Waiver of the Right to Appeal

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> THE COURT: [I]n order to finalize this case, we're required to waive your appeal rights. Do you, in fact, waive your appeal rights?
> MR. OGUL [Defense Counsel]: Your Honor, that has not been part of the negotiation.
> THE COURT: It's got to be.
> MR. OGUL: It has never been made a part of the negotiation.
> THE COURT: Wait, wait. Let's not argue about it, Mr. Ogul.
> MS. BACKERS [Prosecutor]: It's part of the deal.
> THE COURT: Every felony plea I've been taking in here for the last six months—he has to waive his appeal rights. If Mr. Cameron does not want to waive his appeal rights, we do not have a disposition, and I'm sending the case back to Judge McKinstry. That's the way it is.[1]

Plea bargaining[2] is the bedrock upon which modern criminal justice practice rests. Its evolution as the predominant model of criminal case adjudication has resulted in a system where criminal trials are the exception rather than the rule—a trial court model based almost exclusively on negotiation rather than litigation.[3] In recent years, a relatively new feature of plea bargaining practice has emerged which now threatens to render appeals nearly as rare a phenomenon as trials have become under the old model. This new aspect of the practice—which is illustrated by the extract above—is the increasingly prevalent requirement that a criminal defendant waive the right to appeal as a condition of any plea bargain.

Since more than eight out of ten criminal cases are disposed of by some form of plea arrangement,[4] the inevitable consequence of such widespread insistence upon appeal waivers will be the removal of an enormous percentage of criminal cases from appellate review. The doors of the trial court could gradually close to scrutiny from above and we could find ourselves moving one step closer to an administrative model of criminal case resolution in which neither factual nor

1. People v. Cameron, No. 101512, slip op. at 2-3 (Alameda County Super. Ct. May 17, 1991) (Transcript of Change of Plea Hearing).

2. Plea bargaining has been defined as "the exchange of prosecutorial, judicial or other official concessions for pleas of guilty." Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1059 n.1 (1976) [hereinafter *Judge's Role*].

3. Although figures vary, most sources estimate that 85% to 90% of criminal cases are disposed of by some form of plea bargain. *See* DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 n.1 (Frank J. Remington ed., 1966); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1909 n.1 (1992); U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 502 table 5.25 (Kathleen McGuire et al. eds., 1990).

4. *See supra* note 3.

legal issues are resolved by the courts, but rather by the parties through a process of negotiation. This development conflicts with our traditional notion that judicial safeguards are needed in the application of penal sanctions and should be examined thoroughly before we signal assent.

Appeal waivers are not an entirely new entry upon the plea bargaining scene.[5] In fact, reported cases adjudicating the validity of such waivers date back to United States Supreme Court approval of the plea bargaining system itself.[6] Despite this pedigree, such waivers were often described as "uncommon"[7] and "not a widespread practice"[8] for most of their early development, and case law on the subject was sparse.[9]

Appeal waivers are far from "uncommon" today. In many jurisdictions, judges[10] and prosecutors[11] routinely insist upon such waivers as a virtual precondition to plea bargaining. Elsewhere, one finds open advocacy on the part of appellate courts[12] and prosecutors[13] for

5. *See, e.g.*, State v. Gutierrez, 512 P.2d 869 (Ariz. Ct. App. 1973); People v. Butler, 204 N.W.2d 325 (Mich. Ct. App. 1972); People v. Ramos, 292 N.Y.S.2d 938 (App. Div. 1968).

6. The turning point in U.S. Supreme Court treatment of plea bargaining is generally understood to be the so-called "Brady trilogy": Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970). In these three companion cases, the Supreme Court gave full approval to the practice of plea bargaining for the first time, concluding that it is "inherent in the criminal law and its administration." *Brady*, 397 U.S. at 751.

7. People v. Fearing, 442 N.E.2d 939, 940 (Ill. App. Ct. 1982).

8. People v. Nichols, 493 N.E.2d 677, 680 (Ill. App. Ct. 1986).

9. *Butler*, 204 N.W.2d at 329. Some early legal literature addressing the phenomenon did appear. *See, e.g.*, Kristine Cordier Karnezis, Annotation, *Validity and Effect of Criminal Defendant's Express Waiver of Right to Appeal as Part of Negotiated Plea Agreement*, 89 A.L.R.3d 864 (1979); Gregory M. Dyer & Brendan Judge, Note, *Criminal Defendants' Waiver of the Right to Appeal—An Unacceptable Condition of a Negotiated Sentence or Plea Bargain*, 65 NOTRE DAME L. REV. 649 (1990); Edmund F. Schmidt, Note, *Criminal Procedure—Plea Bargaining—Implicit Restrictions on Defendant's Right to Appeal*, 21 WAYNE L. REV. 1161 (1975).

10. *See, e.g., supra* text accompanying note 1; People v. Burk, 586 N.Y.S.2d 140, 141 (App. Div. 1992) (quoting the trial judge in that case as saying, "I normally insist on [an appeal waiver] on [sic] the price of my plea agreement").

11. Rex Bossert, *U.S. Defenders in Battle Over Appeal Waivers*, L.A. DAILY J., Mar. 1, 1993, at 9 (describing a policy of the United States Attorney's Office for the Northern District of California requiring appeal waivers in all negotiated misdemeanor cases and a large percentage of negotiated felony cases) [hereinafter *U.S. Defenders*]; Spiros A. Tsimbinos, *Conditioning a Plea or Sentence Agreement on a Waiver of Appellate Rights*, N.Y.L. J., Dec. 3, 1990, at 4 ("Prosecutors throughout [New York] State . . . have moved to obtain waiver of appeals in as many cases as possible.").

12. *See, e.g.*, People v. Olson, 264 Cal. Rptr. 817, 819 (Ct. App. 1989) ("Prosecutors and trial judges can do something about [frivolous criminal appeals] and we encourage

increased reliance upon appeal waivers as a solution to crowded appellate calendars and what is perceived to be a glut of frivolous criminal appeals. The practice is not without its detractors, however. Recently, the policy of the United States Attorney for the Northern District of California of insisting upon appeal waivers in most plea dispositions resulted in a short-lived, but highly publicized, boycott of indigent appointments by the local defense bar.[14] Nonetheless, waiver of the right to appeal is becoming a dominant feature of plea bargaining practice.

This Article explores the legal and constitutional issues raised by appeal waivers. Section I analyzes the current state of the case law. Section II explores the due process challenge to appeal waivers, and concludes that such a challenge would be difficult to sustain given the current state of due process law. It, nonetheless, goes on to suggest that a key premise of due process theory as it relates to plea bargaining—the presumed equality of bargaining power between the prosecution and the defense—may be ripe for challenge. Section III discusses the public policy arguments for and against appeal waivers, and argues that the public policy debate has been unduly skewed in favor of caseload concerns, without giving sufficient consideration to the essential role that the right to appeal plays in the criminal justice system. Section III argues that appeal waivers should either be disapproved or given very restricted scope. Finally, Section IV explores the particular problems raised by waivers of sentencing error. It concludes that waivers of future sentencing error are very difficult to reconcile with

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them to do so .... [T]hey should consider obtaining the defendant's waiver of the right to appeal as part of the negotiated plea.").

13. *See, e.g.*, Roger W. Haines, Jr., *Waiver of the Right to Appeal Under the Federal Sentencing Guidelines*, 3 FED. SENT. R. 227 (1991). The author, an assistant U.S. Attorney in San Diego, California, argues that appeal waivers are lawful and that they represent a "proper and sensible" way of responding to the vastly increased criminal appellate workload that federal courts have experienced in the wake of the Sentencing Reform Act of 1984. *Id.* at 227.

14. Bossert, *U.S. Defenders, supra* note 11, at 1, 10; Rex Bossert, *Conflict Panel Withdraws in Appeal Dispute*, L.A. DAILY J., Mar. 4, 1993, at 1 [hereinafter *Conflict*]; Howard Mintz, *Northern District May Face a Plea Bargain Showdown*, THE RECORDER, Mar. 4, 1993, at 1. The dispute centered around a bank robbery case, United States v. Foster, No. 92-0625DLJ (N.D. Cal. Feb. 25, 1993). Bossert, *Conflict, supra*, at 10. In *Foster*, the defendant negotiated a plea which did not resolve whether or not the defendant was a career offender—a sentencing issue which, if resolved against the defendant, could have more than doubled his sentence. *Id.* The U.S. Attorney insisted upon a waiver of the right to appeal any sentencing error as a condition of the plea bargain. Bossert, *U.S. Defenders, supra* note 11, at 9. The Federal Public Defender assigned to the case resigned in protest. *Id.* at 1. Forty-two private attorneys subsequently refused appointment in the case. Bossert, *Conflict, supra,* at 10.

traditional definitions of knowing waiver or with the basic policies which inform the right to appeal. This section urges that even if appeal waivers are upheld generally, such approval should not extend to waivers of prospective sentencing error.

I. Current State of the Law on Appeal Waivers

A. Issues Which can be Raised on Appeal After a Guilty Plea Absent an Appeal Waiver

A preliminary question to ask is why we are discussing appeal rights at all, given that the defendant has pleaded guilty. A counseled guilty plea, that is both voluntary and intelligent, is an admission of factual guilt that has been traditionally viewed as removing that issue from the case.[15] In fact, in a series of United States Supreme Court cases beginning with the *Brady* trilogy,[16] and culminating in *Tollett v. Henderson*,[17] the Court has held that, by entering a plea of guilty, a defendant forfeits a broad range of potential legal and constitutional appellate claims that would otherwise have been available had the case gone to trial. As the Court said in *Tollett*, "[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."[18]

What issues then may a defendant raise on appeal after a guilty plea; or, to cast the question in the terms of this Article, what appellate remedies are still available to a defendant, after a guilty plea, that

15. Menna v. New York, 423 U.S. 61, 62 n.2 (1975).

16. Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970).

17. 411 U.S. 258 (1973).

18. *Id.* at 267. Note that the *Tollett* line of cases does not itself rest on a principle of waiver. *See, e.g.*, Haring v. Prosise, 462 U.S. 306, 321 (1983) ("[T]he conclusion that a Fourth Amendment claim ordinarily may not be raised in a habeas proceeding following a plea of guilty does not rest on any notion of waiver, but rests on the simple fact that the claim is irrelevant to the constitutional validity of the conviction."). Indeed, any attempt to reconcile *Tollett* with the traditional definition of waiver set out in Johnson v. Zerbst, 304 U.S. 458, 464 (1938) ("an intentional relinquishment or abandonment of a known right or privilege"), seems doomed to failure. *See* Michael E. Tigar, *The Supreme Court, 1969 Term, Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 8 (1970). For this reason, this article will refer to the operative effect of *Tollett* and its progeny as the "forfeiture" of appeal rights. If a defendant has appeal rights that have not been automatically forfeited by his or her guilty plea per *Tollett*, then we face the specific issue addressed by this article: whether these remaining rights may be waived in return for some consideration as part of a plea bargain.

could be the subject of waiver? There appear to be roughly five broad categories of such claims.

First, there are potential issues arising from the entry of the guilty plea itself—whether, for example, the plea was knowing and voluntary and whether defendant received adequate assistance of counsel in entering the plea. *Tollett* makes clear that these issues survive a plea of guilty.[19] Quite simply, reliance on the plea to foreclose appellate review cannot be countenanced if the plea itself is invalid. Thus, it must always be open to the defendant to show that the plea was defective. As will be shown below, a number of courts have held that this first category of issues also survives an appeal waiver.[20]

Second, despite the broad language of *McMann v. Richardson*[21] and *Tollett*, the Court has made clear that there are certain constitutional claims that survive a guilty plea even though the alleged error took place prior to the entry of the plea. Such issues are typified by the due process claim considered in *Blackledge v. Perry*,[22] which the Court found to be so fundamental that it "went to the very power of the State to bring the defendant into court to answer the charge brought against him."[23] These claims include constitutional issues such as the double jeopardy claim in *Menna v. New York*,[24] which the Court found to survive a plea of guilty because it was "not logically inconsistent with the valid establishment of factual guilt."[25] Legal scholars have vigorously debated the meaning and exact contours of these exceptions to the *Tollett* rule.[26] For the purposes of this Article,

19. 411 U.S. at 267. *Cf.* McCarthy v. United States, 394 U.S. 459 (1969); Boykin v. Alabama, 395 U.S. 238 (1969).

20. *See, e.g.*, United States v. Craig, 985 F.2d 175, 178 (4th Cir. 1993); State v. Gibson, 348 A.2d 769, 774 (N.J. 1975); People v. Seaberg, 541 N.E.2d 1022, 1026 (N.Y. 1989).

21. 397 U.S. 759 (1970).

22. 417 U.S. 21 (1974). In *Blackledge*, the defendant was charged with a more serious offense after exercising his right to trial de novo under a state statute. The Court held that the potential for vindictiveness in such a situation was so great as to violate due process and that this due process claim could be raised on appeal even though the accused had pleaded guilty to the more serious charge. *Id.* at 28-29.

23. *Id.* at 30.

24. 423 U.S. 61 (1975).

25. *Id.* at 63 n.2.

26. Note, for example, the exchange between Professors Westen and Saltzburg: Peter Westen, *Away From Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214 (1977); Stephen A. Saltzburg, *Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty*, 76 MICH. L. REV. 1265 (1978); Peter Westen, *Forfeiture by Guilty Plea—A Reply*, 76 MICH. L. REV. 1308 (1978). *See* Tigar, *supra* note 18; Robert N. Shwartz, Note, *The Guilty Plea as a Waiver of "Present but Unknowable" Constitutional Rights: The Aftermath of the* Brady *Trilogy*, 74 COLUM. L. REV. 1435 (1974). *See also* Albert W. Alschuler, *The Supreme Court, The De-*

however, it is sufficient to acknowledge that such exceptions exist, and consequently provide defendants with appellate rights as to certain antecedent constitutional violations, which can, in turn, become the subject of plea bargains for their waiver.

Third, there are specific issues that can be raised on appeal after a plea in those states which have created statutory exceptions to the *Tollett* rule. For example, in California and New York, a defendant may raise suppression issues on appeal, notwithstanding the fact that the judgment is predicated upon a plea of guilty.[27] The Supreme Court has, in turn, determined that states are free to carve out such legislative exceptions to the *Tollett* rule, and that when they do, the defendant may have access to federal habeas corpus as well as the direct appeal, in spite of a guilty plea.[28]

Where such appeal rights are granted by statute, they often account for a significant percentage of appeals arising in that state. For example, a recent study by the National Center for State Courts found that appeals from guilty pleas and other nontrial dispositions averaged between 14% and 25% of all appeals in states which do not provide an exception to the *Tollett* rule.[29] In contrast, appeals from nontrial dispositions in certain California and New York appellate districts amounted to 43% of the total dispositions for each state.[30] Both New York and California courts have ruled that these statutorily granted appeal rights may be the subject of bargained-for waiver.[31] These rulings are among the more significant of the appeal waiver cases because of the number of potential cases affected.

Yet another category of potential appeal waiver cases includes those in which an appeal waiver is taken in the absence of an actual guilty plea. Two examples are illustrative: in the first, the defendant is convicted at trial and then conducts sentence bargaining which includes an appeal waiver;[32] in the second, the defendant has two cases

fense Attorney, and The Guilty Plea, 47 U. COLO. L. REV. 1 (1975) [hereinafter *The Supreme Court*]; George E. Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193 (1977).

27. CAL. PENAL CODE § 1538.5(m) (West 1993); N.Y. CRIM. PROC. LAW § 710.20(1) (McKinney 1995).

28. Lefkowitz v. Newsome, 420 U.S. 283, 291-93 (1975).

29. NAT'L CTR. FOR STATE COURTS, UNDERSTANDING REVERSIBLE ERROR IN CRIMINAL APPEALS 31, 44 n.8 (1989) [hereinafter NCSC].

30. *Id.*

31. People v. Williams, 331 N.E.2d 684, 685 (N.Y. 1975); People v. Charles, 217 Cal. Rptr. 402, 409 (Ct. App. 1985).

32. *See, e.g.*, Bunnell v. Superior Ct., 531 P.2d 1086, 1093 (Cal. 1975); Cubbage v. State, 498 A.2d 632, 633 (Md. 1985); People v. Seaberg, 541 N.E.2d 1022, 1026 (N.Y. 1989).

pending and gets convicted after trial in one while plea bargaining in the other for a combined sentence disposition.[33] In both situations there has been no guilty plea in the case in which the defendant wishes to raise appellate issues. Thus, those issues survive the forfeiture rules of *Tollett* and are available on appeal unless the defendant specifically waives them.[34]

The last category is by far the most significant and involves the vast array of sentencing issues that may potentially be the subject of postplea appeals. It is a procedural fact of life that if there is sentencing error, it will follow, rather than precede, the plea. Therefore, the forfeiture rule of the *Tollett* line of cases will not operate to preclude appeals in cases involving sentencing error. Perhaps of equal importance, the range of potential sentencing issues has increased exponentially in recent years with the advent of complex determinate sentencing schemes that have been adopted in the federal system[35] as well as in many states.[36]

The appeal of sentencing issues thus represents a "growing trend."[37] A recent study found that

> Sentencing issues were raised in one quarter of the appeals [that were the subject of this study], and it appears that sentencing issues are not simply 'add-on' issues to appeals that would otherwise have been filed; a great number of appeals were filed raising only sentencing issues. In addition, sentencing issues have a high error rate. In fact, when sentencing is raised, the appellate court finds error 25 percent of the time.[38]

See also People v. Nguyen, 16 Cal. Rptr. 2d 490 (Ct. App. 1993). *Nguyen* was submitted on the preliminary hearing transcript. Although tantamount to a plea, such a "slow plea" does not come within the forfeiture rules of *Tollett*. *Lefkowitz*, 420 U.S. at 291.

33. *See, e.g.*, People v. Nichols, 493 N.E.2d 677, 679 (Ill. App. Ct. 1986); People v. Fearing, 442 N.E.2d 939, 940 (Ill. App. Ct. 1982).

34. It has been argued that it is particularly unfair to uphold appeal waivers in this class of cases because the defendant has maintained his innocence throughout in the disputed case. This argument has received a mixed reception. *See, e.g., Gibson*, 348 A.2d at 775-76 (holding that "a defendant who has never admitted his guilt should, as we view the interests of justice and appropriate policy considerations, not be deemed to have irrevocably waived his right of direct appeal from a conviction unless he fails to file an appeal within the time provided therefore by law"); *Seaberg*, 541 N.E.2d at 1026 (finding "no basis for distinguishing" the guilty plea situation from the one where defendant has steadfastly maintained his innocence).

35. Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551-3673 (1988), 28 U.S.C. §§ 991-98 (1988).

36. *See, e.g.*, CAL. PENAL CODE §§ 1168-1170.6 (West 1985); ILL. ANN. STAT. ch. 38, paras. 1005-8-1 to 1005-8-4 (Smith-Hurd 1981); IND. CODE ANN. §§ 35-50-1-1 to 35-50-6-6 (Burns 1991); N.Y. PENAL LAW §§ 70.00(2)-(3), 70.02, 70.06, 220.00-43 (McKinney 1987).

37. NCSC, *supra* note 29, at 8.

38. *Id.* at 8.

Given the confluence of these three factors—the immunity of sentencing issues from the *Tollett* forfeiture rules, the wide range of potential sentencing issues, and the relatively high rate of success these claims meet on appeal—it is perhaps not surprising that the pressure to waive appellate rights is most intense in the area of sentencing appeals, or that a high percentage of the recent reported cases have included the issue of appeal waivers.[39]

B. Current Case Law on Appeal Waivers

There has been a sharp increase in reported cases dealing with appeal waivers over the past several years at both the state and federal levels. The cases range from broad challenges to appeal waivers, to specific procedural and interpretive challenges, and can be grouped in the following categories.

1. Per Se Challenges

A substantial majority of state[40] and federal[41] courts which have considered appeal waivers have upheld them against broad per se challenges. Some of these courts have upheld such waivers without the benefit of any real supporting analysis.[42] Others have limited their inquiry simply to whether the waiver was free and voluntary, and did not examine the more basic question of whether such waivers should be permitted at all.[43] Most, however, have examined the underlying

39. *See, e.g.*, United States v. Rutan, 956 F.2d 827 (8th Cir. 1992); United States v. Navarro-Botello, 912 F.2d 318 (9th Cir. 1990), *cert. denied*, 503 U.S. 942 (1992); People v. Nguyen, 16 Cal. Rptr. 2d 490 (Ct. App. 1993); Ballweber v. State, 457 N.W.2d 215 (Minn. Ct. App. 1990); People v. Burk, 586 N.Y.S.2d 140 (App. Div. 1992).

40. Gwin v. State, 456 So. 2d 845 (Ala. Crim. App. 1984); People v. Charles, 217 Cal. Rptr. 402 (Ct. App. 1985); Staton v. Warden, 398 A.2d 1176 (Conn. 1978); People v. Fearing, 442 N.E.2d 939 (Ill. App. Ct. 1982); Weatherford v. Commonwealth, 703 S.W.2d 882 (Ky. 1986); Cubbage v. State, 498 A.2d 632 (Md. 1985); State v. Gallant, 574 A.2d 385 (N.H. 1990); People v. Seaberg, 541 N.E.2d 1022 (N.Y. 1989); White v. State, 833 S.W.2d 339 (Tex. Ct. App. 1992); State v. Perkins, 737 P.2d 250 (Wash. 1987); Blackburn v. State, 290 S.E.2d 22 (W. Va. 1982). *Cf.* Karnezis, *supra* note 9.

41. Appeal waivers have been upheld in all but one of the federal circuits which have considered them: United States v. Rivera, 971 F.2d 876 (2d Cir. 1992); United States v. Melancon, 972 F.2d 566 (5th Cir. 1992); United States v. Rutan, 956 F.2d 827 (8th Cir. 1992); United States v. Wiggins, 905 F.2d 51 (4th Cir. 1990); United States v. Navarro-Botello, 912 F.2d 318 (9th Cir. 1990), *cert. denied*, 503 U.S. 942 (1992); Johnson v. United States, 838 F.2d 201 (7th Cir. 1988). *Compare* Worcester v. Commissioner, 370 F.2d 713, 718 (1st Cir. 1966) (disapproving of appeal waivers in dicta because they "put a price on an appeal").

42. *See, e.g.*, *Rivera*, 971 F.2d at 896.

43. *Gwin*, 456 So. 2d at 847; People v. Williams, 331 N.E.2d 684, 684 (N.Y. 1975). *See also* State v. McKinney, 406 So. 2d 160, 162 (La. 1981) ("extensive 'boykinization'" assures that waiver is free and voluntary). The latter reference is to the procedural requirements

public policy issues with at least some care before coming to the conclusion that appeal waivers pass constitutional muster.[44]

A common line of reasoning in cases upholding appeal waivers begins with the observation that "nearly every right, constitutional or statutory, may be waived."[45] Judicial approval of plea bargaining in general is necessarily predicated upon a determination that the constitutional right to jury trial may be waived in exchange for inducements such as a reduction in the charge or sentence.[46] Since the right to appeal is generally not regarded to be of constitutional dimension,[47]

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of Boykin v. Alabama, 395 U.S. 238 (1969), for ensuring that a guilty plea is knowing and voluntary.

44. However, many of these same courts fall out in considerable disarray over more specific application questions, such as whether certain issues should be beyond the reach of appeal waivers, *see infra* text accompanying notes 93-101; what will render a waiver unknowing or involuntary, *see infra* text accompanying notes 70-71; and what procedural requirements should attend the taking of such waivers, *see infra* text accompanying notes 102-113, to name a few.

45. *Cubbage*, 498 A.2d at 634. This concept that most rights are subject to waiver finds frequent articulation throughout the case law. *See, e.g.*, United States v. Mezzanatto, 115 S. Ct. 797, 801 (1995); Peretz v. United States, 501 U.S. 923, 935 n.12 (1991). For example, it has been held that a defendant may knowingly and voluntarily waive: the Fourth Amendment right to be free from warrantless searches, Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973); the Fifth Amendment privilege against self-incrimination, *Boykin*, 395 U.S. at 243; the Sixth Amendment right to counsel, Faretta v. California, 422 U.S. 806, 819 (1975); Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938); the Sixth Amendment rights to jury trial and confrontation, *Boykin*, 395 U.S. at 243, and the statutory right to pursue civil rights claims against government officials, Town of Newton v. Rumery, 480 U.S. 386, 392-98 (1987).

46. *Brady*, 397 U.S. at 753 ("[W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State . . . by his plea . . . .").

47. Over a century ago, a unanimous United States Supreme Court held that the right to appeal was not "a necessary element of due process of law." McKane v. Durston, 153 U.S. 684, 687 (1894). Although a majority of the Court has continued to hew at that line, *see, e.g.*, Jones v. Barnes, 463 U.S. 745 (1983), some justices have, in recent years, challenged that accepted wisdom. *Id.* at 756 n.1 (Brennan, J., dissenting) ("If the question were to come before us in a proper case, I have little doubt . . . that we would decide that a State must afford at least some opportunity for review of convictions . . . ."). Moreover, a spate of recent legal literature has developed, calling for a rethinking of this question. *See* Marc M. Arkin, *Rethinking the Constitutional Right to a Criminal Appeal*, 39 UCLA L. REV. 503 (1992); Harlon L. Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62 (1985); Harry G. Fins, *Is the Right of Appeal Protected by the Fourteenth Amendment?* 54 JUDICATURE 296 (1971); Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603 (1985); David Rossman, *"Were There No Appeal": The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518 (1990); Alex S. Ellerson, Note, *The Right to Appeal and Appellate Procedural Reform*, 91 COLUM. L. REV. 373 (1991). This past term, the Court issued an opinion which suggests the issue may, in fact, be ripe for reconsideration. In Honda Motor Co. v. Oberg, 114 S. Ct. 2331 (1994), the Court held that, at least in certain civil contexts, the right to judicial review is compelled by the due process guarantee. *Id.* at 2334. This opinion, as well as the larger question of

most courts reason that "if defendants can waive fundamental constitutional rights such as the right to counsel, or the right to jury trial, surely they are not precluded from waiving procedural rights granted by statute."[48] One commentator has observed that "[t]he reasoning of those courts which invalidate pleas conditioned on defendant's agreement to waive his right to appeal seems curiously at odds with the widely-accepted theoretical underpinnings of the plea bargaining system."[49]

The other major thread of reasoning running through the cases upholding appeal waivers is a sweeping public policy analysis which points to a broad array of perceived benefits that flow from the inclusion of such waivers more or less equally to both the state and the accused.[50] The benefits to the state are described variously as some combination of finality,[51] economy[52] and the prompt settlement of liti-

whether the right to appeal in criminal cases might have constitutional stature, is explored further, *infra*, in the text accompanying notes 209-224. Although all 50 states provide appellate review in some form, Arkin, *supra*, at 513-14, only a few grant the right as a matter of constitutional prerogative. Even in those states, courts have found that the right may be waived like other constitutional rights. *Fearing*, 442 N.E. 2d at 941; *Perkins*, 737 P.2d at 251.

48. *Wiggins*, 905 F.2d at 53 (quoting United States v. Clark, 865 F.2d 1433, 1437 (4th Cir. 1989)). Similar language may be found in United States v. Melancon, 972 F.2d 566, 567 (5th Cir. 1992); *Navarro-Botello*, 912 F.2d at 321; People v. Vargas, 17 Cal. Rptr. 2d 445, 448 (Ct. App. 1993); *Charles*, 217 Cal. Rptr. at 405; *Gibson*, 348 A.2d at 777 (Schreiber, J., concurring) and *Seaberg*, 541 N.E.2d at 1024, to name a few.

49. JAMES E. BOND, PLEA BARGAINING AND GUILTY PLEAS § 5.14, 5-29 (2d ed. 1983).

50. United States v. Gonzalez, 981 F.2d 1037, 1040; *Charles*, 217 Cal. Rptr. at 405 (Kozinski, J., dissenting). *Cf.* A.B.A. STANDARDS FOR CRIMINAL JUSTICE Standard 21-2.2(c) cmt., (1980) (urging that appeal waivers are beneficial to all parties and are, therefore, "entirely proper").

51. *Rutan*, 956 F.2d at 829 ("Waivers of appeal in plea agreements preserve the finality of judgments and sentences imposed pursuant to valid pleas of guilty."); *Navarro-Botello*, 912 F.2d at 322 ("The most important benefit of plea bargaining is the finality that results.").

52. At the heart of this argument is frequently a perception that the system is overburdened with criminal appeals, most of which are frivolous. *See, e.g.*, *Olson*, 264 Cal. Rptr. at 819. This perception and its factual bases are addressed in greater detail, *infra*, in the text accompanying notes 337-422. Many courts are quite frank about the cost-savings aspect of plea bargaining in general and appeal waivers in particular. *See, e.g.*, *Navarro-Botello*, 912 F.2d at 322 ("plea bargaining saves the state time and money"); *Gonzalez*, 981 F.2d at 1040 (Kozinski, J., dissenting) ("The assurance that the plea won't be set aside on appeal enables the prosecutor to cut short the time and other resources she will devote to the case."). This viewpoint received perhaps its most unvarnished articulation in *Seaberg*, where the court opined that "if full trials were required in each case New York's law enforcement system would collapse." 541 N.E.2d at 1024. Whether a similar observation might be made about the dangers inherent in full utilization of defendant's appeal rights, one California court attempted to compute the costs of the average "criminal appeal with no meritorious issues" at approximately $6,000 and extrapolated from this figure that "if

gation.[53] The major benefit to the defendant is viewed as an increase in plea bargaining leverage which provides the accused with another important bargaining chip to bring to the plea negotiation table.[54] This observation is sometimes coupled with the warning that contrary rulings would cut down on incentives for prosecutors to offer inducements in general.[55] In addition, defendants are also perceived as benefiting in much the same way as the government benefits from the certainty that such a process promises.[56]

While the majority of courts considering the matter have upheld appeal waivers, a minority of jurisdictions have refused to uphold them in any form. Two separate lines of reasoning recur in these cases: first, that the use of such waivers impermissibly chills the right to appeal in violation of due process,[57] and second, that such waivers violate public policy. The public policy rationale most frequently articulated is the need to prevent the parties in the criminal process

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only five percent of these appeals fall into the 'frivolous' category those 285 cases result in an unnecessary cost to the taxpayers of $1,710,000 a year." *Olson*, 264 Cal. Rptr. at 819.

53. *See Seaberg*, 541 N.E.2d at 1024 ("[B]argains fairly made should signal an end to litigation, not a beginning . . . ."). *Cf. Gibson*, 348 A.2d at 775 ("We do not share the view that there is an affirmative public policy to be served in fostering appeals . . . . 'The settlement of litigation ranks high in our public policy.'" (quoting Jannarone v. W.T. Co., 168 A.2d 72, 74 (N.J. 1961), *cert. denied*, 171 A.2d 147 (N.J. 1961)).

54. *Gonzalez*, 981 F.2d at 1043 (Kozinski, J., dissenting) ("Criminal defendants usually have few enough bargaining chips; sparing the government the time and expense of a trial and appeal is the primary currency in which they must deal."). *Cf. Gibson*, 348 A.2d at 775.

55. People v. Rodriguez, 480 N.W.2d 287, 290 (Mich. Ct. App. 1991) ("It stands to reason that a party to agreements voluntarily entered into, but consistently repudiated by means of appeal, might become wary of entering into such agreements."). *Cf. Gibson*, 348 A.2d at 775; *Perkins*, 737 P.2d at 251.

56. *See, e.g., Navarro-Botello*, 912 F.2d at 320 ("Whatever appellate issues might have been available to Navarro-Botello were speculative compared to the certainty derived from the negotiated plea with a set sentence parameter.").

57. The most frequently cited case for this proposition is People v. Butler, 204 N.W.2d 325 (Mich. Ct. App. 1972), where the court invalidated an implicit appeal waiver because of its "chilling effect on the right to appeal." *Id.* at 330. An implicit appeal waiver is a bargain that indirectly achieves a waiver of appeal rights, by means of a stipulation that one charge will be dismissed only after the appeal period had expired on the disputed charge. *Butler*, in turn, relied upon dicta in People v. Harrison, 191 N.W.2d 371 (Mich. 1971), and Worcester v. Commissioner, 370 F.2d 713 (1st Cir. 1966), which strongly condemned the practice as "constitutionally obnoxious," *Harrison*, 191 N.W.2d at 374, and "unfair," *Worcester*, 370 F.2d at 718. *Butler* also relied upon People v. Ramos, 292 N.Y.S.2d 938 (App. Div. 1968), which found the practice to be "tantamount to a denial of defendant's right to appeal." *Id.* at 940. (*Ramos* was overruled, *sub silentio*, by *Seaberg*, 541 N.E.2d at 1022.)

from insulating themselves from all review,[58] although sometimes the matter is merely asserted without the benefit of any real analysis.[59]

Those jurisdictions which have invalidated appeal waivers differ dramatically on the remedy they will provide. Some simply allow the appeal to go forward,[60] others void the conviction,[61] while still others allow the appeal to proceed but give the prosecutor the option of voiding the plea bargain.[62]

Although the United States Supreme Court has never ruled on this issue directly, the Court's opinion in *United States v. Mezzanatto*[63] strongly suggests that the current Court would approve present appeal waiver practice if the matter were to come before it.[64]

Prior to *Mezzanatto, Town of Newton v. Rumery*[65] was frequently cited as bestowing the High Court's official blessing upon negotiated appeal waivers. However, that case is of questionable precedential value because *Rumery* was concerned with release dismissal agreements[66] and the Court distinguished that type of arrangement from traditional plea bargains.[67] More importantly, Justice O'Connor's critical concurring vote was premised on a requirement that the government would bear the burden of proving that such release agreements were "voluntarily made, not the product of prosecutorial overreaching, and in the public interest."[68] Her concurrence emphasized the need for actual proof on this issue and cautioned against presuming validity in any given case.[69] If the Court were to impose similar proof requirements on the government in every case in which

58. State v. Ethington, 592 P.2d 768, 769 (Ariz. 1979). *Cf. Butler*, 204 N.W.2d at 330. The continuing authority of *Butler* is called into some question by an opinion from a different panel of the same Michigan court of appeal which examines each of the separate bases underlying the *Butler* opinion and rejects them as "at odds with the widely accepted underpinnings of the plea bargaining system." *Rodriguez*, 480 N.W.2d at 291.

59. *See, e.g.*, Majors v. State, 568 N.E.2d 1065 (Ind. Ct. App. 1991).

60. *See, e.g., id.* at 1068.

61. *See, e.g., Butler*, 204 N.W.2d at 325.

62. *See, e.g., Gibson*, 348 A.2d at 775.

63. 115 S. Ct. 797 (1995) (approving the prosecutorial practice of soliciting waivers of the protections of Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11(e)(6) as a condition of plea bargaining). The implications of the *Mezzanatto* opinion are discussed in greater detail, *infra*, in the text accompanying notes 218-224.

64. *Id.* at 802.

65. 480 U.S. 386 (1987).

66. These are agreements in which a criminal defendant releases his right to file an action under 42 U.S.C. § 1983 in return for a prosecutor's dismissal of pending criminal charges.

67. *Rumery*, 480 U.S. at 393 n.3.

68. *Id.* at 401 (O'Connor, J., concurring).

69. *Id.* at 401-02 (O'Connor, J., concurring).

it wished to rely upon a waiver of appeal rights, those waivers would lose much of their docket clearing magic.

2. *Challenges to the Voluntariness of the Waiver and to Ineffective Assistance of Counsel in Advising as to the Plea*

Virtually all courts agree that despite an appeal waiver, defendants remain free to raise on appeal any issue which goes to the validity of the plea or the waiver itself. For example, there is general agreement that a defendant will not be precluded from appealing issues pertaining to the knowing and voluntary character of the plea or appeal waiver.[70] Thus, in *United States v. Baty,* where the defendant asked the court to explain a written plea agreement which set forth the appeal waiver and, where the trial court declined to do so, the Fifth Circuit concluded that the waiver was not knowing and voluntary.[71] In contrast, where the record has revealed full disclosure and an eyes-open decision by the defendant, courts usually have no problem upholding the voluntariness of the waiver.[72]

As a corollary, there appears to be general consensus that an accused may raise the question of adequate assistance of counsel in making the waiver. One case directly holds that such a claim can be raised as a basis for setting aside the waiver, thereby rejecting the argument that claims of ineffective assistance of counsel can only be raised in a collateral proceeding.[73] Several other cases suggest in dicta that such claims may be made, but theorize that they are more appropriately brought as part of a collateral attack. For example, *United States v. Abarca*[74] holds that an appeal waiver also operates as a waiver of rights under 28 U.S.C. § 2255, except for claims of ineffective assistance of counsel.[75] Thus, this holding supports the general principle that ineffective assistance issues are not waived, but is silent on whether they could be used to challenge the waiver on appeal.

70. *See, e.g.,* United States v. Baty, 980 F.2d 977, 978 (5th Cir. 1992); People v. Vargas, 17 Cal. Rptr. 2d. 445, 449 (Ct. App. 1993). Currently, a controversy surrounds the question of whether prospective waiver of future, unknown sentencing error can ever be viewed as an "intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). *Rutan* and *Navarro-Botello* hold that it can. *Vargas* and People v. Sherrick, 24 Cal. Rptr. 2d 25 (Ct. App. 1993), hold that it cannot. This issue is discussed in detail, *infra,* in Section IV.

71. 980 F.2d at 978-79.

72. *See, e.g., Wiggins,* 905 F.2d at 53; *Navarro-Botello,* 912 F.2d at 318.

73. *See, e.g.,* United States v. Craig, 985 F.2d 175, 178 (4th Cir. 1993).

74. 985 F.2d 1012 (9th Cir. 1993).

75. *Id.* at 1014.

Judge Kozinski, in his *United States v. Gonzalez*[76] dissent, indicated that ineffective assistance challenges may be made but must be limited to section 2255 motions.[77] Finally, the district court in *United States v. Kuhl*[78] provided a particularly confusing message. In a case where it was clear that both the prosecution and defense counsel had erred in calculating the correct sentencing guideline range,[79] the court held that defendant's appeal waiver also constituted a waiver of any collateral attack under section 2255.[80] What is confusing about this holding is that the court repeated the received wisdom that ineffective assistance of counsel can be challenged on collateral attack, but then ignored the fact that defendant's claim was largely based on ineffective assistance grounds when it dismissed defendant's section 2255 claim.[81]

3. *Challenges that the Sentence Imposed was in Violation of the Plea Bargain*

Another category of appeals which are traditionally permitted, despite a general waiver of appeal rights, include issues of whether there has been compliance with the bargain. Since much of the reasoning supporting appeal waivers is grounded in notions of contract law,[82] there is wide agreement that "the defendant always retains the right to complain that the sentence was in excess of the bargain . . . . Otherwise, a deprivation of that bargain might arise, for which the waiver of appeal was presumably part of the quid pro quo."[83] Failure to comply with the terms of the bargain has alternatively been viewed by at least one federal court as undermining the voluntariness of the

76. 981 F.2d 1037 (9th Cir. 1992).
77. *Id.* at 1043 (Kozinsky, J., dissenting).
78. 816 F. Supp. 623 (S.D. Cal. 1993).
79. *Id.* at 626.
80. *Id.* at 628.
81. *Id.* at 628-30.
82. *See, e.g., Nguyen*, 16 Cal. Rptr. 2d at 493. *See also Gibson*, 348 A.2d at 784-85 (Pashman, J., dissenting); People v. Ventura, 531 N.Y.S.2d 526, 532 (App. Div. 1988). *Ventura* is discussed, *infra*, in note 325. *Cf.* Santobello v. New York, 404 U.S. 257, 262 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."); United States v. Salcido-Contreras, 990 F.2d 51 (2d Cir. 1993). *Contra* People v. Selikoff, 318 N.E.2d 784, 791 (N.Y. 1974) ("Application to plea negotiations of contract law is incongruous. The strong public policy of rehabilitating offenders, protecting society, and deterring other potential offenders presents considerations paramount to benefits beyond the power of individuals to 'contract.'").
83. *Nguyen*, 16 Cal. Rptr. 2d at 494. *Cf. Gonzalez*, 981 F.2d at 1038. *But see id.* at 1042 (Kozinsky, J., dissenting) (arguing that such claims should only be heard if the failure to comply has first been challenged in the trial court by way of motion or objection); *Navarro-Botello*, 912 F.2d at 320.

plea, with the court coming to the same conclusion on appealability as those courts which rely on contract principles.[84]

4. Invalidity of Waivers Involving Nonsentencing Issues

Some states have upheld appeal waivers in general, but have found waivers involving certain enumerated rights to be invalid. For example, in New York an accused may not waive speedy trial claims,[85] or claims that challenge the legality of a sentence or the defendant's competency to stand trial.[86] The rationale behind these rulings is that those legal protections have to do, not only with the fairness to the accused, but also with the "fairness in the process itself and, therefore, a defendant may not waive them."[87] At least one State Bar has determined that it would be unethical for either the defense attorney or the prosecutor to negotiate a waiver of allegations of ineffective assistance of counsel or of prosecutorial misconduct.[88]

5. Appeals Challenging the Sentence Imposed

As noted earlier, courts generally permit challenges alleging that the sentence imposed was in violation of the plea bargain.[89] However, the issue which has led to the greatest division is whether other sentencing error may be waived as part of a waiver of appeal rights. Roughly five different approaches can be gleaned from these cases.

Minnesota has gone the farthest by holding that all sentencing error is immune from negotiated appeal waivers.[90] A Minnesota appellate court has concluded that the combination of an unconditional statutory right to appeal all sentencing error plus the statutorily de-

84. *Salcido-Contreras*, 990 F.2d at 52.

85. *Seaberg*, 541 N.E.2d at 1025.

86. People v. Callahan, 604 N.E.2d 108, 112 (N.Y. 1992) (citing People v. Armlin, 371 N.Y.S.2d 691).

87. *Seaberg*, 541 N.E.2d at 1025. This principle that there are some rights which implicate the very fairness of the system and which therefore cannot be waived is encountered in many jurisdictions. *See, e.g.*, CAL. CIV. CODE § 3513 (West 1988) ("Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."). However, such provisions are normally interpreted quite narrowly. In fact, section § 3513 has been read as creating a presumption in favor of waiver in the normal case. Outboard Marine Corp. v. Superior Ct., 124 Cal. Rptr. 852, 859 (Ct. App. 1975) ("Unless otherwise provided by law, any person may waive the advantage of a law intended for his benefit (CIV. CODE § 3513).").

88. THE NORTH CAROLINA STATE BAR, RULES OF PROFESSIONAL CONDUCT Canon VI, 129 (Michie 1993).

89. See *supra* Section 1(B)(3).

90. Ballweber v. State, 457 N.W.2d 215 (Minn. Ct. App. 1990).

fined role of the courts under the Minnesota Sentencing Guidelines[91] requires a determination that normal theories of waiver should not apply to sentencing error: "'Vindication of the Guidelines' stated goals of establishing 'rational and consistent sentencing standards' of reducing sentencing disparity, and providing uniformity in sentencing requires appellate review of trial court sentencing decisions."[92]

A number of jurisdictions, including New York,[93] California,[94] and some federal courts,[95] hold that claims of illegal sentencing may be raised despite an appeal waiver. To reach this conclusion, these courts have employed a rather narrow definition of an illegal sentence.[96]

Most federal courts take the very expansive position that all sentencing error, except for illegal sentences, may be waived despite the fact that the nature and dimensions of the possible error were unknown to the defendant at the time of the plea and appeal wavier.[97] These cases have explicitly rejected the contention that, consistent with *Johnson v. Zerbst*, a defendant cannot waive an unknown right.[98] By way of contrast, California courts have taken virtually the opposite position, holding that defendants cannot waive unknown, prospective sentencing error, at least without an explicit statement that this is being waived.[99]

Lastly, a number of state courts, including those in California which would otherwise not allow waiver of future sentencing error,

91. MINN. STAT. ANN. § 244 (West 1995).

92. *Ballweber*, 457 N.W.2d at 217. It is interesting to note the similarity between the content and goals of the Minnesota Sentencing Guidelines and the Federal Sentencing Guidelines. *See* UNITED STATES COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL (1992). The text accompanying notes 271-289, *infra*, explores whether the policies underlying the Federal Sentencing Guidelines require a conclusion similar to that of the *Ballweber* opinion regarding appellate review of sentencing error. 457 N.W.2d at 217-18. At least one California court has opined in dicta that sentencing error cannot be waived. *Olson*, 264 Cal. Rptr. at 819 n.2. However, at least three other California cases hold to the contrary. *Nguyen*, 16 Cal. Rptr. 2d at 494; *Vargas*, 17 Cal. Rptr. 2d at 446; People v. Brown, 29 Cal. Rptr. 2d at 353 (Ct. App. 1994).

93. *Seaberg*, 541 N.E.2d at 1025.

94. *Nguyen*, 16 Cal. Rptr. 2d at 494 (holding that acts beyond the court's jurisdiction cannot be waived).

95. *See, e.g., Rutan*, 956 F.2d at 829.

96. *Callahan* is careful to distinguish between challenges that go to the legality of the sentence or the power of the court to impose sentence and claims which are "addressed merely to the adequacy of the procedures the court used to arrive at its sentencing determination." 604 N.E. at 112. The latter are waiveable; the former are not.

97. *See, e.g., Rutan*, 956 F.2d at 830; *Melancon*, 972 F.2d at 572; *Navarro-Botello*, 912 F.2d at 320.

98. *Rutan*, 956 F.2d at 830; *Navarro-Botello*, 912 F.2d at 320.

99. *Vargas*, 17 Cal. Rptr. 2d at 451; *Sherrick*, 24 Cal. Rptr. 2d at 25-26.

will uphold sentencing appeal waivers when the bargain includes an agreement between the parties for a specific sentence.[100] In these cases, the courts reason that the defendant cannot complain when he has received precisely that for which he has bargained.[101]

6. *Requirement that the Trial Judge Specifically Address the Defendant Concerning Waiver of Appeal Rights*

A current area of specific controversy in federal courts concerns whether the trial judge must personally address the accused about any appeal waiver as part of the court's obligation under Rule 11.[102] In *United States v. Wessells*,[103] the Fourth Circuit held that a written appeal waiver would not operate to prevent the accused from appealing an improper application of the sentencing guidelines where "the transcript of Wessells' Rule 11 hearing before the district court reveals that the court did not question Wessells specifically concerning the waiver provision of the plea agreement,"[104] and where other evidence indicated defendant's waiver was not knowing and voluntary.[105] On the other hand, the Ninth Circuit in *United States v. DeSantiago-Marti-*

100. *See, e.g., Nguyen*, 16 Cal. Rptr. 2d at 494-95.

101. *See, e.g.*, People v. Burk, 586 N.Y.S.2d 140, 143 (App. Div. 1992).

102. Rule 11(d) of the Federal Rules of Criminal Procedure requires, in part, that "the Court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement." FED. R. CRIM. P. 11(d).

Incidental to the Rule 11 controversy is a dispute over whether an appeal waiver can be viewed as free and voluntary when the trial court fails to comply with the requirement of Federal Rule 32(c)(5) that it advise the defendant of the right to appeal his sentence. FED. R. CRIM. P. 32(c)(5). Actually, this issue has arisen with both a positive and a negative spin—with courts having to consider alternatively whether compliance or noncompliance with the Rule could undermine the voluntary quality of an appeal waiver. Both contentions have been rejected. The argument that compliance with the Rule could invalidate a waiver is premised on the reasoning that a defendant cannot make a knowing waiver of a right the court tells him he still retains. The Fifth Circuit rejected such an argument in *Melancon*, relying on the fact that the court's statement came nearly four months after the plea agreement, and could not have influenced the defendant's decision to plead. 972 F.2d at 568. Similar problems could be avoided in the future simply by not only complying with the notice provision of Rule 32, but by going on to explain that this is what is being waived. In United States v. DeSantiago-Martinez, 980 F.2d 582 (9th Cir. 1992), the Ninth Circuit rejected the reverse argument, declining to adopt defendant's contention that, in order to make the waiver of the right to appeal a knowing one, the court was required to comply with the Rule 32 mandate that the accused be informed that he had such a right in the first place. *Id.* at 583.

103. 936 F.2d 165 (4th Cir. 1991).

104. *Id.* at 168.

105. *Id.*

nez[106] explicitly held that "a Rule 11 colloquy on the waiver of the right to appeal is not a prerequisite to a finding that the waiver is valid."[107] The dissenting opinion objected that the majority was permitting "the district court to shirk its duties under Rule 11 and Rule 32(a)(2) when a defendant's waiver of the right to appeal a sentence is contained in a plea agreement."[108]

This issue is not limited to the federal courts. Recently, in *People v. Castrillon*,[109] a California appellate court held that a properly executed written waiver form may be relied upon as a sufficient showing of a voluntary and knowing waiver of the right to appeal.[110] This issue is not new to guilty plea practice. Over a decade ago, the California Supreme Court held that reliance upon a written waiver form was sufficient to satisfy the constitutional mandate of *Boykin v. Alabama*,[111] while the United States Supreme Court has urged that in these sorts of inquiries, "[m]atters of reality, and not mere ritual, should be controlling."[112]

On a related front, another California appellate court has recently held that a waiver of appeal rights, which does not include a specific advisement to the accused of the existence of such appeal rights, is not a knowing and intelligent waiver and is therefore invalid.[113]

7. *Appeals by the Government*

At least one federal court has interpreted such appeal waivers by the defendant as necessarily containing an implicit mutuality provision which would bar appeals by the government as well.[114] Despite the fact that the plea agreement in that case applied on its face only to prevent appeals by the defendant, the Fourth Circuit dismissed a sentencing appeal by the government on the grounds that it would be "far too one-sided to construe the plea agreement to permit an appeal by

106. 980 F.2d 582 (9th Cir. 1992).

107. *Id.* at 583.

108. *Id.* (Ferguson, J., dissenting).

109. 278 Cal. Rptr. 121 (Ct. App. 1991).

110. *Id.* at 123.

111. 395 U.S. 238 (1969), *cited in*, *In re* Ibarra, 666 P.2d 980, 984-85 (Cal. 1983).

112. McCarthy v. United States, 394 U.S. 459, 467 n.20 (1969) (citing Kennedy v. United States, 397 F.2d 16, 17 (6th Cir. 1968)). *See also infra* text accompanying note 441.

113. People v. Rosso, 36 Cal. Rptr. 2d 218, 221 (Ct. App. 1994).

114. United States v. Guevara, 941 F.2d 1299, 1299 (4th Cir. 1991), *cert. denied*, 503 U.S. 977 (1992).

the government . . . but not to permit an appeal on similar grounds by the defendant."[115]

II. The Due Process Issue

The early cases which struck down appeal waivers often did so on due process grounds.[116] This rationale was derived from a series of United States Supreme Court cases that began with *Griffin v. Illinois*[117] and continued with *Rinaldi v. Yeager*,[118] *North Carolina v. Pearce*,[119] and *Blackledge v. Perry*.[120]

Griffin and its progeny invalidated a variety of different state practices, all of which were viewed as violating due process because they placed an impermissible burden on the right of a defendant to appeal a criminal conviction.[121] As formulated in *Pearce*, a central tenet of due process doctrine as it pertains to appeals is that "[a] court is 'without right to . . . put a price on an appeal. A defendant's exercise of a right of appeal must be free and unfettered.'"[122]

A. Do Appeal Waivers Impermissibly "Chill" the Right to Appeal?

It is not surprising, therefore, that a number of lower courts in the early 1970s found bargained-for appeal waivers to violate due process.[123] It would certainly seem that such waivers result in a price be-

115. *Id.* at 1299. One commentator has criticized the Fourth Circuit's attempt in *Guevara* to rewrite the plea agreement and has suggested an alternative solution wherein "neither party should be barred from an appeal unless both have *explicitly* waived that right." D. Randall Johnson, *Giving Trial Judges the Final Word: Waiving the Right to Appeal Sentences Imposed Under the Sentencing Reform Act*, 71 NEB. L. REV. 694, 724 (1992).

116. *See supra* note 57.

117. 351 U.S. 12 (1956) (holding due process requires indigent defendants receive a free trial transcript for appeals).

118. 384 U.S. 305 (1966) (invalidating a state statute that required only defendants sentenced to prison to reimburse the state for the costs of their trial transcripts).

119. 395 U.S. 711 (1969) (invalidating the practice of vindictively imposing greater sentences on retrial following a successful appeal).

120. 417 U.S. 21 (1974) (invalidating a practice of bringing more serious charges whenever a defendant exercised a statutory right of trial *de novo* as a means of "appealing" a misdemeanor conviction).

121. *Id.* at 28-29.

122. *Pearce*, 395 U.S. at 724 (quoting *Worcester*, 370 F.2d at 718).

123. As recently as 1990, a law review note contended that the *Griffin* line of cases compelled such a conclusion. Dyer & Judge, *supra* note 9, at 669. *Cf.* Paul D. Borman, *The Chilled Right to Appeal from a Plea Bargain Conviction: A Due Process Cure*, 69 NW. U. L. REV. 663 (1974); Schmidt, *supra* note 9, at 675.

ing placed on the right to appeal.[124] If one defendant gets less time in exchange for waiving the right to appeal, then the defendant who insists upon exercising the right must inevitably get more, and that amount "more" is the price of an appeal.

Such reasoning has, of course, been challenged. Judge Bazelon, in his now famous opinion addressing a similar argument with respect to plea bargaining at trial, was of the belief that:

> Superficially it may seem that . . . the defendant who insists upon a trial [and] is found guilty pays a price for the exercise of his right when he receives a longer sentence than his less venturesome counterpart who pleads guilty. In a sense he has. But the critical distinction is that the price he has paid is not one imposed by the state to discourage others from a similar exercise of their rights, but rather one encountered by those who gamble and lose . . . . To the extent that the bargain struck reflects only the uncertainty of conviction before trial, the "expected sentence before trial"—length of sentence discounted by probability of conviction—is the same for those who decide to plead guilty and those who hope for acquittal but risk conviction by going to trial.[125]

Of course, this is not an argument that there is no price for assertion of the right but rather an argument that the price is a rational one set by the relevant market. The question remains whether such a price—rational or otherwise—should exist.

Moreover, the price may not be a rational one. It seems reasonable to assume that the prosecutor is most likely to offer significant concessions for the waiver of appeal rights when the defendant has colorable issues on appeal.[126] Why else would the prosecutor offer concessions of any magnitude for waiver of the right? But if this is correct, does it remove from the appellate docket those cases we would most like to see go away? As one commentator has observed with regard to trial bargaining:

> If somehow it were possible to have one purified form of plea bargaining to the exclusion of another, most observers probably would prefer the form that eliminated from the trial process the cases in which trial would serve no apparent purpose rather than

124. The trial judge in People v. Burk, 586 N.Y.S.2d 140 (App. Div. 1992), certainly understood it that way when he told the defendant, "I normally insist on [an appeal waiver] on [sic] the price of my plea agreement." *Id.* at 141.

125. Scott v. United States, 419 F.2d 264, 276 (D.C. Cir. 1969).

126. Some cases suggest that appeal waivers will occur mostly where "the defendant has no real interest in an appeal." *Olson*, 264 Cal. Rptr. at 819. However, it is difficult to see why such a defendant would be offered very much by way of concessions.

> the form that left for trial the cases in which there is nothing to try.[127]

At the appellate level, a rational system would likewise remove from appellate review those cases which are patently frivolous rather than those which are viewed as having colorable issues.

Proponents of appeal waivers often counter this argument by asserting that virtually all criminal appeals are frivolous.[128] Such a contention is generally not born out by the statistics.[129] This issue is explored in detail in the following section.

However, such a discussion must be viewed as more or less academic because even if one were to obtain universal agreement that a major effect of all appeal waivers is to burden or "chill" the right to appeal, under current case law this would still not compel a conclusion that due process has been violated. In recent years, the Supreme Court has emphatically abandoned the "rights-burdening" reasoning of the *Griffin* line of cases. Perhaps the clearest statement of this appears in *Chaffin v. Stynchcombe*,[130] where the Court explicitly rejected the contention that a "chilling effect" upon the right to appeal, in the absence of proof of vindictiveness on the part of the court or prosecutor, could establish a due process claim.[131] Instead, the Court read *North Carolina v. Pearce* as intimating "no doubt about the constitutional validity of higher sentences in the absence of vindictiveness despite whatever incidental deterrent effect they might have on the right to appeal."[132]

Guilty plea cases such as *Brady v. United States*,[133] *Parker v. North Carolina*,[134] and *North Carolina v. Alford*,[135] where the Court upheld waivers of the right to jury trial that were entered as part of a traditional plea bargain in order to avoid potential imposition of the death penalty, strongly underscore the point that mere discouragement or "chilling" of the exercise of a fundamental right will not be viewed by the Court as a violation of due process, particularly when it arises in a plea bargaining context. It is difficult to imagine anything

127. Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 694 (1981).

128. *See, e.g.*, *Olson*, 264 Cal. Rptr. at 818-19.

129. NCSC, *supra* note 29, at 5.

130. 412 U.S. 17 (1973).

131. *Id.* at 29.

132. *Id. Cf.* Colten v. Kentucky, 407 U.S. 104 (1972); Moon v. Maryland, 398 U.S. 319 (1970).

133. 397 U.S. 742 (1970).

134. 397 U.S. 790 (1970).

135. 400 U.S. 25 (1970).

more potentially "chilling" upon the free exercise of the right to jury trial than a threat that one may be executed for choosing to exercise that right. Nevertheless, the Court has made it clear that "the imposition of these difficult choices [will be] upheld as an inevitable attribute of any legitimate system which tolerates and encourages the negotiation of pleas."[136]

This affirmation of plea bargaining in even its most coercive contexts flows from the Court's crucial underlying thesis that plea bargaining is ultimately a voluntary process characterized by a give and take between parties who possess relatively equal bargaining power.[137] Indeed, the Court itself has noted that "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."[138]

As a result, the early cases invalidating appeal waivers on due process "chill" theory[139] simply cannot be squared with current due process doctrine as articulated by the Supreme Court. Thus, cases which reject this due process argument such as *United States v. Navarro-Botello*,[140] *United States v. Wiggins*,[141] and *Cubbage v. State*,[142] must be judged more faithful to the Court's current position on this issue.

B. The Doctrine of "Unconstitutional Conditions"

Before leaving the "chill" line of cases entirely, it must be noted that the stark rejection of the rights-burdening theory in some of the later plea bargaining cases is difficult to reconcile with another strain of due process case law to which the Court continues to adhere (albeit in somewhat inconsistent fashion)—namely, the murky doctrine of "unconstitutional conditions."[143] This doctrine posits that "even if a state has absolute discretion to grant or deny a privilege or benefit, it

136. *Chaffin*, 412 U.S. at 31.

137. *Parker*, 397 U.S. at 809.

138. Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978).

139. *See supra* note 57.

140. 912 F.2d 318 (9th Cir. 1990).

141. 905 F.2d 51 (4th Cir. 1990).

142. 498 A.2d 632 (Md. 1985).

143. *See, e.g.*, Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984).

cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of constitutional rights."[144]

The failure of the Court to address appeal waivers in particular or plea bargaining in general in light of the doctrine of unconstitutional conditions probably derives from two factors. First, the doctrine is viewed classically as applying to indirect burdens upon the exercise of fundamental rights. Plea bargaining involves, by contrast, direct bargaining for the waiver of such a right. Although this might be viewed as a stronger case for application of the doctrine, the fact that plea bargaining does not fit its classic contours might explain why the Court has not addressed the question of whether the doctrine compels a contrary result in this context.

The more likely explanation, however, is that "the rhetoric of the cases . . . and the commentary [has been] overwhelmingly dominated [by an approach which] locates the harm of rights-pressuring conditions on government benefits in their *coercion* of the beneficiary."[145] Conditions placed upon the receipt of benefits are more likely to be found unconstitutional when they render involuntary the choice to forego the benefit. Such an approach is ill-suited to application to plea bargaining because, as noted above, current theory dictates that the plea bargaining process reflects an arms-length transaction in which the defendant is totally free to accept or reject the government's offer.[146]

C. What About Vindictiveness?

The very cases which abandoned the rights-burdening approach of *Pearce* emphasized nonetheless the need for a process free from vindictiveness. As stated by the Court in *Blackledge*, "[t]he lesson that emerges from *Pearce*, *Colton*, and *Chaffin* is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness.'"[147]

However, even if one could say that the "chill" line of cases metamorphosed into "vindictiveness" theory as a central tenet of due process analysis, this line of case law similarly offers little solace to opponents of appeal waivers.

144. Epstein, *supra* note 143, at 6-7.

145. Sullivan, *supra* note 143, at 1419.

146. The correctness of the theory supporting this assumption is explored later in this section.

147. 417 U.S. at 27.

The vindictiveness cases held that prosecutors or judges violate due process if they use their charging or sentencing powers to punish a defendant for exercising rights otherwise guaranteed by law. For example, in *Blackledge*, the prosecutor was found to have violated due process by refiling felony charges after the defendant had exercised his statutory right to a trial *de novo* after a misdemeanor conviction for assault.[148] The opportunities for vindictiveness in such a situation were viewed as being so great as to require a presumption that the defendant was being punished for the exercise of his rights under the statute.[149]

It might similarly be argued that a prosecutor who bargains for the waiver of appeal rights presents an equally unacceptable potential for vindictiveness. Although the prosecutor is unlikely to be driven by a personal animus to punish the accused, cases such as *Blackledge* make it clear that the prosecutor's larger institutional interest in avoiding "increased expenditures of prosecutorial resources"[150] can be sufficient to raise a presumption of vindictiveness. It is precisely this interest in conserving resources that motivates a prosecutor who attempts to barter charge or sentence concessions for reductions in her appellate caseload.

Nonetheless, such an extension of *Blackledge* to the appeal waiver context must fail because the Court has been quite unequivocal in its declared intent to distinguish plea bargaining practice from the rule established in the vindictiveness line of cases.[151] The most explicit statement of this intent appears in *United States v. Goodwin*,[152] in which the Court held that "changes in the charging decision that occur in the context of plea negotiation are an inaccurate measure of improper prosecutorial 'vindictiveness.'"[153]

The Court's rationale for such separate treatment of plea negotiations has been variously stated,[154] but at its core is the same assump-

148. *Id.* at 27-28.
149. *Id.*
150. *Id.* at 27.
151. *See supra* notes 132-136.
152. 457 U.S. 368 (1982).
153. *Id.* at 379-80.
154. Professor Schulhofer has, for example, identified four different factors which the Court has invoked at different times to distinguish plea bargaining from other settings which present the potential for vindictiveness: (1) the advance warning of increases in charges that occur in the plea context which is viewed as placing the defendant in a better position to accept or reject the prosecutor's offer, (2) the presumption that the prosecutor's motivation is less likely to be dictated by personal self-vindication in the plea context, (3) the assessment that the prosecutor's institutional interests are more legitimate in the plea

tion about the nature of plea bargaining that characterizes its due process cases in general—i.e., the view that there can be "no such element of punishment in the 'give and take' of plea negotiation[s] so long as the accused 'is free to accept or reject the prosecution's offer,'"[155] and a defendant will be viewed as such a free actor because of the "relatively equal bargaining power" of the parties.[156]

Thus, we see that the Court has distinguished plea bargaining from several different strains of due process analysis—"chill" theory, "vindictiveness" theory, and the doctrine of "unconstitutional conditions"—each of which might present significant questions about the validity of appeal waivers. Central to this separate treatment in each instance has been the Court's core assumption that plea bargaining takes place on a level playing field—that it is a negotiating process characterized by arms-length transactions between parties who enjoy "relatively equal bargaining power."[157]

Whether this is an apt description of the plea process is open to serious question. Some commentators reject the "mutuality of advantage" characterization, arguing instead that fear of heavier sentences after trial makes "[t]he right to reject the proposed plea bargain . . . largely chimerical."[158] Others contend that "'[p]lea bargaining' is in reality the prosecutor's unilateral administrative determination of the level of the defendant's criminal culpability and the appropriate punishment for him,"[159] and that observations to the contrary are nothing more than "glib statement[s]."[160] Certainly it is fair to guess that the defendant in *People v. Cameron*,[161] whose plea colloquy began this Article, felt that he had no practical alternative but to accept the judge's condition of an appeal waiver.[162] Similarly, it would seem that

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context than in the retrial context, and (4) the belief that the pretrial context of plea bargaining makes it less likely that the prosecutor will be motivated by improper factors. Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1091 n.178 (1984).

155. *Goodwin*, 457 U.S. at 378.

156. *Parker*, 397 U.S. at 809.

157. *Id.*

158. Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 579 (1977).

159. Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 38.

160. *Ventura*, 531 N.Y.S.2d at 533.

161. People v. Cameron, No. 101512, slip op. at 2-3 (Alameda County Super. Ct. May 17, 1991).

162. Of course, it could certainly be said that Mr. Cameron had an alternative. He could have refused to waive his appeal rights and thereby given up the benefit of the bargain he had separately negotiated with the prosecutor. The choice was his. But one could

the defendant in *People v. Ramos*,[163] who was faced with the alternative of waiving his appeal rights or rejecting the plea bargain and exposing himself to the death penalty was correctly described by the court as having his range of choices so constrained that "it could not [be] reasonably contemplated that defendant would exercise his 'option' to appeal."[164]

Having said all this, however, it is difficult to distinguish Mr. Cameron from the broad range of criminal defendants who are faced everyday with the decision whether to waive their trial rights to secure a concession as part of conventional plea bargaining—or to distinguish Mr. Ramos from Mr. Brady,[165] Mr. Parker[166] or Mr. Alford.[167] Each of these defendants was "faced with grim alternatives"[168] of exactly the same magnitude as Mr. Ramos, but the courts found their decision to waive their trial rights was voluntary.[169] In short, the due process argument that bargaining for appeal waivers places an impermissibly coercive burden upon the free exercise of the right to appeal is really no different from the venerable argument that plea bargaining in general is impermissibly coercive of waivers of the right to jury trial. This latter argument has been emphatically rejected by the Court as a necessary predicate to its broad approval of the plea bargaining process.[170]

D. Should Plea Bargaining be Revisited?

It may be time to revisit the basic assumptions underlying Supreme Court approval of plea bargaining. Although plea bargaining currently enjoys widespread judicial acceptance and is even encouraged as "an essential component of the administration of

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further argue that this "take it or leave it" approach is not terribly different from the choice a potential robbery victim faces when confronted with the demand for "your money or your life." As Professor Sullivan has pointed out, "coercion involves severe constraint on choice rather than its elimination." *Supra* note 143, at 1442 n.114. Moreover, the greater the differential between the sentence the defendant is offered with, as opposed to without, an appeal waiver necessarily increases the restraint in choice and makes it more likely such a plea was "coerced." Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEG. ST. 43, 70-74 (1988).

163. 292 N.Y.S.2d 938 (App. Div. 1968).

164. *Id.* at 940.

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

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

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

168. *Id.* at 36.

169. *Brady*, 397 U.S. at 748; *Parker*, 397 U.S. at 794; *Alford*, 400 U.S. at 38.

170. *See supra* note 169.

justice,"[171] the process was, through much of its history, viewed to be constitutionally suspect.[172] As recently as 1958, the Supreme Court struck down a bargained-for guilty plea as "improperly obtained."[173] Thus, its lineage is not so ancient as to suggest that reconsideration should be unthinkable.[174] In particular, it may be time to revisit the Court's central assumption that the defendant and the prosecutor are coequal adversaries in the plea bargaining context. Much of the law review commentary has disputed this assumption.[175] Some have gone so far as to suggest that if there ever was a "mutuality of advantage" in the plea bargaining context, it was destroyed by opinions such as *Bordenkircher v. Hayes*.[176]

Furthermore, a recent but dramatic change in the plea bargaining landscape makes such reconsideration particularly appropriate. This change is the arrival in the federal system (as well as a number of state systems) of new determinate sentencing schemes which tilt the playing field significantly in favor of the prosecutor.[177] This is accomplished by sharply increasing the penalty range for given criminal behavior

171. Santobello v. New York, 404 U.S. 257, 260 (1971).

172. Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 19-24 (1979).

173. Shelton v. United States, 356 U.S. 26, 26 (1958). This opinion rested principally upon a confession of error by the Solicitor General. *Id.* Nonetheless, the opinion was widely regarded as a signal that the Court was ready to find the practice of plea bargaining invalid. *See* Alschuler, *supra* note 172, at 35.

174. For arguments in general about the failings of plea bargaining, see Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992).

175. *See* Gifford, *supra* note 159, at 38-39; Malvina Halberstam, *Towards Neutral Principles in the Administration of Criminal Justice: A Critique of Supreme Court Decisions Sanctioning the Plea Bargaining Process*, 73 J. CRIM. L. & CRIMINOLOGY 1, 48 (1982); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12-13 (1978); Mark Tushnet & Jennifer Jaff, *Critical Legal Studies and Criminal Procedure*, 35 CATH. U. L. REV. 361, 366 (1986); Stephen F. Ross, Note, Bordenkircher v. Hayes: *Ignoring Prosecutorial Abuses in Plea Bargaining*, 66 CAL. L. REV. 875, 879-880 (1978).

176. 434 U.S. 357 (1987). *See* Ross, *supra* note 175, at 880. *Bordenkircher* involved a defendant who refused to plead guilty to forgery, a state felony punishable by two to ten years in prison. *Id.* at 358. The prosecutor then carried out a threat made during plea bargaining conferences and charged the defendant under the state habitual criminal statute, thus subjecting him to a mandatory life sentence. *Id.* at 358-59. The Court found no due process violation. *Id.* at 365.

177. U.S. SENTENCING COMM'N, FED. SENTENCING GUIDELINES MANUAL (1994) (The Sentencing Reform Act of 1984, 18 U.S.C. §§ 3351-3586 and 28 U.S.C. §§ 991-998, created the United States Sentencing Commission which was, in turn, charged with establishing the sentencing policies and guidelines that are set forth in this manual). *See, e.g.*, CAL. PENAL CODE §§ 1168-1170.6 (West 1985); ILL. ANN. STAT. ch. 38, paras. 1005-8-1 to 1005-8-4 (Smith-Hurd 1981); IND. CODE ANN. §§ 35-50-1-1 to 35-50-6-6 (Burns 1991); N.Y. PENAL LAW §§ 70.00(2)-(3), 70.02, 70.06, 220.00-43 (McKinney 1987).

and transferring sentencing discretion away from the trial judge (and parole boards) and lodging it with the prosecutor.[178]

In the federal system, the accretion in sentencing range is largely the result of mandatory minimum sentences, statutory changes in the severity of drug sentences, and the sentencing commissioners' decision to impose more severe sentences for white collar crimes. One federal judge, Gerald W. Heaney, recently attempted to measure the increase in sentencing in the Eighth Circuit and concluded that, although Congress expected that time served under the Guidelines would, in the aggregate, be about the same as time served under pre-Guidelines sentences, in fact, an offender sentenced under the Guidelines is likely to serve more than twice as long as someone sentenced under pre-Guidelines law.[179] Although the accuracy of these particular figures has been challenged,[180] there seems little doubt that there have been very significant increases in both the use and average length of prison sentences under the Guidelines.[181] In fact, a recent report by the United States Sentencing Commission indicates that the Eighth Circuit figures compiled by Judge Heaney accurately reflect what is happening across the country in the wake of the Guidelines.[182] Moreover, the rush to mandatory sentencing schemes in the states represented "a shift to policies [which] mandated that convicted criminals be incarcerated, and incarcerated for longer periods of time."[183] These sentencing changes—rather than an increase in crime or in the number of individuals in the crime-prone age group—account for the tremendous rise in national prison population figures since 1970.[184]

Such an increase in sentencing exposure for the accused translates directly into increased bargaining leverage for the prosecutor.

178. *See infra* note 185-195 and accompanying text.

179. Hon. Gerald W. Heaney, *Revisiting Disparity: Debating Guidelines Sentencing*, 29 AM. CRIM. L. REV. 771, 772 (1992).

180. Hon. William W. Wilkins, Jr. *Response to Judge Heaney*, 29 AM. CRIM. L. REV. 795 (1992).

181. UNITED STATES SENTENCING COMM'N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 56-60 (1991).

182. *Id.*

183. Jeff Bleich, Comment, *The Politics of Prison Crowding*, 77 CAL. L. REV. 1125, 1147 (1989). In California, the new "three strikes" sentencing law enacted in March 1994 states: "It is the intent of the legislature in enacting [the following subdivisions] to ensure longer prison sentences and greater punishment." CAL. PENAL CODE § 667(b) (West Supp. 1995).

184. Bleich, *supra* note 183, at 1146-47 (contending that America's prison population increased more in the ten years between 1975 and 1985 than it had in all the preceding fifty years combined).

As Professor Alschuler has noted, "A prosecutor who can threaten only a penalty of three years following a defendant's conviction at trial plainly has less bargaining power than a prosecutor who can threaten a sentence of twenty-five years."[185] More importantly, if increases in sentence exposure do in fact increase the coercive potential of plea bargaining, then as the gap in sentence increases between what the accused is offered for an appeal waiver and what the defendant can expect without such a waiver, the waiver becomes less reliable as an indicator that the appeal was without merit to begin with.[186]

The second way in which these new sentencing schemes have strengthened the prosecutor's hand is the manner in which they have shifted most sentencing discretion away from the judge to the prosecutor. At the very heart of these sentencing reforms is an effort to limit or structure judicial sentencing discretion to avoid "unwarranted sentencing disparities among defendants with similar records."[187] The federal guidelines, for example, severely constrict the range of choices open to the judge. When one adds the effect of mandatory minimums,[188] probation ineligibility,[189] and other constraints on the sentencing powers of the judge, very little sentencing latitude is left to the judge. As a consequence, the principle determinant of actual sentencing becomes the prosecutor's charging decision. This includes not only which offenses are charged or bargained for but also which sentencing facts get to the judge and the probation department and even whether mandatory minimums, as well as other significant constraints on the judge's sentencing function, apply.

This wholesale transfer of discretionary powers was predicted in the legal literature when such determinate sentencing schemes were first being debated,[190] and it is now accepted as fact by courts,[191]

185. Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 569 (1978).

186. *See* Schulhofer, supra note 162, at 72, for a similar argument with respect to the coercive effect of sentencing differentials as part of plea bargaining.

187. 28 U.S.C.A. § 991(b)(1)(B) (West 1993). *Cf.* CAL. PENAL CODE § 1170(a)(1) (West Supp. 1995) (stating that the purposes of California's determinate sentencing act are best served by "uniformity in the sentences of offenders committing the same offense under similar circumstances.").

188. *See, e.g.*, 21 U.S.C.A. § 841(b)(1)(A) (West Supp. 1995); N.J. STAT. ANN. § 2C:43-6(c) (West Supp. 1995).

189. *See, e.g.*, CAL. PENAL CODE § 462 (West Supp. 1995).

190. William T. Pizzi, *Prosecutorial Discretion, Plea Bargaining and the Supreme Court's Opinion in* Bordenkircher v. Hayes, 6 HASTINGS CONST. L.Q. 269, 296 (1978); Alschuler, supra note 185; Terance D. Miethe, *Charging and Plea Bargaining Practices Under*

judges,[192] sentencing administrators,[193] probation officers,[194] and academics.[195]

It is noteworthy that virtually all of the Supreme Court's pronouncements about the fairness of plea bargaining are premised upon a "mutuality of advantage"[196] or "equal bargaining power"[197] that is believed to exist between the prosecutor and the defense. By way of contrast, both the Federal Rules of Criminal Procedure[198] and much of the lower court authority[199] prohibit bargaining between the judge and the accused in large part because, in this latter situation, "the disparity of positions is extremely marked."[200] Indeed, it has been held that precisely because the judge possesses such "awesome power to impose a substantially longer or even maximum sentence in excess of that proposed . . . [a] guilty plea predicated upon a judge's promise of a definite sentence by its very nature does not qualify as a free and voluntary act."[201]

If the awesome sentencing powers of the judge are viewed as preventing arms-length transactions between the judge and the ac-

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Determinate Sentencing: An Investigation of the Hydraulic Displacement of Discretion, 78 J. CRIM. L. & CRIMINOLOGY 155 (1987).

191. United States v. Kikumura, 918 F.2d 1084, 1119 (3d Cir. 1990) (Rosenn, J., concurring) ("[T]he sentencing guidelines have replaced judicial discretion over sentencing with prosecutorial discretion."); People v. Gottfried, 462 N.Y.S.2d 596, 597 (App. Div. 1983) (Sandler, J., concurring) ("[T]he last several years . . . [have] seen the power to sentence defendants effectively transferred from judges to prosecutors.").

192. Jack B. Weinstein, *A Trial Judge's Reflections on Departures from the Federal Sentencing Guidelines*, 5 FED. SENT. R. 6, 7 (1992).

193. William W. Schwarzer, *Judicial Discretion in Sentencing*, 3 FED. SENT. R. 339, 340-41 (1991) (the author is Director of the Federal Judicial Center); Comments of Benjamin F. Baer, Chairman, U.S. Parole Commission in Symposium, 1 FED. SENT. R. 359 (1989).

194. Maria Rodrigues McBride, *Restoring Judicial Discretion*, 5 FED. SENT. R. 219 (1993).

195. Albert W. Alschuler & Stephen J. Schulhofer, *Judicial Impressions of the Sentencing Guidelines*, 2 FED. SENT. R. 94 (1989); Freed, *infra* note 285, at 1697; Stephen J. Schulhofer, *Sentencing Issues Facing the New Department of Justice*, 5 FED. SENT. R. 225 (1993); Robert A. Weninger, *The Abolition of Plea Bargaining: A Case Study of El Paso County, Texas*, 35 UCLA L. REV. 265 (1987); Ronald F. Wright, *The Law of Federal Sentencing in the Supreme Court's 1991-92 Term*, 5 FED. SENT. R. 108 (1992); Elizabeth A. Parsons, Note, *Shifting the Balance of Power: Prosecutorial Discretion Under the Federal Sentencing Guidelines*, 29 VAL. U. L. R. 417 (1994).

196. *Bordenkircher*, 434 U.S. at 363.

197. *Parker*, 397 U.S. at 809.

198. *See* FED. R. CRIM. P. 11(e)(1) provides that "the Court shall not participate in any such [plea agreement] discussions."

199. *See, e.g.*, *Worcester*, 370 F.2d at 718; United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244, 254 (S.D.N.Y. 1966); *Nguyen*, 16 Cal. Rptr. 2d at 493 n.3.

200. *Elksnis*, 256 F. Supp. at 255.

201. *Id.* at 254.

cused and if the prosecution now exercises much of this once exclusive power preserve of the judiciary, then perhaps it is time to revisit the jurisprudential decision in *Brady*[202] and its progeny to approve large scale plea bargaining as a means of resolving criminal cases. It may simply no longer be acceptable to merely assume that "the accused is free to accept or reject the prosecution's offer."[203] The pressures brought to bear upon criminal defendants to waive appellate review of their treatment in the trial courts when faced with bargaining extremely long sentences which are in the virtual control of the prosecutor's office raises anew the traditional due process concerns of fairness and voluntariness.

Of course, the traditional wisdom is that the criminal justice system is so completely dependent upon plea bargaining that its abolition is unthinkable. This was probably most succinctly expressed by Chief Justice Burger in *Santobello v. New York*,[204] where he observed that "[i]f every criminal charge were subjected to a full-scale trial, the States and Federal Government would need to multiply by many times the number of judges and court facilities."[205] However, in recent years a number of practitioners[206] and scholars[207] have challenged this assessment and have argued both that the system could accommodate greater reliance on trials and that plea bargaining is not as inevitable as we tend to assume.

It is by no means certain who is right on this score, but we should not allow cynicism to prevent us from even considering policy changes if we feel them to be warranted. Furthermore, a reconsideration of the basic assumptions about the voluntariness of the process could lead to approaches short of a full scale abolition of plea bargaining. It could, for example, lead the Court to rethink its unqualified embrace of plea bargaining as the preferred means of caseload reduction and lead it to disapprove some of the harsher manifestations of the practice.[208]

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202. 397 U.S. 742 (1970).

203. *Bordenkircher*, 434 U.S. at 363.

204. 404 U.S. 257 (1971).

205. *Id.* at 260.

206. *See, e.g.*, David Lynch, *The Impropriety of Plea Agreements: A Tale of Two Counties*, 19 LAW & SOC. INQUIRY 115 (1994).

207. *See, e.g.*, Stephen J. Schulhofer, *supra* note 154.

208. It might be difficult to reach consensus on which features of plea bargaining are the most harsh or coercive since the current thinking by the Court is that none are. Nonetheless, this author would put at the top of any such list the practice of piling on additional charges when a defendant refuses to engage in plea bargaining, which was approved by the

Nonetheless, since the Court has shown no inclination to engage in such a wholesale reassessment of its basic operation principles in this area, the due process critique of appeal waivers must be viewed as highly theoretical until such time as the Court indicates a willingness to revisit this debate.

III. The Public Policy Issues

A. Introduction

Recent case law has explored at some length the question of whether waivers of appeal rights are in the public interest or whether they "infringe important interests of the criminal defendant and of society as a whole."[209] Although a few courts have disallowed appeal waivers on public policy grounds,[210] the vast majority have resolved the public policy debate in favor of upholding such waivers.[211] The rationales most frequently expressed in favor of such waivers are the need to deal with a caseload perceived to be overburdened with frivolous appeals,[212] the need for finality in the process,[213] the view that the practice furthers the defendant's interests because such waivers operate as an additional bargaining chip in the plea negotiation process,[214] and the view that appeals are less necessary as a corrective process in this situation because the defendant's interests are sufficiently protected by the close judicial supervision of the plea bargaining process at the trial level.[215]

This Article suggests that the public policy debate has been unduly skewed in favor of caseload concerns, without sufficient consideration being given to the essential role that the right to appeal plays in the criminal justice system. Further, this Article explores the public policy arguments most frequently made in favor of appeal waivers and concludes that most of them do not withstand close scrutiny.

Court in *Bordenkircher*. 434 U.S. at 363-64. Also near the top of this list would be the practice of seeking appeal waivers as a condition of engaging in plea bargaining.

209. Town of Newton v. Rumery, 480 U.S. 386, 392 (1987).

210. State v. Ethington, 592 P.2d 768 (Ariz. 1979); Majors v. State, 568 N.E.2d 1065 (Ind. Ct. App. 1991); People v. Butler, 204 N.W.2d 325 (Mich. Ct. App. 1973).

211. *See supra* notes 50-55.

212. *See Olson*, 264 Cal. Rptr. at 818; *Gibson*, 348 A.2d at 775.

213. *See Rutan*, 956 F.2d at 829; *Navarro-Botello*, 912 F.2d at 322.

214. *See, e.g.*, *Gibson*, 348 A.2d at 774; People v. Charles, 217 Cal. Rptr. 402, 405 (Ct. App. 1985); *Gonzalez*, 981 F.2d at 1043 (Kozinski, J., dissenting).

215. *Rumery*, 480 U.S. at 401 (O'Connor, J., dissenting).

B. Public Policy and Waiver of Rights in General

The concept that a promise or agreement may be unenforceable at law because its terms conflict with public policy is one which derives from traditional common law principles.[216] As the Supreme Court observed in *Rumery*, "[t]he relevant principle is well established: a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."[217]

Although this principle may be well-established in the abstract, in actual application most Supreme Court decisions are decidedly inhospitable to the notion that any agreement by a criminal defendant to waive a right—either constitutional or statutory—could be presumptively against public policy. In fact, as the Court observed this past term, such presumptions that do operate in this area are to the effect that all rights, including even the most basic, are subject to waiver.[218] Thus, to suggest, as this Article does, that negotiated waivers of appeal rights are against public policy and that courts should consider disapproving them is to undertake a decidedly uphill task.

However, recent opinions of the Court render this undertaking slightly less burdensome in two fundamental ways. First, the Court has continued to adhere steadfastly to the basic principle that all waiver agreements remain potentially subject to public policy review. For example, in the recent *Mezzanatto* opinion, Justice Thomas voiced agreement with the defense's core premise that "there may be some evidentiary provisions that are so fundamental to the reliability of the fact-finding process that they may never be waived without irreparably 'discredit[ing] the federal courts.'"[219]

Second, and more importantly, the Court has actually invalidated the waiver of a fundamental right on public policy grounds in at least one recent case. In *Wheat v. United States*,[220] the Court specifically declined to enforce a criminal defendant's waiver of his Sixth Amendment right to be represented by counsel free of any conflict of interest.[221] The Court reasoned that to allow a defendant to be

216. *See* RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981).

217. 480 U.S. at 392.

218. *Mezzanatto*, 115 S. Ct. at 801 (approving the prosecutorial practice of soliciting waivers of the protections of Federal Rule of Evidence 410 against the use of statements made during plea negotiations).

219. *Id.* at 803 (quoting C. WRIGHT & K. GRAHAM, 21 FEDERAL PRACTICE & PROCEDURE § 5039, 207-08 (1977)).

220. 486 U.S. 153 (1988).

221. *Id.* at 164.

represented by an attorney with a conflict of interest—even where the defendant had waived all rights against such representation—"not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver."[222]

Thus, the issue is not whether the courts can refuse on public policy grounds to accept a criminal defendant's negotiated waiver of rights. That principle is clearly established,[223] even though the Court may, in general, be hesitant to take such action. Instead, the more pertinent questions are how fundamental is the right that the defendant is being asked to waive and whether compelling the defendant to decide to waive the right "impairs to an appreciable extent any of the policies behind the rights involved."[224]

Accordingly, any analysis of the public policy implications of appeal waivers must begin with an examination of the right to appeal, its importance to the criminal justice system, and the policies it serves.

C. The Importance of the Right to Appeal to the Criminal Justice System

The right to appeal in criminal cases has been variously described as "a fundamental element of procedural fairness"[225] and the "final guarantor of the fairness of the criminal process."[226] In fact, even the suggestion of a judicial system where the determinations of a trial level judicial tribunal would be insulated from review for correctness would strike most people as offensive to our most deeply felt conceptions of procedural fairness. At the core of how we perceive our criminal justice system is a basic distrust of the awesome power of the state and its ability to infringe upon individual rights. The potential for such an abuse of power by either the prosecutor or the trial judge traditionally has been viewed as requiring the availability of some form of corrective process such as the right to appeal.

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222. *Id.* at 162 (quoting United States v. Dolan, 570 F.2d 1177, 1184 (3d Cir. 1978)).

223. *See, e.g.,* United States v. Olano, 113 S. Ct. 1770, 1782 (1993) (Kennedy, J., concurring) (suggesting that the guarantees of FED. R. CRIM. P. 24(c) may not be waived by an agreement to permit alternate jurors to sit in on jury deliberations).

224. McGautha v. California, 402 U.S. 183, 213 (1971).

225. ABA COMM. ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS 14 (1977).

226. Rossman, *supra* note 47, at 518.

Although the right to appeal has not explicitly been recognized as a federal constitutional right,[227] it is such a de facto part of our system that it has been described as "sacrosanct."[228] In fact, it has become such an integral part of our judicial process that an impressive body of scholarship has appeared in recent years maintaining that the right is, in fact, an essential element of due process.[229] At least one Supreme Court justice has expressed the opinion that "[i]f the question were to come before us in a proper case . . . we would decide that a State must afford at least some opportunity for review of convictions."[230]

Such conjecture is given added weight by the Court's recent recognition in *Honda Motor Co. v. Oberg*[231] that, at least in certain civil contexts, the right to judicial review is compelled by the due process guarantee.[232] In *Honda*, the Court held that the Due Process Clause of the Fourteenth Amendment requires judicial review of the size of punitive damage awards.[233] In reaching this conclusion, the Court employed a line of reasoning that raises significant questions about whether it would continue to stick to its position in previous cases that the right to appeal in criminal cases is not an element of due process.

For example, in *Honda*, the Court's principle focus was the degree to which Oregon's failure to provide such review was a "departure from traditional procedures . . . [and] relevant common law."[234] Thus, what was most telling for the Court was the fact that such punitive damage awards were not only subject to judicial review in early common law courts but that a review of current practice disclosed that "[i]n the federal courts and in every State, except Oregon, judges review the size of damage awards."[235]

Application of this analysis to the status of criminal appeals in general is hardly conclusive, but it does provide grist for those who would argue that the issue is ripe for reconsideration. Certainly the

227. Jones v. Barnes, 463 U.S. 745, 751 (1983) (holding that "[t]here is, of course, no constitutional right to an appeal"); McKane v. Durston, 153 U.S. 684, 687-88 (1894) (holding that state has power to place terms and conditions upon criminal appeals).

228. Dalton, *supra* note 47, at 62.

229. *See supra* note 47. Actually, the question of whether the right to appeal is constitutional or not may be largely irrelevant for the purposes of this article because the Court has made clear that if a statutory right is important enough, public policy can prevent its waiver. *Rumery,* 480 U.S. at 392.

230. Jones v. Barnes, 463 U.S. 745, 756 n.1 (1983) (Brennan, J., dissenting).

231. 114 S. Ct. 2331 (1994).

232. *Id.* at 2341.

233. *Id.*

234. *Id.* at 2335.

235. *Id.* at 2338.

right to appeal criminal judgments was not an ingrained part of our common law history,[236] and this is probably part of the reason why the early cases declined to accord constitutional status to the right to appeal. However, the current practice is strikingly different and, in fact, is comparable to the one considered by the Court in *Honda*. Currently, the right to appeal criminal judgments exists as a matter of right in the federal system[237] and in 47 of the 50 states.[238] Moreover, in the three states where review is discretionary in nature,[239] the process has been swathed in such an impressive wrapping of protective procedures that it is difficult to distinguish it from full review as a matter of right.[240]

Of course, the holding in *Honda* is limited to the question of whether some form of judicial review of jury verdicts is required and does not directly address the question of whether a traditional appeals process would be constitutionally compelled. Nonetheless, when one examines the larger policy concerns expressed by the Court—particularly the need to protect against arbitrary and inaccurate adjudication[241] and the problem that a guilty defendant may be unjustly punished[242]—it is difficult not to draw parallels to the criminal process and the right of criminal defendants to be free from arbitrary trial court decisions.

D. The Purposes of an Appeal

Although commentators have occasionally differed on the precise articulation of the purposes served by an appeal and their relative importance, there is widespread agreement on why we have appeals, particularly in the criminal system. The primary purpose is to correct error and assure that mistakes in the lower court do not go unremedied.[243] But beyond that, a variety of broader "institutional" purposes

236. For example, criminal appeals did not exist at the time the Constitution was adopted and Congress did not provide for federal criminal appeals until the late nineteenth century. Arkin, *supra* note 47, at 503-04.

237. 28 U.S.C.A. § 1291 (West 1993).

238. Arkin, *supra* note 47, at 513-14; Dalton, *supra* note 47, at 62 n.2.

239. N.H. REV. STAT. ANN. § 599.1 (1994); VA. CODE ANN. § 16.1-132 (Michie 1995); W. VA. CODE § 50-5-13 (1995).

240. Arkin, *supra* note 47, at 513-14; Dalton, *supra* note 47, at 62 n.2.

241. *Honda*, 114 S. Ct. at 2335.

242. *Id.* at 2339.

243. Contrast, for example, the A.B.A. Standards, *supra* note 225, at § 3.00 commentary at 4, and PAUL D. CARRINGTON, ET AL., JUSTICE ON APPEAL 2-4 (1976) (both of which point to a two-fold purpose of error correction and "institutional" review) with the more sweeping claims of Shapiro, *Appeal*, 14 LAW & SOC'Y REV. 629 (1980) and Dalton, *supra* note 47, at 69 n.24.

have been identified. These include the articulation or systematic development of the law,[244] the assurance that the law will be applied with some degree of uniformity to equally situated individuals,[245] and the legitimation of the law in the eyes of the public.[246]

1. Error Correction

The primary purpose of an appeal is to review lower court judgments for error.[247] This "quality control"[248] function is found in most legal systems and is viewed as particularly important to our own.[249] The concern for accuracy of results is particularly imperative when dealing with criminal judgments where the right to liberty is at stake.[250]

Recently, some conservative critics of the criminal justice system have questioned this received wisdom. For example, Justice Rehnquist in a speech at the University of Florida Law School derided what he described as our "obsessive concern that the result reached in a particular case be the right one," and suggested that the time had come to abolish appeals as a matter of right.[251] Former Solicitor General Rex Lee has opined that there is nothing in the Constitution or in common sense that dictates that the decisions of an appellate court are any more likely to be right than those of a trial court.[252]

Whether or not Justice Rehnquist is correct in his characterization of our concern for accuracy in the criminal arena as an obsession, one commentator seems to capture more closely the essence of our system when he posits that before the state "officially stigmatizes a citizen as standing outside the law and as deserving of society's condemnation, [it] must satisfy itself several times over that such a judg-

244. CARRINGTON, *supra* note 243, at 3.

245. *Id.* at 2.

246. Resnik, *supra* note 47, at 619.

247. Dalton, *supra* note 47, at 66.

248. Rossman, *supra* note 47, at 519.

249. CARRINGTON, *supra* note 243, at 2.

250. This concern is probably best exemplified by the ancient epigram, attributed to Blackstone, that "It is better that ten guilty persons escape, than that one innocent suffer." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 358 (Philadelphia, J.B. Lippincott & Co., 1861). Of course, this is not so much an argument for error correction in general as it is a declaration that errors which result in loss of liberty are particularly anathema to our Anglo-American system of justice.

251. Resnik, *supra* note 47, at 605 (quoting Justice William Rehnquist, Address at the 75th Anniversary of the University of Florida College of Law and the Dedication of Bruton-Geer Hall (Sept. 15, 1984) (on file at *Cornell Law Review*)).

252. Resnik, *supra* note 47, at 606.

ment is warranted."[253] Moreover, Solicitor General Lee's invocation of common sense regarding decisionmakers is difficult to understand if one merely compares the average caseload and contemplation time per case of typical trial and appellate jurists. Trial courts operate at a distinct disadvantage in this regard with many urban trial judges disposing of as many as 100 cases per day.[254]

This is particularly true of the guilty plea cases which are the subject of this Article. These cases are processed hurriedly. Close judicial supervision of the process is more a matter of form than of substance. The files in one case are frequently being read while the plea formalities of the previous case are being acted out on the judicial stage. Waivers of rights—if actually made in open court by the defendant—are done in rote, liturgical fashion.[255] More frequently they are achieved by recourse to a check list that the defendant signs at the direction of his counsel.[256] Factual bases for the pleas are more often than not the subject of stipulations between counsel.[257] Sentencing decisions are commonly the rubber stamp approval of either a plea disposition or a probation report recommendation or, even more problematic, the hurried attempt to apply an enormously complex and constantly changing sentencing scheme to the particular blend of sentencing factors represented by each case.[258] One simple truth controls: the calendar must be moved or the system will implode.

It is not surprising then that mistakes get made. Thus, there is every reason to agree with Professor Resnick who suggests that "common sense" would always opt for "a decision of three people with time for reflection over the decision of one person with little or no time to think."[259]

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253. Dalton, *supra* note 47, at 102.

254. Resnik, *supra* note 47, at 620.

255. *See infra* note 437.

256. *Id.*

257. Cases such as People v. Enright, 183 Cal. Rptr. 249 (1982), and People v. McGuire, 1 Cal. Rptr. 2d 846 (1991), approve of the practice of establishing a factual basis through stipulation.

258. The complexity of California's determinate sentencing scheme was captured by Justice Gardner who wrote in Community Release Bd. v. Superior Ct. (Rabreau), 154 Cal. Rptr. 383 (Ct. App. 1979), "[a]s a sentencing judge wends his way through the labyrinthine procedures of Section 1170 of the Penal Code, he must wonder, as he utters some of its more esoteric incantations, if, perchance, the Legislature had not exhumed some long departed Byzantine scholar to create its seemingly endless and convoluted complexities. Indeed, in some ways it resembles the best offerings of those who author bureaucratic memoranda, income tax forms, insurance policies or instructions for the assembly of packaged toys." *Id.* at 384 n.1.

259. Resnik, *supra* note 47, at 620.

These concerns about accuracy which derive from the need of trial courts to process enormous numbers of criminal cases (particularly guilty plea cases) carry over with equal force to the defense attorneys who are charged with the duty of protecting the interests of the defendants processed through these busy courts. Most of these attorneys are likely to be appointed, overworked, and overwhelmed. In many cases, they may simply be inadequate.[260] This can be a particular problem in guilty plea cases which are processed quickly yet are likely to involve complicated sentencing issues. A recent report of the United States Sentencing Commission concluded that most private criminal defense attorneys generally do not understand the federal sentencing guidelines which control the ultimate fate of their clients,[261] and yet federal sentencing error is an issue typically covered by an appeal waiver.

Thus, there is every reason to believe that there will be errors in the trial court which require the corrective process of appellate review. Moreover, one critical empirical fact demonstrates the need for appeals in criminal cases—despite persistent characterization of the criminal appellate docket as dominated by frivolous claims, the success rate in criminal appeals (when one includes sentencing issues) is frequently as high as 25%,[262] and often compares favorably with the success rate enjoyed by appellants in civil cases.[263] Even if the success rate were lower, at least one Supreme Court Justice has observed that "the reversal rate of criminal convictions on mandatory appeals in the state courts, while not overwhelming, is certainly high enough to suggest that depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction."[264]

a. Can Appeal Waivers Serve as an Alternative to Error Correction Mechanisms?

Many of the decisions upholding appeal waivers operate on an assumption (often unstated) that the error correction purposes of an appeal are not compromised by widespread reliance upon appeal

260. *Id.* at 622-23. *See also* Dalton, *supra* note 47, at 102.

261. U.S. SENTENCING COMM'N, *supra* note 181, at 6. It should be noted that the Federal Sentencing Guidelines present a bewildering mine field of statutory complexity. For examples of how even the most routine cases can raise a host of perplexing legal questions, see Owen S. Walker, *Litigation—Enmeshed Sentencing: How the Guidelines Have Changed the Practice of Federal Criminal Law*, 25 U.C. DAVIS. L. REV. 639 (1992).

262. NCSC, *supra* note 29, at 8.

263. This empirical data is explored in detail, *infra*, in the text accompanying notes 398 - 422.

264. Jones v. Barnes, 463 U.S. 745, 756 n.1 (1983) (Brennan, J., dissenting).

waivers. The belief is that in each such case the defendant will have entered into a voluntary agreement to forego the benefits of appeal and would not have done so if there were serious errors which the defendant felt were of greater importance than the concessions received as part of the bargain.[265]

This line of reasoning is based on two further assumptions about the nature of the process, each of which is open to serious question. The first is that the defendant is actually a free actor in a position to make a truly voluntary choice. This assumption was challenged at length in Part II of this Article and those arguments will not be repeated here except to emphasize two observations. First, rather than entering an arms length trading arrangement where appeal rights are bartered for specific charge or sentence concessions, many defendants find themselves faced instead with a flat requirement that they waive their appeal rights as a precondition to bargaining. Viewed in this way, appeal waivers look less like an additional bargaining chip that the defendant brings to the table and more like the price of admission to engage in the plea bargaining process at all. More specifically, when required in such an across the board fashion, they bear little, if any, relationship to the specific merits of the claim the defendant wishes to raise on appeal.

Second, in those situations where prosecutors bargain selectively for the waiver of appeal rights, it stands to reason that they are most likely to do so in those cases where defendants have arguably meritorious appeal issues, otherwise there would be little incentive on the part of the prosecutor to make significant concessions. This means that the greater the likelihood that the defendant was deprived of fair treatment in the trial court, the greater will be the pressure to give up access to an appeal. Thus, not only do appeal waivers operate most coercively on those who have the greatest reason to appeal but they function as the worst form of screening mechanism, removing from the system precisely the cases we would most want appealed.

There are additional problems with reliance upon appeal waivers as a substitute for the error correction function of an appeal. Principal among these is the question of whether the defendant is the person best situated to judge the strength of the issues on appeal. Presumably, the defendant is the person best situated to determine the need for a trial to adjudicate guilt or innocence. As the Supreme Court has

265. *See, e.g., Navarro-Botello*, 912 F.2d at 320 ("Whatever appellate issues might have been available . . . were speculative compared to the certainty derived from a negotiated plan with a set sentence parameter.").

observed, a guilty plea constitutes "an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case."[266] But, as one commentator has urged, "[n]othing the defendant could say or do . . . could serve to certify the 'correctness' of the trial court's sentencing decision"[267] or any other legal decision made by the trial judge that would serve as the basis for an appeal.

b. The Special Problem of Waiver of Future Sentencing Error

Reliance upon appeal waivers as a substitute for a formal error correction process is particularly problematic when the issue on appeal is sentencing error that has occurred after the entry of the appeal waiver. It is very difficult to defend a theory that defendant's knowing calculation of the significance of the error renders the need for an appeal superfluous when that very same defendant is unaware of either the nature or the magnitude of the error at the time the appeal waiver is entered.

Consequently, the issue of waiver of future sentencing error is potentially one of the most divisive questions for those courts which otherwise approve of appeal waivers. At least one state court has specifically declined to uphold appeal waivers when the issue involves future sentencing error.[268] The federal courts, on the other hand, have generally upheld such waivers.[269]

c. Limits of the Error Correction Rationale

If error correction were the only purpose served by an appeal then the above-mentioned factors might justify the cost-benefit tradeoffs of widespread reliance upon appeal waivers. However, the institutional purposes served by the right to appeal in our criminal justice system go far beyond the individual interests of any particular defendant. When we take into account the fact that almost 90% of all criminal cases are disposed of by guilty plea,[270] then we must recognize that we are talking about more than whether an individual defendant

266. *Menna*, 423 U.S. at 62 n.2.

267. Johnson, *supra* note 115, at 710.

268. *Vargas*, 17 Cal. Rptr. 2d at 451.

269. *Rutan*, 956 F.2d 827; *Melancon*, 972 F.2d 566; *Navarro–Botello*, 912 F.2d 318. This issue is discussed in greater detail in section IV, *infra*, where it will be argued that waivers of this sort are not only an inadequate substitute for the error correction function of an appeal but that they also fail the test of knowing waiver of rights established by the Supreme Court in *Johnson v. Zerbst.*

270. *See supra* note 3.

should be free to waive a particular right for sufficient inducement. We must confront a practice which presents the potential for closing the doors of the American criminal courtroom and shielding most criminal cases from any judicial review. The succeeding sections examine the broader institutional implications raised by such a practice.

2. *Uniform Application of the Law*

A core purpose served by the appellate process is its unifying function—that is, it provides a mechanism for assuring the even-handed application of the law. Trial courts work independently of each other and lack the "self-regulating capacity to promote uniformity among their decisions."[271] It is only by means of appellate review that we guarantee that all courts move in a common direction and that an individual's treatment in the courts is guided by legal principle rather than the whim of an individual trial judge. This perceived need for consistency in the application of legal doctrine is particularly acute in the criminal justice system because it is a system which adjudicates liberty interests. Uniformity of treatment is at the heart of our notions of criminal procedural fairness and, although we do not always achieve the goal, it is our unstinting commitment to the ideal which gives legitimacy to the system.

This imperative of uniform application of the law has particular force in the area of guilty plea appeals because such a large percentage of these appeals involve sentencing issues. In recent years uniformity of treatment has become the touchstone of most sentencing schemes, and appellate review of sentences is increasingly seen as a key vehicle for achieving this goal.

Although appellate review was at one time virtually unheard of in the sentencing process, sentencing law has undergone enormous change in the last two decades.[272] In both the federal and state systems, the practice has evolved from one grounded in virtually unreviewable trial court discretion to one confined by elaborate and complex sentencing statutes which regulate the sentencing decision. Not surprisingly, most of these new statutory schemes provide for appellate review of sentences.[273]

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271. CARRINGTON, *supra* note 243, at 2.

272. Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61 (1993).

273. *See, e.g.*, 18 U.S.C. § 3742 (1988); ARIZ. REV. STAT. ANN. § 13-4037(A) (1989); CAL. PENAL CODE § 1260 (West 1982); COLO. REV. STAT. § 18-1-409(1) (1986); CONN. GEN. STAT. § 51-195 (1985); GA. CODE ANN. § 17-10-6(a) (1990); ILL. REV. STAT. ch. 38, para. 1005-5-4.1 (1982); IND. CONST. art. VII, § 4; IOWA CODE § 814.6(1)(a) (1979); MD.

These sentencing schemes are the result of a nationwide reform movement[274] whose principle goal has been to bring order to a system of sentencing that was previously described as being "lawless," and "so far unconfined that, except for frequently monstrous maximum limits, they are effectively subject to no law at all."[275] A report of the American Bar Association noted that "in no other area of law does one man exercise such unrestricted power. No other country in the free world permits this condition to exist."[276]

The response of both Congress and a significant number of state legislatures was to bring about a profound change in the nature of sentencing theory and practice. Congress passed the Sentencing Reform Act of 1984[277] and a significant number of states either followed suit or—in the case of states like Minnesota[278] and California[279]—led the way. The result was an elaborate codification of sentencing along the lines of two basic models: a guidelines system (often promulgated by a sentencing commission) which structures sentencing discretion tightly[280] or a system of presumptive sentences for each offense with a narrow range of discretion accorded to the trial judge to depart up or down.[281]

CODE ANN., CRIM. L. § 645JA (1992); MASS. GEN. L. ch. 278, §§ 28-28C (1981); MINN. STAT. § 244.11 (1992); 42 PA. CONS. STAT. § 1386(c) (1983); TENN. CODE ANN. § 40-35-401 (1990).

274. Probably the most influential force behind this movement was Judge Marvin E. Frankel of the Federal District Court for the Southern District of New York, whose book on the subject, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972), has been called "[a] key document in the movement for sentencing reform." Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 422 (1992). Other examples of advocacy for sentencing reform include Daniel R. Coburn, *Disparity in Sentences and Appellate Review of Sentencing*, 25 RUTGERS L. REV. 207 (1971), and A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES (1968).

275. FRANKEL, *supra* note 274, at 8.

276. A.B.A., *supra* note 274, at 1-2.

277. Pub. L. No. 98-473, 98 Stat. 1988 (codified as amended at 18 U.S.C. §§ 3351-3586 (1988) and 28 U.S.C. §§ 991-998 (1988)).

278. MINN. STAT. § 244 (1990).

279. CAL. PENAL CODE §§ 1170-1170.95 (West Supp. 1992).

280. Minnesota was the first state to establish a guidelines system in 1978. *See* MINN. STAT. § 244 (1990). The Minnesota system served as a model for the Federal Sentencing Reform Act of 1984 as well as guidelines systems in 13 other states. *See* Lowenthal, *supra* note 272, at 63 n.8.

281. California's Uniform Determinate Sentencing Law in 1976, CAL. PENAL CODE §§ 1170-1170.95 (West Supp. 1992), was the forerunner here with at least six states adopting a similar model. *See* Lowenthal, *supra* note 272, at 63.

The principle objective of this reform movement was the elimination of disparity in sentencing.[282] It was this aspect of sentencing reform that was most instrumental in enlisting the support of individual legislators[283] and it was this legislative intent that most frequently found expression in the text of the new statutes themselves.[284]

With this in mind, it is easy to see how reliance upon appeal waivers contravenes the policy underlying sentencing reform. The purpose of such waivers is, of course, the elimination of appellate review and without such review trial courts once again are free to exercise the untrammeled discretion that led to the birth of the reform movement. Moreover, given the fact that reform has been generally achieved through the passage of extremely complex and confusing sentencing structures, disparity is just as likely to result from judicial error as it is from judicial discretion. Yet the effect of appeal waivers is to insulate such error from review, compounding the likelihood of disparity.[285]

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282. Helen G. Corrothers, *Rights in Conflict: Fairness Issues in The Federal Sentencing Guidelines*, 26 CRIM. L. BULL. 38, 40 (1990); Kenneth R. Feinberg, *Federal Criminal Sentencing Reform: Congress and The United States Sentencing Commission*, 28 WAKE FOREST L. REV. 291, 295 (1993); Lowenthal, *supra* note 272, at 63; William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of The Federal Sentencing Guidelines*, 41 S. C. L. REV. 495, 495 (1990).

283. Feinberg, *supra* note 282, at 295; The Hon. Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and The Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 187 (1993).

284. The Federal Sentencing Reform Act states that one of the goals of the guidelines is "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6) (1988). California's Determinate Sentencing Law sets forth "the elimination of disparity and the provision of uniformity of sentences" as its declared legislative purpose. CAL. PENAL CODE § 1170 (West. Supp. 1992).

285. An alternative viewpoint has been propounded by Professor Daniel J. Freed in *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992). He suggests that sentence disparity at the trial level reflects greater sensitivity on the part of trial judges to the full range of differences presented by various offenders, *id.* at 1728, and that appellate courts might, in fact, be interpreting the federal guidelines more strictly than Congress intended. *Id.* at 1753. This may be true and may ultimately provide a telling critique of determinate sentencing schemes. Nonetheless, even if it is true, waiver of appellate review of sentences by defendants is not the solution. If appellate courts are, in fact, applying the guidelines more strictly than trial courts, this phenomenon is almost certainly played out through appeals brought by the prosecution rather than by the defense. With rare exception, appeal waivers only restrict the accused from seeking the corrective process of appellate review. To date the sole exception is United States v. Guevara, 941 F.2d 1299 (4th Cir. 1991), which applies principles of reciprocity to appeal waivers. If an accused has been sentenced unfairly by an overly harsh trial court application of the sentencing guidelines, it is unlikely that he will receive even harsher treatment at the hands of the appellate courts whose reversals, after

It is for this reason that Minnesota, the jurisdiction which, along with California, is often credited with launching the determinate sentencing reform movement,[286] has flatly rejected waivers of appeal of sentencing error as being inherently incompatible with the goals of sentence reform. In *Ballweber v. State*,[287] the Minnesota Court of Appeal found that appellate review of sentencing was an essential element of that state's influential guidelines system and held that "[v]indication of the Guidelines' stated goals . . . of reducing sentencing disparity, and providing uniformity in sentencing" requires a per se rule against waivers of sentencing appeals.[288] It is the thesis of this article that the reasoning of this opinion applies with full force to every sentencing scheme which sets sentence uniformity as a goal and provides for appellate review of sentences as a mechanism for achieving that goal.[289]

3. *Articulation of Legal Doctrine*

A related but distinct function served by appeals is their role in the orderly development of constitutional and other legal doctrine. Historically, courts of appeal have been relied upon to "announce, clarify and harmonize the rules of decision employed by the legal system in which they serve."[290] Without an appellate process available to the criminal justice system, some have questioned how legal doctrine would ever evolve in the orderly fashion which we expect.[291] This is a concern that extends far beyond an individual defendant's desire for access to corrective process. As Justice Scalia observed last term in an opinion unanimously disapproving routine vacatur of judgments in cases that are settled after appeal is filed, "judicial precedents are . . .

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all, are most frequently applied to unguided downward sentence departures. Freed, *supra* note 285, at 1729.

286. Lowenthal, *supra* note 272, at 63.

287. 457 N.W.2d 215 (Minn. Ct. App. 1990).

288. *Id.* at 217.

289. This would include, at a minimum, the Federal Sentencing Reform Act of 1984, which is modeled closely after the Minnesota statute as well as the 13 state systems listed *supra* note 273.

290. CARRINGTON, *supra* note 243, at 3. *Cf.* Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 HARV. C.R.-C.L. L. REV. 109 (1995); Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L. J. 1073 (1984).

291. Arkin, *supra* note 47, at 576. *Cf. Gibson*, 348 A.2d at 785 (Pashman, J., dissenting) ("The right of appeal implicates many values which transcend the immediate interests of the parties: indeed, appellate supervision of the trial courts and the operation of the appellate process as a device for fashioning new law are at the very heart of our judicial system.").

valuable to the legal community as a whole" and "are not merely the property of private litigants."[292]

This need for the guiding hand of appellate review is particularly acute in the criminal justice system because, as one commentator has noted, it is appellate decisions which "set forth the boundaries within which police, prosecutors, judges, and defense attorneys must operate if they wish to conform to the rules."[293]

a. Law Articulation and Sentencing Appeal

Guilty pleas appear prominently for consideration in terms of law articulation because of the frequency with which they involve sentencing issues. Just as uniformity of sentences was a major goal driving sentence reform and appellate review of sentencing,[294] so too was the perceived need for a system of orderly development of sentencing law. The legislative history of the Federal Sentencing Reform Act of 1984, for example, discloses that Congress believed that appellate review of sentencing would assure "case law development of the appropriate reasons for sentencing outside the guidelines. This, in turn, will assist the Commission in refining the sentencing guidelines as the need arises."[295] Similarly, the American Bar Association Standards For Criminal Justice urge that one of the principle objectives of appellate review of sentences should be to "promote the development and application of criteria for sentencing which are both rational and just."[296]

This need for orderly appellate guidance takes on added significance when one factors in the enormous complexity of most modern sentencing schemes. The federal guidelines are particularly formidable,[297] having been described by one commentator as being "ridiculously complicated."[298] In addition, they are constantly changing. For example, from 1988 through 1992, the Federal Sentencing Commission promulgated 465 amendments to the guidelines and commentary.[299] State systems suffer from similar problems of complexity[300]

292. U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 115 S. Ct. 386, No. 93-714, 1994 U.S. LEXIS 7982, *16 (November 8, 1994).

293. Rossman, *supra* note 47, at 519.

294. *See supra* notes 271-289 and accompanying text.

295. S. REP. No. 225, 98th Cong., 1st Sess. 149, 151 (1983).

296. A.B.A. STANDARDS FOR CRIMINAL JUSTICE, Standard 20-1.2(d) (1980).

297. Terence Dunworth & Charles D. Weisselberg, *Felony Cases and The Federal Courts: The Guidelines Experience,* 66 S. CAL. L. REV. 99, 107 (1992).

298. *Conference on The Federal Sentencing Guidelines: Summary of Proceedings*, 101 YALE L.J. 2053, 2060 (1992).

299. Dunworth & Weisselberg, *supra* note 297, at 107.

and also change with unsettling frequency,[301] creating, in essence, a moving target for trial judges and attorneys. Without some appellate overlay to provide for rational development, the potential for chaotic application of these modern sentencing schemes is a problem of great dimensions.

Appellate courts have responded to this problem with a significant increase in the number of cases reviewing sentencing error.[302] Moreover, the response has provided some significant measure of the guidance one would desire. For example, the 1991 Report of the United States Sentencing Commission concluded that "[a] body of sentencing law, notably similar among circuits in most respects, has quickly developed. The Commission has benefitted from this evolving body of appellate law."[303]

It would seem then that the right to appeal was intended to play an important role in defining the proper scope and meaning of the new sentencing statutes and that it has, by and large, succeeded in doing so. Widespread use of waivers of sentencing error conflicts directly with these basic policies.

b. Law Articulation and Appeals of Suppression Motions

In those few states which permit an appeal of a suppression motion after a guilty plea,[304] such claims represent a significant portion of guilty plea appeals.[305] These claims also represent a major source of trial court error. As a result, a high proportion of those appellate vic-

300. *See, e.g.*, Diane Beale, *California's Determinate Sentencing Law: Punishment for Defendants, Complexity for the Courts*, S.F. ATT'Y, Aug./Sept. 1993, at 18.

301. State determinate sentencing schemes provide an almost irresistible temptation to legislators to tinker with sentencing limits—motivated usually by some shifting combination of the need to respond to crime rates and the desire to remain in elective office. *See, e.g.*, Hallye Jordan, *"Crime of the Month:" Sarcasm Obscures the Debate,* L.A. DAILY J., May 5, 1994, at 7. California's Determinate Sentencing Act has been amended more than 1,000 times since it was passed in 1976. *Id.* Most recently, it was amended with a hastily and sloppily drafted "Three Strikes and You're Out" statute, CAL. PENAL CODE § 667 (West 1994), that may require years of appellate review before its conflicting provisions can be rationalized. *See, e.g.,* CAL. JUD. COUNCIL REP. TO PRESIDING JUDGES AND SOLE JUDGES OF THE TRIAL CTS. (March 18, 1994).

302. JUD. COUNCIL OF CAL., 1983 ANN. REP. 3, 9 ("increased appeals and increased error may coincide with the adoption of a new and complex [sentencing] law") [hereinafter JCC-1983 REPORT]; Freed, *supra* note 285, at 1727 ("[A]bout 5,400 [federal] sentences are being appealed annually. Since sentences were rarely reviewed before the Guidelines, this number represents a significant addition to appellate caseloads.").

303. U.S. SENTENCING COMM'N, *supra* note 181, at 25.

304. CAL. PENAL CODE § 1538.5(m) (Deering 1995); N.Y. CRIM. PROC. LAW § 710.70(2) (McKinney 1994).

305. NCSC, *supra* note 29, at 44 n.8.

tories which defendants are able to obtain involve suppression issues.[306] Thus, it should come as no surprise that waiver of these appellate claims is frequently sought as an element of plea bargaining, and that some of the first cases upholding appeal waivers involved waiver of these claims.[307]

Of course, in most jurisdictions this is never an appeal waiver issue. Search and seizure claims are a classic example of those deprivations of constitutional rights which, because they involve issues that arose prior to the entry of the guilty plea, are deemed forfeited by virtue of the guilty plea.[308] It is only in states such as California[309] and New York[310] which have created statutory exceptions to this rule that appeal rights exist which may, in turn, be subject to bargains for their waiver.

Given that such constitutional claims are viewed as being automatically forfeited by virtue of the plea itself, it is difficult to argue that public policy forbids their waiver when they are resuscitated by state statute—unless, of course, such statutes themselves reflect such a policy against waiver. It might be argued, for instance, that these very statutes represent the considered judgment of the Legislature that search and seizure claims are so integral to the concept of individual liberty that these claims cannot be ignored simply because an individual defendant has chosen to take advantage of a bargained-for sentence or charge reduction. The problem with such an argument is that the legislative history of these statutes suggests a more modest agenda on the part of the legislatures which passed them. Both California Penal Code Section 1538.5(m) and New York Criminal Procedure Law Section 710.70(2) have been found to be premised on the more mundane policy of protecting the public fisc by avoiding the expense of pro forma trials which would otherwise be required in order to preserve search issues for appeal.[311]

Thus, the public policy argument against waiver of such statutory rights is a difficult argument which has been rejected by those courts which have considered it.[312] Nonetheless, there is a serious public policy issue lurking here. Cases upholding appeal waivers in this arena

306. *Id.* at 17.

307. *See, e.g.*, People v. Charles, 217 Cal. Rptr. 402 (Ct. App. 1985); People v. Williams, 331 N.E.2d 684 (N.Y. Ct. App. 1975).

308. *Lefkowitz*, 420 U.S. at 293; *Tollett*, 411 U.S. at 267.

309. CAL. PENAL CODE § 1538.5(m) (Deering 1995).

310. N.Y. CRIM. PROC. LAW § 710.70(2) (McKinney 1994).

311. *Hill*, 117 Cal. Rptr. at 421-22; *Ventura*, 531 N.Y.S.2d at 531-32.

312. *See, e.g., Williams*, 331 N.E.2d at 684; *Charles*, 217 Cal. Rptr. at 402.

are part of a larger trend over the last twenty or so years of removing search and seizure claims from virtually all higher court review. For example, as previously mentioned, a guilty plea automatically forfeits appellate review of search and seizure claims in the almost 90% of the criminal caseload which is resolved by pleas of guilty.[313] In addition, search and seizure claims are removed entirely from federal habeas corpus review if there has been a full and fair opportunity to litigate them in the state system.[314] Lastly, in cases involving warrants, the magistrate's decision to issue the warrant can not even be reviewed in the trial court, let alone a court of appeal so long as the police officer executing the warrant had an objective, good faith belief in its validity.[315]

This general trend toward the removal of search issues from most forms of review is not inadvertent. It is a deliberate choice on the part of the Court reflecting a judgment that "application of [the exclusionary rule should be] restricted to those areas where its remedial objectives are thought most efficaciously served."[316] Thus, besides the previously mentioned limits on appellate review, the Court has also limited application of the exclusionary rule in the areas of standing,[317] impeachment,[318] grand jury testimony,[319] civil proceedings,[320] and the fruit of the poisonous tree doctrine,[321] to name a few.

Without revisiting the entire question of the proper scope of the exclusionary rule, it does appear that there are particular problems with removing its operation from most forms of appellate review. At the very least, the complexity of these constitutional issues raises the very real question of whether a single authority can generate dependably accurate results over time.[322] Application of constitutional doctrine is, in general, a very difficult judicial task that is made all the more difficult by constantly shifting trends and countertrends that characterize Supreme Court guidance in this area. In this sense, it is

313. *See supra* note 3.

314. Stone v. Powell, 428 U.S. 465, 481-82 (1976).

315. United States v. Leon, 468 U.S. 897, 913 (1984).

316. United States v. Calandra, 414 U.S. 338, 348 (1974).

317. Rakas v. Illinois, 439 U.S. 128, 148 (1978); Alderman v. United States, 394 U.S. 165, 174 (1969).

318. United States v. Havens, 446 U.S. 620 (1980); Walden v. United States, 347 U.S. 62 (1954).

319. *Calandra*, 414 U.S. at 354.

320. United States v. Janis, 428 U.S. 433, 459-60 (1976).

321. United States v. Ceccolini, 435 U.S. 268, 273 (1978); Wong Sun v. United States, 371 U.S. 471 (1963).

322. Arkin, *supra* note 47, at 574.

quite different from such relatively more straightforward tasks as statutory interpretation or such discretion-based tasks as evidentiary rulings. The chance for error is greater and, given that these issues cut to the core of individual liberty, we must view with some concern the fact that such decision-making has been largely removed from appellate review. On a more pragmatic level, the political pressures upon local trial courts when called upon to enforce the constitutional rights of accused criminals during periods of public outrage over crime raise nagging questions about the ability of first tier courts to fulfill the mandate of the Constitution. As one commentator has noted:

> In the field of criminal procedure a strong local interest competes only against an ideal. Local interest is concerned with the particular case and with the guilt or innocence of the particular individual. . . . While it is hard indeed for any judge to set apart the question of the guilt or innocence of a particular defendant and focus solely upon the procedural aspects of the case, it becomes easier in a reviewing court, where the impact of the evidence is diluted. The more remote the court, the easier it is to consider the case in terms of a hypothetical defendant accused of crime, instead of a particular man whose guilt has been established.[323]

While the current application of cost benefit analysis by the Supreme Court concludes that there is only marginal deterrent value in permitting review of suppression issues in the areas discussed, there is another way to view this matter. It seems quite plausible that permitting waiver of appeal rights in these cases undercuts deterrence by diluting the effect of the exclusionary rule in the nearly 90% of the caseload which is disposed of by pleas.[324]

Thus, it would seem that the purposes of appeals are particularly compromised when appeal waivers of suppression claims are permitted. Of course, this conclusion takes one far beyond appeal waivers. If there is merit to this viewpoint, then it would require not merely rethinking the appeal waiver cases, but also *Tollett v. Henderson* and the entire line of forfeiture cases as they apply to suppression issues.[325] This is not likely to be on the current court's agenda.

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323. Walter V. Schaefer, *Federalism and State Criminal Procedure,* 70 HARV. L. REV. 1, 5 (1956).

324. For a similar argument with respect to Brady v. United States, 397 U.S. 742 (1970), and the entire line of forfeiture cases, see Tigar, *supra* note 18, at 21.

325. An appellate court in New York has adopted a very unique approach to the public policy issues presented by appeal waivers of suppression issues. *Ventura* holds simply that there is no legitimate state interest in upholding appeal waivers in cases where the search issue is dispositive. *Id.* at 531-32. The court reasoned that the major prejudice to the state in overturning appeal waivers is the predicament of having to try a state case on stale

4. Legitimation of the Criminal Justice System

A final institutional purpose of appeals is their legitimation function, that is, they serve "to legitimate decisions of the state, to dignify the participants, and to make meaningful the interaction between individuals and the state."[326] In other words, appeals are an essential part of the overall procedural structure which operates to assure us that the system is a fair one. It is essential that the system not only be fair but that it be perceived as fair. The continued willingness of the public to support the coercive imposition of the criminal sanction—even in these times of increased demand for tough law enforcement—is based ultimately on the perception that the system operates in an even-handed and just manner.[327]

The right to appeal plays an important role in this legitimating process. It assures the public, rightly or wrongly, that trial court decisions will be reviewed for accuracy and fairness and adds an aura of probity to the criminal justice process. Indeed, it can be argued that the current public insistence upon more and more punitive application of the criminal law is embraced by such a wide spectrum of the populace precisely because it is taken on faith that these laws will be subject to a review procedure that checks for aberrational applications. One writer has gone so far as to describe this aspect of the appellate function as providing a "fig leaf"[328] for the criminal justice system, reasoning that "[r]egardless of whether appeal of right improves upon the efforts of trial court judges, it arguably serves to make them more acceptable."[329]

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evidence after having relied upon the plea bargain to resolve the case. *Id.* at 531-32. Since there will be no such trial where the search issue is dispositive, the court concludes that the only other possible prejudice to the state is the loss of the conviction itself. *Id.* at 532. Since there is no legitimate state interest in preserving an unjust conviction for the sake of the conviction alone, the court reasons that there is no sound reason for upholding such waivers. *Id.* Although the reasoning of the *Ventura* opinion has not been adopted by other courts, it finds support in an earlier article written by Professor Westen. Westen, *supra* note 26. There, Professor Westen isolates a similar theory of prejudice as rationalizing such divergent Supreme Court forfeiture opinions as *Tollett* and *Blackledge,* and argues that such a showing of prejudice should be required before the state is ever permitted to rely upon a defendant's waiver of the right to appeal. Westen, *supra* note 26, at 1258.

326. Resnik, *supra* note 47, at 619. *Cf.* CARRINGTON, *supra* note 243, at 8-9; ROBERT M. COVER & OWEN M. FISS, THE STRUCTURE OF PROCEDURE (1979) (arguing that procedure is an important component of fairness).

327. WAYNE R. LA FAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 42 (2d ed. 1992).

328. Dalton, *supra* note 47, at 98.

329. *Id.* at 98.

The right to appeal may play a further legitimating role beyond that of reassuring the general public. The availability of a corrective process is instrumental in assuring defendants that their treatment at the hands of the state is guided by principles of fairness rather than the individual caprice of a given trial judge.[330] When pleas must be made without access to appeal protections—particularly when defendants must surrender such protections as the price of plea bargaining—it is less likely that the defendant will accept his treatment as fair. This, in turn, makes the processes of rehabilitation and assimilation back into society more problematic.[331]

The right to appeal thus serves a multitude of important goals, some specific to the individual appellant but most serving the larger institutional purposes of the criminal justice system itself. Widespread reliance upon waivers of the right to appeal undermines each of these purposes in a definable and substantial way. This is particularly so when one considers that nearly 90% of the criminal caseload is disposed of by plea and the unmistakable trend is to condition increasingly greater numbers of these guilty pleas with a waiver of the right to appeal. Thus, such waivers seriously imperil the public policy that underlies the right to appeal in criminal cases and should, accordingly, be disapproved.

However, with rare exception, appeal waivers have not been found to violate public policy. Quite the contrary, they have been found to *further* public policy. How can this result be justified? It is time to turn to the public policy arguments traditionally made in support of appeal waivers to inquire whether they are sufficiently compelling to overcome the objections to the practice and justify the prevailing approach courts have taken toward them.

E. The Public Policy Arguments in Favor of Appeal Waivers Do Not Withstand Close Scrutiny

As noted previously, most courts which have considered the public policy questions raised by waivers of appeal rights have concluded

330. Research in the social science field indicates that if a litigant receives a negative outcome but perceives that the process used to reach that decision was fair, the aggrieved party is more likely to accept the negative outcome. *See, e.g.*, Scott Barclay & Jerry Goldman, Does Procedural Justice Plus Appellate Process Equal Appellate Justice?, Paper delivered to Annual Meeting of the Law and Society Association and the Research Committee on the Sociology of Law of the International Sociological Association, University of Amsterdam, The Netherlands, June 1991, at 20. (on file with author).

331. Arkin, *supra* note 47, at 577-78 n.300.

that public policy favors such waivers.[332] The rationales developed by these courts can be organized loosely into four categories: (1) the need to protect the system from being overwhelmed by what is seen as an enormous number of frivolous appeals,[333] (2) the need for finality in the process,[334] (3) the belief that the practice furthers the defendant's interests because such waivers operate as an important bargaining chip in the plea negotiation process,[335] and (4) the view that appeals are less necessary as a corrective process in this arena because the defendant's interests are sufficiently protected by close judicial supervision of plea bargaining practice at the trial level.[336]

The cases tend to invoke these arguments with little in the way of supporting data other than citation to previous cases which have articulated a similar view. Examination of each of these rationales in some detail shows that each fails to find significant support when measured against the realities of modern criminal caseloads and practice.

1. Are the Courts Really Being Overwhelmed by Frivolous Appeals?

The conventional wisdom is that, since there is a constitutional guarantee to a free appeal,[337] there is little incentive not to appeal and, as a result, the system is awash in enormous numbers of criminal appeals, most of which are without merit.[338] Former Chief Justice Warren Burger espoused such a view when he complained that the typical criminal appeal is "an endless quest for technical errors unrelated to guilt or innocence" that makes a "mockery of justice" and undercuts the deterrent effect of criminal sanctions.[339] A number of courts have complained about the proliferation of criminal appeals[340] and some have translated this into an issue of wasted taxpayer dollars. For example, a recent California Court of Appeal opinion deplored what it viewed as "the unnecessary burden placed on California taxpayers and on an already overburdened Attorney General's office and

332. *See supra* text accompanying notes 209-240.

333. *Olson*, 264 Cal. Rptr. at 818-19; *Gibson*, 348 A.2d at 775.

334. *Rutan*, 956 F.2d at 829; *Navarro-Botello*, 912 F.2d at 322.

335. *Gonzalez*, 981 F.2d at 1043 (Kozinski, J., dissenting); *Charles*, 217 Cal. Rptr. at 405-06; *Gibson*, 348 A.2d at 774.

336. *Rumery*, 480 U.S. at 401 (O'Connor, J., concurring).

337. Douglas v. California, 372 U.S. 353 (1963).

338. NCSC, *supra* note 29, at 5.

339. Warren E. Burger, *Annual Report to the American Bar Association by the Chief Justice of the United States*, 67 A.B.A. J. 290, 292 (1981). *Cf.* MACKLIN FLEMING, THE PRICE OF PERFECT JUSTICE (1974).

340. *Gibson*, 348 A.2d at 775.

Court of Appeal by meritless and even frivolous criminal appeals,"[341] while a federal appeals court judge has complained of "squandering public funds for pointless briefs in hopeless appeals."[342]

There are really two separate components to this critique: first, the claim that the criminal appellate docket is expanding at an alarming rate and, second, the assertion that most criminal appeals—particularly those arising from guilty pleas—are frivolous. Each of these will be explored in turn.

a. What Has Happened to the Criminal Appellate Docket in the Wake of *Douglas v. California?*

In the period immediately following *Douglas v. California*'s 1963 guarantee of appointed counsel to indigent appellants for a first appeal of right, the criminal appellate caseload rose dramatically.[343] This should hardly come as a surprise. Most criminal defendants who appeal are indigent. It has been estimated that the figure is as high as 90%,[344] although in many jurisdictions the figure is, in fact, much higher.[345] Those defendants who may have had the resources to retain counsel have often expended those funds on trial counsel. More importantly, most defendants who appeal are felons who have been sentenced to prison[346]—a circumstance which virtually assures that they will not have the ability to pay for counsel.

Prior to *Douglas v. California*, such an indigent defendant who wished to appeal had virtually no alternative other than to pursue his remedies *in propria persona*. As daunting as this prospect might be to a defendant at the trial stage,[347] the appellate phase with its total emphasis on written, legal argumentation, is even less accessible to most *pro per* litigants. Thus, it is not surprising that prior to *Douglas* very few defendants appealed; nor is it surprising that once this opinion

341. *Olson*, 264 Cal. Rptr. at 818.

342. *Gonzalez*, 981 F.2d at 1044 (Kozinsky, J., dissenting).

343. In the period between 1963 and 1983 appellate caseloads increased at a faster pace than trial court filings, doubling every 8 to 10 years. NCSC, *supra* note 29, at 43 n.1.

344. CARRINGTON, *supra* note 243, at 59.

345. *See, e.g.*, Letter from Ron Barrow, Clerk of Court, California First District Court of Appeal (on file with author), indicates that in Fiscal Year 1992-1993 of 1,195 criminal appeals, only 59, or 5%, had retained counsel.

346. Thomas Y. Davies, *Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal*, 1982 AM. B. FOUND. RES. J. 543, 559 (1982).

347. Faretta v. California, 422 U.S. 806 (1975), guarantees this right. Even at the trial level it is exercised relatively infrequently, perhaps in observance of the old adage that "He who represents himself has a fool for a client."

made counsel available to defendants, criminal appellate filings skyrocketed.

It is contended, however, that the rate of increase in criminal appeals continued to rise for a period extending well beyond what we might reasonably attribute to the impact of *Douglas* and that caseloads continue to rise even today.[348] It is certainly true that criminal appellate caseloads continued to grow at a rate greater than trial court filings for the two decades following *Douglas.*[349] This Article will explore the possible explanations for this below. However, since the early 1980's, despite perceptions to the contrary,[350] there seems to have been a leveling off in the growth of criminal appeals.[351] In the federal courts of appeal from 1977 to 1987 the number of criminal appeals rose from 4,738 to 5,260, or a relatively unspectacular 11% increase over a period of 11 years.[352] In some jurisdictions, there has been an actual decrease in the ratio of appellate filings to trial court filings. For example, in California between 1982-83 and 1991-92, criminal appeals increased 38% from 5,137 to 7,114.[353] But this must be contrasted with a 127% increase in trial court filings from 72,390 to 164,583 over the same period.[354] When measured by what was happening in the trial courts, this represents a substantial decrease in the rate of growth of appeals. The fact that there are, nonetheless, more criminal cases on the appellate docket is not the result of choices made by convicted defendants. It is the result of choices made by public officials to respond more aggressively to crime and thus funnel more cases into the criminal justice pipeline in the first place.[355]

However, even though the rate of growth has leveled off, the absolute numbers remain high. What besides *Douglas v. California* might explain this?

348. Joy A. Chapper & Roger A. Hanson, *Taking the Delay Out of Criminal Appeals*, 27 JUDGE'S J. 7 (Winter 1988).

349. NCSC, *supra* note 29, 43 n.1.

350. *Olson*, 264 Cal. Rptr. at 818.

351. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1991 557 (1992), [hereinafter DOJ STATISTICS]. These numbers jumped dramatically with the passage of the federal sentencing guidelines, growing by 57.9% from 1988 to 1990. Dunworth & Weisselberg, *supra* note 297, at 99. The impact of the federal guidelines upon the appellate caseload is discussed in the next section.

352. *Id.*

353. JUD. COUNCIL OF CAL. 1993 ANN. REP., Vol. II, at 25 and 59 [hereinafter JCC-93 REPORT].

354. *Id.*

355. *Id.*

b. The Impact of the New Sentencing Statutes

Probably the single most important factor in the growth of caseload, other than *Douglas* itself, has been the passage of determinate sentencing statutes in the federal system and in a large number of the states. Prior to the arrival of these statutes there were virtually no appeals of sentencing issues. A sentence within statutory limits was viewed as generally not reviewable.[356] The advent of modern sentencing statutes changed all this. In place of a system grounded almost entirely in discretionary decision-making, these new sentencing statutes provided detailed sentencing schemes with rules that regulated the sentencing decision and a complexity that provided ample room for judicial error. In addition, these sentencing acts for the first time provided for appellate review of sentencing decisions as a matter of right.[357] By permitting litigants to appeal when previously they were denied the right, and by simultaneously creating a system so complicated it virtually invites error, it is no surprise that the number of appeals has increased.

The numbers have, in fact, gone up. In many jurisdictions, it is possible to look at a graph of appellate filings and identify exactly when a new sentencing act went into effect. For example, while appeals held steady for more than a decade in the federal courts,[358] a dramatic spike appears on the graph after November 1, 1987 when the federal guidelines went into effect.[359] From June 30, 1988 to June 30, 1990, federal criminal appeals grew by 57.9%.[360] Moreover, just over half of that two year increase involved appeals of sentences alone.[361] In California, where the state's Judicial Council concluded that the new Determinate Sentencing Act was responsible not only for more appeals, but also more error,[362] guilty plea appeals constituted only 13.8% of all appeals before the Act went into effect.[363] Currently in California, guilty plea appeals average approximately one-third of criminal appeals.[364]

356. Dorszynski v. United States, 418 U.S. 424, 443 (1974); United States v. Tucker, 404 U.S. 443, 446-47 (1972).

357. *See supra* note 273.

358. *See supra* note 351.

359. 18 U.S.C. § 3551 (1988). Pub. L. No. 98-473, § 235, 98 Stat. 1988 (1984).

360. Dunworth & Weisselberg, *supra* note 297, at 104 n.13.

361. *Id.*

362. JCC-1983 REPORT, *supra* note 302, pt. 1, at 9.

363. Davies, *supra* note 346, at 558.

364. Letter from Mark Cutler, Exec. Dir., Cent. Cal. App. Proj. to the author (Feb. 13, 1994) (on file with author) [hereinafter CCAP letter].

This data illustrates that the new sentencing statutes have had a major impact on appellate caseloads. The growth of criminal appeals is not the result of bored defendants with nothing better to do than create mischief in the criminal courts. It derives in large measure from these sentencing schemes which rely on appeals as a vehicle for achieving the larger goal of uniformity in sentencing and which are often so bewilderingly complex as to virtually guarantee appellate issues in a high percentage of sentencing decisions.

c. The Impact of Rapid Changes in Sentencing Law and Criminal Law in General

A secondary impact of the new determinate sentencing statutes derives from the ease with which they may be amended. Fixed sentences can easily be adjusted upward with the stroke of a legislative pen. Although indeterminate schemes may also be amended, the fact that the ultimate sentence is determined sometime down the road by an administrative agency, such as a parole board, lessens the immediacy of the impact of such amendments.

This ability to make certain and immediate changes in the amount of time served by convicted criminals holds a certain allure for legislators as a sure-fire method for earning their tough-on-crime stripes during an election year. In fact, it is interesting to chart changes in sentencing law in comparison to election year cycles. Professor Lowenthal has done such a comparison with regard to how and when Congress chose to enact and then change the penalty scheme for drug trafficking and the use of firearms.[365] The enactment and changes in these penalty schemes corresponded directly to election year cycles.[366] For example, one month before the 1984 elections, Congress enacted the Controlled Substances Penalties Amendment Act,[367] providing mandatory minimum sentences for several drug offenses. Two years later, in the next election year, Congress enacted the Anti-Drug Abuse Act of 1986[368] which set mandatory minimum sentences according to the weight of the controlled substances possessed.[369] In 1988, another election year, Congress passed the Anti-Drug Abuse Act of 1988, toughening the mandatory minimum

365. Lowenthal, *supra* note 272, at 64 n.9.

366. *Id.*

367. Enacted as a chapter of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 501, 98 Stat. 1837, 2068 (1984).

368. Pub. L. No. 99-570, 100 Stat. 3207 (1986).

369. 21 U.S.C. § 841(b)(1) (1991).

sentences once again.[370] Finally, in 1990, when the Judicial Council recommended the repeal of existing mandatory minimum sentences, Congress responded instead to the pressure of election year politics and provided for additional mandatory minimums.[371]

Election motivated ratcheting-up of penalty provisions is not limited to the federal branch. In California, it has been estimated that lawmakers (and voters through the initiative process) have amended the Penal Code more than 1,000 times since 1977 when the state's Uniform Determinate Sentencing Act went into effect.[372]

If the consequence of all this was merely annual changes in the number of years assigned as penalty to each individual crime then the resulting confusion might be relatively manageable. However, the tinkering is not limited to numbers—it goes to the very structure of the sentencing schemes themselves. For example, in California, the Uniform Determinate Sentencing Act began with four different triads from which the sentencing judge was to pick a specific sentence depending upon the severity of the crime and the individual characteristics of the defendant. These have now grown to more than twenty.[373] The Act originally provided for eight enhancements which added one, two, or three years to the sentence, depending upon factors relating to the defendant or the manner in which the crime was committed. These have grown to approximately 110.[374] To this one must add other basic changes in the structure of the sentencing process such as mandatory consecutive sentences,[375] probation ineligibility,[376] and, of course, the new "Three Strikes You're Out" law,[377] all of which further complicate matters. Many of these were passed in the heat of election year politics and are characterized by confusing or inherently conflicting provisions.[378]

370. Pub. L. No. 100-690, § 6371, 102 Stat. 4181, 4370 (1988) (codified at 21 U.S.C. § 844(a) (1991)).

371. *Lowenthal, supra* note 272, at 64 n.9.

372. Jordan, *supra* note 301, at 7.

373. *Id.*

374. *Id.*

375. *See, e.g.*, CAL. PENAL CODE §§ 4500, 4501 (West 1986).

376. *See, e.g.*, CAL. PENAL CODE § 1203.06(a) (West 1994). *Cf.* CAL. PENAL CODE § 1203(e)(1) (West 1994) (stating a defendant armed with a weapon is presumptively ineligible for probation unless, in the interests of justice, the court makes certain findings on the record).

377. CAL. PENAL CODE § 667 (West 1994).

378. Charles Finnie, *In the Courts, Mixed Results for (3 Strikes)*, L.A. DAILY J., Mar. 14, 1994, at 1.

The temptation to tinker is not limited to legislative bodies alone. Between 1988 and 1991 the United States Sentencing Commission promulgated 434 amendments to the federal sentencing guidelines.[379] In 1992, the commission proposed 38 additional amendments.[380]

Adding this element of constant revision to statutory sentencing schemes that were complex to begin with has resulted in a system that one commentator delicately described as "ridiculously complicated."[381] The consequence is that error is common among judges, prosecutors, and defense counsel. It comes as no surprise, therefore, that we have seen a sizeable increase in the number of sentencing appeals in the wake of these statutory changes. What should surprise and concern us is the response in many jurisdictions—which is to a movement to curtail such appeals through increased reliance upon appeal waivers.[382] Restricting defendants' appellate rights as a means of containing caseload pressure can only result in insulating erroneous trial court sentencing decisions from review. Further, it has the appearance of being unfair, if not cynical.

d. Other Factors Affecting Appellate Caseloads

There are a variety of other factors that have contributed to the rise in the criminal appellate caseload, most of which are also beyond the control of individual criminal defendants.

Chief among these has been the recent rise in trial court filings. The nation's response to crime over the past decade has been to bring the full force of the criminal justice system to bear, particularly in the so-called "war against drugs." As a result, the number of criminal filings has risen at an exponential rate. In the federal system, there was a 40% increase in felony criminal filings between 1985 and 1992.[383] In California, between 1982-83 and 1991-92 superior court filings in criminal cases rose 127% from 72,390 to 164,583.[384] Nationwide, drug arrests during that period more than doubled from 471,200 to 980,700.[385] At the same time, those people who were being charged were going to

379. Dunworth & Weisselberg, *supra* note 297, at 107 n.27.

380. *Id.*

381. *Conference on the Federal Sentencing Guidelines: Summary of Proceedings*, 101 YALE L.J. 2053, 2060 (1992).

382. *See, e.g., Olsen*, 264 Cal. Rptr. 817. *See also* Haines, *supra* note 13, at 227; Tsimbinos, *supra* note 11, at 4.

383. Richard C. Reuben, *Keeping Pace with Judicial Vacancies*, A.B.A. J., Jul. 1994, at 34.

384. JCC-1993 REPORT, *supra* note 353, Vol. II, at 59.

385. U.S. BUREAU OF JUST., PRISONERS IN 1993, June 1994, at 8.

prison at a much higher rate,[386] a very significant factor for appellate dockets because defendants sentenced to prison are much more likely to appeal than those who are not.[387] From 1980 to 1993, the number of state and federal prison inmates almost tripled.[388]

Although the public and its elected representatives have shown single-minded purpose in toughening crime provisions, they have been less vigilant in providing the funding necessary to accomplish those retributive goals. With the exception of correctional budgets (which nearly doubled nationwide between 1986 and 1991),[389] funding of the total criminal justice system has seen a proportional decrease during that same time period.[390] This is particularly true with regard to the single most important resource with regard to caseload: the size of the judiciary. In California, for example, despite the huge rise in caseload, not one additional judgeship at the trial or appellate level has been created since 1987.[391] As California's Chief Justice Lucas has noted, "One of the fundamental principles upheld by a responsive justice system is that the public court system must have adequate resources to perform its constitutional role."[392] It is against this backdrop that public policy arguments in support of reducing dockets by waiving appellate rights have a particularly hollow ring.

One last factor in the growth of appellate dockets should be mentioned, although its precise impact is difficult to measure. This is the establishment of intermediate appellate courts in the various state systems. Although conceived as a means of relieving pressure on state supreme courts,[393] the establishment of such courts has often been accompanied by an overall increase in appellate court filings.[394] In 1957, such courts existed in only thirteen states, a number which had remained unchanged since 1911.[395] By the end of 1987, they existed in thirty-eight states.[396]

Although the growth period seems largely to be behind us, appellate caseloads have certainly expanded significantly in the last thirty years. This growth has not been the haphazard and aimless phenome-

386. *Id.* at 2.
387. Davies, *supra* note 346, at 559.
388. U.S. BUREAU OF JUST., *supra* note 385, at 1.
389. A.B.A., THE STATE OF CRIMINAL JUSTICE: AN ANNUAL REPORT, at ii (1993).
390. *Id.*
391. JCC-1993 REPORT, *supra* note 353, Vol. I, at 17.
392. *Id.*
393. U.S. BUREAU OF JUST., THE GROWTH OF APPEALS 6 (Feb. 1985).
394. *Id.*
395. NCSC, *supra* note 29, at 28.
396. *Id.*

non described by some critics.[397] Rather, it has been a rational response to a series of dramatic changes in the judicial landscape. Chief among these has been the Supreme Court's recognition of a right to counsel on appeal; the emergence of new sentencing laws which both complicate sentencing and create an appellate right where none existed; and the growing volatility and severity of criminal law provisions in general. It is not surprising that these factors have led to caseload growth. However, it is unfortunate that the public response has been the development of a movement to curtail procedural rights and insulate error from review rather than support for an increase in resources to accommodate these changes.

e. Are Most Criminal Appeals Frivolous?

The public policy arguments in support of appeal waivers go beyond caseload numbers to broad assertions that most criminal appeals are frivolous.[398] We are told that the system is not only awash in criminal appeals but that most are so totally without merit that they amount to nothing more than "squandering public funds for pointless briefs in hopeless appeals."[399] Again, the empirical data tells a different tale.

Before addressing the data, however, some preliminary observations are in order. The first is that the normative underpinnings of the criminal appellate process are such that one should not expect large numbers of reversals of criminal convictions even where arguably meritorious legal issues are present. As Thomas Davies has noted, the norms of criminal appellate decision-making are heavily weighted in favor of affirmance and this is true despite indicators that there are legal errors in many affirmed cases.[400] The appellate norms to which Davies principally refers are the substantial evidence rule[401] and the

397. *See* Burger, *supra* note 339.

398. CARRINGTON, *supra* note 243, at 91-96. It should be noted in passing that Rule 3.1 of the Model Rules of Professional Conduct as well as Rule 11 of the Federal Rules of Civil Procedure prohibit counsel from asserting a claim that is frivolous. The quoted assertions about the nature of the criminal appellate caseload seem to presume a level of professional misconduct on the part of the practicing bar that would be shocking, if true.

399. *Gonzalez*, 981 F.2d at 1044 (Kozinsky, J., dissenting).

400. Davies, *supra* note 346, at 551.

401. The substantial evidence rule maintains that appellate courts should not disturb lower court factual rulings as long as there is any evidentiary support for those rulings. As formulated by the California Supreme Court in People v. Newland, 104 P.2d 778 (Cal. 1940), before an appellate court will overturn a trial court factual determination, "it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below." *Id.* at 780. As applied by

harmless error rule,[402] each of which is predicated upon broad precepts of deference to lower court decision-making and each of which strongly predisposes appellate courts to affirm criminal cases whether or not there has been factual or legal error below. As a result, appellate courts approach criminal appeals in an "affirmance mode," which creates a form of self-fulfilling prophecy—a tautological concept of frivolous appeals under which appeals are viewed as hopeless because they are certain to be affirmed and affirmed because they are viewed as hopeless.[403]

A second preliminary observation is that the manner in which one defines success is critical in assessing the merit of criminal appeals. If one limits the definition to a complete reversal of the trial court judgment then criminal appellate success rates are quite low. For example, in California in 1991-92, only 5% of all criminal appeals resulted in a reversal.[404] However, this is a far too narrow definition of merit. The relief most criminal defendants are seeking on appeal is something far short of a complete reversal. A very significant percentage are seeking some form of what is loosely classified as a "modification" of the judgment and can include such diverse forms of relief

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most reviewing courts, the rule is seen as requiring acceptance of trial court's factual findings unless they are virtually devoid of any support. Davies, *supra* note 346, at 598.

402. Although the harmless error doctrine is formulated differently depending upon the nature of the underlying error, in general it stands for the principle that "on appeal from a judgment it is a cardinal rule that the duty devolves upon the appellant not only to specify the error of which he complains, but also to establish to a reasonable certainty that without such error having been committed, the result of the trial of the action would have been substantially different from that which was actually reached by the trial court." People v. Britton, 6 Cal. 2d 10, 13 (1936). Like the substantial evidence rule, this is a formidable norm of affirmance, but one which encourages affirmance in the face of legal as opposed to factual error. Reliance upon the harmless error doctrine by appellate courts to affirm convictions has increased substantially in recent years. *See, e.g.,* United States v. Innamorati, 996 F.2d 456, 475 n.5 (1st Cir. 1993) ("Errors that the Supreme Court deems to warrant automatic reversal are rare."); Stephen H. Goldberg, *Harmless Error: Constitutional Sneak Thief*, 71 J. CRIM. L. & CRIMINOLOGY 421 (1980); C. Elliot Kessler, *Death and Harmlessness: Application of the Harmless Error Rule by the Bird and Lucas Courts in Death Penalty Cases—A Comparison & Critique*, 26 U.S.F. L. REV. 41 (1991); Gregory Mitchell, *Against "Overwhelming" Appellate Activism: Constraining Harmless Error Review*, 82 CAL. L. REV. 1335 (1994); Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79 (1988); Donald A. Winslow, Note, *Harmful Use of Harmless Error in Criminal Cases*, 64 CORNELL L. REV. 538 (1979). The increased reliance on this doctrine led Justice Marshall to condemn what he viewed to be "a disturbing and increasingly widespread trend among some courts to sanction egregious violations of the constitutional rights of criminal defendants by blandly reciting the formula 'harmless error' whenever it appears that the accused was factually guilty." Briggs v. Connecticut, 447 U.S. 912, 915 (1980) (Marshall, J., dissenting from denial of certiorari).

403. Davies, *supra* note 346, at 582.

404. JCC-REPORT 1993, *supra* note 353, Vol. II, at 28.

as correction of sentencing error, vacating a conviction on a lesser included offense or overturning one of several convictions.[405] This is particularly true of guilty plea appeals in which correction of sentencing error is usually the most significant, if not the only, relief sought by the appellant.[406]

While the statistics vary to some degree from jurisdiction to jurisdiction, the overwhelming message they provide is that when one factors in the full measure of what criminal defendants are actually seeking on appeal, their success rate compares surprisingly well to that of their civil counterparts. A recent study of federal appeals disclosed that in 1991, 13.6% of all criminal defendants in federal appellate courts received some form of relief.[407]

Another study revealed that in 1989, 11.3% of all federal criminal appellants obtained relief.[408] Of particular interest was the finding that of those cases resulting in remand rather than reversal, 51% resulted in a different decision in the second proceeding.[409] Thus, the relief obtained by criminal appellants is real, not merely symbolic—a fact that is significantly at odds with current assumptions about the frivolity of such claims. A study of criminal appeals in the Second Circuit from 1989 to 1991 disclosed a success rate of 19%, while civil appellants obtained relief in 27% of the cases during the same period.[410]

The figures for state courts are comparable. A study of appeals in New York in 1984 demonstrated that 23% of defendants received relief.[411] In California in 1991-92, 23% of criminal defendants obtained relief as compared to 36% of civil appellants.[412]

Moreover, if we break these figures down and look at guilty pleas in particular, we again find the reality of criminal appellate adjudication to be dramatically different from its description. For example, a recent study of guilty plea appeals in the third and fifth appellate districts in California showed that in fiscal year 1992-93, of a total of 714

405. NCSC, *supra* note 29, at 34.

406. *Id.* at 18-19.

407. Jon O. Newman, *A Study of Appellate Reversals*, 58 BROOK. L. REV. 629, 630 n.2 (1992). It is interesting to note that Mr. Newman felt compelled to defend those numbers from criticism of the reverse sort from what we have been examining—that is, criticism suggesting that the reversal rate in criminal cases might be too high. *Id.* at 630.

408. Arkin, *supra* note 47, at 515.

409. *Id.* at 515 n.54.

410. Newman, *supra* note 407, at 632.

411. Arkin, *supra* note 47, at 516.

412. JCC-1993 REPORT, *supra* note 353, Vol. II, at 28.

guilty plea appeals, 168 (or 24%) obtained some form of relief.[413] More specifically, of those 168 successful appeals, 38 resulted in a complete reversal, 89 were modified, 36 were remanded, 4 were affirmed with a remand on a particular issue, and one was a hybrid affirmance/reversal.[414] This high rate of success on guilty plea appeals—although contrary to conventional wisdom—should not be surprising. Appeals from pleas of guilty are traditionally characterized by a high percentage of sentencing issues and other studies have shown that criminal defendants enjoy the highest rate of success with determinate sentencing appeals.[415]

Finally, as at least one federal judge has observed, the drain which guilty plea appeals place upon scarce judicial resources is vastly overstated because the results of such appeals are rarely, if ever, new trials.[416] The vast majority of successful guilty plea appeals merely require new sentencing which involves substantially less temporal and financial resources than do new trials.[417] Moreover, sentence appeals themselves consume far fewer resources in that they generally have far shorter records and require significantly less briefing and much shorter judicial opinions.[418] Lastly, as the California sentence appeal study shows, those appeals which are, in fact, without merit tend to be shunted out of the system at an early state of the proceedings with a minimal expenditure of judicial resources. In the two judicial districts studied, fully one-third of the sentence appeals were disposed of either by voluntary abandonment by the defendant or no-merit briefs[419] by the attorney. This brings the success rate of those guilty plea appeals which were fully pursued on the merits closer to 35%.[420]

413. CCAP Letter, *supra* note 364.

414. *Id.*

415. NCSC, *supra* note 29, at 5.

416. United States v. Bolinger, 940 F.2d 478, 483 (9th Cir. 1991) (Nelson, J., dissenting).

417. *Id.*

418. Johnson, *supra* note 115, at 711.

419. CCAP Letter, *supra* note 364. Pursuant to Anders v. California, 386 U.S. 738 (1967) and, in California, People v. Wende, 25 Cal. 3d 436 (1979), an appointed attorney who determines that a criminal appeal is frivolous may petition the court to withdraw but must file a brief declaring that there are no meritorious issues for appeal. *Anders*, 386 U.S. at 742; *Wende*, 25 Cal. 3d at 441. This, in turn, places an obligation upon the court to review the record independently to determine whether the appeal is, in fact, without merit. Although some have complained that this process is cumbersome, *see, e.g.,* Philip Hager, *An Appeal Losing Appeal*, May 1994 CAL. LAW. 43, in reality such *Anders* appeals are usually handled by court staff and involve very minimal briefing and opinion writing—usually a statement of facts plus a declaration of no issues.

420. These percentages are derived by subtracting the 236 cases resolved by abandonment or no-merit briefs from the total of 714 guilty plea cases. The remainder of 478 active cases was then used to factor the 168 cases which resulted in some relief for the accused.

Thus, close scrutiny raises significant doubts about traditional public policy claims that the active encouragement of appeal waivers is a justifiable response to an appellate process that is being overwhelmed by a glut of frivolous appeals. Criminal appellate caseloads have increased in recent years but for very good reasons. Criminal appeals, when measured by the success rate of relief sought, are no more likely to be without merit than are civil appeals. The reversal rate for criminal appeals is certainly high enough to justify Justice Brennan's observation that "depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction."[421] Thus, there is no good reason to single out guilty plea appeals for elimination. Moreover, even if caseload concerns were sufficient to justify efforts to reduce the numbers of these appeals, the mechanism chosen—promotion of the waiver of appeal rights—is arguably the least equitable screening device because it eliminates cases without regard to merit. In fact, as argued earlier, appeal waivers may bear an inverse relationship to the merit of the underlying claims.[422] If appeal waivers eliminated only frivolous appeals then few would disagree that they furthered public policy. But appeal waivers eliminate review of meritorious claims with equal effect and it is difficult to see how public policy is advanced by the removal of such claims from the system. Thus, the "judicial resources" component of the public policy argument supporting appeal waivers is overstated and fails to provide a convincing rationale for the surrender of the fundamental right to appeal.

2. Would Defendants be Deprived of an Important Bargaining Chip?

The appeal waiver cases assume that the availability of appeal waivers provides an important benefit to criminal defendants because the ability to waive the right to appeal increases the defendant's leverage at the plea bargaining table. To quote one federal judge, "Criminal defendants usually have few enough bargaining chips; sparing the government the time and expense of a trial and appeal is the primary currency in which they must deal."[423] The Supreme Court has concluded that it would "hesitate to elevate more diffused public interests above [the defendant's] considered decision that he would benefit personally from the agreement."[424] As a corollary to this line of reason-

421. Jones v. Barnes, 463 U.S. 745, 757 n.1 (1983) (Brennan, J., dissenting).

422. *See supra* text accompanying notes 126-127.

423. *Gonzalez*, 981 F.2d at 1043 (Kozinski, J., dissenting).

424. *Rumery*, 480 U.S. at 395. The most extreme articulation of this viewpoint is provided by Frank Easterbrook, who would define the value of all things (including personal

ing, it is argued that prosecutors might become wary of entering into plea agreements if they are consistently repudiated by means of appeal.[425] Therefore, it is argued that any decision to prohibit, or even limit, appeal waivers would do a terrible disservice to the accused. However, this is difficult to imagine.

Preliminarily, it is not at all clear that the ability to waive appeal rights does, in fact, operate as a bargaining chip. In more and more jurisdictions, waiver of appeal rights is a precondition to plea bargaining.[426] Thus, an appeal waiver is rarely a discrete item of trade to be bartered for specified concessions; rather, it is the price of admission to plea bargaining.[427] If this is true, then the danger defendants face from the possible abolition of appeal waivers is the inability to engage in plea bargaining. This is difficult to credit. In fact, it is difficult to believe abolition of appeal waivers would have any impact whatsoever because the criminal justice system is simply too dependent upon plea bargaining to take seriously the notion that prosecutors would cause plea bargaining to come to a halt simply because courts found appeal waivers to violate public policy.

However, assuming that the traditional viewpoint is partially correct and that some defendants do succeed in "purchasing" specific concessions by proffering waivers of their appeal rights, there are still problems with advancing this as a policy argument in favor of appeal waivers.

First of all, it is reasonable to assume that the parties would simply bargain over something else if this "chip" were no longer available. Even under the most favorable theory, the waiver of appeal rights is not the defendant's most powerful bargaining tool. Defendants bargain with trial level prosecutors. The real benefit that a defendant can offer to such an adversary is the removal of one more case from a crushing caseload. In other words, it is the waiver of trial that

rights) in terms of their ability to be bargained in trade: "In [unconstitutional conditions] cases, people sell their constitutional rights in ways that, they believe, make them better off. They prefer the benefits of the agreement to the exercise of their rights. If people can obtain benefits from selling their rights, why should they be prevented from doing so? One aspect of the value of a right—whether a constitutional right or title to land—is that it can be sold and both parties to the bargain made better off. A right that cannot be sold is worth less than an otherwise-identical right that may be sold." Frank Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges and the Production of Information*, 1981 SUP. CT. REV. 309, 347.

425. *See, e.g.*, *Rodriguez*, 480 N.W.2d at 290.

426. *See supra* text accompanying note 1.

427. *Burk*, 586 N.Y.S.2d at 141 (quoting the trial judge in that case as saying, "I normally insist on that [an appeal waiver] on [sic] the price of my plea agreement").

is likely to be most attractive to the prosecutor who is doing the bargaining; not the waiver of appeal. A different prosecutor will almost certainly have responsibility for any possible appeal and, while the trial prosecutor might have the larger needs of the system in mind, it is the pragmatic demands of his or her own personal situation that are most likely to affect how he or she sees the value of a given bargain.

Finally, even if none of the above were true—even if individual defendants might be disadvantaged by the unavailability of appeal waivers as a bargaining tool—we should still find that public policy cuts against their perpetuation. That is because the long-range interests of criminal defendants in general, and the larger interests of the criminal justice system as a whole, are furthered by the discontinuance of appeal waivers.

As Professor Alschuler observed in commenting upon plea bargaining in general, "the long-range effect of a series of apparently voluntary transactions, each apparently 'value maximizing' when viewed individually, [would] be the creation of a society in which values that most of us hold dear would mean less than they should, a society in which we might not especially want to live."[428] Phrased another way, even if a given defendant might benefit from the ability to bargain away appeal rights, criminal defendants in general will do better in a system where they do not have to forfeit their right to judicial review in order to engage in plea bargaining. Lastly, the criminal justice system as a whole will benefit more from a policy that permits a public airing of what happens in the trial courts than it will from one which closes the doors of the criminal courthouse to judicial review in the name of defendants' rights.

3. *Are the Interests of Defendants Who Plead Guilty Adequately Protected by the Plea Process Itself?*

The cases upholding appeal waivers describe a plea process that is replete with procedural safeguards at the trial level and which provides many of the protections that might otherwise flow from an appeal process.[429] As described by the Supreme Court, "[p]lea bargaining takes place only under judicial supervision, an important check against abuse."[430] As amplified by a Michigan appellate court:

> In such proceedings, the trial judge serves as a neutral and detached party to the plea negotiations and possesses an obligation

428. Alschuler, *supra* note 127, at 699.
429. *See, e.g., Gibson*, 348 A.2d at 772.
430. *Rumery*, 480 U.S. at 401 (O'Connor, J., concurring).

> to ensure that the agreed-upon disposition will serve the interests of justice . . . . Likewise, a prosecutor's duty is not to enter into plea agreements at any expense, but to see that justice is served. For those skeptical enough to suggest the trial court and prosecutor may simultaneously lose sight of their respective obligations, we add the protection afforded defendants by their attorneys . . . . [T]he attorney will protect the defendant's interests, be those interests best served by preserving the right to appeal or waiving the same.[431]

Thus, the cases assure us that, as long as the plea is voluntary, a defendant's decision to waive the right to appellate review should not be viewed as offending public policy. This author began his legal career with several years experience practicing in busy urban criminal trial courts. The hortatory comments quoted above strike him more as aspirational sentiments about how the system should operate than as truly accurate descriptions of how it does, in fact, function. These descriptions neglect to account for the influence upon all the trial participants of the crushing caseload realities of modern criminal practice. A more accurate description of what goes on in these courts is provided by Professor Alschuler's description of trial judges who "look for guilty pleas the way that salesmen look for orders."[432] "They . . . describ[e] prosecutors whose desire to 'move' cases, to maintain high 'batting averages,' to keep desirable job assignments, to please influential defense attorneys, and to avoid the wrath of trial judges sometimes leads to much more generous offers than a rational vectoring of litigation risks could warrant."[433] The articles have also described overburdened public defenders whose all but instinctive response to most cases is the guilty plea as well as private defense attorneys whose equally large caseloads lead them to plead virtually all of their clients guilty, sometimes even deceiving their clients for the sake of turning a fast buck.[434] Even if the truth lies somewhere between these contrasting descriptions, it is difficult to credit policy arguments which maintain that defendants who plead guilty have no need for appellate review because the trial court process will adequately safeguard their interests.

Ironically, this is exemplified by much of the current case law concerning what will constitute a sufficient showing of voluntariness to uphold a waiver of appeal rights. The cases are replete with exhor-

431. *Rodriguez*, 480 N.W.2d at 290-91.

432. Alschuler, *Judge's Role, supra* note 2, at 1114.

433. Alschuler, *supra* note 127, at 690.

434. Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L. J. 1179, 1206-70 (1975).

tations that appeal waivers will only be upheld if the waiver is made "intelligently, voluntarily and with a full understanding of the consequences."[435] Trial courts are entrusted with the obligation of enforcing that requirement by careful inquiry into the defendant's decision to waive his appeal rights and his understanding of the consequences of doing so. Certainly, there are trial courts which do this quite conscientiously. For example, the district court judge in *Navarro-Botello*, "carefully summarized the provisions of the plea agreement" to the defendant and personally determined that the defendant understood its contents and the rights he was waiving.[436] But for many trial courts, the plea process is much more of an empty ritual.

For example, many courts now rely on preprinted waiver forms which defendants must sign and which often constitute the entire advisement process.[437] In federal court, reliance is placed upon elaborate written plea agreements which are signed by counsel for both sides and by the accused but which are almost always drafted by the U.S. Attorney. Although defense counsel may negotiate concerning the terms of the bargain, defense participation in the drafting of these plea agreements is typically only slightly greater than that exercised by the average consumer in the drafting of an installment sales contract.

A controversy exists over whether trial judges must actually explain these forms to defendants to satisfy themselves that defendants fully understand what they mean or whether the judge may simply rely upon the fact that the defendant's signature appears on the dotted line. Rule 11(d) of the Federal Rules of Criminal Procedure requires that "the court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that a plea is voluntary and not the result of force or threats or of promises apart from the plea agreement."[438] Consequently, the Fourth Circuit has held that where the district court judge did not personally question the defendant about the appeal waiver provisions of such an agreement, the waiver cannot be upheld if there

435. *See, e.g.*, State v. Perkins, 737 P.2d 250, 251 (Wash. 1987)

436. 912 F.2d at 321.

437. Typical of these forms is one utilized by the Marin County Superior Court in northern California. This form reduces the entire appeal waiver advisement process to a requirement that the defendant place his initials next to one of 17 different numbered paragraphs, one of which reads "I understand that I have the right to appeal from the judgment of this court. I waive my right of appeal and my right to attack the final judgment by any statutory or non-statutory means." (Form on file with author).

438. FED. R. CRIM. P. 11(d).

is other evidence to suggest it was not knowing and voluntary.[439] The Ninth Circuit, on the other hand, has held that such a Rule 11 colloquy by the judge is not necessary when there is written plea agreement.[440] Many state courts agree with the Ninth Circuit in holding that a waiver form is sufficient evidence of the voluntariness of an appeal waiver without the need for any judicial inquiry.[441]

Of course, even judicial inquiry itself is no panacea. Formal questioning by a judge can be just as ritualistic and litany-driven as any written waiver form. The reality of criminal trial court practice is marked by a preoccupation with moving the caseload and this is particularly true with guilty plea cases. However, no matter how formalistic the voir dire by a trial judge, it is more likely to flush out cases where the defendant does not understand what he or she is doing than are written forms presented for his or her signature. Thus, when much of the current case law fails to require that the trial judge "make the minor investment of time and effort necessary . . . to demonstrate on the record that the defendant understands"[442] precisely what is being waived, it is difficult to share the optimism of those earlier cases which assume that a defendant who pleads guilty has no need for appeal rights because the trial court process will safeguard the defendant's interests.

4. Finality

Many courts which have upheld appeal waivers on public policy grounds have done so by emphasizing the need for finality in the criminal justice process.[443] Reasoning that plea bargains accompanied by waivers of appeal rights enable the parties to "avoid the delay and uncertainties of trial and appeal and permit swift and certain punishment of law violators,"[444] it is argued that "bargains fairly made should signal an end to litigation, not a beginning."[445]

439. United States v. Wessells, 936 F.2d 165 (4th Cir. 1991).

440. United States v. DeSantiago-Martinez, 980 F.2d 582, 582-83 (9th Cir. 1992).

441. *See, e.g.*, People v. Castrillon, 278 Cal. Rptr. 121 (Ct. App. 1991). *Cf. In re* Ibarra, 666 P.2d 980, 984-85 (Cal. 1983). Both cases uphold reliance upon such forms despite the United States Supreme Court mandate that when it comes to these sorts of inquiries, "Matters of reality, and not mere ritual, should be controlling." McCarthy v. United States, 394 U.S. 459, 467 n.20 (1969) (*citing* Kennedy v. United States, 397 F.2d 16, 17 (6th Cir. 1968)).

442. *DeSantiago-Martinez*, 980 F.2d at 584 (Ferguson, J., dissenting) (quoting United States v. Bruce, 976 F.2d 552, 559 (9th Cir. 1992)).

443. *See, e.g.*, *Wiggins*, 905 F.2d at 54; *Navarro-Botello*, 912 F.2d at 322.

444. *Seaberg*, 541 N.E.2d at 1024.

445. *Id.*

Waiver of the right to appeal does, of course, tend to serve the interests of finality. However, it does so at the expense of other important values. These values include accuracy and fairness of adjudication as well as the systematic and uniform development of the law and its legitimation in the eyes of the public—in short, the purposes served by appeals in general. In fact, at some level it could be said that the goal of finality is inevitably in conflict with the very concept of an appellate process. Appeals, by necessity, undermine finality—both by forestalling the conclusive effect of trial court judgments and by sometimes overturning those judgments, which often has the further effect of requiring yet more proceedings. The most efficient way to promote finality would be to abolish the right to appeal altogether.

Despite the rhetoric of most appeal waiver cases, which is decidedly anti-appellate process, none has yet gone so far as to urge such an extreme measure as the abolition of the right to appeal.[446] However, the inevitable consequence of blanket encouragement of appeal waivers for plea concessions can only be a substantial decrease if not the virtual elimination of appeals in those cases arising from guilty pleas.

Although there is substantial judicial opinion extolling this trend, efforts to insulate most—if not all—guilty pleas from appellate review are misguided. Guilty plea appeals raise significant issues. Why else do they enjoy a success rate approaching 25%?[447] Moreover, guilty plea appeals often raise sentencing issues which Congress and a number of state legislatures have declared should be closely regulated by the appellate process and which result in a high rate of appellate relief.[448] Most importantly, even if the case for pruning guilty plea appellate calendars could be made, reliance upon appeal waivers as the screening device is the least equitable way to go about doing it. Appeal waivers eliminate cases on a basis which is not related to the strength of the underlying appellate issues but rather to the attractiveness of the proffered plea concessions—a factor which may often bear an inverse relationship to the merit of the appeal. Thus, although widespread reliance upon appeal waivers may serve the interests of finality by deterring the exercise of the right to appeal by those who have pleaded guilty, it achieves these ends by ignoring, or substan-

446. Chief Justice Rehnquist has urged consideration of such an approach in comments off the bench. These comments are critiqued, *supra,* in the text accompanying notes 253-264.

447. CCAP Letter, *supra* note 364.

448. Even when guilty plea appeals raise nonsentencing issues, appellants achieve a significant measure of success. *See, e.g.,* NCSC, *supra* note 29. This is particularly true in those jurisdictions which permit postplea appeals of suppression issues. *Id.* at 14.

tially undermining, a competing complex of values which provides the very rationale for the appellate process.

Supporters of appellate waivers dispute this reasoning. They contend that "the settlement of litigation ranks high in our public policy,"[449] and that negotiated plea dispositions are a satisfactory—if not preferable—substitute for lengthy and time-consuming appellate resolution of legal disputes. We are told that "where a defendant, with the participation of his attorney and the prosecutor, makes his own terms, understands them, and thereby brings an end to a prosecution or trial,"[450] the final and prompt conclusion of litigation is a public benefit that far surpasses any that might be derived by fostering appeals.[451]

A major problem with this approach is that it presumes that defendants are in a position to make an adequate assessment of the issues on appeal and that any decision they make to forego these issues should satisfy the court's independent interest in fair and accurate adjudication. This assumption may make some sense with regard to the core question of guilt or innocence where the defendant may be the best person to make a factual judgment on that issue. That is why the Supreme Court has held that a guilty plea constitutes "an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case."[452] However, the same cannot be said for the legal issues which form the basis of most appeals. To this question, the defendant brings no particular insight and, as one commentator has argued, "[n]othing the defendant could say or do . . . could serve to certify the 'correctness' of the trial court's sentencing decision,"[453] or any other legal decision that provides the basis for an appeal.

The argument that the defendant's negotiated waiver of appeal can provide a satisfactory substitute for judicial resolution of the issues raised on appeal is particularly unconvincing in any case that involves waiver of future, unknown sentencing error. Many jurisdictions uphold such waivers, rejecting objections that it is impossible to make a knowing and intelligent waiver of unknown error.[454] When the accused is negotiating blindly in this manner, not only is it difficult to accommodate the plea to traditional definitions of knowing

449. *Gibson*, 348 A.2d at 775 (quoting Jannarone v. W.T. Co., 168 A.2d 72, 74 (N.J. 1961), *cert. denied*, 171 A.2d 147 (N.J. 1961)).

450. *Rodriguez*, 480 N.W.2d at 291.

451. *Id.*

452. *Menna*, 423 U.S. at 62 n.2.

453. Johnson, *supra* note 115, at 710.

454. *See, e.g., Navarro-Botello*, 912 F.2d 318; *Rutan*, 956 F.2d 827.

waiver,[455] but the disposition provides virtually nothing to answer the concerns of accuracy and fairness of adjudication that provide the basic justification for an appellate process.

Even if negotiated waivers of appeal rights could be viewed as satisfying the error correction purposes served by appeals, they seem necessarily to conflict with the broader institutional purposes of appeals. Finality is gained but only at the expense of uniformity, systematic articulation of the law, and legitimization of the criminal justice system. Individualized deal-making may sometimes serve the interests of the litigants, but it is the antithesis of uniform decision-making. Cases may be resolved more quickly and with greater finality through such a system, but brushing aside the appellate process deprives us of a forum for the articulation and orderly development of legal doctrine. Lastly, backroom trades of appellate claims for charging and sentencing concessions does little to reassure the public about the dignity and fairness of the process.

As the California Supreme Court observed many years ago, "the state has no interest in preserving erroneous judgments."[456] Arguments which place finality and efficiency over concerns for accuracy and fairness raise basic questions about the quality of justice being administered. The current rush to embrace appeal waivers elevates a criminal defendant's desperate search for clemency at sentencing to a substitute for the judicial system's obligation to insure not only that the defendant was treated fairly, but that the system operated equitably as a matter of institutional justice. The discussion of waiver of appeal rights has been dominated by concerns of calendar control. It is time to turn the debate back to issues of rights and accuracy of adjudication.[457]

IV. Waiver of Sentencing Error

A. Introduction

Sections II and III of this article have developed due process and public policy challenges to the use of appeal waivers which, if accepted, would prohibit reliance upon such waivers in all contexts. To date, these arguments have not been eagerly embraced by most courts which have heard them. Thus, this last section pursues the more lim-

455. Whether such a plea can withstand scrutiny under the waiver standard established by Johnson v. Zerbst, 304 U.S. 458 (1938), is analyzed in some detail, *infra*, in the text accompanying notes 462-479.

456. People v. Henderson, 35 Cal. Rptr. 77, 86 (1963).

457. *See* Arkin, *supra* note 47, at 521.

ited question of whether courts which approve of the use of appeal waivers in general should, nonetheless, disapprove of their use when the underlying appellate issues are ones of sentencing error.

B. All Sentencing Error

The first question is whether all sentencing error should be reviewable and, therefore, exempted from waivers. The error correction, uniformity, and law articulation purposes of the appellate process have been repeatedly invoked by the drafters of most modern sentencing schemes.[458] It is for this reason that most of those schemes not only provide for appellate review of sentences but emphasize its importance to the broader goal of avoiding "unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[459] Thus, a mechanism such as appeal waivers which permits the widespread circumvention of appellate review of sentences would seem to conflict directly with those policies and should, accordingly, be disapproved.[460]

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458. *See supra* notes 282-289 and 295-296.

459. 18 U.S.C. § 3553(a)(6) (1994).

460. This argument was developed at length, *supra*, in the text accompanying notes 249-281 and will not be repeated here except to note that Minnesota, the jurisdiction which developed the first sentencing guidelines system and which has been at the forefront of sentence reform, has reached precisely this conclusion and has held that the policies underlying its sentencing system prohibit the waiver of appellate review of any issues of sentencing error. Ballweber v. State, 457 N.W.2d 215 (Minn. Ct. App. 1990).

With regard to waivers of sentence error under the Federal Sentence Reform Act, one commentator has proposed a modification of the *Ballweber* approach—one which would permit limited enforcement of appeal waivers under that act but withhold approval of those which are clearly contrary to the letter and spirit of the Act. *See* Johnson, *supra* note 115. Professor Johnson proposes that an appeal of a sentence waiver should be enforced except where: (1) sentence was imposed in violation of the underlying substantive criminal statute; (2) in imposing sentence, the trial judge considered factors that trial judges are prohibited by law from considering (such as race or religion); and (3) in imposing sentence, the trial judge committed "plain error" in violation of the Sentencing Reform Act. *Id.* at 719-720. This suggested approach could potentially eliminate some of the worst excesses that are possible with unlimited enforcement of appeal waivers. However, there are definite limits to what it offers by way of a check upon improper sentencing choices. The first two factors are arguably nothing new. Even those courts which give uncritical acceptance to the use of appeal waivers assume that "illegal" sentences could always be appealed. *See, e.g., Rutan*, 956 F.2d at 829; *Nguyen*, 16 Cal. Rptr. 2d at 494; *Seaberg*, 541 N.E.2d at 1025. Certainly that is what the first of these proposed exceptions contemplates and it is argued that the second would also come within the definition of "illegal sentences" as well. *See infra* note 476. It is the third of the proposed exceptions which would provide some constraint upon the use of appeal waivers in federal court that arguably does not exist at present. However, the standard of "plain error" is notoriously imprecise, *see, e.g.*, CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 856 (2d ed. 1982), and therefore provides little if any protection against the worst excesses. If we are to adopt an

C. Waiver of Prospective Sentencing Error

Even if one rejects the blanket approach to sentencing error adopted in *Ballweber*, there is a subspecies of sentence error which courts should never allow to be waived—that is, the waiver of prospective error, the contours of which are unknown (and unknowable) at the time of the waiver. As will be developed below, such waivers are impossible to reconcile with traditional concepts of knowing and intelligent waiver or with the basic policies that inform the right to appeal.

1. Isn't all Sentencing Error Prospective?

At one level, virtually all sentencing error is prospective when viewed from the vantage point of the plea bargaining process where appeal waivers are obtained. If the defendant has already pleaded and been sentenced there is nothing to bargain over and thus plea bargaining will inevitably precede the sentence process. The only exception might be the "packaging" of cases where the defendant obtains concessions in a new case in return for the waiver of sentencing error that occurred in a past case. This is a rather infrequent occurrence.

The real distinction that is being drawn here is not the one between future and past sentence error but rather the one between bargains that involve waiver of future, uncharted sentence error and bargains that include a promise of a specific sentence (either in the form of a specified term of years, a predetermined range of years or a maximum term). These latter situations raise different questions and are explored in subsections D & E below. This section is confined to those situations where the defendant pleads "blind" and is asked to waive all possible error that might be committed by the judge after entry of the plea and appeal waiver.[461]

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approach which picks and chooses among which appeal of sentence error waivers will be upheld and which will not, it is submitted that the approach proposed in subsections C, D and E, below, would be fairer to the parties and easier to implement.

461. Courts split quite dramatically on this issue. Some reject all notions that the uncertainty of appellant's situation would render his waiver uninformed and provide blanket approval of such waivers. *Rutan*, 956 F.2d at 830; *Melancon*, 972 F.2d at 569-70; *Navarro-Botello*, 912 F.2d at 320. Jurisdictions such as California, on the other hand, have taken virtually the opposite position, holding that defendants cannot waive unknown, future sentencing error, at least without an explicit statement that it is being waived. *Vargas*, 17 Cal. Rptr. 2d at 451; *Sherrick*, 24 Cal. Rptr. 2d at 26.

2. *The Concept of Knowing and Intelligent Waiver*

The Supreme Court established the standard for knowing waiver of trial rights more than half a century ago in *Johnson v. Zerbst*,[462] where it held that "[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."[463] This has been uniformly understood to mean that valid waiver of a right presupposes an actual and demonstrable knowledge of the contours of the right which is being waived.[464] Most recently this standard has led at least one appellate court to reject an appeal waiver as being unknowing where the trial court did not specifically advise the defendant of either his right to appeal generally or of his specific right to appeal a pretrial motion to suppress evidence.[465]

In recent years, the Court has softened this requirement in contexts outside the formal courtroom process, particularly in the area of search and seizure.[466] However, in those very search cases where the Court has departed from the *Johnson v. Zerbst* standard, it has emphasized the continuing vitality of that test as the one to be applied for the waiver of "rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial."[467]

If there is one class of cases which has come to exemplify the Court's insistence upon the need for strict application of the *Johnson* standard to preserve fair trial rights it would have to be those cases involving the taking of guilty pleas. Indeed, if there is any one theme unifying the Court's guilty plea advisement cases from *Boykin v. Alabama*[468] to *McCarthy v. United States*[469] to *Henderson v. Morgan*,[470] it is that in order to enter a constitutionally valid plea, the defendant must know precisely what is being given up as a consequence of the plea. *Boykin* requires that the defendant be aware of the three essential constitutional rights being waived as part of the plea.[471] *McCarthy* holds that the plea must be based on "an understanding of the law in

462. 304 U.S. 458 (1938).
463. *Id.* at 464.
464. *See, e.g.*, Jones v. Brown, 89 Cal. Rptr. 651 (Ct. App. 1970).
465. People v. Rosso, 36 Cal. Rptr. 2d 218, 221 (Ct. App. 1994).
466. *See, e.g.*, Schneckloth v. Bustamante, 412 U.S. 218 (1973) (holding that prosecution need not show defendant's knowledge of right to refuse consent to demonstrate valid consent to search).
467. *Id.* at 237.
468. 395 U.S. 238 (1969).
469. 394 U.S. 459 (1969).
470. 426 U.S. 637 (1976).
471. These rights are the right to jury trial, the right to confrontation, and the privilege against self-incrimination. *Boykin*, 395 U.S. at 243.

relation to the facts."[472] *Henderson* requires that the defendant receive "real notice of the true nature of the charge against him"[473] including notice of "critical" elements of the offense.[474]

In recent years there has been some disagreement among the lower courts as to what proof is required to demonstrate compliance with these requirements. For example, despite *Boykin's* express statement that a knowing waiver of its three enumerated trial rights "cannot [be] presume[d] . . . from a silent record,"[475] a number of lower courts have held that these rights do not explicitly have to be mentioned on the record to establish the knowing quality of the waiver.[476] However, these same cases emphasize that they are merely rejecting a talismanic requirement that the defendant engage in the ritual of mentioning each of these rights as part of his waiver. In each, the court has emphasized that the record was sufficient to demonstrate that the defendant was "not only aware of the rights discussed in *Boykin*, but was fully aware of the consequences of waiving them."[477] Thus, although these cases may relax the proof requirements for demonstrating that the *Boykin* standard has been met, they do not in any way retreat from the basic message of *Boykin* which is that the *Johnson v. Zerbst* standard of knowing waiver is fully applicable to the plea process.

Similarly, the Supreme Court's recent decision in *Parke v. Raley*[478] did not retreat from the knowing plea standard established in *Boykin*. It merely created a presumption that this standard was complied with in a case presenting a collateral attack upon the plea many years after the plea was entered.[479]

Although this willingness to relax the proof requirements may, as a practical matter, undermine the force of the Court's otherwise firm insistence that *Johnson v. Zerbst* be given effect in the plea-taking

472. 394 U.S. at 466.

473. 426 U.S. at 645 (quoting Smith v. O'Grady, 312 U.S. 329, 334 (1941)).

474. *Henderson*, 426 U.S. at 647 n.18.

475. 395 U.S. at 243.

476. *See, e.g.*, United States v. Pricepaul, 540 F.2d 417, 422 (9th Cir. 1976); Wilkins v. Erickson, 505 F.2d 761, 763 (9th Cir. 1974); People v. Howard, 5 Cal. Rptr. 2d 268 (1992).

477. *Wilkins*, 505 F.2d at 764.

478. 113 S. Ct. 517 (1992) (upholding the validity of a plea despite the absence of any stenographer's notes of the disputed plea colloquies).

479. A similar example of the Court's willingness to erect a presumption of compliance with the *Johnson v. Zerbst* standard is provided by *Henderson*. There, the Court indicated it might be appropriate to presume compliance with its requirement that the defendant be informed of the nature of the offense from its expectation that defense counsel has probably, in most cases, explained "the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit." 426 U.S. at 647.

context, it has no effect in the situation we are examining—i.e. waiver of prospective sentencing error. That is because in such a situation we are not dealing with whether we can presume the sufficiency of defendant's knowledge from a limited record. Instead, we are dealing with a total absence of knowledge on the part of the defendant. There is simply no way the accused can be viewed as knowing what he is giving up as a part of his waiver because it has not been determined at the time the plea is entered. Cases which emphasize reliance upon the total record or the advice of counsel to demonstrate the knowing quality of defendants' pleas are simply inapposite. There is nothing that counsel could tell defendant or that a larger record could disclose that would demonstrate that defendant really understood the nature or the magnitude of the sentencing error he was waiving because it has not yet occurred. Thus, under current law, waivers of this sort simply cannot withstand scrutiny. Unless the Court is prepared to reconsider its firm position that *Johnson v. Zerbst* controls the plea process, waiver of prospective sentencing error cannot be justified under the Constitution.

3. *The Purposes of Appeal*

Even if the *Johnson v. Zerbst* standard for knowing waiver did not present such a significant hurdle to the approval of prospective sentence error waiver, the policy arguments, developed at length in Section III above, provide a particularly compelling impediment to reliance upon such waivers when considered in this very problematic context. It is often argued—or assumed—in many of the cases upholding appeal waivers that despite the important role that we assign to the right to appeal, the defendant is always free to waive that right and that, in the guilty plea context, such a waiver can serve as a sufficient substitute for the purposes otherwise served by the right to appeal.[480]

With regard to the error correction purposes of appeal, one frequently made argument is that the defendant can make a rational assessment of his likely success on appeal and weigh this against the precise nature of what is offered to him by way of plea concessions.[481] If this exchange is satisfactory to the defendant, it is argued that it should equally satisfy the larger concerns of the system that error in

480. *See, e.g., Navarro-Botello*, 912 F.2d at 322. This argument was specifically addressed in the text accompanying notes 243-330, *supra*, but will be revisited here briefly because it is most open to question when it is directed at waiver of future sentencing error.

481. *Id.* at 320.

the trial court not go uncorrected. Whatever attractiveness this argument might present in the abstract, it must fail in this context because the defendant is in no position to engage in the weighing of alternatives that the argument presupposes—precisely because he does not know one of the essential alternatives. To uphold serious legal error in this situation on the ground that the defendant's assessment of the error can satisfy our own demand for accuracy is sheer legal fiction and should not be permitted.

With regard to the broader institutional purposes served by appeal, waivers that permit the court to overlook sentencing error that has not yet been committed at the time of the plea present the greatest possibility for undermining the major purpose of most sentence reform, which is the reduction of sentence disparity and the creation of uniformity of treatment.[482] Moreover, it is these kinds of waivers which would seem least justifiable to the layperson and, therefore, the most likely to undermine public confidence in the criminal justice system. Thus, even if one is inclined to approve of appeal waivers as a general matter of public policy, permitting their use to prevent defendants from appealing prospective sentencing error that could not be anticipated is at odds with our most basic perceptions of why we have an appellate review process. This particular form of appeal waiver should simply never be permitted.

D. Pleas for Specified Sentences

Assuming courts were to accept the previous reasoning and adopted a rule disallowing appeal waivers of prospective sentencing error, a reasonable exception to such a rule might be one which permitted waivers of this sort where the defendant bargained for a specific sentence and received that specified sentence. When the defendant gets precisely what is bargained for it offends our basic notions of fairness to allow that same defendant to try to improve upon the deal by means of appeal.

Of course, if one's position is that all sentence waivers violate public policy then an erroneous sentence violates that policy whether the defendant agreed to it or not. But if we assume a rejection of this broad, per se approach and ask which classes of sentencing appeal waivers are most or least defensible, certainly this latter class seems

482. For judicial articulation of this argument see United States v. Bolinger, 940 F.2d 478, 483 (9th Cir. 1991) (Nelson, J., dissenting).

least troubling in light of the policy considerations we have been exploring.[483]

1. *Is the Issue Moot?*

A preliminary question presented by appeal waivers in cases involving bargains for specified sentences is whether a defendant in such a situation has any appeal rights to bargain away. In many jurisdictions, when a defendant pleads guilty in return for a specified sentence, courts simply will not entertain an appeal[484] either on the theory that the plea agreement constitutes a complete and adequate basis for imposition of the punishment specified[485] or on the theory that the defendant is estopped from challenging its terms.[486] Thus, it may be that such defendants simply have no appeal rights to exercise and courts which have struggled with the validity of appeal waivers in this context have overlooked a much simpler basis for resolution of the issue.

2. *Sentence Appeal Waivers in This Context Are Less Offensive*

The primary factor which distinguishes appeal waivers for a specified sentence from the "blind" pleas discussed previously is that they fit more comfortably into the *Johnson v. Zerbst* definition of a knowing and intelligent waiver.[487] Here, the defendant knows precisely what the consequences of his plea will be. Even if the manner in

483. Thus, it is not surprising to find precisely such an exception created in jurisdictions which have adopted a general prohibition against waiver of prospective sentencing error. California is a prime example. Although cases such as *Vargas* and *Sherrick* prohibit waiver of future sentencing error in general, cases such as *Nguyen* permit waivers which involve bargains for specific sentences. New York courts have similarly upheld appeal waivers involving specific sentences, People v. Burk, 586 N.Y.S.2d 140 (Ct. App. 1992). However, although New York agrees with California as to the validity of these specific waivers, New York's disapproval of appeal waivers in general is much narrower than California's. New York has limited its general disapproval of sentence appeal waivers to those involving "illegal" sentences. *Seaberg*, 543 N.Y.S.2d at 971. This latter term has been interpreted in its narrow jurisdictional sense and has not been read to require the invalidation of waivers of prospective sentence error. People v. Callahan, 604 N.E.2d 108, 112 (N.Y. 1992).

484. *See, e.g., Nguyen*, 16 Cal. Rptr. 2d at 495.

485. *Olson*, 264 Cal. Rptr. at 818. *Cf.* Cal. Rules of Ct., Rule 440 (repealed 1991) (declaring such a negotiated disposition as constituting "an adequate reason for the imposition of the punishment specified"). *See also* 18 U.S.C. § 3742(c)(1) (1994), which provides that "[i]n the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure . . . a defendant may not file a notice of appeal under [18 U.S.C. § 3742(a)(3) or (4)] unless the sentence imposed is greater than the sentence set forth in such agreement."

486. People v. Jones, 258 Cal. Rptr. 294 (Ct. App. 1989).

487. *See supra* Section IV (c)(2).

which the judge actually arrives at that sentence is open to challenge, the defendant at least had full knowledge of what he was facing at the time of the plea. Therefore, the concerns addressed in the previous section do not apply with the same force.

With regard to the error correction purposes of appeal, there may still, of course, be error. Given the complexity of most modern sentencing schemes, an agreement between counsel which is followed by the court might still be in violation of what the law demands.[488] However, when the defense and the prosecution make sentencing calculations independent of the court and when they and the court arrive at an agreement as to what is required, a system of checks and balances is created which may not provide a perfect substitute for an appeal but does provide many of its safeguards.

It is somewhat more difficult to overlook the larger, systemic purposes of appeal in these situations, however. Erroneous sentences violate the overriding purposes of uniformity and nondisparate treatment that are at the heart of most sentencing reform. The fact that the parties have agreed to the sentence makes no difference. In fact, negotiated dispositions which violate the dictates of the sentencing law present the potential for conscious evasion of these larger goals of uniformity of treatment. Nonetheless, we are presuming at this stage of the analysis that these broad systemic arguments have not carried the day and that courts have chosen not to disallow all appeal waivers of sentencing error. Thus, if some waivers are going to be approved, those involving pleas where the defendant got precisely what he bargained for are the least troubling from a public policy standpoint.

3. Illegal Sentences

Even if we give general approval to most appeal waivers in this context, there are a few constraints which should still apply. For example, sentences which are plainly illegal because they exceed what the statute would permit should not be allowed, even if agreed to. Most jurisdictions follow this principle[489] and this includes states

488. *See, e.g.*, United States v. Kuhl, 816 F. Supp. 623 (S.D. Cal. 1993), where counsel and the court agreed that a sentence of 46 months was appropriate under the federal guidelines. Subsequently, it was discovered that all were erroneously using a guidelines manual which had not yet gone into effect. (This case and its Sixth Amendment implications are discussed *supra* note 78).

489. *See, e.g.*, *Rutan*, 956 F.2d at 829; *Nguyen*, 16 Cal. Rptr. 2d at 494; *Seaberg*, 541 N.E.2d at 1025.

which uphold appeal waivers when the plea is to a specific sentence.[490] In addition to illegal sentences, courts should also disapprove appeal waivers for specific sentences when there is a claim that the judge, in imposing sentence, utilized a factor such as race or religion which may not lawfully be considered.[491] As Judge Marvin Frankel observed in his enormously influential book on judicial sentencing practices, use of such impermissible criteria would "fatally infect the judgment and destroy its allowable character as an exercise of judicial discretion."[492]

E. Pleas for a Sentence Range Within a Guidelines System

In sentencing guidelines schemes, a bargained plea is frequently made to a negotiated sentence range[493] rather than to a specific term of years. This is particularly true in the federal system where the judge is prohibited from engaging in the plea bargaining process[494] and, therefore, from promising a specific sentence as part of the bargain.

In a number of ways such pleas to a specified guidelines range resemble pleas to a specified term of years. Although the judge's range of sentence choice is obviously not as constrained by the terms of the bargain as with a plea to a specified term, such a bargain does place some limits upon the judge's choice and, thus, concerns about the knowing quality of any appeal waivers are not as great as when the defendant pleads completely "blind." However, what really distinguishes these kinds of plea agreements from the totally open pleas that began this discussion is the discretionary nature of the sentencing decision the judge makes as part of the disposition.

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490. *Nguyen*, 16 Cal. Rptr. 2d at 494; *Burk*, 586 N.Y.S.2d at 143.

491. United States v. Garcia, 919 F.2d 1478, 1480 (10th Cir. 1990). *Cf.* Wade v. United States, 504 U.S. 181 (1992) (even a discretionary, nonreviewable decision of the prosecutor not to make a substantial assistance motion under the federal sentencing guidelines may be reviewed upon a showing that such a refusal was based on an unconstitutional motive such as race or religion); Johnson, *supra* note 115, at 720.

492. Frankel, *supra* note 274, at 76.

493. An example is provided by the federal guidelines system. This scheme is structured around a sentencing table which is a grid consisting of two elements: the offense level on the vertical axis and the defendant's criminal history on the horizontal axis. At the intersection between each offense level row and criminal history column is a "cell" containing a presumptive sentencing range expressed in months (i.e., a range of 51 to 63 months for offense level 22 and criminal history category III). This is what is referred to as a guidelines range. The judge is expected to choose a sentence within this range. Phillis Skloot Bamberger and David J. Gottlieb, *Practice Under the Federal Sentencing Guidelines*, 7-1, 7-5 (3d ed. 1994).

494. FED. R. CRIM. P. 11(e)(1).

When a judge is choosing a specific term of years from a predetermined sentencing range, she is no longer expected to apply the immense body of statutory, regulatory and judicially created case law that is represented by the Sentencing Reform Act and its guidelines. Neither must she make explicit legal rulings which may be measured against these strict standards. Instead, the court is called upon to exercise its discretion.[495] In doing so, it may consider "without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law,"[496] including "information that the guidelines do not take into account."[497] This is a grant of discretionary decision-making power that is dramatically different from the complex, legalistic mode of adjudication that is required of the judge in applying the guidelines themselves. It is the kind of judgment that characterized virtually all sentencing determinations prior to the advent of sentence law reform,[498] and it is the kind of judicial determination that was traditionally viewed as being beyond the reach of appellate review.[499]

Thus, so long as the judge, in exercising his discretion, does not apply reasons for the sentence which are facially illegal, or make factual findings that are so clearly erroneous as to implicate due process concerns,[500] the policies underlying the right to appeal have less force in this arena and it may make sense to exempt appeal waivers in this context from a general rule disallowing all waivers of prospective sentencing error.

1. Mootness

Of course, there is another way to view this—and that is to say that a defendant who has made such a bargain simply has no appeal rights to waive. There is dicta in at least one recent Supreme Court opinion to the effect that a federal court's decision to impose a sentence at a particular point within the guidelines is simply not appealable[501] because the Sentencing Reform Act of 1984[502] did not provide

495. Williams v. United States, 503 U.S. 193 (1992). *Cf.* United States v. Colon, 884 F.2d 1550 (2d Cir. 1989); United States v. Reed, 914 F.2d 1288 (9th Cir. 1990).

496. FED. SENTENCING GUIDELINES MAN. § 1B1.4.

497. *Supra* note 496, comment to § 1B1.4.

498. Hon. William W. Wilkins, Jr., Sentencing Reform and Appellate Review, 46 Wash. & Lee L. Rev. 429, 437 (1989). Judge Wilkins, Chairman of the U.S. Sentencing Commission makes precisely this point in arguing for nonreviewability of such decisions.

499. *Id.*

500. *Garcia*, 919 F.2d at 1481.

501. Williams v. United States, 503 U.S. 193, 204-05 (1992).

502. 18 U.S.C. §§ 3551-3581, 28 U.S.C. §§ 991-998.

for appeals from discretionary sentencing determinations. Much of the lower court authority prior to that opinion was in accord.[503]

2. Pleas to a "Cap"

It is the discretionary quality of judicial determinations made within a predetermined guidelines range which also serves to distinguish plea agreements with such a condition from plea agreements which are merely conditioned by a sentencing maximum or "cap." Sentencing decisions made pursuant to the latter kind of bargain are not made within a framework that calls for discretionary judgment; quite the opposite is the case.

Although a "cap" places a limit on the ultimate term of years the judge may choose, it places no limit on the type of judgment she is called upon to make. Such a judge must still engage in the rule-driven model of decision-making dictated generally by the guidelines. Her discretion is accordingly limited and her sentencing determination is subject to the full range of statutory constraints that would be true of any other sentencing decision under the guidelines. This is precisely the kind of sentencing decision to which the right of appeal found in section 1342(a) of the Sentencing Reform Act was directed. Consequently, bargains for appeal waivers which would insulate these types of sentencing decisions from judicial review should not be upheld.[504] Waivers as part of a plea to a "cap" are like waivers made in the context of "blind" pleas. They increase substantially the likelihood of aberrant sentencing determinations and undermine the very purposes of sentence law reform.

V. Conclusion

Appeal waivers are now a dominant feature of the plea bargaining landscape. Once described as uncommon, they are now actively encouraged and solicited as a solution to crowded appellate dockets.

503. United States v. Braslawsky, 913 F.2d 466 (7th Cir. 1990); United States v. Dugan, 912 F.2d 942 (8th Cir. 1990); United States v. Reed, 914 F.2d 1288 (9th Cir. 1990); United States v. Garcia, 919 F.2d 1478 (10th Cir. 1990); United States v. Colon, 884 F.2d 1550 (2nd Cir. 1989). In this light it is interesting to speculate why the Ninth Circuit, in *United States v. Navarro-Botello*, went to such lengths to uphold the appeal waiver in that case. The defendant and the prosecutor agreed to a sentence range of 15 to 21 months and Mr. Navarro-Botello received a sentence of 21 months. Thus, the court might simply have held the sentence to be non-appealable under the statute.

504. In this regard, see United States v. Bolinger, 940 F.2d 478, 481-83 (9th Cir. 1991) (Nelson, J., dissenting), where the judge adopted such reasoning to disapprove of appeal waivers limited by a "cap," while indicating her willingness to approve appeal waivers to an agreed-upon guidelines range.

In many jurisdictions, such waivers are a virtual precondition to engaging in plea bargaining. Judicial approval of such bargains has been widespread. Most courts have rejected the broad due process and public policy objections which have been raised against their enforcement. In fact, most courts have found that public policy affirmatively supports the practice of appeal waiver.

Reliance upon waiver doctrine as a means of calendar control is troubling for many reasons. The solicitation of appeal waivers is inevitably tied to the adversarial goals of the parties in plea bargaining. In such a context, the prosecutor will be most tempted to offer concessions for waiver of the right to appeal when the defendant has meritorious issues to raise on appeal. Consequently, the use of appeal waivers has a tendency to screen out those cases we would most want to see appealed.

To the extent that waivers are not bargained for in this case-specific manner, the alternative is frequently an across–the–board requirement that appeal rights be waived as a precondition to engaging in plea bargaining. Used in this way, the practice has a tendency to screen out both the meritorious and the unmeritorious claim on an equal basis. Thus, viewed as a screening device, appeal waivers are objectionable because they fail in any systematic fashion to eliminate from the appellate docket those cases we would most like to see go away.

However, the issues raised by appeal waivers go beyond practical concerns over the effectiveness of the practice as a mechanism of calendar control. Despite widespread judicial opinion to the contrary, the current use of appeal waivers raises fundamental issues of fairness and public policy. These concerns go to the very heart of why we have an appellate process as well as to the wisdom of our choice of plea bargaining as the principle device for resolving criminal cases.

The due process attack upon appeal waivers is based upon the conclusion that an inevitable result of routine bargaining for such waivers is the placement of a heavy burden upon the free exercise of the right to appeal. Several traditional strains of due process analysis incorporate such a rights-burdening approach.[505] However, none has ever been applied by the court to the process of plea bargaining. That is primarily because the court views plea negotiation as a voluntary process between participants of equal bargaining power wherein the defendant is always free to reject any offer that might "burden" the

505. *See supra* text accompanying notes 123-168, discussing "chill" theory, "vindictiveness" theory, and the doctrine of "unconstitutional conditions."

available choices—whether it be the exercise of the right to trial or the right to appeal.

This view of plea bargaining is open to serious challenge in light of the changes which have occurred in sentencing law over the past two decades. The move to determinate sentencing schemes has strengthened the prosecutor's hand in plea bargaining immeasurably and has rendered characterizations of level playing fields and equally matched adversaries somewhat antiquated.

However, this leads not merely to a challenge of appeal waivers but to a challenge of plea bargaining in general. Such a challenge would require the Court to revisit entirely its approval of the plea bargaining system. The Court has shown no inclination to do this. In fact, it continues to view the practice as "an essential component of the administration of justice."[506] Thus, although it could be argued that appeal waivers provide the perfect vehicle for a wholesale reconsideration of plea bargaining (because they move us toward an administrative system of criminal case adjudication that utilizes neither trials nor appeals), the argument is not likely to succeed in the current climate.

The attack upon appeal waivers which provides a more reasonable possibility of effecting change is that which is grounded in public policy. The public policy argument starts from the basic premise that the right to appeal is "a fundamental element of procedural fairness as generally understood in this country."[507] The availability of appellate review serves to guarantee fairness by advancing several distinct purposes. These include its principle function of error correction—assuring that mistakes in the lower court do not go unremedied. Appeals also serve a variety of broader, "institutional" purposes which include the articulation and systematic development of the law, the assurance that the law will be applied with some degree of uniformity and, finally, the legitimation of the criminal justice system in the eyes of the public.

Each of these purposes is seriously undermined by the approval of a practice whose singular purpose is to entice appellants to give up access to the right in order to obtain some measure of clemency. Certainly our demand for accuracy in the resolution of criminal cases can never be satisfied by the substitution of a system of barter which bears no necessary relationship to the merit of the underlying appellate issues (and which may, in fact, bear an inverse relationship to merit).

506. Santobello v. New York, 404 U.S. 257, 260 (1971).

507. A.B.A. STANDARDS, *supra* note 225, at § 3.10 commentary at 14.

Our requirement that the criminal justice system treat all defendants equally and uniformly is necessarily frustrated by a process that substitutes private deal-making for judicial resolution of questions of law. This is particularly true with the guilty plea appeals which are the focus of this Article. Sentencing issues dominate these appeals and nondisparity of treatment was the major driving force behind virtually all modern sentence law reform—including, in particular, the creation of the right to appeal sentences. Furthermore, the legitimation function of appeals is also undermined by such waivers since there is simply no longer any institutional guarantee that serves to assure the public, the accused or the key players in the criminal justice system that aberrant trial court decisions will not be allowed to go unremedied.

Thus, routine encouragement of waivers of the right to appeal impairs the policies behind the right and should be disapproved. Unfortunately, most courts which have considered the matter have come to the opposite conclusion. They have done so by relying upon a variety of contrary policy arguments, none of which can withstand close scrutiny. For example, those courts which uphold the use of appeal waivers often assume that most criminal appeals are frivolous. The empirical data suggests otherwise. When one factors in sentencing relief, appellants are successful in upwards of 25% of defense appeals.[508] These figures compare favorably to the relief obtained by civil litigants and raise major questions about the wisdom of cutting off avenues of appellate relief.

Although criminal appellate dockets have grown significantly in recent decades, most of this growth can be traced to decisions by criminal justice policy makers either to expand the right to appeal, to complicate criminal process or to increase the number of criminal filings—all of which necessarily leads to increased appellate litigation. However, these same policy makers have failed to provide the increased resources necessary to accommodate the effects of their policy choices. Thus, the system faces a calendar control problem of its own making, but looks elsewhere for the solution by limiting the rights of criminal defendants to seek appellate relief. This is not only fundamentally unfair but unsound as a matter of public policy.

Advocates of increased reliance upon appeal waivers describe them as an important bargaining chip for defendants in plea bargaining. Actual practice suggests, however, that rather than constituting a

508. *See supra* text accompanying notes 383-397.

discrete item of exchange, surrender of appeal rights is often the price of admission to plea bargain. Since few would seriously contend that plea bargaining would cease if defendants were not free to waive their appeals rights, it is difficult to believe that defendants would be deprived of an important benefit if we chose to disapprove of such waivers. However, even if some individual defendants were disadvantaged by such a determination, the long range interests of criminal defendants in general (and the larger interests of the criminal justice system as a whole) are furthered by the discontinuance of appeal waivers.

Waiver of appeal rights is also often justified on the grounds that such waivers serve the important institutional goals of finality and efficiency. They do so, but only at the cost of other important goals – most notably, accuracy and fairness of adjudication. A system of calendar control which relies heavily upon such a practice must ultimately raise fundamental questions about the quality of justice being administered.

Finally, even if one rejects both the due process and public policy critiques of appeal waivers and finds that their use should be approved in general, there is one variant of the practice which should never be approved—that is, prospective waiver of future sentencing error. Such waivers offend both our most basic concept of knowing and intelligent waiver as well as the policy goals behind most modern sentencing reform.

The debate over appeal waivers has been unduly dominated by concerns of calendar control. Appeal waivers are neither a rational nor a just means of limiting access to appellate relief. More significantly, their use illustrates the limits and ultimate weaknesses of a system which places such total reliance upon plea bartering as the basic mechanism of criminal case adjudication. Finally, and most importantly, they undermine the fundamental principles that support the right to appeal in a system devoted to procedural justice.