Michigan Law Review

Volume 76 | Issue 8

1978

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Recommended Citation

Stephen A. Saltzburg, *Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty*, 76 MICH. L. REV. 1265 (1978).

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PLEAS OF GUILTY AND THE LOSS OF CONSTITUTIONAL RIGHTS: THE CURRENT PRICE OF PLEADING GUILTY

Stephen A. Saltzburg*

INTRODUCTION

Few of the Supreme Court's criminal procedure decisions concern court watchers more than those limiting the opportunities of defendants who plead guilty to raise constitutional claims in subsequent attacks upon their convictions.¹ The Court has expressly recognized that federal courts and many state courts want a defendant's guilty plea to be a final, binding adjudication; that, with respect to the opportunity to raise post-conviction claims, federal and state courts may constitutionally favor those defendants who go to trial over those who plead guilty; and, therefore, that a defendant who pleads guilty cannot later raise many of the constitutional claims that he could have had he chosen to fight rather than settle.² In fact,

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1. See, e.g., the three cases often referred to as the "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). Perhaps the most thorough attack on the opinions is Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1 (1975). See also Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975); Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEXAS L. REV. 193 (1977); Tigar, *The Supreme Court, 1969 Term—Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1 (1970); 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). Professor Israel has commented upon the frequency with which these opinions are attacked. See Israel, *Criminal Procedure, The Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1357-58 (1977).

2. For example, in the *Brady* trilogy, see note 1 *supra*, the claims barred by guilty pleas—challenges to death penalties applicable only to defendants standing trial (*Brady v. United States*, 397 U.S. 742 (1970), and *Parker v. North Carolina*, 397 U.S. 790 (1970)), and challenges to the voluntariness of confessions (*McMann v. Richardson*, 397 U.S. 759 (1970), and *Parker*)—all could have been raised and preserved had the defendants gone to trial. All the defendants could have been tried despite their pleas, since not every guilty plea must be accepted. In fact, rules the Supreme Court has approved indicate that the government has an interest in going to trial even when individual citizens have no such interest. See, e.g., FED. R. CRIM. P. 11. Although the Court recognizes plea bargaining as legitimate, see, e.g., *Santobello v. New York*, 404 U.S. 257 (1971), the Federal Rules of Criminal Procedure do not require that a court accept a particular bargained-for plea. See, e.g., *United States v. Stamey*, 569 F.2d 805 (4th Cir. 1978). In fact, the Supreme Court has refused to recognize a constitutional right

unless he pleads in a jurisdiction that explicitly preserves certain constitutional claims after a guilty plea, he presumptively loses his claims once the plea is accepted.³ If finality is the goal, the Court promotes it, but not as well as it did several years ago, for recent Supreme Court opinions provide that in all jurisdictions, even those most desiring finality, some claims survive a guilty plea and are never lost.⁴ The Supreme Court has held, in effect, that defendants may plead guilty under local law and still preserve the right to raise certain constitutional claims after pleading. However, the Court has had difficulty distinguishing between the many constitutional claims that are lost following a guilty plea and the few that are not.

Commentators have not hesitated to point out the inadequacy of the Court's efforts,⁵ yet they have given the Justices little help in locating the elusive line for which they search. This dearth of aid is understandable in view of the discomfort many feel at the notion that constitutional rights may be lost through guilty pleas made without what they regard as a traditional knowing and intelligent waiver⁶ and in view of the general dissatisfaction with bargained-for pleas.⁷ Until recently, then, the literature has offered no rationale for the Court's rulings. Therefore, Professor Westen's attempt in this journal last year to fill that void was most welcome.⁸ He suggested that a defendant who pleads guilty loses all constitutional claims except those that, "if asserted before trial, would forever preclude the state from obtaining a valid conviction against him."⁹ The defendant retains those few claims, Professor Westen explained, because

to plea bargain. *Weatherford v. Bursey*, 429 U.S. 545 (1977). However, this Article suggests that a court may have to accept a plea in some circumstances whether or not bargaining has occurred, although the main focus of the Article is on jurisdictions which encourage pleas and want them to be as final as possible.

3. See *Lefkowitz v. Newsome*, 420 U.S. 283 (1975). Judicial decisions as well as statutes can provide that certain claims survive guilty pleas. See note 142 *infra* and accompanying text.

4. See, e.g., *Menna v. New York*, 423 U.S. 61 (1975) (per curiam); *Blackledge v. Perry*, 417 U.S. 21 (1974). Such claims are never lost, that is, if certain procedural requirements are satisfied. See note 137 *infra*.

5. See, e.g., Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1, 13-21 (1975); Dix, *supra* note 1, at 240-45; Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214, 1219-26 (1977).

6. See, e.g., Alschuler, *supra* note 5, at 2 ("I conclude that the Court has abandoned desirable concepts of waiver in guilty-plea cases"). Professor Westen concludes that Alschuler "assumes that these decisions must be understood in traditional terms of waiver." Westen, *supra* note 5, at 1216 n.2. But Alschuler argues only that they are best understood in those terms, not that other analyses are impossible.

7. See, e.g., Alschuler, *supra* note 5, at 11, 51-70.

8. See Westen, *supra* note 5.

9. *Id.* at 1226.

setting aside the defendant's conviction in light of one of those claims leaves the state "in no worse a position with respect to its ability to obtain a valid conviction against the defendant at trial than it occupied before entry of the plea."¹⁰

This Article proposes the same basic rule as Westen's to explain the Supreme Court's decisions, but for very different reasons which require several modifications of the Westen rule. I argue that all the guilty-plea cases, properly viewed, are consistent with, and therefore can be read as evidence of, a theory more easily applied than articulated by the Court: that some constitutional rights are largely premised on notions of litigation avoidance, that their "avoidance" rationales must be respected, and that these rights therefore prevent governments from establishing procedural rules that force criminal defendants to go to trial—to choose more rather than less expensive means—to claim them.¹¹ The rule of thumb is that defendants may plead guilty and yet preserve constitutional claims which, if sustained, would bar any litigation of the charges against them. Forcing defendants to go to trial to assert such claims negates their value and is intolerable. Hence, defendants wishing to raise double jeopardy and closely related claims, some speedy trial claims, and arguably certain attacks on the constitutionality of substantive criminal statutes that proscribe conduct beyond the power of the state to punish legitimately, cannot be forced to incur the costs of trial to assert that the Constitution bars the state from proceeding at all with its charges. Rather, defendants may plead guilty and then assert these claims. Other claims—those not substantially concerned with avoiding litigation and its attendant costs—may be barred following a guilty plea.

Because this Article asserts that the Court's holdings sometimes deserve more respect than the Court's rationales, we must retread some of the familiar ground that the Westen article covers. Some

10. *Id.* at 1235.

11. There are numerous reasons why trials can be more costly to defendants than guilty pleas. Several examples are offered here. First, various court costs may be imposed on a convicted defendant after trial. Second, some courts will require the defendant to be present during trial, which obviously means that the defendant cannot engage in profit-generating activities. Third, trials may involve delays which might keep a defendant who cannot make bail incarcerated and away from work in a case in which the court ultimately will impose probation after conviction. Also, the defendant who goes to trial might be sentenced more severely than if he pleaded guilty. Thus, the defendant who wishes to urge that he should not be involved in litigation at all risks a more severe sentence (plainly a cost) by going to trial. This is true for all defendants who want to retain constitutional claims and thus do not plead guilty, but there is something special about litigation avoidance rights: if the holders go to trial to preserve the claims, the rights are violated and some of the costs can never be recouped. Other rights can better be vindicated by appellate courts, although no remedy is ever perfect.

reiteration is necessary not only to clarify the Court's unifying theme, but also to explain it. Part I traces the Court's doctrinal developments chronologically. The opinions are examined meticulously and critically, since the defects in the Court's reasoning must be discussed to derive the theory that justifies the distinctions among rights drawn by the cases, whether or not the Court had that theory in mind. Once the problems with the Court's various approaches are identified, the need for additional thought should be plain. Those who need not be persuaded that the guilty plea cases are muddled and who know them all too well can quickly traverse Part I and address the heart of the Article, set forth in Parts II and III, without delay.

Part II examines Westen's thesis and shows that it must be articulated somewhat differently if it is to withstand analysis. Part III propounds modifications of the Westen rule and a very different rationale for it. More importantly, perhaps, it suggests that the theory of the cases more closely comports with traditional waiver doctrine than has previously been recognized, even by the Justices themselves.

The Article concludes in Part IV that in several important cases the Court, because of its erroneous assumptions about various defendants' states of concern, actually misapplied the theory that best distinguishes between claims that survive guilty pleas and those that do not. Finally, the Article makes a point that some may find surprising: once the guilty plea cases are properly understood and once defendants who plea-bargain know what the cases stand for, we may find that the very decisions intended to promote plea bargaining actually undermine public acceptance of bargaining because they lessen the punishment imposed upon serious offenders who plead guilty.

I. THE LOSS OF OPPORTUNITIES TO RAISE CONSTITUTIONAL CLAIMS: DECISIONS IN SEARCH OF A RATIONALE

A. *Closing the Door to Constitutional Claims*

Although commentators disagree about which of the guilty plea decisions is most significant,¹² they generally consider the *Brady* trilogy¹³ central. We may begin this discussion with the case that gave

12. Compare Alschuler, *supra* note 5, at 51, with Israel, *supra* note 1, at 1359.

13. See note 1 *supra*. After this section examines the *Brady* trilogy, further references to the cases will not be accompanied by citations. As the Article progresses, most major cases will be discussed on the assumption that they are sufficiently few that the reader can keep them in mind.

the trilogy its name, *Brady v. United States*.¹⁴ Brady was charged with kidnapping under the Federal Kidnapping Act,¹⁵ which then authorized the death penalty "if the verdict of the jury shall so recommend" or, alternatively, imprisonment for any term up to life. Since the trial judge was apparently unwilling to try the case without a jury,¹⁶ Brady faced an unhappy choice: plead guilty to avoid any possibility of the death sentence or go to trial and risk the jury's determination not only of guilt, but also whether to impose the death sentence. Brady pleaded guilty. Thereafter, the Supreme Court decided in *United States v. Jackson*¹⁷ that the Federal Kidnapping Act's death penalty provision unconstitutionally infringed a defendant's sixth amendment right to a jury trial. Before the Supreme Court's decision in *Jackson*, but after a lower court had dismissed Jackson's indictment, Brady attacked his conviction collaterally,¹⁸ arguing that the unconstitutional death-penalty provision had improperly coerced him to plead guilty. Although the district court found that Brady had not pleaded guilty "by reason of the statute,"¹⁹ and the court of appeals affirmed,²⁰ the Supreme Court was willing to "assume that Brady would not have pleaded guilty except for the death penalty provision."²¹

But the Court held that this assumption did not mean that the conviction was unconstitutionally tainted. Noting the absence of "evidence that Brady was so gripped by fear of the death penalty or hope of leniency that he did not or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty,"²² the Court held that Brady had pleaded voluntarily and *with the help of counsel*. It held also that Brady had pleaded intelligently: he was mentally competent, "[h]e

14. 397 U.S. 742 (1970).

15. Federal Kidnapping Act of June 25, 1948, ch. 645, 62 Stat. 760 (amended in 1972 to remove the death penalty provision; current version at 18 U.S.C. §§ 1201-02 (1976)).

16. 397 U.S. at 743. Although it is reasonable to insist that the prosecutor consent to a waiver of jury trial, especially when the judge has life tenure and is not easily challenged, *see Singer v. United States*, 380 U.S. 24 (1965), it is not necessarily reasonable to permit a judge, as does FED. R. CRIM. P. 23(a), to deny both sides the opportunity to waive a jury. *Cf. United States v. Ammidown*, 497 F.2d 615 (D.C. Cir. 1973) (restricting judicial discretion to reject a guilty plea condoned by the prosecutor).

17. 390 U.S. 570 (1968).

18. Pursuant to 28 U.S.C. § 2255 (1976).

19. 397 U.S. at 749 n.7.

20. 404 F.2d 601 (10th Cir. 1968).

21. 397 U.S. at 750.

22. 397 U.S. at 750.

was advised by competent counsel,"²³ and he was not legally entitled "to withdraw his plea merely because he discovered long after the plea had been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action."²⁴ Thus, the dual requirements of a voluntary and intelligent decision were satisfied.²⁵ Three Justices who concurred in the result²⁶ would have distinguished permissible (*i.e.*, legal) pressure put on a defendant to admit guilt, such as the prosecution's mustering of a strong case, from impermissible (*i.e.*, illegal) pressure, such as that applied by an unconstitutional penalty provision.²⁷ But they would have found this plea valid in light of the district court's findings.

Parker v. North Carolina,²⁸ the second case of the trilogy, involved an issue similar to that in *Brady*. The defendant, charged with the capital offense of first-degree burglary and forced to choose between a trial before a jury that could return the death sentence and a plea to a judge who could not,²⁹ chose to plead.³⁰ A majority of the Supreme Court assumed that *Jackson* invalidated the sentencing scheme³¹ but held that, as in *Brady*, the plea was not invalid simply

23. 397 U.S. at 756. At several points in its opinion the majority emphasized counsel's competence.

24. 397 U.S. at 757. For the majority, *Brady* involved the traditional principles for determining both the general validity of using a defendant's actions against him and the specific validity of guilty pleas. 397 U.S. at 747-48, & nn.4-6, citing *inter alia* *Boykin v. Alabama*, 395 U.S. 238 (1969), and *Brookhart v. Janis*, 384 U.S. 1 (1966) (a "slow plea" case).

25. See note 24 *supra*.

26. Justice Brennan, writing for himself and Justices Douglas and Marshall, concluded that the lower courts were not clearly erroneous in finding that the statute did not induce *Brady's* plea. For an incisive attack on this position, see Alschuler, *supra* note 5, at 57 n.187.

27. Accord *Dix*, *supra* note 1, at 243-46. But see Alschuler, *supra* note 5, at 58-70.

28. 397 U.S. 790 (1970).

29. Apparently North Carolina law required that the case be tried to a jury. 397 U.S. at 792 n.1. Although the federal statute in *Brady* allowed both bench and jury trials, 397 U.S. at 743 n.1, the trial judge refused to hear the case without a jury.

30. Death penalties may have been somewhat more likely following jury trials under North Carolina law than under the federal statute considered in *Brady*, since the latter required that the jury specially recommend death, signifying perhaps that life was the presumptive sentence. The presumptive sentence in North Carolina was death.

31. The Court chose somewhat strange language, saying only, "It may be that under *United States v. Jackson* . . . it was unconstitutional to impose the death penalty under the statutory framework which existed in North Carolina at the time of *Parker's* plea." 397 U.S. at 794-95 (footnote omitted). Nowhere did the Court make clear what difference it saw between *Brady* and *Parker*. Presumably, the difference was that North Carolina threatened all defendants who went to trial with the death penalty, whereas the federal scheme presented a capital threat only to those who elected or were forced to have a jury, as opposed to a judge, trial. Thus, the unconstitutionality of the scheme was, despite Justice Brennan's dissent, not "inescapable." 397 U.S. at 813 (Brennan, J., dissenting). Possibly the Court was not more forthcoming because it wished to avoid another question concerning the voluntariness of *Parker's* plea. Had the Court decided that a death penalty threat to *all* those who stood trial did not

because the penalty scheme was.³²

Parker involved a second issue which was identical to that raised and more carefully considered in the third case of the trilogy, *McMann v. Richardson*.³³ "whether and to what extent an otherwise valid guilty plea may be impeached in collateral proceedings by assertions or proof that the plea was motivated by a prior coerced confession."³⁴ After noting that the case involved neither the claim that counsel had been denied nor that the circumstances coercing the confession had had an "abiding impact"³⁵ that tainted the plea, the Court asked whether a showing that the defendant would not have pleaded had he not been coerced to confess could nullify the plea. The Court answered that a defendant who relinquishes a trial, who abandons the opportunity to challenge his confession at or before trial or on any appeal, and who admits guilt "to take the benefits of a plea, if any,"³⁶ hardly acts involuntarily. "[W]hether his plain bypass of state remedies was an intelligent act depends on whether he was so incompetently advised . . . that the Constitution will afford him another chance to plead."³⁷ As long as counsel provides "reasonably competent advice,"³⁸ a defendant may not attack his plea on the ground that his counsel misjudged the admissibility of the con-

penalize the right to jury trial, the Court would have had to focus on whether this scheme was more coercive of guilty pleas than was the federal statute and, if it was, whether the additional coercion was acceptable. Apparently the Court in *Parker* ignored the fact that it left the possibility open in *Brady* that a death penalty or other punishment scheme could be so coercive as effectively to deny a defendant free choice. Of course, the Court did not find the *Brady* scheme as coercive as that. But by failing to note the features that made the North Carolina scheme arguably harsher than the one in *Brady* (see notes 29 & 30 *supra*) and that thus made it arguably unconstitutional, the Court avoided the question whether the incremental pressure to plead exerted on a North Carolina defendant nudged that penalty system over the fine line separating the permissible (*Brady*) from the impermissible. It still is not clear when a penalty scheme becomes too coercive. See generally *Commonwealth v. Nickol*, 476 Pa. 75, 381 A.2d 873 (1977); *Commonwealth v. Bhillips*, 475 Pa. 427, 380 A.2d 1210 (1977). Also compare *Lockett v. Ohio*, 98 S. Ct. 2954, 2971 (1978) (Blackmun, J., concurring), with 98 S. Ct. at 2976 (Rehnquist, J., dissenting). For the latest word by the Supreme Court, see *Corbitt v. New Jersey*, 99 S. Ct. 492 (1978).

32. In this portion of the *Parker* opinion, the Court noted that the defendant "had the advice of retained counsel . . . for the month before he pleaded." 397 U.S. at 796 (1970). In the second major part of its opinion, concerning the significance of Parker's allegedly coerced confession on his plea, the Court reiterated that "the advice he received was well within the range of competence required of attorneys representing defendants in criminal cases." 397 U.S. at 797-98.

33. 397 U.S. 759 (1970). After the three *McMann* defendants had entered their pleas, New York enacted statutes allowing some constitutional claims to be raised after a guilty plea. See *Lefkowitz v. Newsome*, 420 U.S. 283 (1975).

34. 397 U.S. at 760.

35. 397 U.S. at 767.

36. 397 U.S. at 768.

37. 397 U.S. at 768-69.

38. 397 U.S. at 770.

fession.³⁹ Furthermore, the Court held it irrelevant that the pleas being challenged had been made when it was the practice of state courts to abstain from independently determining the voluntariness of a confession, a practice which was subsequently declared unconstitutional.⁴⁰ The majority said:

It is no denigration of the right to trial to hold that when the defendant waives his state court remedies and admits his guilt, he does so under the law then existing; further, he assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts.⁴¹

Justice Brennan dissented from the majority's almost exclusive emphasis on the adequacy of counsel; he maintained that a guilty plea induced by a coerced confession becomes the tainted fruit of the poisonous tree,⁴² especially in a system which lacks adequate procedures for challenging confessions and which thereby encourages defendants to avoid trials.⁴³ Justice Brennan, as in *Brady* and *Parker*, would have inquired not only into the defendant's knowing decision to plead, but also into the reasons for that decision.⁴⁴ And he would have held that a defendant could not lose a claim like that raised in

39. 397 U.S. at 770.

40. *Jackson v. Denno*, 387 U.S. 368 (1964). As Justice Brennan's *McMann* dissent noted, *Jackson* has been applied retroactively. 397 U.S. at 783. Prior to *Jackson*, the state courts, rather than independently determining voluntariness, had required that the government present a prima facie case of voluntariness and then had submitted the issue to the jury with an instruction to disregard an involuntary confession.

41. 397 U.S. at 774. The majority feared that "[t]he alternative would be a per se constitutional rule invalidating all New York guilty pleas that were motivated by confessions and that were entered prior to *Jackson*." 397 U.S. at 774. But it is more than slightly plausible that only pleas motivated by involuntary confessions would be tainted, since defendants who had confessed voluntarily were correct in believing that trial juries would learn that. Doubtless, numerous hearings might have been needed to decide the voluntariness of pleas, but that concern differs from the one expressed by the majority. That concern might have been assuaged by requiring a defendant who pleaded guilty to allege specific facts supporting a claim of coercion. See, e.g., *Machibroda v. United States*, 368 U.S. 487 (1962). Even the limited opening implicitly recognized by the Court for post-plea challenges—where the coercion inducing the confession has a lingering effect—could require hearings when such allegations are made.

42. Justice Brennan cited *Harrison v. United States*, 392 U.S. 219 (1968), which held that a defendant's testimony at a previous trial made in response to the introduction of three invalid confessions must be deemed a fruit of the poisonous tree. Although Justice White's dissent in *Harrison* offered Justice Brennan's position some support, 392 U.S. at 234, *Harrison* had less precedential value than the dissenters realized. If the defendant's constitutional claim prevails at or before a trial, some remedy presumably must be provided. Suppressing all fruits of the poisonous tree is one of many available remedies. The question of what remedy is most appropriate had to be reached in *Harrison*. But *McMann* raised a threshold question: should a guilty plea be considered an abandonment of the constitutional claim, an abandonment which makes it unnecessary for the court to reach the fruit-of-the-poisonous-tree issue?

43. Justice Brennan argued that the *McMann* majority actually made *Jackson v. Denno*, 387 U.S. 368 (1964), only partially retroactive despite the Court's previous assertions that *Jackson* was to be fully retroactive. See cases cited at 397 U.S. at 783 n.7. But obviously he was begging the real question, which was whether one who pleaded guilty abandoned or lost the *Jackson* claim. Justices Douglas and Marshall joined his opinion.

44. 397 U.S. at 784.

McMann—respecting the New York procedures for evaluating confessions—when the defendant had no way to foresee that he might some day have a valid challenge under a future Supreme Court case.⁴⁵

*Tollett v. Henderson*⁴⁶ followed the *Brady* trilogy. The Supreme Court held there that a defendant who pleaded guilty to first-degree murder could not challenge in subsequent federal habeas corpus proceedings the racial composition of the grand jury that had indicted him.⁴⁷ The state effectively conceded that it had systematically discriminated on the basis of race in its grand jury selection, but, it said, Henderson had not objected within the time prescribed by state law. Although Henderson testified that he had been unaware of the discrimination and of his ability to challenge it, and although his attorney's affidavit supported him, the Supreme Court relied on *Brady* for the following principle:

[A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When 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. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.⁴⁸

Thus, the Court remanded the case for further proceedings, including an inquiry into whether Henderson's attorney had rendered reasonably competent advice.

Justice Marshall, writing for himself and Justices Douglas and Brennan, argued in dissent that the majority was extending the *Brady* rationale by applying it where a defendant had not simply "misjudged the possibility of successfully raising constitutional challenges to the pretrial proceedings,"⁴⁹ but "where counsel did not consider and present to his client the possibility of a challenge to the composition of the grand jury."⁵⁰ According to the dissenters, Henderson's counsel either failed to inquire adequately into the grand jury's composition or he failed to report adequately the results of that inquiry to his client. These facts, said the minority, hardly con-

45. 397 U.S. at 785.

46. 411 U.S. 258 (1973).

47. Henderson did not bring his federal claim until twenty years after his plea. His 99-year sentence resulted from a bargain made to avoid the death penalty.

48. 411 U.S. at 267.

49. 411 U.S. at 270.

50. 411 U.S. at 270.

stituted a waiver or adequate representation by counsel;⁵¹ the defendant had not voluntarily and knowingly foregone a constitutional claim, since he was unaware of it when he pleaded.⁵²

B. *Nudging Open the Door*

In all of these cases, the Supreme Court assumed that the government accepted the guilty pleas to promote finality and judicial and prosecutorial efficiency (as well as to protect defendants from the vagaries of trial). As was suggested in the Introduction, the four decisions served those goals well. Following the *Brady* trilogy and *Tollett*, therefore, one fairly might have assumed that a guilty plea entered with the advice of competent counsel would be unchallengeable⁵³ (except perhaps where special state rules expressly permitted challenges even after the defendant had tendered a plea and the court had accepted it).⁵⁴ Whatever else might be said about that approach to collateral remedies, it provides a clear-cut rule to clarify for federal district judges the proper scope of collateral proceedings and to reduce both the number of state court cases reaching federal courts and the number of collateral attacks by federal prisoners. However, subsequent Supreme Court cases indicate that more must be said: the Constitution requires that some claims be heard despite the offer and acceptance of a guilty plea. In fact, not long after

51. *Tollett* is another of the cases in which a fear of the death penalty partly induced the guilty plea. Although a plurality of the Supreme Court insisted in *Gregg v. Georgia*, 428 U.S. 153, 199 (1976), that using the death penalty as a bargaining chip in plea bargaining does not invite the kind of arbitrariness condemned in *Furman v. Georgia*, 408 U.S. 238 (1972), there is reason to believe that the death penalty is popular among prosecutors because of the hydraulic pressure it exerts upon defendants to plead. See, e.g., *Lockett v. Ohio*, 98 S. Ct. 2954 (1978). One point that has received little attention is the impact of a capital sanction upon the defense attorney's legal advice. Although one might assume that lawyers whose own lives are not at stake would be less averse to risk than their clients, the lawyer's role as fiduciary, the growing number of malpractice suits, and the greater burdens of trying a case with life or death consequences may distort a lawyer's judgment in advising clients. More cynical observers might suggest that busy public defenders or underpaid appointed lawyers are likely to want to avoid the complexities of a capital trial in order to turn to other work.

52. Probably the majority opinion too quickly conceded that the *Brady* trilogy is distinguishable from *Henderson's* case because "the facts giving rise to the constitutional claims [in the trilogy] were generally known to the defendants and their attorneys prior to the entry of the guilty pleas." 411 U.S. at 266. It is not clear that the facts known to the defendants in the *Brady* trilogy included "facts" about the relevant state courts' procedures in ruling on confession claims or about the possible unconstitutionality of the death penalty statutes. Perhaps the last "fact" is more properly characterized as "law," but the point remains that the *Brady* trilogy defendants may not have known all the details about challenges to the death penalty provisions or about the procedure used by some state courts to handle preliminary questions of fact.

53. Plainly the competence of counsel could be challenged under the decisions.

54. See the discussion of *Lefkowitz v. Newsome* in note 137 *infra*. This exception was left open in *McMann v. Richardson*, 397 U.S. 759, 770 n.13 (1970).

Tollett the Court indicated that “no subsequent challenge” was not what it had in mind. In 1974, the Supreme Court’s 7-2 decision in *Blackledge v. Perry*⁵⁵ opened the door to some collateral challenges and created lasting confusion about the distinction between the *Brady* cases and *Tollett* on the one hand and *Blackledge* on the other.

The facts of *Blackledge* hardly presaged its eventual place in the Supreme Court reports. Perry, a North Carolina prison inmate, was convicted in a bench trial of a misdemeanor assault with a deadly weapon. He received a six-month sentence, to be tacked to the term he was then serving. Taking advantage of the state’s trial de novo system, Perry appealed to the trial court of general jurisdiction.⁵⁶ The prosecutor responded by obtaining a felony indictment for the assault. After pleading guilty, Perry received five to seven years, to be served concurrently with the sentence he was already serving. This sentence increased Perry’s potential confinement by seventeen months rather than by the six months the lower court’s consecutive sentence required.⁵⁷ Perry challenged the prosecutor’s tactic of indicting him for a higher offense following his appeal. The court of appeals affirmed the district court’s decision that the state had twice placed Perry in jeopardy and that Perry’s guilty plea did not preclude him from raising his claims. The Supreme Court majority agreed that its decision in *North Carolina v. Pearce*⁵⁸ meant that the prosecutor, in seeking the higher indictment, had an impermissible opportunity for vindictiveness and thus denied Perry due process of law.

The Court previously had dealt with North Carolina’s plea system in *Parker*, one of the *Brady* trilogy. Therefore, it must have assumed in *Blackledge*, as it had in *Parker*, that the state wanted guilty pleas to be conclusive and final. The Court nonetheless agreed with the lower courts that Perry’s guilty plea did not bar his

55. 417 U.S. 21 (1974). Justice Rehnquist dissented on three grounds. Justice Powell joined that portion of the dissent which discussed the impact of the guilty plea.

56. “When an appeal is taken, the statutory scheme provides that the slate is wiped clean; the prior conviction is annulled, and the prosecution and the defense begin anew in the Superior Court,” which is a higher court. 417 U.S. at 22.

57. 417 U.S. at 23 n.2.

58. 395 U.S. 711 (1969). *Pearce* held that due process was violated when, following a criminal defendant’s successful appeal and unsuccessful retrial, the trial judge, without stating specific, justificatory findings in the record, levied a greater penalty than he had at the initial sentencing. The *Blackledge* Court distinguished *Colton v. Kentucky*, 407 U.S. 104 (1972), which upheld a greater sentence imposed after a de novo trial in a higher court, and *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973), which held *Pearce* inapplicable to jury sentencing so long as the jury is uninformed of a defendant’s prior sentence.

due process claim, and it purported to distinguish *Blackledge* from the *Brady* trilogy and *Tollett* as follows:

Although the underlying claims presented in *Tollett* and the *Brady* trilogy were of constitutional dimensions, none went to the very power of the State to bring the defendant into court to answer the charge brought against him. . . . In the case at hand, by contrast, . . . [h]aving chosen originally to proceed on the misdemeanor charge in the District Court, the State of North Carolina was . . . simply precluded by the Due Process Clause from calling upon the respondent to answer to the more serious charge in the Superior Court. . . . [T]he right that [the defendant] asserts and that we today accept is the right not to be haled into court at all upon the felony charge.⁵⁹

The *Blackledge* dissenters had difficulty deciphering the majority opinion. The commentators have found it equally difficult. Both have asked what the Court meant when it said that neither the claims in the *Brady* cases nor in *Tollett* "went to the very power of the State to bring the defendant into court to answer the charge brought against him." Justice Rehnquist properly noted that the state had no power to convict in *Tollett* if the indictment was constitutionally invalid.⁶⁰ Thus, if the majority's point was that a defendant can attack, after his guilty plea, a mistake in the origination of the proceedings, it had decided *Tollett* wrongly.

There is another reading of the *Blackledge* opinion that is not confined to initiating criminal actions. If the opinion is read broadly enough to allow defendants to challenge convictions on any ground that would invalidate them, virtually any constitutional claim would be permissible on collateral review, since all nonharmless constitutional errors bar conviction.⁶¹ Such a reading⁶² would effectively

59. 417 U.S. at 30. Apparently, the Court considered it significant that the prosecutor did not go straight to the grand jury even though he could have. 417 U.S. at 29 n.7. Moreover, that the prosecutor could have bargained with the defendant prior to filing any charges or to seeking grand jury action did not suggest to the Court that it should view the first trial as the prosecutor's "opening bid" in the bargaining. Reading *Blackledge v. Perry* in conjunction with the more recent *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), it seems that prior to commencement of trial or a guilty plea, the Court will not insist that prosecutors and grand juries conform to their publicly announced decisions, although the same sort of "vindictiveness" condemned in *Pearce* and *Blackledge* may constitutionally occur in negotiations that are never formalized in open court. The appearance of vindictiveness is to be avoided, but only sometimes. See generally *United States v. Groves*, 571 F.2d 450 (9th Cir. 1978).

60. 417 U.S. at 35-36.

61. Even some errors that are in fact harmless may compel reversal on appeal if the appellate court presumes there was harm and refuses to engage in ad hoc review of particular cases. See, e.g., *Holloway v. Arkansas*, 435 U.S. 475 (1978).

62. Professor Westen has asserted that the trouble with this broad reading "is that it goes too far, for one can scarcely think of a constitutional claim that precludes the state from obtaining a valid conviction without regard to whether the defendant himself asserts it as a defense." Westen, *supra* note 5, at 1221. This misses the point, however. There are claims which, I believe, probably bar a valid conviction whether or not raised by a defendant and

overrule the *Brady* line of cases, which clearly was not the intent of the *Blackledge* majority.

Still another reading of *Blackledge* emphasizes the Court's statement that "[u]nlike the defendant in *Tollett*, Perry is not complaining of 'antecedent constitutional violations' or of a 'deprivation of constitutional rights that occurred prior to the entry of the guilty plea.'"⁶³ Thus, the reading suggests, only claims stemming from constitutional violations that occur at the time or after the guilty plea is entered may be raised collaterally. But this reading makes little sense, as Professor Alschuler has persuasively argued:

The defendant's attorney, by filing a motion to dismiss the indictment, could have challenged the "contemporaneous" violation of the defendant's rights as easily as he could have challenged any "antecedent" violation, but he did not do so. If the entry of a plea of guilty precludes inquiry into "antecedent" violations, it is difficult to understand why it does not preclude inquiry into "contemporaneous" violations as well.

If the Court's distinction mattered, moreover, there is a clear sense in which the alleged violation of the defendant's rights in *Perry* was antecedent to his plea. The Court emphasized that the defendant could not constitutionally have been haled into court, yet the defendant had obviously been indicted and brought into court prior to the entry of his plea. . . .

Finally, it is not at all apparent that the defendants in the prior cases were complaining of "antecedent" violations of their rights. In *McMann*, each defendant did, of course, allege that an "antecedent"

which a defendant cannot waive—*e.g.*, a federal criminal defendant cannot waive the right to be tried in an article III court with subject matter jurisdiction. It is well established that absence of subject matter jurisdiction must be raised *sua sponte* once noticed by a federal court. *See, e.g.*, *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Louisville & N.R.R. v. Mottley*, 211 U.S. 149 (1908); *Jackson v. Ashton*, 33 U.S. (8 Pet.) 148 (1834). I doubt whether the defendant could waive the right to fundamentally fair procedures in a criminal case, since the very concept of waiver itself assumes a context in which it can fairly be determined that someone is validly giving up something. *See also* *Gilmore v. Utah*, 429 U.S. 1012, 1018 (1976) (order terminating stay of execution) (White, J., dissenting: "I believe . . . that the consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment."); *United States v. Lopez*, 581 F.2d 1338 (9th Cir. 1978), and *United States v. Scalzitti*, 578 F.2d 507 (3d Cir. 1978) (federal defendant cannot waive jury unanimity requirement). The concept of plain error stands in sharp contrast to the Western thesis. *See, e.g.*, *FED. R. EVID.* 103(d).

Professor Westen correctly notes that most protections can be waived. The question in most guilty plea cases is not whether a defendant can waive a particular right; it is whether a guilty plea operates as a waiver even though the defendant did not intend it as one. Thus, a defendant who raises a collateral attack on the ground that his confession was coerced or on any other grounds properly cognizable in habeas corpus proceedings is saying, in effect, "I didn't waive anything," and the question becomes whether a court can respond with the statement: "Whether you specifically intended to or not, you gave up your right by pleading guilty."

What is wrong with a broad reading of the *Blackledge* opinion is that it would provide no way of distinguishing the *Brady* cases and *Tollett* from *Perry's* case, something that the Court clearly wanted to do.

63. 417 U.S. at 30.

constitutional violation had occurred at the time that his confession was obtained. It was, however, a somewhat different constitutional violation—one that would occur at trial when the involuntary confession was received in evidence—that had allegedly motivated his plea. This “contemporaneous” or, perhaps, “threatened subsequent” violation supplied the basic grievance. Moreover, there was even more clearly no “antecedent” violation of the defendant’s constitutional rights in *Brady v. United States*, where the defendant claimed that his guilty plea had been induced by the threat that an unconstitutional death sentence would be imposed following a trial.⁶⁴

The Court’s first attempt to apply the *Blackledge* rule to different facts produced yet one more reading of the *Blackledge* majority’s intent. In a footnote to *Menna v. New York*,⁶⁵ which held that a double jeopardy claim was not lost following a plea of guilty,⁶⁶ the Court attempted to juxtapose that opinion and its precedents. It stated first that the *Brady* trilogy involved antecedent constitutional violations,⁶⁷ second that “waiver was not the basic ingredient of this line of cases,”⁶⁸ and finally that the

point of these cases is that a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it *quite validly* removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the state’s imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent⁶⁹ with the valid establishment of factual guilt. . . . Here, however, the claim is that the state may not convict petitioner no matter how validly his factual guilt is established.⁷⁰

64. Alschuler, *supra* note 5, at 16 n.51.

65. 423 U.S. 61 (1975) (per curiam).

66. Menna was sentenced to 30 days in jail for refusing to testify before a grand jury after a court had granted him immunity. Subsequently he was indicted for his refusal to answer questions before the same grand jury. New York conceded that the 30-day sentence was a criminal conviction and the Supreme Court found support in New York law for the proposition that the second indictment was for the same crime. Although the Supreme Court considered *Blackledge* a due process case because of the way it had earlier decided *North Carolina v. Pearce*, 395 U.S. 711 (1969), its rationale for the due process holding closely resembles that supporting the constitutional protection against double jeopardy. Hence, the holding in *Menna* hardly came as a surprise. In fact, there is every reason to believe that *Pearce* should have been decided on double jeopardy grounds, as Justice Harlan, who wrote separately in *Pearce*, and Justice Douglas, who was joined by Justice Marshall, argued in their opinions.

67. 423 U.S. at 62 n.2.

68. 423 U.S. at 62 n.2.

69. I assume that the Court erred in its choice of words. Obviously, it should have said “consistent,” not “inconsistent.”

70. 423 U.S. at 62 n.2 (emphasis original). Perhaps the Court should have explained what “quite validly” meant. Is factual innocence irrelevant once a defendant pleads? Some courts have suggested that it might be pertinent once a plea is determined to be invalid. *See, e.g., United States v. Roberts*, 570 F.2d 999 (D.C. Cir. 1977); *State v. Eighth Judicial Dist., — Mont. —*, 575 P.2d 65 (1978). It is arguable that courts should pay more attention to constitutional claims that would establish that one who entered a valid plea is, in fact, innocent.

It requires few words to demonstrate that this distinction is unacceptable. The Court's supposed line between "antecedent" and other constitutional violations is no better because raised a second time. The discussion of factual guilt is equally unpersuasive. It cannot be squared with *Tollett*, where the grand jury claim was unrelated to factual guilt, and, arguably, it cannot distinguish *Menna* from *Brady* and *Parker*, since the challenges to the death-penalty schemes concerned not whether Brady and Parker were guilty, but whether the statutes could effectively deny them a trial by severely pricing the choice of a jury trial. Even *McMann* can be viewed as similar to *Menna*, since the defendants in *McMann* raised not only the factual and legal questions of the voluntariness of their confessions, but also the legitimacy of the New York procedures, which encouraged defendants to forego trials whether guilty or innocent. Indeed, an argument can be made that the Court's own language in *Menna*, quoted above,⁷¹ requires that *Menna* be decided differently, since "the defense of double jeopardy is designed in part to protect innocent defendants from being wrongly convicted by means of successive prosecutions for the same offence."⁷² While not entirely persuasive,⁷³ this argument highlights the difficulty of drawing hard and fast lines between issues of factual guilt and other issues.⁷⁴ Moreover, it helps make clear that *Menna* and *Blackledge*, though they may be consistent, scarcely help identify the line that properly separates those constitutional claims that survive a plea of guilty from those that do not.⁷⁵

71. See text accompanying note 70 *supra*.

72. Westen, *supra* note 5, at 1224.

73. Aside from the fact that *Menna*'s second trial followed a conviction, which Professor Westen properly notes, *id.* n.24, this argument is weak indeed, because no need exists to inquire into guilt and innocence if a person twice placed in jeopardy properly complains. See *Robinson v. Neil*, 409 U.S. 505 (1973). Even if the evidence is so overwhelming that no one could reasonably have even the slightest doubt about the defendant's guilt, the fact that it is the prosecution's second try requires that the defendant's claim be sustained. See *Abney v. United States*, 431 U.S. 651 (1977).

74. Thus, there are three problems in using "factual guilt" to demarcate between lost and preserved claims and in saying that only claims which are unrelated to factual guilt survive guilty pleas. First, that analysis does not explain *Tollett*. Second, it raises the difficult problem of determining whether a constitutional claim sufficiently relates to the determination of guilt and innocence. Consider, for example, cases in which the Supreme Court has had to decide whether to make a constitutional decision retroactive; the Court has recognized that some rights affect the determination of guilt or innocence, but not very much. See, e.g., *Adams v. Illinois*, 405 U.S. 278 (1972); *Johnson v. New Jersey*, 384 U.S. 719 (1966). Third, that analysis forgets that some defendants plead guilty while professing their innocence and often admit only that they want whatever benefits a bargain affords. See, e.g., *North Carolina v. Alford*, 400 U.S. 25 (1970).

75. Professor Westen, *supra* note 5, at 1227-31, persuasively rejects two other explanations of the Court's line drawing: (1) that the Court is attempting to identify those cases in which the claimed constitutional violation, which is complained of after the plea, had materially affected

II. A NEW RULE TO EXPLAIN THE CASES

The state of the law respecting the rights foregone after pleading guilty is obviously unsatisfactory. Nothing in the language of any of the Supreme Court's cases articulates a rule that helps even slightly in addressing new cases or evaluating the merits of those already decided.⁷⁶ Some commentators suggest that the Justices should be embarrassed because their language does not square with cases decided before 1970.⁷⁷ Most commentators have been satisfied with attacking the Court's work, but recently Professor Westen boldly proposed a rule that he believes can explain the Court's work, and he suggested how that rule might be applied in cases that have yet to reach the Court.⁷⁸ To distinguish rights that survive guilty pleas and

the decision to plead and to allow challenges only in such cases; and (2) that the Court is attempting to identify those cases in which the state has no interest in preserving a conviction and is attempting to allow post-plea constitutional challenges only in such cases. The first explanation is inadequate in light of the Court's assumption in *Brady* about the importance of the statute's effect on the plea. In addition, one would have to suppose that, irrespective of the nature of the violation, any uncorrected constitutional violation potentially strengthens the prosecution's hand and tends to encourage guilty pleas. The second explanation is unacceptable for obvious reasons:

In *Blackledge* itself, for example, the defendant did not go so far as to contend that the state had no interest in prosecuting him for the felony of assault with intent to kill; instead, he argued that the state should have charged him with the felony initially, and not as a response to his decision to take a de novo appeal from his misdemeanor conviction. Similar reasoning applies with regard to other defenses, such as those of double jeopardy, speedy trial, and presidential pardon. In each case, although the defense would bar the possibility of conviction, it does nothing to abrogate the state's interest in prosecution. Thus, far from being cases in which the state has no interest in prosecution, these are cases in which the state's interest is merely outweighed by interests of the accused.

Id. at 1231 (footnote omitted).

Professor Westen has also argued that *Menna* and *Blackledge* cannot be squared. *Id.* at 1225. It is true that whether the cases are consistent depends on how the cases' confusing language is read. I have suggested in the text some of the problems with the language of both opinions. Apparently, the *Menna* court believed it was applying the *Blackledge* principle and perhaps even that it was more clearly articulating that principle. Clarity, however, is not a virtue of either opinion.

76. Eventually, the Supreme Court might clarify the constitutional strictures relevant to the pleading process by deciding so many cases that no issues remain unresolved. In view of the Court's workload and its pace thus far, the possibility is remote that adjudication will answer in the near future all the questions raised by the cases already decided. Were the possibility more proximate, many lower courts would be much relieved, but the fact would remain that unless we understand why the Court draws the lines that it does, we cannot adequately evaluate the legitimacy of its decisions.

77. Consider, for example, the criticism of the dissenting opinion in *Ellis v. Dyson*, 421 U.S. 426 (1975), voiced by Alschuler, *supra* note 5, at 17-19 (citing earlier Supreme Court decisions in *Ex parte Siebold*, 100 U.S. 371 (1879); *Baender v. Barnett*, 255 U.S. 224 (1921)) and Westen, *supra* note 5, at 1225-26 n.28 (citing *Haynes v. United States*, 390 U.S. 85, 87 n.2 (1968)). The criticisms are mistaken to the extent that they suggest that the dissenting Justices could not possibly square their language with the guilty plea cases. See text at notes 105-21 *infra*.

78. For example, Professor Westen wrote that "the right to a speedy trial, like that based on the prohibition against double jeopardy, is one of those defenses that is deemed to survive a guilty plea." Westen, *supra* note 5, at 1224. But he offered little explanation why, under the Court's rationale, speedy-trial claims must survive a guilty plea. His accompanying footnote

rights that expire, Professor Westen proposes the following rule:

[A] defendant who has been convicted on a plea of guilty may challenge his conviction on any constitutional ground that, if asserted before trial, would forever preclude the state from obtaining a valid conviction against him, regardless of how much the state might endeavor to correct the defect. In other words, a plea of guilty may operate as a forfeiture of all defenses except those that, once raised, cannot be "cured."⁷⁹

I conclude that with two amendments the proposed rule explains the Supreme Court's decisions and defensibly distinguishes rights that are lost and those that are retained following a plea of guilty. But in my view, the correct rationale for the amended rule is far removed from that offered by Professor Westen for his rule. The rationale offered here comports with established waiver doctrine and avoids the need to justify a "forfeiture" doctrine whose dimensions are most troublesome.⁸⁰ Before stating the necessary amendments, however, I shall investigate Professor Westen's explanation for his rule.

Westen asserts that the defendant who pleads guilty leads the state to believe that it need not gather additional evidence or further prepare its case; that if the plea were later overturned, the delay in investigation and preparation would prejudice the state; and that a constitutional claim should be heard despite a knowing and intelligent plea only when the state will be in no worse position if the plea is overturned than it would have been had no plea been entered. This analysis is flawed in principle and inadequate to explain the Court's cases.

Fundamentally wrong is the assumption that "the entry of the plea itself may have impaired the state's ability thereafter to prove the defendant guilty at trial."⁸¹ For several reasons, courts should

cites lower-court cases. I doubt that the Supreme Court itself would consider the answer clear. Compare *Abney v. United States*, 431 U.S. 651 (1977), with *United States v. MacDonald*, 435 U.S. 850 (1978). I do believe that Westen's is the correct answer for some speedy trial claims, however. See note 105 *infra*.

79. Westen, *supra* note 5, at 1226. It is not clear whether the rule is descriptive or prescriptive. The article begins as if the rule were descriptive, but ends with an argument that appears to be more prescriptive.

80. The term "forfeiture" is not new with Westen. Its roots are clear as early as 1963, when Justice Brennan authored the landmark opinion in *Fay v. Noia*, 372 U.S. 391 (1963), which has now been eroded by *Wainwright v. Sykes*, 433 U.S. 72 (1977). Commentators picked up on the term following the *Brady* trilogy. See, e.g., Tigar, *supra* note 1, at 11, 17, 20. Professor Westen echoes the earlier use of the term, although he does so in the context of defending some forfeitures, whereas those who wrote before him used the term pejoratively. I shall argue that the term is unnecessary to an understanding of the Court's decisions and, more importantly, that it has no place in a proper analysis of intelligent guilty pleas.

81. Westen, *supra* note 5, at 1236.

resist that assumption and any rule that depends upon it.

First, it is doubtful that the assumption accurately reflects the real world of plea bargaining, at least in many jurisdictions. By no means is it plain that most plea bargaining occurs before the government completes or almost completes its investigation. If the government has exhausted all reasonable leads before bargaining,⁸² how has it lost any valuable opportunities to gather evidence? Even if data conclusively showed that prosecutors and police gather less evidence for cases in which bargains are consummated, the Supreme Court should not promote such bargaining, but should establish rules that encourage complete investigations and knowledgeable bargaining in the light of available evidence.

Second, even if the Court is disinclined to promote fact-gathering generally, in many cases a successful attack on a plea, though made several days or weeks after the plea, will not disadvantage the government. If a grand jury has investigated a big case, or if a crime is already stale when charges are first brought, modest delays between a plea's entry and a subsequent challenge probably will not irretrievably damage the government's interests. Although in some cases memories fade and witnesses die and move, often no such problems arise. The Supreme Court has established that the government need not indict a criminal defendant at the earliest possible time even though delay may reduce the defendant's chances of prevailing.⁸³ Why, then, should the government be absolutely protected against the vicissitudes of delay?⁸⁴ Indeed, the suggestion that it should be presumes that a guilty plea cannot be attacked if the government's case at trial would be only one percent (or perhaps one tenth of one percent) weaker because of the plea. Why this balance in the government's favor should prevail is nowhere made clear. The absolute rule seems odd when the government, without necessarily violating a defendant's rights,⁸⁵ can delay a trial and prejudice his defense to induce him to plead guilty. Rules that require reversal when a party in a criminal case suffers any harm whatsoever are disfavored to-

82. Professor Alschuler found that prosecutors have a good sense of their cases' strengths and weaknesses before bargaining. See Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 56-61 (1968). Moreover, the American Bar Association has concluded that criminal defendants "should not be hurried through the plea of guilty process." ABA Project on Minimum Standards for Crim. Just., Standards Relating to Pleas of Guilty, Commentary to § 1.3(b) (App. Draft, 1968).

83. See *United States v. Lovasco*, 431 U.S. 783 (1977).

84. Apparently, any disadvantage to the state outweighs a defendant's constitutional claim. See Westen, *supra* note 5, at 1237 n.48, 1249 n.69.

85. See the four-pronged test for speedy-trial claims in *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

day.⁸⁶ Before adopting such rules to bar the litigation of constitutional claims, one should examine their costs and benefits with more sophistication.

Third, and most importantly, the assumption must fall before a more powerful argument: If the Supreme Court held that a host of constitutional challenges could follow a guilty plea, and that a state that failed to investigate and prepare adequately, even after accepting the plea, would not be heard to complain, a state could hardly claim that it had relied to its detriment if a plea were subsequently attacked and overturned. If one has to choose between imposing burdens on criminal defendants or on the government, one might accept the argument that the government must bear the burden because it must shoulder the load in criminal prosecutions. But, whether or not this argument is accepted, the indisputable point is that an overturned guilty plea disadvantages the state in the manner Westen describes only if the Supreme Court creates a system that leads the state to think that it need not prove cases once pleas are accepted. If the Court announced a "no reliance" approach to some or all pleas, the government would be on notice that pleas do not necessarily remove all incentives to gather evidence. Because *Blackledge* and *Menna* hold that some pleas will be overturned after they are accepted, the reliance interest of the state already is weakened.

Even if all guilty pleas so horribly disadvantage the government that one is willing to assume that the only constitutional claims that justify attacking guilty pleas are those claims that absolutely preclude conviction because of defects the state cannot correct, the practical problem of identifying those exceptional cases remains. Because none of the claims raised in the *Brady* cases survived, the assumption of the preceding sentence requires one to accept Westen's argument that "none of the defects in the *Brady* trilogy necessarily precluded the prosecution from ever obtaining a valid conviction at trial."⁸⁷ Although this argument might itself be ques-

86. A rare exception is *Holloway v. Arkansas*, 435 U.S. 475, 487 (1978). The trend is to weigh the costs unfairly imposed by one party on another against the costs of further litigation. See generally Saltzburg, *The Harm of Harmless Error*, 59 VA. L. REV. 988, 998-1018 (1973).

87. Westen, *supra* note 5, at 1226 n.29, where he explains, The defect in *Brady* could have been cured by redrafting the statute to permit both the judge and the jury to impose the death penalty, or by construing the statute to prohibit both the judge and the jury from imposing the death penalty. The defect in *McMann* could have been cured by requiring the trial judge to review the validity of the confession before allowing it to be considered by the trial jury. The first defect in *Parker* was identical to the defect in *Brady*; the second defect, relating to the admissibility of the defendant's confession, could have been cured by excluding the confession from trial.

tioned,⁸⁸ it can be accepted *arguendo* for the sole purpose of showing that it fails to distinguish the *Brady* cases from those allowing constitutional challenges following a plea of guilty.

Consider, for example, *Blackledge*. Westen argues that no remedy existed for the prosecutorial error in that case. But surely this is incorrect. Under North Carolina law, the prosecutor could have brought several different charges against Perry.⁸⁹ Had the prosecutor known that one of these charges would invite a due process challenge, he could have brought others.⁹⁰ Thus, his mistake could have been cured. In *Menna* also the mistake could have been cured by the same sort of change which, Westen suggests, could have alleviated the constitutional problem with the statute under which Brady was convicted. That is, the New York courts could have emphasized that the government wanted the contempt citation Menna received purged and that his thirty-day sentence, properly construed, was not a criminal, but a civil, contempt sentence with a maximum term.⁹¹ It

88. It is not clear that the kidnapping statute could be redrafted after Brady's crime to apply to him. *But see* *Dobbert v. Florida*, 432 U.S. 282 (1977). Moreover, it is doubtful that a court could remove through statutory construction a penalty expressly included. The procedural problems in *McMann* relating to confessions might have been cured, but by whom? Would a trial judge have had the power to change established state procedure? The Court of Appeals of New York, whose judges are bound to follow the United States Constitution, refused to grant relief in the case that eventually became *Jackson v. Denno*, presumably signifying that it did not believe a change was required by the Constitution and was not persuaded that state law needed a non-constitutional revision. *People v. Jackson*, 10 N.Y.2d 780, 177 N.E.2d 59, 219 N.Y.S.2d 621, *cert. denied sub nom. Jackson v. New York*, 368 U.S. 949 (1961). In fact, the Supreme Court had sustained the constitutionality of the New York procedure in *Stein v. New York*, 346 U.S. 156 (1953). The state legislature might have changed the procedure (*but cf. Sanchez v. State*, 567 P.2d 270 (Wyo. 1977) (limiting power of legislature to bifurcate issues at trial), discussed in Gallivan, *Insanity, Bifurcation and Due Process: Can Values Survive Doctrine*, 13 LAND & WATER L. REV. 515 (1978)), assuming that it was in session, that it could act before speedy trial rights would have been denied, that it believed a change necessary or desirable, and that it would have taken an action arguably casting doubt upon the legitimacy of prior practice. Viewed in this light, the argument that a change could have been made is suspect. Undoubtedly, a state able to read future Supreme Courts' minds could rewrite statutes and redesign procedures to avoid constitutional problems. But the same state could restructure its laws and improve its prosecutorial techniques to avoid many double jeopardy and related claims. Finally, it is not clear that a case like *Parker* could be tried if the confession and all facts were suppressed.

89. For example, the prosecutor might have brought a new charge of carrying a concealed weapon. *See* N.C. GEN. STAT. § 14-269 (Supp. 1977). A conviction might have resulted in a consecutive sentence that would have increased Perry's overall prison time.

90. I assume that even though the Supreme Court did not reach Perry's double jeopardy claim, its due process holding implicitly accepted Perry's argument that the original misdemeanor charge was a lesser-included offense of the more severe felony charge. I think this is a fair assumption in light of the majority opinions in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Brown v. Ohio*, 432 U.S. 161 (1977); and *Ashe v. Swenson*, 397 U.S. 436 (1970). *But see* *United States v. Groves*, 571 F.2d 450 (9th Cir. 1978). *See also* *Ciucci v. Illinois*, 356 U.S. 571 (1958); *Hoag v. New Jersey*, 356 U.S. 464 (1958). The Brief for Respondent, at 6-7, 18-19, *Blackledge v. Perry*, 417 U.S. 21 (1974), also supports my assumption.

91. One can suffer a criminal contempt penalty even after serving time for civil contempt. *See, e.g., United States v. United Mine Workers*, 330 U.S. 258 (1947). Moreover, the govern-

would thereby have cured the due process-double jeopardy problem.

The government might often remedy speedy trial claims, which Westen's approach considers equivalent to *Pearce-Blackledge* due process and *Menna* double jeopardy claims, by honing charges, changing the indictment or information to avoid prejudice attributable to delay, and perhaps even by stipulating as true certain facts raised by a defendant or by withdrawing prosecutorial evidence offered to rebut defense evidence that has been weakened by delay. Such remedies would involve balancing of the kind done when judges consider speedy-trial claims and conclude that the government may prosecute despite delay.⁹² Even if the government cannot refine or substitute charges, it might be able to reopen its investigation in an effort to make a new case on a permissible charge.

Finally, in the case in which there is nothing, absolutely nothing, that the government could do to punish a person like Perry or Menna, the fact remains that there is damage to the government as a result of delay in raising the constitutional claim. Precious judicial resources—along with some prosecutorial, probation and perhaps defender resources—would have been exhausted in connection with taking the plea and sentencing an offender. These should not be overlooked.

Thus, Westen's rationale is without support. I do not suggest, however, that we should disregard the state's interests that I have identified above. In the next Part, where a new rationale is offered to explain the guilty plea cases, I discuss a new way of protecting those interests.

III. AN AMENDED RULE: A NEW RATIONALE

A. *The Amended Rule and New Rationale*

If amended to read as follows, Professor Westen's rule would explain the Supreme Court's decisions and could be justified:

A defendant who has been convicted on a plea of guilty *and who*

ment might have called Menna before the grand jury again, and if he refused to testify it could have sought another contempt citation and jail term. On the remand to the state courts in *Menna*, see note 99 *infra*, New York could have made the argument that I suggest in the text. But, as a practical matter, it might have been too late to recall Menna before the grand jury.

92. I do not argue here that a speedy-trial violation does not mandate a dismissal, see *Strunk v. United States*, 412 U.S. 434 (1973), although a strong case can be made that dismissal should not be the only sanction for all speedy trial violations. See Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525 (1975). I only need claim here that the government, when facing a speedy-trial claim, can seek to avoid dismissal on the ground that it violated the sixth and fourteenth amendments by urging that a less drastic remedy be employed.

has complied with pre-plea procedural rules regarding notice of constitutional claims may challenge his conviction on any constitutional ground that, if asserted before trial, would forever preclude the state from obtaining a valid conviction against him *on the charge to which he pleaded*, regardless of how much the state might endeavor to correct the defect.

The theory I offer is: Certain constitutional rights, like double jeopardy and its due process cousin (born in *North Carolina v. Pearce* and recognized in *Blackledge*), are largely premised on the idea that one should not have to bear the financial, emotional, and other costs of more than one prosecution for the same offense.⁹³ Because those constitutional rights are premised on cost avoidance—that is, on avoiding any trial on the merits—persons claiming such rights should not be compelled, if they have a valid claim, to bear the burdens of the litigation against which the double jeopardy and due process clauses protect them. Rather, if they choose, they should be able to raise their claims in the least expensive way. Thus, a state may desire finality in adjudication, and it may use guilty pleas to promote finality and reduce considerably the cost of litigation, but it may not use the guilty plea to undercut constitutional protections whose purpose is to relieve criminal defendants of litigation. In other words, if, as a matter of federal constitutional law, the sustaining of a constitutional claim would bar any litigation of the specific charges against a defendant, the defendant has a right to plead guilty and retain the claim. This rationale emphasizes the protection afforded defendants by the Constitution, not the disadvantages to the state when pleas are overturned. But I am also concerned with the state's legitimate interests and, shortly, I shall suggest a pleading mechanism to protect them.

We can see, therefore, why Menna could plead guilty to the charge which placed him in jeopardy a second time and still raise his double jeopardy claim.⁹⁴ The government could not force Menna to spend money to defend himself at a full trial as a condition of raising

93. In *Pearce* and *Blackledge*, the Court was willing to equate a trial de novo on the same charge with an appeal in the same prosecution, but was concerned that after a change in the nature of the charge, the trial de novo appeared to be the equivalent of a second prosecution with attendant, additional costs to the defendant.

94. This is not to say that New York could not prohibit pleas of guilty and require trials for everyone. Cf. *Weatherford v. Bursey*, 429 U.S. 545 (1977) (holding that plea bargaining is not a constitutional right). See also note 2 *supra*. It is only to say that when a state provides alternative methods for disposing of criminal cases, the defendant can seek the least costly method for vindicating a double jeopardy claim. If guilty pleas are barred, however, one might argue from the analysis offered here that a constitutional right does exist to pre-trial consideration of a double jeopardy claim. Cf. *State v. Troynack*, 174 Conn. 89, 384 A.2d 326 (1977) (speedy-trial claims receive special treatment).

his double jeopardy claim.⁹⁵ He was allowed, because of the nature of the constitutional claim, to take the speedy and less expensive route of pleading guilty⁹⁶ and then asserting his claim.⁹⁷ New York may not have desired this procedure, but the constitutional protection upon which Menna relied, according to the Supreme Court, limited New York's capacity to bar the post-plea claim of double jeopardy.

Blackledge can be similarly explained. As noted above, Perry's due process claim resembled a double jeopardy claim.⁹⁸ In seeking collateral review of his conviction, one can argue, Perry avoided at the lowest possible cost the improper charge added before the *de novo* trial.

The Supreme Court recognized, but lightly passed over, one difference between the two cases. The second charge against Menna was improper; thus, the government could impose no penalty once the court sustained the double jeopardy claim. Accordingly, if that claim finally prevailed on the merits in light of New York law, the conviction would have to be vacated.⁹⁹ In *Blackledge*, the state could have proceeded in the higher court; what it could not properly do was raise the grade of the offense in the higher court.¹⁰⁰ There is some merit, then, in Justice Rehnquist's dissenting argument that the case should have been remanded for resentencing in accordance with *Pearce*.¹⁰¹ But Justice Rehnquist's argument omits one fact which

95. It is extremely unlikely that the government will reimburse the successful criminal defendant. Cf. *James v. Strange*, 407 U.S. 128 (1972) (recognizing legitimate state interests in statutes requiring indigent defendants to reimburse state expense in providing counsel, though striking down the statute in question on equal protection grounds); *Schilb v. Kuebel*, 404 U.S. 357 (1971) (acquitted defendant can be assessed a portion of bail amount as administrative costs). Even if states commonly reimbursed acquitted defendants for out-of-pocket expenses, it would be a rare jurisdiction that attempted to compensate for the emotional trauma of a trial. See also note 11 *supra*.

96. Obviously, the defendant who pleads guilty under these circumstances is stuck with the conviction if his post-plea claim fails. But he is aware of that when pleading and deliberately chooses not to contest his guilt on the merits.

97. It is generally assumed that pleas are often entered to avoid the costs of litigation. There is reason to think that, at least as respects the state, that assumption is valid. See Y. KAMISAR, W. LAFAYE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 1096 n.d (4th ed. 1974). Defendants who plead guilty may be concerned with different "costs" including the physical and mental costs of trials. But, because they plead guilty they must believe that they have gotten a benefit (cost reduction) as a result.

98. See note 66 *supra*.

99. In *Menna*, the Supreme Court remanded for a decision on the merits, since the New York Court of Appeals, relying on *Tollett*'s decision regarding post-plea challenges, had not reached the underlying constitutional claim.

100. The state can raise the grade of the offense only in exceptional circumstances. See *Blackledge v. Perry*, 417 U.S. 21, 29 n.7 (1974) (citing *Diaz v. United States*, 223 U.S. 442 (1912)).

101. 417 U.S. at 37-39.

reveals that the majority acted properly and consistently with the theory outlined here in vacating Perry's conviction. When the prosecution moved from a lesser to a greater offense, it alleged a new element of the crime—that Perry acted “with intent to kill and inflict serious bodily injury.” Surely a defendant would not be indifferent about which offense, the greater or lesser, would produce a conviction. The seriousness of the offense for which he was convicted might increase the stigma and might also affect any future involvement with the police, the prosecutor, or the court. Faced with the greater charge, Perry had a choice: go to trial or plead guilty. Under the majority's approach as explicated here, Perry could not be asked to assume the risks involved in litigating the greater claim. Hence, the majority justifiably vacated the conviction and freed the prosecution to restore the original misdemeanor charge to the docket of the court of record.

With *Menna* and *Blackledge* accounted for, only *Tollett* and the *Brady* trilogy remain. None of the constitutional claims raised in those cases invoked rights that are firmly rooted in a concern that litigation costs not be imposed on criminal defendants. Arguably, all constitutional claims are equal and therefore all should be litigable at the lowest cost. This position is tenable,¹⁰² but the Supreme Court seems never to have adopted it or anything very close to it.¹⁰³ In fact, the *Brady* trilogy's principle, if not its language, conflicts with that argument. Even those who like the argument, however, can concede that particular rights exist whose purpose in substantial part is to avoid litigation by accused persons.

The constitutional claims raised in the *Brady* trilogy concerned two confessions and the effect on guilty pleas of two statutory penalty schemes, one of which was invalid and the other of which the Court suggested might also be unconstitutional. The right to jury trial, which the federal statute before the Court certainly impinged, is not a right established to avoid trials. And if the state statute involved in *Parker* were invalid as discouraging litigation, a challenge to it would not be based on a litigation-avoidance rationale. Nor is the right to suppress coerced confessions designed to avoid litigation. Of course, the government may have insufficient evidence to proceed

102. See, e.g., *Doyle v. Ohio*, 426 U.S. 610 (1976) (no mention permitted at trial of the defendant's silence after hearing *Miranda* warnings); *Simmons v. United States*, 390 U.S. 377 (1968) (no use by prosecution in case-in-chief of defendant's testimony during suppression hearing); *Griffin v. California*, 380 U.S. 609 (1965) (no comment permitted on a defendant's decision not to testify).

103. See, e.g., *United States v. MacDonald*, 435 U.S. 850 (1978). See also *Corbitt v. New Jersey*, 99 S. Ct. 492 (1978).

if a confession is suppressed, but that is not necessarily so. Moreover, an improperly obtained confession is not suppressed to protect a defendant against a trial on the merits. Similarly, the challenge in *Tollett* to the composition of a state grand jury did not rest significantly on a defendant's interest in conserving resources.¹⁰⁴ If the challenge were sustained, the state could nonetheless renew litigation if it could obtain a proper indictment. Where the state already has secured a conviction, the indictment surely would be forthcoming. Hence, the theory presented here reconciles all of the cases decided recently.

B. *The Rationale Applied in a Different Context*¹⁰⁵

This new rationale also helps to explain the willingness of two

104. The right to be indicted by a fairly chosen grand jury arguably embodies a concern that defendants not stand trial unnecessarily. But *Tollett* was a state case, and states need not use grand juries. See *Gaines v. Washington*, 277 U.S. 81 (1928); *Hurtado v. California*, 110 U.S. 516 (1884). Attacks on improperly chosen state grand juries proceed under the equal protection clause. See generally *Castaneda v. Partida*, 430 U.S. 482 (1977); *Turner v. Fouche*, 396 U.S. 346 (1970); *Carter v. Jury Commn.*, 396 U.S. 320 (1970). Even in federal jurisdictions, however, where the fifth amendment's grand jury requirement applies of its own force, there is reason to think that the requirement embodies a greater concern for the appearance of fairness than for the protection against litigation expenses. It becomes difficult to believe after a conviction by plea or trial that, but for improprieties in the selection process, the grand jury would not have returned an indictment. More important, once a conviction is obtained, a second grand jury almost certainly would indict. Thus, under my test, the state not only could, but would, prosecute on the same charge again. Therefore, a plea results in the loss of an opportunity to attack the composition of the grand jury. It may be that even those defendants who go to trial should suffer a similar loss upon conviction. Professor Alschuler suggests that Supreme Court decisions permitting challenges to a grand jury's composition after conviction by a properly selected trial jury are difficult to explain "in terms of insuring fair procedure for the defendants themselves." Alschuler, *supra* note 5, at 29. He explains the decisions as "the only effective means of correcting an unconstitutional practice that would otherwise persist." *Id.* at 30. But other remedies do exist. For example, challenges to grand jury procedures can be raised in civil suits. See, e.g., *Castaneda*, *Turner*, and *Carter*. If the Court wants to protect the defendant's right to an impartial grand jury, it could fashion a remedy that would not require unnecessary retrials: upon a finding that an indicting grand jury was improperly selected, a case would be sent to a new, properly constituted grand jury, which would not be told of the successful prosecution and which would redetermine whether an indictment should issue. Any objection that the later grand jury might be considerably different from the improperly selected one would fall in light of the fact that existing law allows a subsequent grand jury to reindict and a second trial to be held.

105. Earlier, I referred to speedy-trial claims. See note 78 *supra*. Such claims probably express a cost-minimization, trial-avoidance concern of a special kind. The disadvantages to a defendant of a delayed trial are such that at some point, the defendant wins the right not to be tried at all. See, e.g., *State v. Tiedemann*, — Mont. —, 584 P.2d 1284 (1978). Thus, a criminal defendant who pleads guilty can probably raise a speedy-trial claim to attack his conviction. Because the merits of such a claim more readily appear after trial, see *United States v. MacDonald*, 435 U.S. 850 (1978), the entry of a plea may reduce the chance that a subsequent attack will succeed.

I have also mentioned subject matter jurisdiction and fundamental fairness claims. See note 62 *supra*. Courts would probably consider counsel's failure to complain of an absence of jurisdiction or of the state's failure to provide fair procedures among the best examples of ineffective assistance. The more outrageous it seems to deny someone the right to raise a

Justices in *Ellis v. Dyson*¹⁰⁶ to hold that two defendants who pleaded guilty¹⁰⁷ to violating a city loitering ordinance thereby lost the right to sue for expunction of their arrest records on the ground that the ordinance was unconstitutional. In light of their reservations about abstention and the case-or-controversy requirement, the majority concluded "that it would be inappropriate . . . to touch upon any of the other complex and difficult issues that the case otherwise might present,"¹⁰⁸ which included the significance, if any, of the fact that the plaintiffs had pleaded guilty. However, Justices Powell and Stewart¹⁰⁹ argued that the complaint was properly dismissed because the two plaintiffs had pleaded guilty:

When a state criminal defendant pleads guilty to state charges or refuses to invoke state appellate remedies, his conviction no longer can be said to rest on an alleged denial of a constitutional right. Instead, it rests solely on the defendant's refusal to litigate the asserted right. The only issue then cognizable on collateral attack is whether the refusal to litigate was knowing and voluntary. If it was, collateral attack based on the asserted constitutional claim is foreclosed.¹¹⁰

The two dissenters' language perpetuates the confusion generated by *Blackledge*, which is discussed above,¹¹¹ and the dissenters surprisingly fail to cite several precedents that would have suggested a different conclusion.¹¹²

Yet, the dissenting opinion comports with the theory offered here to reconcile the Supreme Court's guilty plea opinions.¹¹³ To challenge the Dallas loitering ordinance, the plaintiffs invoked the special first amendment claim that, whether or not their conduct was punishable under a properly drawn statute, the vagueness and overbreadth of the ordinance required that the guilty pleas be set aside.¹¹⁴ The vagueness claim is more easily disposed of than the overbreadth challenge. When a defendant claims that a statute is too vague, the defendant raises problems of notice and potential arbi-

claim, the more likely it is that the raising of that claim will be presumed a requirement of adequate legal assistance.

106. 421 U.S. 426, 437 (1975) (dissenting opinion of Powell and Stewart, JJ.).

107. Actually, the defendants pleaded *nolo contendere*, but with respect to punishment that plea has the same effect as a guilty plea. 421 U.S. at 428 n.3.

108. 421 U.S. at 435.

109. The Chief Justice joined another part of the dissenting opinion.

110. 421 U.S. at 442.

111. See text at notes 59-75 *supra*.

112. That failure is pointed out in Alschuler, *supra* note 5, at 17-21, and Westen, *supra* note 5, at 1225-26 n.28.

113. Another justification for the dissenting opinion is set forth in the text at notes 119-21 *infra*. A third theory might have been *res judicata*. But see note 161 *infra*.

114. See generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW 710-24 (1978).

trariness in law enforcement. Neither is a litigation-avoidance problem; neither involves a threat to protected activity. Overbreadth is more troublesome because the claim is that the statute impinges upon protected activities. But one may conclude that litigants who plead guilty effectively concede that their conduct is not beyond the punitive reach of the state and that the challenged ordinance would be properly construed to reach their conduct. Although the ordinance still may impermissibly threaten the protected activities of others, the *Ellis* dissenters said that one defendant's rare opportunity to raise another's claims would be denied those who plead guilty. Arguably, this produces a sound result since those defendants who enter guilty pleas may "chill" the speech of others by suggesting that the statutes to which they plead are valid. It makes some sense then to restrict the overbreadth aspect of *jus tertii* to those willing to fight at trial. But, it might be argued in response that guilty pleas would not "chill" the speech of third persons if the pleading defendants could make post-plea overbreadth claims. I would reject this argument on the ground that the pleaders might be punished immediately after pleading and that some "chill" might occur. I cannot deny, however, that the "chill" might be reduced if post-plea challenges were permitted. But the fact remains that it is reasonable for the dissenters to want to restrict overbreadth challenges in order to promote prompt pre-plea challenges to invalid statutes.

If litigants claimed that the state's coercive power did not reach certain conduct, that claim should be considered even after a plea. In fact, the dissenting opinion in *Ellis* suggests at a slightly different point that persons who claim that legislative enactments impinge on their constitutionally protected activity should have greater access to collateral attack than those whose complaint is that the statute sweeps overbroadly and therefore threatens others.¹¹⁵

In essence, this Article's theory recognizes that one's right to engage in constitutionally protected activity—conduct that cannot be criminally sanctioned—embraces the opportunity to prevent the government from imposing the costs of litigation on the protected conduct. If criminal defendants could not plead guilty, avoid trial, and raise collateral claims, the imposition of litigation costs might be an additional government weapon against protected activity. This would explain why the defendant in *Haynes v. United States*,¹¹⁶ who

115. 421 U.S. at 447. The dissenters discussed cases in which the Court "found constitutional challenges to state and federal statutes justiciable despite the absence of actual threats of enforcement directed personally to the plaintiff." 421 U.S. at 447.

116. 390 U.S. 85 (1968).

pleaded guilty to a federal firearms statute violation, could raise a constitutional claim after pleading. Because of the privilege against self-incrimination and the existence of federal criminal firearms statutes, no law requiring a person to supply information concerning firearms to the government was likely to pass muster. Hence, the defendant's failure to register his firearm was beyond the reach of legitimate penalty provisions, and the defendant could raise that claim following a plea of guilty.¹¹⁷ The theory also explains language from other cases that some commentators have used in criticizing the *Ellis* dissenters.¹¹⁸

Nothing in the theory is inconsistent with another reading of the *Ellis* dissent. The dissenters may have been concerned that, because the *Ellis* plaintiffs had actually raised their constitutional claim by pre-trial motion before pleading guilty, their pleas might have resulted from a bargain in which the plaintiffs received concessions from the state in exchange for abandoning all their defenses, including the constitutional attack on the statute. If this did concern the dissenters, they probably should have voted for a remand to ascertain whether any bargaining had taken place or any deal had been made, and if so, the precise contours.¹¹⁹ But even if the dissenters too quickly made assumptions unfavorable to the plaintiffs, their opinion foreshadows arguments that one would expect to see in future cases. If a defendant bargained with the government knowingly and intelligently (presumably advised by competent counsel) and explicitly offered to forego a constitutional claim in exchange for a

117. The Court relied upon the *Haynes* decision, *inter alia*, in *Leary v. United States*, 396 U.S. 6 (1969). What Professor Alschuler said about *Leary* he also might have said about *Haynes*: "The Court's view was plainly that the line of self-incrimination cases that included *Leary* had 'dealt with the kind of conduct that cannot constitutionally be punished in the first instance.'" Alschuler, *supra* note 5, at 20 n.65 (quoting from *United States v. United States Coin & Currency*, 401 U.S. 715, 723 (1971)). Although the Court reached a different result on the merits of the underlying fifth amendment claim, the justification for reaching the merits of the underlying claim in *Haynes* also justified reaching the merits in *Sullivan v. United States*, 348 U.S. 170 (1954).

118. *See, e.g., Ex parte Siebold*, 100 U.S. 371 (1879), relied upon by Alschuler, *supra* note 5, at 18-19. Aside from the fact that the case did not present the question of what rights were lost by a plea, the fact that *Siebold* involved the reach of federal power signifies that it fits the analysis suggested here. *See also Baender v. Barnett*, 255 U.S. 224 (1921), also cited by Alschuler, *supra* note 5, at 19 n.61. *Baender* involved in part a challenge to the reach of congressional power to punish private acts. The remaining part dealt with a claim that certain conduct was constitutionally protected unless accompanied by proof of certain types of mens rea. Both claims asserted that Congress could not punish the petitioner's conduct—*i.e.*, the conduct was beyond the federal government's reach. The petitioner was unsuccessful there. Some habeas petitioners have fared better. *See, e.g., Pollock v. Williams*, 322 U.S. 4 (1944).

119. As the majority opinion indicates, the court that accepted the pleas had rejected the constitutional claim before the pleas were entered. 421 U.S. at 428. No mention of any bargain is made.

benefit, the Supreme Court should enforce the bargain,¹²⁰ except in unusual circumstances where a claim cannot be waived.¹²¹

If a defendant raises a double jeopardy claim as in *Menna*, or a related due process claim as in *Blackledge*, the prosecution may discuss with him the filing of charges that circumvent the double jeopardy problem. If the defendant prefers the existing charges to the prospective charges and agrees to forego the double jeopardy defense in exchange for the benefit of not facing the new charges, a court could reasonably respect the bargain, since the government gave up a legitimate opportunity to prosecute in order to please the defendant. If the government cannot readily circumvent the double jeopardy or due process claim, but the validity of that claim is uncertain, there is still room for bargaining. If the defendant agrees explicitly to give up a claim in return for government concessions, that decision can be respected in the same way that a defendant's decision not to challenge a confession essential to the government's case is respected. Bargains are made because, in a world of uncertainty, both parties prefer a negotiated agreement to a winner-take-all solution.¹²² The defendant says in effect, "I have a right to plead guilty and then raise a double jeopardy claim, but I will relinquish that right for a better plea." If the prosecutor accepts the offer, there is no reason why the defendant should be able to seek to set aside the plea and, should the attack fail, still get the benefit of the bargain. Even if the defendant must forego the bargain to challenge the plea, the prosecutor's interest in finality and in avoiding post-plea challenges remains. If plea bargaining is permissible, an explicit bargain should be respected. If the government cannot circumvent the defendant's constitutional claim and there is no reasonable doubt that the claim is correct, an intelligent, knowing defendant, represented by competent counsel, would never plead guilty. When doubts about the claim exist, they should be treated no differently from doubts about guilt and innocence—*i.e.*, they are subject to bargaining.

It is possible to identify a class of cases in which even a negotiated plea should not bar a later attack on a conviction: that is, where the state alleges conduct which was not clearly beyond the reach of its criminal sanction at the time the defendant pleaded guilty but subsequently is held to be. In that case, the government cannot pun-

120. See *United States v. Doyle*, 348 F.2d 715, 718-19 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965).

121. See note 62 *supra*.

122. See generally Ballou, "Jurisdictional" Indictments, Informations and Complaints: An Unnecessary Doctrine, 29 ME. L. REV. 1 (1977).

ish the conduct under any circumstances. If the Constitution unquestionably protects the conduct so that no law could reach it, the state has no valid interest in enforcing its bargain. Professor Westen, who disagrees, argues that "the fact that a statute is declared unconstitutional does not mean the state has 'no interest' in enforcing the statute; it merely means that the state's interests are overridden by the defendant's constitutional interests."¹²³ This misses the point, however. If the conduct is constitutionally protected, enforcing an earlier plea bargain advances no state interest properly cognizable in courts pledged to support the Constitution. But Professor Westen fears that this principle, if accepted, must extend "to *every* constitutional defense to conviction, including the grand jury defense in *Tollett*."¹²⁴ His argument assumes the conclusion; it fails to explain why a Court cannot distinguish two classes of cases—those involving conduct the state is entitled to punish and those involving conduct the state is forbidden to punish. In the former, the issue is whether defendants who are fully advised of their rights, and who wish to plead guilty after bargaining in an area of uncertainty, should be able to minimize the uncertainty through a guilty plea and then, having captured the advantages of the bargain, be able to attack the conviction. A guilty plea procedure is an alternative system for vindicating the state's power to control conduct properly within its reach. In the latter class of cases, no procedures can change the fact that the state cannot have a constitutionally cognizable purpose in punishing some conduct.

The problem with any argument in favor of allowing those who negotiate a plea to take advantage of a change in the law is that it ignores the state's legitimate interest in avoiding expensive litigation. If only a trip through appellate litigation, perhaps in both state and federal courts, can answer the question whether the actual conduct of the defendant who pleaded is constitutionally protected under a newly established constitutional doctrine, the state may powerfully argue that a plea bargain should bar a subsequent attack claiming constitutional protection for the defendant's conduct. This problem may well be insurmountable.¹²⁵

123. Westen, *supra* note 5, at 1230 n.35.

124. *Id.* at 1231 n.36.

125. It is true, of course, that *Blackledge*, *Menna* and all post-plea claims involve potential fact-finding burdens, but the Court has forced the state to bear, or at least share, these burdens in order to vindicate the right of defendants to avoid costly trials. If a defendant expressly gives up such a right, courts are less likely to want to burden the state.

C. *Procedural Requirements To Protect the State*

It also should be evident that nothing in the theory espoused here prohibits procedural rules that require a criminal defendant who wishes to preserve a claim of the sort that existing Supreme Court opinions indicate will survive a guilty plea to raise that claim when his plea is entered or before.¹²⁶ Ever more commonly, courts adopt procedural rules that require defendants to raise claims before trial.¹²⁷ A defendant who ignores such rules loses the claim on direct review and, in light of the Supreme Court's recent change in attitude, also may be unable to resurrect the claim by collateral attack.¹²⁸

It seems clear to some courts that a defendant who goes to trial without raising a double jeopardy claim loses it. To do otherwise, one court has reasoned, "would allow the defendant a free shot at an acquittal at the second trial but, failing that, a certain reversal of the conviction in a later collateral proceeding."¹²⁹ This rationale rests on an unfounded assumption.¹³⁰ In many instances, a defendant who goes to trial hardly receives a free shot at acquittal. If the defendant pays for his counsel, the costs associated with a trial are likely to be greater than the costs of raising a double jeopardy claim by motion before trial. If the defendant cannot secure release pending his trial, the various discomforts of jail and the loss of wages and opportunities combine to make the choice to undertake a trial rather than to file a pre-trial motion more onerous than simply "a free shot." Also, the defendant who proceeds to trial risks a sentence that may be considerably higher than the one attaching to a guilty plea.¹³¹ Unless the defendant knows with certainty that any convic-

126. The Supreme Court lightly passed over the state's argument in *Tollett* that the defendant did not follow its procedural rules and that this alone barred his collateral attack. Since the defendant incurs no greater cost by raising a claim before pleading, rather than after, requiring him to raise claims promptly does not violate the cost minimization aspects of the constitutional right.

127. See, e.g., FED. R. CRIM. P. 12(b)(2).

128. Compare *Wainwright v. Sykes*, 433 U.S. 72 (1977), with *Fay v. Noia*, 372 U.S. 391 (1963).

129. *Ochoa v. Estelle*, 445 F. Supp. 1076, 1082 (W.D. Tex. 1976). The district court, citing *Francis v. Henderson*, 425 U.S. 536 (1976), held that comity requires deference to a state law mandating a pre-trial challenge on double jeopardy grounds.

130. Perhaps this explains why other courts reject the idea that the claim is lost if not raised before trial. See, e.g., *United States v. Anderson*, 514 F.2d 853 (7th Cir. 1975).

131. See, e.g., Administrative Office of the United States Courts, *Federal Offenders in the United States District Courts*, 1965, at 28 (1967), reported in D. OAKS & W. LEHMAN, *A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT* 194 n.429 (1968). The constitutionality of a higher sentence after trial than after a guilty plea is unclear. See, e.g., *Scott v. United States*, 419 F.2d 264 (D.C. Cir. 1969); *Commonwealth v. Bethea*, 474 Pa. 571, 379 A.2d 102 (1977). See also *Corbitt v. New Jersey*, 99 S. Ct. 492 (1978). See generally ABA Standards, *Pleas of Guilty* § 1.8(a) (Approved Draft 1968).

tion will be overturned on appeal, he assumes the risk that an unsuccessful double jeopardy claim will leave a higher sentence in effect. Moreover he may begin to serve the sentence while making the collateral attack. This is no small price for going to trial. Thus, costs of several different kinds fetter the choice to litigate the merits; the assumption underlying the quoted rationale is therefore vulnerable.¹³²

Why, then, may a rule require that certain claims be raised promptly before trial or not at all? The answer lies in two state interests: the interest in conserving resources by avoiding trials that would be unnecessary if defendants raised insurmountable bars to valid prosecutions,¹³³ and the interest in correcting remediable errors¹³⁴ while that is still possible¹³⁵ and before resources are wasted.¹³⁶ These interests are protected by rules requiring that, upon pain of losing them, some claims be raised before litigation commences.

Similar state interests justify a rule requiring defendants to raise constitutional claims that they wish to preserve for post-plea attack before their pleas are accepted. Such a rule often would allow the prosecutor not only to avoid unnecessary plea bargaining and preparation for sentence recommendations (if permitted) but also to avoid constitutional problems whenever possible. The failure of a defendant advised by competent counsel to raise a claim pursuant to the

132. In one sense the defendant who pleads may get something "free." If the prosecutor bargains unaware of a prospective constitutional challenge, the defendant may gain a good bargain without "paying" for the right to make his challenge. This suggests, as do other arguments made in the text at notes 137-38 *infra*, that, before they plead, defendants should have to raise the claims they intend to assert later. But even when the prosecutor is unaware that the defendant may raise a post-plea claim, the defendant who pleads does give up rights. Prosecutorial ignorance may affect the bargaining process, but the plea still amounts to a loss of rights by the defendant.

133. One might argue that the state needs no such protection because no rational defendant would incur defense costs by failing to make an appropriate pre-trial motion when he could plainly bar a successful prosecution. In some cases, however, the burdens of properly presenting a pre-trial claim may eclipse the costs of defending at trial. Yet, the costs to the government of trying the case, in view of the heavy burden of persuasion it bears, may be much greater than any set of costs to the defendant. In such cases the government reasonably wants the defendant to reduce the government's costs for a fruitless prosecution. The rule also protects against the defendant who, knowing that his claim could bar any prosecution, wants to waste government resources in retribution for having to defend himself.

134. I have previously noted that when double jeopardy or due process problems block some prosecutions, other charges may be substituted. The substitution may not be perfect, but the prosecutor will prefer a second best charge to one that ultimately cannot stick. In fact, the prosecutor may prefer a second best charge devoid of constitutional problems to a better charge beset with constitutional difficulties.

135. *E.g.*, before the statute of limitations on an alternative charge runs. *But see* 18 U.S.C. §§ 3288-89 (1976).

136. If a prosecutor were indifferent to which of two charges to bring, and only one of them presented constitutional problems, the prosecutor would avoid unnecessary litigation by choosing the other.

proposed rule would result in the loss of the constitutional claim.¹³⁷ Since the Supreme Court's guilty plea cases now demonstrate that pleas of guilty do not *a fortiori* result in the loss of constitutional claims, frugal states should and probably will require that defendants assert constitutional claims which would not be lost after an ordinary guilty plea before the pleas are entered if they are to be preserved for post-plea attack.¹³⁸ I believe that the Court would sustain such a notice rule; but Professor Westen's analysis probably would lead to a conclusion that any notice rule is invalid as applied to double jeopardy and similar claims, since he views these as beyond the state's capacity to repair. It is ironical, therefore, that his approach, which is designed to protect the state from injury, fails to do so; but the rationale I suggest, which is not dependent on identifying injury to the state when a plea is overturned, since I believe there is likely to be damage in all such cases, permits the state to protect its legitimate interests without impairing constitutional rights.¹³⁹

If notice is required and the requirement is satisfied, does the plea nevertheless vitiate the claims raised? The answer must be "no." Surely the Supreme Court's cases suggest that, with the exceptions discussed in this Article, jurisdictions *may* compel defendants to choose between pleading guilty—thus waiving all claims—and going to trial—thus retaining the claims, but not that they *must* opt for such an all-or-nothing approach. Even though a jurisdiction plainly may require defendants to give up quite a bit to plead guilty, and though historically most American jurisdictions have done so, thoughtful lawmakers might prefer another approach. Some juris-

137. New York and California, for example, permit defendants to appeal from certain adverse pre-plea rulings despite the entry of a guilty plea. *See, e.g.*, N.Y. CRIM. PRAC. LAW §§ 710.70(2)-(3) (McKinney 1971); CAL. PENAL CODE § 1538.5(m) (West 1970). In *Lefkowitz v. Newsome*, 420 U.S. 283 (1975), the Supreme Court held that constitutional claims which state law allows a defendant to raise on appeal after a guilty plea are cognizable also in a federal habeas corpus action. The Court has never said that the right to raise post-plea challenges cannot be conditioned upon a prompt pre-plea motion that raises all the claims the prospective pleader hopes to preserve; however, *Tollett v. Henderson*, 411 U.S. 258 (1973), casts an unnecessary shadow over such a procedure. *See* note 126 *supra*. Part III. D *infra* of this Article discusses the concepts of forfeiture and waiver. The loss of constitutional claims may appear to involve a forfeiture, as some have used the term. *But see* text at notes 144-50 *infra*.

138. States might even provide, and require that the parties use, speedy avenues for appellate review of pre-trial rulings. *Cf. Abney v. United States*, 431 U.S. 651 (1977) (double jeopardy claim reviewable on appeal before trial). Of course, the Supreme Court will probably adhere to its reasoning in *Francis v. Henderson*, 425 U.S. 536 (1976), that a habeas corpus petitioner will not lose a constitutional claim if he can adequately explain his failure to raise it (by showing "cause") and can demonstrate that actual prejudice resulted. Discerning what the Supreme Court means by "prejudice" is no easy matter, however. *See* Dix, *supra* note 1, at 211.

139. *See also* text at notes 89-92 *supra*.

dictions, attempting to encourage guilty pleas, expressly provide that a defendant may after pleading raise certain claims that were raised unsuccessfully before pleading.¹⁴⁰ The Supreme Court has held that federal constitutional claims which a state allows defendants to raise in state court following guilty pleas can also be raised in a federal habeas corpus action.¹⁴¹ Some jurisdictions without statutes expressly providing that constitutional claims may be retained following a guilty plea allow prosecutors to contract with individual defendants to preserve constitutional claims following a plea.¹⁴²

140. See note 137 *supra*. Also, because the significance of a plea is determined by local law except in the few instances in which the Constitution dictates particular attributes of a plea, local law can provide that non-constitutional post-plea claims can be raised. See, e.g., *Commonwealth v. Myers*, 478 Pa. 580, 392 A.2d 685 (1978).

141. In his dissent in *Lefkowitz v. Newsome*, 420 U.S. 283 (1975), Justice White argued that waiver was not the concept employed in the *Brady* trilogy and in *Tollett*. 420 U.S. at 299. But he used "waiver" in a very limited sense, and nothing in his reasoning is inconsistent with my argument. Justice White maintained that New York could not give defendants an expectation that federal courts would hear certain constitutional claims following a guilty plea in state court. His argument on this point is unexceptionable. If Congress wanted, it could ban federal habeas corpus suits by persons who plead guilty in state courts, except in the extraordinary case where the Constitution might require some form of federal review by habeas action even for a person who was told before pleading that the plea would deprive him of a federal forum. What Justice White missed was that, whether New York properly interpreted federal law or not, it almost surely led some criminal defendants to believe that, after pleading guilty, they retained all opportunities for vindicating constitutional claims. Had the Supreme Court dissenters prevailed, all the pleas entered in New York prior to the decision, and during the period when New York permitted defendants to raise specified constitutional claims after pleading guilty, arguably would have been invalidated on the ground that the defendants were inadequately informed of what they gave up by pleading guilty. In the case of defendants who raised pre-plea constitutional claims, it would have been especially difficult for the Supreme Court to have said that the loss of a federal forum would not have significantly influenced the decision whether or not to plead. In a footnote, 420 U.S. at 301 n.7, Justice White admitted the possibility that *Newsome* and others would have been misled into thinking that they had a federal forum, and he suggested that the best course would be to permit repleading for those who had pleaded guilty in misplaced reliance before the Supreme Court decision. He did not admit that this procedure might have been constitutionally required had his opinion prevailed.

The other fundamental flaw in the dissent's analysis was its reading of prior cases. In the *Brady* trilogy, in *Tollett*, and in *Blackledge* and *Menna*, the Supreme Court assumed that the states wanted maximum finality in the guilty plea process. Thus, those cases addressed the federal constitutional limits on state prescriptions as to the finality of a guilty plea. When the Court upheld a state's refusal to recognize post-plea challenges, it recognized that the state could prescribe maximum finality as a principal goal of a guilty plea system. When the Court held that post-plea challenges on some issues had to be recognized, it held that some state interests must give way to federal constitutional rights. But in no prior case did the Court refuse to promote state interests *unless* the Constitution required it to refuse. In *Lefkowitz*, the state procedures did not assume that maximum finality was optimal finality. Thus, the Supreme Court had to determine the appropriate federal attitude toward relitigation of claims made in a state system that purported to treat persons who actually litigated and lost constitutional claims before pleading guilty as if they had gone to trial but presented no defense. Seen in this light, the majority's approach to the problem was much superior to the dissenters'.

142. See, e.g., *United States v. Zudick*, 523 F.2d 848, 851-52 (3d Cir. 1975); *United States v. Doyle*, 348 F.2d 715 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965); *United States v. Callaghan*, 445 F. Supp. 1296 (D.N.J. 1978); *McNamara v. State*, 357 So. 2d 410 (Fla. 1978); *State v. Aguiard*, 357 So. 2d 535 (La. 1978). Some jurisdictions may limit the contracting range. See, e.g., *Brown v. Florida*, 355 So. 2d 138 (Dist. Ct. App. 1978); *Gordon v. State*, 577 P.2d 701

There is growing acceptance of the idea that an entire trial need not be held in order for the defendant to preserve one point of constitutional law. The costs to the defendant and to the state seem excessive.¹⁴³

D. *Procedural Requirements to Protect the Defendant: Waiver Versus Forfeiture*

The government *may* choose to adopt a notice rule to protect its interests, and it may choose to allow defendants to retain, even after they plead, all claims properly noticed. It *must*, in my view, adopt procedural safeguards to assure that the defendant understands the effect of a guilty plea. A defendant loses no claims by pleading guilty unless he waives them, and commentators who argue that waiver and forfeiture may be readily distinguished in the guilty plea context confuse more than help analysis.

Waiver has been defined as "a conscious choice made by a person whose right is at issue (or by someone else with legal authority to make the choice for him) that will be given the legal effect of rendering the advantage of that right unavailable to him."¹⁴⁴ Forfeiture

(Alaska 1978). At least a few federal courts have read the *Brady* trilogy and *Tollett* as foreclosing bargains that preserve claims. See, e.g., *United States v. Benson*, 579 F.2d 508 (9th Cir. 1978).

143. The New York approach has been praised by courts and commentators. See, e.g., 1 C. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE: CRIMINAL* § 175, at 381-82 (1969); *United States v. Dorsey*, 449 F.2d 1104, 1108 n.18 (D.C. Cir. 1971). But not all New York courts are convinced of its merits. See, e.g., *People v. Navarro*, 61 App. Div. 2d 534, 403 N.Y.S.2d 80 (1978). One of the problems with the contract method of preserving claims is that it invites prosecutors to suggest contracts that ban judicial supervision of bargains and prosecutorial conduct. In *Washington v. State*, 559 S.W.2d 825 (Tex. Crim. App. 1977), for instance, the court left open the question whether the defendant could be held to an agreement not to appeal his sentence. The facts of the case are most disturbing. In return for a guilty plea to charges of aggravated robbery and attempted murder, the prosecutor agreed to drop capital murder charges. After the defendant pleaded and was sentenced, he appealed. Responding to what he apparently thought was an agreement not to appeal, the prosecutor reactivated the murder case and obtained a death sentence from the jury. The defendant was saved by the appellate court decision that the prosecutor mistook the plea bargain and could not properly have proceeded with the capital murder charges. Cf. *Worcester v. Commissioner*, 370 F.2d 713, 718 (1st Cir. 1966) (judge cannot offer sentencing concession in return for abandonment of appellate rights); *Franklin v. State*, 577 P.2d 860 (Nev. 1978) (improper pressure on witness). In my view, the courts have accepted plea bargaining largely because they can rule as to what is fundamentally fair and what is unconscionable. Most courts that have sanctioned bargaining profess to believe that prosecutors and defendants compromise on areas of uncertainty and that their compromise must appear reasonable to a reviewing court. It is not surprising that prosecutorial attempts to prevent judges from reviewing bargains appall the courts. If the courts truly care to review plea bargains, they might condition their acceptance of a plea upon an agreed summary by the parties of the nature, scope, and reasons for any plea agreement. But their concern does not yet run so deep.

144. *Dix*, *supra* note 1, at 205. Justice Black used language that has become more familiar: "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

has been described as the loss of rights "without ever having made a deliberate, informed decision to relinquish them, and without having ever been in a position to make a cost-free decision to assert them. Unlike waiver, forfeiture occurs by operation of law without regard to the defendant's state of mind."¹⁴⁵ That the difference between the concepts can be more apparent than real is best demonstrated by a series of hypothetical situations, all of which assume that the defendant is charged with first-degree murder for shooting his wife.

Situation 1.

The defendant, advised by competent counsel about all aspects of the case and all his rights, constitutional and otherwise, pleads guilty to second-degree murder. After the key prosecution witness dies of heart failure, the defendant attacks his plea, asserting a fact that the state stipulates is accurate: Had the defendant chosen to go to trial, the trial would have occurred after the witness's death and the government would have had insufficient evidence to go forward. Counsel did not tell the defendant that the witness might die of a heart attack, although they did discuss the uncertainty of litigation. Most circuits and commentators probably would agree that when the defendant admitted his guilt,¹⁴⁶ he waived the right to challenge the conviction on the ground that insufficient evidence existed to convict him beyond a reasonable doubt,¹⁴⁷ even though he did not and could not know that the key witness would die.

Situation 2.

The defendant's lawyer advises him as fully as in Situation 1, and, in addition, tells him about the right to jury trial, the advantages and disadvantages of a jury, and how it is selected. Pursuant to a plea bargain, on the trial date the defendant pleads guilty and is sentenced. Thereafter, he sees the jury panel that will hear the case to be tried in place of his. To his surprise, the defendant finds a disproportionately large percentage of his minority group on the jury panel. He challenges his plea on the ground that he never would have waived his right to a jury trial had he known the panel's composition, and that he could not validly relinquish the right to jury without that information. Few courts would hesitate even momen-

145. Westen, *supra* note 5, at 1214.

146. *Cf.* United States v. Ramirez, 513 F.2d 72, 78 (5th Cir. 1975) (defendant's guilty plea not vitiated by government's failure to inform him that its key witness would not have been able to testify at trial).

147. *See generally In re Winship*, 397 U.S. 358 (1970).

tarily to call this a valid waiver. The defendant can waive the right to a jury trial if he understands enough about juries generally to decide to forego one.¹⁴⁸

Situation 3.

The defendant reveals to his counsel facts sufficient to suggest that he killed in self-defense, but after a thorough investigation the only evidence of self-defense his counsel can develop is the defendant's own testimony. The defendant considers his prior record and its likely use as impeachment evidence should he testify and pleads guilty to second-degree murder. Subsequently, witnesses come forward with evidence previously unknown to the prosecution or the defense to support the self-defense claim. It is doubtful that the defendant could maintain that because he did not know of the evidence and could not therefore have foregone the right to use it in his behalf,¹⁴⁹ he did not knowingly and intelligently forego his right to present a defense.¹⁵⁰

Traditionally, courts have treated the three hypotheticals as waiver problems and have found the waiver doctrine inclusive enough to bar post-plea challenges by the three defendants. Use of the waiver concept has led courts to inquire into exactly what information the defendants had when pleading and exactly what they did not know. Thus, the bottom line question for the courts was always "did they know enough?" A forfeiture analysis suggests that this is the wrong question and that states, by accepting guilty pleas, can avoid having it asked and answered. It is this analysis that I find unacceptable, since I believe that the basic concept of a guilty plea is "almost total waiver."¹⁵¹ The mistake made by those who question the waiver analysis is that they confuse waiver with perfect knowledge. The two are not the same.

Choices are usually made with only imperfect knowledge. One of the things that bargaining allows is negotiation about uncertainty. To satisfy the Supreme Court's requirement that a guilty plea be

148. *Cf. Henderson v. Morgan*, 426 U.S. 637 (1976) (distinguishing critical elements of an offense from other elements).

149. I do not suggest that states should not permit newly discovered evidence claims on behalf of those who plead guilty. Arguably, innocence should matter to a state. *See* note 70 *supra*. But a state is not required to permit such claims to be raised after the Supreme Court's decision.

150. *See generally Chambers v. Mississippi*, 410 U.S. 284 (1973), for an example of judicial recognition of the right to put on a defense.

151. *See* note 155 *infra*.

knowing and intelligent,¹⁵² and shown to be so on the record,¹⁵³ the defendant must understand how much he loses by a guilty plea. If he understands that a plea automatically results in the loss of opportunities to raise certain claims, the defendant who chooses to plead may be said to have made a deliberate, informed waiver.¹⁵⁴ Therefore, a defendant should be instructed¹⁵⁵ by the trial judge¹⁵⁶ as follows:

You have indicated that you wish to plead guilty. Our rules provide that if you plead guilty you give up the right to challenge on almost all grounds the conviction that will result from your plea. Although the law provides that in the most limited circumstances a post-plea challenge can be raised, the cases in which such challenges will be considered are few. [This jurisdiction has a rule that any claim not raised before a plea is entered is lost. You have raised no claims prior to pleading and, therefore, no claim possibly could be heard afterwards.]¹⁵⁷ The fact is that you will be giving up the opportunity to use newly discovered evidence and to take advantage of changes in the law that might occur subsequent to your plea. You will be admitting guilt, finally and with no hope of a challenge to your conviction. Your lawyer is required to represent you competently and if you have any questions about what you are giving up, you should talk to your lawyer again. I shall be happy to give you time to do so.¹⁵⁸ If you or your attorney would like to address any questions to the court, you may do so, and the court will endeavor to answer them.

A defendant who pleads guilty after hearing this instruction waives all claims that the Supreme Court has held are lost by a plea. If the

152. *Johnson v. Zerbst*, 304 U.S. 458 (1938).

153. *Boykin v. Alabama*, 395 U.S. 238 (1969). See also *Blackledge v. Allison*, 431 U.S. 63 (1977); *Suggs v. LaVallee*, 570 F.2d 1092 (2d Cir. 1978); *United States v. Adams*, 566 F.2d 962 (5th Cir. 1978); *State v. Vensel*, 88 Wash. 2d 552, 564 P.2d 326 (1977).

154. Courts always emphasize the extent of the defendant's knowledge at the time of his plea when evaluating the validity of a conviction based upon a guilty plea. See, e.g., *Henderson v. Morgan*, 426 U.S. 637 (1976); *Commonwealth v. Tabb*, 477 Pa. 115, 383 A.2d 849 (1978).

155. Professor Spritzer pointed out the need for special care in taking guilty pleas in *Spritzer, Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473, 476 (1978):

In the "guilty plea" case . . . there are impressive reasons for adopting the waiver standard. There is no question that the rights being abandoned—the totality of rights associated with the criminal trial—are of the most basic character. The defendant is not giving up a single privilege or prerogative that might affect the result; he is forfeiting the entire ball game. Moreover, the setting in which the plea is tendered—a formal proceeding before the judge—is one ideally suited to the kind of inquiry that the waiver principle dictates. Finally, it is difficult to perceive any legitimate societal interest in the acceptance of a plea that is the product of improper influence or misapprehension.

156. Cf. *Commonwealth v. Cathey*, 477 Pa. 446, 384 A.2d 589 (1978) (necessity of personal notice of appeal rights).

157. Or, "you have raised several claims, but none is of the type that can be pursued following a guilty plea." Or perhaps, "you have raised several claims, but only the following will remain alive after your plea is taken."

158. If the defendant does then consult his counsel, the judge would repeat this entire instruction except for this sentence and the preceding one.

notice feature is added, and no notice of claims is supplied by a defendant, even double jeopardy and other claims that currently are preserved after a guilty plea also would be lost. The defendant waives known rights, although the details of the rights are somewhat uncertain.

Thus, the guilty plea cases do not allow for the loss of rights without the defendant's knowing choice. The decision to plead involves some degree of uncertainty, but it is still a choice. Moreover, the defendant makes a deliberate, informed decision. This is the purpose of providing counsel. It should not be overlooked that under the Supreme Court's decisions, a defendant could attack any guilty plea on the ground that his counsel rendered inadequate service.¹⁵⁹ Rather than viewing the Court's decisions as involving forfeiture, they may be viewed as involving waiver under extremely uncertain circumstances.¹⁶⁰

The forfeiture analysis may be more attractive where a defense counsel fails to raise a claim even though it existed before the plea's entry and where the defendant argues that he would have raised it had his lawyer advised him of it. If no reasonable lawyer would have failed either to raise or to inform his client of the claim, there is every reason to believe that under the Supreme Court's holdings the lawyer who failed to do so would be deemed ineffective and the plea would be set aside. When a claim is less important and a lawyer disregards it to work on more important issues, and a court says that this decision lies within the reasonable competence of a lawyer, the court in effect tells the criminal defendant that it may validly refuse to hear constitutional claims that are not raised in accordance with reasonable procedural rules.

Such a judicial statement recognizes that constitutional rights have two parts: the underlying substantive right and the procedural guarantees that surround it. The Supreme Court's decisions indicate that once the state recognizes a substantive right, it must afford the criminal defendant reasonable opportunities to claim that right, and it must guarantee him reasonably competent assistance in doing so. In the Court's view, this is all that the Constitution mandates. Even in this context, however, to speak of forfeiture invites error. If a defendant claims that his confession is coerced, but he fails to raise that

159. Professor Alschuler agrees that "it may be reasonable to equate a competently counseled guilty plea with a knowing guilty plea." Alschuler, *supra* note 5, at 55.

160. At some point, the uncertainties might be too great to have a valid waiver. Recognition of this possibility is nothing more than reiteration of the bottom line question raised in the text accompanying note 151 *supra*.

claim before pleading guilty, he cannot assert the claim in a later collateral attack on the conviction. However, if prosecuted for a second crime to which the same confession relates, the defendant almost surely can move to suppress the confession. Thus, he may still vindicate the underlying constitutional right. Furthermore, even if the *Ellis* dissent is correctly interpreted as attacking the recognition of a collateral attack on a statute by one who has pleaded guilty (an attack cleverly posed in the nature of a civil suit), no opinion of the Court bars a civil suit, even by one who has pleaded guilty, against police officers who unconstitutionally coerce a confession. The civil rights suit would challenge the police officers' conduct, which is no more constitutional after a final conviction than before.¹⁶¹ For these reasons, the term "forfeiture" is unhelpful in analyzing the guilty plea cases.¹⁶²

It is important to reject the concept of forfeiture with its implication that nothing limits the state's ability to impose hidden costs on criminal defendants once they choose to plead guilty. That a state has an interest in imposing such costs does not answer the question whether it may do so in the face of a subsequent challenge asserting the defendant's ignorance at the time of his guilty plea. The state always has an interest in obtaining maximum benefits at the lowest price from those it opposes in litigation.¹⁶³ But the constitutional safeguards developed to protect criminal defendants suggest that the state can further its interest only by offering the defendant an informed choice. That the choice involves uncertainty does not mean that no real choice exists, since, as was demonstrated above, most choices involve some uncertainty. Under the circumstances, the uncertainty may be so great that the court will find it fundamentally unfair to accept a plea,¹⁶⁴ but the guilty plea cases suggest that such instances probably will be rare. As long as the defendant has a fair opportunity to choose between preserving claims and pleading

161. One might argue that the failure to raise a claim in the first case should bar its being raised later. See *Currie, Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317 (1978). But this would "push res judicata beyond where . . . any court has intentionally gone." *Id.* at 349-50.

162. The defendant who pleads guilty and the defendant who goes to trial both may "lose" an opportunity to raise claims not raised by competent counsel.

163. States should, of course, also realize that they have an interest in fair procedures.

164. One of the best examples of a state's unfair exploitation of uncertainty occurs when a criminal defendant agrees to plead guilty if the prosecutor recommends a certain sentence, and the trial judge indicates he will accept the plea if the defendant understands that a different sentence may nonetheless be imposed. Although the defendant is aware of the uncertainty, almost certainly he expects the recommendation to be accepted. If it is not, the defendant should be allowed to replead. For an example of how outrageously far courts will go to sustain pleas, see *Lilly v. Commonwealth*, — Va. —, 243 S.E.2d 208 (1978).

guilty, the waiver concept governs and there is no need to recognize a doctrine of forfeiture.

IV. CONCLUSION

A. *The Cases Reconciled*

Unlike most of the commentary on the Supreme Court's guilty plea cases, this Article has attempted to demonstrate that those cases can be reconciled. I have tried to show why the line between lost and preserved guilty pleas is drawn to vindicate certain constitutional rights. Drawing a line between constitutional defenses designed in large measure to limit the imposition of litigation on criminal defendants and other constitutional claims not only is defensible, it also makes a good deal of sense in the guilty-plea systems of the many jurisdictions which increasingly emphasize finality. If it is clear to the defendant who contemplates pleading guilty that a plea made with the advice of counsel competent to explain the benefits and risks of going to trial is indeed final, due process concerns are satisfied when subsequent attempts to raise claims are rejected (at least as long as plea bargaining is an acceptable part of our criminal justice system). However, no matter how clearly the state stresses a guilty plea's finality, the defendant who pleads guilty must have the option of raising certain constitutional claims, like double jeopardy, which are based on cost-minimization principles. Those claims, this Article argues, survive a guilty plea unless (1) the defendant explicitly waives them when pleading; or (2) the defendant fails to satisfy the jurisdiction's requirement of a pre-plea notice of claim.

B. *The Merits of the Precedents*

With the waiver concept now in hand, it is easy to return to the *Brady* trilogy and *Tollett* to state the difficulty with the opinions: The Court assumed that the defendants who pleaded guilty in those cases either knew what the instruction proposed in this Article would have told them or that it did not matter whether they knew because they would have pleaded guilty anyway. Both assumptions are challengeable and should have been scrutinized in trial courts. Unless a defendant knows that he may lose rights and opportunities to raise claims, those rights cannot legitimately be taken. If the defendant does know, then he can properly waive them, assuming that the court complies with applicable procedural rules in taking the guilty plea. If the defendant does not know, I argue that no "forfeiture"

can be permitted and no waiver found. I suspect that the defendants in the four cases did not know. If they did not, the cases were wrongly decided.

C. *Plea Bargaining Generally*

One of the intriguing things about the *Brady* approach is that it reduces uncertainty (assuming that this Article has now clarified the distinction between claims lost following a plea and those preserved) on one issue—the scope of guilty-plea waiver—by suggesting that a guilty plea ends the line for most pleaders. (A notice requirement would produce even greater certainty.) Hence, it now is clear that the defendant considering whether to plead knows that his plea almost surely will be the final disposition of his case. It is also true, however, that when asked to relinquish all claims, including future ones, some increased uncertainty may complicate the defendant's pleading decision. A defendant will have difficulty predicting what future claims might be lost by pleading guilty. Yet, he must attempt to weigh the loss of those claims, together with the loss of present claims, against the benefits to be gained from pleading guilty. While in theory the trade-off may seem most uncertain, most defendants probably never would benefit from a future claim that is presently unavailable, since such claims are relatively uncommon. As a result, most defendants will know what they are giving up at the time they plead. And the principal effect of the guilty-plea cases will be to promote both certainty and finality.

Ironically, while the Court wanted to legitimate and promote plea bargaining, its guilty-plea cases could undercut the current support for the concept. In truth, guilty pleas have been and will continue to be the product of largely uncontrolled bargaining.¹⁶⁵ Already, dissatisfaction exists with the trade-offs prosecutors make to strike bargains.¹⁶⁶ Once the Supreme Court's decisions are reconciled and properly understood, the greater finality and certainty that they produce may leave criminal defendants less willing to plead guilty. Prosecutors may respond with more generous bargaining offers than heretofore, and in the long run, the increased costs to a defendant associated with finality may require greater prosecutorial

165. The instructions and advice which are furnished to prosecutors still leave them with much room to bargain. See, e.g., U.S. Dept. of Justice, *Materials Relating to Prosecutorial Discretion*, [1978] 24 CRIM. L. REP. (BNA) 3001.

166. See, e.g., Scoppetta, *Getting Away with Murder: Our Disastrous Court System*, SATURDAY REV., June 10, 1978, at 10-13.

concessions to make a plea attractive.¹⁶⁷ If it is true that the hardened criminal bargains most effectively, at some point the concessions will be too great for the public to swallow. Moreover, the disparity between the sentences of those who plead and those who are tried may prove politically unpopular at a time when more uniform sentences seem to be preferred. Perhaps plea bargaining will be retained, but some limits may possibly be placed on its scope.

Brady and its progeny are doctrinally consistent, as this Article demonstrates. But none of the Supreme Court's guilty-plea cases come to grip with the real problems of bargained-for justice. They remain for future consideration.

167. If future defendants commonly arrange to retain certain claims after pleading guilty, plea bargaining may lose favor with the courts, since judges naturally want to avoid post-conviction claims as they struggle with mounting caseloads and demanding speedy trial rules. It may turn out that prosecutors are satisfied to bargain for convictions that make their offices appear effective, even though those convictions are anything but final. This is especially true if the defendant who pleads guilty is likely to go to jail during post-conviction proceedings. It is also possible that prosecutors will prefer to bargain for "tough sentences" by arranging for defendants to preserve numerous post-conviction claims in exchange for a plea. None of this is likely to sit well with the courts. Whether the public will accept it is less clear. That may depend on the number of convictions overturned and the results on retrial.