” or the “flattery of hope,” and that pleas were induced absent “the torture of fear,” then confessions were taken as evidence of guilt.<sup>61</sup> Notwithstanding the obvious paradox—that inculpatory evidence was procured as a result of an involuntary confession and in violation of common law—the Court determined that it was reasonable and pragmatic to accept the probative value of the evidence to gain a conviction.<sup>62</sup>

As the colonial United States commenced the process of designing its own law based on English common law, *Rex v. Warickshall*<sup>63</sup> provided a foundation for subsequent Supreme Court decisions regarding plea-bargaining, the first of which appeared in *Hallinger v. Davis*.<sup>64</sup> Because the plea-bargaining process was opaque, the Court’s primary concern was the temptation to induce coerced confessions. At issue in *Hallinger* was the question of voluntariness,<sup>65</sup> a component of the plea process that would occupy the Court for the next seventy-six years. But because pleas were considered the same as any other confession, the Court did not attempt to create a bright-line rule uniquely applied to plea settings.<sup>66</sup> In *Hallinger*, the Court concluded that so long as

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60. *Rex v. Warickshall*, (1783) 168 Eng. Rep. 234.

61. *Id.* at 235.

62. *Id.*

63. *Id.* at 234–35.

64. *Hallinger v. Davis*, 146 U.S. 314 (1892).

65. *Id.* at 324 (“[W]e are readily brought to the conclusion that the appellant, in voluntarily availing himself of the provisions of the statute and electing to plead guilty, was deprived of no right or privilege within the protection of the fourteenth amendment.”).

66. This would have to await the Court’s decision in *Walker v. Johnston*. *Walker v. Johnston*, 312 U.S. 275 (1941).

pleas are voluntarily entered into (meaning there was no coerced confession), they were constitutionally protected.<sup>67</sup> Two cases rounded out the Court's stance on plea-bargaining in the nineteenth century, the *Whiskey Cases*<sup>68</sup> and *Bram v. United States*.<sup>69</sup> The *Whiskey Cases* addressed violations of internal-revenue and liquor laws.<sup>70</sup> They presented the first instance in which a prosecutor, and not the governor of the state which had formerly been the custom, made an offer of immunity during a plea negotiation.<sup>71</sup> Because the prosecutor proffered immunity in exchange of a guilty plea to a single charge in the original indictment, the Court overturned the conviction based on prosecutorial overreach.<sup>72</sup>

In keeping with its nineteenth-century concern over coerced confessions, the Court in *Bram* overturned Bram's conviction due to a question about the voluntariness of his confession.<sup>73</sup> While Bram was convicted at trial and not by way of a plea, the *Bram* Court's concern with preservation of Fifth Amendment protections, especially regarding confessions induced by real or perceived threats of violence and/or direct or indirect promises of benefits, seems by way of juxtaposition to contemporary interpretations of the constitutionality of pleas to signify an enlightened defense of the liberty interests of the accused.<sup>74</sup>

While the Supreme Court produced very few criminal-procedure decisions in the nineteenth century, the twentieth century witnessed an awakening to constitutional questions associated with crime-scene investigation and due process. Between 1927 and 1970, the Court decided eight consequential cases that directly affected plea-bargain-

67. *Hallinger*, 146 U.S. at 324.

68. *United States v. Ford*, 99 U.S. 594 (1878).

69. *Bram v. United States*, 168 U.S. 532 (1897).

70. *Ford*, 99 U.S. at 594-95.

71. *Id.* at 596-98.

72. *Id.* at 605 ("Having come to the conclusion that the district attorney had no authority to make the agreement alleged in the plea in bar, it follows that the Circuit Court erred . . . and that the judgment must be reversed, and the causes remanded . . .").

73. *Bram*, 168 U.S. at 540. Among its many references to Common Law, the Court in *Bram* cited the following passage from a widely used legal textbook addressing the topic of coerced confessions:

In 3 RUSSELL ON CRIMES 478 (6th Ed.) it is stated as follows: 'But a confession, in order to be admissible, must be free and voluntary; that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence. \* \* \* A confession can never be received in evidence where the prisoner has been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.

*Id.* at 542-43 (omission in the original) (quoting 3 RUSSELL ON CRIMES 478 (6th Ed.).

74. *Id.* at 542-43. In this Article the Author is particularly interested in the Court's clear concern over "direct or indirect promises of benefits," as it is this aspect of contemporary plea negotiations that appears to be prima facie unconstitutional.

ing.<sup>75</sup> These eight decisions are indicative of a Court that, for the first seventy years of the twentieth century, viewed plea-bargaining with considerable suspicion, especially as it pertained to violations of Fifth Amendment protections. For example, in *Kercheval* (1927), the Court proclaimed that it “will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence.”<sup>76</sup> In *Walker* (1941), the Court appears downright progressive when it remanded an accepted plea on the grounds that the prosecutor conditioned the plea on the threat of a harsher sentence if convicted at trial.<sup>77</sup> Voluntariness was once again at issue in *Waley v. Johnston* (1942), where the FBI physically threatened the defendant and threatened to publish false statements and manufacture evidence that would lead the state of Washington to execute him.<sup>78</sup> The Court remanded for a hearing on those allegations.<sup>79</sup> In one of the more prescient procedural incidents involving plea cases, in 1957, the Court granted certiorari in the case of *Shelton v. United States*.<sup>80</sup> In a per curiam opinion, this case was set aside when, prior to hearing the case, Solicitor General Rankin for the United States admitted that the plea may have been improperly effectuated and withdrew.<sup>81</sup> It appears that throughout his plea negotiations with the prosecutor, Shelton maintained his innocence.<sup>82</sup> However, once sentencing inducements became too attractive to dismiss, he halted his declaration of inno-

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75. *Kercheval v. United States*, 274 U.S. 220 (1927); *Walker v. Johnston*, 312 U.S. 275 (1941); *Waley v. Johnston*, 316 U.S. 101 (1942); *Shelton v. United States*, 356 U.S. 26 (1958) (per curiam); *Machibroda v. United States*, 368 U.S. 487 (1962); *United States v. Jackson*, 390 U.S. 570 (1968); *Boykin v. Alabama*, 395 U.S. 238 (1969); *McCarthy v. United States*, 394 U.S. 459 (1969).

76. *Kercheval*, 274 U.S. at 224.

77. *Walker*, 312 U.S. at 286 (“[T]he petitioner desired the aid of counsel . . . and did not knowingly waive that right, and that by the conduct of the District Attorney, he was deceived and coerced into pleading guilty when his real desire was to plead not guilty or at least be advised by counsel as to his course.”). The question of whether threats of a sentencing enhancement, or “trial tax,” were unconstitutional was taken up in *U.S. v. Jackson*, 390 U.S. 570 (1968), and again in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). In *Jackson*, the Court declared that threatening a defendant with the possibility of execution if convicted at trial in order to induce a plea was unconstitutional. *Jackson*, 390 U.S. at 581–86. Ten years later in *Bordenkircher* the Court once again addressed the question of whether threats of enhanced sentences upon conviction at trial were unconstitutional because they were vindictive. *United States v. Edmonds*, 103 F.3d 822 (9th Cir. 1996). The answer in *Bordenkircher* was no, threats of this kind are not vindictive. By reversing its decision in *Jackson* the Court made prosecutorial threats of enhanced sentences if convicted at trial constitutional. *Bordenkircher*, 434 U.S. at 363–65. Much more will be said about these decisions as the argument in this Article develops.

78. *Waley*, 316 U.S. at 102–03.

79. *Id.* at 105.

80. *Shelton*, 356 U.S. at 26.

81. *Id.*

82. *Shelton v. United States*, 242 F.2d 101, 102–03 (5th Cir. 1957) (containing the facts of the case that Shelton consistently maintained his innocence throughout his plea negotiations).



cence and accepted the plea.<sup>83</sup> The Solicitor General may have been concerned that a Supreme Court decision in *Shelton* would have severely limited prosecutorial discretion to plea.<sup>84</sup> So rather than risk a precedent-setting decision regulating pleas with a case involving a man who vigorously proclaimed his innocence up until the moment when the sentencing inducement was so attractive that he could not afford to risk trial, the Solicitor General folded.<sup>85</sup> Once again in 1962, in *Machibroda*, the Court had occasion to hear a case involving sentencing inducements, and consistent with its decision in *Walker* (1941), the Court remanded for fact-finding, indicating that if the allegations of sentencing enhancements to induce a plea were true, then *Machibroda* was entitled to relief.<sup>86</sup>

In 1968 and again in 1969, the Supreme Court asserted its authority to put in place the last of the twentieth-century progressive civil-liberties protections for defendants engaged in plea negotiations.<sup>87</sup> Civil libertarians would have to wait another forty-three years for any indication that the Court was taking the issue of plea-bargaining seriously, and even then, the Supreme Court's majority refused to confront the constitutionality of pleas.<sup>88</sup>

At issue in *United States v. Jackson* was a newly created federal statute, 18 U.S.C. § 1201(a), which provided for the death penalty if one were found guilty following a jury trial or provided for life in prison if the defendant *pleaded* guilty.<sup>89</sup> The question at issue for the Court was: Does the threat of execution upon jury conviction unnecessarily and excessively “chill” the exercise of constitutional rights?<sup>90</sup> The Court minced no words in response: “[T]he evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them.”<sup>91</sup> Once again at issue was the Court's long-held concern with voluntariness. Was it conceivable that prosecutorial inducements might become so attractive that even an innocent person would consider accepting a plea? Was it possible that the thin stream of prosecutorial inducements would overbear the de-

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83. *Id.* at 103–04.

84. *Id.*

85. *Shelton*, 356 U.S. at 26.

86. *Machibroda v. United States*, 368 U.S. 487, 514 (1962).

87. *See United States v. Jackson*, 390 U.S. 570, 584–85 (1968); *Boykin v. Alabama*, 395 U.S. 238, 244 (1969); *McCarthy v. United States*, 394 U.S. 459 (1969).

88. *See Lafler v. Cooper*, 132 S. Ct. 1376, 1383, 1387 (2012); *Missouri v. Frye*, 132 S. Ct. 1399, 1412, 1414 (2012). Each case was decided on March 21, 2012. Each case will be discussed below, but for now suffice it to say that the Supreme Court acknowledged the right to effective assistance of counsel in a plea setting. *Id.*

89. *Jackson*, 390 U.S. at 577–78.

90. *Id.* at 582 (“The question is not whether the chilling effect is ‘incidental’ rather than intentional; the question is whether that effect is unnecessary and therefore excessive.”).

91. *Id.* at 583.

fendant's will? Returning to voluntariness in *Boykin v. Alabama*,<sup>92</sup> the Court generated the rationale and suggested more precise language that would, in 1974, become part of the Federal Rules of Criminal Procedure, Rule 11.<sup>93</sup> Specifically, the Court declared that, "It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary."<sup>94</sup> And again, as if to drive home the point that in this case there was no record that the defendant properly understood the plea nor entered into it voluntarily, the Court proclaimed, "A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment."<sup>95</sup> While *Boykin* can be lauded for the Court's attention to the knowing and voluntary component of pleas and even to a subterranean disconcertion about the efficacy of the process, the language it precipitated in the 1974 amendment to Rule 11 established a fallacious barometer for determining the efficacy of pleas. Rule 11's language is based on a lack of knowledge about the sociological and psychological aspects of decision-making, not to mention whether plea-bargaining is constitutional in the first place. In short, *Boykin* codified a federal rule standard that is without social, scientific, or constitutional merit.

The last case to appear in the decade of the 1960s once again shows the Court attempting to compel prosecutors and the various courts of appeal to more strictly discern the extent to which a plea was knowingly and voluntarily entered. In *McCarthy v. United States*, the Court determined that there had been a clear violation of Rule 11 because the judge did not properly address the defendant to ascertain whether he had accepted the plea knowingly and voluntarily.<sup>96</sup> Specifically,

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92. *Boykin v. Alabama*, 395 U.S. 238 (1969).

93. The 1974 Amendments to Federal Rules of Criminal Procedure, Rule 11(c) make reference to both *Boykin v. Alabama* and *McCarthy v. United States* (1969):

Subdivision (c) prescribes the advice which the court must give to the defendant as a prerequisite to the acceptance of a plea of guilty. The former rule required that the court determine that the plea was made with 'understanding of the nature of the charge and the consequences of the plea.' The amendment identifies more specifically what must be explained to the defendant and also codifies, in the rule, the requirements of *Boykin v. Alabama*, 395 U.S. 238 . . . (1969), which held that a defendant must be apprised of the fact that he relinquishes certain constitutional rights by pleading guilty.

FED. R. CRIM. P. 11 (Advisory Committee notes on Rules—1974 Amendments). Rule 11(c) also "retains the requirement that the court address the defendant personally." *Id.* (citing *McCarthy v. United States*, 394 U.S. 459, 466 (1969)). There is also an amendment to Federal Rules of Criminal Procedure Rule 43 to make clear that a defendant must be in court at the time of the plea. *Id.* 43(a)(1) ("Unless this rule . . . provides otherwise, the defendant must be present at: the initial appearance, the initial arraignment, and the plea").

94. *Boykin*, 395 U.S. at 242.

95. *Id.*

96. *McCarthy*, 394 U.S. at 459.

the Court said, “If a defendant’s guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.”<sup>97</sup> The Court indicated that error occurred in violation of Rule 11 because there was no attempt to discern whether the plea was entered into voluntarily and because a plea colloquy should “produce a complete record when the plea is entered of the factors relevant to the voluntariness determination.” The rule mandates the district judge’s direct inquiry of a defendant pleading guilty as to whether the defendant understands “the nature of the charge [against him] and the consequences of his plea.”<sup>98</sup> Once again, like *Boykin*, while the spirit of the decision may be in keeping with historical concern over coerced confessions, and *McCarthy* clearly raises the ire of the Court, the proposed remedy falls short of empirical and constitutional correctness.

One hates to be too harsh in retrospect. After all, from 1893 to 1969 the Court expressed strong suspicion about the efficacy of plea-bargaining since there were documented abuses of the Fifth Amendment by law enforcement and prosecutors. But despite seventy-six years of thoughtful Supreme Court decisions attempting to reign in overzealous prosecutorial implementation of plea-bargains, the normative affirmation of pleas that existed at the end of the 1960s, and that was later codified in Rule 11 (as a result of *Boykin* and *McCarthy*), cleared the way for a decade’s worth of obsequious Supreme Court decisions that effectively banished to the furthest reaches of pedantic academic jurisprudential argument questions pertaining to the constitutionality of plea-bargaining.

#### B. *Turning Point: The 1970s*

Significant modification to interpretations of due-process protections relating to pleas emerged in 1970 with the Supreme Court’s decision in *Brady v. United States*.<sup>99</sup> The 1970s significantly, and even dramatically, transitioned the Court away from concerns over voluntariness and the protections afforded by the Fifth Amendment during plea negotiations by rendering seven decisions that helped to clarify a new procedural posture that was far more accepting of legislative sentencing initiatives and the assertion of prosecutorial authority constituting pleas.<sup>100</sup>

Recall that in 1968, the Court in *United States v. Jackson* declared unconstitutional the practice of threatening a defendant with the pos-

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97. *Id.* at 466.

98. *Id.* at 464–67.

99. *Brady v. United States*, 397 U.S. 742 (1970).

100. *See Brady*, 397 U.S. 742; *North Carolina v. Alford*, 400 U.S. 25 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970); *Santabello v. New York*, 404 U.S. 257 (1971); *Chaffin v. Sychcombe*, 412 U.S. 17 (1973); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Corbitt v. New Jersey*, 439 U.S. 212 (1978).

sibility of execution in order to extract a guilty plea.<sup>101</sup> A mere two years later in *Brady v. United States*, the Court reversed itself.<sup>102</sup> And while *Brady* would be preeminent for this fact alone, the case stands *sui generis* as the essential case in the lineage of Supreme Court plea-bargain decisions for its affirmation of the constitutionality of plea-bargaining as an invaluable component of due process and the adjudication of guilt.<sup>103</sup> First and foremost, *Brady* is notable for its radical departure from all previous Court decisions with regard to its interpretation of voluntariness. Specifically:

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 rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.<sup>104</sup>

To legitimize the plea process, the Court contended that “plea-bargaining flows from the *mutuality of advantage* to defendants and prosecutors.”<sup>105</sup> This language reappears in subsequent cases where the allusion is to two equitable parties conferencing to negotiate a deal. It is in *Brady* where the Supreme Court first begins to lay the foundation for a criminal-adjudication process based upon the law of contracts.<sup>106</sup> Since the defendant is a free agent of sorts, the plea provides a mutual opportunity for advantage, for a defendant who sees *slight possibility* of acquittal,<sup>107</sup> “the advantages of pleading guilty and limiting the

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101. *See, e.g.*, *United States v. Jackson*, 390 U.S. 570, 585 (1968) (“The capital punishment provision of the Federal Kidnaping (sic) Act cannot be saved by judicial reconstruction.”).

102. *Brady*, 397 U.S. at 742 (“[D]efendant’s plea of guilty was not rendered involuntary because of possible fear of death penalty if case were tried to jury.”).

103. *Id.* at 750 (“The State to some degree encourages pleas of guilty at every important step in the criminal process.”); *id.* at 751–52 (“The issue we deal with is inherent in the criminal law and its administration because guilty pleas are not constitutionally forbidden, because the criminal law characteristically extends to judge or jury a range of choice in setting the sentence in individual cases, and because both the State and the defendant often find it advantageous to preclude the possibility of the maximum penalty authorized by law. . . . It is this mutuality of advantage that perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty. . . .”).

104. *Id.* at 751.

105. *Bordenkircher*, 434 U.S. at 363 (emphasis added) (quoting *Brady*, 397 U.S. at 752).

106. *Brady*, 397 U.S. at 758 (“[B]ased on our expectations that courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants’ admissions that they committed the crimes with which they are charged.”); *see also*, *Santobello v. New York*, 404 U.S. 257, 262 (1971); *Cooper v. United States*, 594 F.2d 12, 15 (4th Cir. 1979); *State v. Wheeler*, 631 P.2d 376, 379 (Wash. 1981); *State v. Collins*, 265 S.E.2d 172, 176 (N.C. 1980).

107. The Author dares say that most “competent defendants” and their attorneys would likely perceive there to be only a “slight possibility of acquittal” since roughly one-percent of all criminal trials end in acquittal. *See, e.g.*, DANIEL GIVELBER & AMY

probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated.”<sup>108</sup> This statement reflects willful ignorance regarding those who are actually innocent of the charges they face, guilty of lesser charges, or guilty of different charges. In short, the Court hit upon what has come to be known as the “innocence problem.”<sup>109</sup>

To deflect the prevailing concerns raised by all previous Court decisions regarding voluntariness, not to mention the likelihood that an innocent defendant might accept a guilty plea, the *Brady* Court further fantasized that “competent defendants” who are “adequately” advised by counsel, and where the plea is entered into knowingly and voluntarily, are capable of intelligent choice in response to prosecutorial persuasion.<sup>110</sup> This is a remarkably naive set of assumptions that were not true in the 1970s and are most certainly false when confronted with contemporary social science and legal scholarship.

Two additional cases were decided in 1970—*North Carolina v. Alford*<sup>111</sup> and *Parker v. North Carolina*.<sup>112</sup> Once again the question of voluntariness appeared before the Court. At issue in *Alford* was whether the death penalty could be imposed despite a defendant’s protestations of innocence.<sup>113</sup> Henry Alford accepted a plea to second-degree murder in order to avoid the likelihood of the death penalty should he be convicted of first-degree murder at trial.<sup>114</sup> The majority in *Alford* agreed that a defendant could maintain his claim of innocence while the state could proceed with a guilty-plea verdict.<sup>115</sup> Significantly, because there is no admission of guilt, there can be no “automatic judgment against the defendant in any companion civil case.”<sup>116</sup>

*Parker v. North Carolina* is notable for its dissenting opinion, where Justices Brennan, Douglas, and Marshall raise serious concerns about the majority’s application of the “knowing and voluntary” prong.<sup>117</sup>

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FARRELL, NOT GUILTY: ARE THE ACQUITTED INNOCENT? 7 (N.Y. Univ. Press 2012). That, however, is not the matter. What is of gravest concern is the cost calculation that must be generated by the defendant who is (a) innocent, or (b) guilty of something less than the existing charge(s).

108. *Brady*, 397 U.S. at 752 (emphasis added).

109. Lucian Dervan & Vanessa Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 17 (2013).

110. *Brady*, 397 U.S. at 758.

111. *North Carolina v. Alford*, 400 U.S. 25 (1970).

112. *Parker v. North Carolina*, 397 U.S. 790 (1970).

113. *Alford*, 400 U.S. at 30.

114. *Id.* at 27–28.

115. *Id.* at 37–38.

116. ERWIN CHERMERINSKY & LAURIE LEVENSON, CRIMINAL PROCEDURE ADJUDICATION 123 (2008).

117. *Parker*, 397 U.S. at 799–816.

For example, the dissent stated, “[T]he Court apparently holds that never, except perhaps in highly unrealistic hypothetical situations, will the constitutional defects identified in *Jackson* vitiate a guilty plea.”<sup>118</sup> At issue in *Parker*, like in *Bram*, *Brady*, and *Alford*, was the question of whether threats of enhanced punishment diminish the voluntary aspect of pleas.<sup>119</sup> *Parker*, a fifteen-year-old African American who was charged with rape and burglary and who was facing the death penalty if convicted at trial, alleged that his guilty plea was the product of a coerced confession and that the grand jury was racially biased.<sup>120</sup> The majority in *Parker* upheld his conviction stating that the plea was knowing and voluntary, there was no coerced confession, and the grand jury was unbiased.<sup>121</sup>

In 1971, the Supreme Court decided *Santobello v. New York*.<sup>122</sup> *Santobello* is important for two reasons. First, the Court established the significance of prosecutors honoring their plea offers.<sup>123</sup> Second, the Court affirmed the centrality of plea-bargaining as an essential part of the criminal-justice system.<sup>124</sup> At issue was whether the defendant could withdraw his plea following an initial agreement about guilt, but where sentencing was yet to be determined. After a series of lengthy delays that led to the introduction of a new prosecutor, the State recommended the maximum sentence.<sup>125</sup> The defendant unsuccessfully attempted to withdraw his plea, and his conviction was upheld on appeal.<sup>126</sup> The Court remanded based upon the promises that had been made by the first prosecutor on the case.<sup>127</sup> As if to explain away the prosecutorial misconduct that took place in *Santobello*, the Court took the opportunity to affirm the centrality of plea-bargaining. Blaming “unfortunate lapse(s) in orderly prosecutorial procedures”<sup>128</sup> on the prosecutor’s heavy workload, the Court ascertained that, “The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called ‘plea-bargaining,’ is an essential component of the administration of justice. *Properly administered, it is to be encouraged.*”<sup>129</sup> Making veiled reference to *Brady*, the

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118. *Id.* at 800.

119. *Id.* at 799 (“In *United States v. Jackson*, we held that the operative effect of the capital punishment provisions of the Federal Kidnaping [sic] Act was unconstitutionally ‘to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial.’ The petitioners in these cases claim that they were the victims of the very vices we condemned in *Jackson*.” (internal citations omitted)).

120. *Id.* at 791–94.

121. *Id.* at 799.

122. *Santobello v. New York*, 404 U.S. 257 (1971).

123. *Id.* at 257–58.

124. *Id.* at 260–61.

125. *Id.* at 257–60.

126. *Id.* at 260.

127. *Id.* at 263.

128. *Id.* at 260.

129. *Id.* (emphasis added).

*Santobello* majority exalted in the superlative good judgment displayed through implementation of the plea:

[The plea] leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.<sup>130</sup>

And does anyone take seriously the Court's reference to "rehabilitative prospects"? What, exactly, did it have in mind? While the 1970s may have been flush with rehabilitative enthusiasm, that is certainly not the case in the second decade of the twenty-first century.

While not a plea-bargaining case, *Chaffin v. Sychcome* provided the Court with the opportunity to once again emphasize, just as it had in the *Brady*, *Parker*, and *Alford* line of cases, that a threat of harsher punishment in no way infringes upon the assertion of a defendant's constitutional rights.<sup>131</sup> Put another way, discouraging defendants from exercising their Fifth and Sixth Amendment rights is *not* unconstitutional. Inspired by *Brady*, the *Chaffin* Court said, "Although every such circumstance has a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices was upheld as an inevitable attribute of any legitimate system which tolerates and encourages the negotiation of pleas."<sup>132</sup>

Here, the *Chaffin* majority acknowledged that the emperor stands naked before us, but as is so often the case, threw its hands up and simply rationalized its decision by casting it in the shadow of the three cases preceding it. A more pernicious assertion appears just a few paragraphs later:

The criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow. . . . Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses,

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130. *Id.* at 261. Of course this meandering rationale for pleas ignores both the due process issues involved in "shortening the time between charge and disposition," and "being denied pretrial release pending trial." *Id.* at 261. As well as the issue of finality that appears in the 1996 Antiterrorism and Effective Death Penalty Act. Antiterrorism and Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-32, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 28, 42, and 49 U.S.C.), available at <http://www.gpo.gov/fdsys/pkg/PLAW-104publ132/html/PLAW-104publ132.htm>. And does anyone take seriously the Court's reference to "rehabilitative prospects"? These issues will be taken up more thoroughly later in this Article.

131. *Chaffin v. Sychcome*, 412 U.S. 17 (1973).

132. *Id.* at 31 (emphasis added).

the Constitution does not, by that token, always forbid requiring him to choose.<sup>133</sup>

Here laid before us is the rub of this Article: a right is not something that you can negotiate away even if you want to—that would be a privilege. A right is superior to a privilege because, even when we are not sophisticated enough to fully appreciate its meaning, and for the culture as a whole, it is still there to protect us. You can neither give a right away, nor can it be taken away. The Court's emphasis on the ability to "choose" one's rights is dangerous in a democracy as it erodes the protective web necessary for the realization of personhood under law.

The decade of the 1970s closed with two decisions—*Corbitt v. New Jersey*<sup>134</sup> and *Bordenkircher v. Hayes*.<sup>135</sup> In *Corbitt*, the Court reaffirmed its decisions in *Brady*, *Parker*, and *Alford*—that the threat of an enhanced sentence if convicted at trial *would not* constitute a violation of the defendant's Fifth, Sixth, and Fourteenth Amendment rights.<sup>136</sup> But it was the Court's 5–4 decision in *Bordenkircher*<sup>137</sup> that produced the most dramatic effect on post-*Brady* plea jurisprudence. As with nearly all the preceding plea cases, at issue was the question of voluntariness.<sup>138</sup> Defendant Hayes, charged with producing a forged document, faced between two and ten years in prison.<sup>139</sup> The prosecutor offered him five years pursuant to a plea.<sup>140</sup> If the defendant rejected the plea, the prosecutor threatened to charge him as a habitual offender, which carried a life sentence.<sup>141</sup> Hayes rejected the plea offer and was convicted at trial where he was sentenced to life in prison.<sup>142</sup> The Supreme Court decided that, in holding out the likelihood of enhanced charge and sentence if convicted at trial, the prosecutor had not acted inappropriately.<sup>143</sup> Citing *Blackledge*, the Court retreated to existing plea practice to rationalize its decision: "Whatever 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 criminal justice system."<sup>144</sup> Once again affirming the contractual nature of the plea, the Court stated:

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133. *Id.* at 32 (emphasis added) (citing *McGautha v. California*, 402 U.S. 183, 213 (1971)).

134. *Corbitt v. New Jersey*, 439 U.S. 212 (1978).

135. *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

136. *Corbitt*, 439 U.S. at 212, 226.

137. *Bordenkircher*, 434 U.S. at 357.

138. *Id.* at 358.

139. *Id.*

140. *Id.*

141. *Id.* at 358–59.

142. *Id.* at 359.

143. *Id.* at 357.

144. *Id.* at 361 (quoting *Blackledge v. Allison*, 431 U.S. 63, 71 (1976)). This language flies in the face of cross-cultural indicia of the abject refusal to establish a system of jurisprudence based almost solely on plea bargaining. In short, there clearly



To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort. . . . But in the “give-and-take” of plea bargaining there is no such element of punishment or retaliation so long as *the accused is free to accept or reject the prosecution’s offer*.<sup>145</sup>

Continuing, the Court addressed the voluntariness inherent in the plea with a tortured and failed logic: “Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process.”<sup>146</sup>

As with nearly all of its 1970s plea jurisprudence, the Court “doth protests too much, me thinks.”<sup>147</sup> Of course, it is the constitutionality of plea-bargaining that is at issue and, through explication of the 1970s case law regarding pleas, it is clear that the Court struggles to balance the structural demands facing prosecutors (increased caseload, resource pressures) with what appears to be the authoritative promulgation of trial rights appearing in the Fifth and Sixth Amendments. The Court hypothesizes that when pleas are knowingly and voluntarily entered, they do not violate the Fifth and Sixth Amendments. This appeal to *argumentum ad ignorantiam* is a fallacy of formal logic. It presents the proposition as true because it has not yet been proven false. Thus, the Court assumes what must be proven, which is the issue that all Court decisions before the 1970s had severely criticized. In the excerpted paragraph immediately above, the Court also re-emphasizes the contractual nature of the plea bargain, refusing to view the resulting “deal” as unconstitutional since it was the product of a legally binding contract. But in what is perhaps the Court’s most brazen affront to the Bill of Rights, it stripped away the veneer of constitutionality to explain: “It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that *the prosecutor’s interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty*.”<sup>148</sup>

As a party to the adversarial system and one whom is facing serious structural pressures to quickly resolve cases, this would be an understandable admission emanating from a prosecutor. But for the Supreme Court to articulate it is simply astonishing. For what the Court admits to, takes it far afield from the statement of prosecutorial ethics outlined in *Berger v. United States*, where Justice Sutherland delivered

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are examples from jurisdictions outside of the United States where the impulse to plea has been rejected. See HARRY R. DAMMER & JAY S. ALBANESE, *COMPARATIVE CRIMINAL JUSTICE SYSTEMS* 136–37 (5th ed. 2014).

145. *Bordenkircher*, 434 U.S. at 363 (emphasis added) (internal citations omitted).  
146. *Id.*

147. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 2, available at <http://shakespeare.mit.edu/hamlet/full.html>.

148. *Bordenkircher*, 434 U.S. at 364 (emphasis added).

the opinion of the Court.<sup>149</sup> Through its affirmation of prosecutorial pressure to induce a plea by dissuading defendants from exercising their right to trial, the *Bordenkircher* Court lost all perspective, and in doing so, it recklessly disfigured the balance of power in adversarial due process.

The decade of the 1970s ended with the constitutionality of plea-bargaining firmly in place as the Supreme Court met legal challenges to the voluntariness of the plea with indifference. Moreover, the Court had taken to referring to the plea-bargaining process in the terms of contract law. While not fully formed, it was clear that the Court treated the resolution of criminal cases via plea negotiations as similar to two equitable parties engaging each other at the bargaining table. This would have deleterious consequences for subsequent challenges to plea-bargaining as violating the doctrine of unconstitutional conditions.

Since the decade of the 1970s, there have been a few landmark cases. In 1995, in *United States v. Mezzanatto*, the Supreme Court ruled on the constitutionality of plea waivers where the waiver pertained to the ability of the state to use inculpatory statements made during plea negotiations at trial.<sup>150</sup> In 2002 in *United States v. Ruiz*, the Supreme Court returned to its 1970s enhancement of prosecutorial authority in plea negotiations by deciding that there is no constitutional requirement for the state to disclose impeachment evidence prior to entering into a plea negotiation.<sup>151</sup> Most recently, on the same day in March of 2012, the Supreme Court rendered two decisions that caught many court watchers by surprise. In *Missouri v. Frye* and *Lafler v. Cooper*, the Court held that defendants have a right to effective assistance of counsel in plea settings.<sup>152</sup> These decisions are remarkable because, while they signify the first time that the Supreme Court acknowledges the right to competent counsel for defendants engaging in a plea bargain, they *do not* pave the way for changes

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149. *Berger v. United States*, 295 U.S. 78, 88 (1935) (“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”).

150. *United States v. Mezzanatto*, 513 U.S. 196, 196 (1995).

151. *United States v. Ruiz*, 536 U.S. 622, 633 (2002).

152. *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012).

to plea-bargaining more generally.<sup>153</sup> In fact, Alschuler refers to the two decisions as “Two Small Band-Aids for a Festering Wound.”<sup>154</sup> This brief historical time-line indicates that for most of the Supreme Court’s history, while never suggesting that plea-bargaining was illegal, it remained suspicious and concerned about the extent to which the plea setting induced coerced confessions. That all changed beginning in 1970 with the Court’s inspissated interpretations of the Fifth Amendment and the doctrine of unconstitutional conditions. There are exceedingly plausible, though unsatisfactory, explanations as to why in the next Section.<sup>155</sup>

#### IV. THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS AND PLEA WAIVERS

Unlike the United States Supreme Court’s 1970s capitulation to legislative and prosecutorial motives bearing on the constitutionality of pleas, cases pertaining to *plea waivers* have historically traveled a non-linear path. Supreme Court justices who fancy themselves as originalists contend that the only prudent way to interpret the Constitution is to do so consistent with the way the Framers would have interpreted it.<sup>156</sup> By that measure, the most conservative originalist justices presently occupying the Supreme Court—Clarence Thomas and Antonin Scalia<sup>157</sup>—should be the most vehemently opposed to plea-bargaining. After all, it was Justice Harlan’s 1898 decision in *Thompson v. Utah* that, through what can only be read as an originalist interpretation of common law, colonial law, statute, and Supreme Court precedent, declared that it was unconstitutional for a defendant to waive his or her right to a jury trial.<sup>158</sup> Prior to *Thompson*, the Supreme Court decided

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153. BRUCE GREEN, IMAGINING PLEA BARGAINING WITHOUT COMPETENT COUNSEL: JUSTICE SCALIA’S PURSUIT OF LESS PERFECT JUSTICE (forthcoming 2015).

154. Alschuler, *supra* note 27. Alschuler dampens any exuberance that might emerge from among progressive legal jurists who have interpreted *Lafler* and *Frye* as signifying an opening for progressive transformations of the plea bargaining system. After all, as he suggests, “four justices of the Supreme Court would allow your lawyer’s incompetence to kill you,” and “the remaining five justices of the Supreme Court might also leave you on death row.” *Id.* at 674, 675.

155. If curiosity is prodding you for at least some scrap of insight the Author is referring here to the work of the late William Stuntz. WILLIAM STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011). Stuntz presents ample data regarding the effect of increasing urban crime rates during the 1960s on all manner of enhanced sentencing schemes, as well as a broadening of police and prosecutorial authority. *Id.* at 26–40.

156. GOODWIN LIU, PAMELA KARLAN & CHRISTOPHER SCHROEDER, KEEPING FAITH WITH THE CONSTITUTION 25 (2010).

157. If the criteria was simply political and ideological conservatism one might easily include Justices Alito and Roberts in the mix, but the Author has seen no published reference to any faith in originalism, the focus of my attention here.

158. *Thompson v. Utah*, 170 U.S. 343 (1898), *overruled by* *Collins v. Youngblood*, 497 U.S. 37 (1990).

*Hopt v. Utah*.<sup>159</sup> The language used by the Court in *Hopt* makes two points that I made above: (1) rights are not solely the possession of an individual, they are cultural artifacts that must be preserved in order to firmly realize freedom, and (2) the inalienability of rights means that they cannot be given away.<sup>160</sup> The Court emphatically stated its opposition to those who would support jury trial waivers by asserting that:

The [pro-waiver] argument necessarily proceeds upon the ground that [the defendant] alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. . . . [However,] [t]he public has an interest in his life and liberty. . . . *That which the law makes essential in proceedings involving the deprivation of life and liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods.*<sup>161</sup>

To render its decision in *Thompson*, and with *Hopt* as precedent, the Harlan Court considered both Article III of the Constitution of the United States and the Sixth Amendment.<sup>162</sup> For Harlan and all previous Supreme Courts, published scholarship, and professional practice, Article III was the controlling stipulation when it came to jury trials. Its language is emphatic and it is mandatory.<sup>163</sup> Specifically, Justice Harlan returns to *Hopt* by stating in *Thompson*: “[T]he [C]onstitution of the United States gave the accused . . . the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by unanimous verdict of a jury.”<sup>164</sup> The Supreme Court was not alone in its “public interest” or “public rights” interpretation of the Bill of Rights.<sup>165</sup> In *Low v. United States*, the Sixth Circuit Court of Appeals declared, “The right to waive a right does not exist when the matter concerns the public as well as the individual.”<sup>166</sup> In *Cancemi v. People*, the New York Court of Appeals asserted, “Criminal prosecutions involve public wrongs . . . which affect the whole community, considered as a community, in its social

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159. *Hopt v. Utah*, 110 U.S. 574 (1884).

160. *Id.* at 579 (“The natural life, says Blackstone, ‘cannot legally be disposed of or destroyed by an individual, neither by the person himself, nor by any other of his fellow creatures merely upon their own authority.’ The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law.” (internal citations omitted)).

161. *Thompson*, 170 U.S. at 354 (emphasis added) (internal citations omitted); see also Stephen Siegel, *The Constitution on Trial: Article III’s Jury Trial Provision, Originalism, and the Problem of Motivated Reasoning*, 52 SANTA CLARA L. REV. 373, 392 (2012).

162. *Thompson*, 170 U.S. at 347–48.

163. Siegel, *supra* note 161, at 383.

164. *Thompson*, 170 U.S. at 355.

165. Siegel, *supra* note 161, at 397.

166. *Low v. United States*, 169 F. 86, 91 (6th Cir. 1909).

and aggregate capacity.”<sup>167</sup> To summarize, “[b]y either theory, jury trial was a right that governments could not deny and defendants could not waive. Jury trial protected the people as well as the defendant.”<sup>168</sup>

However, a mere thirty-two years after *Thompson*, the Supreme Court dramatically altered its jurisprudential path and, in *Patton v. United States*, reversed *Thompson* by declaring it *constitutional* for a defendant to waive her or his right to a jury trial.<sup>169</sup> Justice Sutherland, who wrote the opinion for the Court, inverted the jurisprudence relied upon in *Thompson*, privileging the language used in the Sixth Amendment over the more mandatory language appearing in Article III.<sup>170</sup>

Article III Section 2 of the Constitution states: “The Trial of all Crimes, except in Cases of Impeachment, *shall* be by Jury . . . .”<sup>171</sup>

The Sixth Amendment to the Constitution states: “In all criminal prosecutions, the accused shall *enjoy* the right to a speedy and public trial . . . .”<sup>172</sup>

For Justice Sutherland, the Sixth Amendment usurped Article III because it is a more recent amendment to the Constitution.<sup>173</sup> That being the case, the language of the Sixth Amendment controls the right to trial by jury. What Justice Sutherland pointed to in his opinion is the more “permissive” language employed in the first sentence of the Sixth Amendment, in particular the word “enjoy,” that provides a defendant with the constitutionally protected right to waive a trial by jury.<sup>174</sup> Justice Sutherland’s dramatic shift in constitutional analysis of the right to a jury trial occurred at a time of growing discontent with jury trials, attributable to increasing caseloads being forced upon prosecutors, defense attorneys, and the courts as a result of rising urban crime.<sup>175</sup> Sutherland’s interest was to increase the number of bench trials as a way to expedite case processing.

Stephen Siegel contends that the most important event giving rise to the *Patton* decision was the triumphant arrival of classical liber-

167. *Cancemi v. People*, 18 N.Y. 128, 136–37 (1858) (internal quotations and citations omitted), *superseded by constitutional amendment*, N.Y. CONST. art. I, § 2 (amended 1938); Siegel, *supra* note 161, at 398.

168. Siegel, *supra* note 161, at 399–400.

169. *Patton v. United States*, 281 U.S. 276, 298–99 (1930), *abrogated by Williams v. Florida*, 399 U.S. 78 (1970).

170. *Id.* at 297–98 (“[T]hat the [F]ramers of the Constitution simply were intent upon preserving the right of trial . . . . That this was the purpose of the third article is rendered highly probable by a consideration of the form of expression used in the Sixth Amendment . . . .”).

171. U.S. CONST. art. III, § 2 (emphasis added).

172. U.S. CONST. amend. VI (emphasis added).

173. *Patton*, 281 U.S. at 298.

174. *Id.* at 297–98; Siegel, *supra* note 161, at 381.

175. Siegel, *supra* note 161, at 423.

alism.<sup>176</sup> By viewing defendants as *homo economicus*, “free agents” able to buy and sell goods in the judicial marketplace, the Court adopted a “creedal shift [that] encouraged judges and commentators to interpret constitutional rights as individual privileges rather than collective rights.”<sup>177</sup> From there it was only a short step to associating plea-bargaining with contract law, thereby permitting defendants the right to waive their constitutional protections.

#### A. *Plea Waivers Beginning in the 1970s*

Three Supreme Court cases from the 1970s pertaining to plea waivers produced mixed results. In *McMann v. Richardson*, the Supreme Court based its opinion on the presumption that the plea was knowingly and voluntarily entered and that the defendant had received “reasonably competent” counsel.<sup>178</sup> Specifically, the Court held that a defendant (a) who confesses to the alleged crime prior to the plea<sup>179</sup> and (b) who pleads guilty despite believing that the state has a weak case against him, but who foregoes presentation of facts pursuant to his alleged innocence in state court, has made an intelligent choice to do so and cannot then petition the Court for habeas review.<sup>180</sup> The Court further secured the constitutionality of plea waivers when it addressed the question of grand jury bias in *Tollett v. Henderson*.<sup>181</sup> In a 6–3 decision, Justice Rehnquist cited both *Brady v. United States* and *McMann v. Richardson* to foreclose federal habeas appeals relating to constitutional errors that antedated acceptance of the plea, so long as the defendant’s plea was entered into knowingly and voluntarily, and he had been provided with reasonably competent counsel.<sup>182</sup> However, it is important to note that “the Court reserved decision on the question of whether a federal habeas appeal was foreclosed in a state that permits an appeal from a conviction based on a guilty plea.”<sup>183</sup>

Unlike in *McMann* and *Tollett*, where *Brady* and its progeny were controlling, in *Lefkowitz v. Newsome* the Court rejected the prevailing logic regarding plea waivers in those states, like New York, that provided for the right to federal habeas corpus regardless of the knowing and voluntary nature of the plea.<sup>184</sup> The Court found that “[t]he plea is entered with the clear understanding and expectation by the State,

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176. *Id.* at 427.

177. *Id.*

178. *McMann v. Richardson*, 397 U.S. 759, 770, 772–73 (1970).

179. *Id.* at 767–68.

180. *Id.* at 769–71.

181. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

182. *Id.*

183. W.R. Baldwin III, *Lefkowitz v. Newsome: The Supreme Court Takes Another Look at Guilty Pleas*, 33 WASH. & LEE L. REV. 223, 226 n.26 (1976) (citing *McMann*, 397 U.S. at 770 n.13).

184. *Lefkowitz v. Newsome*, 420 U.S. 283, 288–92 (1975).

the defendant, and the courts that it will not foreclose judicial review of the merits of the alleged constitutional violations.”<sup>185</sup>

The Court also reasoned that “[w]hen state law permits a defendant to plead guilty without forfeiting his right to judicial review of specified constitutional issues, the defendant is not foreclosed from pursuing those constitutional claims in a federal habeas corpus proceeding.”<sup>186</sup>

As in New York in 1979, and again in 2010, the North Carolina Code Chapter 15A-979 Criminal Procedure Act, Article 53 – Motion to Suppress Evidence part (b) preserves the right of a defendant upon denial of a motion to suppress evidence to appeal from a judgment of conviction, including a guilty plea.<sup>187</sup>

New York state is once again the site of an important plea-waiver decision in the case of *People v. Ventura*, where the Appellate Division of the Supreme Court held that waiving the right to appeal a suppression motion violated a defendant’s due-process rights, contract law, and public policy.<sup>188</sup> Stating in bold terms the limits placed on prosecutorial authority when executing plea waivers, the Court stated:

The powers of a prosecutor may indeed be broad, *People v. Zimmer*, 51 N.Y.2d 390, 394, 434 N.Y.S.2d 206, 414 N.E.2d 705, but not so broad and limitless as to include the power to exact waivers of as fundamental a right as the right to appeal without first advancing a *legitimate* State interest. There is no legitimate State interest in preserving an unjust conviction for the sake of the conviction alone. And it is for us, not the prosecutor, to determine on an appeal whether a conviction is unjust.<sup>189</sup>

But, the Court went further in chastising the prosecutor and the coercive nature of the plea process, and because the spirit of the Court’s decision is consistent with this Article’s fundamental thesis, the Author has taken the liberty of reproducing a portion of it at some length here:

Not only is the waiver itself contrary to public policy because it fails to serve any legitimate State interest, but the coercive manner in which it was extracted also requires its invalidation. Defendant had already assumed a big risk proceeding with his suppression hearing having been warned by the prosecutor that she would double the sentence promise from three years to life to six years to life, if defendant lost the motion. How grossly unfair, then, and what an offensive blow to defendant’s ability to calculate the risks attendant upon a decision either to proceed with a suppression hearing or accept a generous plea, to discover at the conclusion of the hearing

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185. *Id.* at 290.

186. *Id.* at 293.

187. N.C. GEN. STAT. § 15A-979 (2010).

188. *People v. Ventura*, 531 N.Y.S.2d 526, 529–30 (N.Y. App. Div. 1988).

189. *Id.* at 532 (emphasis added).

that even the doubled offer of six years to life was conditioned on defendant's waiver of his suppression issue.

This court may not excuse such punitive and coercive plea bargaining with a glib statement that defendant could have rejected the plea offer. The reality is that there are instances, and this case is one, where "defendants have no practical alternative to accepting the plea bargain proposed by prosecutors." When the entire prosecution rests on evidence ruled admissible despite defendant's meritorious constitutional challenge and there is no point in defendant proceeding to trial, to condition a plea to the waiver of the right to appeal the suppression ruling is inherently coercive and infects the entire plea bargain, no matter how generous the plea is otherwise.<sup>190</sup>

Despite the Court's decision in *Ventura*, however, not all was rosy for defendants challenging plea waivers. In *People v. Olsen* and *People v. Seaberg*, the California Court of Appeals and the New York Court of Appeals respectively sought to enhance the right of prosecutors to condition pleas on the defendant waiving his constitutional rights.<sup>191</sup>

In nearly all of the Supreme Court decisions regarding plea bargains, the issue has been the concern over voluntariness or consent. Hamburger imaginatively perceives the union of consent with unconstitutional conditions to be the Gordian Knot of constitutional law where, for the Court, a defendant's perceived-to-be-voluntary consent to waive Fifth and Sixth Amendment privileges in exchange for a plea extinguishes the taint of unconstitutional conditions.<sup>192</sup> This is not so.

## V. RIGHTS, PRIVILEGES, AND NATURAL LAW

Returning for a moment to the discussion of colonial and constitutional interpretations of the Fifth and Sixth Amendments up to 1930, there can be no doubt that contemporary adjudication of plea-bargaining is by definition an unconstitutional condition on a benefit.

The case law guiding plea-bargaining is exemplary of the way in which powerful interests, i.e. legislators and judges, move the goal posts when existing principles or law fail to suit their needs. For example, the Supreme Court has consistently ruled to protect free speech when confronted with unconstitutional conditions on benefits. For example, when a prospective employee is presented with the opportunity to attain the benefit of a job but only on the condition that

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190. *Id.* at 533.

191. *People v. Olsen*, 264 Cal. Rptr. 817, 819 (Dist. Ct. App. 1989); *People v. Seaberg*, 541 N.E.2d 1022, 1026 (N.Y. 1989).

192. Philip Hamburger, *Unconstitutional Conditions: The Irrelevance of Consent*, 98 VA. L. REV. 479, 483 (2012).



he solely affiliate with a political party of the employer's choosing.<sup>193</sup> But when the question arises within a criminal-law context, the Court diverts the question *from* analysis based on unconstitutional conditions *to* criminal waiver. The Court moves the goal posts. In doing so, the Court applies a new semiotic category—contract law—where defendants are “free” to engage in the “give and take” of plea negotiations to their presumed benefit.<sup>194</sup>

Given contemporary adjudication and resource pressures, should legislators and judges narrowly parse the distinction between rights and privileges where the former seems to be constituted by natural law, and the latter a more pragmatic response to the daily grind of prosecutorial decision-making, thereby enabling said legislators and judges to customize statutes and law in accordance with prevailing need? If so, what *is* a right? Are rights the product of divine inspiration leading to correct reason, or does a secular legislative process bestow them upon us? If it is the former, then clearly rights are inalienable. But if rights are granted through the messy contested terrain of secular policy-making, then clearly what the state giveth the state can taketh away. If that is true, then what differentiates “rights” from “privileges”? This is a question that has been thoroughly explored in the jurisprudential debate among various stripes of originalist theorists. In his 2008 tribute to Bernard Siegan, Eric Claeys lays the foundation for distinguishing between rights and privileges.<sup>195</sup> Claeys distinguishes two types of originalist theorists—“formalist” originalists and “fundamental rights” originalists.<sup>196</sup> It is the latter who best exemplify the approach taken in this Article. Specifically, “fundamental rights” originalists hold that the meanings of many constitutional clauses are informed, with enough specificity for politicians and judges to follow, by natural-law and rights principles as understood in the early Enlightenment.<sup>197</sup>

#### A. *Natural Law and Natural Rights in the United States*

Much of the argument advanced in this Article is an attempt to mount a solid defense of the preservation of the Fifth and Sixth Amendment rights as essential to meeting constitutional obligations flowing from the Fourteenth Amendment's due-process, fundamental-fairness, and equal-protection clauses. Space limitations prohibit

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193. *Elrod v. Burns*, 427 U.S. 347, 347–48 (1976); *see also* *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 100 (1947); *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952); *Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 898 (1961).

194. Jason Mazzone, *The Waiver Paradox*, 97 Nw. U. L. REV. 801, 833 (2003).

195. Eric R. Claeys, *Blackstone's Commentaries and the Privileges or Immunities of United States Citizens: A Modest Tribute to Professor Siegan*, 45 SAN DIEGO L. REV. 777 (2008).

196. *Id.* at 779.

197. *Id.* at 779–80.

thorough exploration into all of the historical interstices of natural law, but the assumptions guiding the evolution of colonial constitutions, the Declaration of Independence, the United States Constitution, and the Bill of Rights, not to mention precedent-setting Supreme Court decisions emerging from the late eighteenth and early twentieth centuries, make it clear that whether one adopts the classical natural-law position espoused by Aristotle, the Stoics, or Cicero, the late Middle Ages Roman Catholic interpretation of natural law found in St. Thomas Aquinas, or the Modern Era expressions found in de Vitoria and Suarez, Hooker, Grotius, Pufendorf, Hobbes, Rousseau, Saint-Simon, and Locke, a common thread consumes them all—preservation of the essential dignity, eminence, and liberty constituting all human beings in accordance with *lex terrae*.<sup>198</sup> This human liberation impulse was translated into a legal theory existing at the time of the American Revolution and affirmed in the Constitution proclaiming, “That the political and social world is governed by certain and universal laws, which are unalterable and inescapable, which are the source of man’s natural rights, and to which all human laws must conform and which accordingly limit and restrict government which must act in obedience to natural law only.”<sup>199</sup> But it was not solely the politically astute and the learned who spoke about and understood their constitutional relationship to power as based on natural law, these ideas were ubiquitous in the colonies.<sup>200</sup> Hamburger asserts that, “Americans tended to take for granted that natural law had a foundation in the physical world and yet had moral implications. Natural law, according to Americans, was a type of reasoning about how individuals should use their freedom.”<sup>201</sup> And colonial Americans, regardless of status and class were not as philosophically metaphysical as Justice Pound would suggest.<sup>202</sup> On the contrary, it appears that colonists understood natural law and

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198. For a general overview of the theories associated with each of these philosophers see GEORGE C. CHRISTIE & PATRICK H. MARTIN, *JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW* 118–92 (2d ed. 1995).

199. Charles S. Desmond, *Natural Law and the Constitution*, 22 *FORDHAM L. REV.* 235, 242 (1953).

200. Philip A. Hamburger, *Natural Rights, Natural Law, and the American Constitutions*, 102 *YALE L.J.* 907, 915 (1993).

201. *Id.* at 923.

202. Roscoe Pound, *The Scope and Purposes of Sociological Jurisprudence*, 24 *HARV. L. REV.* 591, 591–92 (1911). While acknowledging the significant progressive contributions made by natural law scholars who articulate the confluence of reason and right to promote justice, Justice Pound’s criticism of philosophical approaches to law (and here he is adopting a stance originally proposed by Hume) is that they too often substitute *ought* for *is*. *Id.* at 619. That is, Justice Pound asserts that natural law theorists offer grand platitudes and ideal types but when it comes to addressing day-to-day application of the law to real world problems, well, it falls short. *Id.* at 609–10. “In philosophical jurisprudence this tendency takes the form of over-abstractness, of a purely abstract right and justice, which, instead of resulting in a healthy critique of dogmas and institutions or at least providing material therefor [sic], leads to empty generalities, thus in effect leaving legal doctrines to stand upon their own basis.” *Id.* This was not, however, the way natural law was viewed by common colonial people.

natural rights as very narrowly defined, and to include a limited degree of liberty.<sup>203</sup> Thoughtfully secure in their awareness of enlightened self-interest, Americans understood that in order to optimize liberty in what was recognized as a bounded state of nature (one comprised of a social contract), they would have to relinquish some of their natural liberty to a constitutional government. A constitution that gained its legitimacy and authority from the will of the people as a whole would be expected to express and protect natural rights. But being historically aware and rightfully fearful that any hegemonic power might infringe upon those rights, it became imperative, especially for the Anti-Federalists, that natural rights must be given literal and symbolic authority in the new constitution.<sup>204</sup>

Embedded deeply within the psyche of the American people was a fundamental statement of belief:

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

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, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.<sup>205</sup>

Thomas Jefferson, the author of the Declaration of Independence, was a natural-law philosopher.<sup>206</sup> Like his founding brethren—James Otis, Samuel Adams, John Adams, Thomas Paine, and Patrick Henry—Jefferson was steeped in expressions of *lex naturalis* that were espoused by Grotius, Pufendorf, Hobbes, and Locke.<sup>207</sup> So much so

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203. Hamburger, *supra* note 200, at 908; *see also* Desmond, *supra* note 199, at 242 (“[W]hen the Declaration of Independence was written and the Constitution ratified, practically every civilized person believed in natural law.”).

204. Hamburger, *supra* note 200, at 932–33.

205. THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776).

206. *See, e.g.*, Desmond, *supra* note 199, at 235–36 (“[The Declaration of Independence] was, of course, a recognition and assertion of the natural rights of men, a declaration that, in a state of nature and before the formation of a political society, men were equal in their possession of certain inalienable rights which Jefferson, author of the great Declaration, described as rights to ‘life, liberty and the pursuit of happiness.’” (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776))).

207. *Id.* at 240–41.

that embedded in the Declaration of Independence is the general reference to natural law espoused by each, with a specific reference to Locke's compelling command that a government that becomes destructive of the pursuit of life, liberty, and happiness must be altered or abolished.<sup>208</sup> It was Gouverneur Morris, representative from the state of Pennsylvania to the Constitutional Convention in 1787, who penned the Preamble to the Constitution.<sup>209</sup>

WE THE PEOPLE of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>210</sup>

The first three words of Morris's poetic exordium signify a historical nod to natural rights since it was the people, not any state or government, that by virtue of their natural rights were entering into a social contract. All natural rights were perceived by the Framers and colonists to originate with God, not governments, and it was the people through their ability to reason who bestowed upon governments the authority to maintain the general welfare while in return the people agreed to surrender some of the rights that existed in a state of nature. Furthermore, references to "Justice" and the "Blessings of Liberty" each signify natural-rights theories that were well known to the Framers.<sup>211</sup> The Constitution's first ten Amendments constitute the Bill of Rights.<sup>212</sup> These ten Amendments were ratified on December 15, 1791.<sup>213</sup> On many occasions leading up to the ratification of the Constitution, Anti-Federalists threatened to defeat it unless an enumerated set of rights was included.<sup>214</sup> So taken for granted were the substantive rights later appearing in the Bill of Rights that Madison saw no need to include them.<sup>215</sup> But Anti-Federalists textual affirmation of the long-held natural rights was imperative to preserve the will of the people as against any tyrannical power. To reiterate for our

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208. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* ch. 2 (1690), available at <http://www.justiceharvard.org/resources/john-locke-second-treatise-of-government-1690/>; THE DECLARATION OF INDEPENDENCE paras. 1–2 (U.S. 1776); see also Desmond, *supra* note 199, at 236.

209. *Gouverneur Morris*, BILL OF RIGHTS INST., <http://billofrightsinstitute.org/educate/educator-resources/founders/gouverneur-morris/> (last visited Mar. 8, 2015); see also *Morris, Gouverneur, (1752–1816)*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000976> (last visited Mar. 8, 2015).

210. U.S. CONST. pmb1.

211. Desmond, *supra* note 199, at 236.

212. U.S. CONST. amends. I–X.

213. See, e.g., Desmond, *supra* note 199, at 239 (“[T]he Amendments which went into effect in 1791.”).

214. AKHIL REED AMAR, *AMERICA'S CONSTITUTION* 315–47 (2005).

215. See *id.*

purposes those rights that specifically address matters of due process, liberty, and justice are the Fourth, Fifth, Sixth, and Eighth Amendments (on July 9, 1868, the Fourteenth Amendment would be added).<sup>216</sup> The first eight amendments express natural law and natural rights.<sup>217</sup> The antecedent language of each of the rights asserted in the Bill of Rights can be found in various measure as articulated in Magna Carta, the English Bill of Rights of 1689, the English Habeas Corpus Act, the Massachusetts “Body of Liberties” of 1641, the Virginia Bill of Rights of 1776, and in the Massachusetts Declaration of Rights of 1780.<sup>218</sup> Likewise, the U.S. Supreme Court and many state courts acknowledged the primacy of natural law.<sup>219</sup>

Cicero famously first said, “Law is coeval with God” (a sentiment later repeated by Blackstone), where law does not arise as a product of human thought, but as a matter of divine endowment. “Law is the highest reason, implanted in nature, which commands what ought to be done and forbids the opposite. This reason when firmly fixed and fully developed in the human mind is law.”<sup>220</sup> By the time of the Enlightenment, natural-law scholars had largely eschewed reference to God and divinity and had focused more specifically on human reason.<sup>221</sup> That American law should reflect natural law was an idea that had its roots in medieval times. But Americans, who frequently made reference to “right reason,” were articulating a fresh interpretation of natural rights, one that was more the product of Grotius, Pufendorf, and Locke, than Aristotle, Cicero, or Aquinas. Specifically, the Framers

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216. U.S. CONST. amends. IV–VI, VIII, XIV.

217. This point may be a matter of some dispute. For example, Hamburger suggests that Americans were fairly certain that most of the rights articulated in the Bill of Rights originated as natural rights, while others were civil rights granted through the judicial and political processes. Hamburger, *supra* note 200, at 918–19. Hamburger suggests that habeas corpus and right to a trial by jury were viewed by Americans at the time of the founding to be civil rights and to affirm this point cites to James Madison who says that, “Trial by jury cannot be considered as a natural right, but a right resulting from a social compact which regulates the action of the community, but is essential to secure the liberty of the people as any one of the pre-existent rights of nature.” *Id.* at 921 n.42. However, he also cites to Richard Henry Lee, one known at the time of the founding to be writing under the pseudonym The Federal Farmer. *Id.* Lee, like most others commenting on the origin of the Bill of Rights, includes habeas corpus and right to a trial by jury as “unalienable or fundamental rights” *Id.* (quoting FEDERAL FARMER (Dec. 25, 1787), reprinted in 2 *The Complete Anti-Federalist* 372 (Herbert J. Storing ed., 1981)). What one finds in this literature is the concept of natural rights and fundamental rights to be used interchangeably.

218. Desmond, *supra* note 199, at 237.

219. See generally Charles Grove Haines, *The Law of Nature in State and Federal Judicial Decisions*, 25 *YALE L.J.* 617 (1916).

220. See, e.g., CHRISTIE, *supra* note 198, at 123 (quoting CICERO, DE LEGIBUS I, vi, 18 (C.W. Keyes trans., Cambridge MA 1977)).

221. Hamburger, *supra* note 200, at 937.

understood natural law within the context of their modern rights analysis. . . . Americans asserted that the people, in accordance with the implications of natural law, should protect their natural liberty by establishing government and should formulate their constitutions and laws to reflect natural law—that is, to reflect the reasoning that led the people to create constitutions and laws.<sup>222</sup>

For the Framers of the Declaration of Independence, the Constitution, and the Bill of Rights, theirs was a world of philosophical enlightenment contextualized by a discourse that made synonymous reference to *jus naturale*, the law of nature, the law of reason, *lex naturalis*, *lex aeterna*, natural justice, and due process of law.<sup>223</sup> Fowler asserts that the due-process clause of the Fourteenth Amendment signified “a new natural law philosophy to meet the growing demands upon constitutional jurisprudence.”<sup>224</sup>

Application and interpretation of natural law has changed in accordance with changing political, economic, and cultural conditions. Such was the case that gave rise to the preservation of personhood rights within states beginning in the thirteenth century with the Magna Carta, but was more fully apparent during the middle of the sixteenth century.<sup>225</sup> Following Elias, “legal forms correspond at all times to the structure of society.”<sup>226</sup> With greater divisions of labor and higher degrees of social integration, there grows a need for institutions to facilitate universal validity of the law and for written agreements.<sup>227</sup> Throughout our colonial history, and continuing to present day, natural law has served as a powerful theoretical and philosophical foundation for establishing the *ought* of contemporary law and life. It was reference to natural law that provided the reasoning behind the content included in constitutions, and it was natural law that provided Americans with the criteria necessary to gauge the efficacy of those constitutions.<sup>228</sup>

If natural law leads to the creation of natural rights, and adhering to natural rights preserves natural liberty, then the rights codified in the Bill of Rights must be adhered to in order to preserve liberty. Failing to adhere to the Fifth and Sixth Amendments violates the spirit and intent of philosophical and pragmatic concerns of the Framers and of Americans more generally, concerns that were understood within the context of more than a thousand years of natural-law philosophy and practice as embraced in common law.

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222. *Id.*

223. Fowler Vincent Harper, *Natural Law in American Constitutional Theory*, 26 MICH. L. REV. 62, 62 (1927).

224. *Id.*

225. See NORBERT ELIAS, *THE CIVILIZING PROCESS* 230 (Blackwell rev. ed. 2000).

226. *Id.* at 233; see also Harper, *supra* note 223, at 62.

227. ELIAS, *supra* note 225, at 233.

228. Hamburger, *supra* note 200, at 940.

The Privileges and Immunities Clause located in Article IV, Section 2 of the Constitution is suggestive of pre-political rights that were taken for granted from common law through the passage of the Fourteenth Amendment.<sup>229</sup> The privileges and immunities clause reads as follows:

The Citizens of each state shall be entitled to all Privileges and Immunities of Citizens in the several States.<sup>230</sup>

Little in the way of judicial attention has been paid to Article IV because a similar statement was included in Section 1 of the Fourteenth Amendment to the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>231</sup>

Like Amar, the Author contends that the privileges and immunities clause incorporates the Bill of Rights.<sup>232</sup> While often viewed as being synonymous with privileges, freedom, and liberty, a “fundamental rights” originalist considers the long view of historical context to discern what is a subtle but important a priori positioning of rights relative to privileges. Following upon Blackstone’s rendering of the Enlightenment era social compact, rights precede privileges and immunities in a dialectical coupling where rights are the signified, and privileges and immunities are signifiers. Privileges and immunities are positive-law articulations of the moral principles constituting rights. More simply, in a causal ordering it is pre-political, natural-law-inspired rights that come first, followed closely by the ways that politicians and judges attempt to devise the rules and laws necessary to realize the right. By privileging historical analysis of the contours of American jurisprudence, we are better positioned to understand the significance placed on the rights guaranteed by the Bill of Rights as unalienable, immutable, and constitutive of the fundamental assumptions made explicit by the Constitution. For example, the language provided in Article IV emanates from Blackstone’s *Commentaries on the Laws of England*, where Blackstone references pre-political “natural liberty.”

The rights themselves thus defined by [Magna Carta and other foundational] statutes, consist in a number of private immunities; which will appear, from what has been premised, to be indeed no

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229. U.S. CONST. art. IV, § 2.

230. *Id.*

231. U.S. CONST. amend. XIV, § 1.

232. AMAR, *supra* note 53, at 176–77.

other, than either that residuum of natural liberty, *which is not required by the laws of society to be sacrificed to public convenience*; or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals. These therefore were formally, either by inheritance or purchase, the rights of all mankind. . . . And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty; and the right of private property: *because as there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.*<sup>233</sup>

Amar makes a similar point with regard to Blackstone's use of the words privilege and immunity, where Blackstone invokes these concepts when discussing "landmark English charters of liberty of Magna Carta, the Petition of Right, the Habeas Corpus Act, the English Bill of Rights of 1689, and the Act of Settlement of 1701."<sup>234</sup> As Amar observes, each of these documents established the foundation of common law.<sup>235</sup> Importantly, Blackstone's own reference to pre-political rights as expressed in the Magna Carta, and "natural liberties," suggests that "these foundational statutes do not give English subjects new rights; they merely 'declare' that the subjects have in civil law rights they already enjoy as a matter of natural law."<sup>236</sup> No political state can bestow what is already guaranteed by the state of nature to all human beings. Sounding like Blackstone, Justice Brennan writing in dissent in *United States v. Verdugo-Urquidez* asserted that the Framers were not creating new rights, "[r]ather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be pre-existing."<sup>237</sup> This Locke-inspired, morally infused natural-law articulation of rights that appears in Blackstone, the Declaration of Independence, the Bill of Rights, as well as in the writings of American philosophers and the opinions of American judges is precisely what constitutes the inalienability of constitutional rights.

Perhaps the most extraordinary judicial opinion giving full-throated expression to the pre-political rights of citizens was *Campbell v. State of Georgia*.<sup>238</sup> James Campbell was convicted of manslaughter in January of 1852 following an alleged altercation with Carl Mays that ulti-

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233. Claeys, *supra* note 195, at 790 (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (W.S. Hein & Co. 1992) (1766)) (emphasis added).

234. AMAR, *supra* note 53, at 169.

235. *Id.*

236. Claeys, *supra* note 195, at 790.

237. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 288 (1990) (Brennan, J., dissenting); see also Tina Wan, *The Unnecessary Evil of Plea Bargaining: An Unconstitutional Conditions Problem and a Not-So-Least Restrictive Alternative*, 17 S. CAL. REV. L. & SOC. JUST. 33 (2007).

238. *Campbell v. Georgia*, 11 Ga. 353 (1852).



mately led to his death.<sup>239</sup> At issue was the introduction at trial of hearsay evidence against Campbell that he claimed violated the Sixth Amendment confrontation clause.<sup>240</sup> The Superior Court decision was appealed to the Georgia Supreme Court,<sup>241</sup> and it was as a member of that Court that Judge Lumpkin cast his place in jurisprudential history. The question before the Court was whether the Bill of Rights is incorporated to the states.<sup>242</sup> Judge Lumpkin ruled clearly that the Bill of Rights applied to every citizen of the United States regardless of his or her location:

The principles embodied in these amendments, for better securing the lives, liberties, and property of the people, were declared to be the “birthright” of our ancestors, several centuries previous to the establishment of our government. It is not likely, therefore, that any Court could be found in America of sufficient hardihood to deprive our citizens of these invaluable safeguards.<sup>243</sup>

And more specifically with regard to what Judge Lumpkin referred to as the “declaratory” powers emanating from the Bill of Rights:

While the amendments to the Constitution of the United States were primarily intended to be restrictive upon the powers of the General Government, and not the Legislatures of the several States—yet *they are “declaratory” of great principles of civil liberty, which neither the national nor the State governments can infringe.*<sup>244</sup>

And:

[t]he right of a party accused of a crime, to meet the witnesses against him, face to face, is no new principle. It is coeval with the Common Law. Its recognition in the Constitution was intended for the two-fold purposes of giving it prominence and permanence.<sup>245</sup>

A clearer restatement of Blackstone’s *Commentaries* would be hard to find. And Judge Lumpkin’s language was not unique for the times, as the *Dred Scott* decision makes clear.<sup>246</sup>

It is at this point that the Author must return to Justice Sutherland’s 1930 decision in *Patton v. United States*, as it is an important deviation from *Thompson v. Utah* and all previous settled law on the issue of rights waivers.<sup>247</sup> As previously established, the influence of liberal economic theory postulated citizens as “free agents” who were able to

239. *Id.* at 354.

240. *Id.* at 364.

241. *Id.*

242. *Id.* at 364–65.

243. *Id.* at 365.

244. *Id.* at 353 (emphasis added).

245. *Id.* at 374.

246. See AMAR, *supra* note 53, at 169 (emphasizing the Supreme Court’s labeling the entitlements of the “rights and privileges of the citizen,” and “privileges and immunities of citizens”).

247. *Patton v. United States*, 281 U.S. 276 (1930), *abrogated by Williams v. Florida*, 399 U.S. 78 (1970).

buy and sell their rights consistent with perceived benefits. This contract model of rights was at odds with historical precedent but provided a powerful ideological device necessary to remedy systemic challenges facing the administration of high caseloads. The courts viewed plea waivers not as a usurpation of constitutional protections, but as a way to enhance efficiency. Criminal defendants were “free” to choose the path that most suited their interests as manifested in a set of prosecutorial offers and an assessment of the risk of conviction at trial.<sup>248</sup> But is this constitutionally permissible? The literature addressing unconstitutional conditions and rights waivers is dense and controversial.<sup>249</sup> However, at the risk of marginalizing the contention that plea-bargaining is unconstitutional, the Author wants to provide at least a modest critique of the liberal-economic framing of *homo economicus* and the Randian<sup>250</sup> notion that American citizens engage the state as individuals (free thinking, free acting, reasonable, rational) who are fully self-contained, autonomous units that are “free” to engage state authority in a bargaining transaction as if (a) *homo economicus* possessed equitable power and authority and (b) *homo economicus* was possessive of the *authority* as a self-contained bearer of rights to negotiate those away.<sup>251</sup> As demonstrated below, neither is the case.

The Constitution is a law.<sup>252</sup> As such, neither the state nor any other public or private institution may alter the law; that can only be done through the consent of the people.<sup>253</sup> The Constitution does permit the government to place conditions on benefits, but it also requires the consent of the governed to do so. Conditions constituting plea negotiations distort the meaning of consent. In his 1918 opinion for a unanimous Court in *Union Pacific R. Co. v. Public Service Commission of Missouri*, Justice Holmes made clear the Court’s concerns that consent through coercion registers an impermissible and unconstitutional condition on a benefit. Justice Holmes stated:

Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in case of a failure to

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248. See Mazzone, *supra* note 194, at 833.

249. For an early attempt to argue the unconstitutionality of pleas based upon unconstitutional conditions see Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970).

250. The word “Randian” refers to Ayn Rand, author of the classic novels *The Fountainhead* and *Atlas Shrugged*.

251. In this Article the Author has exclusively focused on the constitutional questions at issue regarding plea-bargaining. In subsequent analysis the Author will deconstruct more thoroughly the notion liberal construction of *homo economicus* by establishing through the application of sociological and psychological literatures that subjects are constituted selves who often fail to embody the liberal objectivist ideal type so prevalent in liberal economic and jurisprudential theory.

252. Hamburger, *supra* note 192, at 483.

253. *Id.*

accept it, and then to declare the acceptance voluntary, as was attempted in *Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor*. On the facts we can have no doubt that the application for a certificate and the acceptance of it were made under duress.

*It always is for the interest of the party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.*<sup>254</sup>

The constitutional presumption of consent was of “the governed” as a whole, especially when regarding a matter of fundamental rights. But in the buckled, *Alice in Wonderland*, hegemonic philosophy of consent that permeated liberal, economic jurisprudence beginning in the early 1900s, consent came to be synonymous with one lone defendant engaging the state in the marketplace of rights trading, an ideological position that was firmly ensconced in plea jurisprudence following *Brady v. United States* in 1970. When the government offers a charge or sentencing reduction in exchange for (meaning with the “consent” of the defendant) the abdication of Fifth and Sixth Amendment protections, it does so in violation of the Constitution. Consent under these circumstances confers a power to the government that the Constitution denies to it.<sup>255</sup> Justice Harlan, in *Thompson v. Utah*, and Justice Sutherland, in *Frost v. Railroad Commission of California*, asserted a similar sentiment about the common law, that the government “may not impose conditions which require the relinquishment of constitutional rights.”<sup>256</sup> While the facts of *Frost* pertain to the right of the Frost brothers to use state roadways to carry goods, the principle guiding Justice Sutherland’s opinion is apropos of pleas:

Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. In reality, the carrier is given no choice, except between the rock and the whirlpool,—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.

It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold . . . . But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which required the relin-

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254. *Union Pac. R. Co. v. Pub. Serv. Comm’n of Mo.*, 248 U.S. 67, 69–70 (1918) (emphasis added).

255. Hamburger, *supra* note 192, at 484.

256. *Frost & Frost Trucking Co. v. R.R. Comm’n of Cal.*, 271 U.S. 583, 594 (1926).

quishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel the surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.<sup>257</sup>

Forgetting for a moment that it was this same Justice Sutherland who, only four years later (in 1930), would author the precedent-setting majority opinion in *Patton v. United States*, an opinion that set the foundation for all subsequent state claims legitimating the constitutionality of plea-bargaining by adopting the “defendant as free agent capable of bargaining away individual constitutional rights for purposes of expediency” principle of due process, his antecedent reasoning in *Frost* demonstrates what was known and accepted at common law and in the Articles of Confederation, the Declaration of Independence, the Constitution, the Bill of Rights, the opinions of the federal courts, the state and federal legislatures, and among legal philosophers up to that time. Simply put, *the state could not condition a privilege on the abdication of a constitutional right*. Or as Justice Holmes would have it, presentation of a condition on a constitutional right would amount to duress and would necessarily force a defendant into choosing from among the “lesser of two evils.”

Still, the juxtaposition of the *Frost* and *Patton* opinions is hard to ignore, especially since Justice Sutherland’s about-face in *Patton* foretells what would become an all too frequent occurrence at the Supreme Court starting in the 1970s—intellectual dishonesty for purposes of political and institutional expediency.

It is worth returning to *United States v. Vanderwerff*, the recently decided by the United States District Court for the District of Colorado opinion where Judge Kane bookends the early nineteenth-century opinions referenced above with his own statement regarding the dubious legality of pleas.<sup>258</sup> Mr. Vanderwerff was charged with three counts of receiving and possessing child pornography.<sup>259</sup> During plea negotiations, he agreed to plead guilty to Count 2, and the state agreed to dismiss Counts 1 and 3.<sup>260</sup> However, “the proposed plea agreement contained a waiver of Mr. Vanderwerff’s statutory right to appeal any matter in connection with his prosecution.”<sup>261</sup> It was the matter of the appellate waiver that was in dispute before Judge Kane.<sup>262</sup> But as is clear from his opinion, he contextualizes the appellate waiver issue in the broader framework of the “dubious” constitu-

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257. *Id.* at 593–94.

258. *United States v. Vanderwerff*, No. 12–cr–00069, 2012 WL 2514933, at \*4 (D. Colo. June 28, 2012).

259. *Id.* at \*1.

260. *Id.*

261. *Id.*

262. *Id.* at \*1, \*5.

tionality of plea-bargaining before narrowing his focus to the matter before the court.<sup>263</sup>

Prioritizing efficiency at the expense of the individual exercise of constitutional rights applies to the guilty and the innocent alike, and sacrificing constitutional rights on the altar of efficiency is of dubious legality . . . . A rational defendant, even if innocent, may plead guilty to a lesser offense in order to minimize the risk of prosecution.<sup>264</sup>

He then narrowed his focus to specific reference to appellate waivers: “Indiscriminate acceptance of appellate waivers undermines the ability of appellate courts to ensure the constitutional validity of convictions and to maintain consistency and reasonableness in sentencing decisions.”<sup>265</sup>

There are two remaining problems regarding the presumption of consent: (a) the government cannot rely on consent to do what it cannot legally do and (b) the government relies on the use of force to generate the consent that it needs to do what it legally cannot do.<sup>266</sup> With regard to the former, by definition, requiring defendants to sign plea waivers as a condition on a benefit, like the right to appeal suppression motions,<sup>267</sup> unfair sentences,<sup>268</sup> or the withholding of exculpatory evidence, manifests as a powerful government manipulation of the adjudication process through an apparent procurement of consent. Once again, supporters of waivers rely upon established principles of contract law to legitimate the constitutionality of plea waivers. In particular, plea waivers are viewed as a mutually beneficial agreement.<sup>269</sup> Constituting case law in this area is the assumption that only contract law, not criminal due process, can assure an equitable and fair outcome based on principles of free and unfettered negotiation. And, as is consistent with liberal economic assumptions about *homo economicus*, to limit the opportunity for a defendant to lay claim to a benefit would be to limit that defendant’s freedom to bargain.<sup>270</sup> Contrary to Judge Kane’s framing of plea waiver’s in *Vanderwerff*, in *United States v. Wenger*,<sup>271</sup> the Seventh Circuit Court of Appeals validated plea waivers by suggesting that (a) defendants benefit when

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263. Vanderwerff appealed Judge Kane’s decision rejecting the plea bargain to the Tenth Circuit Court of Appeals. On August 8, 2012, in a per curiam opinion, the three panel Court of the Tenth Circuit dismissed Vanderwerff’s appeal. *Vanderwerff*, 2012 WL 2514933, *appeal dismissed*, No. 12-1280 (10th Cir. Aug. 8, 2012) (per curiam).

264. *Id.* at \*4.

265. *Id.* at \*5.

266. Hamburger, *supra* note 192, at 485–86.

267. See *People v. Ventura*, 531 N.Y.S.2d 526 (N.Y. App. Div. 1988).

268. *United States v. Johnson*, 992 F. Supp. 437, 439 (D.D.C. 1997).

269. See *People v. Seaberg*, 541 N.E.2d 1021, 1024 (N.Y. 1989); *United States v. Howle*, 166 F.3d 1166, 1169 (11th Cir. 1999).

270. See Alexandra W. Reimelt, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. REV. 871, 882 n.103 (2010).

271. *United States v. Wegner*, 58 F.3d 280 (7th Cir. 1995).

they are given the choice to negotiate their charge and sentence and (b) eliminating plea waivers would jeopardize the entire plea process.<sup>272</sup> In general, however, the federal courts of appeal are striking often disparate positions with regard to plea waivers making any reference to uniformity of opinion moot.<sup>273</sup> For example, both *United States v. Raynor* and *People v. Butler* hold that appeal waivers are per se invalid because “the waivers violate due process, conflict with the public interest, and cannot comport with contract law requirements.”<sup>274</sup> At least one court has held that plea waivers are unconstitutional and violate the principles of contract law because it is apparent that the two parties to the bargain are in no way equals and the waiver cannot be knowing and voluntary.<sup>275</sup>

In addition, to threaten defendants with harsher punishment if convicted at trial (the trial tax) is tantamount to a use of legal force that by no measure of reasoned consideration can be viewed as “consensual.” Because the conditions on benefits in plea settings rely upon a distorted and, in the Author’s view, intellectually dishonest interpretation of consent by ignoring the power imbalances existing between defendants and prosecutors, and because of the force that is available to prosecutors to severely restrict or eliminate liberty, plea-bargaining amounts to an unconstitutional condition that violates the Bill of Rights.<sup>276</sup> Specifically, “[i]t therefore is crucial that the role of consent as a mechanism within the government’s authority should not obscure the problem of whether consent can cure what the government does outside its constitutional authority.”<sup>277</sup> Defenders of the constitutionality of plea-bargaining build their support upon a house of cards by conflating defendant’s consent of rights waivers as a prophylactic for constitutional violations. As long as there is consent, then there is no need to be concerned about the usurpation of rights and subsequent liberty restrictions. To reiterate a point made earlier but in a different context, pre-political constitutional rights serve not as the sole possession of *homo economicus*, but as “spheres of freedom legislated by the people as legal limits on government.”<sup>278</sup> Limitations

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272. *Id.* at 883.

273. *See, e.g.,* *United States v. Raynor*, 989 F. Supp. 43, 49 (D.D.C. 1997); *People v. Butler*, 204 N.W.2d 325, 330 (Mich. Ct. App. 1972).

274. Reimelt, *supra* note 270, at 884 (“[A]ppeal waivers [are] per se invalid . . . because the waivers violate due process, conflict with the public interest, and cannot comport with contract law requirements.”).

275. *United States v. Johnson*, 992 F. Supp. 437, 438–39 (D.D.C. 1997) (“[I]t is the view of this Court that it would be inappropriate for it to accept a plea agreement that waives the defendant’s right to appeal an unconstitutional or otherwise illegal or erroneous sentence.”).

276. Hamburger, *supra* note 192, at 490.

277. *Id.* at 507.

278. *Id.* at 510.

on assertion of government authority reside in the domain of legislated legal constraints, not contractual relationships.<sup>279</sup>

## VI. CONCLUSION

In a July 5, 1852 speech delivered to the Rochester Ladies' Anti-Slavery Society, Frederick Douglass said, "America is false to its past, false to its present, and solemnly binds herself to be false in the future."<sup>280</sup> Douglass was obviously speaking about the blemish of slavery, but he might as well have been addressing plea-bargaining.

The Author initiated this Article with a reference to the well-worn fable made famous by Hans Christian Andersen. The Author suggested that it was absolutely crystalline that the system of plea-bargaining in the United States appears nakedly before us as an institutional mechanism for enhancing an out-of-control criminal-justice system. In order to establish plea practice as constitutional, the Supreme Court was forced to employ a juridic discourse that shifted from the language of due process found in criminal law, especially the protections afforded by the Fifth and Sixth Amendments, and toward contract law where defendants were "free" to negotiate away their rights. This legal maneuver is akin to the Bush Administration's use of the term "enemy combatants" rather than "prisoners of war" because the latter would have invoked Geneva Convention protections.<sup>281</sup> The Supreme Court applied an entirely novel standard to the adjudication of criminal cases, and it rationalized its decision as being based on the need for efficiency. Post-1970 Supreme Court decisions, as the Author revealed in Section III, generated legitimacy for the plea system by referencing its 1970 precedent. Reasoning by *circulus in propando*, plea-bargaining was considered constitutional because it existed, and it existed because it was constitutional. Since the late 1960s, the Court has failed to address the constitutionality of pleas forthrightly *without* shifting the narrative away from due process and

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279. *Id.* at 512–13.

280. See ANNE-MARIE SLAUGHTER, *THE IDEA THAT IS AMERICA* 28 (2007) (quoting Frederick Douglass, *What to the Slave is the Fourth of July?*, Speech at Rochester, New York (July 5, 1852) (transcript available at <http://teachingamericanhistory.org/library/document/what-to-the-slave-is-the-fourth-of-july/>)).

281. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833, § 1(f) (Nov. 13, 2001) ("Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."); see generally, *Ex parte Quirin*, 317 U.S. 1, 37–38 (1942) (discussing lawful versus unlawful combatants). See, e.g., William J. Haynes II, *Enemy Combatants*, COUNCIL ON FOREIGN RELATIONS (Dec. 12, 2002), <http://www.cfr.org/international-law/enemy-combatants/p5312> ("All of the detainees are unlawful combatants and thus do not as a matter of law receive the protections of the Third Geneva Convention.").

toward contract law. The reason for this, the Author contends, is because the Court's rationale would not bear the weight of 500 years of Common Law, U.S. constitutional mandates, and opinions of the Court extending to 1930. With the deftness of the magician's slight of hand and the invocation of rhetorical deception, the Court disappears criminal procedure and due process afforded by the Constitution to all who are facing the loss of liberty and in its place returns an entirely new rhetorical device—the law of contracts.

Those who participate in the proliferation of legal narrative justifying and rationalizing the plea system, the Author argues, are analogous to the vain king who, naked before all observers, continued despite what was obviously transparent to rationalize his conviction. The Supreme Court, prosecutors, judges, and even defense attorneys turn to rationalization from legitimate plea practices. They have to because, as demonstrated in this Article, neither our Common Law heritage, our founding documents, colonial and state constitutions, nor Supreme Court decisions until 1930 permitted plea waivers on constitutional grounds. Each of these federal and state institutions turned to our founding commitment to natural law and natural rights as constitutive of our philosophical understanding of personhood and liberty. As demonstrated, the Fifth and Sixth Amendment rights were considered by most to be natural rights and, as such, were inalienable. What explains this philosophical shift? It appears that it was the need for increased efficiency with regard to case litigation. But how did this happen?

Do rights trump privileges with regard to the administration of pleas? Or put another way, Does our pre-political commitment to preservation of personhood under the law, with all its attendant qualities of liberty, freedom, and security, eclipse institutional demands for efficiency? Remember that until 1930 the Supreme Court issued opinions that emphatically ruled in the affirmative. Starting in 1930 with *Patton v. United States*, however, the Supreme Court did a dramatic about-face and shifted the course of plea jurisprudence.<sup>282</sup> Why? Because the dramatic increases in criminal caseloads meant increasing demand for prosecutorial and judicial efficiency. But there remains a cart-and-horse problem. Why were there so many cases putting nearly insurmountable pressures on the legal system? Where did and do they come from? The problem of enhanced prosecution was and still is a direct by-product of legislative decision-making. The more legislators at the state and federal level define behaviors as criminal and in need of prosecution, the greater the resource pressures confronting law enforcement, prosecutors, defense attorneys, and the courts to investigate and adjudicate them. Is it really that simple? By saying so, the Author is at risk at being labeled incompetent and stu-

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282. See *Patton v. United States*, 281 U.S. 276 (1930).



pid. Clearly, by drawing attention to this simple fact, the Author proclaims that the emperor stands naked before us. There really is not any need for plea-bargaining if there are fewer cases to litigate. How is it that all other Common Law countries manage to get by with a plea regimen that is the inverse of ours, and yet still manage to generate quite orderly civil society?

Finally, is the Author arguing for the elimination of plea-bargaining, or a kinder, gentler, more constitutionally viable version of it? Realistically, the Author joins Langer in calling for a directed-verdict standard.<sup>283</sup> Increased discovery coupled with more nuanced acknowledgement of the ways in which human beings actually process and understand information, along with a modified adversarial due process may ameliorate some of the more pernicious aspects of plea-bargaining. These and a host of other questions remain to be explored, but those will have to await another day. For now it is enough to say that, as presently implemented, the usurpation and direct inducement to gain convictions by encouraging defendants to abdicate their inalienable rights is a threat to personhood and liberty in the United States of America.

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283. See Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 34 AM. J. CRIM. L. 223 (2006).