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Peter Westen

University of Michigan Law School, pkw@umich.edu

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FORFEITURE BY GUILTY PLEA—A REPLY

*Peter Westen**

This freedom from absolute arbitrary power is so necessary to, and closely joined with, a man's preservation, that he cannot part with it but by what forfeits his preservation and life together. For a man not having the power of his own life cannot by compact, or his own consent, enslave himself to any one, nor put himself under the absolute arbitrary power of another to take away his life when he pleases. Nobody can give more power than he has himself; and he that cannot take away his own life, cannot give another power over it [except] having by his own fault forfeited his life by some act that deserves death. . . .¹

Stephen Saltzburg and I agree on what the problem is—to identify the principle that distinguishes the class of constitutional claims a defendant may lose by pleading guilty from the smaller class of claims he retains. But we disagree on the solution. In fact, our disagreement is significantly more profound than Professor Saltzburg suggests. He purports to accept my proposed rule while disagreeing with me only regarding the rule's supporting rationale.² If that were true, this exchange of views would have no practical significance, because both approaches would produce the same actual results. The fact is, however, that Professor Saltzburg and I disagree not only regarding the underlying theory, but also on the content of the consequent rule. And it is no accident that we do: It reflects a more fundamental disagreement between us about the nature of constitutional rights.

I will begin by describing what I think Professor Saltzburg and I both mean by a "legal theory." I then apply that standard to test the validity of the two theories at issue here, first Professor Saltzburg's, then mine. I next discuss a third theory that is independent of both Professor Saltzburg's and mine, *viz.*, that whether a constitutional claim survives a guilty plea depends on whether it is "jurisdictional." Finally, I comment generally on the concept of forfeiture and its influence on the way one conceives of constitutional rights.

* Professor of Law, The University of Michigan. B.A. 1964, Harvard University; J.D. 1968, University of California, Berkeley.—Ed.

1. J. LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT* § 23 (J. Gough ed. 1947).

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

I. THE NATURE OF A LEGAL THEORY

What do we mean by a "legal theory"? One possibility is to analogize a legal theory to a scientific theory. A scientific theory is *predictive*: it is a hypothesis about future behavior based on observation of past behavior. Some legal theories are like that. Thus, it was once said that the theory that best predicted the Supreme Court's behavior under Section 7 of the Clayton Act was that "the Government always wins."³

Nonetheless, that is not what Professor Saltzburg and I mean by a "legal theory." Of course, each of us would be delighted if his theory successfully predicted the Court's behavior, because each believes his theory is sound and should be recognized as a rule of decision. But the validity of our theories does not depend upon their predictive value. On the contrary, if the Court rejects them and reaches results inconsistent with the two theories, we will not be forced to repudiate them; instead, we might conclude that the Court, and not the theory, is wrong.⁴

Another possibility is to analogize a legal theory to an historical theory. An historical theory is *causal*: it is an explanation of past behavior, an hypothesis about why the past occurred as it did. Some legal theories serve the same purpose. Thus, it has been suggested that what best explains the Court's decisions in certain freedom-of-association cases is that the Court sympathized with the NAACP but disdained the Communist Party.⁵

Again, however, Professor Saltzburg and I mean something else. We would be delighted, of course, if our theories proved to be consistent with every case the Supreme Court has decided; but the measure of these theories is not the extent to which they explain past judicial behavior. If the theories are shown to be inconsistent with one or more of the Court's previous decisions, we will not be forced to scrap the theories altogether or create exceptions to accommodate the aberrant cases; instead we might conclude that the theories are

3. *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

4. For example, Professor Saltzburg and I both believe (though for different reasons) that a defendant's sixth amendment right to a speedy trial ought to survive a guilty plea; yet neither of us would be surprised if the Court decided the issue the other way. If that happens—that is, if the Court decides that the right to a speedy trial does not survive a guilty plea—Professor Saltzburg and I will not necessarily be forced to repudiate our theories. On the contrary, unless the Court supports its decision with a persuasive explanation, we might well conclude that it is the Court, and not our respective theories, that is wrong. For a discussion as to whether a defendant's sixth amendment right to a speedy trial ought to survive a guilty plea, see note 67 *infra*.

5. See M. SHAPIRO, *FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW* 161-62 (1966); Frantz, *The First Amendment in the Balance*, 71 *YALE L.J.* 1424, 1441-42 (1962).

sound and that the aberrant cases are wrong.⁶

A third possibility is the analogy to a moral theory. A moral theory is *prescriptive*: it is a normative statement about how one *should* behave. This comes closer to the mark because, at the very least, we each believe our respective rules reflect shared intuitions about procedural justice. But this is still insufficient to describe our enterprise, because a proposed rule can be intuitively just and yet have nothing in common with the way courts actually behave. Professor Saltzburg and I both purport to say something more than what the law should be; we each believe our proposed rules correspond with—and describe—what the law is now.⁷

Thus far we have explored and rejected three possible definitions of what Professor Saltzburg and I mean by a legal theory. There is a fourth possibility—namely, a strong form of the third model combined with weaker forms of the other two: By “legal theory” we mean a just and rational rule that *generally* explains the Court’s behavior in the past and, therefore, has a *plausible* likelihood of being adopted as a rule of decision in the future. In other words, our purpose is to propose a rule of decision for the treatment of constitutional defenses following pleas of guilty that has a plausible claim to being explicitly adopted. To make such a claim, the rule must be rational and coherent; it must correspond with society’s shared intuitions about procedural fairness; and it must be generally consistent with past judicial behavior.

II. THE SALTZBURG SOLUTION

Professor Saltzburg is ambivalent about the actual terms of his proposed rule. On one hand, he believes that his rule is identical to mine, because he purports to accept mine (with some minor amendments);⁸ on the other hand, he also seems to believe that his rule is different from mine, because he suggests that the two rules will pro-

6. For example, toward the end of his article, Professor Saltzburg suggests that a defendant should *never* be held to lose constitutional claims by pleading guilty unless it can be shown that he explicitly and knowingly waived them. Saltzburg, *supra* note 2 at 1305-07. He concludes, however, that in the event of conflict between his suggestion and the Court’s decided cases, it is the cases themselves, not his theory, that are “wron[g].” *Id.* at 1307.

7. Professor Saltzburg contends that his proposed rule is “consistent” with “all the guilty plea cases.” Saltzburg, *supra* note 2, at 1267. To the extent it is, his proposed rule should be distinguished from the separate suggestion he makes toward the end of his article—that a defendant should not lose constitutional claims unless he knowingly and explicitly waives them. *Id.* at 1305-07. Professor Saltzburg recognizes that this latter proposal is difficult to square with the Court’s decided cases, yet he believes it *should* be adopted by the Court as a rule of decision.

8. *Id.* at 1267, 1268, 1285.

duce different results in particular cases.⁹ To clarify this ambiguity, we must turn to Professor Saltzburg's stated rationale for his rule, because the rationale must inform the rule. Once we understand the rationale, we can deduce the resulting rule and then determine whether it is identical to mine.

Professor Saltzburg's thesis is straightforward: Certain constitutional rights (of which double jeopardy is the paradigm) are designed in large part to protect defendants not from the consequences of trial, but from the burdens of the trial process itself. A defendant should not have to endure an entire trial in order to assert such claims because, even if the claims are eventually vindicated, asserting them entails the very costs and burdens that they are designed to avoid. Accordingly, a defendant who wishes to assert such claims without going to trial should be allowed to plead guilty and assert them following the conviction entered upon his plea. In Professor Saltzburg's words:

[A]ll 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. . . . Forcing defendants to go to trial to assert such claims negates their value and is intolerable. Hence, defendants wishing to raise [such claims] cannot be forced to incur the costs of trial¹⁰

Now that we have identified the rationale for Professor Saltzburg's rule, we can formulate the rule itself. The rule would go something like this: A defendant who pleads guilty may subsequently challenge his conviction on any constitutional ground that is designed in large measure to spare him the burdens of the trial process itself, unless he freely and intelligently waives the claim.¹¹

9. Professor Saltzburg implies, for example, that both *Blackledge v. Perry*, 417 U.S. 21 (1974), and *Menna v. New York*, 423 U.S. 61 (1975), would be decided differently under his theory than under mine. See Saltzburg, *supra* note 2, at 1284-85.

10. Saltzburg, *supra* note 2, at 1267. See also *id.* at 1286.

11. Professor Saltzburg apparently believes a defendant can waive *any* constitutional right, provided that the waiver is voluntary and intelligent. *Id.* at 1293, 1303, 1305. Accordingly, if, in pleading guilty, a defendant explicitly waives a constitutional claim, Professor Saltzburg would presumably preclude the defendant from thereafter asserting it. The only exception he envisages is the situation in which a defendant waives his right to argue that the conduct to which he is pleading guilty cannot constitutionally be made a crime; Professor Saltzburg would allow a defendant to waive such a claim as part of a negotiated plea, but would otherwise treat it as nonwaivable. It should be noted, however, Professor Saltzburg treats those claims as nonwaivable for reasons that are independent of his general thesis regarding "trial avoidance" defenses; as far as his trial-avoidance thesis is concerned, a defendant could waive

It should be apparent by now that Professor Saltzburg's rule is very different from my own.¹² What is more, his rule fails to satisfy even his own standard of what a legal theory should be. His rule is not only inconsistent with the controlling precedents, but it is premised on an assumption about the criminal process that has no relationship to the way criminal cases are actually litigated.

A. *The Problem of Precedent*

With respect to the controlling precedents, Saltzburg's rule is both overinclusive and underinclusive. That is, his rule would not only preserve constitutional claims which the Supreme Court believes may be extinguished by a plea of guilty, it would extinguish claims which the Supreme Court believes survive a plea of guilty.

1. *Overinclusiveness*

*Tollett v. Henderson*¹³ exemplifies the kind of constitutional claim that the Court allows a defendant to lose by pleading guilty, but that Professor Saltzburg thinks survives. Willie Lee Henderson, a black defendant, pled guilty to a state grand jury's indictment charging him with first-degree murder. Twenty years later he challenged his conviction, arguing that the indictment had been returned by a grand jury from which blacks had been unconstitutionally excluded. The lower court agreed that the indicting grand jury had been unconstitutionally empaneled, and ordered that Henderson be released from custody. The Supreme Court reversed. The Court assumed, *arguendo*, that Henderson had been unconstitutionally indicted, but it nonetheless denied relief: "just as the guilty pleas in the *Brady* trilogy were found to foreclose direct inquiry into the merits of claimed antecedent constitutional violations there, we conclude that [Henderson's] guilty plea here alike forecloses independent inquiry into the claim of discrimination in the selection of the grand jury."¹⁴

A defendant's right to be indicted (or otherwise lawfully charged) in a constitutional manner is a classic example of the "avoidance"

any constitutional claim in any setting, provided that the waiver was voluntary and intelligent. Thus, to create an exception for the class of constitutional claims that goes to the authority of the state to make the defendant's conduct a crime, Professor Saltzburg must invoke a separate and entirely independent theory—that the state should not be able to hold a defendant to his waiver if it has "no interest" in doing so. *Id.* at 1294. Ironically, this is precisely the rationale that underlies the Reliance Theory of forfeiture.

12. For a fuller explanation of my own theory, and of the differences between it and Professor Saltzburg's, see Part III *infra*.

13. 411 U.S. 258 (1973).

14. 411 U.S. at 266.

claims that Professor Saltzburg thinks survive a guilty plea. He describes "avoidance" claims as designed to protect defendants from "the financial, emotional, and other costs" of trial.¹⁵ In his own words, they are rights "premised on cost avoidance—that is, on avoiding any trial on the merits."¹⁶

The right not to stand trial except upon lawful indictment by grand jury, is, *par excellence*, an "avoidance" right.¹⁷ The very words of the fifth amendment make explicit that its purpose is to protect defendants from being wrongfully forced to stand trial: "No person shall be *held to answer* for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ."¹⁸ The Supreme Court, too, has held that the fifth amendment protects defendants "from the trouble, expense, and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury."¹⁹ In Justice Field's words:

The institution of the grand jury . . . is of very ancient origin in the history of England—it goes back many centuries. . . . [T]he institution was adopted in this country, and is continued from considerations similar to those which gave it its chief value in England, and is designed as a means . . . of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country . . . to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for this accusation and trial.²⁰

In short, *Tollett* is directly contrary to Professor Saltzburg's thesis, because, while it involved the kind of "avoidance" right that he thinks must survive a guilty plea, the Court squarely held that the right was lost by the defendant's plea of guilty.

To be sure, Professor Saltzburg tries to extricate himself from the holding in *Tollett* by pointing out that *Tollett* was a state proceeding to which the fifth amendment right to indictment by grand jury did

15. Saltzburg, *supra* note 2, at 1286. He also describes them as "claims . . . substantially concerned with avoiding litigation and its attendant costs." *Id.* at 1267.

16. *Id.* at 1286.

17. *Id.* at 1267.

18. U.S. CONST., amend. V (emphasis added).

19. *Ex parte Bain*, 121 U.S. 1, 12 (1887) (quoting Chief Justice Shaw in *Jones v. Robbins*, 74 Mass. (8 Gray) 329, 344 (1857)).

20. 121 U.S. at 10-11 (quoting Justice Field's charge to a grand jury in an unrelated case).

not apply.²¹ But there are two problems with that response. For one thing, the constitutional right that *was* at issue in *Tollett*—the right to be criminally charged in a racially nondiscriminatory manner—is also designed to protect defendants from wrongly having to stand trial.²² Furthermore, even if *Tollett* were distinguishable on its facts, Professor Saltzburg must argue that *Tollett* would have been decided differently if it had involved a federal defendant challenging his grand jury indictment on fifth amendment grounds. Yet Professor Saltzburg must know that if the Supreme Court ever takes such a case, it will do exactly what all the lower courts have done—it will follow *Tollett* and hold that federal grand jury objections are lost by pleas of guilty.²³

21. Saltzburg, *supra* note 2, at 1289 n.104.

22. Take *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), for example. The defendant in *Yick Wo*, a Chinese, was convicted of operating a laundry in a wooden building in violation of a municipal ordinance. He admitted that he was guilty, but appealed on the ground that he had been wrongly singled out for prosecution because he was Chinese. The Court agreed and reversed the conviction, holding that since the prosecution was based on the criterion of race, the defendant should never have been prosecuted in the first place. Thus, the Court held that the remedy for violation of a defendant's constitutional right to nondiscriminatory prosecution is to bar the prosecution for as long as the discrimination continues.

To be sure, constitutional violations of this kind can be "cured" by nondiscriminatory re-prosecuting the defendant (and others similarly situated); a defendant like *Yick Wo* could be retried if the state could show that his prosecution was part of a policy of nondiscriminatory enforcement. But that does not mean that the constitutional claim in *Yick Wo*—*i.e.*, the right to nondiscriminatory prosecution—is not designed to protect defendants from the burdens of prosecution. It merely means that the right to a remedy for the violation of this particular claim ceases as soon as the violation itself ceases. In that respect, the right to be free from discriminatory prosecution very much resembles the right to indictment by grand jury: Both are premised on a trial-avoidance rationale; both protect defendants from the burdens of the litigation process itself in cases in which the process is commenced in an unconstitutional manner; but in each case the right to be free from prosecution is conditioned upon a showing of an underlying violation, and if the violation ceases, so does the right to be free from prosecution. In other words, it is true that a defendant's immunity from prosecution may not be permanent following the violation of his right to indictment by grand jury or his right to nondiscriminatory prosecution. But that does not mean that those two rights are not based on a trial-avoidance rationale. Rather, it means that the two rights, though based on a trial-avoidance rationale, are incomplete defenses that can be "cured" by reinstituting the prosecution in a proper manner.

The foregoing discussion is simply another reminder that the real distinction between claims that survive a guilty plea and claims that are extinguished is not the difference between trial-avoidance and non-trial-avoidance claims, but the difference between complete (or incurable) defenses on the one hand, and incomplete (or curable) defenses on the other. If it is true (as I believe it is) that the controlling distinction is whether a constitutional claim is complete or incomplete, then Professor Saltzburg's proposed rule fails to correspond to the distinction. That is, trial-avoidance claims may be either complete defenses (*e.g.*, the right to be free from re-prosecution following an acquittal), or incomplete defenses (*e.g.*, the right to indictment by grand jury); conversely, non-trial-avoidance claims may be either complete defenses (*e.g.*, the right to be free from double punishment), or incomplete defenses (the right to trial by jury). Consequently, Professor Saltzburg's distinction between trial-avoidance and non-trial-avoidance claims is of no use in distinguishing the kinds of claims that survive a guilty plea from the kinds that are extinguished.

23. *Cox v. United States*, 428 F.2d 877 (9th Cir. 1970); *Rice v. United States*, 420 F.2d 863 (5th Cir. 1969), *cert. denied*, 398 U.S. 910 (1970); *Hopkins v. United States*, 344 F.2d 229, 234

2. *Underinclusiveness*

Conversely, there are certain constitutional claims that the Supreme Court believes should survive a guilty plea but which Professor Saltzburg would allow to be lost. Examples can be found both in the law of double jeopardy and in the context of unconstitutional statutes. In each case, the Supreme Court has held that such claims survive a guilty plea, while Saltzburg would allow them to be extinguished.

a. *Double jeopardy*. The double jeopardy clause entails three separate guarantees: (1) it protects a defendant from being retried for the same offense following an acquittal; (2) it protects him in certain ways from being retried for the same offense following a conviction or mistrial; and (3) it protects him from double punishment for the same offense.²⁴ The first two guarantees, which invariably arise in the context of a second prosecution, are designed in part to protect defendants from the burdens of the second proceeding; to that extent Professor Saltzburg is justified in describing them as "cost avoidance"²⁵ defenses. But the third guarantee is not so designed. The right of a defendant to be free from double punishment does not necessarily arise in the context of a second prosecution, nor can it be said to rest on any notion of trial "avoidance." Consequently, to be consistent, Professor Saltzburg must argue that certain double jeopardy claims—those relating to double punishment—do not survive a guilty plea.

This point is best illustrated by example. Assume that a single indictment charges a defendant with both a greater and a lesser-included offense, say, felony murder plus the underlying felony. The defendant pleads guilty to both counts and receives full consecutive sentences on both felony murder and the underlying felony. It subsequently appears that the relationship between felony murder and the underlying felony is such that to sentence a defendant on both counts for a single homicidal felony violates the double jeopardy clause.²⁶

(8th Cir. 1965); *Michener v. United States*, 170 F.2d 973, 975 (8th Cir. 1948); *Alaway v. United States*, 280 F. Supp. 326, 333 (C.D. Cal. 1968).

24. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). See generally Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81.

25. Saltzburg, *supra* note 2, at 1286.

26. See, e.g., *Harris v. Oklahoma*, 433 U.S. 682 (1977). To be sure, the two consecutive sentences in *Harris* were imposed, not in a single proceeding, but at successive proceedings; but the Supreme Court has said that if two offenses are the same for the purposes of the rule against imposing multiple punishments, it makes no difference whether the sentences are imposed at a single proceeding or successively. See *Brown v. Ohio*, 432 U.S. 161, 166 (1977).

It should be obvious that the constitutional claim in this hypothetical case is not based on a theory of trial "avoidance." There is nothing unlawful about requiring a defendant to stand trial on the consolidated indictment, provided that the jury is instructed that he may not be convicted of more than one of the two offenses; nor is there anything unlawful about requiring a defendant to plead to the consolidated indictment, provided, again, that he is not sentenced on more than one count.²⁷ Consequently, if Professor Saltzburg were deciding this case, he would have to rule that the defendant had "waived" his double jeopardy claim by pleading guilty. Yet that is contrary to the force of Supreme Court precedent and to the view of every court that has explicitly considered the issue.²⁸

b. *Unconstitutional statutes.* Professor Saltzburg also has trouble with what other commentators take to be the easiest of the cases, that in which a defendant pleads guilty to a charge that cannot constitutionally be made a crime. Consider, for example, *Haynes v. United States*.²⁹ The defendant, Haynes, pled guilty to an information charging him with the crime of failing to register possession of a firearm. Thereupon he challenged his conviction, arguing that the firearms statute was unconstitutional because by requiring that he register his illegal firearm, the statute compelled him to incriminate himself in violation of the fifth amendment. The Supreme Court agreed that this could not constitutionally be made a crime. More important, noting that the claim was "a full defense to prosecutions"³⁰ under the statute, the Court held that the defendant could assert his fifth amendment claim despite having pled guilty.

Professor Saltzburg endeavors to square *Haynes* with his pro-

27. See *Iannelli v. United States*, 420 U.S. 770, 786 n.18 (1975) (no constitutional barrier to requiring a defendant to stand trial on separate charges—even though they constitute the "same offense" for double jeopardy purposes—provided that the defendant is not given multiple sentences). See also *United States v. Gaddis*, 424 U.S. 544, 548-50 (1976).

28. See, e.g., *Launius v. United States*, 575 F.2d 770, 771 (9th Cir. 1978); *Sherley v. Commonwealth*, 558 S.W.2d 615, 618 (Ky. 1977) (dictum); *State v. Franklin*, 337 So. 2d 1152, 1154 (La. 1976); *State v. White*, 300 Minn. 99, 105-06, 219 N.W.2d 89, 93 (1974). The Supreme Court has not yet addressed this issue directly, but its behavior in a related line of cases suggests that it is as likely (if not more likely) to preserve double punishment issues for review as other double jeopardy questions. Thus, in originally deciding what kinds of double jeopardy questions were sufficiently serious to justify collateral attack by writ of habeas corpus, the Court held that while a defendant could not raise double jeopardy issues relating to retrial following a mistrial or prior conviction, he could raise double jeopardy issues relating to double punishment. Compare *Ex parte Bigelow*, 113 U.S. 328 (1885) (defendant may not use writ of habeas corpus to raise double jeopardy issues relating to re-prosecution following a mistrial), with *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873) (defendant may raise double jeopardy claims relating to double punishment by writ of habeas corpus).

29. 390 U.S. 85 (1968).

30. 390 U.S. at 100. See also 390 U.S. at 87 n.2.

posed rule; but he has a difficult time of it because the constitutional claim in *Haynes*—*i.e.*, the right not to have to register an incriminating firearm—has nothing whatever to do with protecting criminal defendants from the “costs” of trial. The answer, Professor Saltzburg says, is that the privilege against self-incrimination protects defendants not only from *being penalized* for asserting their right to remain silent, but also from *having to litigate* their right to remain silent. In Professor Saltzburg’s own words:

In essence, [the] 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 cost 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*, who pleaded guilty to a federal firearms statute violation, could raise a constitutional claim after pleading.³¹

There are at least two problems with this gambit. For one thing, there is no reason to believe that the right to remain silent (or any other constitutionally protected activity, for that matter) is designed to immunize defendants from the cost of litigating the existence of the right. On the contrary, the Court has squarely held that the privilege against self-incrimination protects defendants from being punished for remaining silent, not from having to litigate their right to remain silent.³² Furthermore, if the privilege against self-incrimination were construed as Professor Saltzburg suggests, every defendant who pleads guilty in the face of a coerced confession could challenge his conviction on the same ground, because he could argue (as Professor Saltzburg does with respect to the defendant in *Haynes*) that within his substantive right not to be forced to confess is the right to avoid the “litigation costs”³³ of a trial by pleading guilty while retaining his fifth amendment claim. Perhaps Professor Saltzburg would accept that result. But he would have to admit that, at the very least, it requires overruling both *McMann v. Richardson*³⁴ and *Parker v. North Carolina*.³⁵

31. Saltzburg, *supra* note 2, at 1291-92 (footnote omitted).

32. *Garner v. United States*, 424 U.S. 648, 663-65 (1976); *United States v. Ryan*, 402 U.S. 530, 532-33 (1971).

33. Saltzburg, *supra* note 2, at 1288.

34. 397 U.S. 759 (1970) (defendant, by pleading guilty, forfeits his fifth amendment challenge to the evidence on which he would have been tried).

35. 397 U.S. 790 (1970) (defendant, by pleading guilty, forfeits his right to challenge an involuntary confession).

In conclusion, Professor Saltzburg's proposed rule directly contradicts major precedents. This would not be so bad if he were advancing a moral theory (as opposed to a legal theory), or if the inconsistencies offended only a few of many existing precedents. But it must be remembered that the Supreme Court has spoken in this area scarcely more than a half-dozen times. Considering that Professor Saltzburg purports to explain the Court's past behavior, and considering that his proposal conflicts with, perhaps, half the cases the Court has decided, he fails even his own test of a legal theory.³⁶

B. *The Problem of Principle*

Professor Saltzburg's proposal is not only inconsistent with precedent, it is flawed in principle: It is premised on an assumption about the criminal process that is foreign to the way criminal cases are actually litigated.

Professor Saltzburg's theory contains four essential steps: (1) some constitutional rights are designed in part to spare defendants the burdens of the trial process itself; (2) defendants possessing such rights—*i.e.*, rights designed to protect them from trial itself—should not have to go to trial in order to assert them; (3) apart from the guilty plea process, defendants are now "*forced*"³⁷ to go to trial in order to assert such rights; (4) consequently, in order to obtain the full benefit of trial "avoidance" rights, defendants possessing such rights should be allowed to plead guilty and yet retain their claims for purposes of collateral attack.

The argument has a nice ring to it because (1) and (2) are undeniably true and because the conclusion, (4), follows ineluctably from the preceding three steps. Unfortunately, step (3) is false. It is simply not true that defendants are "forced" to go to trial in order to assert trial avoidance claims.

Consider, for example, *Blackledge v. Perry*³⁸ and *Menna v. New York*,³⁹ the two principal cases from which Professor Saltzburg derives his theory. The defendant in *Blackledge* pled guilty to an indictment in North Carolina and later challenged the charge on principles of double jeopardy and due process—rights that Professor Saltzburg says are premised on a trial "avoidance" rationale. The defendant was allowed to challenge his guilty plea on those grounds,

36. Professor Saltzburg contends that his "theory" is "consistent" with "all the [Supreme Court's] guilty plea cases." Saltzburg, *supra* note 2, at 1267. See also note 7 *supra*.

37. *Id.* at 1286 (emphasis added).

38. 417 U.S. 21 (1974).

39. 423 U.S. 61 (1975).

Professor Saltzburg says, because otherwise he would have been "forced" to go to trial in order to raise them. But that was not true. As the Supreme Court fully understood, a defendant in North Carolina may challenge an indictment on such grounds at any time, including before trial, and may ask that the trial court hear the motion either before trial or on the date of trial before the jury is empaneled.⁴⁰ Thus, the Court's decision in *Blackledge*, that the defendant's constitutional claim survived his guilty plea, cannot be explained on the ground that he would otherwise have had to stand trial in order to assert the claim.

The same is true in *Menna*. The defendant there pled guilty to a charge which he later challenged on double jeopardy grounds. Again, according to Professor Saltzburg, the defendant was allowed to preserve his double jeopardy claim because otherwise he would have had to stand trial to assert it. But that was clearly not the case. A defendant in New York may challenge his indictment on double jeopardy grounds at any time within forty-five days following his arraignment and may further insist that the trial court hear the motion before trial.⁴¹ Indeed, the defendant in *Menna* not only possessed this pretrial option, he fully exercised it and received a pretrial ruling on the double jeopardy issue.⁴² Consequently, the Court's decision that the double jeopardy claim survived his guilty

40. N.C. GEN. STATS. §§ 15A-954(a)(4-5, 7-8), -952(f) (1978). The Supreme Court can be presumed to have been aware of North Carolina's procedures for asserting defenses before trial, because it explicitly referred to them in *Parker v. North Carolina*, 397 U.S. 790, 798 n.11 (1970).

41. N.Y. CRIM. PROC. LAW §§ 210.20(1)(e), .20(2) (McKinney Supp. 1977).

42. 36 N.Y.2d 930, 931, 335 N.E.2d 848, 849, 373 N.Y.S.2d 541, 542 (Fuchsberg, J., dissenting), *rev'd. on other grounds*, 423 U.S. 61 (1975). To be sure, Professor Saltzburg might argue that while the defendant in *Menna* was allowed to raise the double jeopardy claim by a pretrial motion, he would not have been allowed to appeal from the denial of that motion without first standing trial. Accordingly, so the argument might go, the *Menna* defendant was allowed to plead guilty and then raise his claim by collateral attack, because that was the only avenue available to him for appealing the trial judge's ruling without first standing trial. There are two problems with this argument. First, it assumes that a defendant has a constitutional right to appeal rulings on constitutional claims; yet the Supreme Court has said in the past and insists today that a defendant has no constitutional right to an appeal. *See Abney v. United States*, 431 U.S. 651, 656 (1977); *McKane v. Durston*, 153 U.S. 684, 687 (1894). Second, even assuming that a defendant has a constitutional right to an appeal, the argument assumes that he also has a right to take an interlocutory appeal from the pretrial ruling, rather than to wait for a final judgment; yet the Supreme Court has never held any such thing. On the contrary, the closest the Supreme Court has come is to say that a defendant has a statutory (rather than a constitutional) right to an interlocutory appeal in federal cases; but even there the Court distinguishes between double jeopardy claims and speedy-trial claims. *Compare United States v. MacDonald*, 435 U.S. 850 (1978) (defendant has no statutory right to an interlocutory appeal from a pretrial denial of a speedy-trial claim) *with Abney v. United States*, 431 U.S. 651 (1977) (defendant has a statutory right to an interlocutory appeal from a pretrial denial of a double jeopardy claim).

plea cannot conceivably be explained on the ground that the defendant would otherwise have been "forced" to stand trial to assert it.

Now, Professor Saltzburg might respond in one of two ways. First, while recognizing that defendants can always raise their claims by motion before trial, he seems to argue that the principle of "cost avoidance"⁴³ entitles a defendant to raise his claims "in the least expensive way,"⁴⁴ including by way of pleading guilty wherever that entails "the lowest possible cost" to him.⁴⁵ Unfortunately, that response raises its own formidable problems. For one thing, it is an enormous and unsupported leap in logic to assume that because a constitutional right protects defendants from the emotional and financial costs of standing trial, it must also spare them the costs of a pretrial motion. Consider, for example, the double jeopardy right of a defendant not to be retried following a mistrial declared over his objection. Assuming that the right is designed to protect a defendant from the burdens of a second trial, it hardly follows that it also relieves him of responsibility for objecting to the second prosecution by means of a pretrial motion. Professor Saltzburg presents no argument, either in law or reason, to justify his leap from the right to avoid trial to the further right to assert claims "at the lowest possible cost."

Furthermore, even if trial-avoidance rights do entitle a defendant to raise his claims in the least expensive way, the twofold process of pleading guilty and then challenging the plea collaterally can hardly be described as less expensive than a pretrial motion. If anything, the pretrial motion is less expensive, because it involves only one step while the plea-and-collateral-attack procedure necessarily involves two. When a defendant collaterally attacks a prior guilty plea, he must either file an entirely new lawsuit (as, in federal cases, under 28 U.S.C. § 2255) or make a post-plea motion (as, in federal cases, under rule 32); in either event, the procedure is more complicated than any motion he would otherwise make before trial. Interestingly, Professor Saltzburg implicitly admits as much by conceding that the state can require a defendant to raise his trial-avoidance defenses by pretrial motion in lieu of a plea of guilty.⁴⁶ In short, even

43. Saltzburg, *supra* note 2, at 1286.

44. *Id.*

45. *Id.* at 1287.

46. *Id.* at 1295-99. If Professor Saltzburg is right that the state can constitutionally require a defendant to raise his "cost avoidance" claims by motion before trial, one of two conclusions must follow: *either* the state is not constitutionally required to allow a defendant to raise his claims "in the least expensive way," *or* the two-step process of first pleading guilty and then challenging the guilty plea is not "less expensive" than a pretrial motion. In either event,

if a defendant is constitutionally entitled to raise certain claims in the least expensive way possible, he is never justified in doing so by pleading guilty as long as he can promptly and inexpensively assert his claims beforehand.

Second, while admitting that his theory does not explain *Blackledge* or *Menna*, Professor Saltzburg might argue that *if* a jurisdiction forces a defendant to stand trial to assert his trial-avoidance defenses, *then* a defendant has a constitutional right to assert them by the two-step process of pleading guilty and attacking the plea collaterally. Again, this response raises several problems of its own. On one hand, insofar as it assumes that there *are* jurisdictions that prohibit a defendant from raising trial-avoidance defenses before trial, it is incorrect. As far as I can tell, no such jurisdictions exist, at least not in this country. Indeed, Professor Saltzburg implicitly admits as much, because if such jurisdictions did exist, defendants could plausibly claim a constitutional right to plead guilty in order to assert such defenses; yet Professor Saltzburg admits that defendants in this country have no constitutional right to plead guilty.⁴⁷

On the other hand, insofar as the argument assumes that there are no such jurisdictions, it is entirely hypothetical—a speculative argument for an imaginary jurisdiction. In short, Professor Saltzburg's theory is either a fallacy for jurisdictions that do exist, or a syllogism for jurisdictions that do not. Whichever, it is hardly useful in resolving real cases.

III. THE RELIANCE THEORY

By now it should be apparent that Professor Saltzburg and I disagree on both the appropriate rule of decision and its underlying rationale. The difference between us is that while he focusses on the *content* of constitutional claims, I look to the *effect* of their assertion. He examines the purpose of constitutional claims to determine whether they are designed to spare defendants the burdens of the trial process; I look to their impact to determine whether their belated assertion impairs the ability of the prosecution to sustain its burden of proof at trial.

This latter approach follows from a more general principle I originally advanced—namely, that the state may not extinguish constitu-

Professor Saltzburg's concession regarding mandatory pretrial motions undermines his argument.

47. *Id.* at 1286 n.94, commenting on *Weatherford v. Bursey*, 429 U.S. 545 (1977).

tional defenses unless it can show some *good reason*, viz., some legitimate and sufficient state interest, in precluding a defendant from now asserting them, aside from an unabashed desire that constitutional rights never be invoked.⁴⁸ Accordingly, it follows that a defendant is entitled to assert a constitutional claim at any time, even after a knowing and intelligent announcement that he will not do so, if he can show that the state will suffer no special prejudice from his doing so. Conversely, a defendant may lose a constitutional claim if, by his conduct, he causes the state reasonably to rely to its substantial prejudice on his not asserting it. In the context of guilty pleas, therefore, this Reliance Theory produces the following rule:

(i) A defendant, having pled guilty, may raise any constitutional claim that constitutes a complete defense to the crime charged—*i.e.*, any claim which, if asserted before trial and if valid, would have effectively precluded the state from ever obtaining a lawful conviction on the crime charged—unless the state can show that by pleading guilty, the defendant caused the state reasonably to rely to its serious detriment on his not asserting the claim;⁴⁹

(ii) A defendant, having pled guilty, may be precluded from asserting all other constitutional claims, unless the defendant can show that his belated assertion will not cause the state any substantial prejudice in now taking the case to trial (except for the prejudice that would inevitably have occurred had he asserted the claim from the outset).⁵⁰

Professor Saltzburg raises three principal objections to the Reliance Theory: (A) an “empirical” objection from his perception of the realities of the guilty plea process; (B) an objection from principle; and (C) an objection from precedent. None of these objections is persuasive.

48. See Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure*, 75 MICH. L. REV. 1214, 1236-37, 1260-61 (1977).

49. For example, if a defendant is charged with two separate offenses, he may plead guilty to one on which he has a complete defense in return for the prosecutor's agreement to dismiss the other count to which he has no such defense. In that event, if the defendant has either explicitly or implicitly agreed as part of a negotiated settlement not to challenge his conviction on the first count, and if the prosecutor has relied on that by dismissing the second count, then the defendant should not be permitted to raise the complete defense to the count to which he pled guilty. See *id.* at 1256-58.

50. This formulation of the rule rests on certain “general assumptions,” *id.* at 1249 n.69—namely, that the likelihood of prejudice to the prosecution following a plea of guilty is sufficiently great to justify immediately placing upon the defendant the burden of showing an absence of prejudice. Needless to say, the rule can easily be further refined, or finely tuned, to correspond with the realities of prejudice. Thus, if research shows that the government does not usually suffer prejudice following a guilty plea until the defendant is sentenced, the rule can be changed to allow a certain grace period following a guilty plea in which the government shoulders the burden to show prejudice. See text at notes 53-55 *infra*.

A. *The Empirical Objection*

Professor Saltzburg challenges the Reliance Theory for what he takes to be an underlying empirical assumption. The theory assumes, he says, that the state relies to its detriment on every guilty plea, even where a defendant moves to set aside the plea within "several days"⁵¹ of entering it. Yet empirical evidence suggests, he says, that the entry of guilty pleas does not always prejudice the preparation of criminal cases.

This criticism misconceives both the empirical assumptions underlying the Reliance Theory and the empirical evidence. To begin with, the theory does *not* conclusively presume that every guilty plea prejudices the prosecution. On the contrary, the theory explicitly recognizes that the prosecution does not always rely to its detriment on a defendant's plea and, for that reason, explicitly allows a defendant to escape the consequences of forfeiture by making such a showing. Thus, even if Professor Saltzburg is empirically correct that in "many cases"⁵² the prosecution is not prejudiced, his statement is not responsive, because the Reliance Theory assumes that to be true and takes it into account.

Nor does the theory assume that the prosecution is *immediately* prejudiced by a delay of even "several days" between the plea and the motion to set it aside. On the contrary, as I originally stated, the general rule—that a defendant may not raise an incomplete (or dilatory) constitutional claim after a guilty plea—rests on "general assumptions"⁵³ about the likelihood of prejudice; and, as a general rule, it can always be further refined to account for particular realities of prejudice. Thus, instead of presuming immediate prejudice following a guilty plea, one could prescribe a grace period in which the prosecution bears the burden of demonstrating prejudice. Such is the practice on a nonconstitutional level under federal rule 32: That rule presumes that the prosecution will not be prejudiced by the withdrawal of a guilty plea between entry of the plea and sentencing, and it requires that the prosecution show otherwise; conversely, once the defendant has been sentenced, the rule assumes that the government will be prejudiced and places a heavy burden on the defendant to show otherwise.⁵⁴ Obviously, if the probabilities of prejudice are

51. Saltzburg, *supra* note 2, at 1282.

52. *Id.*

53. Westen, *supra* note 48, at 1249 n.69.

54. See 2 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL §§ 538-39 (1969). See generally *United States v. Barker*, 514 F.2d 208, 218-26 (D.C. Cir.) (en banc), *cert. denied*, 421 U.S. 1013 (1975).

thought to justify it, a similar dividing line can be incorporated into a constitutional rule for the challenge of guilty pleas.⁵⁵

At most, therefore, the rule I propose contains a rebuttable assumption that at some time following a guilty plea, the prosecution will rely to its detriment on the entry of the plea. That assumption is neither startling nor audacious; on the contrary, it is the essential truth underlying the Court's recognition that the state has a legitimate interest "in maintaining the finality of guilty-plea convictions."⁵⁶ Nor does Professor Saltzburg refute that empirical assumption. At most he opines that in some jurisdictions prosecutors may prepare cases targeted for plea bargaining as thoroughly as cases targeted for litigation. Even if that is so (and it is doubtful),⁵⁷ it ignores the fact that bargained-for cases are only a portion of all guilty plea cases and that, of all bargained-for cases, prosecutorial bargaining represents only a further-reduced portion.⁵⁸ It also ignores the fact that even the best-prepared guilty plea case is hardly ever preserved in a form that is readily admissible in evidence. Unlike a case that has already gone to trial and produced a written transcript of evidence, the guilty-plea case exists only in the prosecutor's files, which makes it difficult (if not impossible) for a prosecutor to sustain his burden of proof if his original witnesses have become unavailable.⁵⁹ For all these reasons, the prosecutor has a strong and legitimate interest in the finality of guilty pleas.

55. Three members of the Supreme Court have advocated a constitutional rule containing precisely that same proviso. *Santobello v. New York*, 404 U.S. 257, 267-68 (1971) (Marshall, J., concurring and dissenting, joined by Brennan and Stewart, JJ.):

[I] believe that where the defendant presents a reason for vacating his plea and the government has not relied on the plea to its disadvantage, the plea may be vacated and the right to trial regained, at least where the motion to vacate is made prior to sentence and judgment. . . . It is worth noting that in the ordinary case where a motion to vacate is made prior to sentencing, the government has taken no action in reliance on the previously entered guilty plea and would suffer no harm from the plea's withdrawal.

See also *Neely v. Pennsylvania*, 411 U.S. 954, 957-59 (1973) (Douglas, J., dissenting from denial of certiorari); *Dukes v. Warden*, 406 U.S. 250, 257-58 (1972) (Stewart, J., concurring); 406 U.S. at 264-71 (Marshall, J., dissenting).

56. *McMann v. Richardson*, 397 U.S. 759, 774 (1970).

57. After all, the very purpose of plea bargaining for many prosecutors is to avoid the burden of fully preparing a case for plenary trial. That is one reason why the state is more seriously prejudiced by having to reopen a prosecution following a guilty plea than following a trial. Cf. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 147 (1970) (lack of transcripts of testimony of witnesses who are no longer available may be another reason the state is prejudiced).

58. See Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1, 57 n.187 (1975) (some defendants may plead guilty without any thought that their pleas of guilty will bring a reduction in punishment); Alschuler, *The Trial Judge's Role in Plea Bargaining (pt. I)*, 76 COLUM. L. REV. 1059, 1076-99 (1976) (some defendants plead guilty because of explicit or implicit promises of leniency by the trial judge without reference to any negotiation with the prosecution).

59. See Westen, *supra* note 48, at 1235-36.

In short, Professor Saltzburg's objection is a straw man. He assumes that I believe that the prosecution is *immediately* prejudiced by *every* entry of a guilty plea and then argues that in "many cases"⁶⁰ no such prejudice occurs. If he means that sometimes the government is not prejudiced by the entry of a guilty plea, I heartily agree and, for that very reason, I would allow a defendant to make such a showing. If he means that the likelihood of prejudice is empirically small, and that prejudice does not usually occur even after designated periods of time, then I disagree and call upon him to produce his evidence.⁶¹

B. *The Objection from Principle*

Professor Saltzburg raises two objections from principle. First, considering that defendants are often prejudiced by delays caused by the prosecution, it seems "odd," he says, to give the prosecution "absolute protection against the vicissitudes of delay" caused by the defendant. As he puts it:

[The Reliance Theory] 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, can delay a trial and prejudice his defense to induce him to plead guilty.⁶²

Perhaps I should note at the outset that despite what Professor Saltzburg says, the Reliance Theory does not "depend" upon a one percent (or one tenth of one percent) measure of prejudice. On the contrary, if any *trivial* amount of prejudice sufficed to foreclose a defendant from asserting his constitutional claims, no defendant could ever challenge a guilty plea on constitutional grounds—even in cases like *Blackledge* and *Menna*—because the state could always complain of the wasted costs and effort of the guilty plea procedure itself. Obviously, if *Blackledge* and *Menna* are to be taken seriously, they must be understood as requiring something in the order of "substantial" prejudice.⁶³ In the guilty-plea context, this means that

60. Saltzburg, *supra* note 2, at 1282.

61. Compare this with Friendly, *supra* note 57, at 147 (the longer the lapse of time between the entry of a conviction and the date of retrial, the greater the prejudice to the prosecution).

62. Saltzburg, *supra* note 2, at 1282 (footnote omitted).

63. In stating that prejudice of one tenth of one percent is sufficient to justify forfeiture under the Reliance Theory, Professor Saltzburg may be making one or more of the following assumptions about the nature of forfeiture: (1) if "forfeiture" is extended to its natural implications, it means that the state can arbitrarily deny a defendant his constitutional rights any time it chooses to; or (2) even if it is assumed that an *act* or some *conduct* by a defendant is a

the state must allege in good faith that the entry of the defendant's plea of guilty had a materially adverse effect on its ability to prove him guilty beyond a reasonable doubt at trial. In other words, the state must allege that it relied on the finality of the defendant's plea and, because of that reliance, is now less able to prove the defendant guilty than it otherwise would have been.

To be sure, this does not answer Professor Saltzburg's objection altogether; it merely requires the objection to be restated. He would still presumably argue that as long as defendants are unprotected from the prejudice caused by prosecutorial delay, there is no principled justification for protecting the prosecution from "substantial" prejudice caused by a defendant's plea of guilty. But the two kinds of prejudice are not equivalent. Ordinarily, when a defendant is prejudiced in the preparation of his case by the prosecution's delay in filing a charge or in bringing the case to trial, he cannot show that the prosecution deliberately caused the prejudice or deliberately took action which caused him reasonably to change his trial position to his detriment. Indeed, if a defendant can make such a showing, he is almost certainly entitled to relief.⁶⁴ Conversely, when a prosecutor complains of prejudice due to a guilty plea, he *can* argue that the defendant deliberately took action—*i.e.*, deliberately entered a plea of guilty—which predictably caused the prosecutor reasonably to change his litigation posture to his detriment. In other words, the difference between the guilty plea cases and the cases Professor Saltzburg refers to is the difference between detrimental reliance on one hand and its absence on the other.

This brings us to Professor Saltzburg's second argument from principle. The Reliance Theory, he says, depends on a circularity. The theory assumes that the prosecution will actually rely on a guilty plea. Yet, were it not for the Reliance Theory, the prosecution

prerequisite to the forfeiture of constitutional rights, the state can arbitrarily identify any trivial behavior as the relevant "act"—*i.e.*, the act of, say, breathing—and then use it as an excuse to strip the defendant of his rights.

Both positions are misconceived. The first, that the state can strip a defendant of his constitutional rights without regard to any voluntary or intelligent action on his part, is a misuse of the concept of forfeiture. See Thomson, *Self-Defense and Rights* 3-6 (Lindley Lecture, University of Kansas, April 5, 1976). The second position, that any trivial conduct on a defendant's part is sufficient to justify forfeiture, misconceives the rationale of forfeiture: that the defendant, by his conduct, put the state at a disadvantage sufficiently significant to justify precluding him from now asserting his rights. Accordingly, in order to justify a forfeiture, the state cannot "arbitrarily" refer to any trivial conduct on the defendant's part, but rather must point to conduct that justifies forfeiture. See Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUB. AFF. 93, 112 (1978).

64. See *United States v. Lovasco*, 431 U.S. 783, 795 (1977); *United States v. Marion*, 404 U.S. 307, 324 (1971).

would never be in a position to rely on a guilty plea, because it is the Reliance Theory—by prohibiting post-plea challenges—that enables the prosecution to rely on the plea's finality. Consequently, so the argument goes, the Reliance Theory cannot be based on actual reliance alone, because without the theory, actual reliance would not be possible.

Professor Saltzburg is perfectly right. The Reliance Theory does *not* rest solely on actual reliance; it also rests on the proposition that the state *should be able to rely* on the finality of a guilty plea. In that respect, it is much like a defendant's fourth amendment "expectation" of privacy. The scope of the fourth amendment is measured not by the degree of privacy a defendant *actually* expects from the government, but on what he *should be entitled* to expect.⁶⁵ Similarly, with respect to guilty pleas, whatever prosecutors may actually expect, they are entitled to expect that "dispositions by guilty plea are accorded a great measure of finality."⁶⁶ And it is the combination of their *reasonable* expectation of finality and the actual expectations which it creates that justifies the Reliance Theory.

C. *The Objection from Precedent*

I am somewhat puzzled by Professor Saltzburg's objection from precedent. Indeed, I find the argument so troublesome that I hesitate to discuss it for fear of doing him an injustice. In effect, he argues that the Reliance Theory is inconsistent with precedent because, when tested in three hypothetical cases, the theory would preclude a defendant from asserting claims that precedent says should survive. Yet in each hypothetical case, Professor Saltzburg arranges the facts so that the asserted claim is invalid on its own merits. Obviously, if a claim is invalid, that alone is a sufficient reason for rejecting it, regardless of whether it would otherwise survive a guilty plea.

To take one example, Professor Saltzburg assumes (correctly, I believe) that the denial of a speedy trial is the kind of claim that survives a guilty plea under *Blackledge-Menna*.⁶⁷ He then constructs

65. See Note, *A Reconsideration of the Katz Expectation of Privacy Test*, 76 MICH. L. REV. 154 (1977).

66. *Blackledge v. Allison*, 431 U.S. 63, 71 (1977).

67. A speedy-trial claim should survive a guilty plea because, like a double jeopardy claim, it is a complete defense to the crime charged; that is, if a speedy-trial claim is valid, the only appropriate remedy is to dismiss the prosecution with prejudice. See *Strunk v. United States*, 412 U.S. 434 (1973). The justification, of course, for allowing complete defenses to survive a guilty plea is that the prosecution can never contend that it relied to its detriment on the guilty plea, or that it would be prejudiced by the defendant's belated assertion of the claim. To say that a defense is "complete" means that it conclusively bars prosecution and, if valid, would have precluded the prosecution from ever obtaining a valid conviction at trial.

a hypothetical case to show that a speedy-trial claim would be lost under the Reliance Theory. But in doing so, he makes the asserted claim one the defendant would lose on its merits in any event. Thus, he assumes that "the government, when facing a speedy-trial claim, can seek to avoid dismissal on the ground that the sixth and fourteenth amendments [were not violated]."⁶⁸ Not surprisingly, having thus assumed that the defendant's speedy-trial claim is unmeritorious, he concludes that the Reliance Theory would not allow the defendant to set aside the guilty plea on speedy-trial grounds.

This argument, which is stated three times,⁶⁹ suffers from a confusion. No one seriously believes that a defendant can attack a guilty plea on constitutional grounds that are invalid, or that invalid

The majority view is that speedy-trial claims do survive a guilty plea. See *United States v. DeCosta*, 435 F.2d 630, 632 (1st Cir. 1970) (dictum); *Gwynn v. Fay*, 215 F. Supp. 653 (S.D.N.Y. 1963), cert. denied, 379 U.S. 981 (1965); *Williams v. Henderson*, 289 So. 2d 74, 77 (La. 1974); *People v. Haymes*, 47 App. Div. 2d 587, 363 N.Y.S.2d 382 (1975); *People v. Coleman*, 47 App. Div. 2d 578, 362 N.Y.S.2d 663 (1975). But see *United States v. O'Donnell*, 539 F.2d 1233 (9th Cir.), cert. denied, 429 U.S. 960 (1976).

In one circumstance the passage of time may prejudice the prosecution and, in that event, a court may be justified in precluding a defendant from asserting a speedy trial claim. Specifically, the government may be able to allege that the passage of time following the guilty plea has made it difficult for the prosecution to rebut the defendant's contention that he was "prejudiced" by the delay. In other words, the passage of time itself may make it difficult for the prosecution to contest the merits of the defendant's constitutional claim. In that event, a court may appropriately hold that the defendant, by pleading guilty, forfeited the speedy trial claim.

68. Saltzburg, *supra* note 2, at 1285 n.92.

69. With respect to *Menna v. New York*, 423 U.S. 61 (1975), for example, Professor Saltzburg argues that the defendant's double jeopardy claim may have been curable (and, therefore, forfeitable under the Reliance Theory) because the double jeopardy claim may have turned out to be groundless, Saltzburg, *supra* note 2, at 1284-85; yet it should be obvious that if the double jeopardy claim in *Menna* was in fact invalid, then it would not have helped the defendant under any theory, including the theory the Court itself advanced in *Menna*. 423 U.S. at 62 n.2.

With respect to *Blackledge*, on the other hand, Professor Saltzburg argues that the prosecutor could have cured the due process problem by charging the defendant with some offense besides assault with intent to kill, Saltzburg, *supra* note 2, at 1284. Again, this argument raises several problems. For one thing, it suggests that to make a due process claim under *Blackledge*, one must show that the relationship between the subsequent charge and the original charge is the relationship between a greater and a lesser-included offense. See *id.* at 1284 n.90. I do not think that is true; on the contrary, I have always supposed that a defendant could invoke the due process protection of *Blackledge* whenever he can show that in response to his *de novo* appeal, the prosecutor charged him with a higher offense (or with additional offenses) arising out of his original conduct, whether or not the relationship between the newly added offense and the original is the relationship between a greater and a lesser-included offense. See *United States v. DeMarco*, 550 F.2d 1224 (9th Cir. 1977); *Wynn v. United States*, 386 A.2d 695, 697 (D.C. 1978). Furthermore, even if Professor Saltzburg is right about the content of the due process claim in *Blackledge*, it merely means that if the prosecution in *Blackledge* had charged the defendant with some other offense, then the defendant could not have challenged a guilty plea to that other offense, because in that hypothetical case his due process claim would have been groundless. But that is very different from concluding that the due process claim that the defendant in *Blackledge* actually made was either curable or invalid with respect to the offense with which he was actually charged.

claims survive a guilty plea, or that a defendant, by pleading guilty, can render invalid claims valid. On the contrary, each of the legal theories at issue here, including Professor Saltzburg's, is concerned only with a class of constitutional claims that are *otherwise valid*. From within that class, each seeks to identify those claims that survive a guilty plea. Thus, the Reliance Theory distinguishes between those valid claims that are complete defenses on one hand and those that are incomplete (or "dilatory"⁷⁰ or whose effects are "curable"⁷¹) on the other: Everything else being equal, valid but incomplete defenses may be forfeited by a plea of guilty; valid and complete defenses survive.

Professor Saltzburg confuses the incompleteness of a defense—the extent to which it is "dilatory" or "curable"—with its invalidity. He therefore thinks he can discredit the Reliance Theory by showing that among the constitutional claims that the Supreme Court says survive a guilty plea are some that will be "curable" (and, hence, forfeitable under the Reliance Theory) because they will turn out to be invalid. But that confuses two separate concepts, for there is no relationship whatsoever between whether a claim is curable and whether it is valid. Consider, for example, the grand jury defense in *Tollett*. The Court assumed that the grand jury had been unconstitutionally empaneled and that the defendant's claim, in that sense, was valid. Yet the Court held that by pleading guilty the defendant forfeited his otherwise valid claim because the claim was in the nature of a "constitutional plea in abatement";⁷² that is, it was not the kind of claim that would forever preclude the prosecution from obtaining a lawful conviction at trial, but rather was a claim (albeit valid) the prejudicial effects of which could be cured by the return of a lawful indictment. Conversely, the double jeopardy claim in *Menna* survived because it was a complete (*i.e.*, "incurable") defense; that is, it was a claim (if valid) that would have forever precluded the government from obtaining a lawful conviction at trial on the offense charged. Obviously, however, if the double jeopardy claim in *Menna* had been invalid, it would have been useless to the defendant, however complete or incurable it might otherwise have been.

In conclusion, in order to criticize the Reliance Theory on

70. A "dilatory" claim may be defined as one that does not forever preclude prosecution on the offense charged, but "would only delay the inevitable date of prosecution." *Tollett v. Henderson*, 411 U.S. 258, 268 (1973).

71. Westen, *supra* note 48, at 1226, 1236.

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

grounds of precedent, it is not enough to show that complete defenses may turn out to be invalid, because the theory does not purport to deal with invalid defenses. Rather, Professor Saltzburg would have to find valid defenses that are complete and yet "curable." Or, from the class of otherwise valid defenses, he would have to give examples of complete defenses that do not survive a guilty plea, or incomplete defenses that do survive. He has done none of these things.

IV. THE NOTION OF "JURISDICTIONAL" DEFENSES

Thus far we have discussed two theories for distinguishing constitutional defenses that survive a guilty plea from those that may be lost by pleading guilty. Yet there remains a third theory—namely, that whether constitutional claims survive a guilty plea depends on whether they are "jurisdictional." Fortunately, the Supreme Court itself has eschewed the talismanic notion of jurisdictional error. In Judge Henry Friendly's inimitable phrase, the Court has declined to "kiss the jurisdictional book."⁷³ But some lower courts and commentators incline to do so,⁷⁴ and it deserves a comment.

The obvious difficulty with "jurisdictional error" is that it is not self-defining; it is a label one attaches to those constitutional defenses that are already determined—by some anterior standard—to deserve to be heard. This can be illustrated by comparing the different ways in which "jurisdictional" is used in habeas corpus cases on one hand and guilty plea cases on the other. Constitutional claims relating to the process of indictment are said to be "jurisdictional" for purposes of determining whether a defendant may assert them by a federal writ of habeas corpus;⁷⁵ yet the same claims are said to be "nonjurisdictional" for purposes of deciding whether a defendant may assert them following a guilty plea.⁷⁶

In order to decide whether the notion of jurisdictional error is useful, one must first define it in the guilty plea context. One possi-

73. Friendly, *supra* note 57, at 151.

74. See *United States v. Wild*, 551 F.2d 418, 421-22 (D.C. Cir.), *cert. denied*, 431 U.S. 916 (1977); *United States v. Doyle*, 348 F.2d 715, 718-19 (2d Cir.) (Friendly, J.), *cert. denied*, 382 U.S. 843 (1965); *United States v. Parrino*, 203 F.2d 284 (2d Cir. 1953) (L. Hand, J.), *aff'd*, 212 F.2d 919 (2d Cir.), *cert. denied*, 384 U.S. 840 (1954); *Hammonds v. State*,—Ala. App.—, 354 So. 2d 345 (1978); *State v. Tramble*, 116 Ariz. 249, 253, 568 P.2d 1147, 1151 (1977); Ballou, "Jurisdictional" Indictments, Informations and Complaints: An Unnecessary Doctrine, 29 ME. L. REV. 1, 9 (1977); Note, *Waiver of the Statute of Limitations in Criminal Proceedings: United States v. Wild*, 90 HARV. L. REV. 1550, 1555 n.45 (1977); Note, *The Statute of Limitations in a Criminal Case: Can It Be Waived?*, 18 WM. & MARY L. REV. 823, 830-35 (1977).

75. See *Ex parte Bain*, 121 U.S. 1 (1887).

76. See note 74 *supra*.

bility is that it means jurisdiction over *the person* of the defendant—*i.e.*, the constitutional rules governing the relationship of a particular defendant to the forum and the process for bringing him into court. Yet that is unlikely for several reasons. For one thing, challenges to personal jurisdiction are rare and hardly worth all this fuss.⁷⁷ Furthermore, they are generally disfavored both in civil and criminal procedure. Under the Federal Rules of Civil Procedure, for example, a defendant forfeits his constitutional objections to the court's jurisdiction over his person unless he raises them in a timely fashion.⁷⁸ The same is true under the Federal Rules of Criminal Procedure.⁷⁹ It is implausible, to say the least, that a constitutional right which a defendant can so easily lose by default for having failed to assert it in a timely fashion before trial would survive a defendant's deliberate act of pleading guilty.⁸⁰

"Jurisdictional error" more probably refers to *subject matter* jurisdiction—*i.e.*, the constitutional rules that govern the kinds of criminal cases that courts are competent to hear. Yet this raises several difficulties of its own. For one thing, there is no reason to believe that constitutional claims relating to subject matter jurisdiction cannot be waived;⁸¹ and if they can be waived, there is no reason to

77. It is extremely rare to find a case involving *constitutional* objections to the court's jurisdiction over a defendant's person in a criminal case, because the Supreme Court has taken the position that the manner in which a criminal defendant is brought before a court does not raise due process problems, even if his presence was secured illegally or forcibly. See *Frisbie v. Collins*, 342 U.S. 519 (1952). See generally Y. KAMISAR, W. LAFAYE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 201-02 (4th ed. 1974). See also *id.* (1978 Supp.) at 42.

78. FED. R. CIV. P. 12(h)(1).

79. C. WRIGHT, *supra* note 54, § 193 at 405.

80. To be sure, there may be cases in which a defendant's constitutional objection to the court's jurisdiction over his person would, if valid, preclude the government from ever instituting the prosecution in a lawful manner. In that event, a defendant should be able to raise the objection following a guilty plea, not because the claim goes to jurisdiction over his person, but because the claim is a complete defense.

81. To be sure, Professor Saltzburg makes the standard reference to the cases standing for the proposition that errors relating to subject matter jurisdiction are nonwaivable. Saltzburg, *supra* note 2, at 1276-77 n.62. But all the cases Professor Saltzburg refers to were decided on *non-constitutional* grounds; that is, they merely indicate that a jurisdiction—in formulating its own domestic law—is always free to permit a person to raise certain kinds of errors at any time. Obviously, that is very different from saying that the *Constitution* entitles a defendant to raise certain constitutional claims at any time despite a domestic rule of waiver or forfeiture to the contrary. Everyone agrees that the state and federal courts may fashion local rules of procedure providing for the survival of constitutional claims. See *id.* at 1266 n.3; Westen, *supra* note 48, at 1217, 1253-54. Thus, rules of civil and criminal procedure alike direct the federal courts to allow parties to raise claims relating to subject matter jurisdiction at any time. FED. R. CIV. P. 12(h)(3); FED. R. CRIM. P. 12(b)(2). But it does not follow that the Constitution precludes a jurisdiction from providing by rule for the forfeiture or waiver of claims relating to subject matter jurisdiction. On the contrary, the better view is that jurisdictions *can* (and maybe *should*) treat claims relating to subject matter jurisdiction like other personal defenses and require that they either be raised at a certain time or be forfeited. See generally Note, *Judicial Power and Jurisdictional Attacks on Judgments*, 87 YALE L.J. 164 (1977).

believe that they cannot be forfeited by a plea of guilty. Assume, for example, that a federal defendant, having a constitutional right to insist that his case be heard by an article III court, nonetheless prefers that a magistrate try his case. Presumably he could waive all of his trial rights, including his right to be tried by an article III court, simply by pleading guilty. If so, is there any reason to believe that the Constitution forbids him from agreeing with the prosecutor to waive his right to be tried by an article III court and to be tried, instead, by a federal magistrate?⁸² If not—if a defendant can effectively waive his right to be heard by an article III court—why can he not forfeit such a claim by pleading guilty?

To be sure, some subject matter claims may be complete defenses, *i.e.*, defenses that permanently and incurably preclude prosecution for the crime charged; in that event, they should be nonforfeitable by a plea of guilty, not because they relate to subject matter jurisdiction, but because they are complete defenses. In other cases, however, the jurisdictional claims, though valid, are entirely “dilatory” in that they can be entirely cured; in the article III hypothetical, for example, a defendant’s jurisdictional objection to being tried by a magistrate can be completely cured by transferring the case to an article III court. If the jurisdictional claim is curable, and if state rules of procedure provide for forfeiture,⁸³ there is no good reason a jurisdictional claim should be treated differently from claims relating to the right to trial by jury and the right to be free from compulsory self-incrimination. Just as a defendant may forfeit curable claims relating to his right to be heard by a jury and to be free from coercive interrogation, he should also be capable of forfeiting claims relating to subject matter jurisdiction. The governing principles are the same.

Furthermore, the litmus test of subject matter jurisdiction cannot

82. See MAGISTRATES R. 2 (b)-(c) (defendant charged with a minor offense may waive his right to be tried by an article III judge and consent to be tried, instead, by a magistrate).

83. It is worth emphasizing again that the constitutional rule for forfeiture must be distinguished from the domestic rule. As far as domestic law is concerned, a jurisdiction is perfectly free to provide that any—or even all—rights can be raised at any time, before or after a plea of guilty. See, *e.g.*, FED. R. CRIM. P. 12(b)(2) (claims relating to subject matter jurisdiction may be raised at “any time during the pendency of the proceedings”). Obviously, if the domestic law permits a defendant to raise a claim after a plea of guilty, then the constitutional standard of forfeiture is irrelevant; whatever else it might do, the constitutional rule certainly does not *require* the forfeiture of claims that the domestic law permits a defendant to raise. See Westen, *supra* note 48, at 1217. On the other hand, if the domestic law does *not* provide for the survival of a defense, then its survival does depend on the constitutional standard of forfeiture. If a jurisdiction chooses to provide that claims relating to subject matter jurisdiction are forfeited either by a plea of guilty or by a defendant’s failure to raise them in a timely fashion, I see nothing in the Constitution dictating that they survive.

be squared with precedent, because under the controlling cases certain claims survive that have nothing to do with subject matter jurisdiction. Consider, for example, the double jeopardy claim in *Menna*. The *Menna* Court held that double jeopardy claims survive a guilty plea. Accordingly, to square *Menna* with the jurisdictional explanation, one would have to say that rules of double jeopardy are rules that define the subject matter jurisdiction of state and federal courts. Yet it has always been understood that valid double jeopardy claims do *not* oust courts of subject matter jurisdiction.⁸⁴ The double jeopardy clause is essentially a constitutional rule of res judicata, and claims of res judicata are not ones that go to a court's subject matter jurisdiction.⁸⁵ Consequently, even if there were some abstract reason for using subject matter jurisdiction as the controlling test (and I cannot imagine what it would be), that test could not be reconciled with the controlling cases.⁸⁶

As still a third possibility, one could relax the traditional meaning of "jurisdictional error" as a term of art and use it to denominate those particular claims that survive a guilty plea.⁸⁷ Unfortunately, in order to identify those claims, one must first ascertain the standard that distinguishes forfeitable from nonforfeitable claims; yet once one ascertains the standard, it is far simpler to refer to the standard directly than to apply the standard first and then call the result "jurisdictional."

This can be illustrated by reference to the Reliance Theory. If one wishes to speak in the language of "jurisdiction," one can do so in conjunction with the Reliance Theory (or any other theory for that matter). Accordingly, to determine whether a particular claim is "jurisdictional," one would first decide whether it is a claim which, if valid, would preclude the prosecution from ever obtaining a lawful conviction against the defendant at trial; if it is, then one would call

84. See 1 C. WRIGHT, *supra* note 54, § 193 at 405, 409-10. See also *Ex parte Bigelow*, 113 U.S. 328 (1885).

85. 1 C. WRIGHT, *supra* note 54, § 193 at 410 n.70; 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* §§ 1393, 1394 at 869 (1969).

86. *State v. Lueder*, 74 N.J. 62, 81, 376 A.2d 1169, 1178 (1977): "We are not in accord with the view recently expressed, that *Blackledge* 'has carved out an exception' to the *Tollet* [sic]-*Brady* principle for claims 'attacking the jurisdiction' of the court in which the defendant was [to be] tried. . . ."

87. Cf. Ballou, *supra* note 74, at 9 (to say that a defect is "jurisdictional" means that it survives a guilty plea). But see Bartor, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 470 (1963):

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

it "jurisdictional" and hold that it survives a guilty plea.⁸⁸ But it should be obvious that the second step—labelling the claim "jurisdictional"—is purely conclusory and entirely lacks substantive content. If one is to use the Reliance Theory anyway, one might as well simplify matters by avoiding the second step and referring to the Reliance Theory directly.

In conclusion, for purposes of defining the kinds of claims that survive a guilty plea, the notion of jurisdictional error is either fallacious or useless: If understood in its technical sense as a term of art, it fails to explain the cases; if understood more broadly as a term for the guilty plea cases alone, it is superfluous.

V. REFLECTIONS ON FORFEITURE

The ultimate source of Professor Saltzburg's concern, I suspect, is not the Reliance Theory itself, but the underlying principle that constitutional rights can be forfeited. He resists the concept of forfeiture for several reasons: (1) being accustomed to analyzing the loss of constitutional claims in terms of waiver, he regards the competing concept of forfeiture as an upstart, a meddlesome newcomer in an otherwise settled mode of thinking; (2) believing that civil liberty is best secured by tying it to "free choice," he fears that forfeiture will subvert liberties that the requirements of waiver now protect. I think he is wrong on both counts.⁸⁹

88. See, e.g., *Commonwealth v. Little*, 468 Pa. 13, 17 n.2, 359 A.2d 788, 790 n.2 (1976) (to say that a defect is "jurisdictional" means that it is the kind of defect which, according to *Blackledge*, survives a guilty plea).

89. In addition to the grounds discussed below, Professor Saltzburg also challenges the principle of forfeiture on the ground that it would cause a defendant to lose the right to assert constitutional claims not only regarding the charges to which he has pled guilty, but also regarding unrelated civil and criminal proceedings. Saltzburg, *supra* note 2, at 1304. The disturbing thing about this argument is that it casts doubt on Professor Saltzburg's understanding of forfeiture. Nothing in the theory of forfeiture suggests that a guilty plea causes a defendant to lose the right to assert constitutional claims in unrelated proceedings. On the contrary, since the justification of forfeiture is that the defendant's plea of guilty causes the prosecution to rely to its detriment on not having to prosecute the defendant on the crime charged, it can have no bearing on whether the defendant should be allowed to assert constitutional claims in unrelated proceedings.

Ironically, if anything threatens to cause a defendant to lose constitutional claims in unrelated proceedings, it is Professor Saltzburg's theory of waiver, not the principle of forfeiture. Consider, for example, the hypothetical case Professor Saltzburg himself poses: A defendant who pleads guilty later contends that he was a victim of a coerced confession. Obviously, having pled guilty, the defendant cannot challenge his conviction on that ground, unless, perhaps, he can show beyond doubt that without the coerced confession the prosecution could never have convicted him at trial. See *People v. Johnson*, 396 Mich. 424, 443-44, 240 N.W.2d 729, 739-40 (1976). The question, rather, is whether the defendant, having pled guilty, may nonetheless assert the claim in a civil suit against the police officers who coerced the confession in violation of his privilege against self-incrimination. The answer according to principles of forfeiture is obvious—the defendant does not lose the claim by pleading guilty, because the civil defendants could not rationally contend that they reasonably relied to their detriment in

A. *Forfeiture as an Upstart*

Forfeiture is no newcomer to the law. If anything, waiver, not forfeiture, is the real usurper. Waiver—the notion that one can lose constitutional rights if, and only if, one knowingly and deliberately consents to their surrender—is a creature of nineteenth-century liberalism; it is part and parcel of the development that led to the “will theory” in contracts, the law of negligence in torts, and the doctrines of responsibility in criminal law.⁹⁰ The prior principle, which waiver replaced, was the principle of forfeiture—*viz.*, the notion that rights are inalienable; that they cannot be lost through consent; and that they can be lost, if at all, only through conduct.

The most famous illustration of the principle of forfeiture is from the Declaration of Independence: “all men . . . are endowed . . . with certain *unalienable rights* [and] that among these are life, liberty, and the pursuit of happiness.”⁹¹ What does it mean to say that certain rights are inalienable? It means that they are rights that a person cannot transfer or sell or relinquish or give away; they are rights that he cannot give up merely by an act of consent; in short, they are rights that he cannot waive.⁹² But that does not mean that they are rights he cannot lose. On the contrary, the framers of the Declaration understood, as Locke and Blackstone understood before them,⁹³ that while the rights to life and liberty cannot be alienated, they can be forfeited by conduct inconsistent with their assertion:

“There is at least this much to be said for the notion of forfeiting one’s rights: forfeiture is as commonplace in rights-talk as is acting upon . . . or waiving one’s rights. . . . Blackstone and his predecessors clearly denied the alienability of natural rights even as they insisted upon their forfeitability. . . . Locke and Blackstone . . . argue that I cannot alienate my right to life because my own life is not wholly within my “power;” whereas I must forfeit my life . . . whenever I commit ‘some act that deserves death.’ . . . In short, they argue that whereas alienation of the right to life is logically impossible, forfeiture of this right

the civil suit on the defendant’s not asserting the claim in defense to the criminal charge. The answer is not so clear under the principles of waiver, however, because it could reasonably be argued that once the defendant made a voluntary and knowing decision at his arraignment to relinquish his fifth amendment claim, the claim vanished forever and was beyond his recall.

90. See generally M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 160-211 (1977); J. HURST, *LAW AND THE CONDITIONS OF FREEDOM* 3-32 (1956).

91. UNITED STATES DECLARATION OF INDEPENDENCE, para. 2 (1776) (emphasis added).

92. M. WHITE, *THE PHILOSOPHY OF THE AMERICAN REVOLUTION* 196 (1978); see G. WILLS, *INVENTING AMERICA* 213-17, 229-37 (1978); Richards, *Inalienable Rights: Recent Criticism and Old Doctrine*, 29 *PHIL. & PHENOM. RES.* 391, 398, 403 (1968-1969).

93. 1 W. BLACKSTONE, *COMMENTARIES* * 133; 4 *id.* at * 189; J. LOCKE, *supra* note 1, §§ 6, 23, 135, 172.

under certain conditions is logically necessary."⁹⁴

In other words, with respect to the "right to life," it was the notion of forfeiture, not waiver, that originally explained the conditions under which the right could and could not be lost.

This remains true today. Consider, for example, the double jeopardy rule that a defendant can be constitutionally retried following a successful appeal of his conviction.⁹⁵ The rule cannot be explained by simply narrowing the scope of the defendant's finality interest, because, clearly, a defendant who does not appeal his conviction or whose appeal is unsuccessful cannot be retried.⁹⁶ Nor can the rule be explained in terms of waiver, because the rule applies regardless of the defendant's state of mind or desire not to be retried.⁹⁷ Rather, the rule is based on a notion of "forfeiture"⁹⁸—namely, that the defendant's right to appeal an invalid conviction is conditioned upon foregoing his right to object to being retried. What justifies the forfeiture, of course, is the need to balance the defendant's interest in "finality"⁹⁹ against "the societal interest in punishing one whose guilt is clear."¹⁰⁰ This balancing results in a form of estoppel by conduct: by virtue of taking a successful appeal, the defendant for-

94. Bedau, *The Right to Life*, 52 *MONIST* 550, 567-68 (1968). See also Feinberg, *supra* note 63, at 111-12:

It was an important part of the classic doctrine of natural rights as expounded by Locke and Blackstone that some natural rights at least (certainly including the right to life) can be forfeited but not alienated. The distinction is roughly that between losing a right through one's fault or error, on the one hand, and voluntarily giving the right away, on the other. . . . A *non-forfeitable right* is one that a person cannot lose through his own blundering or wrongdoing; an *inalienable right* is one that a person cannot give away or dispense with through his own deliberate choice.

To be sure, Locke and Blackstone both assume that a person cannot forfeit his "life" unless he engages in conduct that is morally blameworthy. But that is only because the forfeiture they refer to—*i.e.*, taking the person's life by the state—occurs in the context of exacting criminal punishment; it is the use of forfeiture as a criminal punishment, not forfeiture generally, that creates the additional requirement that the underlying conduct be morally blameworthy. With respect to forfeiture generally, it is not necessary that the defendant's conduct be morally blameworthy; it is sufficient that the consequences of his conduct are such as to justify the loss of rights.

95. See *United States v. Ball*, 163 U.S. 662 (1896).

96. See *Waller v. Florida*, 397 U.S. 387 (1970).

97. Mayers & Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 *HARV. L. REV.* 1, 6-7 (1960).

98. *Green v. United States*, 355 U.S. 184, 194 (1957). To be sure, the *Green* Court used the term "forfeiture" disapprovingly, but that was only because the particular condition in *Green*—*i.e.*, the conditioning of the defendant's right to appeal an erroneous conviction on one count upon his willingness to be retried upon a count which he did not appeal—was not one in which the state had a legitimate interest. For a comparison of the unjustified "forfeiture" in *Green* with the justified forfeiture in *United States v. Ball*, 163 U.S. 662 (1896), see *Benton v. Maryland*, 395 U.S. 784, 811 (1969) (Harlan J., dissenting).

99. *United States v. Jorn*, 400 U.S. 470, 479 (1971) (Opinion of Harlan, J.).

100. *United States v. Tateo*, 377 U.S. 463, 466 (1964).

feits the right he would otherwise have to object to being retried.¹⁰¹

Conversely, just as forfeiture explains better than waiver the conditions under which constitutional rights are lost, it also better explains the conditions under which rights are retained. To take another double jeopardy example, consider the rule that a defendant whose conviction is reversed on appeal for insufficiency of the evidence may object to being retried even though he may have originally *requested* a new trial.¹⁰² Obviously, if waiver were sufficient to explain the loss of constitutional claims, a defendant who makes a deliberate, informed, and counselled decision to request a new trial could be held to that decision. But waiver is not sufficient; rather, the state must also show that it has relied to its detriment on his motion for a new trial—that the motion's withdrawal would prejudice the state in a way which would not have occurred if the defendant had never made the motion in the first place. The defendant retains his double jeopardy claim despite his prior motion for a new trial because the state cannot make such a showing; the state can proffer no legitimate reason for preventing him from now asserting rights that he could have asserted originally, except its (illegitimate) desire that he never assert such rights.¹⁰³ Again, it is the standards of forfeiture, not waiver, that ultimately control.

In short, far from being a newcomer or usurper in the law, the principle of forfeiture not only predates the notion of waiver, but continues to inform our judgments about the conditions under which constitutional claims are and are not lost.

101. *Cf.* *United States v. Weiser*, 428 F.2d 932, 936 (2d Cir. 1969) (defendant who relies on the defense of insanity is thereby estopped from objecting to being compelled to submit to an involuntary psychiatric examination).

102. *Burks v. United States*, 437 U.S. 1, 17-18 (1978):

[W]e hold today that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient In our view it makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy. It cannot be meaningfully said that a person 'waives' his right to a judgment of acquittal by moving for a new trial. . . . To the extent that our prior decision suggests that by moving for a new trial, a defendant waives his right to a judgment of acquittal on the basis of evidentiary insufficiency, those cases are overruled.

103. *Burks v. United States*, 437 U.S. 1, 16 (1978):

[W]hen a defendant's conviction has been overturned due to a failure of proof at trial, . . . the prosecution cannot complain of prejudice [if it is denied an opportunity to retry the defendant], for it has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the Government's case was so lacking that it should not have even been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

(Emphasis original.)

B. *Forfeiture as a Threat*

Professor Saltzburg also suggests that forfeiture menaces the full development of constitutional liberty, and that it does so more dangerously than conventional theories of waiver.¹⁰⁴ The situation (if anything) is precisely the opposite: Under Professor Saltzburg's theory of waiver defendants stand to lose many rights that they would retain under a theory of forfeiture.

Assume, for example, that a defendant is subpoenaed to testify before a grand jury. Before testifying, he is fully advised of his fifth amendment rights, including the right to consult with counsel. After consulting with counsel, and in his counsel's presence, he signs a statement waiving his privilege against self-incrimination with respect to all questions relevant to the grand jury inquiry. After delivering the statement to the prosecutor, the defendant has second thoughts. He calls the prosecutor, rescinds the waiver, and declares he will assert the privilege before the grand jury whenever he thinks it appropriate.

It is clear, I think, that Professor Saltzburg would hold this hypothetical defendant to his written waiver. For Saltzburg, it is sufficient that a waiver be "knowing and intelligent"¹⁰⁵—that the defendant "understand"¹⁰⁶ the nature of his rights, and that he make "a deliberate, informed waiver."¹⁰⁷ Yet those conditions would be insufficient under a theory of forfeiture. Rather, to hold a defendant to the waiver, the state would have to show that it had relied to its detriment on the defendant's statement, and that it would suffer special prejudice if he could assert the privilege. Since the state cannot do so on the above facts, the defendant is constitutionally entitled to disregard the statement of waiver and to invoke the privilege against self-incrimination as if he had intended to do so from the outset.¹⁰⁸

To be sure, in some cases the government does rely upon a waiver. If, for example, a defendant waives the privilege against self-incrimination by testifying favorably to his cause at trial, he should not then be free to rescind his waiver and suddenly assert the privilege on cross-examination; if he were allowed to do so, he could

104. That, at least, is what I infer from Professor Saltzburg's statement that his theory protects "constitutional rights." Saltzburg, *supra* note 2, at 1305. See also *id.* at 1286 ("This rationale emphasizes the protection afforded defendants by the Constitution, not the disadvantages to the state when pleas are overturned.").

105. *Id.* at 1302.

106. *Id.*

107. *Id.*

108. See *Stevens v. Marks*, 383 U.S. 234 (1966).

prejudice the prosecution with partial answers that would distort the fact-finding process.¹⁰⁹ In that event, he loses his right to the privilege, not only because he made a deliberate and informed decision to forego it, but because his conduct caused the state to change its position to its detriment. He loses the privilege, in other words, not because he waived it, but because he forfeited it.

In sum, the difference between Professor Saltzburg and me is that while he would allow a defendant to lose his right to trial by jury, his right to be free from unreasonable searches and seizures, and his other rights, simply by making an informed decision to relinquish them, I would require the state to show some good reason for precluding the defendant from asserting his rights, aside from the immaterial fact that he once renounced them.¹¹⁰

VI. CONCLUSION

Professor Saltzburg, who wishes to adhere to the concept of waiver, is left in a precarious position. He admits that "forfeiture analysis"¹¹¹ is "more attractive"¹¹² than waiver in explaining why a defendant loses constitutional claims by failing to assert them in a timely fashion; yet he fails to see that for the very same reasons forfeiture also better explains why a defendant does (and does not) lose constitutional claims by pleading guilty.¹¹³

109. See generally, C. MCCORMICK, EVIDENCE §§ 132, 140-41 (2d ed. 1972). See also *United States v. Hearst*, 563 F.2d 1331, 1338-42 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000 (1978).

110. Assume, for example, that a defendant, having waived his right to be tried by a jury, is tried and convicted by a judge and that his conviction is then reversed on appeal; thereafter, in connection with the prosecutor's effort to retry him, the defendant changes his mind and requests to be tried by a jury. Or assume that a defendant, after being fully advised of his rights, allows police officers to search his home; after the police have fully searched the first floor and are about to proceed to the second, he suffers a change of heart and asks that the police officers leave without searching the second floor. In each case Professor Saltzburg would presumably say that the defendants had waived their respective rights and were not entitled to assert them. In contrast, I would say that each defendant *is* entitled to rescind his waiver and to assert his rights because the government is incapable of showing that it relied to its detriment on his waiver. See *United States v. Lee*, 539 F.2d 606 (6th Cir. 1976) (defendant, having waived his rights to be tried by a jury, may reassert the right in connection with a new trial following reversal of his conviction); *Mason v. Pulliam*, 557 F.2d 426 (5th Cir. 1977) (defendant, having consented to a search of his papers, may rescind his waiver at any time with respect to papers that the government has not yet examined).

111. Saltzburg, *supra* note 2, at 1303.

112. *Id.*

113. Professor Saltzburg is willing to say that a defendant "forfeits" his constitutional claims by failing to comply with rules of practice requiring that he assert them before trial. The reason he finds "forfeiture analysis" to be "attractive" there, *id.* at 1303, I suspect, is that the state has an obvious interest in being able to resolve pretrial issues with finality; yet the state will never be able to protect that interest if it is required to show that a defendant's failure to assert his claims in a timely fashion was the product of a "knowing and intelligent waiver." Accordingly, to allow the state to foreclose a defendant from belatedly asserting his claims,

He tries to escape that paradox by suggesting that the guilty plea cases can be, perhaps, reconciled with traditional canons of waiver. Perhaps, he says, the defendants in those cases were actually advised that by pleading guilty, they would waive "almost all grounds"¹¹⁴ for challenging their convictions, including grounds then unknown to them. But, of course, that was not the case. The record shows that the defendants in those cases were not so warned.¹¹⁵ Indeed, the Supreme Court specially emphasized that its decision treating the entry of a guilty plea as a forfeiture of constitutional claims was not based on a concept of waiver:

In the instant case, the facts relating to the selection of the . . . grand jury . . . were found . . . to have been unknown to both [the defendant] and his attorney. If the issue were to be cast solely in terms of 'waiver,' the Court of Appeals was undoubtedly correct in concluding that there had been no such waiver here. But just as the guilty pleas in the *Brady* trilogy were found to foreclose direct inquiry into the merits of claimed antecedent constitutional violations there, we conclude that respondent's guilty plea here alike forecloses independent inquiry into the claim of discrimination in the selection of the grand jury.¹¹⁶

Furthermore, to accommodate the requirements of the guilty plea process, Professor Saltzburg is forced to adopt a standard of waiver so watered down that it leaves the defendant nothing of value. According to Professor Saltzburg, it suffices to tell a defen-

Professor Saltzburg is apparently prepared to consider it sufficient that the defendant had a realistic opportunity to assert his claims before trial and that his belated effort to assert them would substantially impair the state's legitimate interest in finality.

Significantly, precisely the same things are true with respect to a defendant who wishes to assert constitutional claims following a guilty plea. In each case, the state has a legitimate interest in seeing that claims are litigated promptly; in each case, the state's interest in finality will be frustrated if it is required to show that the defendant's failure to assert his claims was the product of a "knowing and intelligent waiver"; in each case, therefore, it should be enough to show that the defendant had a realistic opportunity to assert his claims before pleading guilty, and that his belated effort to assert them would substantially impair the state's interest in finality.

114. *Id.* at 1302.

115. *Tollett v. Henderson*, 411 U.S. 258, 266 (1973); 411 U.S. at 270, 273-74 (Marshall, J., dissenting); *Brady v. United States*, 397 U.S. 742, 743-45 nn.2-3, 756-57 (1970); *McMann v. Richardson*, 397 U.S. 759, 771-74 (1970); 397 U.S. at 785 (Brennan, J., dissenting); *Parker v. North Carolina*, 397 U.S. 790, 793 n.3, 795 n.7 (1970); 397 U.S. at 811-12 (Brennan, J., dissenting). Interestingly, Professor Saltzburg admits that he "suspect[s]" that the defendants in the guilty plea cases were not so advised. Saltzburg, *supra* note 2, at 1306.

116. *Tollett v. Henderson*, 411 U.S. 258, 266 (1973). See also *Lefkowitz v. Newsome*, 420 U.S. 283, 299 (1975) (White, J., dissenting):

[These] contentions assume that the *Brady* trilogy was based upon notions of waiver. In other words, it [*sic*] assumes that this Court has in the past refused to set aside 'guilty pleas' on the basis of antecedent violations of constitutional rights only because the plea was deemed to have 'waived' those rights. This assumption finds some support in the language of those cases, but waiver was not their basic ingredient. In any event, the Court squarely and conclusively rejected the waiver rationale in *Tollett v. Henderson*, *supra*.

dant that he is waiving “almost”¹¹⁷ all his constitutional claims, both known and unknown, without telling him which claims or how many he retains, or what kinds of claims might arise in the future. This is a far cry from what we usually mean by waiver—“an intentional relinquishment or abandonment of a known right or privilege.”¹¹⁸

It is surprising that Professor Saltzburg finds comfort in a standard of waiver so drained of content. It is also surprising that he fails to examine *why* it is that he—a champion of waiver—is willing to compromise his notions of waiver to accommodate the guilty plea process. The reason, I would submit, is that the state’s legitimate interest in the finality of guilty pleas is too great to tolerate anything else. Once one recognizes that—once one perceives the link between the state’s interest in finality and the *Brady* trilogy’s standard of estoppel—one can see what is really going on in these cases. The issue here is not waiver as waiver is ordinarily understood. We are dealing here with something entirely different. We are dealing with a rule of law that a defendant, by pleading guilty, forecloses himself from raising certain constitutional claims—regardless of whether he actually knew he possessed those claims or even intended to forego them—because a contrary rule would intolerably impair the state’s legitimate interest in finality. There is a word to describe this, and it is not “waiver”—it is forfeiture.

117. Saltzburg, *supra* note 2, at 1302.

118. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).