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ANCHORS AWAY: WHY THE ANCHORING EFFECT SUGGESTS THAT JUDGES SHOULD BE ABLE TO PARTICIPATE IN PLEA DISCUSSIONS

COLIN MILLER*

Abstract: The “anchoring effect” is a cognitive bias by which people evaluate numbers by focusing on a reference point—an anchor—and adjusting up or down. Unfortunately, people usually do not sufficiently adjust away from their anchors, so the initial choice of anchors has an inordinate effect on their final estimates. More than ninety percent of all criminal cases are resolved by plea bargains. In the vast majority of those cases, the prosecutor makes the initial plea offer, and prosecutors often make high initial offers. Assuming that the prosecutor’s opening offer operates as an anchor, nearly all criminal cases in this country produce unjust results based upon an unconscious cognitive bias. This Article proposes a solution that most jurisdictions have rejected: Judges should be able to participate in the plea discussions. Federal Rule of Criminal Procedure 11(c)(1) and most state counterparts strictly preclude judges from participating in plea discussions, but a few jurisdictions permit judicial participation. In these jurisdictions, plea discussions commence with the prosecution and defense laying out their cases and asking for particular dispositions and the judge responding with the expected post-plea sentence. This Article contends that this type of judicial participation would reduce the anchoring effect.

INTRODUCTION

Thirty-eight pairs of MBA students at Northwestern University participated in a mock negotiation.¹ Researchers designated one student in each pair the seller and the other student the buyer.² The research-

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¹ Adam D. Galinsky & Thomas Mussweiler, *First Offers as Anchors: The Role of Perspective-Taking and Negotiator Focus*, 81 J. PERSONALITY & SOC. PSYCHOL. 657, 660 (2001).

² *See id.*

ers told each student that the negotiation would involve the sale of a pharmaceutical plant.³ They also told all the students several other facts about the prospective sale: (1) the seller purchased the plant three years ago for \$15 million, which was below the market price because the previous seller was in bankruptcy; (2) two years ago, the plant was appraised at \$19 million; (3) in the last two years, the real estate market declined five percent, though the plant was unique and possibly immune to the decline; and (4) a similar plant sold nine months ago for \$26 million.⁴

The researchers informed the buyer-students that they were CFOs of a company in need of a new plant to manufacture highly specialized compounds.⁵ The researchers also told the buyers that their best alternative to purchasing the seller's plant was to spend \$25 million on building a new plant.⁶ Meanwhile, the researchers told the seller-students that they were selling the plant because their company was phasing out the product that the plant produced.⁷ The researchers then told the sellers that their best alternative was to strip the plant and sell the equipment for a projected profit of \$17 million.⁸ The major variable was that the researchers told half of the pairs that the seller must make the first offer and the other half of the pairs that the buyer must make the first offer.⁹

The result? In every pair, the students reached an agreement.¹⁰ When seller-students made the opening offer, they first offered to sell the plant for an average of \$26.6 million; when buyer-students made the initial offer, they first offered to buy the plant for an average of \$16.5 million.¹¹ When the opening offer was an offer to sell by a seller-

³ *Id.*

⁴ *Id.* at 660, 669.

⁵ *Id.* at 660.

⁶ *Id.* Although the new plant would be closer to the company's headquarters, it would take a year to build. *Id.* The researchers thought it important to note that the cost of building the new plant was close to the \$26 million price of the comparable plant that sold nine months earlier. *Id.* at 660, 669.

⁷ Galinsky & Mussweiler, *supra* note 1, at 660.

⁸ *Id.* at 661. The researchers thought it important to note that the profit generated by stripping the plant was close to the \$15 million price that the sellers paid for the plant three years ago. *Id.* The researchers also noted that the projected \$17 million in profit was only \$2 million less than the appraisal value of the plant. *Id.*

⁹ *Id.* Another variable was that the researchers gave a quarter of the negotiators—half of those in the secondary offer position—a page of information instructing them to think about alternatives to negotiating an agreement that the party making the first offer could present. *Id.*

¹⁰ *Id.*

¹¹ *Id.*

student, the average final purchase price was \$24.8 million.¹² When a buyer-student opened the bidding, the average final purchase price was \$19.7 million.¹³

This \$5.1 million difference in average final purchase price can be explained by the “anchoring effect”—an unconscious cognitive bias by which “[p]eople come up with or evaluate numbers by focusing on a reference point (an anchor) and then adjusting up or down from that anchor.”¹⁴ In the Northwestern study, the opening offer was the anchor, and the problem for the students not making that offer was that people typically do not veer much from their anchors.¹⁵ This meant that the choice of the initial anchors had an inordinate effect on the students’ final purchase prices.¹⁶

Many legal bargaining theorists now recognize anchoring as a basic truth of *civil* negotiations,¹⁷ and it seems safe to assume that this same cognitive bias applies to *criminal* negotiations as well. For example, Professor Stephanos Bibas has argued:

The same dynamics [present in civil negotiations] help to explain the course of plea bargaining. For example, a prosecutor might initially offer a robbery defendant twenty years’ imprisonment by piling on every plausible enhancement. The defendant, of course, rejects this unreasonable offer out of hand, but the initial offer serves as a high anchor. When the prosecutor comes back with a revised offer of fifteen years, that offer sounds more reasonable. By the time the prosecutor comes down to twelve years, the defendant is ready to jump at the deal. If the prosecutor had started out at twelve years,

¹² *Id.*

¹³ Galinsky & Mussweiler, *supra* note 1, at 661.

¹⁴ Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2515 (2004); see Galinsky & Mussweiler, *supra* note 1, at 658–59, 662; see also Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1128 (1974) (explaining the anchoring effect).

¹⁵ Galinsky & Mussweiler, *supra* note 1, at 660–61; see also Bibas, *supra* note 14, at 2516.

¹⁶ Galinsky & Mussweiler, *supra* note 1, at 660–61; see also Bibas, *supra* note 14, at 2516.

¹⁷ See Robert J. Condlin, *Legal Bargaining Theory’s New “Prospecting” Agenda: It May Be Social Science, But Is It News?*, 10 PEPP. DISP. RESOL. L.J. 215, 247 (2010) (“[A]nchoring is endemic to dispute settlement generally . . .”); Dan Orr & Chris Guthrie, *Anchoring, Information, Expertise, and Negotiation: New Insights from Meta-Analysis*, 21 OHIO ST. J. ON DISP. RESOL. 597, 609 (2006) (“Several studies have found evidence that anchors of various kinds—including opening offers/demands, statutory damage caps, insurance policy limits, negotiator aspirations, and so forth—can have an effect on both settlements and deals.”); see also Bibas, *supra* note 14, at 2517 (discussing how a plaintiff’s lawyer may use implausibly large damage requests to create a high anchor and increase the ultimate jury award).

however, the defendant might have anchored on that number as the highest likely sentence and rejected it as a bad deal.¹⁸

More than ninety percent of all criminal cases in this country are resolved by plea bargains.¹⁹ In the majority of those cases, the prosecutor makes the initial plea offer,²⁰ which is typically high.²¹ Assuming that the anchoring effect applies to *criminal* negotiations in the same way that it applies to *civil* negotiations, this would mean that nearly every criminal case in this country is resolved on the basis of an unconscious cognitive bias.

This Article proposes a solution to this problem, which the vast majority of jurisdictions in the United States have rejected: Judges should be able to participate in plea discussions. Federal Rule of Criminal Procedure 11(c)(1) and most state counterparts strictly prohibit judges from participating in plea discussions,²² but a few jurisdictions, such as Florida and Connecticut, permit judicial participation.²³ In these jurisdictions, plea discussions typically commence with the

¹⁸ Bibas, *supra* note 14, at 2517–18.

¹⁹ Jodi M. Brown & Patrick A. Langan, *State Court Sentencing of Convicted Felons, 1994*, BUREAU OF JUST. STATS. 3 (Mar. 1998), <http://www.bjs.gov/content/pub/pdf/scscf94.pdf>. In 1996, plea bargains resolved ninety-one percent of convictions. David J. Levin, Patrick A. Langan & Jodi M. Brown, *State Court Sentencing of Convicted Felons, 1996*, BUREAU OF JUST. STATS. 50 (Feb. 2000), <http://www.bjs.gov/content/pub/pdf/scscf96.pdf>. In 2004, plea bargains resolved ninety-five percent of convictions. *State Court Sentencing of Convicted Felons, 2004—Statistical Tables*, BUREAU JUST. STATS., at tbl. 4.1, <http://www.bjs.gov/content/pub/html/scscf04/tables/scs04401tab.cfm> (last revised July 28, 2013).

²⁰ Justin H. Dion, Note, *Criminal Law—Prosecutorial Discretion or Contract Theory Restrictions?—The Implications of Allowing Judicial Review of Prosecutorial Discretion Founded on Underlying Contract Principles*, 22 W. NEW ENG. L. REV. 149, 160 (2000) (“Once the prosecutor decides that a plea agreement could benefit the government, the prosecutor will usually make the initial offer to the defendant.”).

²¹ Andrew E. Taslitz, *Prosecutorial Preconditions to Plea Negotiations: “Voluntary” Waivers of Constitutional Rights*, CRIM. JUST., Fall 2008, at 14, 21.

²² FED. R. CRIM. P. 11(c)(1) (“An attorney for the government and the defendant’s attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions.”); David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure and Vice Versa*, 94 GEO. L.J. 683, 700 n.59 (2006) (“Most state rules mirror the federal rule in this respect, but a growing minority of states allow and even encourage judges to participate in plea negotiations.”); *see, e.g.*, COLO. R. CRIM. P. 11(f)(4) (“The trial judge shall not participate in plea discussions.”); MISS. UNIF. R. CIR. & CNTY. COURT PRAC. 8.04(B)(4) (“The trial judge shall not participate in any plea discussion.”); TENN. R. CRIM. P. 11(c)(1) (“The court shall not participate in these discussions.”); WYO. R. CRIM. P. 11(e)(1)(C) (“The court shall not participate in any such discussions.”).

²³ *See* FLA. R. CRIM. P. 3.171(d) (permitting judicial participation in plea discussions); *State v. Revelo*, 775 A.2d 260, 268 (Conn. 2001) (same); *infra* notes 160–179 and accompanying text.

prosecutor and defense counsel laying out their cases and asking for particular dispositions.²⁴ The judge then facilitates future negotiations by responding with the expected post-plea sentence in the form of a sentence cap, a sentencing range, or a fixed sentence.²⁵

This Article contends that this type of judicial participation reduces the anchoring effect because the expected post-plea sentence communicated by the judge replaces the prosecutor's opening offer as the anchor, producing a fairer plea-bargaining process. Such judicial participation in plea discussions ameliorates many of the problems currently associated with the plea-bargaining system and can be conducted in a way that avoids many of the pitfalls that have prevented most jurisdictions from allowing such action.

Part I of this Article sets forth the problems with the current plea-bargaining process, beginning with the *caveat accused* approach courts have taken with regard to plea bargaining and ending with the toothless judicial review of plea agreements.²⁶ Part II describes the ways in which jurisdictions such as Florida and Connecticut allow judges to participate in the plea-bargaining process.²⁷ Part III defines the anchoring effect and explains both how the cognitive bias is created and how it distorts the way in which civil parties engage in negotiations.²⁸ Part IV details why the anchoring effect likely distorts the decision making of criminal defendants during plea bargaining and concludes that judicial participation during plea discussions would significantly reduce the effect of this cognitive bias.²⁹ Part V notes that judicial participation during plea discussions has the capacity to resolve many of the current problems identified with the plea-bargaining process in Part I.³⁰ Finally, Part VI argues that most of the problems associated with judicial participation in plea discussions are overstated and avoidable.³¹

²⁴ Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 242, 249 (2006).

²⁵ Turner, *supra* note 24, at 242, 249.

²⁶ See *infra* notes 32–156 and accompanying text.

²⁷ See *infra* notes 157–179 and accompanying text.

²⁸ See *infra* notes 180–252 and accompanying text.

²⁹ See *infra* notes 253–354 and accompanying text.

³⁰ See *infra* notes 355–394 and accompanying text.

³¹ See *infra* notes 395–422 and accompanying text.

I. CURRENT PROBLEMS WITH THE PLEA-BARGAINING PROCESS

Under Federal Rule of Evidence 410, statements made by a defendant during plea discussions with opposing counsel are inadmissible.³² Nevertheless, defendants hoping to engage in plea bargaining with prosecutors will face several potential pitfalls. First, courts have applied a *caveat accused* approach under Rule 410, placing the heavy burden on criminal defendants to prove that their statements were actually made during plea discussions rather than more informal or preliminary discussions.³³ Second, even when prosecutors clearly inform defendants that they are about to engage in plea discussions, they often place a condition on the process: For the defendant to get to the plea-bargaining table, he must waive the protections of Rule 410.³⁴ This permits the prosecutor to use the defendant's plea-related statements for impeachment or even as substantive evidence in the event that a bargain is not reached and the case proceeds to trial.³⁵ Finally, prosecutors often force defendants to sign a waiver of their appellate rights before agreeing to a plea bargain.³⁶

Criminal defendants are also often saddled with public defenders who lack the training, resources, and time to be able to either defend their cases effectively at trial or drive a hard bargain during plea discussions.³⁷ Furthermore, when defendants enter into a plea bargain, they do not understand, nor do they benefit from, the toothless judicial review of that bargain by a theretofore uninvolved judge.³⁸ Such review is unlikely to expose the prosecutor's coercion or the defendant's confusion.³⁹

³² FED. R. EVID. 410(a); *see infra* note 40 and accompanying text.

³³ *See infra* notes 43–79 and accompanying text. The “*caveat accused* approach” describes an approach that places this burden on the defendant. Colin Miller, *Caveat Prosecutor: Where Courts Went Wrong in Applying Robertson’s Two-Tiered Analysis to Plea Bargaining, and How to Correct Their Mistakes*, 32 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 209, 209–13 (2006). Alternatively, courts have taken a “*caveat prosecutor* approach,” which places the burden on the prosecution to prove that discussions with the defendant were not plea discussions protected by Rule 410. *United States v. Herman*, 544 F.2d 791, 796 (5th Cir. 1977); Miller, *supra*, at 210.

³⁴ *See infra* notes 80–127 and accompanying text.

³⁵ *See infra* notes 80–117 and accompanying text.

³⁶ *See infra* notes 118–127 and accompanying text.

³⁷ *See infra* notes 128–139 and accompanying text.

³⁸ *See infra* notes 140–156 and accompanying text.

³⁹ *See infra* notes 140–156 and accompanying text.

A. *The Courts' Caveat Accused Approach to Federal Rule of Evidence 410*

Federal Rule of Evidence 410(a) renders certain pleas and plea-related statements inadmissible “against the defendant who made the plea or participated in the plea discussions.”⁴⁰ One such plea-related statement is “a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.”⁴¹ Accordingly, in cases in which a defendant makes self-incriminatory statements during *formal* plea discussions with the prosecutor, Rule 410(a)(4) typically renders such statements inadmissible against the defendant.⁴²

⁴⁰ FED. R. EVID. 410(a). Evidence of withdrawn guilty pleas has been inadmissible in federal prosecutions since the U.S. Supreme Court’s 1927 decision in *Kercheval v United States*. *Id.* 410 advisory committee’s note; 274 U.S. 220, 223–25 (1927). In *Kercheval*, the Court reasoned:

The effect of the court's order permitting the withdrawal was to adjudge that the plea of guilty be held for naught. Its subsequent use as evidence against petitioner was in direct conflict with that determination. When the plea was annulled it ceased to be evidence. By permitting it to be given weight the court reinstated it *pro tanto*. . . . Giving to the withdrawn plea any weight is in principle quite as inconsistent with the prior order as it would be to hold the plea conclusive. Under the charge, if the plea was found not improperly obtained, the jury was required to give it weight unless petitioner was shown to be innocent. And if admissible at all, such plea inevitably must be so considered. As a practical matter, it could not be received as evidence without putting petitioner in a dilemma utterly inconsistent with the determination of the court awarding him a trial. . . . The withdrawal of a plea of guilty is a poor privilege, if, notwithstanding its withdrawal, it may be used in evidence under the plea of not guilty.

274 U.S. at 224 (citations omitted) (internal quotation marks omitted). When the New York Court of Appeals addressed the issue of admissibility of withdrawn pleas in 1961 in *People v. Spitaleri*, it noted that allowing withdrawn pleas to be admitted in evidence would effectively force the defendant to take the stand. 173 N.E.2d, 36–37 (N.Y. 1961); see FED. R. EVID. 410 advisory committee’s note (“[T]he [*Spitaleri*] court pointed out that the effect of admitting the plea was to compel defendant to take the stand by way of explanation and to open the way for the prosecution to call the lawyer who had represented him at the time of entering the plea.”). Further, the inadmissibility of withdrawn guilty pleas encourages plea bargaining. See FED. R. EVID. 410 advisory committee’s note.

⁴¹ FED. R. EVID. 410(a)(4). Federal Rule of Evidence 410 renders other kinds of plea-related statements inadmissible, including “a statement made during a proceeding on either [a guilty plea that was later withdrawn or a nolo contendere plea] under Federal Rule of Criminal Procedure 11 or a comparable state procedure.” *Id.* para. (a)(3).

⁴² See *id.* para. (a)(4). For example, in 2005 in *United States v. Stein*, the U.S. District Court for the Eastern District of Pennsylvania addressed the admissibility of statements made to an Assistant U.S. Attorney (“AUSA”) in the course of formal plea discussions arranged by counsel. No. CR. 04-269-9, 2005 WL 1377851, at *12–14 (E.D. Pa. June 8, 2005). The court reasoned:

In other cases, it is unclear whether conversations between a defendant and a prosecutor are too preliminary or informal to be classified as “plea discussions” under Rule 410(a)(4). In these cases, the majority of courts have applied a two-tiered analysis—derived from the U.S. Court of Appeals for the Fifth Circuit’s 1976 en banc opinion in *United States v. Robertson*—to determine whether such discussions are plea discussions.⁴³ In *Robertson*, Drug Enforcement Administration

In sum, on these facts, where a represented defendant made statements to an [AUSA] in formal proffer sessions that defense counsel specifically requested be “off-the-record” . . . , the Court finds the defendant’s statements inadmissible under . . . FRE 410 as statements “made in the course of plea discussions with an attorney for the prosecuting authority.”

Id. at *14.

⁴³ 582 F.2d 1356, 1366–67 (5th Cir. 1978) (en banc); see Miller, *supra* note 33, at 232–34 (noting how all but a handful of courts have adopted the *Robertson* analysis). Five circuits have explicitly adopted the *Robertson* test, a two-part test that determines “first, whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and, second, whether the accused’s expectation was reasonable given the totality of the objective circumstances.” *Id.* In 1983, the U.S. Court of Appeals for the Fifth Circuit reaffirmed the two-part *Robertson* test in *United States v. Conaway*, 11 F.3d 40, 42 (5th Cir. 1983) (“This circuit uses a two-part test to evaluate such claims.”). The U.S. Court of Appeals for the Sixth Circuit explicitly adopted it in 1993 in *United States v. Little*, Nos. 92-6719, 92-6720 92-6721, 1993 WL 501570, at *3 (6th Cir. Dec. 6, 1993) (“In [reviewing the finding of fact that discussions were plea discussions], we adopt the test set forth in *United States v. Robertson* . . .”). In 1980, The U.S. Court of Appeals for the Seventh Circuit adopted *Robertson* in *United States v. O’Brien*, 618 F.2d 1234, 1240–41 (7th Cir. 1980) (“In determining whether a discussion can be properly characterized as a plea negotiation, we must consider the accused’s subjective expectation of negotiating a plea at the time of the discussion, and the reasonableness of that expectation.”). The U.S. Courts of Appeals for the Ninth and Eleventh Circuits have also adopted *Robertson*. *United States v. Knight*, 867 F.2d 1285, 1287–88 (11th Cir. 1989) (“The trial court first determines whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and then determines whether the accused’s expectation was reasonable given the totality of the objective circumstances.”); *United States v. Doe*, 655 F.2d 920, 925 (9th Cir. 1980) (“This court, following *United States v. Robertson*, has adopted a bifurcated test to establish the admissibility of statements made during what are assertedly plea negotiations . . .”) (citation omitted). In three other circuits, the Second, Fourth, and Tenth, district courts have adopted the *Robertson* test. Miller, *supra* note 33, at 233; see, e.g., *United States v. Kearns*, 109 F. Supp. 2d 1309, 1315 (D. Kan. 2000) (“A statement is made in the course of plea discussions with a United States Attorney if (1) the suspect exhibited an actual subjective expectation that he was negotiating a plea at the time of the discussion, and (2) his expectation was reasonable given the totality of the circumstances.”); *United States v. Bridges*, 46 F. Supp. 2d 462, 465 (E.D. Va. 1999) (“Although no such test has been adopted in this circuit, other courts have applied a two-tiered test that focuses on the speaker’s state of mind, and asks whether his subjective expectation that a statement is being made in the course of plea discussions was objectively reasonable given the totality of the circumstances.”); *United States v. Fronk*, 173 F.R.D. 59, 67 (W.D.N.Y. 1997) (“I believe the *Robertson* two-tiered analysis to be the appropriate vehicle for analyzing [the defendant’s] suppression claims.”). Out of all the circuit courts, only the U.S. Court of Appeals for the First

agents arrested Andrew Robertson and his confederate, William Burtigan.⁴⁴ As the agents were about to transport the arrestees to a courthouse for arraignment, Robertson and his confederate struck up a conversation with the agents in the parking lot.⁴⁵ Robertson later moved to suppress statements made during this conversation, claiming that they were made during plea discussions.⁴⁶

In addressing this issue, the Fifth Circuit found that when determining whether discussions are “plea discussions” for Rule 410(a)(4) purposes, “[t]he trial court must apply a two-tiered analysis and determine, first, whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and, second, whether the accused’s expectation was reasonable given the totality of the objective circumstances.”⁴⁷ The Fifth Circuit ended this conclusion with a footnote, which stated in relevant part:

While the government apparently bears the burden of proving that the discussion was not a plea negotiation once the issue has been properly raised, *See United States v. Herman*, 544 F.2d at 799 n. 12, we need not decide the weight of that burden here. Here, though the issue was first raised on appeal, we are able to reach our result because the record is void of any significant indications of plea negotiations.⁴⁸

As this footnote makes clear, in *Robertson*, the Fifth Circuit relied upon its opinion in *Herman* to reach the apparent conclusion that, when the issue is properly raised by the defendant, the prosecution bears the burden of proving that a discussion is not a plea discussion.⁴⁹ In *Herman*, the Fifth Circuit indeed placed the burden of proof on the prosecution as part of a prosecutor-beware interpretation of Rule

Circuit has explicitly rejected the *Robertson* analysis. Miller, *supra* note 33, at 233; *see* *United States v. Penta*, 898 F.2d 815, 818 (1st Cir. 1990) (finding that Federal Rule of Criminal Procedure 11 does not embrace the two-part *Robertson* test and deciding that plea discussions mean plea discussions).

⁴⁴ 582 F.2d at 1359. The Drug Enforcement Administration agents also arrested Robertson’s “lady friend” and Burtigan’s wife. *Id.*

⁴⁵ *Id.* Robertson and his confederate made the statements hoping for leniency for the two women the agents had arrested. *Id.* at 1360–62.

⁴⁶ *Id.* at 1359.

⁴⁷ *Id.* at 1366.

⁴⁸ *Id.* at 1366 n.21 (citation omitted).

⁴⁹ *Id.* (citing *Herman*, 544 F.2d at 799 n.12). *Herman* was superseded by statute on a different point, as explained by the U.S. Court of Appeals for the Fifth Circuit’s 1985 decision in *United States v. Keith*. 764 F.2d 263, 265 (5th Cir. 1985).

410(a)(4).⁵⁰ *Robertson* was consistent with this *caveat prosecutor* approach, with (1) the majority citing *Herman* for the proposition that Rule 410(a)(4) can apply regardless of whether the start of plea discussions was specifically announced,⁵¹ and (2) a special concurrence determining that the Rule's operation should not depend on the utterance of "magic words" related to plea bargaining.⁵²

As noted, nearly every court has adopted *Robertson's* two-tiered analysis for determining whether a discussion is a plea discussion for Rule 410(a)(4) purposes.⁵³ At the same time, almost all of these courts have explicitly or implicitly refused to place the burden of proof on the prosecution; instead, they have replaced the *caveat prosecutor* approach with a *caveat accused* approach, in which defendants must affirmatively prove that they satisfy both tiers of the *Robertson* analysis.⁵⁴

For instance, in 1994, in *State v. Traficante*, the Supreme Court of Rhode Island addressed a case where the defendant moved to suppress

⁵⁰ *Herman*, 544 F.2d at 796. According to the court in *Herman*:

The legal battleground has thus shifted from the propriety of plea bargaining to how best to implement and oversee the process. Plea bargaining is a tool of conciliation. It must not be a chisel of deceit or a hammered purchase and sale. The end result must come as an open covenant, openly arrived at with judicial oversight. A legal plea bargain is made in the sunshine before the penal bars darken. Accordingly, we must examine plea bargains under the doctrine of *caveat prosecutor*.

Id. (emphasis added).

⁵¹ 582 F.2d at 1367 (quoting *Herman*, 544 F.2d at 797) ("To allow the government to introduce statements uttered in reliance on the rule would be to use the rule as a sword rather than a shield. This we cannot allow; the rule was designed only as a shield.")

⁵² *Id.* at 1371-72 (Morgan, J., concurring). The concurring judges reasoned:

The point is, however, that at the time a confession is given, which is the relevant time for characterizing the transaction, the parties are ordinarily contemplating that no trial contest of the question of guilt will ensue. When such a confession is the result of bargaining, I do not believe the protection of the rules should depend on whether the accused utters a few magic words like, "and, of course, I'm also going to plead guilty." As the court has observed, "if we are overly exacting in deciding which statements come within this standard, we will deter the unrestrained candor that often produces effective plea negotiations." Thus, I conclude that ordinarily a bargained for confession is tantamount to a plea negotiation because the reasonable expectation of all parties is that the question of innocence will be disposed of without trial.

Id. (citation omitted).

⁵³ See Miller, *supra* note 33, at 232-34.

⁵⁴ See *id.* ("[C]ourts almost categorically failed to mention the footnote in *Robertson* immediately succeeding its two-tiered analysis. The footnote stated that the burden of proof was on the government in most cases. Both the phrase 'caveat prosecutor' and the substance of the doctrine were consistently ignored.")

statements that he made during a meeting with an assistant attorney general because he claimed that the statements were made during plea discussions.⁵⁵ In addressing this issue, the Supreme Court of Rhode Island adopted *Robertson's* two-tiered analysis, yet applied a *caveat accused* approach.⁵⁶ The court found that the meeting was not a plea discussion because defense counsel admitted that “the words ‘plea bargain’ or ‘negotiate a guilty plea’ were never mentioned in arranging the . . . meeting.”⁵⁷

In reaching this conclusion, the Rhode Island Supreme Court relied upon the 1989 opinion of the U.S. District Court for the District of Maine in *United States v. Lau*.⁵⁸ In *Lau*, the court rejected a defendant’s claim that a meeting with an Assistant U.S. Attorney (“AUSA”) was a plea discussion because the words “plea,” “charge,” and “indictment” were never used.⁵⁹ The court acknowledged that defense counsel thought that the meeting was a plea discussion and that the defendant might have subjectively expected that he was negotiating a plea.⁶⁰ Nonetheless, because the defendant failed to prove that his expectation was objectively reasonable, the court found that Rule 410(a)(4) was inapplicable.⁶¹

Alternatively, although some courts have not explicitly placed the burden of proof on the defendant, their analyses reveal how a defendant could think that he was negotiating a plea, but in reality have no protection under Rule 410(a)(4). For instance, in the U.S. Court of Appeals for the 8th Circuit’s 1995 decision in *United States v. Hare*, Kevin Hare appealed his convictions for wire fraud and money laundering, alleging, inter alia, that the district court erred in denying his motion to suppress statements that he made in an initial meeting with an AUSA.⁶² The Eighth Circuit found that, at the initial meeting:

⁵⁵ 636 A.2d 692, 693 (R.I. 1994).

⁵⁶ *See id.* at 696 (focusing on whether the defendant could demonstrate to the court that he had a subjective belief of entering into plea discussions and if he could demonstrate that his belief was objectively reasonable).

⁵⁷ *Id.* at 697.

⁵⁸ *Id.* (citing *United States v. Lau*, 711 F. Supp. 40, 42–43 (D. Me. 1989)).

⁵⁹ *See* 711 F. Supp. at 42.

⁶⁰ *See id.* at 43. (“Pomeroy stated at the hearing that he considered the interchange to be negotiations concerning disposition of the matter, and that his purpose was for Defendant to have contact with the Government and not be charged.”).

⁶¹ *See id.*

⁶² 49 F.3d 447, 448–49, 451 (8th Cir. 1995). Hare was involved in an insurance fraud scheme. *Id.* at 449. Government investigations into Hare’s scheme led agents to his office on October 14, 1992. Then, the following events occurred:

The AUSA acknowledged that he and Hare had discussed the Sentencing Guidelines somewhat, but said they had done so only in general terms and not for the purpose of negotiating a plea. At Hare's inquiry, the AUSA informed him that the Guidelines would call for definite jail time, absent cooperation due to the amount of money involved. Specifically, the AUSA "told him that a 5K motion would reduce his exposure under the guidelines" but further testified that they "did not discuss the specifics of where the guidelines came out." The AUSA did not discuss specific charges with Hare and did not offer any plea bargain.⁶³

Thereafter, Hare continued cooperating with the government, and he eventually entered into a plea bargain.⁶⁴ Later, however, Hare stopped cooperating under the plea agreement.⁶⁵ The prosecution subsequently presented his self-incriminatory statements from the initial meeting at his trial.⁶⁶ In rejecting Hare's ensuing Rule 410(a)(4) appeal, the Eighth Circuit reasoned that even though Hare might have hoped to improve his position, his statements were not made in the course of plea discussions because no plea bargain was contemplated or offered at that time.⁶⁷

Such a reading of Rule 410(a)(4) is not only inconsistent with a *caveat prosecutor* approach, but is also in tension with the Advisory Committee's Notes. In 1979, decades before the *Hare* opinion, the Rules regarding the inadmissibility of statements made during plea discussions were amended for purposes of clarification.⁶⁸ According to the

[The agents] showed him the evidence that they had gathered against him through their investigation. Hare said that he had been expecting them and showed them a written confession that he had already been preparing. Hare chose to accompany the agents to the United States Attorney's office for an interview with them and the [AUSA]. During that interview, Hare admitted with remorse and without condition that he had participated in the scheme

Id.

⁶³ *Id.* at 451 (citation omitted).

⁶⁴ *Id.* The offer Hare accepted required him to cooperate with the government. *Id.*

⁶⁵ *See id.* at 450–51.

⁶⁶ *Id.* at 451.

⁶⁷ *Id.*

⁶⁸ *See* FED. R. CRIM. P. 11 advisory committee's note (1979 amendment). The clarification was necessary because the prior language was confusing and caused inconsistent results. *See* FED. R. EVID. 410 advisory committee's note (1979 amendment); FED. R. CRIM. P. 11 advisory committee's note (1979 amendment); H.R. REP. NO. 93-1597, at 1–14 (1974).

Advisory Committee, “the amendment ensure[d] ‘that even an attempt to open plea bargaining [is] covered under the same rule of inadmissibility.’”⁶⁹

Nevertheless, some courts have flatly concluded that preliminary discussions and attempts to open plea bargaining are not plea discussions.⁷⁰ For example, in the U.S. Court of Appeals for the First Circuit’s 1990 decision in *United States v. Penta*, a United States Attorney thought that a suspect “was trying to get us to agree not to prosecute him, or get us to agree that we would recommend probation or a minimum jail sentence”⁷¹ The United States Attorney encouraged the defendant to tell him everything, but when the defendant repeatedly asked him what would happen if he cooperated, the United States Attorney told him that he could not promise anything.⁷²

When the suspect later made self-incriminatory statements, the First Circuit construed them as part of an attempt to open plea bargaining and rejected the argument that these statements were covered by Rule 410(a)(4)⁷³ The court reasoned that “plea discussions means plea discussions.”⁷⁴ Accordingly, the court explicitly rejected the claim that “preliminary discussion must be considered as part of the overall plea-bargaining process.”⁷⁵ Similarly, in *State v. Murray*, the Court of Criminal Appeals of Tennessee in 1998 flatly rejected the defendant’s claims that offers to enter into plea negotiations are plea discussions.⁷⁶

⁶⁹ See FED. R. CRIM. P. 11 advisory committee’s note (1979 amendment) (quoting *United States v. Brooks*, 536 F.2d 1137, 1139 (6th Cir. 1976)).

⁷⁰ See Miller, *supra* note 33, at 234–235; see also, e.g., *Penta*, 898 F.2d at 818 (refusing to find that a preliminary discussion constitutes a part of an overall plea-bargaining process); *State v. Murray*, No. 01C01-9702-CR-00066, 1998 WL 934578, at *18 (Tenn. Crim. App. Dec. 30, 1998) (finding that for statements to be protected, they must be “made in connection with, and relevant to a plea of guilty or a plea of nolo contendere,” and therefore that preliminary discussions—such as those conducted with a police officer—will not be protected) (internal quotation marks omitted).

⁷¹ 898 F.2d at 816.

⁷² *Id.* at 817.

⁷³ See *id.* at 817–18.

⁷⁴ *Id.* at 818 (quoting *United States v. Serna*, 799 F.2d 842, 849 (2d Cir. 1986)).

⁷⁵ *Id.* (internal quotation marks omitted).

⁷⁶ 1998 WL 934578, at *18. The *Murray* court reasoned:

James Murray contends that his statements were inadmissible under Rule 11(e)(6) of the Tennessee Rules of Criminal Procedure because they were offers to enter into plea negotiations. We disagree. . . . Before Rule 11(e)(6) can be invoked to exclude statements made by an accused, the statements must be “made in connection with, and relevant to” a plea of guilty or a plea of nolo contendere. Therefore, this Rule is inapplicable in this case because, as a police officer, Detective Moran could not have entered into a plea bargain agreement with Mr. Murray. This issue has no merit.

In sum, the above opinions make clear that courts have created a *caveat accused* approach to Rule 410(a)(4). Thus, if a defendant is charged with a crime and attempts to open plea bargaining with the prosecutor, that prosecutor will almost certainly be able to introduce at trial any self-incriminatory statements made by the defendant during his attempt.⁷⁷ Furthermore, if a defendant makes self-incriminatory statements while honestly thinking that he is already engaged in plea discussions with a prosecutor, his statements will be admissible, unless he can prove that his expectation was objectively reasonable.⁷⁸ Under the *caveat accused* approach, the defendant bears the burden of proving that his statements are admissible, and he must do so by satisfying *Robertson's* two-tiered analysis: (1) that he subjectively expected that he was negotiating a plea; and (2) that his expectation was reasonable, given the totality of the objective circumstances.⁷⁹

B. *Forced Waiver of the Plea-Related Rules and Appellate Review*

The prosecution may also make a defendant waive certain rights before entering into plea discussions. For example, the prosecutor can ask the defendant to waive the protections of Rule 410.⁸⁰ These waivers principally take one of four forms: (1) an impeachment waiver is one that permits the use of a defendant's statements for purposes of impeachment;⁸¹ (2) a rebuttal waiver allows the prosecution to use the defendant's statements to rebut arguments, or evidence, offered on the defendant's behalf; (3) a case-in-chief waiver allows admission of the defendant's statements for purposes of proving the prosecution's case-in-chief;⁸² and (4) appeals waivers may cause defendants to waive their right to appellate review.⁸³

1. *Mezzanatto* and the Forced Waiver of Rule 410

a. *Mezzanatto and Impeachment Waivers*

Even after the difficulties associated with proving formal plea discussions are resolved by requests—or agreements—to engage in plea

Id. (footnote omitted) (citations omitted).

⁷⁷ See *supra* notes 70–76 and accompanying text.

⁷⁸ See *supra* notes 53–69 and accompanying text.

⁷⁹ See *Robertson*, 582 F.2d at 1366; Miller, *supra* note 33, at 241–43.

⁸⁰ See *infra* notes 80–127 and accompanying text.

⁸¹ See *infra* notes 84–99 and accompanying text (impeachment waivers).

⁸² See *infra* notes 100–117 and accompanying text (rebuttal and case-in-chief waivers).

⁸³ See *infra* notes 118–127 and accompanying text (appeals waivers).

discussions, defendants will face additional problems. For example, once prosecutors inform defendants that plea discussions are about to begin, they will typically force defendants to sign a waiver to reach the plea-bargaining table. This waiver is known as a proffer agreement, or “Queen for a Day” agreement, and it communicates to defendants that they are, in some way, waiving the protections of Rule 410(a)(4).⁸⁴

The U.S. Supreme Court gave its imprimatur to this practice in its 1995 opinion in *United States v. Mezzanatto*.⁸⁵ In *Mezzanatto*, the State charged Gary Mezzanatto with possession of methamphetamine.⁸⁶ The prosecutor later informed Mezzanatto and his attorney that, as a condition to proceeding with a plea meeting, Mezzanatto “would have to agree that any statements he made during the meeting could be used

⁸⁴ See *United States v. Parra*, 302 F. Supp. 2d 226, 230–31 & n.1 (S.D.N.Y. 2004) (“Proffer agreements are also sometimes called *Mezzanatto* agreements after the Supreme Court case or ‘Queen for a Day’ agreements.”). The U.S. District Court for the Southern District of New York in 2004 in *United States v. Parra* included the proffer agreement in its reported opinion. *Id.* at 230. This agreement was the “standard proffer agreement” of the U.S. Attorney’s Office for the Southern District of New York. See *id.* at 230, 237. The agreement read in relevant part:

The following understandings exist:

(1) **THIS IS NOT A COOPERATION AGREEMENT.** The Client has agreed to provide the Government with information, and to respond to questions, so that the Government may evaluate Client’s information and responses in making prosecutive decisions

(2) In any prosecution brought against Client by this Office, except as provided below the Government will not offer in evidence on its case-in-chief, or in connection with any sentencing proceeding for the purpose of determining an appropriate sentence, any statements made by Client at the meeting, except in a prosecution for false statements, obstruction of justice or perjury with respect to any acts committed or statements made during or after the meeting or testimony given after the meeting.

(3) Notwithstanding item (2) above: . . . (b) in any prosecution brought against Client, the Government may use statements made by Client at the meeting . . . for the purpose of cross-examination should Client testify; and (c) the Government may also use statements made by Client (including arguments made or issues raised *sua sponte* by the District Court) at any stage of the criminal prosecution (including bail, all phases of trial, and sentencing) in any prosecution brought against Client.

. . . .

(9) Client and Attorney acknowledge that they have fully discussed and understand every paragraph and clause in this Agreement and the consequences thereof.

Id. at 230–31.

⁸⁵ 513 U.S. 196, 210 (1995) (“We hold that absent some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of the plea-statement Rules is valid and enforceable.”).

⁸⁶ *Id.* at 198.

to impeach any contradictory testimony he might give at trial if the case proceeded that far.”⁸⁷ Mezzanatto signed a waiver to this effect (i.e., an impeachment waiver) and, after the prosecutor caught him in a series of lies, the meeting short was cut short.⁸⁸ At his trial, Mezzanatto began providing testimony that contradicted some of his statements during the plea meeting.⁸⁹ Over defense counsel’s objection, the prosecutor impeached Mezzanatto with his prior inconsistent statements.⁹⁰

After Mezzanatto was convicted, he appealed, claiming, *inter alia*, that prosecutors cannot force defendants to waive the protections of Rule 410(a)(4) in order to commence plea discussions.⁹¹ The Ninth Circuit agreed, noting that plea bargains are important to both the *accuser* and the *accused* because they provide a speedy and economical way to resolve cases while preserving the administration of justice.⁹²

The Supreme Court, however, disagreed, finding that defendants can waive the protections of Rule 410(a)(4) in the same way that they can waive many other rules of evidence and criminal procedure.⁹³ In a concurring opinion joined by Justices Breyer and O’Connor, Justice Ginsburg clarified that the Court merely held “that a waiver allowing the Government to impeach with statements made during plea negotiations is compatible with Congress’ intent to promote plea bargaining.”⁹⁴ She warned, though, that a waiver to use statements made during plea negotiations in the case-in-chief would inhibit plea bargaining by more severely undermining a defendant’s incentive to negotiate.⁹⁵ Nevertheless, because the waiver in *Mezzanatto* was not this type of waiver, Justice Ginsburg left this issue for another day.⁹⁶

In a dissenting opinion joined by Justice Stevens, Justice Souter reframed Justice Ginsburg’s concern in a different way. According to Justice Souter, “[A]lthough the erosion of the Rules has begun with this trickle, the majority’s reasoning will provide no principled limit to it.”⁹⁷

⁸⁷ *Id.*

⁸⁸ *Id.* at 198–99.

⁸⁹ *Id.* at 199.

⁹⁰ *Id.*

⁹¹ *United States v. Mezzanatto*, 998 F.2d 1452, 1453–54 (9th Cir. 1993), *rev’d* 513 U.S. 196 (1995).

⁹² *See id.* at 1454–56.

⁹³ *See Mezzanatto*, 513 U.S. at 200–210.

⁹⁴ *Id.* at 211 (Ginsburg, J., concurring).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 217 (Souter, J., dissenting). Justice Souter said this was because “[t]he Rules draw no distinction between use of a statement for impeachment and use in the Government’s case in chief.” *Id.*

He reasoned, therefore, that “[i]f objection can be waived for impeachment use, it can be waived for use as affirmative evidence, and if the Government can effectively demand waiver in the former instance, there is no reason to believe it will not do so just as successfully in the latter.”⁹⁸ Justice Souter then warned that “[w]hen it does, there is nothing this Court will legitimately be able to do about it.”⁹⁹

b. Mezzanatto’s Aftermath: Case-in-Chief Waivers and Rebuttal Waivers

Justice Souter’s words ended up being prophetic. After *Mezzanatto*, five circuits have addressed the issue of whether a prosecutor, as a precondition for plea bargaining, can force an accused to sign a waiver permitting the use of his statements during plea discussions as part of the State’s case-in-chief.¹⁰⁰ Those circuits—the Fourth, Fifth, Eighth, Tenth, and D.C.—have all endorsed case-in-chief waivers.¹⁰¹ Although the First Circuit has not yet addressed the question of whether case-in-chief waivers are enforceable, a district court in the First Circuit has upheld such a waiver.¹⁰² It is unclear, however, whether other district courts in the First Circuit will reach the same conclusion.

Although the remaining circuits have not addressed the issue of case-in-chief waivers, each circuit has approved the use of rebuttal waivers.¹⁰³ Whereas the impeachment waiver permits prosecutors to im-

⁹⁸ *Mezzanatto*, 513 U.S. at 217 (Souter, J., dissenting).

⁹⁹ *Id.*

¹⁰⁰ See, e.g., *United States v. Stevens*, 455 F. App’x 343, 345 (4th Cir. 2011) (“Absent fraud, coercion, or some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of Rule 410 is valid and enforceable”); *United States v. Mitchell*, 633 F.3d 997, 1000–01, 1006 (10th Cir. 2011) (holding that the district court did not err when it allowed a case-in-chief waiver); *United States v. Sylvester*, 583 F.3d 285, 288–90 (5th Cir. 2009) (ruling there was no reason not to enforce case-in-chief waivers); *United States v. Young*, 223 F.3d 905, 909–11 (8th Cir. 2000) (concluding that *Mezzanatto* permits case-in-chief waivers); *United States v. Burch*, 156 F.3d 1315, 1320–22 (D.C. Cir. 1998) (reasoning there is no rationale for not extending *Mezzanatto* to case-in-chief waivers).

¹⁰¹ See, e.g., *Stevens*, 455 F. App’x at 345; *Mitchell*, 633 F.3d at 1000–01; *Sylvester*, 583 F.3d at 288–90; *Young*, 223 F.3d at 909–11; *Burch*, 156 F.3d at 1320–22.

¹⁰² See *United States v. DeLaurentiis*, 638 F. Supp. 2d 76, 76, 79 (D. Me. 2009) (ruling that since the defendant waived her rights under Rule 410 of the Federal Rules of Evidence, the government may use all the evidence in question against her).

¹⁰³ See, e.g., *United States v. Hardwick*, 544 F.3d 565, 570 (3d Cir. 2008) (extending *Mezzanatto* to rebuttal waivers); *United States v. Artis*, 261 F. App’x 176, 177–79 (11th Cir. 2008) (reasoning that *Mezzanatto* allows rebuttal waivers); *United States v. Fifer*, 206 F. App’x 502, 509–10 (6th Cir. 2006) (enforcing a rebuttal waiver); *United States v. Velez*, 354 F.3d 190, 196–97 (2d Cir. 2004) (holding rebuttal waivers enforceable); *United States v. Rebbe*, 314 F.3d 402, 406–08 (9th Cir. 2002) (extending *Mezzanatto* to rebuttal waivers); *United States v. Krilich*, 159 F.3d 1020, 1024–26 (7th Cir. 1998) (allowing rebuttal waivers).

peach testifying defendants with statements they made during plea discussions, a rebuttal waiver permits the prosecution to use a defendant's plea statements if the defense presents *any* evidence contradicting the plea statements.¹⁰⁴ Determining whether evidence is "contradictory evidence" depends upon the language of the plea agreement and the circuit in which the case is heard.¹⁰⁵

For instance, in 2002, in the U.S. Court of Appeals for the Ninth Circuit case *United States v. Rebbe*, the government suspected Roger Rebbe, an accountant, of preparing false tax returns.¹⁰⁶ Rebbe and his attorney later met with federal agents and signed a waiver.¹⁰⁷ In the event that a plea agreement was not reached, that waiver read:

[T]he government may use . . . statements made by you or your client at the meeting and all evidence obtained directly or indirectly from those statements for the purposes of cross-examination should your client testify, or to rebut any evidence, argument or representations offered by or on behalf of your client in connection with the trial.¹⁰⁸

Thereafter, Rebbe made self-incriminatory statements, i.e., "proffer statements," during plea discussions, and the discussions did not result in a plea agreement.¹⁰⁹ The government then informed Rebbe of its intent to introduce his self-incriminatory statements at trial under the terms of the waiver.¹¹⁰ Rebbe moved to exclude these statements under Rule 410(a)(4), but the district court denied his motion, concluding that his statements would be "admissible to rebut any evidence or arguments he made at trial that were inconsistent with his proffer statements."¹¹¹

After the government rested its case at trial, Rebbe requested an advisory opinion "as to whether the admissibility of [his] proffer statements had been triggered."¹¹² The district court refused to rule on the issue, prompting Rebbe to hedge his bets by presenting four defense

¹⁰⁴ *Sylvester*, 583 F.3d at 291.

¹⁰⁵ *Id.* at 291 n.23 (citing *Hardwick*, 544 F.3d at 570; *Velez*, 354 F.3d at 196–97; *Rebbe*, 314 F.3d at 406–08; *Krulich*, 159 F.3d at 1024–26).

¹⁰⁶ *Rebbe*, 314 F.3d at 404.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *See id.* at 404–05.

¹¹² *Rebbe*, 314 F.3d at 405.

witnesses, but not testifying on his own behalf.¹¹³ The gamble did not pay off; instead, at the close of his case, the government successfully moved to admit Rebbe's statements as substantive evidence of his guilt.¹¹⁴ On Rebbe's ensuing appeal, the Ninth Circuit affirmed, holding that Rebbe's defense—consisting of testimony from witnesses on both direct- and cross-examination—was inconsistent with his proffer statements.¹¹⁵

Similarly, in 2005, in *Barrow v. United States*, the U.S. Court of Appeals for the Second Circuit was presented with a waiver that allowed the prosecution to use proffer statements to "rebut any evidence."¹¹⁶ According to the Second Circuit, this waiver could be triggered not only by contradictory interrogation by defense counsel, but also by "[f]actual assertions made by a defendant's counsel in an opening argument."¹¹⁷

As *Rebbe* and *Barrow* illustrate, defendants waive their Rule 410 rights to different degrees based both on the circuit where their case is heard and the language used in the rebuttal waiver. It is unclear how circuits that have approved of rebuttal waivers in unpublished opinions will treat these waivers in future cases. Furthermore, it is unclear how circuits that have approved of one type of rebuttal waiver will treat waivers that have different language. Finally, it is unclear how circuits that have approved of rebuttal waivers, but have not yet addressed the constitutionality of case-in-chief waivers, will handle these latter waivers.

2. Forced Waiver of the Right to Appellate Review

In addition to typically requiring a Rule 410 waiver, prosecutors are also likely to insist on an appeal waiver before reaching a plea agree-

¹¹³ *See id.*

¹¹⁴ *See id.*

¹¹⁵ *Id.* at 407 ("[Given] that Rebbe presented a defense that was inconsistent with his proffer statements and the Government did not seek to admit Rebbe's proffer statements in its case-in-chief, we cannot discern any error on the part of the district court in admitting Rebbe's proffer statements in rebuttal.").

¹¹⁶ 400 F.3d 109, 113–14, 116 (2d Cir. 2005). The entire relevant section of the proffer agreement stated:

[The government could] use [the defendant's] proffer statements as leads to other evidence; as substantive evidence to cross-examine him; and as substantive evidence to rebut any evidence offered or elicited, or factual assertions made, by or on behalf of [the defendant] at any stage of a criminal prosecution (including but not limited to detention hearing, trial, or sentencing).

Id. at 113–14 (internal quotation marks omitted).

¹¹⁷ *Id.* at 118.

ment.¹¹⁸ Appeal waivers are “clauses in plea agreements by which defendants waive their rights to appellate and postconviction review of sentencing errors.”¹¹⁹ Courts have been as receptive to appeal waivers as they have been to rebuttal waivers, with every federal circuit court holding appeal waivers valid.¹²⁰

Appeal waivers take various forms. For example, in 2005, in *United States v. Blick*, the U.S. Court of Appeals for the Fourth Circuit reviewed a waiver which stated:

[T]he defendant knowingly waives the right to appeal the conviction and any sentence within the maximum provided in the statute of conviction (or the manner in which that sentence was determined) . . . on any ground whatsoever, in exchange for the concessions made by the United States in this plea agreement.¹²¹

In a 2008 case decided by the U.S. Court of Appeals for the Eighth Circuit, *United States v. Azure*, the defendant signed a waiver under which she waived “any right to appeal any and all motions, defenses, probable cause determinations, and objections which she has asserted or could assert to this prosecution, and to the Court’s entry of judgment against her and imposition of sentence, including sentence appeals under 18 U.S.C. § 3742.”¹²² Finally, in a 2007 U.S. Court of Appeals for the Tenth Circuit case, *United States v. Novosel*, the defendant signed a waiver waiving his right to appeal “any matter in connection with [the] prosecution, conviction, and sentence.”¹²³

¹¹⁸ See generally Nancy J. King & Michael E. O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209 (2005) (analyzing the prevalence of appeal waivers in plea agreements). In the first empirical study of appeal waivers, the authors reviewed 971 randomly selected 2003 cases that were coded as including a written plea agreement or other agreement and found that 65.2% of them contained some type of appeal waiver clause. *Id.* at 209, 225, 231.

¹¹⁹ *Id.* at 211.

¹²⁰ See, e.g., *United States v. Hahn*, 359 F.3d 1315, 1329–30 (10th Cir. 2004); *United States v. Andis*, 333 F.3d 886, 889 (8th Cir. 2003); *In re Sealed Case*, 283 F.3d 349, 355 (D.C. Cir. 2002); *United States v. Khattak*, 273 F.3d 557, 561–62 (3d Cir. 2001); *United States v. Teeter*, 257 F.3d 14, 21–26 (1st Cir. 2001); *United States v. Hernandez*, 242 F.3d 110, 113 (2d Cir. 2001); *United States v. Fleming*, 239 F.3d 761, 763–64 (6th Cir. 2001); *United States v. Jemison*, 237 F.3d 911, 916–18 (7th Cir. 2001); *United States v. Brown*, 232 F.3d 399, 402 (4th Cir. 2000); *United States v. Howle*, 166 F.3d 1166, 1168–70 (11th Cir. 1999); *United States v. Buchanan*, 59 F.3d 914, 917 (9th Cir. 1995); *United States v. Melancon*, 972 F.2d 566, 567 (5th Cir. 1992).

¹²¹ 408 F.3d 162, 174 (4th Cir. 2005).

¹²² 536 F.3d 922, 926, 929 (8th Cir. 2008).

¹²³ 481 F.3d 1288, 1295 (10th Cir. 2007).

These differences are not merely semantic; even small differences among appeal waivers may lead to unexpectedly divergent results.¹²⁴ And courts in different jurisdictions can read the same language in appeal waivers as producing different results. For example, courts have reached different results on the issue of whether defendants can waive a claim of ineffective assistance of counsel during plea bargaining as part of an appeal waiver.¹²⁵ Moreover, courts have split over whether judges must engage defendants in explicit discussions regarding their waiver of appellate rights at their plea hearings.¹²⁶

To reduce the risk of an appeal waiver, defendants can limit its scope by reserving the right to appeal under certain circumstances.¹²⁷ Of course, this presumes that the defendant or defense counsel realizes that the terms of such a waiver can be negotiated and has the savvy to procure meaningful concessions. As the next subsection reveals, this is not something that can be safely assumed.

C. *Public Defender Crisis*

The problems plaguing many public defender systems exert a heavy burden on criminal defendants involved in plea negotiations. Despite some defendants having private attorneys of their own choosing in such negotiations, public defenders represent around eighty percent of defendants.¹²⁸ Moreover, about ninety percent of capital de-

¹²⁴ Michael Zachary, *Interpretation of Problematic Federal Criminal Appeal Waivers*, 28 VT. L. REV. 149, 171 (2003).

¹²⁵ *Compare, e.g.*, *Williams v. United States*, 396 F.3d 1340, 1342 (11th Cir. 2005) (“Under these circumstances, the sentence-appeal waiver precludes a § 2255 claims [sic] based on ineffective assistance at sentencing.”), *with* *United States v. Pruitt*, 32 F.3d 431, 433 (9th Cir. 1994) (“The plea agreement entered into by the government and Pruitt did not waive Pruitt’s right to bring a § 2255 motion alleging ineffective assistance of counsel.”).

¹²⁶ *Compare, e.g.*, *United States v. Michelsen*, 141 F.3d 867, 871–72 (8th Cir. 1998) (“Although it might have been preferable for the court to have conducted a colloquy with Michelsen regarding his waiver of appeal, such a dialogue is not a prerequisite for a valid waiver of the right to appeal.”), *and* *United States v. DeSantiago-Martinez*, 38 F.3d 394, 395 (9th Cir. 1992) (rejecting the argument that the judge must advise defendant of the waiver at the guilty plea hearing), *with* *United States v. Bushert*, 997 F.2d 1343, 1351 (11th Cir. 1993) (“[A] waiver is not knowingly or voluntarily made if the district court fails to specifically question the defendant concerning the waiver provision of the plea agreement during the Rule 11 colloquy and the record indicates that the defendant did not otherwise understand the full significance of the waiver.”).

¹²⁷ King & O’Neill, *supra* note 118, at 242.

¹²⁸ Steven K. Smith & Carol J. DeFrances, *Indigent Defense*, BUREAU OF JUST. STAT. 4 (Feb. 1996), <http://www.bjs.gov/content/pub/pdf/id.pdf>.

fendants are appointed public defenders because of their indigence.¹²⁹ Surveys have shown that most public defender services suffer from constraints including vast caseloads, insufficient training, limited resources, as well as tremendous time pressure.¹³⁰

The issues faced by public defenders pose a problem for defendants during the plea-bargaining process. One scholar studied how public defenders conduct themselves during the plea-bargaining process by observing and interviewing public defenders from 1984 to 1988.¹³¹ She found that instead of using a more aggressive and proactive approach toward research and investigation, defenders assume a more passive and reactive stance.¹³² As a result, defenders “may be less likely to find viable defenses than attorneys who represent wealthy clients with greater access to resources”¹³³ and “presumably, more likely to accept a prosecutor’s plea offer.”¹³⁴

Recently, these inadequacies have come to a head. In 2007, indigent defendants in three Michigan counties sued the state, claiming “that the public defender systems in their counties [were] so bad that poor people [were] pleading guilty because, for all practical purposes, they [were] given no other choice.”¹³⁵ Specifically, they alleged that that underfunded public defenders violated defendant’s rights by encouraging plea bargains instead of zealously fighting the charges.¹³⁶

These criticisms have also come from public defenders themselves. In November 2008, public defenders’ offices in seven states protested these overwhelming workloads by either ceasing to take on new cases or suing to limit their caseloads.¹³⁷ According to these offices, the ma-

¹²⁹ Adam Lamparello, *Establishing Guidelines for Attorney Representation of Criminal Defendants at the Sentencing Phase of Capital Trials*, 62 ME. L. REV. 97, 139 (2010) (quoting Jeffrey Levinson, Note, *Don’t Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 149 (2001)).

¹³⁰ LISA J. MCINTYRE, *THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE* 63–64, 77–94 (1987) (surveying the attitudes of public defenders about their work, and their disillusionment due to adverse working conditions).

¹³¹ Debra S. Emmelman, *Gauging the Strength of Evidence Prior to Plea Bargaining: The Interpretive Procedures of Court-Appointed Defense Attorneys*, 22 LAW & SOC. INQUIRY 927, 929 (1997).

¹³² *Id.* at 952.

¹³³ *Id.*

¹³⁴ Brandon J. Lester, Note, *System Failure: The Case for Supplanting Negotiation with Mediation in Plea Bargaining*, 20 OHIO ST. J. ON DISP. RESOL. 563, 586 n.96 (2005) (interpreting Debra S. Emmelman’s study).

¹³⁵ Tresa Baldes, *Michigan Faces Constitutional Case Over Cash-Strapped Public Defenders*, NAT’L L.J. (Dec. 24, 2009), <http://www.law.com/jsp/article.jsp?id=1202437272541>.

¹³⁶ *Id.*

¹³⁷ Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 769 (2010).

majority of a public defender's workload has turned into processing guilty pleas.¹³⁸ The demanding pace of representation has made the work of these public defenders a "plea bargain assembly line," with the result of "less justice and more McJustice."¹³⁹

D. Toothless Judicial Review of Plea Bargains

If the parties reach a plea agreement, the defendant is only entitled to a plea hearing, where the judge determines whether the guilty plea is knowing, intelligent, and voluntary.¹⁴⁰ In cases governed by the Federal Rules of Criminal Procedure, this plea hearing is the first time a judge becomes involved with the plea-bargaining process.¹⁴¹ This is because Federal Rule of Criminal Procedure 11(c)(1) allows the government's attorney and the defendant—either through an attorney or self-representation—to negotiate a plea agreement.¹⁴² The court is not allowed to participate in these plea discussions.¹⁴³ Although most state rules of criminal procedure follow the federal rules by not allowing judges to take part in these discussions, a growing number of states allow or encourage judges to participate in plea negotiations.¹⁴⁴

Because most judges are not involved with plea negotiations until the plea hearing, after-the-fact review is difficult.¹⁴⁵ In large part, this is because after parties agree to a plea bargain, they do not wish to provide the judge with any information that could disrupt the plea.¹⁴⁶ Although some judges request that defendants "allocute," or concede that they are guilty, the judge does not conduct a trial or even cursorily review the evidence.¹⁴⁷ One judge has described this process as "a five-minute interview of the person, under Rule 11, getting a kind of half-hearted, scripted confession as part of the guilty plea process."¹⁴⁸ Furthermore, although some courts will engage a defendant in an explicit

¹³⁸ *Id.*

¹³⁹ *Id.* (internal quotation marks omitted).

¹⁴⁰ Julie R. O'Sullivan, *The Last Straw: The Department of Justice's Privilege Waiver Policy and the Death of Adversarial Justice in Criminal Investigations of Corporations*, 57 DEPAUL L. REV. 329, 361 (2008).

¹⁴¹ See FED. R. CRIM. P. 11(c)(1).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Sklansky & Yeazell, *supra* note 22, at 700 n.59.

¹⁴⁵ Turner, *supra* note 24, at 212.

¹⁴⁶ *Id.*

¹⁴⁷ O'Sullivan, *supra* note 140, at 361.

¹⁴⁸ Panel Discussion, *The Expanding Prosecutorial Role from Trial Counsel to Investigator and Administrator*, 26 FORDHAM URB. L.J. 679, 684 (1999).

discussion when a waiver is signed,¹⁴⁹ others have found that such a discussion is not required.¹⁵⁰ If the judge accepts the plea agreement, he incorporates the agreed-upon disposition into his judgment.¹⁵¹

Alternatively, judges can reject the plea.¹⁵² When judges reject the plea, they inform the parties of the rejection and advise the defendants that they can withdraw or maintain their guilty pleas; however, judges may still render a less favorable decision for defendants than what the plea agreement proposed.¹⁵³ If the judge rejects the plea or the defendant and prosecutor do not reach a plea agreement, the case proceeds to trial. If the defendant signed a case-in-chief waiver, the prosecution can present any self-incriminatory statements made by the defendant during plea discussions as part of its case-in-chief as substantive evidence of guilt, even if the defendant chooses not to present any witnesses or evidence.¹⁵⁴ If the defendant signed a rebuttal waiver and wants to prevent self-incriminatory statements from being introduced, he must walk a tightrope—presenting some evidence to bolster his case, but not enough evidence to trigger the waiver.¹⁵⁵ Finally, if the defendant signed an impeachment waiver and wants to testify in his own defense, he must balance the risk of impeachment based upon any inconsistent statements made during plea discussions against the risk of invoking the privilege against self-incrimination.¹⁵⁶

II. JUDICIAL INVOLVEMENT IN PLEA BARGAINING

As noted, although Federal Rule of Criminal Procedure 11(c)(1) and many state counterparts prohibit judges from participating in plea discussions, a growing minority of states allow or encourage judges to participate in such discussions.¹⁵⁷ One state allowing judicial involve-

¹⁴⁹ See, e.g., *Michelsen*, 141 F.3d at 871–72 (“Although it might have been preferable for the court to have conducted a colloquy with Michelsen regarding his waiver of appeal, such a dialogue is not a prerequisite for a valid waiver of the right to appeal.”); *DeSantiago-Martinez*, 38 F.3d at 395 (rejecting the argument that the judge must advise the defendant of the waiver at the guilty plea hearing).

¹⁵⁰ See, e.g., *Bushert*, 997 F.2d at 1351 (“[A] waiver is not knowingly or voluntarily made if the district court fails to specifically question the defendant concerning the waiver provision of the plea agreement during the Rule 11 colloquy and the record indicates that the defendant did not otherwise understand the full significance of the waiver.”).

¹⁵¹ FED. R. CRIM. P. 11(c)(4).

¹⁵² See FED. R. CRIM. P. 11(c)(5).

¹⁵³ *Id.*

¹⁵⁴ See *supra* notes 100–102 and accompanying text (discussing case-in-chief waivers).

¹⁵⁵ See *supra* notes 103–117 and accompanying text (discussing rebuttal waivers).

¹⁵⁶ See *supra* notes 84–99 and accompanying text (discussing impeachment waivers).

¹⁵⁷ See *supra* note 142–146 and accompanying text.

ment in plea bargaining is Florida.¹⁵⁸ Connecticut also allows judicial participation, but it follows a different model than Florida.¹⁵⁹

A. Florida's Model of Judicial Involvement

Florida Rule of Criminal Procedure 3.171(d) appears to allow judicial involvement only after a plea has been reached. Rule 3.171(d) provides:

After an agreement on a plea has been reached, the trial judge may have made known to him or her the agreement and reasons therefor prior to the acceptance of the plea. Thereafter, the judge shall advise the parties whether other factors (unknown at the time) may make his or her concurrence impossible.¹⁶⁰

Furthermore, Florida case law also envisions limited judicial involvement in plea discussions; nevertheless, in practice, Florida plea bargaining follows neither the rules, nor the case law.¹⁶¹ In fact, Floridian judges typically become involved in plea discussions during the pretrial conferences as “a matter of course.”¹⁶² And because these discussions occur during pretrial conferences, there is usually a public record, although off-the-record discussions occur from time to time.¹⁶³

Whether these discussions take place on or off the record, negotiations proceed similarly, with the prosecution usually presenting its position first and laying out the material facts.¹⁶⁴ The presentation usually reviews the defendant's background, the circumstances of the crime, and the defendant's score under Florida's sentencing system.¹⁶⁵ Defense counsel then responds to the prosecution with his or her own interpretation of the facts and a request for a more lenient disposition.¹⁶⁶

¹⁵⁸ See *infra* notes 160–170 and accompanying text.

¹⁵⁹ See *infra* notes 171–179 and accompanying text.

¹⁶⁰ FLA. R. CRIM. P. 3.171(d).

¹⁶¹ Turner, *supra* note 24, at 240.

¹⁶² *Id.* at 241.

¹⁶³ *Id.* at 241–42.

¹⁶⁴ *Id.* at 242.

¹⁶⁵ *Id.* A defendant's “score” is a metric under Florida's sentencing guidelines that determines how severely a defendant will be punished. Michael D. Crews, *Part I: Introduction, Overview of Florida's Sentencing Policies*, FLA. DEP'T OF CORRECTIONS (last visited July 15, 2013), http://www.dc.state.fl.us/pub/sg_annual/0001/intro.html.

¹⁶⁶ Turner, *supra* note 24, at 242.

After hearing the defense and prosecution, the judge reveals how he or she would dispose the case in an expected post-plea sentence.¹⁶⁷ Specifically, the recommendation usually takes the form of a sentence range, a cap, or a fixed sentence.¹⁶⁸ As a general rule, Florida judges do not give information about the post-trial sentence possibilities, as defendant may perceive these statements as coercing them into waiving their right to a trial.¹⁶⁹ Rather, a typical comment might read as follows:

I have not seen the witnesses and the other information that might come at trial, but just from the information I have here, I think that you would get X [years]. But if we go to trial, you might get a different sentence if a lot of the evidence is new.¹⁷⁰

B. *Connecticut's Model of Judicial Involvement*

As with plea bargaining in Florida, Connecticut judges may, during pretrial conferences, become involved in plea negotiations.¹⁷¹ In Connecticut, however, the conferences are usually behind closed doors in the judge's chambers and not officially recorded.¹⁷² When the judge first meets with both sides, the prosecution presents a brief summary of the case, and the defense may respond.¹⁷³

In Connecticut, judges facilitate the negotiation, listening to each side's arguments and proposing additional considerations.¹⁷⁴ Judges are particularly engaged when they believe the case deserves little time in court.¹⁷⁵ After each side presents its position, the judge usually tells the parties the expected post-plea sentence—most commonly a fixed sentence, but sometimes a sentence range or cap.¹⁷⁶ Furthermore,

¹⁶⁷ *Id.* Some judges go further and comment on the merits of both the prosecution and defense's positions. *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 243.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 249. In 2001, in *State v. Revelo*, the Supreme Court of Connecticut reaffirmed that it "expressly has approved judicial involvement in plea discussions when it is clear to all concerned parties that, in the event a plea agreement is not reached, the judge involved in the plea negotiations will play no role in the ensuing trial, including the imposition of sentence upon conviction." 775 A.2d 260, 268 (Conn. 2001).

¹⁷² Turner, *supra* note 24, at 249. Practitioners in Connecticut agree that the absence of official records encourages candor. *Id.* at 249 n.298.

¹⁷³ *Id.* at 249.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 249 & n.305.

unlike Florida, judges in Connecticut will sometimes give the parties an estimate of the post-trial sentence.¹⁷⁷

If the sides do not reach a plea agreement after plea discussions, Connecticut case law provides that only “a judge who was not involved in the plea negotiations and is unaware of the plea terms offered at pre-trial [may] conduct the trial and post-trial sentencing phase.”¹⁷⁸ Moreover, even motions to suppress must be heard by a judge different from the one who handled the plea negotiations.¹⁷⁹

III. EXPLAINING THE ANCHORING EFFECT

The “anchoring effect” is a cognitive bias by which individuals evaluate numbers in relation to a reference point—the anchor—and then modify those numbers based on that “anchor.”¹⁸⁰ The bias manifests itself in three particular ways: (1) the selection of an anchor; (2) underadjustment; and (3) the fact that even arbitrary, random, or irrelevant numbers can serve as anchors and distort calculations.¹⁸¹

A. *Problem One: Selecting an Anchor*

Selecting an anchor is often biased.¹⁸² Researchers conducted a study with nineteen pairs of students from the Heinz School at Carnegie Mellon University, sixty pairs of law students from the University of Texas, and fifteen pairs of students from the Wharton School at the University of Pennsylvania.¹⁸³ The researchers gave each pair twenty-seven pages of testimony that they abstracted from an actual Texas case involving a \$100,000 suit for damages sustained in a car crash.¹⁸⁴

¹⁷⁷ *Id.* at 249. Nevertheless, because a different judge will preside at trial and sentencing than at the plea discussions, the pretrial judge may not provide an accurate estimate of the actual sentence imposed. *Id.* at 249–50.

¹⁷⁸ Turner, *supra* note 24, at 248 (citing *State v. D’Antonio*, 830 A.2d 1187, 1194 (Conn. App. Ct. 2003)).

¹⁷⁹ *Id.* at 249–50.

¹⁸⁰ See Bibas, *supra* note 14, at 2516; *supra* note 14 and accompanying text.

¹⁸¹ Bibas, *supra* note 14, at 2516; see *infra* notes 182–290 and accompanying text (providing an in-depth discussion of these issues).

¹⁸² Bibas, *supra* note 14, at 2516. Specifically, in the negotiation context, “[A]ssessments of fairness are self-serving.” *Id.* (citing Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1820–21 (2000)).

¹⁸³ Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337, 1339 (1995).

¹⁸⁴ *Id.* at 1338. The subjects received information about witness testimony, police reports, maps, and testimony from the plaintiff and defendant. *Id.* at 1338 n.2.

Along with the evidence, the subjects received additional information.¹⁸⁵ The researchers told the pairs that a Texas judge received the same materials and had decided an appropriate award.¹⁸⁶ They also told each subject to make “two judgments: (1) what they thought was a fair settlement from the vantage point of a neutral third party; [and] (2) their best guess of the amount that the judge would award.”¹⁸⁷ The subjects received a bonus of one dollar if their prediction was within \$5000 of the judge’s actual award of \$30,560.¹⁸⁸ In addition, the researchers addressed fees as follows:

The subjects were each paid a fixed fee for participating in the experiment. They were instructed to try to negotiate an “out of court” settlement in the form of a monetary payment from the defendant to the plaintiff. Before the negotiation, the defendant was given \$10 from which to make this payment. Every \$10,000 from the case was equivalent to \$1 for the subjects. For example, a \$40,000 settlement meant the defendant gave \$4 to the plaintiff and kept \$6.¹⁸⁹

When the test subjects knew their role in the negotiation, their predictions of the judge’s award and evaluations of fairness tended to be self-serving.¹⁹⁰ To carry out the study’s main variable, researchers told subjects in Group A whether they were the plaintiff or defendant *before* giving them their case materials, while subjects in Group B were told their roles *after* they received their case materials, submitted their thoughts on a fair settlement, and guessed the judge’s award.¹⁹¹ In Group A, there was a strong tendency toward self-serving judgments of fairness and predictions of the awards. The Group A plaintiffs and defendants differed from the vantage point of a neutral third party in their thoughts regarding a fair settlement by an average of \$19,756.¹⁹² Their guesses regarding the amount that the judge would award dif-

¹⁸⁵ *Id.* at 1338–39.

¹⁸⁶ *Id.* at 1338. The researchers wanted the pairs to know that an independent judge had read the same materials and that the judgment was not chosen from an actual trial. *Id.* at 1338 n.3.

¹⁸⁷ *Id.* at 1338.

¹⁸⁸ *Id.* at 1338–39.

¹⁸⁹ Babcock et al., *supra* note 183, at 1339. They were also given thirty minutes to negotiate a settlement, and if they were unable to come to an agreement, the Texas judge’s decision was imposed upon them. *Id.*

¹⁹⁰ *Id.* at 1341.

¹⁹¹ *Id.* The Group B subjects were given their roles immediately before negotiating. *Id.*

¹⁹² *Id.* at 1340.

ferred from the judge's actual award by an average of \$18,555.¹⁹³ Both of these guesses were statistically different from zero.¹⁹⁴ In Group B, the average differences were \$6275 and \$6936, neither of which was statistically different from zero.¹⁹⁵

In addition to self-serving judgments, Group A subjects were less likely to reach a settlement. The Group A pairs only settled 27% of the time, after an average of 3.75 negotiation periods, whereas the subjects in Group B settled 94% of the time, after an average of 2.51 periods—both statistically significant differences.¹⁹⁶ Alternatively put, “there were four times as many disagreements when bargainers knew their roles initially than when they did not know their roles.”¹⁹⁷

B. Problem Two: Underadjustment

Underadjustment is a second problem with the anchoring effect, and is consistent with the results of the Babcock study.¹⁹⁸ Underadjustment describes the observation that people typically do not adjust their position much away from their anchors.¹⁹⁹ As a result of this phenomenon, a party's initial choice of anchors has an inordinate effect on its final estimates.²⁰⁰ The reason for this underadjustment is that “the anchor brings to mind features of the target that resemble the anchor, thus leading people to overemphasize similarities and underestimate differences.”²⁰¹ The researchers in the pharmaceutical plant negotiation study from the introduction found such an underadjustment, with the average purchase price for the plant being \$24.8 million when the seller made the higher initial offer and \$19.7 million when the buyer opened the bidding with a lower offer.²⁰²

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Babcock et al., *supra* note 183, at 1340.

¹⁹⁶ *Id.* at 1339–40.

¹⁹⁷ *Id.* at 1339.

¹⁹⁸ *See id.* at 1339–41; Bibas, *supra* note 14, at 2516.

¹⁹⁹ Bibas, *supra* note 14, at 2516.

²⁰⁰ *Id.* (citing Paul Slovic & Sarah Lichtenstein, *Comparison of Bayesian and Regression Approaches to the Study of Information Processing in Judgment*, 6 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 649, 693 (1971)).

²⁰¹ *Id.* (citing Gretchen B. Chapman & Eric J. Johnson, *Anchoring, Activation, and the Construction of Values*, 79 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 115, 119–21 (1999)); Thomas Mussweiler & Fritz Strack, *The Semantics of Anchoring*, 86 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 234, 236–39 (2001); Amos Tversky, *Features of Similarity*, 84 PSYCHOL. REV. 327, 340 (1977)).

²⁰² *See supra* notes 12–13 and accompanying text.

Researchers also found underadjustment in a study in which they told subjects that they purchased a BMW that occasionally stalled at stop lights and was extremely difficult to start in the morning.²⁰³ The researchers informed each subject that the BMW dealer claimed that the car was not defective, that the subject's mechanic agreed that the problem could not be improved, and that the BMW dealer refused to refund the subject's money.²⁰⁴ The subjects were then told that, according to their lawyer, there could only be two outcomes if they went to trial: (1) the jury could find in their favor and award them a complete refund; or (2) the jury could find against them, and they would recover nothing.²⁰⁵ Finally, the researchers told each subject that the subject received and rejected a first offer from the BMW dealer and later received a second offer of a \$12,000 refund if the subject kept the car and dropped the lawsuit.²⁰⁶ The variable in this scenario was that researchers told subjects in Group A that the BMW dealer's initial offer was \$2000 and subjects in Group B that the BMW dealer's initial offer was \$10,000.²⁰⁷

The researchers then asked the subjects to rate the second offer from 1 to 5, with "definitely accept" scored as a "5," "probably accept" scored as a "4," "undecided" scored as a "3," "probably reject" scored as a "2," and "definitely reject" scored as a "1."²⁰⁸ Group A subjects, who received the lower initial offer of \$2000, responded with an average score of 3.54, which clearly favored acceptance of the final offer.²⁰⁹ Group B subjects, who received the higher initial offer of \$10,000, responded with an average score of 2.97, which narrowly disfavored acceptance of the final offer.²¹⁰ The difference between the average scores of 3.54 and 2.97 is statistically significant.²¹¹ Furthermore, 63% of Group A subjects indicated that they would "definitely accept" or "probably accept" the \$12,000 offer, whereas only 34% of Group B subjects indicated the same, again a statistically significant result.²¹²

²⁰³ See Russell Korobkin & Chris Guthrie, *Opening Offers and Out-of-Court Settlement: A Little Moderation May Not Go a Long Way*, 10 OHIO ST. J. ON DISP. RESOL. 1, 11 (1994).

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 11–12.

²⁰⁶ *Id.* at 12. The first offer was for a refund of a portion of the purchase price in exchange for keeping the car and dropping the lawsuit. *Id.*

²⁰⁷ *Id.* at 12–13.

²⁰⁸ See *id.*

²⁰⁹ Korobkin & Guthrie, *supra* note 203, at 12–13.

²¹⁰ *Id.* at 13.

²¹¹ *Id.*

²¹² *Id.*

Scholars have since conducted a “meta-analysis” of studies by testing the impact of opening figures in negotiation experiments.²¹³ The study found a 0.497 correlation between the initial anchor and the final outcome of the negotiation, an unusually large correlation according to social and behavioral science standards.²¹⁴ A correlation of 0.497 means that for every one dollar increase in the opening offer, there is a final sale price increase of nearly fifty percent.²¹⁵ Put another way, “nearly 25 percent of the difference in outcomes among negotiations can be accounted for as a function of an opening offer or other initial anchor.”²¹⁶

C. *Problem Three: Even Arbitrary, Random, or Irrelevant Numbers Can Serve as Anchors and Distort Calculations*

The third main problem with the anchoring effect is that, because anchors can be arbitrary, random, or irrelevant numbers, and thus lead to distorted calculations.²¹⁷ In one famous study, researchers had subjects spin a “wheel of fortune” that was rigged to stop on the number 10 or 65.²¹⁸ After the subjects spun the wheel, the researchers asked the subjects whether the number that they spun was higher or lower than the percentage of African countries in the United Nations.²¹⁹ The researchers then asked the subjects to estimate the percentage of countries in the United Nations that are African; those who spun a 10 (the “low anchor” condition), on average guessed 25%, whereas those who spun a 65 (the “high anchor” condition), guessed 45% on average.²²⁰ Even when the researchers offered to pay the subjects for accuracy, it did not decrease the anchoring effect.²²¹

Researchers have found similar results in studies using mock jurors to evaluate plaintiff damage requests.²²² When a plaintiff’s attorney re-

²¹³ Orr & Guthrie, *supra* note 17, at 598. Meta-analysis is “a statistical method that allows scholars to analyze all available studies to measure the impact of one variable—in this case, opening offers, demands or other starting figures—on another variable—in this case, negotiation outcomes.” *Id.*

²¹⁴ *Id.* at 621.

²¹⁵ *Id.*

²¹⁶ *Id.* at 621–22. Other studies have found that opening offers and initial counteroffers account for 57.6% of the variance in negotiated outcomes. *Id.* (citing Dirk Van Poucke & Marc Buelens, *Predicting the Outcome of a Two-party Price Negotiation: Contribution of Reservation Price, Aspiration Price, and Opening Offer*, 21 J. ECON. PSYCHOL. 67, 70 (2002)).

²¹⁷ Bibas, *supra* note 14, at 2516.

²¹⁸ Tversky & Kahneman, *supra* note 14, at 1128.

²¹⁹ *See id.*

²²⁰ *See id.*

²²¹ *Id.*

²²² Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 789 (2001).

quested \$100,000 in damages in a fake case, mock jurors awarded slightly more than \$90,000 in damages.²²³ But when the attorney requested the exorbitant amount of \$500,000 in damages in the very same case, the mock jurors awarded nearly \$300,000.²²⁴ Other studies have also found that even outlandish damage requests can influence a jury award.²²⁵ In one study, mock jurors gave the plaintiff a substantially higher award when the plaintiff's lawyer requested \$1 billion in damages than when the plaintiff's lawyer made a more reasonable request.²²⁶

Researchers also have found similar results in studies with actual judges.²²⁷ In one study, researchers posed the following facts to federal magistrate judges:

Suppose that you are presiding over a personal injury lawsuit that is in federal court based on diversity jurisdiction. The defendant is a major company in the package delivery business. The plaintiff was badly injured after being struck by one of the defendant's trucks when its brakes failed at a traffic light. Subsequent investigations revealed that the braking system on the truck was faulty, and that the truck had not been properly maintained by the defendant. The plaintiff was hospitalized for several months, and has been in a wheelchair ever since, unable to use his legs. He had been earning a good living as a free-lance electrician and had built up a steady base of loyal customers. The plaintiff has requested damages for lost wages, hospitalization, and pain and suffering, but has not specified an amount. Both parties have waived their rights to a jury trial.²²⁸

The researchers randomly assigned sixty-six judges to a "no-anchor" condition and asked them how much they would award the plaintiff.²²⁹ They also randomly assigned fifty judges to an "anchor" condition, which provided that the defendant had moved to dismiss the

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *See id.*

²²⁶ *Id.* (citing Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 10 *APPLIED COGNITIVE PSYCHOL.* 519, 525–26 (1996)).

²²⁷ *Id.* at 790–94.

²²⁸ Guthrie et al., *supra* note 222, at 790.

²²⁹ *Id.* at 790–91.

case for failure to satisfy the requirements of diversity jurisdiction.²³⁰ The researchers asked the judges in the anchor condition to rule on the motion and asked them what they would award the plaintiff if they denied the motion.²³¹ The motion was meritless because it was clear that the plaintiff had incurred more than \$75,000 in damages.²³² Nevertheless, the researchers believed that the motion would serve as a low anchor.²³³ Their hypothesis was realized: the judges in the anchor condition awarded an average of \$882,000, whereas judges in the no-anchor condition awarded the plaintiff an average of \$1,249,000—a statistically significant result.²³⁴

Researchers found similar results in a study of German judges and prosecutors.²³⁵ In the first iteration of the study, researchers gave the subjects case materials regarding a rape.²³⁶ After reviewing these materials, researchers told about half of the subjects that a journalist called them during a recess and asked whether they thought the sentence would be higher or lower than one year (the “low-anchor” condition).²³⁷ They told the other subjects that they also received a call, and that a journalist asked whether they thought the sentence would be higher or lower than three years (the “high-anchor” condition).²³⁸ The researchers told all subjects that they refused to answer the question.²³⁹ They then asked the subjects whether they would tell a colleague that the sentence suggested by the journalist was too low, too high, or just right.²⁴⁰

The researchers then had the subjects sentence the defendant.²⁴¹ The subjects in the low-anchor condition sentenced the defendant to an average of 25.43 months’ incarceration, whereas the subjects in the

²³⁰ *Id.*

²³¹ *Id.* at 791.

²³² *Id.*

²³³ *Id.*

²³⁴ Guthrie et al., *supra* note 222, at 791.

²³⁵ Birte Englich et al., *Playing Dice with Criminal Sentences: The Influence of Irrelevant Anchors on Experts’ Judicial Decision Making*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 188, 190 (2006). In Germany, prosecutors and judges receive identical training and switch between the two positions in their first years of professional practice. *Id.*

²³⁶ *Id.* at 190–92.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 191.

²⁴⁰ *Id.*

²⁴¹ Englich et al., *supra* note 235, at 191.

high-anchor condition sentenced the defendant to an average of 33.38 months' imprisonment—a statistically significant result.²⁴²

In the second iteration of the study, the researchers gave different subjects case materials regarding a shoplifting, with the only variable being that they told some subjects that the prosecutor demanded a sentence of three months' probation (the "low-anchor" condition), and other subjects that the prosecutor demanded nine months' probation (the "high-anchor" condition).²⁴³ The researchers then asked the subjects whether the prosecutor's demand was too high, too low, or just right, and thereafter had the subjects sentence the defendant.²⁴⁴ Subjects exposed to the low-anchor condition sentenced the defendant to an average of 4.00 months' probation, whereas subjects exposed to the high-anchor condition sentenced the defendant to an average of 6.05 months' probation—also a statistically significant result.²⁴⁵

Finally, in the third iteration, the researchers kept the facts the same as in the second iteration, except that the prosecutor's demand came from a roll of dice.²⁴⁶ Researchers gave about half of the subjects two dice that would always come up with the numbers one and two, and the other subjects two dice that would always come up with the numbers three and six.²⁴⁷ After the subjects rolled both dice, the researchers told them that the combined number that they rolled—three (the "low-anchor" condition) or nine (the "high-anchor" condition)—was the number of months that the prosecutor demanded as a sentence.²⁴⁸

The researchers again asked the subjects whether this demand was too high, too low, or just right, and then they had the subjects sentence the defendant.²⁴⁹ Subjects in the low-anchor condition gave an average sentence of 5.28 months, whereas subjects in the high-anchor condition gave an average sentence of 7.81 months—a statistically significant difference.²⁵⁰ Based on these results, the researchers concluded that even "irrelevant anchor values that were obviously determined at random may influence sentencing decisions of legal professionals."²⁵¹

²⁴² *See id.*

²⁴³ *Id.* at 192.

²⁴⁴ *Id.* Before the sentencing, all subjects were confronted with the defense attorney's demand of one month's probation. *Id.*

²⁴⁵ *See id.* at 193.

²⁴⁶ *Id.* at 194.

²⁴⁷ English et al., *supra* note 235, at 194.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *See id.*

²⁵¹ *See id.* at 197.

Thus, the anchoring effect plays a large role in legal environments, and many legal bargaining theorists now recognize anchoring as a basic truth of civil negotiations.²⁵² But does the anchoring effect play a similar role in criminal plea negotiations?

IV. THE ANCHORING EFFECT IN THE PLEA-BARGAINING PROCESS AND HOW JUDICIAL INVOLVEMENT CAN DECREASE IT

It is likely that the anchoring effect influences the plea-bargaining process.²⁵³ The three problems associated with the anchoring effect are manifested in the criminal justice system, and therefore support this conclusion. The parties in criminal negotiations have all been pre-assigned their roles, leading to a biased selection of anchors.²⁵⁴ Furthermore, the phenomenon of underadjustment explains why defendants do not adjust away from the prosecution's biased offers.²⁵⁵ Finally, defendants anchor on inaccurate plea offers because they fear conviction on false charges.²⁵⁶ Judicial participation in plea discussions could reduce the anchoring effect in criminal negotiations.²⁵⁷

A. *The Likelihood That the Anchoring Effect Has a Significant Effect on the Plea-Bargaining Process*

Although there have been many studies about the anchoring effect in *civil* negotiations, there have been very few studies of the anchoring effect in *criminal* negotiations.²⁵⁸ This is unsurprising. It does not take much for research subjects to place themselves in the shoes of an aggrieved BMW buyer or a potential pharmaceutical plant purchaser or seller. Conversely, having subjects put themselves in the shoes of a criminal defendant facing a murder rap, and either the death penalty or life imprisonment, seems like much more of a flight of fancy. In the civil setting, subjects should be able to accurately predict how they would deal with a settlement offer of \$12,000 for an allegedly defective BMW. The same predictability does not extend to how they would deal with an offer to plead guilty to voluntary manslaughter in exchange for a recommendation of ten years' incarceration. Moreover, in a study, it is difficult to replicate actual plea-bargaining conditions, such as the defen-

²⁵² See Condlin, *supra* note 17, at 247.

²⁵³ See *infra* notes 258–290 and accompanying text.

²⁵⁴ See *infra* notes 263–277 and accompanying text.

²⁵⁵ See *infra* notes 278–285 and accompanying text.

²⁵⁶ See *infra* notes 286–290 and accompanying text.

²⁵⁷ See *infra* notes 291–354 and accompanying text.

²⁵⁸ Bibas, *supra* note 14, at 2530.

dant's likely pretrial detention, minimal resources, and inadequate representation. This difficulty means that any such study would lack ecological validity.²⁵⁹ Furthermore, although the researchers gave the subjects in the BMW study conflicting evidence regarding whether the BMW was defective, researchers in a plea bargaining study presumably would need to tell subjects whether or not they committed the subject crime.

That said, plea-bargaining scholars have speculated that the anchoring effect plays a large role in the plea-bargaining context. According to Professor Stephanos Bibas, the anchoring effect may play the same role in criminal negotiations between a prosecutor and a defendant, as it does in negotiations between a plaintiff and a defendant.²⁶⁰ Again, because the three main problems associated with the anchoring effect manifest themselves in the criminal justice system, this conclusion makes sense.

B. *Problem One: Selection of an Anchor Is Often Biased*

The first problem with the anchoring effect is that selecting an anchor is often biased.²⁶¹ For instance, in the \$100,000 car accident study, pairs of subjects without pre-assigned roles as plaintiffs and defendants differed in their thoughts regarding a fair settlement by an average of \$6275, whereas pairs of subjects with pre-assigned roles differed by an average of \$19,756.²⁶² In the plea-bargaining context, the prosecutor is like the pre-assigned subject; he knows that he is the attorney for the prosecuting authority when he reviews the defendant's case file and makes the initial offer during plea discussions. As a result, the anchoring effect suggests that the selection of the initial offer (the anchor) will reflect the prosecution's bias.

In addition to the anchoring effect, several other cognitive biases suggest that the prosecutor will make a high initial offer due to viewing the evidence in the light least favorable to the defendant. For example, it is well established that there is a "confirmation bias," which leads individuals to seek out and prefer information that confirms their hy-

²⁵⁹ See Mark A. Schmuckler, *What Is Ecological Validity? A Dimensional Analysis*, 2 *INFANCY* 419, 419 (2001). Ecological validity is typically understood as whether or not a person can generalize behavior observed in a laboratory to behavior in the actual world. *Id.*

²⁶⁰ See Bibas, *supra* note 14, at 2517–18.

²⁶¹ *Id.* at 2516.

²⁶² See *supra* notes 185–197 and accompanying text.

potheses.²⁶³ As prosecutors review a suspect's file, the confirmation bias would drive them to only look for evidence that supports that suspect's guilt.²⁶⁴ Another well-recognized cognitive bias is "selective information processing"—when an individual overvalues information confirming a pre-existing belief and undervalues evidence contrary to that belief.²⁶⁵ Thus, once prosecutors form an opinion that the defendant is guilty, they will value evidence supporting their pre-existing opinion more heavily than evidence contradicting that opinion. Due to selective information processing, the prosecutor will readily credit any new evidence supporting a theory of the defendant's guilt, while undervaluing or ignoring evidence indicating that the defendant is innocent.²⁶⁶

Furthermore, people also suffer from a cognitive bias known as "reactive devaluation," a tendency to give little weight to information provided by a disliked individual.²⁶⁷ Assuming that a prosecutor dislikes a defendant, or the acts that the defendant has allegedly committed, reactive devaluation means that the prosecutor is likely to disregard exculpatory evidence provided by the defendant.

A final cognitive bias is "belief perseverance," which suggests that a prosecutor, believing a defendant to be guilty, will cling to that belief despite evidence to the contrary.²⁶⁸ In sum, all of these cognitive biases may contribute to prosecutors overcharging defendants and making high initial plea offers.²⁶⁹

In addition to cognitive biases, the prosecutor's role in the criminal justice system also contributes to their biased anchors. For example, studies have highlighted that, due to heavy caseloads, screening cases to

²⁶³ Alafair Burke, *Neutralizing Cognitive Bias: An Invitation to Prosecutors*, 2 N.Y.U. J. L. & LIBERTY 512, 516–17 (2007).

²⁶⁴ *Id.* at 517 (citing Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 316).

²⁶⁵ *Id.* at 517–18.

²⁶⁶ *Id.* at 518.

²⁶⁷ Geoffrey P. Miller, *Preliminary Judgments*, 2010 U. ILL. L. REV. 165, 178 (citing Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 7 NEGOTIATION J. 389, 394–95 (1991)).

²⁶⁸ Burke, *supra* note 263, at 518. Belief perseverance is a phenomenon "in which people adhere to their beliefs even when the evidence that initially supported the belief is proven to be incorrect." *Id.* (citing Craig A. Anderson et al., *Perseverance of Social Theories: The Role of Explanation in the Persistence of Discredited Information*, 39 J. PERSONALITY & SOC. PSYCHOL. 1037 (1980); Lee Ross et al., *Perseverance in Self-Perception and Social Perception: Biased Attributional Processes in the Debriefing Paradigm*, 32 J. PERSONALITY & SOC. PSYCHOL. 880, 882 (1975)).

²⁶⁹ *See id.* at 516–19 (discussing the effect of cognitive biases on prosecutors).

avoid trial is one of the most critical functions of any prosecutor.²⁷⁰ Furthermore, to secure a desirable plea agreement, it is well established that prosecutors will resort to deliberately overcharging a defendant.²⁷¹ When plea discounts have no limits, as is often the case, prosecutors will typically overcharge defendants simply because it gives them leverage at the bargaining table.²⁷²

Prosecutors specifically engage in both vertical and horizontal overcharging.²⁷³ Prosecutors horizontally overcharge by padding charges against the defendant “with nonoverlapping counts of a similar offense type, or with multiple counts of the same offense type, where the underlying criminal conduct sought to be punished is adequately penalized by a single count.”²⁷⁴ Vertical overcharging is simpler, with the prosecutor merely charging an offense greater than what the evidence reasonably supports.²⁷⁵ Prosecutors will present a potential plea deal as a way for defendants to minimize losses, and then they will often make high initial plea offers.²⁷⁶ The prosecutor’s hope is that the defendant will anchor on the offer, resulting in a plea bargain that might have been rejected in the absence of overcharging, and an inflated initial plea offer.²⁷⁷

C. *Problem Two: Underadjustment*

As described above, people typically do not adjust from their anchors much because the anchor has such a substantial effect on all future adjustments.²⁷⁸ The prosecutor, rather than defense counsel, almost always makes the initial offer during plea discussions, resulting in

²⁷⁰ Sarah J. Cox, *Prosecutorial Discretion: An Overview*, 13 AM. CRIM. L. REV. 383, 412–13 & n.154 (1976); see also Alexandra W. Reimelt, Note, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. REV. 871, 874–75 (2010) (“For the State, avoiding a trial preserves scarce prosecutorial and judicial resources for those cases in which there is a substantial question about the defendant’s guilt or the State’s capacity to meet its burden of proof.”).

²⁷¹ Ellen S. Podgor, *Race-ing Prosecutors’ Ethics Codes*, 44 HARV. C.R.-C.L. L. REV. 461, 463 (2009); see Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1254–56 (2008) (“[P]rosecutors can be expected to, and do routinely, overcharge . . .”).

²⁷² Covey, *supra* note 271, at 1254.

²⁷³ *Id.* (citing Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85–87 (1968)).

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ See Taslitz, *supra* note 21, at 21.

²⁷⁷ See *id.*

²⁷⁸ See *supra* notes 15–16, 201–202 and accompanying text.

high initial offers.²⁷⁹ Thus, if criminal defendants are like the subjects in the aforementioned studies, the plea bargains that most defendants accept are inordinately influenced by prosecutors' self-serving and biased initial offers.

Exacerbating the underadjustment problem in plea negotiations is the belief that the average criminal defendant underadjusts more than the average person. Recall that eighty percent of criminal defendants are represented by public defenders who are less likely to find viable defenses and presumably more likely to accept plea offers.²⁸⁰ These factors suggest that a criminal defendant is more likely to underadjust than the average person as well as an average litigant with better resources and representation.

Another factor that may exacerbate the degree to which criminal defendants underadjust is a phenomenon known as the "trial penalty," a de facto penalty that judges impose at sentencing on defendants "with the temerity to go to trial."²⁸¹ There is significant support for the existence of the trial penalty, and studies have shown that there are substantial differences in the sentences imposed after jury trials compared to sentences imposed after guilty pleas.²⁸² For instance, in a study of criminal sentences for different types of offenses in five states, researchers found that cases reaching a jury trial have a more severe average penalty than cases with guilty pleas.²⁸³ In another study, sentences following jury trials were found to be 44.5 months longer than those following guilty pleas (after controlling for a number of factors).²⁸⁴ Indeed, one of the main reasons that the vast majority of jurisdictions preclude judges from participating in plea discussions (and the reason that Connecticut precludes plea-participating judges from presiding over defendants' trials if plea negotiations fail) is the fear that these

²⁷⁹ Dion, *supra* note 20, at 160; Podgor, *supra* note 271, at 463; Taslitz, *supra* note 21, at 14, 21.

²⁸⁰ See *supra* notes 130, 135–136 and accompanying text.

²⁸¹ Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 419 (2008).

²⁸² *Id.* at 419 n.33.

²⁸³ *Id.* (citing Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 973, 975 (2005)). For example, in one state, the study found a 350% plea-trial differential in sentence length in heroin distribution cases. *Id.*

²⁸⁴ *Id.* (citing Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L. Q. 67, 88–90 (2005); Jeffery T. Ulmer & Mindy S. Bradley, *Variations in Trial Penalties Among Serious Violent Offenders*, 44 CRIMINOLOGY 631, 650, 652 (2006)).

judges would penalize non-pleading defendants.²⁸⁵ Because defendants are the ones who will suffer the consequences of the trial penalty if a deal is not reached, it is easy to see why they would underadjust rather than vigorously negotiate.

D. *Problem Three: Even Arbitrary, Random, or Irrelevant Numbers Can Serve as Anchors and Distort Calculations*

The third main problem with the anchoring effect also manifests itself in criminal plea negotiations.²⁸⁶ Most people are risk averse, and although guilty defendants are likely to be less risk averse than innocent defendants,²⁸⁷ it is easy to see how even a guilty but overcharged defendant could “plausibly distrust adjudication’s capacity to vindicate false charges.”²⁸⁸ These defendants would thus “sensibly accede to inaccurate pleas to avoid the risk of graver consequences.”²⁸⁹ Similar to the subjects who awarded the plaintiff more when the plaintiff asked for an outlandish \$1 billion, it is easy to see how a defendant who recklessly killed a victim could agree to plea guilty to second degree murder when the prosecutor originally charged him with capital murder.²⁹⁰

E. *How Judicial Participation in Plea Discussions Could Reduce the Anchoring Effect*

As noted, studies have found that when researchers present subjects with a hypothetical case and only provide them with the plaintiff’s request for damages, the subjects anchor on that request and damages awards increase with the plaintiff’s request.²⁹¹ Conversely, when researchers present subjects with damages requests by both the plaintiff and the defendant, the anchoring effect is reduced or eliminated. In

²⁸⁵ FED. R. CRIM. P. 11; *United States v. Davila*, 133 S. Ct. 2139, 2148–49 (2013) (“In recommending the disallowance of judicial participation in plea negotiations now contained in subsection (c)(1), the Advisory Committee stressed that a defendant might be induced to plead guilty to avoid antagonizing the judge who would preside at trial.”).

²⁸⁶ Bibas, *supra* note 14, at 2516.

²⁸⁷ Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1943 (1992).

²⁸⁸ Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585, 1612 (2005) (citing Abbe Smith, *Defending the Innocent*, 32 CONN. L. REV. 485, 494 & nn.56–58 (2000)).

²⁸⁹ *Id.*

²⁹⁰ See *supra* notes 217–251 and accompanying text (describing a variety of studies that illustrate how even arbitrary or irrational initial offers will produce the anchoring effect).

²⁹¹ See *supra* notes 223–224 and accompanying text.

one study, researchers read 360 undergraduate students a case summary which was adapted from an actual case as follows:

[T]he defendant shipping company was responsible for a fall by the plaintiff, a 33-year-old male longshoreman. The summary described the plaintiff's injuries, including injured tendons and cartilage in one knee and a herniated disc. The plaintiff also had several attacks of temporary paralysis that caused him to collapse and, on one occasion, to break his arm. He developed complications following his second arthroscopic surgery, causing him to be bedridden and to need a wheelchair for 6 months. The plaintiff's injuries caused severe depression for which he received psychiatric treatment. His doctors testified that his chronic back pain and occasional pain and swelling in his knee probably would worsen as he aged. The summary stated that although the plaintiff found desk work at similar pay, he was unable to continue working outdoors and missed the physical labor.²⁹²

The researchers told the subjects that a prior jury had already found the defendant responsible for the plaintiff's injuries and had awarded damages for medical expenses and lost earnings; the subjects merely needed to award damages for pain and suffering.²⁹³ The subjects had to decide the minimum and maximum award that they thought would be reasonable and the amount of damages to award.²⁹⁴ The variable was the amount of damages for pain and suffering requested by the plaintiff and the defendant.²⁹⁵

In the "low anchor" condition, where subjects were told that the plaintiff requested \$750,000 in damages and that the defendant made no request, the subjects listed an average minimum reasonable award of \$351,250, an average maximum reasonable award of \$1,058,626, and an average award of \$609,866.²⁹⁶ Subjects who were told that the defendant countered the plaintiff's \$750,000 request with a request that he be ordered to pay only \$25,000 in damages, listed an average mini-

²⁹² Mollie W. Marti & Roselle L. Wissler, *Be Careful What You Ask For: The Effect of Anchors on Personal Injury Damages Awards*, 6 J. EXPERIMENTAL PSYCHOL.: APPLIED 91, 94 (2000). The study adapted this case summary from *Scala v. Moore McCormack Lines, Inc.*, decided by the U.S. Court of Appeals for the Second Circuit in 1993. *Id.*; see 985 F.2d 680, 681-83 (2d Cir. 1993).

²⁹³ Marti & Wissler, *supra* note 292, at 94.

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 95-96.

imum reasonable award of \$187,250, an average maximum reasonable award of \$625,653, and an average award of \$433,594.²⁹⁷

In the “medium anchor” condition, subjects who were told that the plaintiff made a request for \$1.5 million in damages, with no corresponding defense request, listed an average minimum reasonable award of \$490,484, an average maximum reasonable award of \$1,267,903, and an average award of \$867,419.²⁹⁸ Subjects who were told that the defendant countered the plaintiff’s request with a \$25,000 damages request averaged a \$371,033 minimum, \$1,101,684 maximum, and \$662,129 average award.²⁹⁹

In the “high anchor” condition, subjects who were informed that the plaintiff asked for \$5 million in damages and that the defendant made no damages request, listed average minimums and maximums of \$787,452 and \$3,313,000, and \$1,929,129 as an average award.³⁰⁰ Meanwhile, subjects informed that the plaintiff’s request was accompanied by a defense request of \$25,000 listed an average minimum and maximum of \$552,679 and \$2,322,321, and an average award of \$1,264,286.³⁰¹

Unsurprisingly, the average minimum and maximum awards that subjects thought were reasonable increased as the plaintiff’s request for damages increased.³⁰² Nevertheless, when the defendant countered with a damages request, both the minimum and maximum reasonable awards were substantially less than when the defendant offered no rebuttal amount.³⁰³ Also unsurprisingly, as the plaintiff’s request increased, the average award also increased.³⁰⁴ Once again, however, the average awards were higher when a rebuttal amount was not specified.³⁰⁵

Researchers in another study found similar results. In this study, researchers selected 122 jurors waiting to be called for voir dire to participate in a study.³⁰⁶ The researchers gave the subjects a summary of the evidence presented in an age discrimination lawsuit.³⁰⁷ Subjects

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ Marti & Wissler, *supra* note 292, at 95–96.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *See id.*

³⁰³ *Id.* at 96.

³⁰⁴ *Id.* at 95.

³⁰⁵ Marti & Wissler, *supra* note 292, at 95.

³⁰⁶ Edith Greene et al., *Juror Decisions About Damages in Employment Discrimination Cases*, 17 BEHAV. SCI. & L. 107, 112 (1999).

³⁰⁷ *Id.* at 113.

were placed in four different groups.³⁰⁸ Subjects in one condition (the “no award, no expert” condition) were exposed to neither any suggested awards during closing arguments nor any expert witness testimony.³⁰⁹ Subjects in a second condition (the “award, no expert” condition) heard that the plaintiff’s attorney requested \$719,354 in damages for lost wages and benefits, whereas defense counsel countered that the defendant should be ordered to pay only \$321,000.³¹⁰ In a third condition (the “award, plaintiff’s expert” condition), subjects learned the same information as the subjects in the second condition, but they also heard testimony from the plaintiff’s expert economist explaining how he arrived at the \$719,354 figure.³¹¹ Finally, subjects in a fourth condition (the “award, both experts” condition) were exposed to the same information as subjects in the third condition, but they also heard testimony from the defendant’s expert explaining the basis for his \$321,000 figure.³¹²

The researchers had the subjects in each group complete pre-deliberation questionnaires and then deliberate for up to forty-five minutes, or until they reached a verdict.³¹³ Subjects in group one awarded the plaintiff an average of \$520,000 in lost wages and benefits, whereas group two subjects awarded an average of \$566,000.³¹⁴ Subjects in group three, who heard expert testimony from the plaintiff’s expert, but not the defendant’s expert, awarded the plaintiff an average of \$719,000 in damages, i.e., nearly the same amount suggested by the plaintiff’s expert.³¹⁵ Conversely, subjects in group four, who heard expert testimony from both sides, awarded the plaintiff an average of \$529,000 in damages, the median between the expert’s respective proposals.³¹⁶

Recall Professor Bibas’s hypothetical, illustrating how the anchoring effect might influence plea-bargaining negotiations: The professor envisions that under circumstances in which a prosecutor makes a high

³⁰⁸ *Id.* at 112. In some groups, the study gave jurors award recommendations. *Id.* Some groups also received expert economic testimony. *Id.* The four groups were: (1) no award recommendations, no expert; (2) award recommendations, no expert; (3) award recommendations, plaintiff’s expert; and (4) award recommendations, both plaintiff’s and defense experts. *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² Greene et al., *supra* note 306, at 112.

³¹³ *Id.* at 114.

³¹⁴ *Id.* at 116.

³¹⁵ *Id.* at 116, 118.

³¹⁶ *Id.* at 116.

initial offer of twenty years' incarceration—achieved by piling on every possible enhancement—the defendant will reject this opening offer, but will anchor on the twenty-year proposal.³¹⁷ Although the defendant will reject the prosecutor's next offer of fifteen years' imprisonment, he will later accept the prosecutor's final offer of twelve years' incarceration.³¹⁸ Based upon the aforementioned studies—illustrating the phenomenon of underadjustment and the weight given to arbitrary anchors by jurors and judges—Professor Bibas's hypothetical appears to reach a plausible result.³¹⁹

Alternatively, this hypothetical would end differently if it were set in a jurisdiction where the judge could be involved in plea discussions—such as Florida or Connecticut. Plea negotiations in these jurisdictions would instead begin with a prosecutor presenting his case to the judge and making a request for twenty years' imprisonment.³²⁰ Defense counsel would then present his case and request.³²¹ Assuming that the enhancements piled on by the prosecutor lacked evidentiary or factual support, defense counsel's request would likely be significantly lower—perhaps five years' incarceration.

After considering both sides, the judge would then communicate his expected post-plea sentence.³²² For example, the judge could first communicate the expected sentence in the form of a fixed sentence.³²³ Recall that studies have shown how judges are subject to the same anchoring effect as other research subjects.³²⁴ As a result, the previous two studies suggest that the judge would likely communicate an expected sentence somewhere between the prosecutor and defense counsel's requests.

A comparison with the civil context is telling. In 2010, Professor Geoffrey P. Miller proposed that a judge in a civil case be allowed to

³¹⁷ See Bibas, *supra* note 14, at 2517–18; *supra* note 18 and accompanying text.

³¹⁸ See Bibas, *supra* note 14, at 2517–18; *supra* note 18 and accompanying text.

³¹⁹ See *supra* notes 203–212, 220–233 and accompanying text.

³²⁰ See *supra* notes 24, 164–165 and accompanying text (describing how prosecutors initiate pretrial discussions before a judge in Florida and Connecticut).

³²¹ See *supra* notes 14, 166 and accompanying text (explaining how defense attorneys respond to prosecutors' requests). Defense counsel presumably would have formulated his request before the hearing and thus would not be anchored to the prosecutor's opening request. See *supra* notes 14, 166 and accompanying text.

³²² See *supra* notes 25, 167–170 and accompanying text (illustrating how a judge communicates post-plea sentences in Florida and Connecticut).

³²³ Turner, *supra* note 24, at 242, 249.

³²⁴ See *supra* notes 227–252 and accompanying text (discussing studies that demonstrate the anchoring effect's impact on judges).

issue a preliminary judgment.³²⁵ According to Professor Miller, the anchoring effect hinders civil negotiations because the parties “make extreme demands in hopes of anchoring discussions at a favorable figure.”³²⁶ If, on the other hand, judges, were able to make preliminary judgments, those judgments themselves would as the anchors, and in turn, reduce the anchoring effect.³²⁷

Moreover, Miller argued that “[b]ecause preliminary judgments [would be] made by a judge after a provisional review of the evidence, . . . they offer litigants the satisfaction of a formal adjudication and thus potentially enhance their willingness to accept the outcome as legitimate and binding.”³²⁸ Furthermore, preliminary judgments would be publicly announced and thus “provide valuable information to third parties to guide future conduct.”³²⁹ Finally, Miller claimed that although reactive devaluation likely causes many civil parties to ignore their opponents’ arguments, the same devaluation is unlikely to occur when a judge renders a preliminary ruling.³³⁰ There is no adversarial relationship between a judge and the party, and the judge is only interested in a fair and speedy resolution of the matter.³³¹

The anchoring effect suggests that these same results would apply if a judge communicates a fixed sentence after both sides present their cases during a preliminary hearing in a *criminal* case. In a criminal case, the anchor would be the judge’s fixed sentence suggestion of ten years’

³²⁵ Miller, *supra* note 267267, at 167. A preliminary judgment is:

[A] tentative assessment of the merits of a case or any part of a case, based on the same sorts of information that the courts already consider on motions for summary judgment. The difference between a preliminary judgment and a summary judgment is that the court, in a preliminary judgment, would not be limited to deciding issues with which no reasonable jury could disagree. Instead the court would provide its own provisional judgment on the merits of the case based on the information provided by the parties. A preliminary judgment, once given, would convert into a final judgment after the expiration of a reasonable period of time—say, thirty days. Any party against whom a preliminary judgment is issued, however, would have the right to object prior to the expiration of the period (with or without explanation), in which case the judgment would be vacated and the case would proceed according to ordinary rules of procedure.

Id. at 167–68.

³²⁶ *Id.* at 179 (citing Korobkin & Guthrie, *supra* note 203, at 18–19). It has been noted that offering extreme opening offers is a successful litigation strategy. *Id.* at 176 n.48.

³²⁷ *Id.* at 179.

³²⁸ *Id.* at 168.

³²⁹ *Id.*

³³⁰ *Id.* at 179.

³³¹ Miller, *supra* note 267, at 179.

incarceration, not the prosecutor's opening offer of twenty years. By having a neutral judge communicate a fixed sentence, the prosecutor and defendant would more easily agree upon a plea bargain. Indeed, Connecticut prosecutors and defense attorneys broadly agree that having a neutral third party creates a fairer negotiation, and a judge makes each party more amenable to agreement and less likely to disturb that resolution through appeal.³³² Moreover, although plea conferences with judges are not officially recorded in Connecticut, they are recorded in Florida and can provide valuable information to future prosecutors and defendants about what judges think are appropriate plea bargain sentences.³³³ Finally, coming from a neutral judge, a fixed sentence recommendation should help the prosecutor overcome some of the aforementioned cognitive biases, like reactive devaluation.³³⁴ A preliminary judicial recommendation should also have the same effect on defendants. As the Connecticut interviewees noted, "the judge's involvement may be valuable to defendants who would refuse a reasonable bargain simply because they mistrust the prosecutor, yet would accept the same offer if it came from the judge."³³⁵

To further mitigate the anchoring effect, judges could communicate the expected sentence in the form of a sentence range or a sentencing cap.³³⁶ Judges could communicate a range by indicating that they would approve of a plea deal under which the defendant's sentence fell within a certain span of years. Likewise, judges could communicate a sentencing cap by indicating what the maximum acceptable sentence under a plea bargain would be.³³⁷ Studies indicate that such actions by a judge would mitigate the anchoring effect.

For example, in one study, researchers gave forty male Vanderbilt University students a set of written instructions. The instructions provided the following scenario to each subject:

[He] and the other subject were to take the role of two automobile dealers. One of the dealers, Colonial Motors, had a customer for a "Mongoose" sedan, but did not have the car on his lot. The other dealer, Tower Automobile Company, had

³³² Turner, *supra* note 24, at 254–55.

³³³ *See id.* at 241–42.

³³⁴ *See* Miller, *supra* note 267, at 178 (citing Ross & Stilling, *supra* note 267, at 394–95) (describing reactive devaluation as a cognitive bias that causes parties to give insufficient weight to the opinions of those they dislike).

³³⁵ Turner, *supra* note 24, at 254.

³³⁶ *See id.* at 242.

³³⁷ *See id.*

just such a car. The task for the subjects as dealers was to arrange a contract whereby Tower sold Colonial the sedan, so that Colonial could then sell it to the customer. Colonial's task was to submit bids to Tower for the price he was willing to pay for the car. Tower could accept a bid or make a counterbid. Tower's profit was the difference between the cost of the car to him (\$2500) and what Colonial would pay him for the automobile. Colonial's profit was the difference between what the customer would pay for the car and what he had to pay Tower.³³⁸

In reality, the researchers designated each subject a Tower automobile dealer—no subjects represented Colonial Motors.³³⁹ Researchers gave each subject an initial bid from a fictional Colonial automobile dealer, after which the parties exchanged a series of bids and counterbids until an agreement was reached.³⁴⁰ The counterbids were determined according to a bid schedule constructed on the initial basis of Colonial selling the car for \$3500, with Colonial profiting on the difference between \$3500 and the amount it paid Tower for the car.³⁴¹ Under each condition, each successive bid after Colonial's initial bid led to a 10% decrease in the company's profit.³⁴²

There were two variables: the amount of Colonial's opening bid and the amount of information given to the subjects.³⁴³ In the unfavorable-incompletely informed condition, researchers gave subjects an initial bid by Colonial of \$2615 and merely told them that the cost of the car was \$2500.³⁴⁴ Subjects in the unfavorable-completely informed condition were treated in the same way, except that the researcher also told them that Colonial's customer would pay \$3500 for the car.³⁴⁵ In the favorable-incompletely informed condition, researchers gave subjects a first bid of \$3050 and only told them the \$2500 cost of the car.³⁴⁶ Re-

³³⁸ Robert M. Liebert et al., *The Effects of Information and Magnitude of Initial Offer on Interpersonal Negotiation*, 4 J. EXPERIMENTAL SOC. PSYCHOL. 431, 434-35 (1968).

³³⁹ *Id.* at 435.

³⁴⁰ *See id.*

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.* These two variables were combined to create four conditions: (1) unfavorable-incompletely informed condition; (2) unfavorable-completely informed condition; (3) favorable-incompletely informed condition; and (4) favorable-completely informed condition. *Id.*

³⁴⁴ Liebert et al., *supra* note 338, at 435.

³⁴⁵ *Id.*

³⁴⁶ *Id.*

searchers treated subjects in the favorable-completely informed condition the same, except that they also told them that the Colonial customer would pay \$3500.³⁴⁷

The researchers hypothesized that uninformed bargainers, when faced with an unfavorable opening offer from an opponent, would accept a contract of lower value than they would when faced with a favorable opening offer. The contract value of informed bargainers, on the other hand, would not be affected by the opponent's first bid.³⁴⁸ The results proved this hypothesis to be accurate.³⁴⁹ In the unfavorable-incompletely informed condition, subjects reached an average contract price under which they profited by \$525.70, whereas subjects in the favorable-incompletely informed condition profited by an average of \$765.50.³⁵⁰ In contrast, subjects in the unfavorable-completely informed condition achieved an average profit of \$628, whereas subjects in the favorable-completely informed condition procured \$646.50 as an average profit.³⁵¹

In other words, the uninformed subjects anchored on their opponent's first bid. If the first bid was unfavorable to them, they would accept an unfavorable contract, and if the first bid was more favorable to them, they would accept a more favorable contract.³⁵² Conversely, the informed bargainers did not anchor on the opponent's first bid because that value never impacted the final contract value.³⁵³

In jurisdictions in which judges are not involved in plea negotiations, most defendants are like the subjects in the unfavorable-incompletely informed condition: The prosecutor offers the typical defendant a high initial plea offer, and the defendant has no knowledge of (1) how much of a sentencing discount the prosecutor would offer if push came to shove; or (2) what type of sentence a judge would accept. As a result, defendants in these jurisdictions likely accept unfavorable plea bargains based upon the anchoring effect.

In jurisdictions like Florida and Connecticut, where judges are involved in plea discussions, most defendants are like the subjects in the unfavorable-completely informed condition. The prosecutor still makes a high initial plea "offer" in the form of a sentencing demand to the

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 436.

³⁴⁹ *Id.*

³⁵⁰ Liebert et al., *supra* note 338, at 436.

³⁵¹ *Id.*

³⁵² *Id.* at 438.

³⁵³ *Id.*

judge.³⁵⁴ Defense counsel then makes a lower sentencing demand to the judge, who can then respond to the sentencing demands with a sentence cap or range. Those figures will presumably fall somewhere between the two demands. In such cases, the fact that the prosecutor made a high, rather than a low, initial offer should not influence the nature of the plea bargain reached by the parties. Instead, like the informed bargainers in the previous study, defendants should be able to make decisions based upon their knowledge of the maximum (and sometimes minimum) sentence that the judge would accept, making the nature of the prosecutor's initial offer irrelevant, or at least less relevant.

V. JUDICIAL PARTICIPATION AMELIORATES OTHER PLEA-BARGAINING PROBLEMS

Judicial participation in plea bargaining can ameliorate many of the problems facing parties in plea negotiations. Judicial involvement can eliminate the *caveat accused* approach to Federal Rule of Evidence 410 and restore a *caveat prosecutor* approach.³⁵⁵ In addition, judges would also be able to explain to defendants the effects of prosecution-sought waivers.³⁵⁶ Furthermore, judges could use their participation to ensure crisis-ridden public defenders adequately protect the rights of their clients.³⁵⁷ Finally, judicial involvement in plea bargaining would put teeth back into the judicial review of plea agreements required by Federal Rule of Criminal Procedure 11.³⁵⁸

A. Eliminating Caveat Accused

Rule 410(a)(4) deems a defendant's statements inadmissible if they were "made during plea discussions with an attorney for the prosecuting authority."³⁵⁹ Despite the fact that the original intent was for this burden of proof to be placed on the prosecutor, courts have overwhelmingly adopted a *caveat accused* approach, where the burden is placed on the defendant to prove that his statements were protected by this Rule.³⁶⁰

³⁵⁴ See Taslitz, *supra* note 21, at 21.

³⁵⁵ See *infra* notes 359–367 and accompanying text.

³⁵⁶ See *infra* notes 268–376 and accompanying text.

³⁵⁷ See *infra* notes 377–388 and accompanying text.

³⁵⁸ See *infra* notes 389–394 and accompanying text.

³⁵⁹ FED. R. EVID. 410; see *supra* notes 40–42 and accompanying text.

³⁶⁰ See Miller, *supra* note 33, at 232–34.

One response to this situation would be to change the way that courts approach plea bargaining so that the burden is placed back on the prosecution—as the U.S. Court of Appeals for the Fifth Circuit intended in 1976 in *United States v. Robertson*.³⁶¹ Critics, of course, could respond that reintroducing a *caveat prosecutor* approach would hamper criminal prosecutions and too easily allow defendants to insulate their statements from the eyes and ears of jurors.

A more sensible approach, then, would be to permit judicial participation in the early stages of plea bargaining, allowing for courts to better protect the interests of both defendants and prosecutors. Consider again the Connecticut and Florida experiences. In Connecticut, judges become involved in plea discussions during pretrial conferences, with both sides presenting summaries of the case when they first meet the judge.³⁶² Similarly, in Florida, judges typically become involved with plea bargaining during the pretrial conferences, with plea discussions occurring as “a matter of course.”³⁶³ Given the concern of defendants and defense counsel about whether a conversation with the prosecutor will constitute a “plea discussion” covered by Rule 410, these jurisdictions offer a partial solution: defendants can simply wait for the pretrial hearings, where such discussions take place as a matter of course before the judge.³⁶⁴ At these conferences, defendants can speak with impunity, knowing that their statements are being made during formal “plea discussions.”

Some might argue that prosecutors prefer the status quo of a *caveat accused* approach and would therefore object to increased judicial participation. Nevertheless, one study reveals that prosecutors would not likely object to these changes.³⁶⁵ For example, in Connecticut, although the defense and the prosecution have the option to enter plea negotiations without a judge, they typically prefer judicial participation.³⁶⁶ Indeed, “[i]n some districts, virtually all plea negotiations are conducted in the judge’s chambers.”³⁶⁷

³⁶¹ See *supra* notes 48–52 and accompanying text; see also 582 F.2d 1356, 1366 n.21 (5th Cir. 1978) (describing the *caveat prosecutor* approach).

³⁶² See Turner, *supra* note 24, at 249.

³⁶³ See *id.* at 240–42.

³⁶⁴ See *id.* at 240–42, 249.

³⁶⁵ *Id.* at 248.

³⁶⁶ *Id.*

³⁶⁷ *Id.*

B. *The Ability of Judges to Explain Waivers to Defendants*

Even slight differences in language in the “Queen for a Day” agreements and appeals waivers can lead to widely different and unexpected results.³⁶⁸ Currently, in most jurisdictions, there is no way for the parties to get information from the judge regarding a “Queen for a Day” agreement. Judges cannot become involved with the plea-bargaining process until the plea hearing, at which point the defendant would have already signed the waiver.³⁶⁹ If the defendant signed an appeal waiver, the judge may engage the defendant in an explicit discussion regarding the waiver at the plea hearing. Many courts, however, have found that such a discussion is not required.³⁷⁰ Moreover, even if two agreements have identical language, they might produce very different results in different jurisdictions.³⁷¹ For example, some courts have only approved of rebuttal waivers, whereas other courts have approved of case-in-chief waivers.³⁷² Furthermore, some courts have ap-

³⁶⁸ See *supra* notes 106–126 and accompanying text (illustrating how differences in waiver language have caused courts to reach divergent results).

³⁶⁹ See FED. R. CRIM. P. 11(c)(1).

³⁷⁰ See, e.g., *United States v. Michelsen*, 141 F.3d 867, 871–72 (8th Cir. 1998) (“Although it might have been preferable for the court to have conducted a colloquy with Michelsen regarding his waiver of appeal, such a dialogue is not a prerequisite for a valid waiver of the right to appeal.”); *United States v. Portillo*, 18 F.3d 290, 293 (5th Cir. 1994) (“We hold, therefore, that when the record of the Rule 11 hearing clearly indicates that a defendant has read and understands his plea agreement, and that he raised no question regarding a waiver-of-appeal provision, the defendant will be held to the bargain to which he agreed, regardless of whether the court specifically admonished him concerning the waiver of appeal.”); *United States v. DeSantiago-Martinez*, 38 F.3d 394, 395 (9th Cir. 1992) (rejecting the argument that the judge must advise the defendant of the waiver at the guilty-plea hearing). But see, e.g., *United States v. Marin*, 961 F.2d 423, 496 (1994) (holding that “a waiver is not knowingly or voluntarily made if the district court fails to specifically question the defendant concerning the waiver provision of the plea agreement during the Rule 11 colloquy and the record indicates that the defendant did not otherwise understand the full significance of the waiver”); *United States v. Bushert*, 997 F.2d 1343, 1351 (11th Cir. 1993) (same).

³⁷¹ See *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995); *United States v. Parra*, 302 F. Supp. 2d 226, 230 n.1, 230–31 (S.D.N.Y. 2004); King & O’Neill, *supra* note 118, at 211.

³⁷² See, e.g., *United States v. Sylvester*, 583 F.3d 285, 288–90 (5th Cir. 2009) (approving case-in-chief waivers); *United States v. Hardwick*, 544 F.3d 565, 570 (3d Cir. 2008) (approving rebuttal waivers); *United States v. Velez*, 354 F.3d 190, 196–97 (2d Cir. 2004) (approving rebuttal waivers); *United States v. Rebbe*, 314 F.3d 402, 406–08 (9th Cir. 2002) (approving rebuttal waivers); *United States v. Young*, 223 F.3d 905, 909–11 (8th Cir. 2000) (approving case-in-chief waivers); *United States v. Krilich*, 159 F.3d 1020, 1024–26 (7th Cir. 1998) (approving rebuttal waivers); *United States v. Burch*, 156 F.3d 1315, 1320–22 (D.C. Cir. 1998) (approving case-in-chief waivers).

proved of rebuttal waivers, but only in unpublished opinions.³⁷³ Courts have also split over several aspects of appeals waivers, such as whether defendants can waive claims for ineffective assistance of counsel.³⁷⁴

In other words, when a defendant signs any of these waivers, he often does not know exactly what he is waiving. Furthermore, even if the defendant or defense counsel knows that terms in these waivers can be negotiated, they would not necessarily know whether the judge would treat any prosecutorial concessions as meaningful.

The ambiguity inherent to these waivers is also a concern for the prosecutor. If the defendant signs a case-in-chief waiver, most jurisdictions require the prosecutor to convince the judge that the waiver is constitutionally permissible.³⁷⁵ Additionally, the prosecutor desiring to foreclose most avenues of appeal by having the defendant sign an appeal waiver must take the large risk of leaving an appeal open unless the judge hearing the case has previously ruled favorably on a waiver with the same language.³⁷⁶

When judges are involved in plea discussions, these concerns at least partially dissipate. If the parties want to know the efficacy of a waiver, they merely need to ask the judge. Judges can then inform both sides whether they will enforce the subject waiver, and what effect it will have on trial or subsequent appeals.

C. *Diminishing the Effects of the Public Defender Crisis*

Judicial participation in the plea-bargaining process can also work to minimize the negative effects of the public defender system. One landmark study revealed that public defenders, who represent the vast majority of criminal defendants, are typically less capable than their

³⁷³ See, e.g., *United States v. Artis*, 261 F. App'x 176, 177–79 (11th Cir. 2008) (reasoning that *Mezzanatto* allows rebuttal waivers); *United States v. Fifer*, 206 F. App'x 502, 509–10 (6th Cir. 2006) (enforcing a rebuttal waiver).

³⁷⁴ Compare *Williams v. United States*, 396 F.3d 1340, 1342 (11th Cir. 2005) (“Under these circumstances, the sentence-appeal waiver precludes a § 2255 claims [sic] based on ineffective assistance at sentencing.”), with *United States v. Pruitt*, 32 F.3d 431, 433 (9th Cir. 1994) (“The plea agreement entered into by the government and Pruitt did not waive Pruitt’s right to bring a § 2255 motion alleging ineffective assistance of counsel.”).

³⁷⁵ See *United States v. Mergen*, No. 06-CR-352 (NGG), 2010 WL 395974, at *4 (E.D.N.Y. Feb. 3, 2010). In the Fourth, Fifth, Eighth, Tenth, and D.C. Circuits, this extra step is not necessary. See, e.g., *Sylvester*, 583 F.3d at 288–90 (ruling there was no reason not to enforce case-in-chief waivers); *Young*, 223 F.3d at 909–11 (concluding that *Mezzanatto* covered a case-in-chief waiver); *Burch*, 156 F.3d at 1320–22 (reasoning there is no rationale for not extending *Mezzanatto* to case-in-chief waivers).

³⁷⁶ See *supra* notes 118–129 and accompanying text (illustrating how differences in waiver language have caused courts to reach divergent results).

privately paid counterparts,³⁷⁷ and consequently more likely to accept a prosecutor's plea offer.³⁷⁸ Early judicial participation, therefore, can be an important brake on the "McJustice" delivered by plea bargain assembly lines.³⁷⁹

For example, prosecutors and defense attorneys in Connecticut agreed that actively involved, impartial third parties contributed to the fairness of plea negotiations.³⁸⁰ Specifically, interviewees indicated that, "[a]s an impartial mediator, the judge can . . . better ensure that the plea adequately reflects the facts of the case, even where lawyers fail in their representation."³⁸¹ A judge can reject a plea bargain, for instance, when it is clear that a defendant does not understand the plea, or when incompetent and overworked attorneys instruct defendants to enter into plea bargains too early in the process.³⁸² One public defender interviewee responded "that even pro-prosecutor judges try to help inexperienced attorneys make sure that their client will not be harmed."³⁸³ The judge might also encourage defense counsel to consider other options besides imprisonment.³⁸⁴

Prosecutors concur that early judicial involvement in plea bargaining makes the process fairer because both sides gain from the process.³⁸⁵ A judge can mediate the often unreasonable starting positions of prosecutors and defendants.³⁸⁶ With a judge present, prosecutors are not as likely to try to intimidate the defendant during plea bargaining, nor are they as likely to acquiesce to defendants in an effort to speedily resolve the case.³⁸⁷ Moreover, if a prosecutor's incompetence distorts the bargaining process, a judge may refuse to accommodate the prosecutor's position.³⁸⁸

³⁷⁷ See Emmelman, *supra* note 131, at 952 (illustrating that criminal defendants "may be less likely to find viable defenses than attorneys who represent wealthy clients with greater access to resources").

³⁷⁸ Lester, *supra* note 134, at 586 n.96.

³⁷⁹ Appleman, *supra* note 137, at 769.

³⁸⁰ Turner, *supra* note 24, at 254.

³⁸¹ *Id.* at 255.

³⁸² *Id.*

³⁸³ *Id.* at 255 n.348.

³⁸⁴ *Id.* at 254.

³⁸⁵ *See id.*

³⁸⁶ Turner, *supra* note 24, at 254.

³⁸⁷ *Id.*

³⁸⁸ *Id.* at 255.

D. *Putting the Teeth Back in Plea Review*

As noted, if a defendant reaches a plea agreement with the prosecutor, a defendant is only entitled to a plea hearing, where a judge confirms that the plea is “knowing, intelligent, and voluntary.”³⁸⁹ Because judges are not involved with plea negotiations until the plea hearing, after-the-fact review is difficult.³⁹⁰ At this stage, neither the judge nor the parties have much interest in disturbing the agreement, and the judge—with no prior exposure to the plea-bargaining process—typically just engages in “a five-minute interview of the person, under Rule 11, getting a kind of half-hearted, scripted confession as part of the guilty plea process.”³⁹¹

In jurisdictions that allow judicial participation in plea discussions, the situation is markedly different. Judges can explain the plea-bargaining process to defendants, reducing the chance that a plea bargain is unknowing or unintelligent. Moreover, when a judge participates in plea discussions, it gives the judge the ability to determine whether the plea was voluntary or coerced and, perhaps more importantly, allows the defendant to perceive the final plea deal as fair.³⁹² According to one Florida judge:

[Judicial involvement in the plea negotiations] can possibly help with determining whether the plea is voluntary, knowing, or whether there is a factual basis The colloquy is probably sufficient for that, but it helps somewhat to be involved in advance because the defendant sees the court as somewhat less hostile than the prosecutor. So the defendant is more likely to believe it is a fair deal.³⁹³

In turn, defendants in these jurisdictions are not as likely to file appeals.³⁹⁴

VI. THE OBJECTIONS TO JUDICIAL INVOLVEMENT IN PLEA DISCUSSIONS ARE OVERSTATED AND CAN BE AVOIDED

Critics raise three general objections to judicial involvement in plea discussions: (1) guarding against coerced guilty pleas; (2) preserv-

³⁸⁹ O’Sullivan, *supra* note 140, at 361.

³⁹⁰ See Turner, *supra* note 24, at 212.

³⁹¹ See Panel Discussion, *supra* note 148, at 684.

³⁹² Turner, *supra* note 24, at 244–45.

³⁹³ *Id.* at 245.

³⁹⁴ *Id.* at 244.

ing judicial neutrality; and (3) preserving the court as a neutral arbiter.³⁹⁵ Nevertheless, these three concerns are overstated and can be avoided.³⁹⁶ Additional critiques of judicial involvement in plea bargaining, such as concerns about judicial resources and crime, are similarly overstated.³⁹⁷

A. *The Three Principal Interests Served by the Ban on Judicial Participation*

Courts have generally viewed Rule 11(c)(1)'s proscription on judicial involvement in plea discussions as advancing three principal interests.³⁹⁸ First, courts claim that the proscription "guards against 'the high and unacceptable risk of coercing a defendant' to enter into an involuntary guilty plea."³⁹⁹ According to courts, the fear is that if a judge were involved in plea discussions, the defendant would believe that the judge desired a plea bargain and thus would accept one rather than risk being punished by the judge for taking his chances at trial.⁴⁰⁰

A second interest allegedly served by prohibiting judges from participating in plea discussions is the interest of preserving judicial neutrality.⁴⁰¹ Courts fear that a judge involved in plea discussions "may feel personally involved, and thus, resent the defendant's rejection of his advice."⁴⁰² Courts have also claimed that judicial involvement during plea discussions may make it difficult for judges to objectively assess the voluntariness of pleas.⁴⁰³

The third interest that the ban on judicial participation during plea discussions allegedly furthers is preserving the court's reputation as a neutral arbiter.⁴⁰⁴ Courts fear that if judges were involved in plea discussions, a defendant would view judges as adversaries, instead of guarantors of the administration of justice.⁴⁰⁵ According to courts, "the 'interests of justice are best served if the judge remains aloof from all discussions preliminary to the determination of guilt or innocence so

³⁹⁵ See *infra* notes 398–406 and accompanying text.

³⁹⁶ See *infra* notes 407–417 and accompanying text.

³⁹⁷ See *infra* notes 418–422 and accompanying text.

³⁹⁸ *United States v. Bradley*, 455 F.3d 453, 460 (4th Cir. 2006); *United States v. Cannady*, 283 F.3d 641, 644–45 (4th Cir. 2002).

³⁹⁹ *Bradley*, 455 F.3d at 460; see *United States v. Casallas*, 59 F.3d 1173, 1178 (11th Cir. 1995); *United States v. Bruce*, 976 F.2d 552, 556 (9th Cir. 1992).

⁴⁰⁰ *Bradley*, 455 F.3d at 460; *United States v. Werker*, 535 F.2d 198, 201–02 (2d Cir. 1976).

⁴⁰¹ *Bradley*, 455 F.3d at 460; *United States v. Barrett*, 982 F.2d 193, 195 (6th Cir. 1992).

⁴⁰² *Bradley*, 455 F.3d at 460; *Cannady*, 283 F.3d at 644.

⁴⁰³ *Bradley*, 455 F.3d at 460; *Bruce*, 976 F.2d at 557–58.

⁴⁰⁴ *Bradley*, 455 F.3d at 460.

⁴⁰⁵ See *id.* at 461; *Bruce*, 976 F.2d at 557.

that his impartiality and objectivity shall not be open to any question.”⁴⁰⁶

B. *Why These Concerns Are Overstated*

The concerns associated with judicial participation in plea bargaining are overstated and can be avoided. Of course, it may very well be true that if a judge were involved in plea discussions, a defendant would feel coerced into accepting a plea bargain rather than face the wrath of a vengeful judge at trial.⁴⁰⁷ This fear, however, already exists even in the absence of judicial participation. As noted, it is well established that there is a phenomenon known as the “trial penalty,” which is a de facto penalty that judges impose at sentencing “on those defendants with the temerity to go to trial.”⁴⁰⁸ Perhaps more importantly, regardless of whether the trial penalty actually exists, the majority of defendants believe that it does, which “drives the perceived need to plead guilty.”⁴⁰⁹

Given these realities, the fear that judicial participation in plea discussions would coerce defendants into plea bargains or cause judges to punish noncompliant defendants is overstated. These fears already exist in jurisdictions that do not allow judicial participation in plea discussions. Judicial participation would, at worst, only incrementally cause more harm. Moreover, this fear is based on the presumption that judges assume that obstinate defendants prevent the achievement of plea bargains. If judges were involved in plea discussions, however, they would have firsthand knowledge of whether it was the defendant or the prosecutor’s unreasonableness in the negotiation that prevented the sides from making a deal.

Furthermore, if jurisdictions were to allow judicial participation in plea discussions, they could ensure that such participation would not result in a trial penalty any steeper than the penalty that exists in jurisdictions that prohibit such participation. In Connecticut, if the sides do not reach a plea agreement after plea discussions, a judge different from the one involved in plea negotiations must conduct the subsequent trial.⁴¹⁰ The same is true for motions to suppress.⁴¹¹ This proce-

⁴⁰⁶ *Bradley*, 455 F.3d at 460 (citing *Werker*, 535 F.2d at 203).

⁴⁰⁷ *Cf. id.* at 461 (expressing the fear that, if judges were involved in plea discussions, defendants would view them as adversaries); *Bruce*, 976 F.2d at 557 (same).

⁴⁰⁸ See O’Hear, *supra* note 281, at 419; *supra* note 298 and accompanying text.

⁴⁰⁹ O’Hear, *supra* note 281, at 419 n.33.

⁴¹⁰ *Turner*, *supra* note 24, at 248 (citing *State v. D’Antonio*, 830 A.2d 1187, 1194 (Conn. App. Ct. 2003)).

⁴¹¹ *Id.* at 249–50.

ture is intended to ensure that the judge involved in the plea negotiations will play no role in the ensuing trial, including the imposition of sentence upon conviction.⁴¹²

Thus, jurisdictions could prevent any increased trial penalty by adopting Connecticut's procedure. That said, if jurisdictions adopted this procedure, they would lose the benefit gained by having a judge with firsthand knowledge of plea discussions when ruling on whether the defendant's plea was knowing, voluntary, and intelligent.⁴¹³ Of course, courts precluding judicial participation in plea discussions have done so in part based upon the fear that judicial involvement during plea discussions may make it difficult for judges objectively to assess the voluntariness of pleas.⁴¹⁴ If these jurisdictions are correct, this fear should not manifest itself if the judge assessing the voluntariness of a defendant's plea is not the same judge who participated in plea discussions.

The fear that judicial participation in plea discussions would stifle the impression of judges as neutral arbiters also appears ill-founded. Instead, there was broad agreement among Connecticut prosecutors and defense attorneys that actively involved, impartial third parties contributed to the fairness of plea negotiations.⁴¹⁵ Rather than claiming that judges involved in plea discussions coerce defendants into pleading guilty, interviewees indicated that judges can be impartial mediators who, when lawyers fail in representing their clients, ensure that the facts of the case are adequately reflected in the plea.⁴¹⁶ Judges may refuse to honor a plea bargain if, in their view, the defendant had incompetent representation.⁴¹⁷

C. *Addressing Other Possible Interests Served by the Ban on Judicial Participation*

There seem to be two other major defenses of the proscription on judicial participation in plea discussions. One is that judicial participation would decrease the number of plea bargains reached and increase the number of criminal cases reaching trial—a result that would run

⁴¹² See *id.* at 248–50.

⁴¹³ See *supra* notes 389–394 and accompanying text (articulating this benefit).

⁴¹⁴ See O'Sullivan, *supra* note 140, at 361; Turner, *supra* note 24, at 212, 244–45; see also FED. R. CRIM. P. 11 advisory committee's note (1974 amendment) ("Such involvement makes it difficult for a judge to objectively assess the voluntariness of the plea.").

⁴¹⁵ Turner, *supra* note 24, at 254–55.

⁴¹⁶ *Id.* at 255.

⁴¹⁷ *Id.* at 255 n.348.

counter to the congressional intent of promoting plea bargains.⁴¹⁸ Currently, more than ninety percent of all criminal cases in this country are resolved by plea bargains.⁴¹⁹ Yet Florida's rate is even higher, at ninety-six percent.⁴²⁰ It seems unlikely, therefore, that judicial participation in plea discussions would decrease the percentage of cases resolved by plea discussions. Indeed, Connecticut prosecutors and defense attorneys believed the judicial participation made the parties more amenable to agreement early in the process and less likely to appeal after trial.⁴²¹

These responses undermine the second additional defense of the proscription on judicial participation, which is that judicial participation would strain judicial resources. It is of course true that judicial involvement in plea discussions would increase the strain on judicial resources at the front end of criminal trials. One study reveals, however, that such involvement has the capacity to greatly decrease the strain on judicial resources at the back end of criminal trials based on defendants being less likely to appeal guilty pleas or imposed sentences.⁴²²

CONCLUSION

In 1977, in *United States v. Herman*, the U.S. Court of Appeals for the Fifth Circuit concluded:

The legal battleground has . . . shifted from the propriety of plea bargaining to how best to implement and oversee the process. Plea bargaining is a tool of conciliation. It must not be a chisel of deceit or a hammered purchase and sale. The end result must come as an open covenant, openly arrived at with judicial oversight. A legal plea bargain is made in the sunshine before the penal bars darken. Accordingly, we must examine plea bargains under the doctrine of *caveat prosecutor*.⁴²³

Nevertheless, the vast majority of courts have rejected the *caveat prosecutor* approach and replaced it with a *caveat accused* approach, under which the burden is placed on the defendant to prove that his

⁴¹⁸ See FED. R. EVID. 410 advisory committee's note ("Exclusion of offers to plead guilty or nolo has as its purpose the promotion of disposition of criminal cases by compromise.").

⁴¹⁹ See BROWN & LANGAN, *supra* note 19, at 3.

⁴²⁰ Turner, *supra* note 24, at 244.

⁴²¹ *Id.* at 253.

⁴²² *Id.* at 244.

⁴²³ 544 F.2d 791, 796 (5th Cir. 1977) (emphasis added).

statements were made during plea discussions. Indeed, *caveat accused* now permeates all aspects of the plea bargaining process, with defendants often being (1) forced to waive their rights to reach the plea-bargaining table or a plea agreement, (2) represented by experience- and resource-strapped public defenders, and (3) afforded toothless judicial review of the validity of their guilty pleas. Because prosecutors frequently overcharge criminal defendants and make high initial plea offers, the anchoring effect strongly suggests that the vast majority of defendants also accede to unfair plea bargains based upon a cognitive bias. Federal Rule of Criminal Procedure 11(c)(1) prohibits judges from participating in plea discussions, and most states have followed suit; however, “a growing minority of states allow and even encourage judges to participate in plea negotiations.”

More states would be wise to follow the lead of these early adopters because a judge’s participation in plea discussions has the ability to eliminate or at least reduce the anchoring effect. After hearing the sentencing demands of both sides, the judge can communicate the expected post-plea sentence, which would replace the prosecutor’s opening offer as the anchor and produce fairer final pleas. Judicial participation also has the ability to cure many of the other ills that infect the plea-bargaining process. Best of all, these benefits inure to both the defense and the prosecution.

