

PROSECUTORIAL PRECONDITIONS TO PLEA NEGOTIATIONS

“VOLUNTARY” WAIVERS OF CONSTITUTIONAL RIGHTS

BY ANDREW E. TASLITZ

In a companion piece in this symposium, David Leonard addressed the progeny of *United States v. Mezzanato*, 513 U.S. 196 (1994), which upheld the defendant’s “voluntary” waiver of the protections of Federal Rule of Evidence 410, even though the prosecutor refused to attempt plea negotiations absent the waiver. Rule 410 purportedly renders most statements made by an accused during plea negotiations with the prosecutor inadmissible.

The phenomenon of prosecutors insisting on rights-waivers as a precondition to plea negotiations (what I call here “preconditional waivers”) reaches far more broadly, however, than just the context of the Federal Rules of Evidence. This article explores that broader context and whether the practice is consistent with constitutional, ethical, and practical limitations. The article begins by reviewing the logic of the central case law, which supports the validity of prosecutor-mandated preconditional waivers, even of constitutional rights. Next, the article critiques that logic in light of the teachings of social psychology, which show limitations on defense counsel’s ability to ensure his client’s knowing, voluntary, and intelligent rights-waivers in the preconditional setting. This latter point is of greatest concern for constitutional, as opposed to statutory or rules-based, rights-waivers, raising ethical dilemmas for prosecutors that current ethics rules do not address. Rather than calling for new rules or a more muscular waiver test in the preconditional context, however, the article ends with a call for voluntary reforms in the form of improved internal prosecutor policies on the subject.

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The Constitution and Preconditions

As important as *Mezzanato* has been in granting the prosecutor the power to insist on rights-waivers as preconditions to plea bargaining, *Mezzanato* is only the tip of the iceberg. In particular, prosecutors have wide discretion to insist upon preconditional waivers of fundamental constitutional rights, not merely rules-based or statutory ones. These waivers raise even more basic questions of fundamental fairness than does *Mezzanato*. A hypothetical posited by ethics Professor Bruce Green, in a recent Criminal Justice Section CLE program on “Ethics and Professionalism in Plea Negotiations: Best Practices and Worst Pitfalls,” illustrates the problem.

In Green’s hypothetical, police are investigating a drive-by shooting outside a local bar. The shooter aimed at Black Sox Gang member, Cobb, but missed, hitting a bystander named Casey, who survived the assault. Three other bystanders described the shooter in the most general of terms: as a male sitting in the front passenger seat of a big black car. That shooter was also accompanied by a male driver and a female backseat passenger.

The police focused their investigation solely on members of the rival Highlanders gang. Based upon inadmissible informants’ tips, police identified as suspects Tinker (the shooter), Evers (the driver), and Chance (the backseat passenger). These informants labeled Tinker the general and Evers a lieutenant in the Highlanders gang. The informants also said, however, that Chance, who is Evers’s girlfriend, may have been unaware of the planned attack. Although Tinker and Evers have criminal records and are rumored to be involved in many other crimes for which they have evaded arrest, Chance has a clean record and a good current employment history. The three bystander witnesses were shown photos of the suspects, but made highly equivocal identifications of all three. Despite this weak evidence, the grand jury indicted all three suspects for attempted murder.

There are numerous issues in this hypothetical that call

into question not only the strength of the prosecutor's case but also whether the three suspects are factually innocent. Eyewitness identifications are notoriously suspect, and those identifications made here were equivocal ones made about a frightening incident likely taking mere seconds—a combination of factors raising a grave risk of error. (*Cf.* AMERICAN BAR ASSOCIATION, *ACHIEVING JUSTICE: FREEING THE INNOCENT, CONVICTING THE GUILTY* 23-47 (2006) (recounting eyewitness identification risks).) Moreover, the police had focused their investigation on certain rival gang members based upon the word of unidentified informants apparently unavailable to testify at trial—informants who, in the world of gang warfare, have every reason to lie, for example, to eliminate gang competition. This early focus on suspects based upon informants' tips where we know little about the tipsters' identities or the bases of their accusations can and has led to the sort of police tunnel vision that is believed to have contributed to numerous wrongful convictions. (*See id.* at 63-78 (informant dangers); Susan Bandes, *Loyalty to One's Convictions: The Prosecutor and Tunnel Vision*, 44 *How. L.J.* 275 (2006).) The equivocal photo identifications may likewise, moreover, have been conducted in a suggestive manner (the witnesses were seemingly shown only photographs of the gang members). Furthermore, as to one of the suspects—Chance—there is reason to believe that, even if she had been present, she lacked the *mens rea* necessary for the crime.

The prosecutor in this hypothetical, while sincerely convinced of the three suspects' guilt, is also aware of the case's weaknesses and is thus eager to dispose of it quickly. Accordingly, the prosecutor agrees to discuss the possibility of a plea, but only subject to these eight preconditions:

1. If Tinker and Evers don't plead guilty in the next week, the deal is off the table.
2. They have to waive their rights to discovery, including both exculpatory (*Brady*) material and witness impeachment material. (The prosecutor knows that, among other things, aside from the three witnesses, there were several other bystanders who failed to identify Tinker and Evers. There is also information to the effect that the shooting was not by members of the Highlanders gang but by members of yet another gang. Given time and resources, defense counsel might discover some of this information).
3. They have to waive the right to challenge the evidence.
4. They have to waive their rights to bring a claim for ineffective assistance of counsel.
5. They have to waive any claim of prosecutorial misconduct.
6. They have to waive any future right to receive

newly discovered evidence of innocence or to raise claims of innocence.

7. What the hell, let's go all the way: They have to waive their right to appeal and to any and all post-conviction remedies.
8. Plus, they have to waive any civil claims relating to police misconduct.

(BRUCE GREEN, *HYPOTHETICAL, ETHICS AND PROFESSIONALISM IN PLEA NEGOTIATIONS: BEST PRACTICES AND WORST PITFALLS*, December 2007.)

The breadth of these waivers is extraordinary. They would prevent an innocent defendant badly advised by incompetent counsel from challenging the plea, even if induced by a prosecutor's arguable threats. They would require the defendant to make the decision whether to plead based upon very limited information. And, if no plea deal is ultimately reached, they would allow the case to go to trial with almost no discovery—including of information unquestionably material to guilt, namely, that an alternative perpetrator did the crime.

Furthermore, almost all these rights are rooted in the Constitution. Yet, Green suggests, the overwhelming weight of current law would find no constitutional or ethical violation in these preconditions. (*See generally* Roland Acevedo, Note, *Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York, Case Study*, 64 *FORDHAM L. REV.* 987, 999-1001, 1010-11 (1995) (on time limits for accepting a deal); *United States v. Ruiz*, 536 U.S. 622 (2002) (on waiver of right to exculpatory *Giglio* impeachment material); John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, *EMORY L.J.* 437 (2001) (on *Brady* waivers); Bruce Green, *Criminal Neglect; Indigent Defense from a Legal Ethics Perspective*, 52 *EMORY L.J.* 1169 (2003) (arguing that in practice counsel is generally found "competent" if he does no more than recommend a plea); *United States v. Hahn*, 359 F.3d 1315 (10th Cir. 2004) (on waiver of right to challenge sentence); *United States v. Teeter*, 257 F.3d 14 (1st Cir. 2001) (similar); *Ariz. Op. 95-08* (waiver ineffective assistance of counsel); *Vt. Op. 95-4* (similar, plus waiver prosecutorial misconduct claims); *cf.* *Kinney v. City of Cleveland*, 144 F. Supp. 2d 908 (N.D. Ohio 2001) (regarding "release-dismissal agreements" waiving civil liability); *Cowles v. Brownell*, 73 N.Y.S.2d 382 (1989) (same).)

Although much of Green's analysis focused on the constitutionality and ethics of having many of these preconditions as clauses in the plea agreements themselves, Green agrees that the logic of these precedents extends to seeking defendant rights-waivers as preconditions to negotiating in the first place. (*See E-mail from Bruce A. Green to Andrew E. Taslitz*, March 2008.)

Yet, in this hypothetical, the rights-waivers might ar-

guably be seen as fair, for surely the defense has strong bargaining power in such a weak case. But this is not necessarily so, for there were multiple positive, albeit questionable, identifications; convictions have been obtained on far weaker evidence. Furthermore, as will be discussed shortly, the potential sentencing costs to each defendant are so high *if convicted* that he or she has a strong disincentive to exercise the right to trial—even with a legitimate defense.

Green's analysis of the above hypothetical, which permits the prosecutor to refuse to negotiate absent rights-waivers, is consistent with the logic of the seminal case upholding the constitutional validity of the plea-bargaining process—*Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

Bordenkircher v. Hayes

In *Bordenkircher*, the prosecutor offered to recommend a five-year sentence for Paul Hayes, who had been indicted for attempting to pass a forged check for about \$88, if Hayes waived his jury trial right and pled guilty. However, the prosecutor insisted that if Hayes refused the plea offer, the prosecutor would seek a new indictment under Kentucky's Habitual Criminal Act, thereby exposing Hayes to a mandatory life sentence. Hayes rejected the offer and, true to his word, the prosecutor obtained a conviction after a jury trial pursuant to indictment on the new charge, for which Hayes was sentenced to life. On appeal, the prosecution admitted that it sought the new indictment *solely* to deter Hayes from exercising his jury trial right. When the case reached the United States Supreme Court, the Court nevertheless approved the prosecutor's actions and the validity of the sentence.

The Court conceded that it would be violative of due process for a state agent to seek to penalize a person's exercise of his constitutional rights. However, said the Court, "in the 'give and take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer." (*Id.* at 363.) Indeed, plea bargains occur because of the reciprocal "mutuality of advantage" to each of the negotiating parties; defendants seek a deal precisely to gain a promise or recommendation of a lesser sentence or reduced charge. (*Id.* at 363.) By definition, therefore, the consequences potentially facing a defendant upon conviction at trial *must be* greater than those upon a guilty plea.

The result of a bargain is thus beneficial to defense and prosecution alike, maintained the Court, for "[d]efendants advised by competent counsel and protected by other procedural safeguards [such as the guilty plea colloquy] are presumptively capable of intelligent choice in response to prosecutorial persuasion and unlikely to be driven to false self-condemnation." (*Id.* at 363.) Although confronting the defendant with the risk of harsher consequences should the defendant proceed to trial might, said the Court, have a

"discouraging effect on the assertion of his trial rights, the imposition of these difficult choices [is] an inevitable"—and permissible—"attribute of any legitimate system which tolerates and encourages the negotiation of pleas." (*Id.* at 364 (quoting *Chaffin v. Stynchcombe*, 412 U.S. 17, 31 (1973).) Accordingly, concluded the Court, by encouraging plea negotiations, the Court has "necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty." (*Id.* at 364.) So long as the prosecution is not discriminating based on race, religion, or other arbitrary classifications, hard bargaining, by openly presenting a defendant with a choice among the unpleasant alternatives there involved, is permissible. Indeed, what the defendant saw as a prosecutor's threat was, in the Court's view, merely desirable prosecutorial candor, for "a . . . constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged." (*Id.* at 365.)

Bordenkircher's reasoning embraced in the constitutional context a logic similar to *Mezzanato's* in a nonconstitutional context. In both cases, the Court showed little concern for power disparities in bargaining so long as the defendant was represented by counsel. In neither case did the Court worry that defendants might make critical choices in relative ignorance of the details of the evidence against them. In both cases, indeed, plea bargaining was treated like any other market transaction in a world relatively free of government regulation. As the *Mezzanato* Court put it,

[I]t simply makes no sense to conclude that mutual settlement will be encouraged by precluding negotiation over an issue that may be particularly important to one of the parties to the transaction. A sounder way to encourage settlement is to permit the interested parties to enter into knowing and voluntary negotiations without any arbitrary limits on their bargaining chips. . . . [I]f the prosecutor is interested in "buying" the reliability assurance that accompanies a waiver agreement, then precluding waiver can only stifle the market for plea bargains. A defendant can "maximize" what he has to "sell" only if he is permitted to offer what the prosecutor is most interested in buying.

(*Mezzanato*, 513 U.S. at 805.)

The similarity in reasoning between the *Mezzanato* and *Bordenkircher* opinions is striking in that the former addressed *preconditions* to plea bargaining while the latter addressed the viability of plea bargaining itself. The two cases suggest a strong commitment by the Court to viewing plea bargaining as but one form of market exchange

in a relatively deregulated capitalist economy. This logic thus apparently governs constitutional and nonconstitutional rules alike. Courts, by this reasoning, should, therefore, permit preconditional waivers of both sorts of rules, for any rights are but bargaining “chips” to be traded for mutual advantage. The Court did indeed expressly face the extension of the *Bordenkircher* logic to preconditional waiver of constitutional rights in *United States v. Ruiz*, 536 U.S. 626 (2002), though perhaps ultimately not strictly deciding that question.

United States v. Ruiz

In *Ruiz*, federal prosecutors offered Angela Ruiz, who had been found with 30 kilograms of marijuana in her luggage, a “fast track” plea bargain. Such an early decision to plead guilty enables the government to recommend a two-level downward departure from the otherwise governing United States Sentencing Guidelines range. The prosecutors’ proposed agreement contained a clause requiring them to turn over to the defendant any known information establishing the factual innocence of the defendant—an apparent nod to *Brady v. Maryland*’s requirement that prosecutors provide material exculpatory evidence in their hands to the accused, 373 U.S. 83 (1963). However, the agreement also specifically required the defendant to waive her right to material

exculpating impeachment information *before* the defendant makes the decision to plead. Explained the court of appeals, “guilty pleas cannot be deemed intelligent and voluntary if entered without knowledge of material information withheld by the prosecution.” (*United States v. Ruiz*, 241 F.3d 1157, 1164 (9th Cir. 2001).) The appellate court continued:

[A] defendant’s decision whether or not to plead guilty is often heavily influenced by his appraisal of the prosecution’s case. . . . [Moreover,] if a defendant may not raise a *Brady* claim after a guilty plea, prosecutors may be tempted to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas.

(*Id.* at 1164.)

The United States Supreme Court disagreed. The Court considered the relevant question to be whether the guilty plea entered by Ruiz was “voluntary” given that it was made without knowledge of material exculpatory impeachment evidence. In the Court’s views, voluntariness had clearly been shown.

In reaching this conclusion, the Court insisted that impeachment information is relevant to the *fairness of a trial* but not to the voluntariness (or knowing and intelligent nature) of the waiver of constitutional rights involved in plea

Hard bargaining—presenting a defendant with unpleasant alternatives—is permissible.

exculpating *impeachment* information relating to informants or other witnesses—information that Ruiz would later argue the prosecutor was required to produce under *Giglio v. United States*, 405 U.S. 763 (1972). In the case of informants, such information would ordinarily have included the informants’ identity, criminal history, history of perjury, and any benefits they received from the state for offering inculpatory testimony.

Because Ruiz would not waive her right to receive such information, prosecutors withdrew their fast-track offer, indicting Ruiz for unlawful drug possession. She later entered an open plea—one absent any agreement—and asked the sentencing judge to accept the two-level downward departure that the government would have recommended had an agreement been reached. The district court denied the motion, imposing a standard guidelines sentence instead.

On appeal, the Ninth Circuit vacated the district court’s sentence, reasoning that the Constitution obligated prosecutors, via the Due Process Clauses, to provide material

negotiation. Critical to the Court’s conclusion was that voluntariness turns on a defendant’s awareness of the *general nature* of his or her constitutional rights, not the specifics of their application to waiving them in a particular case. Here is how the Court put it:

And the law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it. A defendant, for example, may waive his right to remain silent, or his right to counsel even if the defendant does not know the specific questions the authorities intend to ask, who will likely serve on the jury, or the particular lawyer the State might otherwise provide.

(536 U.S. at 629-30.)

Furthermore, the Court concluded, impeachment information is not critical information that must be given the defendant because the “degree of help that impeachment information can provide will depend upon the defendant’s own independent knowledge of the prosecution’s potential case. . . .” (*id.* at 629-30), and “the added value of the ‘right’ [to such information] to a defendant is often limited, for it depends upon the defendant’s independent awareness of the details of the Government’s case.” (*Id.* at 630-31.) “Implicit in this reasoning,” writes law professor Alexandra Natapoff, “is the idea that it is fair to place the burden on the defendant to plumb her own knowledge of guilt and its potential weight at trial in order to estimate the constitutional value of such information.” (Alexander Natapoff, *Deregulating Guilt: The Information Culture of the Criminal Justice System*, CARDOZO L. REV. ____, 6 (forthcoming 2008) (draft manuscript).)

Finally, the Court worried that any contrary rule risks “premature disclosure of Government witness information, which, the Government tells us, could ‘disrupt ongoing investigations’ and expose prospective witnesses to serious harm.” (536 U.S. at 631-32.) Moreover, a disclosure rule would force the government to devote more resources to trial preparation early in the case, depriving the government of the resource-saving advantages that make pleas so attractive. Simultaneously, in the case before it, direct (as opposed to impeaching) exculpatory evidence still had to be provided to the defendant before pleading, a fact that, when combined with the guilty plea safeguards in Federal Rule of Criminal Procedure 11, provided ample protection against the risk of an innocent person’s pleading guilty.

Importantly, the *Ruiz* case did not address the right to provision of direct material exculpatory *Brady* material, as opposed to materially impeaching exculpatory *Giglio* material. In theory, therefore, there might still be a right to preplea *Brady* material. Courts divide on the question, some permitting plea withdrawals where *Brady* material was not provided prior to the plea on the grounds that such a plea is not knowingly and intelligently made, others holding quite the opposite (*See* MICHAEL CASSIDY, PROSECUTORIAL ETHICS 87 (2005).)

Yet the core logic of *Ruiz*—that voluntary waivers require only the most general knowledge that the right exists rather than specifics about its application to the case at hand; that fairness standards for guilty pleas are lower than for trials; that defendants know whether they are guilty anyway; and that early revelation of case weaknesses might compromise prosecutor investigations—suggests that, as in *Ruiz*, there either is no *Brady* right preplea or, if there is one, it can readily be waived. The impact of such an interpretation is potentially huge because, in numerous jurisdictions, as many as 95 percent of all criminal cases are resolved by guilty pleas.

The sometimes explicit, sometimes implicit, logic of *Mezzanato*, *Bordenkircher*, and *Ruiz* is that hard prosecutorial bargaining, including for preconditional waivers, is not alone duress if the accused is represented by counsel, and the defense has adequate information to choose waiver as an option. But these cases suggest that the Court will presume competent counsel absent strong evidence to the contrary. Moreover, two of these three decisions (*Bordenkircher* and *Ruiz*) also suggest that waiver of constitutional rights and statutory ones merit identical treatment.

Duress

The *Bordenkircher* idea that self-interested decisions are definitionally voluntary is, however, one contrary to the meaning given to “duress” and related concepts elsewhere in tort, contract, and constitutional law. (Timothy Lynch, *The Case Against Plea-Bargaining*, REGULATION 2-3 (Fall 2003).) For example, in *Marshall v. Barlow’s, Inc.*, OSHA inspectors entered a businessman’s premises without a search warrant despite his express refusal of consent. The secretary of labor argued that the businessman had a choice—submit to such inspections or decline to open the business in the first place. Accordingly, because he chose to open the business in a world of warrantless OSHA inspections, he voluntarily “consented” to them.

The United States Supreme Court disagreed, recognizing that the OSHA regulations effectively penalized the businessman’s exercise of his Fourth Amendment right to demand a warrant. (*Marshall v. Barlow’s, Inc.*, 436 U.S. 307 (1978).) Although later case law concerning the administrative and special needs exceptions to the warrant requirement suggests that businesspersons do engage in a sort of “quasi-consensual” activity when entering heavily regulated industries, that quasi consent is but one factor in deciding whether the search is reasonable. The Court has never held that the sort of choice facing the businessman in *Marshall*—go out of business or bow to governmental authority—constitutes true “consent” under the Fourth Amendment, consent that, if present, would alone suffice to render the search constitutional. (*See* ANDREW E. TASLITZ, MARGARET L. PARIS & LENESE HERBERT, CONSTITUTIONAL CRIMINAL PROCEDURE 400-02, 411-13, (3rd 2007); *but cf.* *Donovan v. Dewey*, 452 U.S. 594 (1981) (warrantless, nonconsensual search of commercial premises without consent or a warrant was permissible under the Fourth Amendment where the statutory scheme provided an adequate warrant substitute).) The Court has never done so despite its relatively low threshold for finding Fourth Amendment consent. (*Id.* at 448-66.)

Similarly, in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Florida legislature criminalized a newspaper’s criticizing a politician without subsequently permitting him a right to “equal space” in the paper to reply.

The newspapers were free to choose: either do not criticize politicians or do so but only at the cost of giving them free access to the paper to dilute the paper's political position. This choice was, in the Court's view, no real choice at all because it enacted a penalty for exercising the right to publish freely on political matters. (Cf. TAsLITZ et al., *supra*, at 806-12 (analyzing inconsistencies in Court's Fifth Amendment Privilege Against Self-Incrimination "Hobson's Choice" jurisprudence).)

verely—simply for going to trial. It is sheer sophistry to pretend otherwise. (*Id.* at 26-27 (quoting Chief Judge Young).)

If the cost of risking conviction at trial is now so great that plea bargaining is the only practical choice available to most defendants, then a prosecutor's flat refusal even to discuss the prospect of reaching a deal absent preliminary waivers of rights similarly offers the defendant little serious option

The Court presumes competent counsel absent strong evidence to the contrary.

Any choice, of course, is subject to constraints, so the question whether the choice to which the state puts a person involves duress is ultimately a policy question in this form: How much is too much? Still, no sophisticated analysis is needed to conclude that many rights-waiver demands as preconditions to plea bargaining involve duress in any commonsense understanding of that concept. As the CATO Institute's Timothy Lynch puts it, "Plea bargaining rests on the constitutional fiction that our government does not retaliate against individuals who wish to exercise their right to trial by jury." (Lynch, *supra*, at 23.) Although Lynch challenges the constitutionality of the very existence of the institution of plea bargaining—a position I do not take—his comments are particularly apt ones for the voluntariness of prosecutorial preconditions to plea bargaining. Also relevant are the words of Chief Judge William G. Young of the Federal District Court in Massachusetts, who candidly explained:

Evidence of sentencing disparity visited on those who exercise their Sixth Amendment right to trial by jury is today stark, brutal, and incontrovertible. . . . Today, under the Sentencing Guidelines regime with its vast shift of power to the Executive, that disparity has widened to an incredible 500 percent. As a practical matter this means, as between two similarly situated defendants, that if the one who pleads and cooperates gets a four-year sentence, then the guidelines sentence for the one who exercises his right to trial by jury and is convicted will be 20 years. Not surprisingly, such a disparity imposes an extraordinary burden on the free exercise of the right to an adjudication of guilt by one's peers. Criminal trial rates in the United States and in this District are plummeting due to the simple fact that today we punish people—punish them se-

but to comply.

But, even if duress is absent, that would not be sufficient to justify preconditional rights waiver demands. Contractual bargaining is favored by the law because it is considered *socially* beneficial: both parties benefit (otherwise they would not agree), and total societal "wealth," broadly defined, is enhanced whenever fully informed persons with equal power bargain, resulting in a contract. But neither the informational nor equality of power assumptions hold in the plea-bargaining context, as I next explain.

Informational Flaws Weak Discovery Rules

Timid discovery rules and the efficiency pressures of assembly-line justice limit both the amount of critical information available to a defendant deciding whether to plead and the parties' incentives for finding and using what little information is available. There is, for example, no general constitutional right to discovery. (*See Ruiz*, 536 U.S. at 629.) Furthermore, criminal discovery rules in the vast majority of jurisdictions are woefully limited compared to the civil justice system. With rare exceptions, criminal defense attorneys can neither take depositions nor compel prosecution witnesses to give even informal pretrial interviews to the defense. Nor, in many jurisdictions, can defense counsel simply get the name of prosecution witnesses. Even "liberal" jurisdictions with "open file" policies—largely meaning that the prosecutor turns over police and expert reports—provide extraordinarily little information relative to what the civil system routinely offers. (*See Stephen J. Schulhofer, A Wake-Up Call from the Plea-Bargaining Trenches*, 19 L & Soc. INQUIRY 135 (1994).) "Altogether, the discovery rules pose massive barriers to determining the facts, assessing witness credibility, and developing prior to trial a well-informed estimate of the probability of conviction." (*Id.* at 137.) The result, concludes NYU law professor

Stephen Schulhofer, is that “plea bargains are often struck on the basis of incomplete, highly imperfect information and little more than the attorney’s guess about what a trial might reveal if one were held.” (*Id.* at 137.)

Conflicts of interest magnify the problem, “skewing the incentives” of both prosecutors and defense counsel to obtain complete case information quickly, argues Schulhofer. Prosecutors, worried about their “batting average[s],” fearing embarrassing losses, and wanting to cultivate good relationships with defense counsel to ease future deal making, prefer entering into bargains. Defense counsel, often paid an inadequate flat fee for services, have a financial incentive to minimize the time they spend on any individual case. Heavy caseloads and inadequate resources on both sides, moreover, push them not just toward deals but toward deals that minimize investigation and trial preparation costs. Those costs rise dramatically if a case goes to trial, so cost-cutting motivations are at their maximum when the decision whether to go to trial in the first place is being made. Furthermore, frequent deal making feeds on itself, fostering a culture of courtroom “teamwork” rather than true adversarialness, at least absent the galvanizing effect of actually going to trial. This working environment “generates intense pressure to bypass whatever avenues for factual investigation remain open.” (*See* Schulhofer, *supra*, at 137.) Cases such as *Ruiz*, which further limit the discovery available to the defense prior to pleading guilty, worsen this situation. Even plea bargaining’s defenders agree on this point:

If a plea bargain is a contract, it should be subject to the same rules that apply to other contracts, including the requirement that both parties disclose relevant information. If a car dealer must tell you that the car he sells you is defective, prosecutors ought to be required to disclose when their cases are defective.

(Timothy Sandefur, *In Defense of Plea Bargaining*, REGULATION 28 (Fall 2003).)

Cognitive Biases

Even when information is available, a variety of cognitive biases make it hard for defendants to process. Most people, criminal defendants included, are loss averse. They are more worried about what they might lose than what they might gain. (*See* Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163, 168-69 (2007).) If plea deals are presented as ways to minimize losses (namely, of freedom), clients will often find the deal more attractive than otherwise. Moreover, if prosecutors make high initial offers, as they often will, the ultimate deal may end up closer to that offer than a more dispassionate analysis might provide; this is so because the offer serves as an “anchor” keeping deals down in its vicinity. People suffer as well

from “time-discounting,” undervaluing consequences in the far future. (*See id.* at 168-69.) This makes criminal defendants “more indifferent to additional years at the tail end of a sentence.” (*See id.* at 170.) Defendants also may engage in “selective perception” in which they perceive or greatly weigh only information fitting their preconceptions. Defendants differ in their aversion to risk, and a risk-averse defendant, trembling at the thought of extended imprisonment, will therefore pay more attention to the case’s weaknesses than its strengths. (*See id.*) For juvenile defendants, these biases and other sorts of irrational thinking processes may be amplified because of the juveniles’ reduced cognitive capacities and emotional and psychosocial development, deficiencies rooted in the biology of the slowly maturing adolescent brain that compromise its ability to reason and understand, manage powerful emotions, control impulses, adequately consider the future, and resist peer pressure. (*See* Abbe Smith, “*I Ain’t Takin’ No Plea*”: *The Challenges in Counseling Young People Facing Serious Time*, 60 RUTGERS L. REV. 11 (2007).)

Informationally Impaired Counsel

The Court’s assumption that representation by counsel guards against information processing errors is likewise flawed. Social science research suggests that counsel may compensate for the defendant’s cognitive errors only modestly and may even introduce new ones into the system.

Understanding why this is so requires distinguishing between two information processing systems: the automatic and the effortful. Cognitive biases are one sort of automatic processing, using mental shortcuts for quick, low-effort analysis. Schemas are mental shortcuts that organize how we gather and assess information and retrieve it from memory, cognitive biases being one sort of schema. (*See* Blumoff, *supra*, at 168-72.) Labels can affect which schema comes into play. For example, labeling a contest the “Wall Street Game” leads to more competitive behavior than labeling it the “Community Game.” (*See id.* at 168-72.)

Effortful thinking, by contrast, is slower and more laborious but better able to reach data-driven than preconceived theory-driven outcomes. Effortful processing is thus better able to correct for error, achieve accurate results, and encourage flexibility in problem solving and communication. (*See id.* at 172-73.)

Legal training is thought by some commentators to promote effortful over automatic information processing. There is indeed some empirical research suggesting that lawyers may be less susceptible than laypersons to *some* cognitive biases and may be better able “to learn from their past experience and formulate more realistic views of potential outcomes.” (*Id.* at 173); *see also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2521 (2004).) But lawyers are, nevertheless, not

entirely free from cognitive biases, and there are both dispositional (character- or personality-based) and situational forces that may increase attorney bias. (See Blumoff, *supra*, at 173-74.)

Two psychological processes are particularly important here. The first is “epistemic motivation” or the degree to which a person needs more or less information in making decisions. Persons having a strong need for closure are low in epistemic motivation, comfortable making quicker decisions with less data. They are eager to get to the bottom line. (See *id.* at 174-75.) More open-minded individuals are comfortable postponing decisions and eager to gather ample information, favoring a more leisurely, careful reasoning style. They favor effortful thinking, while their closure-loving counterparts rely more on stereotyping and heuristics to speed the arrival of cognitive closure. The latter therefore favor predictability, order, structure, decisiveness, close-mindedness, and the avoidance or ready resolu-

A second factor affecting lawyer rationality in plea bargaining is the phenomenon of group identification. Humans have a need to belong to various groups. This sense of belonging alters “how people perceive and make sense of the world around them.” (*Id.* at 177.) In-group members perceive their “own kind” as multidimensional human beings but perceive out-group members through the lens of stereotype, cognitive bias, and other automatic thinking processes. (See *id.* at 177-78.)

Criminal lawyers often develop a strong sense of personal identification as a “defense attorney” or a “prosecutor.” Gary Lowenthal, who has been on both sides of this divide, writes that prosecutors see a sharp difference between themselves and defense counsel, embracing an “us versus them” worldview in which “there is a strong taboo against socializing with the enemy.” (GARY T. LOWENTHAL, *DOWN AND DIRTY JUSTICE* 107 (2003).) Clinical professor Abbe Smith, a former public defender, writes, though with

Social science research shows counsel may compensate for a defendant's cognitive errors only modestly and may introduce new ones.

tion of ambiguity. (See *id.* at 174-75.)

Lawyer personality research suggests that lawyers are on average more likely than others to fit in the closure-lovers' camp, having a powerful desire for “structure, schedules, closure on decisions, planning, follow-through, and a ‘cut-to-the-chase’ approach.” (SUSAN SWAIM DIA-COFF, *LAWYER KNOW THYSELF: A PSYCHOLOGICAL ANALYSIS OF PERSONALITY STRENGTHS AND WEAKNESSES* 33 (2004).) There is some reason to believe that criminal justice system lawyers are even more driven by the need to “close” cases, achieving final resolution of them. (See Blumoff, *supra*, at 175-76.)

Time pressure and mental fatigue are two situational factors shown to increase the need for closure. Some of this research has been done specifically in the context of negotiations and “strongly suggests that negotiators are less likely to engage in systematic information processing when there is high rather than low time pressure.” (*Id.* at 176-77.) But prosecutors and defense counsel routinely work under enormous time pressure while suffering significant fatigue. Speedy trial clocks, heavy caseloads, and client demands for resolution exacerbate these pressures. The result is that lawyers naturally favoring closure are pushed more toward it by institutional forces, resulting in stereotyped thinking based on incomplete information via cognitive processes of which the lawyers may be entirely unaware. (See *id.* at 176.)

a more positive spin, of the bonds of sisterhood and brotherhood among defense counsel, and particularly among public defenders:

Camaraderie undoubtedly plays an important role in drawing and sustaining defenders. . . .

. . . Many defenders report that the best part of the work is the feeling of community and shared purpose, of being in this together, of esprit de corps. . . . [One] career defender [says]: “There’s something special about us and we’re different from others—certainly other lawyers. There’s this kinship among us. You can’t put a price tag on that.” There is an understanding that defenders better stick together, because pretty much everyone else is against them.

The culture of public defender offices is one of mutual support, collegiality, and generosity. Defenders “attend each other’s closing arguments, cross-examine one another’s clients, handle court appearances for colleagues, commiserate, shoot the bull, and nibble at each other’s food.” If time allowed, defenders would do anything for their colleagues.

. . . .
Camaraderie helps brace public defenders for hostility from the rest of society. . . . As career defender Stu Glovin notes, “The camaraderie is almost like a

sanctuary around here.”
(Abbe Smith, *Too Much Heart and Not Enough Heat: The Short Life and Fractured Ego of the Empathic, Heroic Public Defender*, 37 U.C. DAVIS L. REV. 1203, 1213-15 (2004).)

Defenders are thus more likely to view prosecutors as ciphers than real human beings and vice versa. I myself have observed what seems to be a particularly virulent strain of this cognitive virus in Washington, D.C. I have heard some assistant United States attorneys (AUSAs) in the district describe defenders as liars, sleazy, incompetent, and corrupt. I have heard defenders describe AUSAs as everything just short of the devil. One good friend of mine—a former D.C. public defender—was horrified to discover one year after our friendship began that I had been a prosecutor. It unsettled her entire worldview. How, she wondered, could she square this new information with her perception of me as a “nice guy”?

These sorts of judgments also reflect the “fundamental attribution error,” the finding in psychology that individuals explain their own behavior by reference to the situation in which they find themselves but other’s bad behavior by their character or essential nature. (See Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process* in 10 ADVANCES IN EXPERIMENTAL SOC. PSYCH. 173, 183 (Leonard Berkowitz ed. 1977).) The “ultimate attribution error” is the tendency to view members of out groups in particularly stereotypical ways based purely upon their group membership. (See Blumoff, *supra*, at 189.) The mere label “defense counsel” might thus contribute to prosecutors’ seeing any particular defense attorney as sleazy and untrustworthy. Mistrust might encourage prosecutors to make preemptive strikes, such as insisting upon preconditional waivers, to avoid the embarrassment of later discovering that they have been duped by conscience less defense counsel.

Group stereotyping filters how we process, encode, and retrieve information. Stereotypes can radically alter perceptions of events and why they occur. These filters lead to decisions based upon distorted understandings, impeding rational judgment. This observation holds true in plea bargaining as elsewhere. As one commentator puts it:

In plea bargaining, stereotypic processing based on group membership in the defense or the prosecution camp suggests that there would be a heightened perception of information received from the other side in a way consistent with stereotypes and stereotypic hypotheses. Alafair Burke has explored this idea, suggesting that prosecutors who are sometimes later viewed as overzealous are not unethical or bad people, but are blinded by selective perception and optimistic

overconfidence because they filter potential information about defendant innocence through a stereotypic lens that defendants, as a group, are guilty. (Id. at 181.)

Constitutional Rights Merit Special Protection

The Court’s willingness to judge duress and the voluntariness of preconditional waivers and of plea bargains themselves under the same lax standards in constitutional cases as in rule-based or statutory ones is also flawed. Although the cognitive processes just reviewed hamper defense counsel performance regardless of the type of rule involved, constitutional rights merit heightened protection for at least two reasons: first, the “constitutive function” of such rights; and, second, the centrality of public over private processes to constitutional criminal procedural rights.

The Constitutive Function

Special care must be taken concerning the waiver of constitutional rights because they help to “constitute” the American people. They define us. A society whose basic law outlaws slavery and its badges and incidents is fundamentally different from one that does not. Battles over the meaning of constitutional provisions and struggles to amend them are so passionate because of the at least implicit understanding that what is at stake is the very meaning of America. (See Andrew E. Taslitz, *What Feminism Has to Offer Evidence Law*, 28 SW. U. L. REV. 171, 179-87 (1999) (explaining law’s “constitutive function”).)

This observation is as true of the criminal procedure provisions of the Constitution as of other provisions. Linking many of the former provisions is a concern with regulating information—how the state obtains it, uses it, evaluates it, and determines its consequences. For example, the Fourth Amendment prohibits the state from obtaining information about suspected criminal activities by means of unreasonable searches and seizures, the Fifth Amendment privilege guards against the state’s compelling information from a defendant’s own mouth, and the Sixth Amendment Compulsory Process and Confrontation Clauses help to guarantee an adequate flow of information to the fact finder. These provisions embody core constitutive commitments to privacy, property, free movement, the inviolate nature of the human personality, and the dignity of having a voice in what will be the basis upon which each of us is judged.

Rules mandating public trials, a right to a jury, and the beyond a reasonable doubt burden of persuasion similarly ensure some measure of community scrutiny of state information practices and community involvement in them. These rules are *political* rules about the place of criminal justice in the nation’s governance. (See Andrew E. Taslitz, *Catharsis, the Confrontation Clause and Expert Testimony*, 22 CAP. U. L. REV. 103 (1993).) One commentator nicely captured the constitutive

function of these informational rules of the game:

How information is produced and transformed into a legally acceptable finding of guilt is a defining feature of the criminal justice system. At their most elevated, information rules make the difference between the lynch mob and the trial, torture and interrogation, the Star Chamber and public adversarial process. The rules not only prescribe what information can contribute to a criminal conviction, but they set the tone for the whole process, illuminating the values and precepts that define the normative commitments of the system, not only to the way that individual defendants are adjudicated but also [to] the public values and transparency of the process.

(Natapoff, *supra*, at 10-11.)

These information rules are not limited to the trial. Unreasonable searches and seizures are barred as methods for evidence collection regardless of whether a criminal trial, or even an arrest, ensues. *Miranda*, the Fifth Amendment's child, is violated, says the Court, or at least says a plurality of justices, only if a *Miranda*-violative confession is admitted at trial, but the risk of this occurring means that *Miranda* effectively shapes police behavior in the station-house too. (See TAsLITZ, PARIS & HERBERT, *supra*, at 707, 816.) Other constitutional safeguards arise pretrial because the Court recognizes that events at that stage are potentially determinative of trial outcomes, a point the Court has expressly made about the right to the effective assistance of counsel at critical stages of a criminal prosecution, such as lineups, and, perhaps less clearly, as to the right to be free from unnecessarily suggestive lineup procedures under the Due Process Clauses. (See *id.* at 886-87.)

Plea bargaining is also a potentially outcome-determinative information-generating process, especially if preconditional waivers are permitted. Plea bargaining that does not result in a deal but that did involve such waivers may give the prosecution inculpatory information it otherwise did not have, rendering the trial outcome—a guilty verdict—a near certainty. It is hard to see, therefore, why preservation of constitutional rights that are so protective of *trial* outcomes should be any less protective of *plea* outcomes.

Publicity

Overview. Many constitutional rights protect “publicity.” At a public jury trial, the jury, the judge, and the broader community stand ready to scrutinize the quality and weight of evidence. The fear of such scrutiny can serve to determine and expose abusive state practices. But plea bargains occur in secrecy. Most of the details of the bargaining never see the light of day, even if a deal is reached, for relatively pro forma plea colloquies are, though not wholly empty,

more rituals than serious efforts to scrutinize the quality of the evidence or the means by which it was obtained. If no deal is reached, the details of the bargaining process—the give-and-take, offer and counteroffer of prosecution and defense—will generally not be relevant, thus never being heard by the jury. (See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006).) In any event, no videotapes, audiotapes, or other recordings of bargaining occur, making it hard to reconstruct what happened. Many jurisdictions are moving toward videotaping custodial interrogations by police as a way to deter wrongdoing and more accurately judge the voluntariness of the deal. (See ABA, *ACHIEVING JUSTICE*, *supra*, at 11-22). No similar movement is seriously afoot for plea bargaining.

This secrecy and minimal regulation also keep the public ignorant of what occurs in prosecutors' offices and courthouse corridors. What little they do learn, they do not like, though largely because the truncated picture they receive paints the process as doling out minimal sentences to deeply culpable offenders. The public relies on these false generalizations freed from the focusing power of a two-sided adversarial presentation in a specific case. (Cf. Shulhofer, *supra*, at 138-39 (focusing power of trial).) Defendants become seen as fungible stick figures of evil. Public political pressure assumes guilt, pressing for convictions while ignoring the social costs of doing so via what are in fact harsh, not lenient, plea bargaining outcomes. In such an environment, the quality of decision making suffers, the aggressiveness of state investigative methods increases, the moral force of decision is diminished, and state power goes unchecked. Limiting waiver of core constitutional rights as a precondition to plea bargaining at least places some limits on this process and diminishes the injury it can ultimately do at trial to both the defendant's and the public's interests if no deal is reached.

Procedural Justice Effects

The secrecy and seemingly uncontrolled power of the state during plea bargaining is also likely to make defendants view the whole process as unfair. Defense counsel seem to their clients to too often serve primarily as the bearers of bad news, bullying them into a plea deal based on rules that are stacked against them and a process in which they have little voice. (See Smith, *supra* (describing one such bullying instance and defending it in a world of limited defense options).) Both the public and the accused, albeit for different reasons, feel cheated of procedural justice. Yet ample empirical evidence shows that the denial of such justice reduces perceptions of governmental legitimacy while increasing willingness to disobey the law. (See Tom R. Tyler, *Racial Profiling, Attributions of Motive and the Acceptance of Social Authority*, in *SOCIAL CONSCIOUSNESS IN LEGAL DECISION MAKING: PSYCHOLOGICAL PERSPECTIVES* 61, 69-70 (Richard L. Wiener et al., ed. 2007).) In the long run, crime rises, per-

haps more than it is deterred by the risk of harsh penalties.

Preconditional waivers are likely to exaggerate these negative procedural justice effects. Such waivers can be seen as the “price” paid for the privilege of plea bargaining. But recent psychological and economic research on price theory reveals that the parties to a market exchange have a sense of what constitutes a “fair price.” What is fair is not defined solely by what the market will bear. Instead, social norms of reciprocity, serious voice in setting the price, and concern for weaker parties enter into the price-setting mix. If a stronger opponent still insists on a harsh price, the consumer reacts with resentment, even rage, seeking retribution against the seller. Often outraged buyers can protest by simply walking away from the deal. But in the criminal justice system, the risk of a harsh sanction against a non-compliant “buyer” (the defendant) is so great as to render the feasibility of exit from a bad deal an illusion. Defendant and defense counsel loss of faith in such a system is likely, bringing into question its legitimacy and undercutting any supposed rehabilitative goals of criminal punishment. (See SARAH MAXWELL, UNDERSTANDING WHAT MAKES A PRICE SEEM FAIR AND THE TRUE COST OF UNFAIR PRICING 1-11 (2008).) Although all preconditional waivers raise these risks, constitutional rights-waivers might seem particularly offensive because the Constitution lays the essential ground rules on which all other rules of the game depend.

The Conscience of the Community

Finally, much sociological research establishes that organizations create their own codes of behavior, “delegalizing” all

Political Action 66 L. & CONTEMP. PROB. 221 (2003).)

But the grip of organizational culture is not unbreakable. Much other research suggests that reminders of broader values and why they matter at work too can change hearts and minds. Successful whistle blowers, for example, face ostracism but also ultimately bring about change in organizational behavior. Mere preaching about morality does little good. But reminding organizations of moral principles that have powerful consequences—whether exposure to public ridicule, material loss such as of promotion opportunities, or sanctions that interfere with achieving cherished goals—can effect change. There are no more important rules of public political morality than those set forth in the Constitution. (See *id.* at 291-94.) To insist that these rules continue to hold sway during the secrecy of plea bargaining is thus to insert the conscience of the community into the negotiations. Prosecutors, like most people, want to see themselves as moral persons, but unchecked immersion in their professional role can unduly narrow the prosecutor’s vision. Limiting waiver of constitutional rules enables those rules to act as prosecutorial eyeglasses, restoring moral clarity.

Whither Plea Bargaining?

Much of what I have said might seem to call into question the wisdom of plea bargaining entirely. But I reject that position. First, I have emphasized here the communal over the individual value of defendants’ rights and justice system practices. But, however contradictory it may seem, our legal system embraces *both* the individual and the community. Individual defendants would not want to be deprived of plea bargaining

Secrecy and minimal regulation keep the public ignorant of what occurs in prosecutors’ offices.

other criteria for proper conduct. Workers who bring other, outside criteria to bear on their decision making and actions—for example, relying on broader social values—are viewed as “unpredictable and potentially destabilizing.” The apparent obsession of some major corporations such as Enron with the instrumental goal of maximizing stock value as more important than honesty and clarity in financial transactions is a powerful illustration of this principle. Indeed, studies of whistle blowers—those who face retaliation for speaking out in the name of the public good—reveal that colleagues and superiors even try not to read or hear what the whistle blower says because mere exposure to his or her words taints organizational members and smacks of disloyalty. The moral code of the organization rather than that of the broader society rules on the job. (See Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire*

as an option entirely. In a world of harsh options, a plea deal may sometimes be the best choice available. Moreover, however weak a safeguard, when deals are reached, guilty plea colloquies offer the defendant at least the semblance of some judicial monitoring. Likewise, prosecutors will not want to be forced to shoulder the risks of loss at trials in difficult cases, and, though the accuracy of the point is disputed, the reigning wisdom is that the system could not handle crushing caseloads without the bargaining system. In our market-based culture, plea bargaining is here to stay.

But the social and individual benefits of bargaining turn on informational and power equalities that are fictions. The system perpetrates grave hypocrisies each day by pretending otherwise. The practical solution is not to send plea bargaining into the dustbin of history but to reform it—and certainly not to worsen current rampant inequalities. Prohibiting pros-

ecutor-mandated complete waivers of constitutional rights governing information flows is one way to move toward greater power and informational equality. Moreover, doing so would bring the constitutional conscience of the people into the otherwise secret bargaining process. But flat prohibitions of all such waivers might have high costs in freeing the guilty, though there is not yet hard data to prove that this will be so. Furthermore, courts have proven reluctant to intercede in prosecutorial prerogatives. Rather than advocating judicial interference, therefore, I make a call here for prosecutor self-regulation. If prosecutors do not act, of course, the case can be made (though the battle is uphill) that the now-unregulated market for plea bargains needs to be regulated. One way to do that is for the courts to impose more demanding standards for the waiver of rights—particularly of constitutional rights—as a precondition to plea bargaining. However, prosecutors, I maintain, first deserve a chance to take aim at the problem themselves.

Ethical Restrictions

There are few restrictions on plea bargaining in ethics codes. There are no provisions specifically regulating plea negotiating practices in Rule 3.8 of the Model Rules of Professional Conduct (MRPC), entitled, “Special Responsibilities of the Prosecutor.” There is indirect regulation via Rule 8.4(c)’s prohibition on a lawyer’s engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, but it is unlikely that insistence upon preconditional waivers will be seen as involving such conduct. Rule 3.8(c) also does generally require prosecutors to negotiate only with defense counsel, not the defendant, but I have argued here that representation by counsel is but a modest safeguard against abusive preconditional waivers.

ABA Standard for Criminal Justice 3-4.1 does, however, suggest that “where feasible,” a record should be made of any plea discussions with a pro se defendant, but no such record is required where a defendant is represented by counsel. Moreover, even for pro se defendants, the record-keeping requirements are minimal, often being met by an investigating officer being present and taking notes. (CASSIDY, *supra*, at 89.)

The *U.S. Attorney’s Manual* also lists “considerations to be weighed” in determining what is an appropriate plea bargain but says little, if anything, relevant to preconditional waivers. The National District Attorney’s Association Standard 66.3 also suggests that “[s]imilarly situated defendants should be afforded substantially equal plea agreement opportunities.” This aspirational standard arguably governs preconditional waivers but again offers little protection. A prosecutor who insists that *every defendant* agree to certain preconditional waivers, no matter how onerous, would meet this standard. Even the recent amendments to the *text* of Rule 3.8, which impose certain disclosure and related obligations on a prosecutor who “knows of new credible and material evidence”

of innocence, does little to address even those preconditional waivers made in cases where evidence of guilt is weak.

Ultimately, therefore, the only guidance for a prosecutor is his or her duty to “do justice.” The comment to Rule 3.8 contrasts this duty with that of an advocate, declaring that the prosecutor has an affirmative obligation to “see that the defendant is accorded procedural justice” and “that special precautions are taken to prevent . . . the conviction of innocent persons.” Scholarly commentators have argued that, at a minimum, the prosecutor’s role as a justice minister requires him or her to safeguard the defendant’s constitutional rights, ensure that he or she receives procedural safeguards mandated by law, and minimize the chances of convicting the innocent.

Although the duty to do justice nevertheless provides little guidance to the prosecutor on preconditional waivers, I suggest that this duty can be met in this area, at a minimum, only if the prosecutor crafts internal office policies wrestling with the problem. These policies should generally mandate the production of *Brady* and *Giglio* material to defense counsel *before* plea negotiations. Furthermore, such policies should especially strongly discourage preconditional waivers of *constitutional* rights. Moreover, the starting place for such policies should be that mandating preconditional waivers of any sort is presumptively undesirable, and permitting such waivers should be the exception rather than the rule. Such a presumption should not undermine prosecutorial incentives to negotiate. In most instances, heavy caseloads alone provide the necessary incentive. Where a prosecutor’s willingness to accept a plea deal turns on the defendant’s agreeing to testify against other defendants or otherwise cooperate in law enforcement investigations, the prosecutor remains free to arrange a proffer meeting. If the prosecutor concludes at that meeting that the defendant is truthful, the culpability low, and the defendant’s ability to assist an investigation high, the prosecutor can reach a plea deal to gain the defendant’s cooperation. If the prosecutor concludes otherwise, he or she can simply insist on going to trial. Neither the defense nor the prosecution is in any worse shape than before the negotiation. If a deal is reached, however, it will result from greater equality of information and bargaining power, and all parties will benefit. Additionally, the early and continuing exculpatory-evidence obligations will reduce the likelihood of striking a plea with an innocent defendant.

Alternative or additional approaches are possible. One alternative would emphasize transparency by permitting the video or audio taping of plea negotiations for the sole purpose of aiding the trial judge in assessing the voluntariness of preconditional waivers. This approach is impractical in routine cases where plea negotiations may consist of five minutes of conversation before a scheduled trial, motion argument, or arraignment. But the prosecutor’s need for waivers will be particularly small in such cases. On the

other hand, where prosecutors schedule proffer sessions, they indicate a belief that the defendant's cooperation is important. There is time to tape those and similar negotiating sessions where the defendant participates in questioning by, or conversation with, the prosecutor. Such transparency would be unsettling to prosecutors used to bargaining secrecy. But greater transparency seems a fair price to pay if a prosecutor insists on preconditional waivers that raise risks of countervailing ill social effects.

Another option is for policies to require approval of preconditional waivers by high-level administrators in the prosecutor's office. Such a policy could require a justifying

memorandum as a trigger for the approval process. Requiring higher-level sanction of preconditional waivers would help to make them more rare.

I do not argue that there is a one-size-fits-all solution to the preconditional waiver problem. But I do argue that prosecutors have an obligation to recognize that there is a problem and to make good faith efforts to correct it. Failing that action, the only remaining option is to urge courts to embrace meatier waiver standards. But, as *Mezzanato's* progeny and the other cases discussed here reveal, as a practical matter courts are unlikely to intercede. Reform lies primarily in appeal to the prosecutorial conscience. ■