

---

---

## INCOMPETENT PLEA BARGAINING AND EXTRAJUDICIAL REFORMS

*Stephanos Bibas\**

For many years, plea bargaining has been a gray market. Courts are rarely involved, leaving prosecutors unconstrained by judges or juries.<sup>1</sup> Prosecutors' plea offers largely set sentences, checked only by defense lawyers. In this laissez-faire bargaining system, defense lawyers, not judges or juries, are the primary guarantors of fair bargains and equal treatment for their clients.<sup>2</sup> But the quality of defense lawyering varies widely. Bargaining can be a shadowy process, influenced not only by the strength of the evidence and the seriousness of the crime but also by irrelevant factors such as counsel's competence, compensation, and zeal.<sup>3</sup> And because bargaining takes place off the record and is conveyed to clients in confidence, it is not easy to verify that defense counsel have represented their clients zealously and effectively.

Nevertheless, criminal procedure has long focused on jury trials. Even though guilty pleas resolve roughly ninety-five percent of adjudicated criminal cases,<sup>4</sup> the Supreme Court has usually treated plea bargaining as an afterthought, doing little to regulate it.<sup>5</sup> When it has regulated pleas, the Court has largely focused on the procedures for

---

\* Professor of Law and Criminology and Director, Supreme Court Clinic, University of Pennsylvania Law School. Thanks to Rick Bierschbach for advice and comments on earlier drafts.

<sup>1</sup> For a survey of these and other objections to plea bargaining, see Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 932–34 (1983).

<sup>2</sup> See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1126, 1143 (2011) [hereinafter Bibas, *Regulating the Plea-Bargaining Market*]; see also *Libretti v. United States*, 516 U.S. 29, 50–51 (1995) (“Apart from the small class of rights that require specific advice from the court under Rule 11(c), it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea would forgo.”).

<sup>3</sup> See generally Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2469–86 (2004).

<sup>4</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl. 5.24.2010, <http://www.albany.edu/sourcebook/pdf/t5242010.pdf> (reporting that guilty pleas resolved ninety-seven percent of adjudicated federal criminal cases in fiscal year 2010, excluding dismissals); *id.* tbl. 5.46.2006, <http://www.albany.edu/sourcebook/pdf/t5462006.pdf> (reporting that ninety-four percent of state felony convictions in 2006 resulted from guilty pleas).

<sup>5</sup> *E.g.*, MARKUS DIRK DUBBER, *THE POLICE POWER* 179 (2005) (“The plea bargaining process is governed by very few, if any, principles, with the blessing of the Supreme Court which has turned a blind constitutional eye.”).

waiving trial rights, not the substantive pros and cons of striking a deal.<sup>6</sup> This past Term, the Court for the first time addressed how the Sixth Amendment's guarantee of effective assistance of counsel applies to defendants who reject bargains and receive heavier sentences after fair trials. In *Lafler v. Cooper*<sup>7</sup> and *Missouri v. Frye*,<sup>8</sup> a five-to-four majority of the Court held that ineffectiveness that leads defendants to reject plea bargains can satisfy both the performance and prejudice prongs of *Strickland v. Washington*.<sup>9</sup> Incompetent lawyering that causes a defendant to reject a plea offer can constitute deficient performance, and the resulting loss of a favorable plea bargain can constitute cognizable prejudice, under the Sixth Amendment.<sup>10</sup>

The majority and dissenting opinions almost talked past each other, reaching starkly different conclusions because they started from opposing premises: contemporary and pragmatic versus historical and formalist. The dissenters would have limited the Sixth Amendment to the jury trials with which the Framers were concerned and proceedings ancillary to those trials.<sup>11</sup> As Justice Scalia put it at oral argument, a jury trial is “the 24-karat test of fairness,” and defendants who fail to plead guilty cannot complain that they received “the best thing [that] our legal system” has to offer.<sup>12</sup> Justice Kennedy's majority opinions, by contrast, rested heavily on the dominance of plea bargaining today and its central role in setting sentences as well as convictions. Even a fair trial cannot wipe away an earlier tactical decision that results in a much longer sentence after trial.<sup>13</sup>

Belatedly, the Court noticed that “ours ‘is for the most part a system of pleas, not a system of trials.’”<sup>14</sup> The Court, like Rip Van Winkle, has at last awoken from its long slumber and sees the vast field it has left all but unregulated.<sup>15</sup> Justice Scalia, in dissent, repeatedly as-

<sup>6</sup> Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 2, at 1122–27.

<sup>7</sup> 132 S. Ct. 1376 (2012).

<sup>8</sup> 132 S. Ct. 1399 (2012).

<sup>9</sup> 466 U.S. 668, 687 (1984); *see Frye*, 132 S. Ct. at 1408–10; *Lafler*, 132 S. Ct. at 1384–88.

<sup>10</sup> *Frye*, 132 S. Ct. at 1408–10; *Lafler*, 132 S. Ct. at 1384.

<sup>11</sup> *See Frye*, 132 S. Ct. at 1413–14 (Scalia, J., dissenting) (“The plea-bargaining process is a subject worthy of regulation, since it is the means by which most criminal convictions are obtained. It happens not to be, however, a subject covered by the Sixth Amendment, which is concerned not with the fairness of bargaining but with the fairness of conviction.”); *Lafler*, 132 S. Ct. at 1393 (Scalia, J., dissenting) (characterizing the majority's extension of Sixth Amendment protection to plea bargaining as “a vast departure from our past cases, protecting not just the constitutionally prescribed right to a fair adjudication of guilt and punishment, but a judicially invented right to effective plea bargaining”).

<sup>12</sup> Transcript of Oral Argument at 13–14, *Lafler*, 132 S. Ct. 1376 (No. 10–209).

<sup>13</sup> *Frye*, 132 S. Ct. at 1407; *Lafler*, 132 S. Ct. at 1388.

<sup>14</sup> *Frye*, 132 S. Ct. at 1407 (quoting *Lafler*, 132 S. Ct. at 1388).

<sup>15</sup> I am indebted to Ron Wright for the striking simile. Erica Goode, *Stronger Hand for Judges in the ‘Bazaar’ of Plea Deals*, N.Y. TIMES, Mar. 22, 2012, at A12 (“Professor [Ronald F.] Wright

---

---

sailed the majority for “open[ing] a whole new field of . . . plea-bargaining law,”<sup>16</sup> but it is about time. Now the big question is which institutions can and will ameliorate poor defense lawyering retrospectively or prospectively. The upshot, I predict, will depend on semi-private ordering: few reversals in court, but much more prospective extrajudicial reform.

*Lafler* and *Frye* will not cause courts of appeals to invalidate many convictions for constitutional error. Courts are poorly equipped to remedy woefully inadequate defense lawyering on their own. Plea bargaining creates little record, after-the-fact review is cumbersome and expensive, and courts are reluctant to reverse final judgments, intrude on prosecutors’ prerogatives to bargain, or subject defense counsel’s performance to searching review. *Lafler* and *Frye* will loosen these cautions a bit but will not open the floodgates. Moreover, judges cannot fix the massive underfunding and overwork that plague indigent defense counsel. The good news is that *Lafler* and *Frye* will probably have much bigger effects indirectly, in prompting solutions beyond the courts. Plea bargaining’s semiprivatized justice is best suited to semiprivatized remedies and reforms, backstopped by judges but driven by other actors. Other actors have the incentives and power to achieve, prospectively and flexibly, much that after-the-fact judicial review cannot. In the real world of plea bargaining, the parties’ stances are no longer antagonistic. Counterintuitively, even prosecutors and defendants have strong incentives to collaborate in explaining, promoting, and bulletproofing plea bargains.

Part I summarizes the facts and opinions in *Lafler* and *Frye*. The majority’s contemporary, functional analysis rested upon the dominance of plea bargaining today, while the dissenters’ formalistic logic idealized the historical jury trial as the Sixth Amendment’s exclusive concern. Part II is largely descriptive and predictive, explaining why judges are unlikely to overturn many convictions for violating *Lafler* and *Frye*. Though these decisions should apply retroactively even on federal habeas review, in practice courts will overturn few pleas, as defense lawyers’ bad advice is hard to prove and judges are understandably skeptical of postconviction appeals. Finally, Part III begins with prediction and analysis and ends with normative assessment of *Lafler* and *Frye*’s extrajudicial effects. It predicts that nonjudicial actors (especially prosecutors) will do much to solve plea bargaining’s problems prospectively, explains why they have the incentives to do so, describes how they can do it, and finally praises these developments. While

---

likened the court’s decisions on Wednesday to ‘Rip Van Winkle waking up. He looks around and says, “Wow, when I went to sleep the world was full of trials.”’).

<sup>16</sup> *Lafler*, 132 S. Ct. at 1391 (Scalia, J., dissenting); *accord id.* at 1398.

courts can do little on their own, they can create incentives for other market participants to explain offers and shore up their bargains.

## I. THE DECISIONS

### A. *The Facts*

Galvin Frye had three convictions for driving with a revoked driver's license and was charged with that offense a fourth time, making it a felony punishable by up to four years' imprisonment.<sup>17</sup> The prosecutor sent his defense counsel a letter offering Frye two plea options, one of which would have reduced the charge to a misdemeanor with a recommendation for a ninety-day sentence. The letter stated that both offers would expire on a certain date. Frye's lawyer never communicated the offers to Frye, and they expired. Frye then pleaded guilty without a plea agreement and was sentenced to three years' imprisonment.<sup>18</sup> On a state motion for postconviction relief, he testified that he would have accepted the misdemeanor offer if he had known about it. The state trial court denied the motion, but the Missouri Court of Appeals reversed. It found that Frye was prejudiced by the felony conviction and the higher maximum sentence, deemed Frye's plea withdrawn, and remanded to allow Frye to insist on a trial or to re-plead on whatever terms the prosecutor chose to offer.<sup>19</sup>

Anthony Cooper fired a gun at Kali Mundy's head and missed.<sup>20</sup> As Mundy fled, Cooper pursued her and kept shooting, hitting her in the buttock, hip, and abdomen but not killing her. The State of Michigan charged him with assault with intent to murder, possession of a firearm by a felon, possession of a firearm in committing a felony, misdemeanor marijuana possession, and being a habitual offender. Twice the State offered to dismiss two charges and recommend a sentence of fifty-one to eighty-one months on the others, and Cooper admitted guilt and expressed to the court his willingness to accept the offer. Yet Cooper's lawyer allegedly convinced him that the prosecution could not establish his intent to murder because Mundy had been shot below the waist. (That alleged advice was laughably bad.) Thus, he rejected the offer, was convicted at trial, and received the mandatory minimum sentence of 185 to 360 months.<sup>21</sup> On appeal, the state appeals court rejected his claim of ineffective assistance.<sup>22</sup> A federal district court

---

<sup>17</sup> *Frye*, 132 S. Ct. at 1404.

<sup>18</sup> *Id.* at 1404–05.

<sup>19</sup> *Id.* at 1405; *Frye v. State*, 311 S.W.3d 350, 360–61 (Mo. Ct. App. 2010).

<sup>20</sup> *Lafler*, 132 S. Ct. at 1383.

<sup>21</sup> *Id.*

<sup>22</sup> *People v. Cooper*, No. 250583, 2005 WL 599740, at \*1 (Mich. Ct. App. Mar. 15, 2005) (per curiam).

then granted habeas relief, ordering specific performance of the original plea offer despite the deferential standard of review under the Antiterrorism and Effective Death Penalty Act of 1996<sup>23</sup> (AEDPA) for state convictions.<sup>24</sup> The Sixth Circuit affirmed, finding prejudice in Cooper's lost opportunity to receive a lower sentence.<sup>25</sup>

### B. The Court's Opinions

1. *The Majority's Recognition: The Real World of Guilty Pleas.* — The majority's approach was at root functional and contemporary. The key to understanding the majority is recognizing its realization that today, plea bargains resolve roughly ninety-five percent of adjudicated criminal cases.<sup>26</sup> "The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process . . ." <sup>27</sup> Now that "'horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long[,] . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant."<sup>28</sup> Put another way, the battle today is rarely over conviction, which is usually a foregone conclusion, but over the sentence. A defendant has no right to a plea bargain, the *Lafler* majority noted, but once a plea offer is on the table, he has a right to reasonably competent counsel to minimize his sentence.<sup>29</sup>

Defendants reasonably expect not the maximum sentence, but the going rate established by the functioning market, the Court recognized.<sup>30</sup> "The expected post-trial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less as a bargain."<sup>31</sup> Now that trials are atypical, plea bargains are the norm. Legislatures authorize and prosecutors threaten long post-trial sentences as bargaining chips to be exchanged for pleas. Defendants

<sup>23</sup> Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

<sup>24</sup> *Cooper v. Lafler*, No. 06-11068, 2009 WL 817712, at \*5-10 (E.D. Mich. Mar. 26, 2009).

<sup>25</sup> *Lafler v. Cooper*, 376 F. App'x 563, 573 (6th Cir. 2010).

<sup>26</sup> *Frye*, 132 S. Ct. at 1407 (ninety-four percent of state convictions and ninety-seven percent of federal convictions); BUREAU OF JUSTICE STATISTICS, *supra* note 4, tbl. 5.24.2010; *id.* tbl. 5.46.2006.

<sup>27</sup> *Frye*, 132 S. Ct. at 1407.

<sup>28</sup> *Id.* (first alteration in original) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

<sup>29</sup> See *Lafler*, 132 S. Ct. at 1387; see also *Glover v. United States*, 531 U.S. 198, 203 (2001) ("[A]ny amount of [additional] jail time has Sixth Amendment significance."), *quoted with approval in Lafler*, 132 S. Ct. at 1386.

<sup>30</sup> See *Lafler*, 132 S. Ct. at 1387.

<sup>31</sup> *Id.* (quoting *Bibas, Regulating the Plea-Bargaining Market*, *supra* note 2, at 1138) (internal quotation marks omitted).

who take their chances and are convicted at trial thus receive longer sentences than equally culpable defendants who plead guilty.<sup>32</sup>

The majority refused to limit the right to effective counsel to trials and proceedings leading up to them. In *Lafler*, the petitioner and the Solicitor General argued forcefully that the Sixth Amendment's sole purpose is to protect the fairness of trials and the reliability of post-trial convictions.<sup>33</sup> On that view, the touchstone of prejudice would be whether a trial was unreliable — whether it risked convicting an innocent defendant. The majority reasoned, however, that the right to effective counsel extends to sentencing and comprehends any less favorable outcome, whether conviction or sentence. A heavier sentence can amount to cognizable prejudice, even if it flows from a fair trial.<sup>34</sup> So, fair trials do not wash away all constitutional errors that precede them, the majority held. Trials can even cause cognizable injury, as when going to trial more than tripled Cooper's sentence.<sup>35</sup>

Measuring prejudice will sometimes be difficult, requiring counterfactual speculation. First, as the majority held in both cases, a defendant must prove with a reasonable probability that he would have accepted a more favorable, lapsed plea offer but for counsel's ineffectiveness.<sup>36</sup> Where a defendant pleads guilty only after the prosecution reveals the strength of its case, for example, it may not be clear what he would have done absent that knowledge.<sup>37</sup> Second, prosecutors have discretion to withdraw executory plea offers, and courts need not accept plea bargains. Reviewing courts, the majority held, must thus find that there is a reasonable probability that neither the prosecution would have withdrawn the offer nor the trial court would have rejected it.<sup>38</sup> Intervening events, such as a defendant's new crimes, may suggest that the prosecution would have withdrawn the offer or that the court would not have accepted it.<sup>39</sup>

The real world of plea bargaining is dynamic, sensitive to context, and frequently off the record, as the majority noted. Negotiation is an art reflecting varied styles, and it is done beyond direct judicial supervision.<sup>40</sup> In *Frye*, the State of Missouri stressed the difficulties that prosecutors and courts face in learning about and rectifying out-of-court incompetence, which is cloaked by attorney-client privilege and

---

<sup>32</sup> See *Frye*, 132 S. Ct. at 1407 (quoting Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006)).

<sup>33</sup> See *Lafler*, 132 S. Ct. at 1385, 1387.

<sup>34</sup> *Id.* at 1385–88.

<sup>35</sup> *Id.* at 1386.

<sup>36</sup> *Frye*, 132 S. Ct. at 1409; *Lafler*, 132 S. Ct. at 1389.

<sup>37</sup> *Frye*, 132 S. Ct. at 1411.

<sup>38</sup> See *Lafler*, 132 S. Ct. at 1385, 1389–91; see also *Frye*, 132 S. Ct. at 1410–11.

<sup>39</sup> *Frye*, 132 S. Ct. at 1404–05, 1410–11 (detailing Frye's later crime).

<sup>40</sup> See *id.* at 1408 (citing *Premo v. Moore*, 131 S. Ct. 733, 741 (2011)).

subject to no clear standards.<sup>41</sup> Those problems of contextual standards and off-the-record facts are not new, however. *Strickland* requires defense attorneys to provide minimally competent assistance even when pursuing their clients' interests outside of court.<sup>42</sup> *Strickland* claims after trial frequently challenge pretrial failures to dig up mitigating evidence,<sup>43</sup> and they often depend on the evolution of "prevailing professional norms"<sup>44</sup> such as those reflected in ABA and state bar standards.

Thus, to define the scope of defense counsel's Sixth Amendment duty, the majority looked to ABA and state bar standards, as well as state and federal case law, to distill defense counsel's obligation to communicate formal plea offers to clients promptly.<sup>45</sup> And it suggested ways for prosecutors and trial courts to guard against false claims made with the benefit of hindsight. For instance, formal offers can be documented, written down, and placed on the record for use in later proceedings. Arizona, California, and New Jersey have already developed such procedures.<sup>46</sup>

The majority's approach gives reviewing courts broad discretion in deciding how to remedy Sixth Amendment violations. Courts must tailor remedies to redress constitutional injuries without conferring windfalls or wasting resources.<sup>47</sup> Here, the injury is a lengthened sentence and sometimes more serious convictions, so trial courts must exercise discretion in vacating pleas, accepting new pleas, and resentencing.<sup>48</sup> Sometimes, they may need to consider vacating post-trial convictions, granting remittitur (in effect) to lower post-trial sentences, or even ordering prosecutors to re-offer lapsed pleas.<sup>49</sup> The goal is to restore the prosecution and defense to the positions they would have been in but for the constitutional violation.<sup>50</sup>

The majority's approach to separation of powers is flexible. It favors checks and balances by a range of institutions. As noted, it relies on bar authorities and case law to flesh out defense lawyers' obligations. It encourages prosecutors, trial courts, and rules committees to

---

<sup>41</sup> *Id.* at 1406–07.

<sup>42</sup> *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

<sup>43</sup> *Id.* at 675–76; *see, e.g., Wiggins v. Smith*, 539 U.S. 510, 516–18, 524–25 (2003); *Williams v. Taylor*, 529 U.S. 362, 395–96 (2000); *see also Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010).

<sup>44</sup> *Strickland*, 466 U.S. at 688.

<sup>45</sup> *See Frye*, 132 S. Ct. at 1408.

<sup>46</sup> *See id.* at 1408–09.

<sup>47</sup> *Lafler*, 132 S. Ct. at 1388–89 (quoting *United States v. Morrison*, 449 U.S. 361, 364–65 (1981); *United States v. Mechanik*, 475 U.S. 66, 72 (1986)).

<sup>48</sup> *Id.* at 1389, 1391.

<sup>49</sup> *Id.* at 1389.

<sup>50</sup> *See id.* at 1388–89.

explore various ways to make records of plea offers.<sup>51</sup> And it authorizes trial judges to be creative in fashioning novel remedies, even when those remedies impinge on prosecutorial discretion by requiring prosecutors to reissue lapsed plea offers.<sup>52</sup>

One other hurdle for the Court in *Lafler* was that Cooper was a state prisoner before the Court on federal habeas review and the Court was therefore bound by AEDPA's deferential standard of review. That standard limits the federal habeas court to deciding whether the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."<sup>53</sup> The state court observed that Cooper "knowingly and intelligently rejected two plea offers and chose to go to trial."<sup>54</sup> That statement, as the majority read it, conflated a defendant's knowing and intelligent plea decision with the totality of the *Strickland* inquiry<sup>55</sup> and thus failed to apply the correct legal standard.<sup>56</sup> Furthermore, according to the majority, the state court mischaracterized Cooper's claim as criticizing his counsel for failing to secure a more favorable bargain.<sup>57</sup> Thus, the state court's ruling was contrary to *Strickland*; it applied the wrong rule of law. That reading avoided deferential review of whether the state court's application of clear law was unreasonable.<sup>58</sup> Moreover, the State conceded deficient performance, and one can read the state court's opinion as ignoring the prejudice to Cooper's ultimate sentence.<sup>59</sup> In short, the majority appears to view *Lafler* as a straightforward application of *Strickland*'s longstanding command,<sup>60</sup> thereby avoiding the retroactivity forbidden by AEDPA.

2. *The Dissenters' Classical Model: Criminal Procedure as Jury Trial.* — Justice Scalia's dissents in *Lafler* and *Frye* are implicitly originalist and formalist.<sup>61</sup> Assistance of counsel, he posited, is entirely

<sup>51</sup> See *Frye*, 132 S. Ct. at 1408–09.

<sup>52</sup> *Lafler*, 132 S. Ct. at 1389, 1391.

<sup>53</sup> 28 U.S.C. § 2254(d)(1) (2006).

<sup>54</sup> *People v. Cooper*, No. 250583, 2005 WL 599740, at \*1 (Mich. Ct. App. Mar. 15, 2005) (per curiam).

<sup>55</sup> See *supra* p. 156.

<sup>56</sup> *Lafler*, 132 S. Ct. at 1390.

<sup>57</sup> *Id.*; see also *Cooper*, 2005 WL 599740, at \*1.

<sup>58</sup> Nancy J. King, *Lafler v. Cooper and AEDPA*, 122 YALE L.J. ONLINE 29, 29–33 (2012), <http://yalelawjournal.org/2012/06/19/king.html>.

<sup>59</sup> See *Cooper*, 2005 WL 599740, at \*1.

<sup>60</sup> See *supra* p. 156.

<sup>61</sup> See generally Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183 (2005); Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 2, at 1121–22 (explaining how Justices Scalia's and Thomas's originalism and formalism have led them to a hands-off approach to plea bargaining).



about ensuring a fair trial.<sup>62</sup> The Sixth Amendment addresses the fairness only of convictions, not of bargaining.<sup>63</sup> Defendants have no right to plea bargains (or effective bargainers) and deserve no remedies for ineffective counsel.<sup>64</sup> Plea bargaining is “a necessary evil [rather than] a constitutional entitlement,”<sup>65</sup> because it turns criminal justice into a “casino[], giving each player a fair chance to beat the house, that is, to serve less time than the law says he deserves.”<sup>66</sup>

In Justice Scalia’s eyes, then, trials and post-trial sentences remain the norm. Regulation is a binary on/off switch, protecting the right to a jury trial but not to the lenient windfall of plea bargaining. The Constitution strictly polices jury verdicts and maximum sentences but not plea bargains or sentences below the maximum. Having pleaded guilty, Frye had no constitutional claim — indeed, he had admitted his own guilt, so his conviction was indisputably correct. And having gone to trial and received a statutorily authorized sentence, Cooper had no constitutional claim either.<sup>67</sup>

The dissenters also criticized the majority’s innovation as novel, mushy, and unclear. This “whole new boutique of constitutional jurisprudence (‘plea-bargaining law’)” remains murky, as it fails to specify the proper remedies, and lower courts will struggle to define its contours.<sup>68</sup> It is far from clear, for example, how courts will define defense lawyers’ duties in a way that accommodates the variety of styles and approaches to plea bargaining.<sup>69</sup> Justice Scalia also castigated the majority’s “unheard-of” remedy as too discretionary and incoherent.<sup>70</sup> The majority stretched the Court’s ineffective-counsel precedents, he submitted, in violation of AEDPA’s deferential standard of review on federal habeas.<sup>71</sup> The dissenters read the state court’s opinion in *Lafler* as reciting *Strickland*’s standard correctly and applying it reasonably to find no inadequate representation and thus no cognizable prejudice.<sup>72</sup>

---

<sup>62</sup> *Frye*, 132 S. Ct. at 1412 (Scalia, J., dissenting); see also *Lafler*, 132 S. Ct. at 1393 (Scalia, J., dissenting) (stressing that *Strickland*’s purpose is “to ensure a fair trial” (quoting *Strickland v. Washington*, 466 U.S. 668, 686 (1984))).

<sup>63</sup> *Frye*, 132 S. Ct. at 1414 (Scalia, J., dissenting).

<sup>64</sup> *Lafler*, 132 S. Ct. at 1394–95, 1397 (Scalia, J., dissenting).

<sup>65</sup> *Id.* at 1397.

<sup>66</sup> *Id.* at 1398.

<sup>67</sup> See *Frye*, 132 S. Ct. at 1412 (Scalia, J., dissenting).

<sup>68</sup> *Lafler*, 132 S. Ct. at 1392, 1398 (Scalia, J., dissenting).

<sup>69</sup> *Frye*, 132 S. Ct. at 1412–13 (Scalia, J., dissenting).

<sup>70</sup> *Lafler*, 132 S. Ct. at 1396–97 (Scalia, J., dissenting) (characterizing as “extraordinary” the majority’s statements that statutes, rules, and judicial discretion should shape the proper remedies for constitutional violations, and that sometimes there might be no remedy at all).

<sup>71</sup> *Id.* at 1395–96.

<sup>72</sup> *Id.*

That line of objections leads to a final one, grounded in the separation of powers. Though plea bargaining merits regulation, Justice Scalia submitted, that regulation has nothing to do with the Sixth Amendment. It is for legislatures, not courts, to develop nonconstitutional remedies, by for example disciplining attorney incompetence.<sup>73</sup> Both Justice Scalia's and Justice Alito's dissents evince concern about judges' abilities to regulate prosecutors' bargaining behavior.<sup>74</sup> As Justice Alito noted, requiring prosecutors to re-offer rejected plea offers as a remedy could undercut courts' and prosecutors' efforts to husband their scarce resources by encouraging early pleas.<sup>75</sup>

## II. BACK TO THE FUTURE: HOW MUCH HAS CHANGED AND WILL CHANGE?

In the short term, *Lafler* and *Frye* will matter less to the court system than one might expect. Though they reflect a significant jurisprudential debate, in practice their holdings are unlikely to upset many convictions or disrupt other aspects of judges' day-to-day work, *pace* Justice Scalia. As this Part explains, most circuits had already been applying the basic approach that the Court adopted in *Lafler* and *Frye* with few problems, few defendants will muster the necessary proof to demonstrate ineffective plea-bargaining assistance, judges are naturally disinclined to overturn convictions, and judges are unlikely to dispense overly generous remedies. Defendants must hope not so much for judicial redress after the fact as for other actors' proactive reforms to ensure competent advice in the first place, as Part III discusses.

The dissenters and majority offered starkly different accounts of how radical *Lafler* and *Frye* are in theory and what they will alter in practice. The dissenters, viewing the cases through originalist lenses, understood these cases as radically breaking with the Court's historical focus on jury trials and innocence. As Justice Scalia put it, "[t]oday's decision upends decades of our cases, violates a federal statute, and opens a whole new boutique of constitutional jurisprudence ('plea-bargaining law')."<sup>76</sup> According to his dissent, the Sixth Amendment and *Strickland* are limited to assuring fair trials and convictions, but the majority's decision shatters that limitation.<sup>77</sup> *Lafler* applied its novel holding retroactively upon federal habeas review, he objected, notwithstanding AEDPA's deferential standard of review.<sup>78</sup> And the

<sup>73</sup> *Frye*, 132 S. Ct. at 1414 (Scalia, J., dissenting).

<sup>74</sup> See *Lafler*, 132 S. Ct. at 1392 (Scalia, J., dissenting); *id.* at 1398–99 (Alito, J., dissenting).

<sup>75</sup> See *id.* at 1399 (Alito, J., dissenting).

<sup>76</sup> *Id.* at 1398 (Scalia, J., dissenting); *accord id.* at 1391 (“[T]he Court today opens a whole new field of constitutionalized criminal procedure: plea-bargaining law.”).

<sup>77</sup> See *id.* at 1392–95.

<sup>78</sup> *Id.* at 1395–96.

majority's discretionary "remedy [is] unheard-of in American jurisprudence — and, I would be willing to bet, in the jurisprudence of any other country."<sup>79</sup> Indeed, according to the State, these radical new decisions could open the floodgates to a raft of novel, dubious prisoner claims.<sup>80</sup> Even discounting for Justice Scalia's hyperbole, these are forceful charges.

The majority, however, portrayed its approach as applying the settled law of *Strickland* and prevailing professional norms to a new problem. Various precedents had held that fair trials did not suffice to cure other errors, such as grand jury errors.<sup>81</sup> *Strickland*'s goal of ensuring a "just result," the majority explained, concerns the reliability not only of convictions but also of sentences, even for guilty defendants.<sup>82</sup> Finally, the majority discounted the State's floodgates concern, noting that similar rules have existed for three decades without causing a flood of claims and that prosecutors and judges can guard against fabricated claims.<sup>83</sup>

Jurisprudentially, each side has a point. The truth lies somewhere in between, but the majority has the better of the argument. The majority's substantive approach is not so much an innovation as an unflinching application of *Strickland* to a circumstance it had never before addressed. *Strickland* has long required courts to apply prevailing professional norms as guideposts (not rigid requirements) of attorney conduct, and of late the Court has been enforcing that requirement with increasing vigor.<sup>84</sup> *Lafler* and *Frye* may be part of this trend that may be reinvigorating *Strickland*; they are hardly departures from it. The decisions did come as a surprise to many observers — but largely because the Court showed that it meant what it had said.

Like their jurisprudential point, the dissenters' practical fears are not unreasonable. *Lafler*'s retroactivity holding means that these decisions will apply not only on direct appeal but also upon federal habeas

---

<sup>79</sup> *Id.* at 1396.

<sup>80</sup> *Id.* at 1389 (majority opinion) (citing Brief for Petitioner at 20, *Lafler*, 132 S. Ct. 1376 (No. 10-209)).

<sup>81</sup> *Id.* at 1386. *Contra id.* at 1393 n.1 (Scalia, J., dissenting) (objecting that the majority was relying on precedents interpreting rights other than the right to effective counsel, rights that do not require proof of prejudice to establish violations).

<sup>82</sup> *See id.* at 1385–88 (majority opinion) (citing, for example, *Kimmelman v. Morrison*, 477 U.S. 365, 379–80 (1986), which recognized a federal habeas petitioner's right to effective counsel in moving to suppress illegally seized evidence, even though that evidence may serve as factual proof of guilt, *Lafler*, 132 S. Ct. at 1388).

<sup>83</sup> *Id.* at 1389–90.

<sup>84</sup> For *Strickland*'s settled requirements, see *Strickland v. Washington*, 466 U.S. 668, 688 (1984). For the Court's recent, vigorous enforcement of *Strickland*, see *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005); *Wiggins v. Smith*, 539 U.S. 510, 522 (2003); and *Williams v. Taylor*, 529 U.S. 362, 396 (2000).

review, notwithstanding AEDPA's and *Teague v. Lane*'s<sup>85</sup> bars to retroactivity.<sup>86</sup> Thus, prisoners can use *Lafler* and *Frye* to challenge convictions and sentences that became final years ago, raising fears of opening floodgates.

Nevertheless, as a practical matter, *Lafler* and *Frye* are unlikely to free many prisoners, for four reasons. First, these decisions recognized ineffective-assistance standards that most federal courts and bar authorities were already applying without evident problems. Ten federal circuits have already applied rules consistent with the majority's rule, without causing obvious disruptions.<sup>87</sup> National and state bar authorities as well as courts developed those norms to require defense lawyers to communicate plea offers promptly to their clients.<sup>88</sup> Thus, the core rule has already proven to be workable, and in many jurisdictions it does not change the law.

Second, defendants will find it very hard to satisfy both *Strickland*'s performance and prejudice prongs under *Lafler* and *Frye* — just as they do under *Strickland* itself. *Strickland*'s performance standard is so lax that any “lawyer with a pulse will be deemed effective.”<sup>89</sup> Courts are understandably wary of Monday-morning quarterbacking and deferential to the varied approaches to plea bargaining, which often reflect local knowledge and experience.<sup>90</sup> When in doubt, they interpret attorneys' omissions as tactical decisions to triage and conserve resources and credibility, rather than as negligent oversights.<sup>91</sup> *Frye* and *Lafler* were especially egregious cases of deficient performance: *Frye*'s lawyer entirely failed to communicate a formal, written plea offer to his client for more than a month, while *Cooper*'s lawyer misadvised him that because he had shot his victim below the

---

<sup>85</sup> 489 U.S. 288 (1989) (plurality opinion).

<sup>86</sup> See 28 U.S.C. § 2254(d)(1) (2006) (limiting federal habeas review to state convictions that had unreasonably misapplied or contravened law that had been clearly established at the time by the U.S. Supreme Court); *Teague*, 489 U.S. at 310 (holding that new rules of criminal procedure ordinarily do not apply retroactively to cases on collateral review). The parties did not brief *Teague* and the Court did not discuss it, but *Lafler*'s retroactivity holding under AEDPA should apply with equal force to defeat *Teague* bars as well.

<sup>87</sup> *Lafler*, 132 S. Ct. at 1385, 1389–90; see Gerard E. Lynch, *Frye and Lafler: No Big Deal*, 122 YALE L.J. ONLINE 39, 39 (2012), <http://yalelawjournal.org/images/pdfs/1097>.

<sup>88</sup> *Frye*, 132 S. Ct. at 1408.

<sup>89</sup> Marc L. Miller, *Wise Masters*, 51 STAN. L. REV. 1751, 1786 (1999) (reviewing MALCOLM M. FEELEY & EDWARD L. RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE* (1998)).

<sup>90</sup> See *Frye*, 132 S. Ct. at 1408; *Premo v. Moore*, 131 S. Ct. 733, 741 (2011).

<sup>91</sup> See *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (requiring “highly deferential” judicial review and erecting a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, . . . [that it] ‘might be considered sound trial strategy’” (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955))).

waist, the prosecution could not prove his intent to murder.<sup>92</sup> Few defendants can prove such gross incompetence.

Additionally, *Strickland*'s prejudice requirement lets courts excuse even gross deficiencies so long as they did not affect the outcome.<sup>93</sup> Defendants will find it hard to prove that prosecutors would have left plea offers on the table and that judges would have accepted proposed bargains, and thus that defendants would ultimately have benefitted from the proposed bargains. That prejudice is especially difficult to prove when new facts or litigation developments have intervened.<sup>94</sup>

Third, judges are naturally skeptical and loath to overturn convictions and sentences, particularly final ones.<sup>95</sup> That judicial inclination, whether conscious or unconscious, reinforces the difficulties of proving deficient performance and prejudice under *Strickland*. Judges are inclined to credit an officer of the court over a convicted felon who impugns his lawyer's performance. Appellate and habeas courts are understandably skeptical of the flood of post hoc, self-serving claims raised by defendants who were convicted at trial and regret their decisions not to plead.<sup>96</sup> Judges hear so many boilerplate claims of ineffectiveness that they risk disregarding the valid ones as well. As Justice Jackson famously put it: "It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."<sup>97</sup>

Moreover, in hindsight, defendants' decisions to proceed to trial may seem to have been inevitable, in keeping with psychological studies of hindsight bias and the confirmatory bias.<sup>98</sup> Plea decisions are especially likely to seem inevitable in hindsight because challenges depend on off-the-record evidence that is hard to prove.<sup>99</sup> Few defendants have documentary or other evidence that their attorneys did not tell them of a plea offer or gave them incorrect advice. Given the difficulty of proving such claims and satisfying both of *Strickland*'s prongs, few *Strickland* claims of any sort succeed, let alone fabricated ones.<sup>100</sup> Defendants will succeed only where egregious, provable ineffectiveness causes palpably longer sentences.

---

<sup>92</sup> *Frye*, 132 S. Ct. at 1404; *Lafler*, 132 S. Ct. at 1383.

<sup>93</sup> See *Strickland*, 466 U.S. at 687.

<sup>94</sup> See *Frye*, 132 S. Ct. at 1409–11.

<sup>95</sup> See Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 3 [hereinafter Bibas, *The Psychology of Hindsight*].

<sup>96</sup> See *id.* at 4; see also Lynch, *supra* note 87, at 41.

<sup>97</sup> *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring in result).

<sup>98</sup> Bibas, *The Psychology of Hindsight*, *supra* note 95, at 2–3.

<sup>99</sup> See *id.* at 4.

<sup>100</sup> See *id.* at 1 n.5; see also *Lafler*, 132 S. Ct. at 1389–90 (reporting an absence of flood of claims or windfalls over the last three decades); Lynch, *supra* note 87, at 42.

Fourth, even when injured defendants do prevail, judges are unlikely to overcompensate them; if anything, they may undercompensate them. The *Lafler* and *Frye* majority opinions leave judges broad discretion to decide what remedy to select or, indeed, whether to award any remedy at all,<sup>101</sup> and judges are unlikely to err on the side of leniency. Trials paint vivid portraits of defendants' crimes, providing a wealth of damaging evidence that necessarily colors judges' later sentences. Other events may also bring new, damaging facts to light, such as Frye's post-plea-offer crime, and judges need not necessarily ignore those facts.<sup>102</sup> Judges may take into account the substantial resources that courts and prosecutors have had to expend to try a case,<sup>103</sup> as well as the burdens on witnesses, the exposure of confidential informants, and the like. Thus, even when they award relief, courts' remedies are unlikely to be windfalls.

Given *Strickland*'s extreme deference to attorneys' strategic decisions, the difficulty of proving off-the-record bargaining behavior, and habeas courts' reluctance to reverse final convictions and grant substantial remedies, *Lafler* and *Frye* probably will free few inmates from prison. The dissenters' floodgates fears are thus overblown. Many prisoners will file claims, but few will succeed, and the cases of those prisoners who do succeed will mostly involve egregious ineffectiveness and grave prejudice. Courts will dismiss the many meritless claims quickly and without wasting much time, as they dismiss many ineffective-assistance claims today. But, as I predict in the next Part, *Lafler* and *Frye* will likely spur other institutions to reform plea bargaining.

### III. SOLUTIONS BEYOND THE COURTS

While judges are unlikely to remedy ineffective assistance after the fact, other actors are better positioned to forestall or remedy poor advice going forward. In his *Frye* dissent, Justice Scalia complained that the majority usurped the role of legislatures in regulating plea bargaining and enacting tailored remedies.<sup>104</sup> But in fact, the majority opinions in *Frye* and *Lafler* leave plenty of room for other institutions and may even prompt them to act. *Lafler* leaves much to the discretion of trial courts in fashioning remedies,<sup>105</sup> and to appellate courts, legislatures, and rules committees in guiding that remedial discretion. *Frye*

---

<sup>101</sup> *Lafler*, 132 S. Ct. at 1388–89.

<sup>102</sup> *See id.* at 1389 (declining to direct judges to disregard later information).

<sup>103</sup> *See id.* at 1398–99 (Alito, J., dissenting) (expressing hope that lower courts will take these factors into account).

<sup>104</sup> *Frye*, 132 S. Ct. at 1413–14 (Scalia, J., dissenting).

<sup>105</sup> *See Lafler*, 132 S. Ct. at 1389, 1391.

likewise suggests that these actors, as well as prosecutors, can experiment with various reforms to guard against false claims made with the benefit of hindsight.<sup>106</sup> In contrast to Justice Scalia's static approach to the separation of powers, the majority envisions dynamic, fluid collaboration among various branches and actors.<sup>107</sup>

*Lafler* and *Frye* thus raise three related issues (one predictive, one descriptive, and one normative) concerning how various criminal-justice actors will, can, and should reform plea bargaining prospectively. First, I analyze the various actors' incentives and powers and find, surprisingly, that even prosecutors have strong incentives to promote and safeguard plea bargains. Thus, I predict that these decisions will spur actors to reform the process. The majority's approach seems less likely to shut down reforms than to draw attention to and jumpstart a stalled process. Second, I sketch out the range of possible and feasible reforms. Finally, I praise the likely direction of development. Plea bargaining has existed for centuries and been dominant for decades. It is about time that courts spurred other institutions to act.

*A. Analyzing Actors' Incentives and Predicting Spurs to Reform*

Some of the most important solutions, I suspect, will come from prosecutors. That conclusion is highly counterintuitive, like trusting foxes to guard henhouses. At an adversarial trial, prosecutors' interests are largely antithetical to those of defendants. Even though their job is to do justice, not to win convictions, their adversarial outlook at trial makes them poor guardians of defendants' interests.<sup>108</sup>

Nevertheless, prosecutors now have the right incentives to help their erstwhile opponents. Plea bargaining today is fundamentally not adversarial but collaborative (some would say collusive). The world of criminal justice has been transformed from a gladiatorial ring to a negotiating table, and that transformation has revolutionized the parties' incentives. The quasi-market forces at work encourage all parties involved to work together to achieve plea bargains that benefit all parties directly involved. Prosecutors have strong self-interests and institutional interests in disposing of their cases quickly and consensually, so they can pursue other cases or lighten their own workloads.<sup>109</sup> When they make plea offers, they want defendants to receive them,

---

<sup>106</sup> *Frye*, 132 S. Ct. at 1408–09.

<sup>107</sup> See *supra* pp. 156–67; see also Stephanos Bibas, *Justice Kennedy's Sixth Amendment Pragmatism*, 44 MCGEORGE L. REV. (forthcoming 2012) (manuscript at Part III.A) (on file with the Harvard Law School Library).

<sup>108</sup> See Stephanos Bibas, *Brady v. Maryland: From Adversarial Gamesmanship Toward the Search for Innocence?*, in CRIMINAL PROCEDURE STORIES 129, 131–32, 140–42 (Carol S. Steiker ed., 2006).

<sup>109</sup> Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra* note 3, at 2470–71.

understand them, and accept them. Misadvice or nonadvice that hinders that process thwarts case dispositions, creating backlogs and more work for prosecutors. And errors in plea bargaining breed appeals and habeas petitions, extra work by which no prosecutor wants to be haunted long after a conviction.<sup>110</sup>

Thus, prosecutors have incentives first to persuade defendants to accept their plea offers, and second to make clean records to bullet-proof their convictions on appeal and habeas review. In plea bargaining, unlike at trial, their interests largely align with those of defendants and the system. Both prosecutors and defendants are worse off if ineffective defense lawyering obstructs favorable deals. Not only do prosecutors have the incentives to prevent defense incompetence, but they also have the means. Prosecutors are closely involved in individual cases, and they themselves extend plea offers. They are best positioned to prevent and counteract errors.

Many of those same incentives will spur other actors to collaborate on reforms. Trial judges have strong incentives to clear their own dockets by encouraging defendants to accept deals and making those deals bulletproof. Defender organizations need to resolve large volumes of cases quickly and finally while forestalling charges of attorney incompetence later on. Advisory rules committees and bar associations comprise judges, prosecutors, and defense lawyers, who share the incentives discussed above. Legislatures likewise favor plea bargaining as a cheap, fast way to ensure public safety by locking up criminals.<sup>111</sup> *Lafler* and *Frye* give all of these actors strong incentives to ensure that defendants receive plea offers and understand them well enough to accept them.

These surprising incentives track those created two years ago by the Supreme Court's decision in *Padilla v. Kentucky*,<sup>112</sup> which recognized noncitizen defendants' right to receive accurate information about deportation before they plead guilty.<sup>113</sup> In *Padilla*'s wake, some prosecutors' offices began giving defendants written warnings, listing the types of convictions that could trigger immigration consequences.<sup>114</sup> Some judges began orally warning defendants, at arraignment

---

<sup>110</sup> See *Premo v. Moore*, 131 S. Ct. 733, 742 (2011) ("Prosecutors must have assurance that a plea will not be undone years later because of infidelity to the requirements of AEDPA and the teachings of *Strickland*.").

<sup>111</sup> See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 550–52 (2001).

<sup>112</sup> 130 S. Ct. 1473 (2010).

<sup>113</sup> *Id.* at 1486.

<sup>114</sup> *E.g.*, CRIMINAL COURTS & CRIMINAL JUSTICE OPERATIONS COMMS., N.Y.C. BAR ASS'N, *PADILLA V. KENTUCKY: THE NEW YORK CITY CRIMINAL COURT SYSTEM, ONE YEAR LATER 6* (2011) [hereinafter NYC BAR REPORT], available at <http://www2.nycbar.org/pdf/report/uploads/PadillaCrimCtsCJOReportFINAL6.15.11.pdf>.



or plea hearings, about immigration consequences, verifying that their lawyers had advised them, or even inquiring into defendants' immigration status on the record.<sup>115</sup> Bar associations, public-defender organizations, courts, and public-interest groups began training defense lawyers and advising judges on *Padilla*.<sup>116</sup> Some public defenders began cultivating in-house immigration experts among their attorneys and staff, as well as changing arraignment procedures and providing guides and checklists for defense lawyers to follow in preparing cases.<sup>117</sup> Public-interest groups provided guides, checklists, and charts to foster *Padilla* compliance, and one even offers a hotline to assist defense lawyers who may lack in-house support.<sup>118</sup> The American Bar Association has been developing guidance for prosecutors and defense lawyers on their obligations post-*Padilla*.<sup>119</sup> Likewise, the Advisory Committee on the Federal Rules of Criminal Procedure has recommended augmenting the rules governing plea colloquies to put *Padilla* warnings on the record.<sup>120</sup>

In other words, *Padilla* sent a seismic shock through the system. It woke up a wide range of actors and prodded them all to address a problem that they had largely ignored until then. And in many ways, *Lafler* and *Frye* present even more promising areas for reform than *Padilla*. *Padilla* warnings risk discouraging guilty pleas, or at least slowing them down, by advising defendants of the disadvantages of taking a plea. On their face, they cut against the parties' incentives to

---

<sup>115</sup> *E.g.*, *id.* at 7; IMMIGRANT DEF. PROJECT & N.Y.U. SCH. OF LAW IMMIGRANT RIGHTS CLINIC, JUDICIAL OBLIGATIONS AFTER *PADILLA V. KENTUCKY* 13–14 (2011), available at <http://immigrantdefenseproject.org/wp-content/uploads/2011/11/postpadillaFINALNov2011.pdf>; see also Danielle M. Lang, Note, *Padilla v. Kentucky: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful Padilla Claims*, 121 YALE L.J. 944, 975–84 (2012) (reporting an empirical study of post-*Padilla* cases finding dozens of cases in which the trial court gave some form of *Padilla* warning).

<sup>116</sup> *E.g.*, NYC BAR REPORT, *supra* note 114, at 4. See generally, *e.g.*, Steven Weller & John A. Martin, *Implications of Padilla v. Kentucky for the Duties of the State Court Criminal Judge*, JUDGES' J., Winter 2011, at 13.

<sup>117</sup> *E.g.*, NYC BAR REPORT, *supra* note 114, at 4–5.

<sup>118</sup> *E.g.*, *id.*; AM. BAR ASS'N CRIMINAL JUSTICE SECTION, *PADILLA AND BEYOND* 23–54 (2010), available at <http://adwww2.americanbar.org/sections/criminaljustice/CR109200/Public Documents/padilla.pdf> (reprinting practice advisories, checklists, and interview sheet by The Bronx Defenders, Immigrant Legal Resource Center, Immigrant Defense Project, Public Defender Service for the District of Columbia, and American Bar Association Criminal Justice Section).

<sup>119</sup> Mark Walsh, *Weighing the Consequences: Task Force Probes Defense Lawyers' Role After Padilla*, A.B.A. J., Apr. 2011, at 60–61, available at [http://www.abajournal.com/magazine/article/task\\_force\\_probes\\_defense\\_lawyers\\_role\\_after\\_padilla/](http://www.abajournal.com/magazine/article/task_force_probes_defense_lawyers_role_after_padilla/).

<sup>120</sup> See Memorandum from Hon. Richard C. Tallman, Chair, Advisory Comm. on Fed. Rules of Criminal Procedure, to Hon. Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure (Dec. 8, 2010), available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publication%20Aug%202011/CR\\_Dec\\_2010.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publication%20Aug%202011/CR_Dec_2010.pdf) (proposing the adoption of Federal Rule of Criminal Procedure 11(b)(1)(O), which would require warning criminal defendants at plea colloquies that, if convicted, noncitizen defendants may be removed or denied admission or citizenship).

dispose of their cases, but the desire to do the right thing and to obtain bulletproof convictions has trumped the fear of impeding pleas. *Lafler* and *Frye* remedies cut the other way, harnessing the parties' existing incentives to secure final pleas. They should elicit even greater semi-private efforts to ensure that defendants learn about the advantages of plea offers in order to induce them to accept favorable pleas.

### B. Surveying Possible Reforms

There are many ways to improve the quality of defense lawyering. Most obviously, legislatures could attack the well-known systemic problems plaguing indigent defense. Appointed defense counsel are underfunded, have little support, and need better training and incentives to attract and retain experienced counsel. Legislatures could fund many more public defenders, paralegals, investigators, and the like, so that lawyers could juggle fewer cases and focus more on each one. These structural solutions, however, would cost plenty of money, and criminal defendants are an unpopular constituency, so change is unlikely any time soon.

Other institutions are more likely to enact less ambitious, more targeted reforms. Some steps are obvious, simple, and cheap. Prosecutors can reduce plea agreements to writing, in plain English, and cc clients when they send those agreements to defense lawyers. Prosecutors can also send defendants and their lawyers letters setting forth their understandings of the likely guideline sentences after trial or a plea, as well as of any enhancements that may apply.<sup>121</sup> And they can write liquidated-damages-type clauses to provide for various contingencies, such as the possibility that new evidence comes to light or that a defendant commits another crime. That process would prompt defendants and their lawyers to focus on those contingencies and discuss them.

But prosecutors can do much more. In particular, they can hold so-called reverse proffer sessions. In a proffer, the defendant comes to the prosecutor's office to tell what he knows. In a reverse proffer, the defendant remains silent. Instead, the prosecutor explains how the government would convict the defendant at trial and may choose to reveal more information than required by the discovery rules.<sup>122</sup> Prosecutors could do something similar to sell recalcitrant defendants on plea offers, by explaining both the likelihood of conviction and the expected sentence after a trial versus a plea. Defendants could ask a few questions, and even a ten-minute conversation could accurately communi-

---

<sup>121</sup> See Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 2, at 1156 (noting that federal prosecutors in the Second Circuit are encouraged to provide similar letters to defendants).

<sup>122</sup> See Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra* note 3, at 2525.

cate the prosecutor's offer and the strengths of his case. It would not be necessary to hold reverse proffers for all defendants but only for the small fraction who resist accepting favorable offers. Prosecutors could even audiotape or videotape reverse proffers. Taping would facilitate judicial review and forestall belated claims that defendants had never received offers or had not understood them.

Supervisors in public-defender organizations and criminal-defense law firms can also pursue reforms. They play a crucial role in training new lawyers and providing feedback to experienced ones. They can periodically consult with their line attorneys on cases and sit in on a few of them. After cases end, supervisors can audit random samples of them and solicit feedback from clients (as well as prosecutors and judges) on how lawyers can improve. And supervisors can use this information in hiring, firing, pay, and promotion decisions, to weed out the weakest lawyers.

Advisory rules committees could redraft Federal Rule of Criminal Procedure 11 and analogous rules governing plea colloquies in state court. Amendments could have judges inquire, at pretrial conferences as well as at plea colloquies, whether any plea offers had been made, communicated, and discussed with counsel. Amended rules could provide for reducing all formal plea offers to writing and for including them in the court record. They could also loosen the current ban, effective in a majority of jurisdictions, on letting judges participate in the discussion of or share their views on plea offers.<sup>123</sup>

Even in the absence of new rules, judges can enact many of these practices on their own. Perhaps they can interpret bans on participating in plea bargaining narrowly and at least explain, neutrally, the terms of plea offers. Particularly if rules let them participate, they can go further to debias defendants and counteract their overoptimism, providing accurate information about conviction rates and expected sentences for similar crimes, or even restrained advice. Such measures could partly offset judges' inability to pry into privileged attorney-client conversations, during which defense lawyers may offer bad advice (as in *Lafler*). Sentencing commissions could assist judges and defense lawyers by compiling conviction and sentence statistics for common crimes and translating them into easy-to-grasp graphics.

Bar organizations can do more too. They draft and update various disciplinary rules, ethical canons, and standards of practice to define

---

<sup>123</sup> See, e.g., FED. R. CRIM. P. 11(c)(1) (forbidding judges to participate); MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES 1176 (4th ed. 2011). Allowing judicial involvement might need to be coupled with reassigning cases to different judges if defendants choose to go to trial. That procedure would allay a defendant's fear that a judge could retaliate against him if he refused to heed that judge's advice to take a particular plea offer. See Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra* note 3, at 2543.

lawyers' professional obligations. They can require their members to learn these rules as part of bar exam preparation and continuing legal education. They can develop training materials and checklists specifically for prosecutors and criminal defense lawyers, both to instruct new lawyers and to keep experienced ones from overlooking their obligations to advise their clients of plea offers. And they can embarrass, suspend, or even disbar attorneys who violate their obligations, particularly when errors are repeated or egregious.

### C. Praising Extrajudicial Reforms

The previous sections describe the parties' incentives and means to reform plea bargaining and predict that they will act on those incentives to reform the system. Now it is worth exploring why these developments are desirable.

The basic justification for *Lafler* and *Frye* comes from Justice Kennedy: Today, plea bargaining “is the criminal justice system.”<sup>124</sup> For the Sixth Amendment to remain meaningful in the real world of guilty pleas, defense lawyers must provide minimally adequate assistance in plea bargaining and sentencing, not just at the occasional jury trial. The right to effective counsel should extend to the amount of punishment, not just the fact of guilt. Fair trials do not automatically wipe away grossly ineffective plea bargaining and the heavier sentences that result.<sup>125</sup> Thus, *Lafler* and *Frye* rightly spur other actors to prevent and fix these injustices.

Moreover, extrajudicial reforms will help to ensure that convictions are fair and accurate. The Sixth Amendment presupposes a vigorous, effective adversarial system to test not only defendants' factual guilt but also their culpability and the sentences they deserve. That adversarial testing requires defense lawyers to probe prosecutors' cases, dicker over their offers, and advocate for the most favorable outcomes available in the plea-bargaining market. Other actors, including judges and prosecutors, can help defense lawyers to do their jobs well, backstopping them where they fall short. More collaboration can only help to alleviate the uneven quality of criminal defense.

Thus, *Lafler* and *Frye* stand to improve criminal justice. A particular defense lawyer's incompetence can lead to a much longer sentence. *Lafler* and *Frye* are far from panaceas for sloth, ineptitude, and overwork, but they do provide a remedy for some of the worst incompetence, and they prod other actors to pursue further reforms. The result should be sentences that are tied more to the strength of the evi-

---

<sup>124</sup> *Frye*, 132 S. Ct. at 1407 (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)) (internal quotation mark omitted).

<sup>125</sup> See *id.*

dence and the severity of the crime and criminal record than to irrelevant tactical failures. That focus better serves the core purposes of punishment: retribution, deterrence, incapacitation, and reform. As long as we have a system of plea bargaining, the merits should matter more and lawyers' skill should matter less.

Finally, the extrajudicial reforms likely to be prompted by *Lafler* and *Frye* can work well because they go with the grain of plea bargaining, not against it. They do not seek to squelch bargains that the parties desire. On the contrary, they ensure that clients know about those bargains and the advantages of taking them. Thus, they complement prosecutors', judges', and defense lawyers' existing incentives to clear their dockets and strike mutually advantageous deals.

Nevertheless, critics might reasonably object, on four grounds, that it is not the Court's business to provoke other actors to reform plea bargaining. First, a critic could complain that the Supreme Court has recognized an obligation that belongs to defense lawyers but has forced others to pay the price of this obligation. Prosecutors, judges, bar associations, and others, rather than the defense lawyers who are at fault, will have to work to accommodate *Lafler* and *Frye* in order to forestall appellate reversals. Indeed, in *Frye*, the State cast the issue as unfairness to the State in that the court was "subject[ing] it to the consequences of defense counsel's inadequacies."<sup>126</sup>

That objection misses the mark. True, *Lafler* and *Frye* obligate only defense counsel to provide accurate advice.<sup>127</sup> They do not directly obligate prosecutors, judges, and others. But, in a sense, the entire criminal justice system bears the obligation of ensuring fair, accurate convictions. The Sixth Amendment does not confer rights on states, but on "the accused" "[i]n all criminal prosecutions."<sup>128</sup> The right to counsel, like the other trial rights guaranteed by the Sixth Amendment, is more than a negative right against governmental interference. Just as it must provide speedy, public trials in front of juries, with compulsory process and confrontation, the state must also take affirmative steps to provide defendants with effective counsel.<sup>129</sup> *Brady v. Maryland*<sup>130</sup> requires prosecutors to turn over favorable evidence material to guilt or to punishment, irrespective of any prosecutorial wrongdoing.<sup>131</sup> Likewise, judges are obligated to ensure that defendants under-

---

<sup>126</sup> *Id.*

<sup>127</sup> See *id.* at 1408; *Lafler*, 132 S. Ct. at 1384.

<sup>128</sup> U.S. CONST. amend. VI.

<sup>129</sup> See, e.g., *Strickland v. Washington*, 466 U.S. 668, 687–89 (1983); *Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963); *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932).

<sup>130</sup> 373 U.S. 83 (1963).

<sup>131</sup> See *id.* at 87; *United States v. Bagley*, 473 U.S. 667, 682–83 (1985).

stand the rights they are waiving by pleading guilty.<sup>132</sup> These actors can also backstop defense lawyers, offering accurate information or even second opinions and answering defendants' questions without intruding on their privileged conversations. Ours is no longer a true adversarial system, but a plea-bargaining market. Encouraging the sellers of pleas to explain their prices clearly and transparently and the arbiters to verify the explanation of those prices is not too much to ask.

Second, the dissenters raise legitimate separation-of-powers concerns. Traditionally, prosecutors secure grand jury indictments to bring charges, petit juries convict, and judges sentence. Prosecutors, not judges, decide what charges to initiate and which to dismiss. Thus, ordering the prosecutor in *Lafler* to reoffer the lapsed plea offer<sup>133</sup> appears to intrude upon prosecutorial discretion. One could offer the same objection to prodding other actors to come up with new solutions.

But today, grand juries are rubber stamps, petit juries are absent in most cases, and prosecutors use mandatory minimum and maximum sentences to tie judges' hands. Charging *is* now convicting, which *is* sentencing. Plea bargaining itself has undermined these checks and balances, and judges need to use their remedial powers to restore some semblance of balance, however imperfect. The job of the judge is to impose a sentence based primarily on the need for retribution, deterrence, incapacitation, and reform, not one dictated by grossly incompetent lawyering. The separation of powers does not require judges to abdicate their sentencing power to charge-bargaining prosecutors and inept defense counsel. If anything, rectifying bad defense lawyering helps to ensure the adversarial check presupposed by the Sixth Amendment.

Third, Judge Rakoff objects that *Frye* and *Lafler* create perverse incentives, encouraging defense lawyers to push their clients to plead too early.<sup>134</sup> Defendants, he notes, are best served when their lawyers invest a bit of work to develop factual and legal defenses in order to strengthen their bargaining positions. That background work increases the chances that they will strike more favorable plea bargains or discover defenses that enable them to prevail at trial.<sup>135</sup> Inadequate financial resources and crushing caseloads already encourage many criminal defense lawyers to push clients to plead early, which weakens

---

<sup>132</sup> See FED. R. CRIM. P. 11(b); *Boykin v. Alabama*, 395 U.S. 238, 242–44 (1969).

<sup>133</sup> *Lafler*, 132 S. Ct. at 1391.

<sup>134</sup> Jed S. Rakoff, *Frye and Lafler: Bearers of Mixed Messages*, 122 YALE L.J. ONLINE 25, 26–27 (2012), <http://yalelawjournal.org/2012/06/18/rakoff.html>.

<sup>135</sup> *Id.*

their bargaining position.<sup>136</sup> *Frye* and *Lafler*, Judge Rakoff complains, exacerbate lawyers' incentives to plead cases out too early instead of investing more work, because waiting might occasionally lead to worse results and belated claims of ineffectiveness.<sup>137</sup>

Ineffective assistance claims, however, rarely succeed and will not warp defense lawyers' incentives. Judges and commentators know that waiting involves taking a calculated risk of a worse result, and calculated risks do not always pay off. As the Court has recognized, "[p]lea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks" when deciding whether to take an early bargain or hold out for a better one.<sup>138</sup> Defendants routinely raise ineffective-assistance challenges to whatever decisions their counsel have made, and courts just as routinely brush these challenges off as 20/20 hindsight or Monday-morning quarterbacking.<sup>139</sup> That is doubly true in guilty-plea cases, in which the lack of a trial record puts all the more emphasis on deference to counsel's judgment.<sup>140</sup> Such ineffectiveness claims are already so unlikely to succeed, so prevalent,<sup>141</sup> and thus so devoid of stigma, that it is hard to imagine defense attorneys lying awake at night in fear of their disgruntled clients' filing them. (Criminal litigators, both prosecutors and defense counsel, are generally made of sterner stuff.)

Fourth, the late, great William Stuntz might have argued that constitutionalizing this area of law will, perversely, harm defendants. As he famously contended, the Warren Court sought to help criminal defendants by constitutionalizing vast swaths of criminal procedure.<sup>142</sup> But these new rights have had unintended consequences, encouraging legislatures to broaden criminal laws and give prosecutors more bargaining chips, diverting attention from innocence, favoring well-off defendants with well-funded counsel, and increasing the hydraulic pressures to plead guilty and waive rights.<sup>143</sup> One might fear the same here: seemingly beneficial plea-bargaining rights might discourage prosecutors and defense counsel from negotiating and so impede pleas.

Predicting the future is hazardous, and unintended and unforeseen consequences may yet arise. But the hydraulic-pressure story seems much less likely to recur here. The Warren Court's failing was invent-

<sup>136</sup> See Bibas, *Plea Bargaining Outside the Shadow of Trial*, *supra* note 3, at 2476–80.

<sup>137</sup> See Rakoff, *supra* note 134, at 26–27.

<sup>138</sup> *Premo v. Moore*, 131 S. Ct. 733, 741 (2011).

<sup>139</sup> See Bibas, *The Psychology of Hindsight*, *supra* note 95, at 1–3.

<sup>140</sup> See *id.* at 4–5; *Premo*, 131 S. Ct. at 741.

<sup>141</sup> See Bibas, *The Psychology of Hindsight*, *supra* note 95, at 4.

<sup>142</sup> See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 227–28 (2011).

<sup>143</sup> See *id.* at 224–41.

ing gold-plated rules for criminal trials when in fact most defendants can and do waive those trial rights quite easily. Lawyers naturally turned these constitutional guarantees into plea-bargaining chips. *Lafler* and *Frye*, by contrast, expressly addressed the plea-bargaining world that already prevails. Put another way, the Warren Court rights pushed against the grain, toward more elaborate trials. *Lafler* and *Frye*, however, are about ensuring that the parties know about and consider pleas, which the lawyers are naturally inclined to encourage anyway. The cases reinforce the actors' incentives and customary dispositions rather than attempting to rewire them.

Finally, the Warren Court's approach epitomized old-style command-and-control regulation.<sup>144</sup> It told judges and prosecutors precisely how they were supposed to conduct fair trials, regardless of how cumbersome or revolutionary the new procedures were. But *Lafler* and *Frye* operate more like market incentives. They require effective advice but do not micromanage how defense lawyers, prosecutors, judges, and others may ensure and convey that advice. *Strickland* authorizes experimentation, and the Court is appropriately deferential to prevailing professional norms, practices, and varied approaches.<sup>145</sup> The more flexible the legal standard of compliance, the less hydraulic pressure there is to evade it. The Court's more relaxed approach, creating incentives and then allowing semiprivate ordering to respond, may paradoxically make reform more successful and less likely to be evaded or ignored.

The greater risk is not that *Lafler* and *Frye* will demand too much but that they will demand too little. Courts could easily water down *Lafler* and *Frye* as they have watered down *Strickland*, diluting incentives to reform.<sup>146</sup> To keep these decisions meaningful, bar authorities and others must vigorously explicate prevailing professional norms and experiment in order to discover and promulgate best practices for plea bargaining, developing consensus approaches over time. Courts will find it easier to follow those trends than to lead them.

#### CONCLUSION

Plea bargaining has semiprivatized public justice. That explains why the parties prefer it as a fast, cheap, discreet, consensual resolution that leaves prosecutors, defense lawyers, and judges all better off. That very semiprivate aspect also explains the many legitimate objections to plea bargaining: it commodifies justice, mutes its trumpet, ex-

---

<sup>144</sup> See *id.* at 228–34.

<sup>145</sup> *Strickland v. Washington*, 466 U.S. 668, 688–90 (1983).

<sup>146</sup> See, e.g., Miller, *supra* note 89, at 1786–87 (discussing the watering down of *Strickland*).



cludes central and supporting actors, and bypasses the cathartic morality play of a jury trial.<sup>147</sup>

*Lafler* and *Frye* do not try to budge these hard facts, nor will they overturn many convictions. They do, however, tackle some of the worst errors that are hidden by the absence of a public record. Courts can do more to build records and to craft flexible, creative remedies. But other actors are better suited to experiment with a range of ways to convey, explain, and document plea offers. Right now, everything rests on defense counsel's shoulders, but defense lawyers are overburdened, underfunded, and of course fallible. The state bears an obligation to ensure that defense lawyers do their jobs. Prosecutors, too, can take steps to guard against the worst defense lawyering, acting not just as partisan warriors but also as guardians of justice. And because prosecutors share defendants' interest in resolving cases, they have the right incentives to convey, explain, and document their offers. Those extrajudicial remedies resemble semiprivate governance. Prosecutors, judges, supervisory defense lawyers, bar authorities, rules committees, and other actors can serve as backstops for defense lawyers who might fail to do their jobs.

We can no longer pretend that we live in a well-functioning, fully adversarial system of justice with equally competent opponents. Plea bargaining is collaborative, and defense lawyers make mistakes. To make the Sixth Amendment meaningful in the real world of guilty pleas, courts must harness or at least spur other actors to pursue reforms that courts alone cannot. That process does not violate the separation of powers. On the contrary, it makes checks and balances meaningful again in an opaque system that has largely eroded them.

---

<sup>147</sup> See generally STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* xv–xvi, 29–40 (2012) (contrasting the romanticized jury trial with the market reality of plea bargaining).