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Gregory M. Dyer

Brendan Judge

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In 1985, Darrell Smith was indicted for second degree assault, reckless endangerment, and criminal possession of a weapon. A second indictment charged him with first degree robbery and third degree grand larceny. Before trial, Smith and the prosecutor plea bargained.[1] Smith agreed to plead guilty to first degree robbery and attempted second degree criminal possession of a weapon in exchange for consecutive sentences of two and one-half to seven and one-half years for the robbery charge and one to three years for the weapons charge. The prosecution further required that Smith waive his right to appeal from the plea-based conviction. Smith agreed, and a New York trial court entered judgment against him. Smith later attempted to appeal his conviction, asserting that his sentence was excessive. The Appellate Division dismissed his appeal, however, since the prosecution had obtained a valid waiver of Smith's right to appeal.

In 1986, Alan Seaberg was indicted for two felony counts of operating a motor vehicle while intoxicated. The first count of the indictment charged him with the operation of a vehicle while he had a blood alcohol content of .1 or more. The second count charged him with operating a vehicle while in an intoxicated condition. Seaberg's case proceeded to trial. The jury found him guilty of the offense charged in count one, and of the lesser included offense of driving while impaired charged in count two. At the time of sentencing, the prosecution negotiated with Seaberg, and agreed to a lenient sentence in exchange for Seaberg's agreement to waive his right to appeal. Seaberg subsequently appealed his conviction, asserting several trial errors which he claimed warranted reversal of his conviction. However, since Seaberg had waived his right to appeal as

1 In a plea bargain the prosecution and defense engage in discussions hoping to reach an agreement in which the defendant pleads guilty. The prosecutor, as well as the defendant or defense counsel, may initiate this process. Plea agreements involve concessions by both the prosecution and defense. The "most common" concessions that prosecutors make are reduction or dismissal of the charge, sentence recommendation, and agreement not to oppose a requested sentence. J. BOND, PLEA BARGAINING & GUILTY PLEAS (2d ed. 1982). Less significant concessions include charging as a juvenile rather than as an adult, and agreeing to a particular place of confinement. *Id.* On the other hand, the agreement to plead guilty is the defendant's "strongest bargaining chip." *Id.* at 1-20. Other bargaining chips include agreeing to make restitution, promising to divulge information, aiding in the investigation of a crime, and testifying as a witness. *Id.* at 1-21. The Supreme Court expressly approved plea bargaining in Brady v. United States, 397 U.S. 742 (1970). *See also* Santobello v. New York 404 U.S. 257, 261 (1971) (where the Court refers to plea bargaining as "not only an essential part of the process but a highly desirable part").

part of the sentence negotiation, the Appellate Division dismissed his appeal.[2]

On June 15, 1989, the New York Court of Appeals affirmed the Appellate Division's dismissals of the appeals in these two cases.[3] In *People v. Seaberg*,[4] the Court of Appeals confronted the issue of whether criminal defendants may validly waive their rights to appeal as part of a negotiated sentence or plea bargain.[5] The court, noting that it saw no basis for distinguishing between the two situations presented in the two cases,[6] held that defendants may waive the right to appeal as a condition of either a sentence negotiation or a plea bargain.[7]

In *People v. Smith*,[8] the defendant waived his right to appeal during plea bargaining before trial. In *People v. Seaberg*,[9] the defendant waived his right to appeal during sentence negotiations after trial.[10] The recent New York Court of Appeals case, *People v. Seaberg*, which consolidated these two cases, illustrates a criminal defendant's waiver of the right to appeal at two different stages in the criminal justice system. This Note argues that criminal defendants' waiver of the right to appeal, made pursuant to a condition of either a plea bargain or a negotiated sentence should be invalid. In addition, this Note illustrates the significant differences that exist between the post-trial negotiated sentence stage and the pre-trial plea bargain stage, and suggests that the reasons for invalidating such waivers are even more compelling at the negotiated sentence stage.

Part I of this Note discusses the history of the right to appeal. Part II examines the arguments that American courts have advanced, pro and con, regarding appeal waivers during plea bargains and negotiated sentences. Part III presents the arguments against allowing waivers of the right to appeal in these contexts. These arguments include: (1) a consideration of the due process restrictions on inducing such waivers; (2) an analysis of the policy implications of appeal waivers, including efficiency concerns, the impact on the development of the common law, and the effect on judicial integrity; and (3) an explanation of the effect such waivers have on habeas corpus relief. Finally, Part IV of this Note explains why the waiver of the right to appeal is particularly objectionable at the sentence negotiation stage.

I. History of the Right to Appeal

The right to appeal is relatively new to both the English and American legal systems. In fact, the right to appeal did not exist in England

2 These facts are paraphrased from People v. Seaberg, 74 N.Y.2d 1, 541 N.E.2d 1022, 543 N.Y.S.2d 968 (1989).

3 *Id.* at 5, 541 N.E.2d at 1023, 543 N.Y.S.2d at 969.

4 *Id.* at 1, 541 N.E.2d at 1022, 543 N.Y.S.2d at 968.

5 *Id.* at 5, 541 N.E.2d at 1023, 543 N.Y.S.2d at 969.

6 *Id.* at 10, 541 N.E.2d at 1026, 543 N.Y.S.2d at 972.

7 *Id.* at 5, 541 N.E.2d at 1023, 543 N.Y.S.2d at 969.

8 142 A.D.2d 195, 535 N.Y.S.2d 732 (1988), *aff'd sub nom.* People v. Seaberg, 74 N.Y.2d 1, 541 N.E.2d 1022, 543 N.Y.S.2d 968 (1989).

9 139 A.D.2d 53, 530 N.Y.S.2d 278 (1988), *aff'd*, 74 N.Y.2d 1, 541 N.E.2d 1022, 543 N.Y.S.2d 968 (1989).

10 *Seaberg*, 74 N.Y.2d at 5, 541 N.E.2d at 1023, 543 N.Y.S.2d at 969.

until 1907.[11] As the Court in *Carroll v. United States*[12] noted, "[i]t was 100 years [after the ratification of the Constitution] before the *defendant* in a criminal case, even a capital case, was afforded appellate review as of right."[13] Nonetheless, that the right to appeal is relatively new in no way diminishes its importance. As Yale law professor, Harlon L. Dalton writes, "[a]lthough its origins are neither constitutional nor ancient, the right has become, in a word, sacrosanct."[14] Dalton explains that "[d]uring the past decade of high anxiety over the burdens placed on our judicial system by what has fairly been termed a litigation explosion, the basic right to take an appeal has remained virtually untouched."[15]

The number of jurisdictions in the United States that grant a defendant the right to appeal illustrates the importance of this right. Currently, defendants have some right to appeal in forty-eight states and the District of Columbia as well as in federal courts.[16] Among the states, only West Virginia and New Hampshire have not granted appeal as a matter of right.[17]

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11 The right to appeal was created in England by statute, 7 Edw. VII, ch. 23 § I. Under the statute, "any prisoner, convicted on indictment, may with the leave, either of the tribunal itself or the Court which tried him, appeal on grounds of fact, or mixed law and fact, or any other ground, against his conviction." *Id.*

12 354 U.S. 394 (1957).

13 *Id.* at 400. The Court explained:

> The Act of February 6, 1889, 25 Stat. 656, authorized direct review in the Supreme Court by writ of error "in all cases of conviction of crime the punishment of which provided by law is death, tried before any court of the United States . . . ." Two years later, the Circuit Courts of Appeals Act extended the jurisdiction for direct review to all "cases of conviction of a capital or otherwise infamous crime." 26 Stat. 827. The burden upon this Court of hearing the large number of criminal cases led, in 1897, to transfer of the jurisdiction over convictions in noncapital cases to the Circuit Courts of Appeals. 29 Stat. 1157. Section 238 of the Judicial Code completed the retrenchment in 1911 by eliminating direct review of capital cases. 36 Stat. 1157.

Id. at 400 n.9.

14 Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L. J. 62 (1985).

15 *Id.* at 62.

16 *See* Federal, 28 U.S.C. 1291 (1982); CODE OF ALA. § 12-22-130 (1986); ALASKA STAT. § 22.05.010 (1988); ARIZ. CONST. art. 2 § 24; ARK. CONST. art. 7 § 33; CAL. PENAL CODE § 1237, sub 1 (West 1982); COLO. REV. STAT. § 16-12-101 (1978); CONN. GEN. STAT. § 54-94(a) (1985); DEL. CONST. art. IV § 28 (1897); D.C. CODE ANN. § 11-721(b) (1988); FLA. CONST. art. V § 5(3) (1968 Rev.); GA. CODE ANN. § 6-701 (1975); HAW. REV. STAT. § 641-11 (1988); IDAHO CODE § 19-2801 (1987); ILL. CONST. art. VI § 6 (1971); IND. CODE ANN. § 35-38-4-1 (Burns 1985); IOWA CODE ANN. § 814.6 (West 1978); KY. CONST. § 115 (Baldwin 1988); KAN. STAT. ANN. § 22-3602(a) (Vernon 1987); LA. CODE CRIM. PROC. ANN. art 911 (West 1966); ME. R. CRIM. PROC. 36 (1989); MD. ANN. CODE § 12-301 (1984); MASS. GEN. L. ANN. Ch. 278 § 28 (West 1979); MICH. COMP. LAWS ANN. § 770.3 (West 1982); MINN. STAT. ANN. § 590.06 (West 1986); MISS. CODE ANN. § 99-35-1 (1968); MO. REV. STAT. § 28.03 (1953); MONT. CODE ANN. § 46-20-104 (1989); NEB. CT. R. & PROC. § 29-2301; NEV. REV. STAT. ANN. § 177.015 (Michie 1981); N.J. CONST. art. 6 § 5, par. 2 (1947); N.M. STAT. ANN. § 31-11-14 (1987 Repl.); N.Y. CRIM. PROC. LAW § 460.10; N.C. GEN. STAT. ANN. § 15A-1431 (1989); N.D. CRIM. PROC. R. 37 (1983); OHIO REV. CODE ANN. § 2953.02 (Baldwin 1970); OKLA STAT. ANN. tit. 22, § 1051 (1970); OR. REV. STAT. ANN. § 10-138.020 (1983); PA. CONST. art. 5 § 9; R.I. GEN. LAWS § 12-22-1 (1981); S.C. CODE § 17-27-100 (1976); S.D. CODIFIED LAWS ANN. § 23A-32-2 (1988 Rev.); TENN. CRIM. PROC. R. 37 (1984); TEX. CRIM. PROC. CODE § 44.02 (Amended 1977); UTAH CODE ANN. § 77-35-26 (1980); VT. STAT. ANN. tit. 13 § 7401 (1973); VIR. CONST. art. I § 8; WASH. REV. CODE ANN. § 10.01.010 (1891); WIS. STAT. ANN. § 974.02 (West 1983); WYO. STAT. ANN. § 7-12-101 (1977).

17 One commentator, Robert L. Stern, writes that "[o]nly New Hampshire and West Virginia, which have no intermediate appellate courts, do not provide for an appeal as of right from final judgments in the trial courts of general jurisdiction." R. STERN, APPELLATE PRACTICE IN THE UNITED STATES 13 (2d ed. 1989). In both New Hampshire and West Virginia, the state supreme court has

II. Current State of Law with Respect to Appeal Waivers

When criminal defendants waive the right to appeal in a plea bargain or negotiated sentence, "courts have reached differing results as to the validity of such a waiver."[18] Of those courts that have considered the issue, a majority have held such waivers valid.[19]

A. *Courts Holding Waiver of Appeal Valid*

Many courts that have upheld the validity of appeal waivers, have done so simply on the ground that the defendant knowingly and voluntarily entered into such waiver. Little reasoning is given to support the holdings.[20] By focusing on the defendant's volition and knowledge, these courts fail to address the issue of whether such waivers ought to be permitted in the first place.

Other courts, however, have used more thorough reasoning in making the decision to uphold a defendant's appeal waiver. One commonly advanced explanation analogizes to other rights a criminal defendant may waive.[21] Since a criminal defendant may waive other *constitutional* rights at various points in the criminal justice system (i.e. the right to a jury trial[22], the privilege against self-incrimination[23], etc.) there is no reason why a defendant cannot similarly waive the *statutory* right to appeal.[24] These courts see no distinction between the waiver of the right to appeal and the waiver of other rights which courts commonly recognize.

In a related argument, advanced by at least one court, a comparison is drawn between the situation in which the state provides sentence and charge concessions in return for a guilty plea, and that in which defendants waive the right to appeal in return for similar concessions.[25] The court argued that since the former situation is not said to "chill" a defendant's exercise of the right to trial, then the latter situation cannot rightly be said to "chill" a defendant's right to appeal.[26]

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the discretion to deny review. This system is similar to the certiorari procedure of the United States Supreme Court. However, one fundamental difference is noted by Carrington, Meadow, and Rosenberg: "Whereas the Supreme Court of the United States exercises its discretion after at least one appeal has already been heard by other judges . . . . [in West Virginia and New Hampshire, since] there is no intermediate state appellate court . . . [the courts] can not assume that there has been compliance with the imperatives of appellate justice." P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 132-133 (1976).

18 Annotation, *Validity and Effect of Criminal Defendant's Express Waiver of Right to Appeal As Part of Negotiated Plea Agreement*, 89 A.L.R.3d 864, 866 (1979).

19 *See id.*

20 *See, e.g.*, Barnes v. Lynaugh, 817 F.2d 336 (5th Cir. 1987); State v. McKinney, 406 So.2d 160 (La. 1981); People v. Williams, 143 A.D.2d 162, 531 N.Y.S.2d 807 (1988); People v. Smith, 141 A.D.2d 988, 531 N.Y.S.2d 38 (1988); People v. Juliano, 74 A.D.2d 881, 426 N.Y.S.2d 23 (1980); People v. Jasper, 107 Misc.2d 992, 436 N.Y.S.2d 185 (Sup. Ct. 1981).

21 *See, e.g.*, People v. Charles, 171 Cal. App. 3d 552, 217 Cal. Rptr. 402 (1985); People v. Seaberg, 74 N.Y.2d 1, 541 N.E.2d 1022, 543 N.Y.S.2d 968 (1989).

22 U.S. CONST. art. III, § 2, cl. 3.

23 U.S. CONST. amend. V.

24 *Charles*, 171 Cal. App. 3d at 558-59, 217 Cal. Rptr. at 406; *Seaberg*, 74 N.Y.2d at 7, 541 N.E.2d at 1024, 543 N.Y.S.2d at 970.

25 *See, e.g.*, State v. Gibson, 68 N.J.499, 348 A.2d 769 (1975). For typical concessions made by the state, see *supra* note 1.

26 *Id.* at 510, 348 A.2d at 774.

Some courts uphold appeal waivers based on the importance of plea bargaining in our criminal justice system.[27] Plea bargaining has become vital to the efficient administration of criminal justice because it promotes the prompt and final resolution of criminal cases.[28] The public's interest in finality, which underlies plea bargaining, is furthered by enforcing waivers of a defendant's right to appeal.[29] The courts in these cases suggest that the interests of plea bargaining will be best served when appeal waiver agreements are enforced.[30] Similarly, some courts are concerned that holding such waivers invalid would discourage plea negotiation.[31]

Some courts uphold the appeal waiver in negotiated plea agreements, in part, because they can find no public policy dictating against such a waiver.[32]

Finally, some courts have found an "implicit" waiver of the right to appeal within the terms of the plea agreement. An "implicit" waiver of the right to appeal arises in cases in which there has been no "explicit" waiver by the defendant, but nevertheless the terms of the agreement between the defendant and the prosecutor are such that a waiver, in fact, occurs. A typical example is a plea-bargain in which the prosecutor agrees to drop certain other pending charges against the defendant, but only *after* the appeal period has run on the plea-based conviction. The defendant never expressly waives the right to appeal but, in effect, the same result is achieved.[33] Those courts that have upheld the validity of such conditions have argued that these conditions do not deprive defendants of the right to appeal; the defendants may still appeal their convictions despite any consequences that would flow from such appeals.[34]

B. *Courts Holding Waiver of Appeal Invalid*

Among the courts finding that the waiver of the right to appeal is an invalid condition of a plea agreement, the most common argument advanced is that, for various reasons, such waivers transgress public policy. Some courts argue that an important state interest is to provide appellate review to criminal defendants and that no legitimate state interest is furthered by its waiver.[35] Courts have said that the right to appellate review

27 *See, e.g., Charles*, 171 Cal. App. 3d 552, 217 Cal. Rptr. 402; Weatherford v. Commonwealth, 703 S.W.2d 882 (Ky. 1986); *Seaberg*, 74 N.Y.2d 1, 541 N.E.2d 1022, 543 N.Y.S.2d 968.

28 *Seaberg*, 74 N.Y.2d at 7, 541 N.E.2d at 1024, 543 N.Y.S.2d at 970; *Charles*, 171 Cal. App. 3d at 558, 217 Cal. Rptr. at 405.

29 *Seaberg*, 74 N.Y.2d at 10, 541 N.E.2d at 1026, 543 N.Y.S.2d at 972; *Charles*, 171 Cal. App. 3d at 560-61, 217 Cal. Rptr. at 407.

30 *Seaberg*, 74 N.Y.2d at 10, 541 N.E.2d at 1026, 543 N.Y.S.2d at 972.

31 *See, e.g., Gibson*, 68 N.J. 499, 348 A.2d 769.

32 *See, e.g., Charles*, 171 Cal. App. 3d 552, 217 Cal. Rptr. 402; *Gibson*, 68 N.J. 499, 348 A.2d 769; *Seaberg*, 74 N.Y.2d 1, 541 N.E.2d 1022, 543 N.Y.S.2d 968.

33 *See generally* Annotation, *Defendant's Appeal From Plea Conviction as Affected by Prosecutor's Failure or Refusal to Dismiss Other Pending Charges, Pursuant to Plea Agreement, Until Expiration of Time for Appeal*, 86 A.L.R.3d 1262 (1978); Schmidt, *Criminal Procedure-Plea Bargaining-Implicit Restrictions on Defendant's Right of Appeal*, 21 WAYNE L. REV. 1161 (1975).

34 *See, e.g.*, United States *ex rel.* Amuso v. LaVallee, 291 F. Supp. 383 (E.D.N.Y. 1968), *aff'd*, 427 F.2d 328 (2d Cir. 1970); People v. Irizarry, 32 A.D.2d 967, 303 N.Y.S.2d 332 (1969).

35 *See, e.g.*, People v. Ventura, 139 A.D.2d 196, 531 N.Y.S.2d 526 (1988).

in criminal cases, having become an integral part of the criminal justice system, is an important right that the state must preserve and promote as a necessary safeguard within that system.[36] The state contravenes such a policy when the prosecution is allowed to actively induce the waiver of the defendant's right to appeal.

Courts have also reasoned that public policy forbids prosecutors from insulating themselves from review by bargaining away defendants' rights to appeal.[37] Recognizing the potential for abuse when such convictions are effectively insulated from appellate review, as a matter of public policy courts have allowed defendants to bring an appeal notwithstanding any agreement to the contrary.[38]

Expanding upon this argument, some courts have explained that the prosecution could insulate guilty pleas accepted in violation of the standards developed to protect criminal defendants' basic rights.[39] Considering the due process concerns that arise when a defendant pleads guilty, the defendant should not be deterred from exercising the valuable right to appeal.[40]

Courts in at least one jurisdiction have invalidated such waivers based on a state constitutional right to appeal.[41] The courts reasoned that permitting the prosecution to induce a defendant to waive appellate rights in exchange for a plea agreement would be constitutionally impermissible because it chills the exercise of the defendant's constitutional right to appeal a criminal conviction.[42] Also, the mere fact that such waivers may render prosecutor/defendant plea agreements more enforceable (i.e. a public interest in "finality" is served), does not carry sufficient weight to override a constitutional guarantee.[43] The fact that plea agreements are now an accepted practice does not mean that the prosecution is free to impose any condition on these agreements.[44]

With regard to "implicit" waiver conditions, courts have held that such conditions, in reality, provide the defendant with no meaningful "choice" to appeal, and therefore effectively insulate the conviction from appellate review.[45] It amounts, in practical effect, to denying the defendant his right to appeal.[46]

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36 *See, e.g., Id.*; People v. Ramos, 30 A.D.2d 848, 292 N.Y.S.2d 938 (1968).

37 *See, e.g.*, State v. Ethington, 121 Ariz. 572, 592 P.2d 768 (1979); People v. Stevenson, 60 Mich. App. 614, 231 N.W. 2d 476 (1975).

38 *See, e.g., Ethington*, 121 Ariz. 572, 592 P.2d 768.

39 *See, e.g.*, People v. Butler, 43 Mich. App. 270, 204 N.W.2d 325 (1972); *Ethington*, 121 Ariz. 572, 592 P.2d 768.

40 *See, e.g., Butler*, 43 Mich. App. 270, 204 N.W.2d 325.

41 *See* People v. Harrison, 386 Mich. 269, 191 N.W.2d 371 (1971); People v. Ledrow, 53 Mich. App. 511, 220 N.W.2d 336 (1974); *Butler*, 43 Mich. App. 270, 204 N.W.2d 325. *See also* MICH. CONST. art. I, § 20.

42 *See, e.g., Harrison*, 386 Mich. 269, 191 N.W.2d 371; *Butler*, 43 Mich. App. 270, 204 N.W.2d 325.

43 *Butler*, 43 Mich. App. at 281, 204 N.W.2d at 331.

44 *Id.* at 280-81, 204 N.W.2d at 330.

45 *See, e.g., Ledrow*, 53 Mich. App. 511, 220 N.W.2d 336; People v. Ramos, 30 A.D.2d 848, 292 N.Y.S.2d 938 (1968).

46 *See, e.g., Ramos*, 30 A.D.2d at 849, 292 N.Y.S.2d at 940.

III. The Argument Against Appeal Waivers as a Condition in Plea Bargains and Negotiated Sentences

A. *Due Process Concerns*

The Supreme Court has applied the fourteenth amendment's due process clause[47] to protect a defendant's statutory right to appeal a criminal conviction.[48] The Court has held that unreasonable deterrents or impediments placed upon the right to appeal violate the defendant's constitutional right to due process.[49] The Supreme Court has not reached the question of whether bargaining away a defendant's right to appeal constitutes an unreasonable impediment to appellate review.[50] Nonetheless, its prior cases dealing with impermissible deterrents to appellate review point to the conclusion that both explicit and implicit waivers of the right to appeal made during the plea bargaining process *would* constitute unconstitutional deterrents to the appellate process.

One of the first instances in which the Supreme Court utilized the due process clause to protect a defendant's right to appeal a criminal conviction was *Griffin v. Illinois*.[51] In *Griffin*, the petitioners alleged that there had been errors in their trial that entitled them to have their convictions set aside on appeal.[52] They argued that the only impediment to full appellate review of their case was their lack of funds to buy a transcript of the trial proceedings.[53]

The Court, acknowledging the fact that the Constitution does not require a state to provide appellate courts or a right to appellate review at all,[54] nevertheless found that appellate review had become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant.[55] As a result, the appellate stage of the proceedings was protected by the due process clause.[56] The Court went on to note that:

> [a]ll of the States now provide some method of appeal from criminal convictions, recognizing the importance of appellate review to a correct adjudication of guilt or innocence. Statistics show that a substantial proportion of criminal convictions are reversed by state appellate courts. Thus to deny adequate review . . . means that many . . . may lose their life, liberty or property because of unjust convictions which appellate courts would set aside.[57]

Thus, in *Griffin*, the Court recognized the important role that the appellate process plays in the criminal justice system and extended due

47 U.S. CONST. amend. XIV, § 1.

48 Borman, *The Chilled Right to Appeal From a Plea Bargain Conviction: A Due Process Cure*, 69 Nw. U. L. REV. 663 (1974).

49 Schmidt, *supra* note 33, at 1163.

50 *Id.*

51 351 U.S. 12 (1956).

52 *Id.* at 15.

53 *Id.* A stenographic transcript of the trial proceedings was needed to prepare the documents required to be furnished to the appellate court in order to receive appellate review.

54 *Id.* at 18.

55 *Id.*

56 *Id.*

57 *Id.* at 18-19 (footnote omitted).

process protections to the right to appeal a criminal conviction.[58] The Court seemed to suggest that, given what is at stake in a criminal case, states should aid the appellate process, not hinder it. It appeared to strike the Court as odd that a state which had a general policy of allowing criminal appeals, would impose impediments to a defendant's ability to seek appellate review. In effect, the Court was saying that the state has a duty, under the due process clause, not to limit the opportunity of an appeal in a criminal case.

When the prosecutor conditions the acceptance of a guilty plea upon the waiver of the right to appeal, or agrees, in exchange for the guilty plea, to drop certain charges against the defendant *at the end of the appeals period*, the state undoubtedly hinders the appeals process. In so doing, the state directly contravenes its duty *not* to limit the opportunity of criminal appeals.

North Carolina v. Pearce[59] further clarified the availability of due process protections to preserve an individual's statutory right to appeal.[60] In *Pearce*, the Supreme Court considered the constitutional ramifications of subjecting a criminal defendant to greater punishment following a successful appeal, retrial and reconviction than the punishment imposed at his first trial.[61] The defendants in *Pearce* had received longer sentences on retrial.[62]

"Although the Court held that the equal protection and double jeopardy clauses did not constitutionally preclude the trial judge from imposing a greater sentence, it did find that the imposition of such a sentence infringed on the defendant's right to appeal in violation of the due process clause."[63] The Court found that the practice of imposing heavier sentences upon those who had successfully appealed their cases would serve to "chill" a defendant's statutory right to appeal.[64] The Court, therefore, required that the reasons for imposing a more severe sentence after retrial affirmatively appear in the record and be based on objective information.[65]

> Due process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.[66]

58 *See* text accompanying notes 54-56.

59 395 U.S. 711 (1969).

60 Borman, *supra* note 48, at 672.

61 395 U.S. at 713.

62 *Id.* at 713-14.

63 Borman, *supra* note 48, at 679.

64 395 U.S. at 724.

65 *Id.* at 726.

66 *Id.* at 725. In June, 1989, the Supreme Court overruled Simpson v. Rice, 395 U.S. 711 (1969), the companion case to North Carolina v. Pearce, holding that no presumption of vindictiveness arises when the first sentence is based upon a guilty plea and the second sentence follows a trial. Alabama v. Smith, 109 S. Ct. 2201, 2202 (1989).

The Court stressed that "the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be . . . a violation of due process of law."[67]

In discussing the impact of the fourteenth amendment's due process clause, Justice Stewart concluded that:

> [a] court is "without right to . . . put a price on an appeal. A defendant's exercise of a right of appeal must be free and unfettered . . . . [I]t is unfair to use the great power given to the court to determine sentence to place a defendant in the dilemma of making an unfree choice."[68]

Finally, quoting from its decision in *Rinaldi v. Yeager*[69], the Court emphasized that while "[t]his Court has never held that the States are required to establish avenues of appellate review, . . . it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."[70]

In *Pearce*, then, the Court held that the practice of imposing greater sentences on retrial following a successful appeal, and the possible deterrent effect this practice might have on defendants contemplating an appeal, constitutes an unreasonable impediment to appellate review in violation of the constitutional right to due process.[71] What violated due process was the deterrent or impediment that the system had placed on a criminal defendant's right to appeal. When a state, through the prosecutor, actively seeks to induce a defendant to waive his right to appeal, or so structures a "bargain" as to cause the implicit waiver of this right, it likewise creates an unreasonable impediment to appellate review in violation of the due process clause. If, as Justice Stewart suggests, due process means that a defendant's right to appeal must be "free and unfettered," then plea or sentence bargains conditioned on the defendant's waiver of the right to appeal cannot be tolerated.

Similarly, the state violates due process when it penalizes defendants for having exercised the statutory right to appeal.[72] The point is that criminal defendants should never be placed in a position where an exercise of the lawful right to appeal may result in their being "punished." However, when defendants either expressly agree to waive the right to appeal as part of a plea bargain, or must implicitly waive that right due to the terms of the agreement, they find themselves in exactly that position. By providing coercive incentives to waive the right to appeal, the prosecution, in effect, penalizes the election to appeal. The only way to prevent this is to hold such waivers invalid.

Blackledge v. Perry[73] provides further insight into the availability of due process remedies to preserve the statutory protections of a defend-

67 *Id.* at 724.
68 *Id.* (quoting Worcester v. Commissioner, 370 F.2d 713, 718 (1st Cir. 1966)).
69 384 U.S. 305, 310-11 (1966).
70 395 U.S. at 724.
71 *Id.* at 724-25.
72 *Id.*
73 417 U.S. 21 (1974).

ant's right to appeal.[74] In *Blackledge*, a North Carolina prison inmate was charged and convicted of misdemeanor assault with a deadly weapon. After the defendant filed a notice of appeal, but prior to his appearance in the superior court, where he had the right to a trial *de novo*,[75] the prosecutor obtained an indictment covering the same conduct, for the felony offense of assault with a deadly weapon with intent to kill and inflict serious bodily injury.[76] The defendant claimed that the felony indictment constituted a penalty for exercising his statutory right to appeal, and therefore violated the fourteenth amendment's due process clause.[77] The Supreme Court, relying largely upon its reasoning in *North Carolina v. Pearce*, held that the state had violated the protections of the due process clause by bringing the felony indictment against the defendant.[78]

In *Blackledge*, the Court focused on the conduct of the prosecutor. The Court recognized that:

> [a] prosecutor *clearly* has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial *de novo* in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free. And, if the prosecutor has the means readily at hand to discourage such appeals—by "upping the ante" through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy—the State can insure that only the most hardy defendants will brave the hazards of a *de novo* trial.[79]

Blackledge strengthens the contention that a state's practice of conditioning the acceptance of guilty pleas upon defendants' waiver of the right to appeal, violates due process. In the plea bargain situation, as well as in the sentence negotiation situation, the focus is likewise upon the prosecutor's conduct. As the Supreme Court recognized, the prosecutor has a clear stake in discouraging a defendant from appealing[80] and plea bargaining provides the means to discourage such appeals. By offering attractive "deals" to criminal defendants, a condition of which is the waiver of the right to appeal, or by structuring the terms of the bar-

74 Borman, *supra* note 48.

75 Under North Carolina law, a person convicted in the District Court has a right to a trial *de novo* in the Superior Court. N.C. Gen. Stat. §§ 7A-290, 15-177.1. The right to trial *de novo* is absolute, there being no need for the appellant to allege error in the original proceeding. When an appeal is taken, the statutory scheme provides that the slate is wiped clean; the prior conviction is annulled, and the prosecution and the defense begin anew in the Superior Court.

417 U.S. at 22.

Such a law demonstrates the lengths to which states have been willing to go to afford appellate review in criminal cases and the importance placed on the concept of review in criminal matters. For a list of other states which employ a similar two-tiered system, see Colten v. Kentucky, 407 U.S. 104, 112 n.4 (1972).

76 417 U.S. at 23.

77 *Id.* at 25. (While the defendant also raised a double jeopardy challenge, the Court found it necessary to reach only the due process claim.)

78 *Id.* at 28-29.

79 *Id.* at 27-28 (emphasis added).

80 *Id.*

gain to provide that certain unrelated charges against the defendant will be dropped only *after* the appeals period for his conviction has run, "the State can insure that only the most hardy defendants will brave the hazards"[81] of an appeal. This discouraging effect, coupled with the prosecutor's potential motive to discourage appellate review, led the *Blackledge* Court to hold the prosecutor's conduct violative of due process. *Blackledge* erects a due process bar to any systemic mechanism created by the state for the purpose of discouraging criminal defendants from seeking appellate review. A prosecutor's use of the plea bargaining process to effectuate the waiver of a defendant's right to appeal, is just such a mechanism.

B. *Policy Implications*

1. Efficiency Argument Fails

Proponents of plea bargaining often assert that it is necessary for the efficient operation of the criminal justice system.[82] Estimates of the percentage of criminal defendants who plead guilty range from seventy to over ninety percent.[83] For example, in the year ending June 30, 1986, the United States District Courts dealt with 50,040 criminal defendants; 34,927 of whom pleaded guilty.[84] Although there are no statistics on the mechanisms used to achieve those guilty pleas, the vast majority are considered to be the result of plea bargaining.[85] A good number of these plea agreements contain waivers of the right to appeal.[86]

The primary rationale for plea bargaining is administrative necessity. Chief Justice Burger articulated this rationale when he wrote on the state of the judiciary in 1970. The Chief Justice wrote:

> It is elementary, historically and statistically, that systems of courts-the number of judges, prosecutors and courtrooms-have been based on the premise that approximately 90 per cent of all defendants will plead guilty, leaving only 10 per cent, more or less, to be tried. . . . The

81 *Id.* at 28.

82 *See generally* J. BOND *supra* note 1; O'Hair, *Essential! (Plea Bargaining)*, 64 MICH. B.J. 505 (1984); Schweitzer, *Plea Bargaining: a Prosecutor's View*, 61 WIS. B. BULL. 22 (1988); Smith, *The Plea Bargaining Controversy*, 77 J. CRIM. L. & CRIMINOLOGY 949 (1986); Wright, *Plea Bargaining — a necessary tool*, 16 CONN. L. REV. 1015 (1984).

83 CRAMER, ROSSMAN & MCDONALD, *Some Patterns and Determinations of Plea Bargaining Decisions*, in PLEA BARGAINING 77 (W. McDonald & J. Cramer eds. 1980). *See also* the Notes of Advisory Committee on Rules in the 1974 Amendment which state that "[a]lthough reliable statistical information is limited, one recent estimate indicated that guilty pleas account for the disposition of as many as 95% of all criminal cases . . . . A substantial number of these are the results of plea discussions." F.R.Cr.P. 11(e); Alschuler, *infra* note 90, at 50; J. BOND, *supra* note 1, at 1-2; Chief Justice Burger, *infra* note 87, at 931.

84 BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1987, U.S. DEPT. OF JUSTICE, table 522 at 422 (1987). *See also* J. BOND, *supra* note 1. Bond asserts that "[r]oughly 90 percent of all defendants plead guilty. The 90 percent figure has acquired a validity through repetition that may not be entirely justified by the scanty statistics available." *Id.* at 1-2 - 1-3.

85 CRAMER, ROSSMAN & MCDONALD, *Some Patterns and Determinations of Plea Bargaining Decisions*, in PLEA BARGAINING 77 (W. McDonald & J. Cramer eds. 1980).

86 The court in State v. Gibson, 68 N.J. 499, 508, 348 A.2d 769, 773 (1975), wrote that "while perhaps most plea agreements do not contain express waivers of appeal or conditions against appeal, many of them do . . . ." *Id.*

> consequence of what might seem on its face a small percentage change in the rate of guilty pleas can be tremendous. A reduction from 90 per cent to 80 per cent in guilty pleas requires the assignment of twice the judicial manpower and facilities-judges, court reporters, bailiffs, clerks, jurors and courtrooms. A reduction to 70 per cent trebles this demand.[87]

Nonetheless, the argument that courts should permit defendants to waive their rights to appeal because of the efficiency of the plea bargaining system fails for two reasons. First, questions exist as to whether a system with plea bargaining is more efficient than one without.[88] Professor Malvina Halberstam notes that "even if a greater number of defendants would demand a trial, it does not follow that significantly greater resources would be needed as a result."[89] The process of plea bargaining may consume more time and resources than a trial.[90] For example, Albert W. Alschuler notes that defense attorneys commonly invoke several time consuming strategies to secure a more favorable plea agreement.[91] Such strategies range from demanding a jury trial to a string of pre-trial continuances. The continuances, Alschuler notes, are particularly effective in consuming time because obtaining the continuance itself consumes the court's time.[92] Another strategy is the calling of multiple defense witnesses.[93] The time consuming strategies have the double ef-

87 Burger, *The State of the Judiciary-1970*, 56 A.B.A.J. 929, 931 (1970). *See also* Santobello v. New York, 404 U.S. 257, 260 (1971) (stating that the government would have to greatly increase the number of judges and facilities if every criminal charge went to trial).

88 One jurisdiction, Alaska, has abolished plea bargaining entirely. In his work, PLEA BARGAINING AND GUILTY PLEAS, James E. Bond writes that:

> in July 1975 the state Attorney General declared an official statewide ban on plea bargaining to take effect on August 15, 1975. Although plea bargaining had been partially and experimentally forbidden in a few other American jurisdictions, these experiments were cautious and limited in scope. The Alaska prohibition, while not absolute, contained very few exceptions to the general rule that "District Attorneys . . . will refrain from engaging in plea negotiations . . ."
>
> A recent, thoroughly documented study of the Alaskan experiment . . . . concluded that the ban effectively curtailed plea bargaining.

J. BOND, *supra* note 1, at 1-21. The study also concluded that the ban accelerated the judicial process rather than impeded it. *Id.* at 1-22. *See generally* M. RUBINSTEIN, S. CLARKE & T. WHITE, ALASKA BANS PLEA BARGAINING (1980).

89 Halberstam, *Towards Neutral Principles in the Administration of Criminal Justice: A Critique of Supreme Court Decisions Sanctioning the Plea Bargaining Process*, 73 J. CRIM. L. & CRIMINOLOGY 1, 37 (1982). Halberstam writes that underlying the efficiency argument are two assumptions:

> a) that without sentencing leverage to induce guilty pleas, the number of pleas would decrease and the number of trials would increase significantly; and b) that the increase in trials would require substantially greater prosecutorial and judicial resources than is currently required. Both are factual assumptions that have not been validated empirically.

Id. at 36. Halberstam also points out that "[w]hile a trial takes more time than the entry of a guilty plea, considerable court and attorney time is lost by motions, for adjournment and other pretrial maneuvers related to plea bargaining." *Id.* at 37.

90 Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 58 (1968).

91 *Id.* at 56-58.

92 *Id.* at 56.

93 Alschuler relates a case in which plea negotiations had broken down and the case went to trial. After the assistant district attorney asked that the defense witnesses be excluded from the courtroom, he watched as twenty-five witnesses left the courtroom. At that point, he approached the defense counsel and accepted the counsel's proposal for a five year suspended sentence. *Id.* at 57.

fect of pressuring the prosecution to bargain and weakening the prosecution's case by the passage of time.[94]

Second, even if plea bargaining does improve the efficiency of our justice system, nothing indicates that the waiver of appellate rights is an indispensible part of plea bargaining. No statistics are available on the percentage of plea bargains that include a waiver of the right to appeal. Nonetheless, incidents of appeal would not increase greatly if courts prohibited defendants from waiving their rights to appeal because few defendants will chance forfeiting their bargains by bringing appeals.[95] For those who are willing to take such a chance, the judicial system should ensure that they have the opportunity to appeal. Courts should allow a means through which the defendant can correct injustices in plea bargaining. In short, the importance of the appeal both to the system and to the individual defendants greatly outweighs whatever efficiency the system receives by permitting the waiver of the right to appeal.

2. Analogy to the Ability to Waive other Rights Fails

Since defendants may waive some fundamental constitutional rights, the argument goes, they may waive the statutory right to appeal.[96] This assertion ignores the reasoning behind allowing defendants to waive some of their constitutional rights. None of the reasons that courts have given for allowing defendants to waive constitutional rights, supports the waiver of the right to appeal.[97]

The right to a trial by jury is constitutionally guaranteed.[98] Nonetheless, the Supreme Court in *Patton v. United States*[99] held that defendants may waive this right. The Court reasoned that the defendant can waive the right to jury trial because it was established for the defendant's protection. "[T]he framers of the Constitution were intent upon preserving the right of trial by jury primarily for the protection of the accused."[100] The Court concluded that "Art III, section 2 . . . was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so is to convert a privilege into an imperative requirement."[101]

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94 *Id.* at 56 n.23.

95 *See generally* Note, *The Consequences of Appealing Plea Bargain Agreements: Prisoners Face Increased Sentences on Retrial after Vacated Convictions,* 43 WASH. & LEE L. REV. 556 (1986).

96 *See supra* note 24 and accompanying text.

97 *See, e.g.,* People v. Charles, 171 Cal. App. 3d 552, 217 Cal. Rptr. 402 (1983); People v. Seaberg, 74 N.Y.2d 1, 9, 541 N.E.2d 1022, 1025, 543 N.Y.S.2d 968, 971 (1989).

98 U.S. CONST. art. III, § 2, cl. 3.

> The trial of all crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Id.

99 281 U.S. 276 (1929), *overruled on other grounds,* 399 U.S. 78 (1970).

100 *Id.* at 297.

101 *Id.* at 298.

The Court in *Johnson v. Zerbst*,[102] applied the same reasoning to the sixth amendment guarantee of the right to counsel.[103] According to the Court, the "purpose of the constitutional guaranty of a right to counsel is to protect an accused from conviction resulting from his own ignorance of his legal and constitutional rights, . . ."[104] The Court held that as a result, defendants may intelligently waive the protection that the constitutional right to counsel provides.[105]

Finally, the Court in *Smith v. United States*[106] held that defendants may waive their fifth amendment rights to prosecution by indictment.[107] The *Smith* court adopted the reasoning of *United States v. Gill*.[108] In *Gill*, the court applied the *Patton* reasoning. "It would seem that the reasoning of the court in the Patton Case should apply with equal force . . . and that the provision of the Fifth Amendment requiring an indictment in capital or other infamous cases creates a personal privilege which the defendant may waive."[109] In sum, the reason behind allowing defendants to waive these constitutional rights is that these rights were guaranteed for the protection of defendants.

Clearly, the right to appeal also protects the defendant. Nonetheless, to conclude as a result, that this right may be waived is to overlook the other important policies underlying the right to appeal. Two important functions of appeals are (1) the development of the common law[110] and (2) the maintenance of judicial integrity.[111] Though these reasons may

102 304 U.S. 458 (1937).

103 U.S. CONST. amend. VI.

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

Id.

104 *Johnson*, 304 U.S. at 465.

105 *Id.*

106 360 U.S. 1 (1958).

107 *Id.* at 6.

108 55 F.2d 399 (D. N.M. 1931).

109 *Id.* at 403.

110 Robert J. Martineau writes that one purpose of appellate review is:

> [t]o provide an opportunity for the common law to develop, thereby permitting it to reflect the demands of the individuals and institutions that the laws serve as well as to accommodate factual situations substantially different from those in prior cases. The development function is crucial in a common law jurisdiction which requires courts to make law, not simply apply law as declared by a legislative body.

R. MARTINEAU, FUNDAMENTALS OF MODERN APPELLATE ADVOCACY 2 (1985).

111 Paul D. Carrington, Daniel J. Meador and Maurice Rosenberg note that it is "emphatically true for this country's [legal system] that appellate courts serve as the instrument of accountability for those who make the basic decisions in trial courts and administrative agencies." P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 2 (1976). By way of elaboration, Carrington, Meador and Rosenberg write that the appellate process

> assures litigants that the decision in their case is not prey to the failings of whichever mortal happened to render it, but bears the institutional imprimatur and approval of the whole social order as represented by its legal system. Thus, the review for correctness serves to reinforce the dignity, authority and acceptability of the trial, and to control the adverse effects of any personal shortcomings of the basic decision maker.

Id.

not be the primary reasons behind the right, they are sufficiently valid to prohibit courts from allowing defendants to waive their rights to appeal.

a. *Waivers Impede the Development of the Common Law*

Plea bargaining and allowing the waiver of the right to appeal frustrate the development and refinement of the common law. As Professors Newman and NeMoyer note, the "great issues and conflicts in modern American criminal law, ranging from the *Miranda* warnings to disputes over different tests of insanity, are rendered largely irrelevant by guilty pleas."[112] Albert W. Alschuler wrote that the frustration of the development of law through using the guilty plea is particularly problematic with respect to "procedural defenses [which have] not been previously litigated."[113] Assuming that plea bargains are necessary, the judicial system must not further restrict the development of law by permitting the waiver of the right to appeal.

As the Supreme Court of New Jersey recognized, appeals from plea bargains will be few enough that the system would not be greatly taxed.[114] The court in *State v. Gibson* noted that:

> [p]rosecutors will recognize that the case will be a rare one in which a defendant who has received concessions as to sentences or charges for an agreement not to appeal a collateral conviction will be willing to forfeit those benefits for the, at best, uncertain prospects of securing a reversal, with the equal uncertainty, in most cases, as to the outcome of a retrial.[115]

Though few defendants would appeal from plea bargains, the courts must permit all defendants the oppurtunity to appeal because of the possible impact these cases may have on the development of the common law. Generally, appeals from plea bargains would occur where the status of the law is unclear, as evidenced by the defendants' vacillation between accepting a bargain and asserting a particular defense which will result in a loss of the bargain.[116] Since appeals will be rare and the law may be in question, the courts should not allow defendants to waive the right to appeal.

b. *The Interest of Judicial Integrity Requires the Prohibition of Waivers*

The maintenance of judicial integrity has long been recognized as an important concern. Justices Holmes and Brandeis articulated the con-

112 Newman & NeMoyer, *Issues of Propriety in Negotiated Justice*, 47 DEN. L.J. 367, 369 (1970).

113 Alschuler, *supra* note 90, at 81. Alschuler writes:

> [i]n this situation, plea negotiation provides an effective mechanism for circumventing the development of new law. Boston defense attorney Joseph S. Oteri expresses surprise, for example, that the well-known case of [*Escobedo v. Illinois*, 378 U.S. 478 (1964)] ever reached the Supreme Court. "I had a case that presented the same situation several years earlier," Oteri says. "My trial briefs were written, but I never had to use them . . . . The two of us reached a very satisfactory agreement."

Id.

114 68 N.J. 499, 348 A.2d 769 (1975).

115 *Id.* at 512-13, 348 A.2d at 776.

116 *See* Alschuler, *supra* note 90, at 56-58.

cern in their dissenting opinions in *Olmstead v. United States*.[117] In *Olmstead*, the defendants were convicted of violating the National Prohibition Act.[118] The government unlawfully obtained the crucial evidence by wire tapping the defendant's telephones.[119] Holmes' and Brandeis' opinions objected to this practice. Justice Holmes thought "it a less evil that some criminals should escape than that the Government should play an ignoble part."[120] According to Holmes, "no distinction can be taken between the Government as prosecutor and the Government as judge."[121] On the issue of judicial integrity, Justice Brandeis wrote:

> In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.[122]

In *McNabb v. United States*,[123] the Supreme Court adopted the views of Holmes and Brandeis on judicial integrity. In *McNabb*, the police secured a confession from the accused during an unlawful detention.[124] The Court noted that affirming a conviction based on such a confession reflects negatively on the judiciary. "Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure cannot be allowed to stand without making the courts themselves accomplices in the willful disobedience of law."[125]

By allowing prosecutors to secure from defendants a waiver of their rights to appeal, courts are becoming accomplices to police violations and trial court errors. Injustice taints the entire court system when alleged police violations and trial court errors are rendered permanently isolated from review. Courts must be allowed to review alleged errors and violations in order to maintain the integrity of the United States' legal system.

In considering the analogy between the right to appeal and other rights, the *Seaberg* court also noted interests beyond the protection of the accused.[126] With respect to rights that the defendant may not waive,

117 277 U.S. 438 (1928), (Brandeis, J., and Holmes, J., dissenting).
118 *Id.* at 455.
119 *Id.* at 456-57.
120 *Id.* at 470.
121 *Id.*
122 *Id.* at 485.
123 318 U.S. 332 (1943).
124 *Id.* at 345.
125 *Id.*
126 One of the defendants contended that like the right to a speedy trial, the right to appeal should not be subject to waiver because it involves "matters in which the interests of society transcend the individual concerns of the defendant . . . . Similarly, a defendant may not waive the right to challenge the legality of a sentence . . . or his competency to stand trial." *Seaberg*, 74 N.Y.2d at 9, 541 N.E.2d at 1025, 543 N.Y.S.2d at 971.

such as the right to a speedy trial[127], the right to challenge the legality of a sentence[128] or the defendant's competency to stand trial,[129] the court stated that "[t]hese rights are recognized as a matter of fairness to the accused but they also embrace the reality of fairness in the process itself, therefore, a defendant may not waive them."[130] The court then concluded that the right to appeal "does not implicate society's interest in the integrity of criminal process."[131] The court ignored society's substantial interests in the integrity of the judicial system and the development and refinement of law.

The court also stated that to the extent the right to appeal does implicate society's interest, "that interest is protected by the procedural and substantive requirements imposed on the Trial Judge before the defendant may be sentenced."[132] The requirements to which the court referred were that the judge "must exercise his or her responsibility at the time of sentencing in the light of information obtained from the presentence report or other source"[133] and that the judge may not "refuse both to honor the promise and to vacate the plea taken."[134] Such requirements do not sufficiently protect society's interest in maintaining the integrity of the court. They do nothing to prevent a judge, who has committed an error but fears reversal, from consenting to a deal which conditions a sentence recommendation on the waiver of right to appeal.

C. *Effects on Habeas Corpus Relief*

Unlike other rights which a defendant may waive, the waiving of the right to appeal entails serious consequences with respect to post-conviction relief. In most instances, by waiving the right to appeal, defendants are waiving their rights to seek habeas corpus relief.[135] The Court in *Fay*

127 The right to a speedy trial may be waived by failure to move for dismissal on that ground during trial. As LaFave and Israel note, "[i]f the defendant fails to so move and instead enters a guilty plea or submits to trial, he may not raise the issue for the first time on appeal." W. LaFave & J. Israel, Criminal Procedure 686 (1985).

128 *Seaberg*, 74 N.Y.2d at 9, 541 N.E.2d at 1025, 543 N.Y.S.2d at 971.

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.*

133 People v. Farrar, 52 N.Y.2d 302, 306, 419 N.E.2d 864, 865, 437 N.Y.S.2d 961, 962 (1981).

134 People v. McConnell, 49 N.Y.2d 340, 346, 402 N.E.2d 133, 135-36, 425 N.Y.S.2d 794, 797 (1981).

135 28 U.S.C. § 2254(a) (1982) delineates the right to habeas corpus.

> The Supreme Court, a Justice thereof, a circuit judge or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Id.

Habeas corpus is a route the prisoner may use to challenge detention.

> The writ of habeas corpus is a writ directed to the person detaining another, commanding him to produce the body of the prisoner at a designated time and place, with the day and cause of his caption and detention, to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf. The writ is the process of testing the authority of one who deprives another of his liberty, and it is designed to give a person whose liberty is restrained an immediate hearing to inquire into and determine the legality of the detention . . . .

39 C.J.S. *Habeas Corpus* § 2 (1976).

v. Noia,[136] held that an act such as waiving the right to appeal may bar defendants from seeking habeas corpus relief.[137] The Court stated that "the federal habeas corpus judge may in his discretion deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state remedies."[138] A waiver of the right to appeal is, by definition, a deliberate by-pass of the state court's procedure.[139]

A court is particularly likely to deny defendants' applications for habeas corpus when defendants waive their rights to appeal as part of a plea bargain rather than a negotiated sentence. For example, the Court in *Tollett v. Henderson*[140] stated that "[w]hen a criminal defendant has solemnly admitted in open-court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to entry of the guilty plea."[141] A recent application of the Court's standard reflects defendants' chances of obtaining habeas corpus relief under the discretion of the federal judge after waiving their rights to appeal. In *Rodriquez v. Henderson*,[142] the court denied the petitioner's application for habeas corpus relief stating simply that "he intentionally waived his right to appeal and had a full and fair opportunity to litigate his cause in state court."[143]

In sum, when defendants waive their rights to appeal, the judge in a federal habeas corpus hearing has the discretion to deny the defendants' applications for habeas corpus on the grounds that the defendants failed to assert their claims in the state proceedings in accordance with state procedural requirements. Case law indicates that federal relief is unlikely to follow waivers of the right to appeal, especially when the defendants waive their rights to appeal during plea bargaining and enter a plea of guilty.[144] Thus, by waiving the right to appeal, defendants in most cases

136 372 U.S. 391 (1963), *overruled*, 428 U.S. 465 (1976).

137 Waiving the right to appeal may result in a procedural default. Wayne R. LaFave and Jerold H. Israel write that the

> procedural default question arises when a petitioner failed to present his claim in the state proceedings in accordance with applicable state procedural requirements and the state has held (or would so hold under well established precedent) that this lapse bars consideration of the claim on the merits.

W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 1035 (1985).

138 *Fay*, 372 U.S. at 438.

139 The Court in Wainwright v. Sykes, 433 U.S. 72 (1977), replaced the "deliberate by-pass" standard of *Fay*, adopting a standard which it developed in *Francis v. Henderson*. *Id.* at 91. The *Francis* standard states, "[i]n a collateral attack upon a conviction the rule requires . . . not only a showing of 'cause' for the defendant's failure to [assert a particular defense] but also a showing of actual prejudice." 425 U.S. 536, 542 (1976). Thus, *Wainwright* substantially limited the availability of habeas corpus relief for defendants who waived their right to appeal. The by-passing of the state procedures no longer needs to be deliberate for the judge in the habeas proceedings to deny relief. *Wainwright* at 87-88. This development is irrelevant to plea bargains since they meet the higher standard of "deliberate by-pass. *See* Murray v. Carrier 477 U.S. 478 (1986) (for a discussion of the cause and prejudice standard).

140 411 U.S. 258 (1973).

141 *Id.* at 267.

142 No. 88 Cir. 3614 (S.D.N.Y. July 17, 1989) (LEXIS, Genfed library, Courts file).

143 *Id.*

144 For example, within one year, the waiver of the right to appeal was a factor in the federal court's denial of relief under 28 U.S.C. § 2255, vacation of sentence statute, in the following cases:

are also forfeiting the possibility of collateral relief through habeas corpus proceedings. The waiver of the right to appeal results in much greater consequences than the American legal system should be prepared to allow.

IV. Arguments Against Waivers are Magnified at the Sentencing Stage

Waivers of the right to appeal are more offensive when prosecutors procure them during the sentence negotiation stage which follows a trial throughout which the defendants maintained their innocence. At this stage, defendants' only bargaining tools are rights to appeal.[145] This situation is distinct from the pre-conviction stage where the defendants have much more with which to bargain[146] and many of the points for appeal may not have occurred yet. Also, unlike pre-trial waivers that accompany plea agreements, post-conviction waivers accompany defendants' assertions of innocence throughout the judicial process.

The Supreme Court of New Jersey recognized this distinction.[147] The court wrote that "a defendant who has never admitted his guilt should, as we view the interests of justice and appropriate policy considerations, not be deemed to have irrevocably waived his right of direct appeal from a conviction unless he fails to file an appeal within the time provided therefor by law."[148] Thus, the system of negotiating an impending sentence pressures defendants to waive their rights to appeal in order to bargain, even when they still maintain their innocence.

Another argument against the waiver of the right to appeal at the sentence negotiation stage is that upon conviction, both the judge and the prosecutor have a common interest, i.e., seeing the conviction withstand appeal. As one of the defendants in *Seaberg* argued, negotiated sentences should be subject to appellate review "to protect the interests of defendants and the interests of society. [The defendant asserted] that

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Kinney v. United States, 177 F.2d 895 (10th Cir. 1949), *cert. denied*, 339 U.S. 922 (1950); Hahn v. United States, 178 F.2d 11 (10th Cir. 1949); Michner v. United States, 177 F.2d 422 (8th Cir. 1949), *appeal filed*, 181 F.2d 911 (8th Cir. 1950); Moss v. United States, 177 F.2d 438 (10th Cir. 1949), *cert. denied*, 339 U.S. 933 (1950); Alfred v. United States, 177 F.2d 193 (4th Cir. 1949), *cert. denied*, 339 U.S. 921 (1950); Martyn v. United States, 176 F.2d 609 (8th Cir. 1949); United States v. Wight, 176 F.2d 376 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950); Crowe v. United States, 175 F.2d 799 (4th Cir. 1949), *cert. denied*, 338 U.S. 950, *reh. denied*, 339 U.S. 916 (1950); Doll v. United States, 175 F.2d 884 (10th Cir.), *cert. denied*, 338 U.S. 874 (1949); Dickerson v. United States, 175 F.2d 440 (4th Cir. 1949); Carroll v. United States, 174 F.2d 412 (6th Cir.), *cert. denied*, 338 U.S. 874 (1949).

145 Of course, the value of this bargaining chip depends upon the degree to which the conviction is suspect. Nonetheless, the case law may not be well developed in the applicable area.

146 The greatest weapon in defendants' arsenals when they meet the prosecutor to negotiate is the right to put the prosecution to its proof. As Alschuler writes: "Because calender considerations are so important a part of the plea bargaining process, defense attorneys commonly devise strategies whose only utility lies in the threat that they pose to the court's and the prosecutor's time." Alschuler, *supra* note 90, at 50. As the Court in *Santobello v. New York* wrote, the fear is that "[i]f every criminal charge were subjected to a full scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities. 404 U.S. 257, 260 (1971). Included in the strategies used by defense attorneys are demanding the right to trial by jury, prosecution by indictment, the right to bring witnesses, etc. These strategies are particularly potent against prosecutors with traditionally heavy caseloads. *See generally* Alschuler, *supra* note 90, at 56-58.

147 State v. Gibson, 68 N.J. 499, 512, 348 A.2d 769, 775 (1975).

148 *Id.*

defendants must be protected from misconduct and coercion in the pleading process and ensured fairness in sentencing."[149] The court rejected these arguments stating that they "overlook the role of the trial court and its obligation to insure the reasonableness of the bargain struck and of the sentence imposed."[150] The court has overlooked the possibility that the trial judge may not always be the objective insurer that the system would hope.

In *Worcester v. Commissioner of Internal Revenue*,[151] the court held that a judge may not participate in sentence negotiation because of the possibility of abuse. "A judge who fears he has committed reversible error during the trial, and does not like the thought of being reversed, [may inform] the defendant that he is considering a substantial sentence, but that if the defendant will demonstrate his repentance . . . by waiving appeal, he will suspend it."[152]

Although Federal Rule of Criminal Procedure 11[153] now prohibits a judge from participating in sentence negotiation, the court's reasoning in *Worcester* illustrates a problem with the system of negotiating sentences based on waiver of appeal. The court recognized the potential for a judge to offer a lighter sentence conditioned on the waiving of the right to appeal because the judge feared reversal.[154] The court held that such a practice was inconsistent with the role of the judge as an objective overseer.[155]

Following the reasoning of the *Worcester* court to its logical conclusion, the judge should also be barred from accepting negotiated sentence agreements which include the waiver of the right to appeal. *Worcester* rec-

149 *Seaberg*, 74 N.Y.2d at 8, 541 N.E.2d at 1025, 543 N.Y.S.2d at 971.

150 *Id.*

151 370 F.2d 713 (1st Cir. 1966).

152 *Id.* at 718.

153 F.R.Cr.P. 11(e) Plea Agreement Procedure:

> (1) In General. The attorney for the government and the attorney for the defendant . . . may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty . . . to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:
>
> (A) move for dismissal of other charges; or
>
> (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
>
> (C) agree that a specific sentence is the appropriate disposition of the case. The court shall not participate in any such discussions.

154 The court in *Worcester* wrote: "We cannot try the mind of the judge to assess whether his motives in offering the defendant a valuable consideration to waive appeal (and we can think of little more valuable than not going to jail) were good or bad." *Worcester*, 370 F.2d at 718.

155 *Id.* The court stated that "it is unfair to use the great threat given to the court to determine sentence to place the defendant in the dilemma of making an unfree choice." *Id.* The advisory committee on the rules laid out the reasoning behind prohibiting the court from participating in plea discussions. The committee writes:

> There are valid reasons for a judge to avoid involvement in plea discussions. It might lead the defendant to believe that he would not receive a fair trial, were there a trial before the same judge. The risk of not going along with the disposition apparently desired by the judge might induce the defendant to plead guilty, even if innocent. Such involvement makes it difficult for a judge to objectively assess the voluntariness of the plea . . . . When a judge becomes a participant in plea bargaining be brings to bear the full force and majesty of his office.

Notes on Advisory Committee on Rules-1974 Amendment.

ognized that some judges may fear reversal. For the judge who fears reversal, once a jury or the judge finds a defendant guilty after trial, the judge has an interest in seeing that the conviction withstands appeal. This interest is synonymous with the prosecutor's interest.

If, as the *Worcester* court held, the judge is not to negotiate an appeal because of a conflict of interest, then that judge must also not oversee a sentence negotiation which includes a waiver of the right to appeal. A judge who fears reversal will be as inclined to accept an unfair bargain which is conditioned on the defendant waiving her right to appeal as the judge would be to offer such a bargain if he were permitted to join in the negotiations.[156] In fact, the judge may be more inclined to accept an unfair bargain than he would be to offer an unfair bargain because his participation is much more subtle.

For example, under the Federal Rules of Criminal Procedure,[157] before accepting a plea of guilty, the court need only advise the defendants of the nature of the charge, that they have the right to representation, to plead not guilty and be tried by a jury, that by pleading guilty they waive their right to trial and that anything they say may be used against them in a prosecution for perjury.[158] The court must also determine that the plea is voluntary and that there is some factual basis for the plea.[159] These requirements are not substantial. Courts could easily advise the defendants of all these rights, determine voluntariness and factual basis, and still accept bargains that are unfair to the defendants. For example, none of these requirements prevents courts from accepting pleas that include waivers of the right to appeal in spite of possible police violations or judicial error.

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156 This reasoning extends beyond the situation where the judge accepts a bargain known to be unfair. The judge, in perfectly good faith, may believe that the bargain is fair and is the proper determination of the case but fear reversal which in the judge's mind would be unfair.

157 F.R.Cr.P. 11 delineates the role of the trial judge in accepting a plea of guilty:

> (C) Advice to Defendant. Before accepting a plea of guilty . . ., the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
>
> (1) the nature of the charge . . . .
>
> (2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney . . . .
>
> (3) that he has the right to plead not guilty . . ., and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and
>
> (4) that if his plea of guilty . . . is accepted by the court there will not be a further trial of any kind, so that by pleading guilty . . . he waives the right to a trial; and
>
> (5) if the court intends to question the defendant . . . that his answers may later be used against him in a prosecution for perjury or false statement.
>
> (d) Insuring that the Plea is Voluntary. The court shall not accept a plea of guilty . . . without first determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement . . . .
>
> (e) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

158 *Id.*

159 *Id.*

V. Conclusion

The waiver of a criminal defendant's right to appeal is an unacceptable condition of a sentence or plea bargain. The practice of conditioning the acceptance of sentence or plea bargains upon defendants waiving their rights to appeal represents a systemic deprivation of defendants' rights to have their convictions reviewed. Consequently, it violates the due process clause of the fourteenth amendment. Society has an interest in criminal appeals because they afford an added degree of protection against errors and irregularities in the criminal justice process that can result in the loss of life, liberty or property of the accused. The right to appeal a criminal conviction has become too integral a part of the criminal justice system to be sacrificed in the name of "efficiency". To the extent that the right to appeal implicates judicial integrity and contributes to the development of our law, it is unlike other rights criminal defendants routinely waive. As evidenced in the context of habeas corpus proceedings, such waivers effectively cut off all remedial avenues open to a defendant for bringing errors in the criminal process to the court's attention.

Courts should hold that such waivers are invalid. At present, this is a minority view. The courts that have yet to address the issue of permitting appeal waivers should recognize that the right to appeal a criminal conviction has taken on added significance as a safeguard in a system that depends so heavily upon plea-based convictions for its administration.

Gregory M. Dyer
Brendan Judge