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USING OUTCOMES TO REFRAME GUILTY PLEA ADJUDICATION

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Abstract

The Supreme Court's 2012 decisions in *Lafler v. Cooper* and *Missouri v. Frye* lay the groundwork for a new approach to judicial oversight of guilty pleas that considers outcomes. These cases confirm that courts possess robust authority to protect defendants' Sixth Amendment right to the effective assistance of counsel and that plea outcomes are particularly relevant to identifying and remedying prejudicial ineffective assistance in plea-bargaining. The Court's reliance on outcome-based prejudice analysis and suggestions for trial court-level reforms to prevent Sixth Amendment violations set the stage for trial courts to take a more active, substantive role in regulating guilty pleas.

This Article traces these significant doctrinal shifts and argues that they supply both impetus and authority for trial courts to regulate guilty pleas by monitoring plea outcomes. This proposal builds on market-based concepts while strengthening the judicial role in safeguarding constitutional values. By monitoring outcomes, courts can detect and correct factors in the plea-bargaining market, such as prosecutorial overreaching and ineffective defense counsel, which can distort the parties' ability to negotiate fair results. Outcomes monitoring is justified for practical reasons because it builds on courts' expertise and unique place in the plea markets, it can be implemented at the trial court level, it reinforces courts' traditional sentencing authority, and it can prevent litigation of prejudicial ineffective assistance in post-conviction proceedings.

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INTRODUCTION

The Supreme Court has signaled with its recent decisions in *Lafler v. Cooper*[1] and *Missouri v. Frye*[2] that its approach to judicial oversight of guilty pleas may be changing. In these cases, the Court for the first time looked to the outcome of the case—that is, the conviction and sentence—as critical to its analysis under *Strickland v. Washington*.[3] While technically these cases focused on incompetent defense counsel during plea-bargaining, their significance is broader. The Court appears to have recognized a need for greater regulation of plea-bargaining, considered procedural fairness (not just a reliable guilt determination) as a constitutional value, and relied on case outcomes to measure prejudice. These developments are key to the broader task of reframing guilty plea adjudication in ways that are practical and enhance constitutional norms.

To appreciate their significance, it is necessary to situate *Lafler* and

1. 132 S. Ct. 1376 (2012).
2. 132 S. Ct. 1399 (2012).
3. 466 U.S. 668, 687–96 (1984).

Frye in the broader, complex setting of our modern criminal justice system.[4] Today, more defendants than ever before pass through the criminal justice system, are incarcerated, serve longer sentences, are subject to supervision, and experience lasting collateral consequences.[5] A key feature of this "system" is that prosecutors enjoy enormous power not only to control what criminal cases are prosecuted, but also to dictate through their charging and plea-bargaining decisions how cases are resolved in terms of guilt and sentencing.[6] Substantive and procedural developments in the law have contributed to this growth in the system. Prosecutors gained a substantive edge through the enactment of tough drug laws and recidivist enhancements, greater reliance on prison sentences, and changes in sentencing law that constrained or even eliminated judicial discretion at sentencing.[7] On the procedural side, prosecutors could use the threat of more serious charges or a reward of leniency to induce guilty pleas.[8]

Together, these factors have contributed to higher guilty plea rates, especially because defendants who opt for trial typically face more serious charges with more severe sentencing consequences.[9] *Lafler* is an

4. Some scholars hail *Lafler* and *Frye* as landmark decisions, while others are more skeptical. *Compare* Justin F. Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U. PA. J. CONST. L. 1161, 1161 (2012) (describing *Lafler* and *Frye* as the dawn of a "new era"), *with* Albert W. Alschuler, Lafler *and* Frye*: Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 678–79 (2013) (expressing skepticism about their significance).

5. *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 4, 11 (2010) (analogizing the racialized aspects of mass incarceration to historical features of racial segregation); David Garland, *Introduction: The Meaning of Mass Imprisonment*, *in* MASS IMPRISONMENT 1, 1–2 (David Garland ed., 2001); Marc Mauer, *The Cases and Consequences of Prison Growth in the United States*, *in* MASS IMPRISONMENT, *supra*, at 4, 6 (citing record numbers of drug arrests, and mandatory prison sentences at the federal and state levels); Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 104 (2013); Robert Weisberg & Joan Petersilia, *The Dangers of Pyrrhic Victories Against Mass Incarceration*, DAEDALUS, Summer 2010, at 124, 124.

6. *See* Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1, 8–9, 11 (2012) (describing how prosecutors control sentencing outcomes through charging and charge bargaining).

7. *See* Anne R. Traum, *Mass Incarceration at Sentencing*, 64 HASTINGS L.J. 423, 429–30 (2013) (summarizing policies that led to more prosecutions and longer prison sentences).

8. Bordenkircher v. Hayes, 434 U.S. 357, 360–61, 365 (1978) (holding that the prosecutor did not violate due process by carrying out a threat to charge an offense carrying a mandatory life sentence after the defendant rejected a more lenient plea offer).

9. *See* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (quoting Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006)) (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl. 5.22.2009, *available at* http://www.albany.edu/sourcebook/pdf/t5222009.pdf; SEAN ROSENMERKEL ET AL., DEP'T OF JUSTICE, NCJ 226846, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 1 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf).

example: After the defendant rejected a plea, he was convicted by a jury and received a sentence that was 3.5 times longer than the sentence he would have received with a guilty plea.[10] High guilty plea rates allow prosecutors to efficiently handle a high-volume practice with very few trials, no juries, and minimal judicial oversight.[11]

The Supreme Court in *Lafler* recognized that today our criminal justice system "is for the most part a system of pleas, not a system of trials."[12] As a factual matter, this "system" has been the reality for a century.[13] What is remarkable is that, with this statement, the Court has framed the major task ahead of reorienting constitutional criminal law to fit that reality. Currently, our "system of pleas" largely exists in a constitutional vacuum in which few plea-specific protections exist and none specifically address whether the defendant is receiving a fair deal.[14] There is a wide gap between the elaborate protections afforded defendants at trial, and the bare-bones, "hands-off" process defendants receive when pleading guilty.[15] Increasing regulation of guilty plea adjudication will necessarily require adapting or blending attributes from these two "systems."

Most constitutional criminal rights are procedural in nature and protect defendants at trial.[16] These trial-focused protections evolved in a bygone era when trials were more common, prosecutions and incarceration rates were dramatically lower, and judges enjoyed virtually unfettered, unreviewable discretion to impose sentences.[17] Constitutional protections aimed to ensure that the trial was fair, that the jury's verdict was accorded utmost respect, and that judges acted as

10. Lafler v. Cooper, 132 S. Ct. 1376, 1383, 1391 (2012).

11. *See* Stephanos Bibas, *Taming Negotiated Justice*, 122 YALE L.J. ONLINE 35, 35 (2012) (describing how the Supreme Court has "blessed plea bargaining as a speedy, efficient way to clear congested dockets").

12. *Lafler*, 132 S. Ct. at 1388.

13. *See infra* Subsection II.A.1.

14. *See* Stephanos Bibas, *The Myth of the Fully Informed Rational Actor*, 31 ST. LOUIS U. PUB. L. REV. 79, 79 (2011).

15. *See Lafler*, 132 S. Ct. at 1398 (Scalia, J., dissenting) (referring to the defendant's jury trial as the "exorbitant gold standard of American justice—a full-dress criminal trial with its innumerable constitutional and statutory limitations"); Bibas, *supra* note 15, at 79 ("[T]he Court has taken a laissez-faire, hands-off approach, assuming that plea bargaining is a rational and well-functioning market in which price signals obviate regulation.").

16. *See generally* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE, 196–215 (2011) (describing the Supreme Court's development of constitutional criminal procedure in the 1960s).

17. *See id.* at 39 (describing how fifty years ago, jury trials were "cheap," "reasonably effective," and "common"); Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 4 (2008) (noting that, until recent decades, appellate review of sentencing decisions "was non-existent in most cases").

referees during trial with the final say on sentencing.[18] To be sure, this procedural focus has its champions and critics.[19] While imperfect, this elaborate procedural structure is an expression of core constitutional values about the limits of government power, the roles of judge and jury as checks on the government, and the norms of fairness, justice, and proportionality.

In the system of pleas, there is no complementary, robust scheme of protections or expression of constitutional norms. In guilty plea adjudication, defendants do not so much exercise constitutional rights as convert them to bargaining chips to use in the plea-bargaining process.[20] By pleading guilty, a defendant waives his trial rights in return for a more certain, less severe outcome.[21] As Professor Stephanos Bibas writes, the Supreme Court has taken a "laissez-faire, hands-off approach" to regulating plea-bargaining, in which courts play a perfunctory role in approving deals that are negotiated privately by the parties.[22]

Plea-bargaining itself is complicated: It is ruled by institutional insiders, namely, prosecutors and defense counsel; many defendants are at the mercy of overburdened, underfunded appointed counsel; and defendants may lack access to important information about their plea options or find it difficult to weigh whether to accept a plea deal or risk trial.[23] Despite the complexity of this process, court oversight is

18. *See* Yeager v. United States, 557 U.S. 110, 122 (2009) ("The jury's deliberations are secret and not subject to outside examination."); Jackson v. Virginia, 443 U.S. 307, 319 (1979) (establishing a high bar for reversal of a jury verdict based on insufficiency of the evidence); Carissa Byrne Hessick & F. Andrew Hessick, *Recognizing Constitutional Rights at Sentencing*, 99 CALIF. L. REV. 47, 49 (2011) (observing that sentencing protections receive less attention than trial-focused constitutional protections).

19. *See, e.g.*, Steven J. Schulhofer, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045, 1045–47 (2013) (reviewing STUNTZ, *supra* note 16) (contrasting Stuntz's "blistering indictment" of the "Warren Court['s] revolution in criminal procedure," and the indispensable role of court-enforced procedural safeguards in protecting liberty).

20. *See* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 1066 (2000) ("[E]very new right [conferred by the courts] supplied a new axis along which a bargain could be struck."); *see also* Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 172 ("The Warren Court's failing was inventing gold-plated rules for criminal trials when in fact most defendants can and do waive those trial rights quite easily.").

21. Fisher, *supra* note 20, at 965.

22. Bibas, *supra* note 14, at 79.

23. *See* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 30–33 (2012) [hereinafter BIBAS, MACHINERY] (describing the dominance of institutional repeat players, namely prosecutors, defense lawyers, and judges); Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1153–59 (2011) [hereinafter Bibas, *Regulating the Plea-Bargaining Market*] (describing measures that would assist defendants in better understanding their plea options and related consequences); John H. Blume, *Plea Bargaining and the Right to the Effective Assistance of*

typically limited to determining whether the defendant understands the terms of the deal he is accepting and the rights he is waiving.[24]

Lafler and *Frye* begin the task of normalizing guilty plea adjudication within our existing constitutional framework. This Article traces this important shift at a doctrinal level, and examines how these cases provide a pathway for more robust judicial oversight of guilty pleas. Four features of this doctrinal shift are especially important to the broader project of reframing guilty plea adjudication. First, the Court recognized that ineffective assistance of counsel in the plea stage is actionable error in its own right, even if the resulting conviction is otherwise valid. Second, the Court applied an outcomes-based prejudice analysis to determine whether counsel's deficient performance caused the defendant to be worse off. Third, the Court suggested that a prosecutor could be ordered to reoffer an earlier plea deal to remedy a constitutional violation. And finally, the Court suggested that trial courts could do more to prevent prejudicial error by counsel at the trial stage.

This Article shows how *Lafler* and *Frye* create pathways for judicial oversight of plea outcomes at the trial stage under the Sixth Amendment and based on separation of powers concerns. Part I describes the Court's traditional procedural, outcome-neutral approach to regulation of pleas under the Due Process Clause and the Sixth Amendment right to counsel, and its recent shifts in thinking on guilty plea adjudication reflected in *Lafler* and *Frye*. Part II places reform of guilty plea adjudication into a broader context by considering plea market features and proposals for reform. Plea-bargaining is deeply entrenched, mostly unregulated, and highly adaptive. This means that increased oversight of guilty pleas may change the substantive outcome of particular cases, but is unlikely (absent other changes) to alter the overall rate of pleas. Proposals to reform or better regulate guilty pleas tend either to insist on the need for strengthening constitutional protections or procedures, or to build on the market model in which prosecutors and defendants are viewed as rational actors freely bargaining to acceptable results. Finally, Part III proposes that courts should monitor guilty plea outcomes to safeguard separation of powers and Sixth Amendment concerns and describes how courts might implement this approach. This proposal situates judges as constitutional actors in the plea market with authority to ensure that outcomes are not unfairly distorted by prosecutorial advantage or ineffective counsel. This focus on outcomes is sensitive to the reality of the plea marketplace, while safeguarding core constitutional values.

Counsel: Where the Rubber Hits the Road in Capital Cases, 25 FED. SENT'G REP. 122, 123 (2012) (suggesting that defendants require competent counsel to help the defendants appreciate trial risks and plea offer benefits).

24. Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 23, at 1142.

I. THE COURT'S PROCEDURAL APPROACH

Guilty pleas have been the dominant mode of guilt adjudication for a century, but courts play a limited role in regulating them. Though the Supreme Court views plea-bargaining as an "indispensible" feature of the modern criminal justice system, it has regulated pleas with a light touch by requiring courts to directly question defendants to ascertain that they understand the plea terms and the rights they waive by admitting guilt.[25] By its terms, plea-bargaining connotes that the defendant gets some "bargain" or concession on the charge or sentence he is facing in exchange for pleading guilty.[26] Pleading guilty is a procedural choice (self-conviction in lieu of trial) that comes with substantive consequences, most importantly, a conviction and sentence.[27] Regulating this process is a complex task in part because it combines the distinct phases of adjudication—charging, guilt adjudication, and sentencing. Although these phases may still exist as formally separate proceedings, as a practical matter they may be wrapped into the guilty plea terms that were privately negotiated, outside the courtroom, with little judicial oversight. For example, though courts routinely impose sentences at a separate hearing after the guilty plea is accepted, the sentence imposed may have been set or influenced by the terms of the guilty plea.[28]

The Court's procedural approach to regulating pleas rests on three constitutional components: prosecutorial discretion, due process, and right to counsel. Because prosecutors control charging, the Court has been reluctant on separation of powers grounds to regulate aggressive charge bargaining and threats in the plea-negotiation phase that are the carrot and stick used to induce guilty pleas.[29] Instead, the Court has primarily reviewed the validity of guilty pleas under the Due Process Clause and required trial courts to complete a procedural checklist to ensure that the defendant understands the trial rights he is waiving, as

25. *See* United States v. Dominguez Benitez, 542 U.S. 74, 82–83 (2004); Boykin v. Alabama, 395 U.S. 238, 242–43 (1969) ("[A] plea of guilty is more than an admission of conduct; it is a conviction.").

26. Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) ("Plea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial." (quoting Brady v. United States, 397 U.S. 742, 752 (1970))); BLACK'S LAW DICTIONARY 1270 (9th ed. 2009) (defining a "plea bargain" as an "agreement . . . whereby the defendant pleads guilty . . . in exchange for some concession by the prosecutor, usu. a more lenient sentence or a dismissal of the other charges").

27. *See Boykin*, 395 U.S. at 242–43.

28. *See, e.g.*, FED. R. CRIM. P. 32 (describing presentence report considerations, objections to the presentence report, and sentencing hearing).

29. *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) (noting that prosecutorial decisions are generally left to the broad discretion of prosecutors).

well as the plea terms and its consequences.[30] The Court has trusted that because a defendant has the right to effective assistance of counsel, the counsel will aid the defendant in protecting the defendant's interests during plea-bargaining.[31]

Together, these constitutional components reinforce a plea-bargaining model that involves minimal judicial oversight. In this model, prosecutors have broad discretion to charge and charge-bargain. Courts assume that represented defendants can protect their own interests in negotiations. And courts merely ensure that defendants understand the terms and consequences of their guilty pleas. This system relies on competent counsel, and the Court has long recognized that incompetent counsel can invalidate a guilty plea.[32] As a practical matter, however, the guarantee of effective assistance during plea negotiations has only indirectly impacted plea bargains because ineffective assistance of counsel claims are relegated to post-conviction proceedings[33] and concerns about counsel are not part of the guilty plea routine.

Lafler and *Frye* open the door for courts to consider concerns about counsel before the plea is accepted and avoid prejudicial disparities attributable to incompetent counsel. As this Article traces below, these decisions erode the traditional divide between due process and right to counsel analysis, rely on the substantive outcome of the case (the conviction and sentence) to assess prejudice, and highlight that trial courts are the locus of reforming guilty plea adjudication.

A. *Regulating the Validity of a Guilty Plea*

In regulating guilty pleas, the Supreme Court has developed minimal due process safeguards and mostly deferred to counsel and the plea-

30. *See Boykin*, 395 U.S. at 243–44 ("What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence."); *see also* Henderson v. Morgan, 426 U.S. 637, 644–45 & n.13 (1976) (stating that a plea cannot be voluntary in the constitutional sense unless the defendant understands both the nature of the constitutional rights he is waiving and the nature of the charge against him).

31. Santobello v. New York, 404 U.S. 257, 261 (1971) (stating that constitutional consideration of the process of plea-bargaining presupposes fairness, secured in part by the right to counsel).

32. Padilla v. Kentucky, 130 S. Ct. 1473, 1480–81 (2010); Hill v. Lockhart, 474 U.S. 52, 56 (1985); *see also* Brady v. United States, 397 U.S. 742, 758 (1970) (upholding the validity of a guilty plea as voluntarily and intelligently made when defendants were sufficiently advised by competent counsel).

33. Ineffective assistance of counsel claims are typically asserted in post-conviction proceedings because the claim requires additional factual development, *see* Massaro v. United States, 538 U.S. 500, 505 (2003), or because state post-conviction rules preclude such claims on direct appeal, *see* Martinez v. Ryan, 132 S. Ct. 1309, 1320 (2012).

bargaining market as to the substance or outcome of the negotiations.[34] The Court's stated reasons for constitutionalized guilty plea procedures reflect concerns about judicial oversight, transparency, unjust outcomes, and finality. Overall, concerns about prosecutorial overreaching and the coercive nature of plea-bargaining have taken a back seat to efficiency. The Court has trusted that the plea-bargaining market and counsel will ensure that pleas are proportional, accurate, and just.[35]

The Court's seminal decision in *Boykin v. Alabama*[36] constitutionalized the guilty plea procedure and highlighted important concerns about the practice. The defendant in *Boykin* was charged with five counts of robbery (a capital offense).[37] With appointed counsel, he pled guilty to all five counts just three days later, and was sentenced to death.[38] The Court acknowledged in *Boykin* that the "majority" of convictions are obtained by guilty plea, but expressed concern about the lack of judicial inquiry surrounding the defendant's decision to plead guilty to a death sentence so quickly.[39] The "record [was] wholly silent," the Court said, on why a guilty plea was "the desirable course."[40] Though defense counsel may have had valid reasons for advising the defendant to plead guilty, the Court intoned, the lack of a record, the speed at which the defendant entered the plea, and the severity of the sentence were troubling.[41] The Supreme Court faulted the trial court for accepting a plea in a capital case with "no questions" asked.[42]

Boykin fostered transparency, efficiency, and finality in the guilty plea process. At its core, the Court affirmed judicial authority to review the constitutionality of a guilty plea and injected the procedure with constitutional norms, most notably a fully informed, on-the-record, personal waiver of constitutional procedural rights. Because judicial review requires a record, the Court required trial courts to make a record by canvassing the defendant to establish that his guilty plea is knowing,

34. Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 23, at 1142 (describing the role of judges in plea-bargaining as "passive and reactive").

35. *Id.*

36. 395 U.S. 238 (1969).

37. *Id.* at 239.

38. *Id.* at 239–40.

39. *Id.* at 244 n.7.

40. *Id*. at 240.

41. *See id.* at 239–40, 243–44.

42. *Compare id.* at 239 ("no questions"), *with id*. at 244 (quoting with approval the Supreme Court of Alabama's dissenting justices' statement of the law "that there was reversible error 'because the record does not disclose that the defendant voluntarily and understandingly entered his pleas of guilty'" (quoting Boykin v. State, 207 So. 2d 412, 415 (Ala. 1968) (Goodwyn, J., dissenting))).

intelligent, and voluntary.[43] That meant that courts need to ascertain that the defendant understands his procedural choice, the constitutional rights he is waiving by pleading guilty and forgoing trial (the rights against self-incrimination, to jury trial, and to confront accusers), as well as the substantive impact, particularly the plea terms and sentencing exposure.[44]

Providing for some judicial review legitimized and regularized guilty pleas as well as cemented their finality. A judicially supervised, recorded plea injected transparency into what the Court described as a "previously clandestine practice."[45] The required judicial canvass of the defendant about the guilty plea, though critiqued as "hasty and rote" today, signified that the solemnity and finality of the proceeding required this direct contact between the court and the defendant.[46] The Court made clear in *Boykin* that the need for finality was a driving concern: having a contemporaneous record of the plea was intended to "forestall[] the spin-off of collateral proceedings that seek to probe murky memories."[47] Thus, the recorded guilty plea canvass would provide courts a specific, constitutional role and prevent cases from reappearing in post-conviction proceedings.

While *Boykin* established the Court's procedural approach to regulating pleas, concerns began to surface about the substance of those bargains, separation of powers, and the role of trial court judges. As mentioned, the *Boykin* Court was concerned as a matter of process and outcome that the defendant pled guilty to crimes carrying the death penalty just three days after being charged, with "no questions" asked by the judge.[48] The Court observed that criminal convictions demand more of courts, specifically, that "an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused."[49]

Despite voicing these concerns, in subsequent decisions the Court seemed content to leave the substance of plea bargains to the parties and

43. *Id.* at 243–44.

44. *See id.* at 243 & n.5. The Court further required in *Henderson v. Morgan* that the defendant understand the essential elements of the offense, the nature of the charges as they relate to the facts, and admit facts sufficient to support the conviction. 426 U.S. 637, 645–47 (1976) (invalidating second-degree murder conviction where defendant was not informed about an intent to kill, an essential element of the offense).

45. Bordenkircher v. Hayes, 434 U.S. 357, 362 (1978) (citing Brady v. United States, 397 U.S. 742, 758 (1970)).

46. Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 733 (2010) ("Guilty pleas, although indispensible to the smooth processing of criminal justice, have become hasty and rote . . . ."); *see Boykin*, 395 U.S. at 243–44.

47. 395 U.S. at 244 & n.7 (advising that a detailed plea canvass is necessary "[i]f these convictions are to be insulated from attack").

48. *Id.* at 239.

49. *Id.* at 243–44.

ratified the use of hardball tactics by prosecutors to induce a guilty plea.[50] The Court has assumed that prosecutors and defense counsel "possess relatively equal bargaining power," and that plea-bargaining benefits both sides.[51] Defendants plead guilty, commonly, to avoid a harsher sentence or more serious charges.[52] The state benefits from a quick and final conviction, which allows it to conserve scarce prosecutorial and judicial resources.[53] It is this "mutuality of advantage" to both sides—certainty and convenience for the prosecutor and the prospect of a better outcome for the defendant—that explains why most defendants plead guilty.[54] In *Brady*, the Court rejected the defendant's claim that his plea was involuntary because it was entered to avoid the death penalty.[55] Only actual or threatened physical harm or overbearing mental coercion, the Court stated, would render the plea involuntary.[56] Pleading guilty to avoid the threat of an increased penalty, even death, was deemed a legitimate and noncoercive reason to forgo trial and did not render the plea invalid.[57]

The Court approved the prosecutor's use of aggressive charge-bargaining tactics to induce a guilty plea.[58] *Bordenkircher v. Hayes* presented the thorny question of whether a prosecutor violated due process by threatening to bring more serious charges if the defendant rejected a plea offer.[59] Prosecutors enjoy virtually unfettered discretion in charging, so long as the charges are not discriminatory and are supported by probable cause.[60] In *Bordenkircher*, the defendant, a two-

50. *Bordenkircher*, 434 U.S. at 364 ("[T]his Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty."); *Brady*, 397 U.S. at 750 (holding that the defendant's fear of the death penalty did not rise to the level that would invalidate his guilty plea).

51. Bierschbach & Bibas, *supra* note 6, at 8–9 (citing *Bordenkircher*, 434 U.S. at 362; *Brady,* 397 U.S. at 752–53).

52. *Brady*, 397 U.S. at 749–50 (observing that many defendants plead guilty to get a more lenient sentence, to get reduced or dismissed charges, to gain certainty, and avoid the "agony and expense" of trial).

53. *See id.* at 752 (prosecutorial resources).

54. *Id.* at 752 & n.10 (citing DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 & n.1 (1966) (noting that, at that time, guilty pleas accounted for the vast majority of convictions, some 90–95% of all convictions and 70–85% of felony convictions)).

55. *Id.* at 758.

56. *Id.* at 748.

57. *Id.* at 750 (narrowly defining coercion, i.e., if the state used "actual or threatened physical harm or by mental coercion overbearing the will of the defendant").

58. *See* Bordenkircher v. Hayes, 434 U.S. 357, 358–59, 365 (1978) (allowing the threat of life imprisonment as "a legitimate use of available leverage in the plea-bargaining process").

59. *Id.* at 358.

60. *Id.* at 364 ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what

time felon, was charged with check forgery, which carried a statutory range of two to ten years.[61] The prosecutor offered to recommend a five-year prison term if the defendant pled guilty as charged.[62] If not, the prosecutor threatened to indict him under Kentucky's habitual offender statute, which carried a mandatory life term.[63] The defendant rejected the offer, was indicted on the habitual charge, convicted by a jury, and sentenced to life in prison.[64] The Court held that the prosecutor did not violate due process by threatening (and then charging) the defendant with a mandatory life sentence offense for refusing to accept a plea offer.[65]

Bordenkircher highlights how charge-bargaining collapses three formally distinct adjudication phases: charging, guilt adjudication, and sentencing. In trial adjudication, these discrete tasks are performed by different institutional actors—prosecutors charge (with minimal judicial or grand jury oversight), juries or judges convict, and judges impose the sentence. These separate institutional roles operate as a check (by the court or a jury) on the executive powers to charge, convict, and imprison.[66] In the plea context, the prosecutor may effectively control all three functions—charging, adjudication, and sentencing—displacing the role of judge and jury.[67] *Bordenkircher* also shows the draconian sentencing consequences—the trial penalty—a defendant may suffer by proceeding to trial.[68] The Court sanctioned such charging tactics.[69]

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charge to file or bring before a grand jury, generally rests entirely in his discretion."), *quoted with approval in* United States v. Armstrong, 517 U.S. 456, 464 (1996); Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 379 (2d Cir. 1973) (dismissing a complaint seeking mandamus relief to compel prosecution despite allegations which raised "serious questions . . . as to the protection of the civil rights and physical security of a definable class of victims of crime and as to the fair administration of the criminal justice system"); *see also* U.S. CONST. amend. V ("[N]or shall any person . . . be deprived of life, liberty, or property without due process of law . . . .").

61. 434 U.S. at 358.

62. *Id.* at 358–59.

63. *Id.*

64. *Id.* at 359.

65. *Id.* at 365.

66. *See* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 996–97 (2006).

67. *Id.* at 997, 1017.

68. *Cf.* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2561 (2004) (noting that state judges, who are elected by the same voters as prosecutors, have an incentive to impose penalties on defendants who wish to go to trial); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 84–86 (2005) (arguing that federal prosecutors have become increasingly able to threaten large penalties for going to trial and to promise large rewards for pleading guilty).

69. *Bordenkircher*, 434 U.S. at 358–59, 365 (holding that the prosecutor did not violate due process by carrying out his threat to seek a mandatory life term against a defendant who

The Court's deference in *Bordenkircher* to prosecutorial charging decisions and market forces is justified, nominally, on its particular framing of separation of powers.[70] Because the prosecutor decides what charges to bring and when to bring them, the Court reasoned, it made no difference whether the prosecutor obtained an indictment on the habitual offender charge at the outset or later, as a lever in plea-bargaining.[71] Discouraging the defendant from exercising his right to trial was an "inevitable," "permissible," and "constitutionally legitimate" attribute of a system that tolerates and encourages guilty pleas.[72] *Bordenkircher* ensured that guilty pleas would be prosecutor controlled, with minimal judicial oversight.[73]

The dissenters in *Bordenkircher* voiced concern about the lack of transparency and coercive effect of unchecked charge-bargaining.[74] The Court of Appeals held that a prosecutor could bargain down from the original charge but could not penalize a defendant for exercising his right to trial, as the defendant had done.[75] Justice Harold Blackmun, in his dissenting opinion, recognized that such a rule (rejected by the majority) would lead prosecutors to stack higher charges at the outset, leaving defendants in the worse position of trying to secure release and bargain for lower charges.[76] But fixing charges at the outset would create transparency and interpose regular checks on prosecutors' charging decisions. This was a preferable rule, he argued, for three reasons: (1) the charging decision would be made independent of knowing the defendant's willingness to plead and not used as a plea-bargaining hammer; (2) it would "keep charging practices visible to the general public" by requiring the prosecutor to "lay his cards on the table with an indictment of public record at the beginning of the bargaining process"; and (3) it would eliminate concerns about whether the grand

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rejected a plea offer).

70. *Id.* at 364–65 (noting that the charging decision rests entirely in the prosecutor's discretion, though "there are undoubtedly constitutional limits upon its exercise").

71. *Id.* at 360–61 ("As a practical matter, in short, this case would be no different if the grand jury had indicted Hayes as a recidivist from the outset, and the prosecutor had offered to drop that charge as part of the plea bargain.").

72. *Id.* at 364. The Court distinguished this trial penalty from a line of earlier cases in which the prosecutor penalized a defendant with new, more serious charges for successfully appealing his conviction. *Id.* at 362–63 (distinguishing Blackledge v. Perry, 417 U.S. 21, 27–28 (1974); North Carolina v. Pearce, 395 U.S. 711, 725 (1969), *overruled on other grounds by* Alabama v. Smith, 490 U.S. 794 (1989)).

73. William J. Stuntz, Bordenkircher v. Hayes*: Plea Bargaining and the Decline of the Rule of Law*, *in* CRIMINAL PROCEDURE STORIES 351, 375–76 (Carol S. Steiker ed., 2006).

74. *Bordenkircher*, 434 U.S. at 368 n.2 (Blackmun, J., dissenting).

75. Hayes v. Cowan, 547 F.2d 42, 44–45 (6th Cir. 1976), *rev'd sub nom. Bordenkircher*, 434 U.S. 357.

76. *Bordenkircher*, 434 U.S. at 368 n.2 (Blackmun, J., dissenting).

jury would actually indict for the greater charges.[77] Justice Blackmun also argued that after the defendant was indicted on the higher charge, he should have been given a final chance to accept the plea bargain.[78] Added transparency and accountability would at least make the choice of pleading guilty more clear to the defendant, the public, and the court.

While embracing a prosecutor-controlled market approach, the *Bordenkircher* Court sidelined concerns about prosecutorial overreaching and substantive fairness. Justice Lewis F. Powell, also writing in dissent, argued that the "result" was unjust and the prosecutor's tactics violated due process."[79] The prosecutor's actions violated due process, Justice Powell wrote, because "their admitted purpose was to discourage and then to penalize with unique severity [the defendant's] exercise of constitutional rights."[80] The majority Court, however, dismissed these concerns and ruled that the lower court was "mistaken" in holding that the "substance of the plea offer itself violated" due process.[81]

In contrast to the values expressed in *Boykin*, in *Brady* and *Bordenkircher* the Court sanctioned prosecutors' reliance on aggressive charge bargaining to induce a guilty plea. *Boykin*'s procedural approach was based on core constitutional values: transparency, judicial review, and substantive fairness. *Brady* and *Bordenkircher* appeared to undercut those values. The Court welcomed aggressive plea-bargaining tactics without regard to how they might distort the defendant's conviction and sentence. The role of competent defense counsel was important to the Court's embrace of this guilty plea system, but the Court's efforts to guarantee that right were limited.

B. *Regulating Defense Counsel in the Plea Phase*

Another essential component of the Court's historic procedural approach to plea bargaining was its assumption that defense counsel would protect the defendant's interests in plea bargaining.[82] On this assumption, the Court allowed plea-bargaining to be a party-driven and private process without court oversight. In *Hill v. Lockhart*[83] the Court recognized a defendant's right to the effective assistance of counsel

77. *Id.* at 368 n.2.

78. *Id.* at 369 n.2.

79. *Id.*at 368–69 (Powell, J., dissenting).

80. *Id.* at 373.

81. *Id*. at 362 (majority opinion) (citing Brady v. United States, 397 U.S. 742, 751 n.8 (1970)).

82. *See* Henderson v. Morgan, 426 U.S. 637, 646–47 (1976); *see also Bordenkircher*, 434 U.S. at 362; McMann v. Richardson, 397 U.S. 759, 770–71 (1970); *Brady*, 397 U.S. at 749.

83. 474 U.S. 52 (1985).

during plea-bargaining.[84] Specifically, *Hill* permitted defendants convicted by guilty plea to challenge their convictions by claiming they were denied the right to effective assistance of counsel pursuant to *Strickland v. Washington*, which governs a challenge to a conviction based on ineffective assistance of counsel.[85] It was significant that *Hill* recognized an important constitutional basis to challenge a guilty plea conviction under the Sixth Amendment based on incompetent counsel. But *Hill*'s reach was limited in part because it framed the inquiry so narrowly. Today, *Strickland* continues to provide the governing standard, but the Court's recent decisions in *Lafler* and *Frye* apply *Strickland* more flexibly.

Hill opened the door to new challenges to guilty plea convictions and increased judicial oversight of plea-bargaining. In *Hill* the defendant complained that his plea was invalid because his lawyer misinformed him about the sentencing consequences of pleading guilty.[86] The defendant, who was facing a possible life sentence, pled guilty in exchange for the prosecutor's agreement to recommend a term of thirty-five years, which the court later imposed.[87] The court and defense counsel informed the defendant that he would need to complete at least one-third of his sentence to become eligible for parole.[88] Due to a prior felony conviction, however, the defendant later learned that he would need to serve one-half of his sentence before he was parole eligible.[89] Though the Supreme Court rejected the defendant's claim,[90] it established that *Strickland* applies to challenges to guilty pleas based on ineffective assistance of counsel.[91]

Hill greatly expanded the Court's review of guilty pleas and its exposure to plea-bargaining realities. To prevail under the *Strickland* standard, the defendant in *Hill* was required to prove that "but for [his] counsel's errors, he would not have pled guilty and would have insisted on going to trial."[92] To evaluate the *Strickland* claim, the Court needed to probe off-the-record, behind-the-scenes activities and conversations that led counsel to recommend the plea, or fail to develop alternatives.[93]

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84. *Id.* at 56–57 ("[A] defendant who pleads guilty upon the advice of counsel 'may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.'" (quoting Tollett v. Henderson, 411 U.S. 258, 267 (1973))).

85. 466 U.S. 668, 687–88 (1984).

86. *Hill*, 474 U.S. at 53.

87. *Id.* at 54.

88. *Id*. at 54–55.

89. *Id.* at 55.

90. *Id.* at 60.

91. *Id.* at 57–59.

92. *Id.* at 59.

93. *Id.* (noting that the inquiry may include whether counsel failed to investigate or

Such evidence might include the history of plea offers, the strength of the evidence against the defendant, his possible defenses, risks associated with trial, and counsel's investigation, communication, and advice.[94] The *Boykin* inquiry focuses primarily on the trial court record, especially the plea canvass and sentencing hearing.[95] So, while courts generally left plea negotiations to the parties without judicial oversight, *Hill* provided courts a window into this phase of the case.

For practical and doctrinal reasons, however, *Hill*'s impact was limited and understanding those limitations is important to appreciating the impact of *Lafler* and *Frye*. Three key features limited *Hill*'s scope. First, *Hill* tethered the ineffective assistance claim to due process analysis. Second, it hinged the prejudice analysis on a procedural choice (pleading guilty versus proceeding to trial). Third, like trial-based *Strickland* claims, it relegated complaints about deficient counsel to post-conviction proceedings with the remedy of a new trial. As I discuss below, *Lafler* and *Frye* alter each of these features and provide a broader, more flexible approach to redressing ineffective assistance of counsel during plea negotiations.

The first limitation is that *Hill* expressly linked the validity of the plea (a due process concern[96]) to counsel's performance (a Sixth Amendment concern[97]). Before *Hill*, the Court repeatedly acknowledged the critical role of defense counsel in plea-bargaining and suggested that defense counsel's erroneous advice during the plea phase might be grounds to attack the voluntariness, and thus, the validity, of a plea.[98] The Court connected these dots in *Hill* and relied on *Strickland*

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discover potentially exculpatory evidence or failed to advise the defendant of available affirmative defenses).

94. *Id.*; *see, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 360–61 (1978) (evaluating the defendant's trial risks); Brady v. United States, 397 U.S. 742, 744–45, 749–50, 756 (1970) (evaluating counsel's communication with the defendant and the defendant's trial risks).

95. Boykin v. Alabama, 395 U.S. 238, 240 (1969) (noting that "the record [was] wholly silent" on defense counsel's "[t]rial strategy"); *id.* at 243–44 (noting that the "stake for a[] [defendant] facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the [plea] with the accused to make sure he has a full understanding of what the plea connotes and of its consequences"); *id.* at 244 ("When the judge discharges th[e] [plea canvassing] function, he leaves a record adequate for any review that may later be sought."); *Bordenkircher*, 434 U.S. at 362 (noting that "[t]he open acknowledgement" of plea negotiations "has led th[e] Court to recognize . . . the need for a public record indicating a plea was knowingly and voluntarily made"); Henderson v. Morgan, 426 U.S. 637, 642–43 (1976) (focusing on the defendant's "direct colloquy with the trial judge" at the plea hearing and statements at sentencing); *id.* at 639–40 (considering the evidentiary hearing testimony of the defendant, the defense attorneys, the prosecutor, and others).

96. *See supra* note 34 and accompanying text.

97. Strickland v. Washington, 466 U.S. 668 (1984) (recognizing a standard for "reasonably effective assistance" based on the Sixth Amendment).

98. *See* Bordenkircher, 434 U.S. at 363 (1978) ("Defendants *advised by competent counsel* and protected by other procedural safeguards are presumptively capable of intelligent

to provide the Sixth Amendment analysis. In *Hill* the Court established that ineffective assistance of counsel could undermine the validity of the guilty plea because the "voluntariness of the plea depends on whether counsel's advice" was reasonable.[99] Thus, the Court's inquiry in *Hill* (as in *Boykin*) tests the validity of the guilty plea (a due process issue) with an expanded scope.

A second limitation on *Hill*'s reach is that it hinges *Strickland* analysis on a procedural choice: whether to plead guilty or go to trial. *Strickland* framed its prejudice test broadly: whether, but for counsel's deficient performance, "there is a reasonable probability that . . . the result of the proceeding would have been different."[100] This test contemplates a different substantive outcome. *Hill* narrowed the question to a procedural one: The defendant needed to show that "but for counsel's errors, he would not have pled guilty and would have insisted on going to trial."[101] This binary, procedural choice approach—plead guilty or go to trial—departed from *Strickland*'s substantive assessment of prejudice. Proving that a defendant would have insisted on going to trial is difficult and risky. It is difficult to prove because many defendants are deciding among plea offers, but not contemplating trial, which requires a viable defense and risks harsher penalties.[102] And success itself is risky because the standard remedy for a *Hill* claim is to withdraw the plea and restore the defendant to his pre-plea status—that is, facing trial.[103]

Third, aside from its limited doctrinal scope, practical aspects of *Hill* rendered the right of effective assistance of counsel in plea-bargaining

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choice in response to prosecutorial persuasion [in plea-bargaining], and unlikely to be driven to false self-condemnation." (emphasis added)); Henderson v. Morgan, 426 U.S. 637, 647 (1976) (holding that the defendant's plea was involuntary where "the trial judge found . . . that the element of intent was not explained to respondent," but suggesting that defense counsel's failure to "explain the nature of the offense in sufficient detail to give the [defendant] notice of what he is being asked to admit" might be grounds to attack the voluntariness of the plea); McMann v. Richardson, 397 U.S. 759, 770–72 (1970) (discussing the intelligence and voluntariness of guilty pleas in relationship to the competency of counsel's advice); Brady v. United States, 397 U.S. 742, 749 (1970) (affirming the lower court's "finding of voluntariness" where defendant, "advised by competent counsel," decided to plead guilty).

99. 474 U.S. 52, 56 (1985) (citing *McMann*, 397 U.S. at 771).

100. *Id.* at 57 (citing *Strickland*, 466 U.S. at 694).

101. *Id.* at 59.

102. *Cf. id.* at 60 (holding that "the District Court did not err in declining to hold a hearing on petitioner's ineffective assistance of counsel claim" because "petitioner's allegations [were] insufficient to satisfy the *Strickland v. Washington* requirement of 'prejudice'").

103. Padilla v. Kentucky, 130 S. Ct. 1473, 1485 (2010) (holding that "[t]he nature of relief secured by a successful collateral challenge to a guilty plea [is] an opportunity to withdraw the plea and proceed to trial"); *see also* Margaret Love & Gabriel J. Chin, *The "Major Upheaval" of* Padilla v. Kentucky*: Extending the Right to Counsel to the Collateral Consequences of Conviction*, CRIM. JUST., Summer 2010, at 36, 39–40.

an underenforced guarantee. Typically, defendants can only make a claim of ineffective assistance of counsel during post-conviction proceedings,[104] which often take years.[105] This means that only defendants with longer sentences have the time to pursue *Hill* claims to completion.[106] In the pursuit of such claims, there is no right to counsel,[107] and showing deficient performance and prejudice often requires developing facts outside the record and an evidentiary hearing.[108] Further, procedural rules and deferential review standards pose significant barriers to relief.[109] The record and client file in a guilty plea case are usually far less developed than in cases that went to trial, and the judge handling the ineffective assistance of counsel claim may be less familiar with the defendant since there was no trial.[110] Thus, postponing Sixth Amendment scrutiny until the post-conviction phase means that many defendants simply cannot bring or win such claims.

Importantly, *Hill* did not alter plea-bargaining or guilty plea

104. Louis D. Bilionis & Richard A. Rosen, *Lawyers, Arbitrariness, and the Eighth Amendment*, 75 TEX. L. REV. 1301, 1303 (1997).

105. The time needed to litigate a federal habeas action, six to seven years, far exceeds the median sentence of about seventeen months and the average sentence length of about three years and two months. NANCY J. KING ET AL., NAT'L CTR. FOR STATE COURTS, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS 55, 56 & tbl. 13 (2007), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf (finding that, on average, it takes all federal habeas noncapital petitioners over six years to file a petition in federal court and 11.5 months for the court's decision); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl. 5.48.2006, http://www.albany.edu/sourcebook/pdf/t5482006.pdf (finding that the mean and median incarceration sentence lengths for all felony offenses in state courts in 2006 is, respectively, thirty-eight months and seventeen months).

106. *See* KING ET AL., *supra* note 105, at 20 (finding that, for noncapital cases, 27.7% of habeas petitioners had a life sentence, while the remainder had an average sentence of twenty years).

107. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions . . . ." (citing Johnson v. Avery, 393 U.S. 483, 488 (1969))).

108. Missouri v. Frye, 132 S. Ct. 1399, 1405 (2012) (discussing the defendant's post-conviction "testi[mony that] he would have entered a guilty plea to [a] misdemeanor had he known about the offer"); Lafler v. Cooper, 132 S. Ct. 1376, 1389 (2012) (noting that a court may hold an evidentiary hearing to determine whether the defendant has shown prejudice).

109. *See, e.g.*, 28 U.S.C. § 2254(d) (2012); Harrington v. Richter, 131 S. Ct. 770, 785–86 (2011) (discussing deference to state courts under 28 U.S.C. § 2254(d)); *see also* Anne R. Traum, *Last Best Chance for the Great Writ: Equitable Tolling and Federal Habeas Corpus*, 68 MD. L. REV. 545, 547 n.7, 558, 585 n.215 (2009) (describing procedural default, exhaustion, and timing rules in federal habeas review).

110. Bierschbach & Bibas, *supra* note 6, at 10 (observing that trial court judges are unfamiliar with the facts of a guilty plea case because there has been no trial). Such off-the-record evidence must be developed at an evidentiary hearing, which in federal habeas review is rare. *See* KING ET AL., *supra* note 105, at 35–36 (noting that, in U.S. District Courts, evidentiary hearings were held in 0.4% of noncapital habeas corpus cases, and around 10% of capital cases).

procedures. *Hill* created a new basis to challenge a guilty plea, and exposed judges to the ingredients, including deficient counsel, that influence plea-bargaining. As a practical matter, *Hill* did little to alter the status quo for the majority of defendants who plead guilty.

C. Frye *and* Lafler*: Incorporating Outcomes Analysis*

The Supreme Court's recent decisions in *Frye* and *Lafler* bring ineffective assistance of counsel claims into the modern era by shifting the focus toward plea-bargaining and outcomes. The Court's analysis in *Hill* focused on the validity of the plea and the defendant's procedural choice of whether to plead guilty or go to trial. Though *Strickland* prejudice analysis tests whether the result of the proceeding would have been different, in *Hill* that analysis seemed to turn more on the adjudication process than the sentence. *Frye* and *Lafler* take a different tract, reflecting that process choices and sentencing outcomes are integrally related. These cases establish that a Sixth Amendment ineffective assistance of counsel claim does not turn on whether the conviction is invalid or the defendant's procedural choice to plead guilty or go to trial. Instead, the Court in *Lafler* and *Frye* focused on whether counsel's incompetence affected the outcome—the substantive result.[111] The Court also considered practical concerns about remedies and reform, suggesting that trial courts have a greater role to play than it previously acknowledged.[112]

In *Lafler* and *Frye*, the Court established three key doctrinal points: (1) a *Strickland* claim is independent of other constitutional claims and may succeed even though the conviction is valid; (2) the focus of *Strickland* prejudice is whether counsel's deficient performance prejudiced the outcome, i.e., the defendant's conviction and sentence, not just his procedural choice of whether to plead guilty or go to trial; and (3) to remedy a *Strickland* violation, a court may order a prosecutor to reoffer an earlier plea offer. A fourth point pertains to prophylactic reform, namely, the Court's suggestion that trial-level reforms to the plea procedure could avoid or ameliorate ineffective assistance of counsel claims.[113]

This section discusses these doctrinal points and observes how the Court's Sixth Amendment analysis and focus on outcomes are relevant to the broader task of reframing plea adjudication.

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111. *Lafler*, 132 S. Ct. at 1384, 1386–88; *Frye*, 132 S. Ct. at 1410.

112. *See Lafler*, 132 S. Ct. at 1390; *Frye*, 132 S. Ct. at 1410.

113. *Lafler*, 132 S. Ct. at 1390 (arguing that the "prosecution and the trial courts may adopt some measures to help ensure against late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after a trial leading to conviction" (quoting *Frye*, 132 S. Ct. at 1408–09) (internal quotation marks omitted)).

1. Delinking *Strickland* and Due Process

a. Claiming *Strickland*, Not *Hill*

The defendants' claims in *Lafler* and *Frye* were patterned not on *Hill*, but on *Strickland*, which the Court applied generally to claims of deficient counsel before trial. *Hill* permitted a defendant to claim his plea invalid because, absent attorney error, he would have gone to trial.[114] Neither *Lafler* nor *Frye* fit that mold because neither of the defendants in these cases claimed his conviction was invalid and neither sought trial as a remedy. Instead, each of the defendants in *Lafler* and *Frye* complained that he fared worse, in terms of his conviction and sentence, due to his defense counsel's deficient advice during the plea stage.

Lafler and *Frye* presented an opportunity to confront *Hill*'s limited scope, which the Supreme Court had no occasion to do in *Padilla v. Kentucky*,[115] its 2010 landmark decision. In *Padilla*, a noncitizen pled guilty in state court to a felony drug charge that would result in mandatory deportation.[116] His lawyer erroneously told him before pleading guilty "that he did not have to worry about immigration [consequences]."[117] The defendant in *Padilla* alleged under *Hill* that, but for his attorney's incorrect advice, he would have not pled guilty and would have insisted on going to trial.[118] The Court agreed that defense counsel's performance was deficient, and remanded on prejudice under *Hill*.[119] The Court's opinion implied more broadly, however, that *Hill* was not a perfect fit for most defendants since immigration consequences are relevant to negotiating a better plea.[120] Effective defense counsel would negotiate to avoid or reduce the risk of deportation, which in turn would create a powerful inducement to plead guilty.[121] Though *Padilla* mentioned these plea-bargaining dynamics, it stuck to a traditional *Hill* framework.

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114. Hill v. Lockhart, 474 U.S 52, 58–59 (1985).

115. 130 S. Ct. 1473 (2010).

116. *Id.* at 1477–78 (referring to a guilty plea for "transportation of a large amount of marijuana").

117. *Id.* at 1478 (quoting Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008), *rev'd*, 130 S. Ct. 1473) (internal quotation marks omitted).

118. *See id. See generally id.* at 1485 n.12 (discussing the relationship between *Strickland* and *Hill* in reference to *Padilla*).

119. *See id.* at 1486–87.

120. *See id.* at 1486 ("By bringing deportation consequences into this [criminal] process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties.").

121. *Id.*

Lafler and *Frye*, by contrast, required the Court to consider how *Strickland* would apply to claims that did not fit the *Hill* mold.[122] In *Frye*, defense counsel failed to communicate a favorable plea offer to the defendant (Frye), who later entered a less favorable plea without an agreement.[123] Frye was charged with driving with a revoked license, pled guilty to the felony charge, and received a three-year sentence.[124] Unknown to Frye, the prosecutor had sent a letter to his counsel containing two plea options, one of which would have reduced the charge to a misdemeanor with a recommendation of a ninety-day jail sentence.[125] Frye's counsel did not tell him about the offers, which expired before he pled guilty without a plea agreement.[126] Frye later claimed that he would have accepted the offer to plead to a misdemeanor had he known about it.[127]

In *Lafler*, the defendant (Cooper) claimed that he would have accepted a plea instead of going to trial, which led to a much harsher sentence.[128] Cooper's charges, including assault with intent to murder, arose from a shooting.[129] Before trial, Cooper rejected two plea offers, including one for a recommended sentence of fifty-one to eighty-five months, based on his counsel's erroneous advice that the prosecutor could not prove at trial he had the requisite intent to kill.[130] The jury convicted the defendant on all counts and he was sentenced to a mandatory term of 185 to 360 months.[131] All parties agreed that Cooper's counsel gave him bad advice, so the issue was whether Cooper could establish *Strickland* prejudice despite the valid jury verdict.[132]

The Court analyzed both claims under *Strickland*, which required the Court to determine if "the outcome of the proceeding would have been different with competent advice."[133] *Lafler* presented the opposite fact situation from *Hill*, the Court reasoned, because Cooper alleged that the ineffective assistance "led not to an offer's acceptance but to its

122. Lafler v. Cooper, 132 S. Ct. 1376, 1384–85 (2012); Missouri v. Frye, 132 S. Ct. 1399, 1405–06 (2012).

123. *Frye*, 132 S. Ct. at 1404.

124. *Id.* at 1404–05.

125. *Id.* at 1404.

126. *Id.*

127. *Id.* at 1405.

128. Lafler v. Cooper, 132 S. Ct. 1376, 1386–87 (2012).

129. *Id.* at 1383.

130. *Id.*

131. *Id.*

132. *Id.* at 1384.

133. *Id.* (citing Missouri v. Frye, 132 S. Ct. 1399, 1410 (2012)) (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

rejection."[134] And in *Frye*, "[t]he challenge [was] not to the advice pertaining to the plea that was accepted but rather to the course of legal representation that preceded it with respect to other potential pleas and plea offers."[135]

The Court's broad restatement of *Strickland* clarified that it governs claims of ineffective assistance of counsel at the plea-bargaining stage, regardless of whether the defendant is ultimately convicted by guilty plea or at trial. *Strickland* provides the constitutional standard for all ineffective assistance of counsel claims (of which *Hill* is just one application) and, though a rigorous standard, it is sufficiently flexible to encompass many manifestations of deficient performance, like those presented in *Lafler* and *Frye*. Ineffective assistance of counsel claims can now take at least three forms, provided the *Strickland* test is satisfied: (1) the defendant pled guilty but wanted a trial (*Hill*), (2) the defendant pled guilty but wanted a different plea (*Frye*), and (3) the defendant was convicted at trial but wanted to plead guilty (*Lafler*).

b. *Strickland* as an Independent Basis for Relief

Lafler and *Frye* also recognize that *Strickland* provides an independent basis on which to challenge a guilty plea under the Sixth Amendment. These cases provide that denial of the Sixth Amendment right to effective assistance of counsel is grounds to challenge a conviction, even if the conviction resulted from a reliable guilty plea or fair trial. Professor Justin F. Marceau hails *Lafler* and *Frye* as commencing "a new era in the jurisprudence of the Sixth Amendment."[136] He argues that *Lafler* and *Frye* recognize that *Strickland* does not merely provide a remedy for incompetent lawyering at the trial and sentencing stages, but permits claims addressing prejudicial ineffective assistance of counsel during the pre-trial phase, including plea-bargaining.[137] The significance for guilty pleas is twofold. First, *Frye* places Sixth Amendment analysis of guilty pleas on the same plane as due process analysis under *Boykin*. Second, *Lafler* emphasizes that in today's world, plea-bargaining is as critical as trial or sentencing in determining the outcome of the case.

Frye establishes that a guilty plea can be set aside based purely on Sixth Amendment grounds. Before *Frye*, *Strickland* played the role of helper doctrine in assessing the validity of a guilty plea.[138] *Frye* severs that link. In *Hill* and *Padilla*, the defendants claimed that defense counsel's incompetent advice led them to plead guilty without full

134. *Id.* at 1385.
135. *Frye*, 132 S. Ct. at 1406.
136. Marceau, *supra* note 4, at 1161.
137. *Id.* at 1162–63.
138. *See supra* Section I.B.

knowledge of the consequences.[139] In *Hill*, the Court adopted the theory that "the voluntariness of the plea depends on whether counsel's advice" was reasonable.[140] In other words, the Sixth Amendment (*Strickland*) violation, if proven, resulted in a due process violation (an invalid plea).[141] In *Frye,* there was no due process claim since Frye did not challenge the validity of the accepted guilty plea, but instead challenged the ineffective assistance of counsel that preceded it.[142] In *Frye*, the Sixth Amendment analysis stands on its own, not as an adjunct to due process analysis.[143]

Frye puts the Sixth Amendment on equal footing with due process as a basis for challenging guilty pleas, but, unlike *Boykin*, it fails to dictate new procedural safeguards.[144] After *Frye*, courts must assure that guilty pleas satisfy both due process and Sixth Amendment concerns since either might provide a basis to set aside a guilty plea. The Court in *Boykin* intended the plea canvass to satisfy due process concerns and preclude collateral challenges.[145] Courts have a constitutionalized script, based on *Boykin*, to assess whether a guilty plea satisfies due process.[146] But, as in *Frye*, the same conviction might be vulnerable to collateral attack under *Strickland* if the defendant experienced prejudicial ineffective assistance of counsel before the guilty plea. The current plea canvass requirement is not designed to probe Sixth Amendment concerns, like whether counsel provided effective assistance. As discussed below, the Court suggested that trial courts might develop safeguards to cure some errors, such as the failure to communicate an offer.[147] For now, *Frye* does not constitutionalize such reforms in the way that *Boykin* did.

Lafler reinforces that the *Strickland* analysis is independent from the validity of the conviction. In *Lafler*, the defendant (Cooper) was

139. Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010); Hill v. Lockhart, 474 U.S. 52, 53 (1985).

140. *Hill*, 474 U.S. at 56 (citing McMann v. Richardson, 397 U.S. 759, 771 (1970)).

141. *See id.* at 60 (rejecting the defendant's claim because he failed to allege that ineffective assistance of counsel *caused* him to choose the guilty plea over trial).

142. Missouri v. Frye, 132 S. Ct. 1399, 1404, 1409–10 (2012).

143. *See id.*

144. *See supra* Section I.A.

145. Boykin v. Alabama, 395 U.S. 238, 243–44 & n.7 (1969).

146. TROY K. STABENOW, WEST'S FEDERAL FORMS: DISTRICT COURTS—CRIMINAL § 84:45 (2012) (providing a script for a plea before a magistrate judge). *But see* United States v. Ward, 518 F.3d 75 (1st Cir. 2008) ("While we recognize that no particular form or script is required and that state courts have considerable leeway to establish a record in whatever reasonable manner they see fit, *Boykin* established that the record of a guilty plea must affirmatively disclose that the defendant made his plea intelligently and voluntarily." (quoting Hanson v. Phillips, 442 F.3d 789, 800 (2d Cir. 2006)) (internal quotation marks omitted)).

147. *Frye*, 132 S. Ct. at 1408–09.

convicted at trial and did not challenge the validity of the verdict.[148] The state and the Solicitor General argued that since "the sole purpose of the Sixth Amendment [was] to protect the right to a fair trial," which Cooper received, "[e]rrors before trial . . . are not cognizable . . . unless they affect the fairness of the trial itself."[149] The Court rejected as too narrow the notion that a valid verdict "wipes clean any deficient performance by defense counsel during plea bargaining."[150] The Court stated that while a defendant may not be entitled to a plea bargain, he is entitled to effective assistance of counsel in considering any plea bargain offered by the prosecutor.[151] The Sixth Amendment protects that right and defense counsel's incompetent advice interfered with that right: "[H]ere the question is not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it . . . ."[152] As Professor Marceau argues, *Lafler* established the right to effective assistance of counsel "as valuable for its own sake, and not merely as an adjunct to the fair trial right."[153]

Lafler and *Frye* establish that the Sixth Amendment right to the effective assistance of counsel provides an independent source of authority to challenge a conviction, whether by guilty plea or trial, where incompetent counsel's advice during plea-bargaining prejudiced the outcome.

2. Measuring Prejudice Based on Outcomes

The Court in *Lafler* and *Frye* has accorded substantive outcomes a new, constitutional relevance in two significant ways. Substantive outcomes refers here to the charges of conviction and the sentence imposed as a result of the guilty plea or trial verdict. First, for purposes of analyzing *Strickland*, substantive outcomes provide a concrete, workable measure of prejudice. Second, outcomes analysis reflects that plea-bargaining is about negotiating the sentence. The Court's application of outcome-based prejudice analysis reinforces that pleas, not trials, are the norm and that prior plea offers within the case and the local going (market) rate for pleas in the jurisdiction provide relevant yardsticks for assessing prejudice.

The Court's prejudice analysis in *Lafler* and *Frye* focused on the substantive outcome of the cases.[154] This focus is faithful to *Strickland*'s

148. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1383 (2012).

149. *Id.* at 1385.

150. *Id.* at 1388.

151. *Id.* at 1384, 1387.

152. *Id.* at 1388.

153. Marceau, *supra* note 4, at 1216.

154. Missouri v. Frye, 132 S. Ct. 1399, 1411 (2012) (remanding for a determination of whether there was a reasonable likelihood that the trial court would have accepted the earlier

prejudice test, which turns on a different result. In *Hill*, prejudice turned on a procedural-choice: whether, with competent counsel, the defendant would have opted for trial instead of pleading guilty.[155] Though this was the correct yardstick for assessing prejudice in *Hill*, the Court explained, it is not the "sole means for demonstrating prejudice arising from the deficient performance of counsel during plea negotiations."[156] The prejudice claimed in *Lafler* and *Frye* was the defendant's missed opportunity to accept a favorable plea outcome.[157] The Court considered what difference counsel's incompetenc made in the outcome of the case.

Prejudice can be shown, the Court stated in *Lafler*, "if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence."[158] In *Frye*, procedural factors influencing the plea also played a role.[159] In *Frye*, the favorable plea offer lapsed due to counsel's deficient performance and Frye was arrested (again and for the same offense) before he pled guilty.[160] So, there was a risk that the prosecutor would have withdrawn the original offer or that the court would not have accepted it.[161] To prevail on his *Strickland* claim, Frye needed to prove "a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time."[162]

The outcome orientation of *Lafler* and *Frye* reflects that the sentence, not guilt, drives plea-bargaining. By focusing on outcomes, these cases adjust doctrine based on the fact that ours is "for the most part a system of pleas, not a system of trials."[163] So, while the verdict may properly be the focus of prejudice analysis in trial cases, most defendants plead guilty, and deficient counsel impacts their sentence, that is, the amount of jail or prison time they receive.[164] Sentencing differences are easy to identify and offer a concrete measure of whether the defendant was worse off due to incompetent counsel. The sentencing consequences stemming from a different conviction may be

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plea offer); *Lafler*, 132 S. Ct. at 1384 (citing Strickland v. Washington, 466 U.S. 668, 694 (1984)).

155. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

156. *Frye*, 132 S. Ct. at 1409–10.

157. *Lafler*, 132 S. Ct. at 1384–85; *Frye*, 132 S. Ct. at 1409.

158. *Lafler*, 132 S. Ct. at 1387.

159. *Frye*, 132 S. Ct. at 1409–11.

160. *Id.* at 1404.

161. *Id.* at 1411.

162. *Id.* at 1409.

163. *Lafler*, 132 S. Ct. at 1388.

164. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992) ("To a large extent, this kind of horse trading determines who goes to jail and for how long."), *quoted in Frye*, 132 S. Ct. at 1407.

obvious in some cases, such as where the defendant could have pled to an offense that is a misdemeanor, has a lower sentencing range (or statutory cap), is probationary, or would yield different immigration consequences. In the wake of *Lafler* and *Frye*, defendants may have difficulty proving their counsel was deficient, but the requirement for prejudice—proving a reasonable probability of a lesser offense or less severe sentence—is at least clear.[165]

With outcomes in mind, the Court revisited the harsh trial penalty using a *Strickland* lens. The trial penalty reflects a two-tiered system in which defendants get the "going rate" by pleading guilty or risk a more severe sentence by going to trial.[166] The *Bordenkircher* Court approved the use of aggressive charge-bargaining to induce guilty pleas (the carrot) and facilitate the trial penalty (the stick).[167] In *Lafler* and *Frye*, the Court instead showed a preference for sentences that are in line with the prevailing punishment for similar conduct. Severe sentencing laws, the Court acknowledged, "exist on the books largely for bargaining purposes," and may exceed what Congress or the prosecutor deems appropriate for the crime.[168] Since 94%–97% of defendants plead guilty, the negotiated plea sentence is what the defendant would have received in the "ordinary course," absent deficient counsel.[169] In *Lafler* and *Frye*, the history of plea offers in each of these cases supplied this information.[170] For example, in *Lafler* the defendant claimed that absent counsel's errors, "he would have accepted a plea offer for a sentence the prosecution evidently deemed consistent with the sound administration of criminal justice" instead of the harsher sentence—"3½ times more

165. *See* Carissa Byrne Hessick, *Proving Prejudice for Ineffective Assistance Claims After* Frye, 25 FED. SENT'G REP. 147, 147 (2012) (suggesting that *Frye* increased the prejudice the defendant must prove to get relief).

166. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2528 (2004) ("Experienced counsel and repeat players reduce uncertainty by developing going rates and bonds of trust.").

167. *See* Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978); *see also supra* notes 58–81 and accompanying text.

168. *Frye*, 132 S. Ct. at 1407 (quoting Barkow, *supra* note 66, at 1034) (internal quotation marks omitted); *see also* Bibas, *supra* note 20, at 154–55 (discussing the majority's reasoning in *Frye* and *Lafler*).

169. *See Frye*, 132 S. Ct. at 1407; *Lafler*, 132 S. Ct. at 1387 ("The favorable sentence that eluded the defendant in the criminal proceeding appears to be the sentence he or others in his position would have received in the ordinary course, absent the failings of counsel."); *id.* ("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 a bargain." (quoting Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 23, at 1138) (internal quotation marks omitted)).

170. *Frye*, 132 S. Ct. at 1411 (stating that to prove *Strickland* prejudice, the defendant needed to show a reasonable probability that the trial court would have accepted the earlier offer to plead to a misdemeanor); *see also Lafler*, 132 S. Ct. at 1387 (similar).

severe"—that he received after trial.[171]

Writing in dissent, Justice Antonin Scalia protested the majority's "outcome-based test for prejudice."[172] The Sixth Amendment, Scalia argued, "is concerned not with the fairness of bargaining but with the fairness of conviction."[173] Justice Scalia objected that the majority was constitutionalizing plea-bargaining rather than testing the validity of an accepted plea.[174] Because the constitution provides no right to plea-bargain, he maintained, no constitutional violation could arise from a lost opportunity to accept a plea offer.[175] In contrast, the majority's approach is more practical, less formalistic, and more attuned to how plea-bargaining impacts every case, not just those resulting in a guilty plea.[176]

The majority's outcomes-based analysis reflects, more broadly, that plea-bargaining encompasses all aspects of adjudication.[177] The dissenters' procedural-based approach features guilt adjudication as an isolated, in-court event, divorced from charging and sentencing.[178] In fact, as the majority acknowledges, these phases get absorbed informally in the "horse trading" of plea-bargaining, in which charge- and sentence-bargaining drive negotiations.[179] Further, none of this happens in court. Instead, plea-bargaining occurs privately without "formal court proceedings" or "judicial supervision."[180] *Lafler* and *Frye* acknowledge that plea-bargaining is a critical phase in every case, whether the conviction is obtained by guilty plea or trial verdict, and, unlike other critical phases, plea-bargaining is informal, off-the-record, and occurs outside court.

In addition to establishing that plea outcomes (not post-trial sentences) are the norm, the Court in *Lafler* made the important assumption that trial courts know the "going rate" for plea bargains in their jurisdictions.[181] If this assumption is accurate, a trial judge is well

171. *Lafler*, 132 S. Ct. at 1386–87.

172. *Frye*, 132 S. Ct. at 1412 (Scalia, J., dissenting).

173. *Id.* at 1414.

174. *Lafler*, 132 S. Ct. at 1394–95 (Scalia, J., dissenting).

175. *Id.*; *Frye*, 132 S. Ct. at 1412–14 (Scalia, J., dissenting).

176. *See* Bibas, *supra* note 20, at 154.

177. *See supra* notes 66–69 and accompanying text; *cf. Frye*, 132 S. Ct. at 1407 (quoting Scott & Stuntz, *supra* note 164, at 1912) (internal quotation marks omitted) (asserting that plea-bargaining "*is* the criminal justice system").

178. *See Frye*, 132 S. Ct. at 1414 ("[The plea-bargaining process] 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.").

179. *Id.* at 1407 (quoting Scott & Stuntz, *supra* note 164, at 1912).

180. *Id.*

181. *Id.* at 1410 ("It can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences."); *see also* Bibas, *supra* note 20, at 154 (discussing the Court's observation in *Lafler* that defendants reasonably expect

positioned to reject a plea if she suspects ineffective assistance of counsel has distorted the result. And if the plea is later the focus of a *Strickland* claim in post-conviction proceedings, the court could rely on the local "going rates" as a key factor in analyzing prejudice.[182]

3. Remedying and Preventing Lawyer Incompetence

The Court suggested in *Lafler* that separation of powers concerns may need to yield to the Court's emerging Sixth Amendment jurisprudence. Though the traditional remedy for a *Strickland* claim is a new trial, this obviously would not have fixed the problem in *Lafler* since the defendant's goal was to restore the earlier plea offer. In *Lafler*, the Court suggested that a prosecutor might be required to reoffer the earlier plea offer to remedy a Sixth Amendment violation.[183] Charging is a prosecutorial function, so it is rare for the Court to force a prosecutor's hand on charging.[184] Constitutional protections, such as equal protection and due process, limit prosecutorial discretion but are difficult to enforce.[185] *Lafler* suggests that the Sixth Amendment right to effective assistance of counsel also limits prosecutorial discretion at least at the remedial stage.

The Court in *Lafler* considered two remedial pathways: resentencing and reoffering a plea bargain.[186] It stated, "Sixth Amendment remedies should be narrowly 'tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.'"[187] If, absent the error, a defendant would have received a lesser sentence for the same offense, a court could remedy that error at resentencing.[188] But the remedy is more complicated if,

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the "going rate established by the functioning market").

182. *See Frye*, 132 S. Ct. at 1410 (suggesting that trial courts rely on their familiarity "with the boundaries of acceptable plea bargains and sentences" to assess *Strickland* prejudice).

183. *Id.* at 1389.

184. *See* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

185. *See* United States v. Armstrong, 517 U.S. 456, 464–65 (1996) (stating that equal protection and due process forbid racially discriminatory prosecutions); North Carolina v. Pearce, 395 U.S. 711, 725 (1969) (holding that due process forbids vindictive prosecutions), *overruled on other grounds by* Alabama v. Smith, 490 U.S. 794 (1989); *see also* Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 213 (2007) (describing the high burden defendants face in proving "selective" discriminatory prosecution under *Armstrong*).

186. *Lafler*, 132 S. Ct. at 1389 (noting that the injury suffered comes in at least "two forms").

187. *Id.* at 1388–89 (quoting United States v. Morrison, 449 U.S. 361, 364 (1981)).

188. *See id.* at 1389 ("[T]he court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between."); *see also* Jenia Iontcheva Turner, *Effective Remedies for Ineffective Assistance*, 48 WAKE FOREST L. REV. 949, 950 (2013) (critiquing *Lafler* because it affords trial courts discretion in deciding whether to remedy a

absent the error, the defendant would have pled to a lesser charge, or if the court lacks discretion, due to a mandatory sentencing statute, to adjust the sentence.[189] To remedy a constitutional violation in those circumstances a court may "require the prosecution to reoffer the plea proposal."[190] Thus, a court may force a prosecutor to reoffer an earlier plea offer to remedy a specific Sixth Amendment violation.

The *Frye* Court suggested trial-level reforms to prevent ineffective assistance of counsel in plea-bargaining.[191] One way to ensure the defendant is well-informed of his plea options, the Court said, is to put more on the record at the guilty plea proceeding or before trial—to include, for example, the defendant's understanding of the process that led to the plea, "the advantages and disadvantages of accepting it, and the sentencing consequences or possibilities that will ensue."[192] Some jurisdictions follow another tactic: Plea offers are put in writing and made part of the record before a final plea or trial so any miscommunications can be aired and possibly remedied at the trial court level.[193] These improvements would aid the flow of information between the defendant, prosecutor, and judge.

Lafler and *Frye* set the stage for reforms designed to identify or avoid ineffective assistance of counsel at the trial level, which also could prevent or curb related ineffective assistance of counsel claims in post-conviction.

D. *Toward Outcome-Based Regulation*

Lafler and *Frye* begin a new era of plea-bargaining regulation under the Sixth Amendment, in which outcomes are a key feature. The Supreme Court has recognized that plea-bargaining is a critical phase of nearly every case, since so few cases go to trial. *Strickland* has gained a new independence, so that it stands on its own and is not merely an adjunct to ensure due process (in the guilty phase) or a fair trial. The Sixth Amendment right to the effective assistance of counsel provides a separate, cognizable basis to challenge a conviction, even if the in-court adjudication is valid. Importantly, the prejudice test from *Lafler* and *Frye* is outcome-based: The defendant must show that absent deficient counsel, he would have received a shorter sentence or less serious

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Strickland violation).

189. *Lafler*, 132 S. Ct. at 1389 (citing Williams v. Jones, 571 F.3d 1086, 1088 (10th Cir. 2009); Riggs v. Fairman, 399 F.3d 1179, 1181 (9th Cir. 2005), *reh'g en banc granted*, 430 F.3d 1222 (9th Cir. 2005), *and appeal voluntarily dismissed*, 2006 WL 6903784 (9th Cir. Apr. 14, 2006)).

190. *Id.*

191. *See* Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012).

192. *Id.* at 1406.

193. *Id.* at 1409.

conviction.

As this robust Sixth Amendment jurisprudence has been evolving, separation of powers concerns have been muted. A primary justification for the Court's hands-off approach to plea-bargaining is that prosecutors control charging, so the Court has not regulated aggressive charge bargaining and threats in the plea-negotiation phase that are intended to induce guilty pleas. The Court's attitude about the trial penalty—the severe sentence risk of going to trial—may also be shifting. The Court regards plea-based sentences as the norm and a better yardstick for what prosecutors deem fair. And, at least at the remedial phase, the prosecutor may be ordered to reoffer or recharge an offense to remedy a Sixth Amendment violation.

Finally, though *Lafler* and *Frye* address Sixth Amendment ineffective assistance of counsel claims in the post-conviction phase, trial courts will serve as the locus of reform.[194] Trial judges have specialized expertise, the Court said, in the going rate for plea bargains in their jurisdictions.[195] And trial-based reforms may play a significant role in regulating plea-bargaining by improving representation and catching ineffective assistance of counsel before the judgment is final. Even in post-conviction, trial judges familiar with local plea-bargaining will identify instances in which prejudice can be established.

II. RETHINKING APPROACHES TO REFORM

Lafler and *Frye* shift the paradigm for regulating guilty plea adjudication on several different scales. They recognize that conviction by guilty plea is the overwhelming norm, as has been true for decades. *Lafler* and *Frye* embrace a broad and flexible approach to the Sixth Amendment right to the effective assistance of counsel and recognize that trial court procedural reforms can prevent violations. And while the right to counsel is procedural, the Court's emergent prejudice analysis underscores that outcomes are key to identifying and remedying Sixth Amendment violations. Part III of this Article proposes that courts can implement an outcome-based approach to monitoring plea-bargaining that integrates constitutional concerns into the plea-bargaining market. To set the stage for that proposal, this Part explores how constitutional norms and plea-bargaining fit together.

Several features of plea-bargaining, including its highly adaptive culture and blending of procedural and substantive law, make it particularly challenging for courts to regulate. Proposals to reform plea-bargaining oversight tend to fall into two categories: some build on the

194. *See* Bibas, *supra* note 20, at 167–69 (suggesting that various actors, including legislatures, bar organizations, and prosecutors, could reform the trial court process).

195. *Frye*, 132 S Ct. at 1410 ("It can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences.").

market model, while others insist on the need for constitutional norms or procedures. There is a natural tension between these approaches because the market tends to convert procedural rights into bargaining chips that defendants may use, through waiver, to purchase better outcomes. A central question is whether courts can meaningfully check the market to ensure constitutional norms, such as accuracy, fairness, and proportionality. This proposal envisions courts monitoring outcomes as a check against prosecutorial advantage and deficient counsel.

A. *Plea-Bargaining Eats Everything*

Regulating plea-bargaining is a complex task because it blends criminal adjudication, a thicket in its own right, with market-based negotiation. History has shown that plea-bargaining is forceful and adaptive and that it has evolved and grown organically.[196] Institutional actors adapt to plea-bargaining, and plea-bargaining adapts to changes in criminal law and procedure.[197] As a practical matter, any proposal to regulate plea-bargaining must be contemplated in terms of how it will be absorbed into and manipulated by the plea-bargaining.[198] Plea-bargaining will continue to thrive regardless of the form of regulation; the question is whether effective regulation can be designed to improve the accuracy and fairness of the plea-bargaining market.

1. The Adaptability of Plea-Bargaining

That plea rates have been remarkably steady amid other changes in criminal law and procedure suggests that plea-bargaining is adaptive in two related ways. Plea-bargaining incorporates changes in criminal law and procedure while consistently generating agreements. And institutional players adapt to the practice of plea-bargaining based on independent but often reinforcing interests.

Several scholars have traced the rise and entrenchment of plea-bargaining over the past century.[199] Though plea-bargaining was not widely practiced before the late 1800s, it blossomed at the turn of the

196. *See* Fisher, *supra* note 20, at 1019–20 (noting examples of bargaining in the English courts during the eighteenth century in which victims would sometimes accept cash payments in exchange for abandoning prosecution).

197. Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 7–10 (1979); *see, e.g.*, *id.* at 891 (noting that "charge bargaining appeared almost as soon as a public prosecutor found he had the power to accomplish it").

198. *See* Bibas, *supra* note 20, at 173 (praising *Lafler* and *Frye* because they "reinforce the actors' incentives and customary dispositions rather than attempting to rewire them").

199. *See, e.g.*, Alschuler, *supra* note 197; Fisher, *supra* note 20; Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 13 LAW & SOC'Y REV. 247 (1979).

century and was well established by the 1920s.[200] By 1925, almost 90% of convictions in federal court were obtained by guilty plea[201] and that rate remained steady until the early-1990s.[202] Today, 94% of felony state convictions are obtained by guilty plea, with even higher rates in the federal system.[203] Long before *Lafler* and *Frye*, the Supreme Court acknowledged that the vast majority of cases are resolved by guilty plea.[204]

Plea-bargaining readily absorbs changes in law and procedure. Adjustments to the legal rights of defendants may significantly impact the substance of negotiations, but the basic calculations of risk avoidance on both sides remain. Professor Albert W. Alschuler correlated the rise in guilty plea convictions in the 1920s with the expansion of substantive criminal law in the early part of the twentieth century, including federal prohibition.[205] The practice flourished in urban counties and involved corrupt practices on all sides, with police officers, plea "fixers," magistrates, and punishment-based pricing by defense lawyers all in the mix of bargained-for convictions.[206]

In plea-bargaining, procedural rights intended to protect the defendant, check executive power, and assure accurate results are

200. Alschuler, *supra* note 197, at 5–6 (sketching this history); *id.* at 27 (documenting that in urban jurisdictions in Virginia, guilty plea convictions accounted for half of all convictions in 1917 and three-quarters of all convictions by 1927). For more detailed treatment of the early history of plea-bargaining, see generally *id.* at 7–26.

201. *Id.* at 27. By contrast, from 1908–1915, about 50% of convictions in federal court were by guilty plea.

202. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 105, tbl. 5.22.2010, http://www.albany.edu/sourcebook/pdf/t5222010.pdf (providing information for federal courts from 1945–2010 that shows guilty plea rates increased rapidly during 1991–1999 to new highs, and continued increasing, though more slowly, during 2000–2010).

203. *Id.* tbl. 5.24.2010, http://www.albany.edu/sourcebook/pdf/t5242010.pdf (reporting that guilty pleas resolved over 97% of convictions in federal criminal cases in 2010); *id*. tbl. 5.46.2006, http://www.albany.edu/sourcebook/pdf/t5462006.pdf (reporting that 94% of state felony convictions in 2006 resulted from guilty pleas).

204. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012); Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012); Padilla v. Kentucky, 130 S. Ct. 1473, 1485 (2010); Brady v. United States, 397 U.S. 742, 752 (1970); Boykin v. Alabama, 395 U.S. 238, 244 n.7 (1969); *cf.* Bordenkircher v. Hayes, 434 U.S. 357, 361–62 (1978) (acknowledging the importance of the guilty plea in the criminal justice system).

205. Alschuler, *supra* note 197, at 32 (observing that, in 1912, half of Chicago defendants were arrested for crimes that did not exist twenty-five years earlier and that the Wickersham Commission reported that federal prohibition had created a high-volume guilty plea machinery in federal courts); *see also* Fisher, *supra* note 20, at 917–19 (arguing that plea-bargaining started with the development of liquor laws and the resultant massive expansion of criminal law for relatively victimless crime, then spread to murder and eventually to all parts of the criminal code).

206. Alschuler, *supra* note 197, at 24–26.

converted to bargaining chips within the plea process.[207] This is so because the government may seek to extract a price for a defendant exercising procedural rights; conversely, a defendant is able to gain a better outcome by forgoing procedures. The procedural rights revolution of the 1960s increased judicial oversight of criminal adjudication in the trial court and on appeal.[208] With increased constitutional protections, defendants enjoyed greater access to counsel and were afforded remedies for constitutional violations.[209] These developments expanded procedural protection for defendants and gave prosecutors an additional incentive to bargain.[210] Just as a factually weak case would enable the defendant to negotiate for a better deal, the defendant could also trade his procedural rights—such as the right to move for suppression of illegally seized evidence or warrantless arrest, the right to jury trial, or the right to appeal.[211] With a guilty plea, the prosecutor could avoid the risk of not having a viable case to bring (due to suppression of evidence), losing his case (due to acquittal), or having a conviction reversed on appeal (due to pretrial or trial error).[212] Because of the way protections for defendants get incorporated into the plea bargains, some academics are cautious about increasing the number of rights or judicial controls that will, in short order, have a neutral or deleterious impact on defendants who exercise them.[213]

Prosecutors strengthened their bargaining advantage in the 1980s as substantive legal changes gave them the upper hand and pushed plea rates even higher. Prosecutors attained greater negotiating power in the courtroom under tough drug, mandatory minimum sentence, habitual

207. Barkow, *supra* note 66, at 996–97 (stating that, under plea-bargaining, "prosecutors are allowed to put a price on the defendant's exercise of the judicial check, which is a key element in the separation of powers").

208. Alschuler, *supra* note 197, at 38–40 (describing the impacts of the "due process revolution" on plea-bargaining).

209. *See* McDonald v. City of Chi., 130 S. Ct. 3020, 3044 n.28 (2010) (summarizing the incorporation of constitutional criminal rights to the states); Argersinger v. Hamlin, 407 U.S. 25, 27 (1972) (noting that the Sixth Amendment right to confrontation is applicable to the states); Gideon v. Wainwright, 372 U.S. 335 (1963) (incorporating the Sixth Amendment right to counsel to the states); Mapp v. Ohio, 367 U.S. 643, 346–50 (1961) (affirming the constitutional origins of the rules excluding evidence that was obtained without a warrant from criminal trials).

210. Alschuler, *supra* note 197, at 38.

211. *See* Nancy J. King & Michael E. O'Neil, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 250 (2005).

212. *See* Burks v. United States, 437 U.S. 1, 18 (1978) (holding by implication that, except in cases of reversal based on insufficiency of the evidence, a court of appeal reversing on procedural grounds will remand for a new trial).

213. *See* Fisher, *supra* note 20, at 1066 ("[E]very new right [conferred by the courts] supplied a new axis along which a bargain could be struck."); *see also* Bibas, *supra* note 20, at 172 (invoking the work of Professor William Stuntz, who argued that constitutionalizing the plea-bargaining process might have the perverse effect of harming defendants).

offender, and sentencing laws that constrained judicial sentencing discretion.[214] These new laws gave defendants greater incentive to strike plea bargains to avoid severe sentencing consequences that flow from charging choices. Since the 1980s, federal plea rates have increased from approximately 87% to 97%.[215]

Even as guilty plea rates have remained steady or increased, plea outcomes have become more severe. Since the 1980s, the expansion and aggressive enforcement of criminal laws has dramatically increased the number of defendants prosecuted and the lengths of prison terms imposed.[216] Today guilty pleas occur in a high-stakes environment where long prison terms, severe collateral consequences, and extremely limited resources (such as crowded courtrooms and overburdened defense counsel) are common.[217] In this environment, trials are extremely rare and can carry severe consequences. As a result, most defendants conclude today (as they have for decades) that conviction is

214. Traum, *supra* note 7, at 450–51.

215. BUREAU OF JUSTICE STATISTICS, *supra* note 105, tbl. 5.22.2010, http://www.albany.edu/sourcebook/pdf/t5222010.pdf. Likewise, guilty plea rates have increased to 95% of all state convictions. THOMAS H. COHEN & TRACEY KYCKELHAHN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006, at 10 (2010), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2193.

216. *See* Traum, *supra* note 7, at 430 n.38 ("The per-day incarceration rate jumped from 133 per 100,000 in 1980 to 387 per 100,000 in 1994, and then to 762 per 100,000 in 2008."); *see also* MARGARET WERNER CAHALAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES, 1850–1984, at 54 tbl. 3-24 (1986), *available at* http://www.ncjrs.gov/pdffiles1/pr/102529.pdf (reporting that, in the early 1980s, state offenders served a median of sixteen to seventeen months before first release); FRANKLIN E. ZIMRING & GORDON HAWKINS, THE SCALE OF IMPRISONMENT 120 fig. 5.1 (1991) (showing graphically the total prison population and rate of imprisonment from 1949–1988); Bruce Western & Christopher Wildeman, *The Black Family and Mass Incarceration*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 221, 225 (2009) ("Because the system of criminal sentencing had come to rely so heavily on incarceration, an arrest in the late 1990s was far more likely to lead to prison time than at the beginning of the prison boom in 1980."); Press Release, U.S. Dep't of Justice, The Nation's Prison Population Grew Almost 9 Percent Last Year (Aug. 9, 1995), http://bjs.ojp.usdoj.gov/content/pub/press/PI94.PR (reporting large increases). *See generally* PEW CENTER ON THE STATES, PRISON COUNT 2010: STATE POPULATION DECLINES FOR THE FIRST TIME IN 38 YEARS (2010), *available at* http://www.pewtrusts.org/our_work_report_detail.aspx?id=57797.

By 2006, the median felony sentence in state court was more than four years. *Cf.* COHEN & KYCKELHAHN, *supra* note 215, at 13 ("Among offenders convicted of a felony and sentenced to prison, the mean sentence was 49 months and the median was 24 months.").

217. *See* Traum, *supra* note 7, at 429–30, 431–33, 440 (discussing long prison sentences and collateral consequences); Cara H. Drinan, Lafler *and* Frye*: Good News for Public Defense Litigation*, 25 FED. SENT'G REP. 138, 139 (2012) (noting evidence that one public defender had no opportunity to brief 40%–50% of his clients before they pled guilty). *See generally* Heather Baxter, Gideon*'s Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, 2010 MICH. ST. L. REV. 341 (detailing the indigent defense crisis and related litigation).

either a certainty or poses a significant risk. They plead guilty to "cut their losses."[218] It is a fair prediction that increased regulation of guilty pleas would have the potential to modify plea outcomes but would not likely alter plea rates.

2. Institutional Players and Their Incentives

Enhancing or redefining the role of the judges in guilty plea adjudication may prove difficult because they are integral to supporting the guilty plea system. Plea-bargaining is deeply entrenched in the criminal courts, and its success relies on institutional players—judges, prosecutors, and defense attorneys—doing their part.[219] For these repeat players, plea-bargaining collapses and displaces their traditional trial-based institutional roles and has, over time, assigned them important roles in the guilty plea system.[220]

In trial adjudication, the discrete tasks of charging, convicting, and sentencing involve different institutional players acting as checks on the others. In the traditional model, prosecutors charge (often with judicial or grand jury oversight), juries or judges convict (holding the prosecutor to a high burden of proof), and judges impose sentences. Even in the traditional trial adjudication model, prosecutors' broad charging discretion is minimally checked and can dictate the outcome of the case, including the sentence.[221] Still, the formal, discrete phases of charging, adjudication, and sentencing keep the prosecutor's obligations transparent to the court, the defendant, and the public.[222] Such transparency operates as a check on executive power to charge, convict, and imprison.[223]

Plea-bargaining displaces these institutional roles and consolidates them, often unchecked, in the prosecutor.[224] The prosecutor may effectively control all three functions—charging, adjudication, and

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218. *See* Fisher, *supra* note 20, at 1042.

219. BIBAS, MACHINERY, *supra* note 23, at 31; *see also* Albert W. Alschuler, *The Defense Attorney's Role in Plea-Bargaining*, 84 YALE L.J. 1179, 1229–30 (1975) (describing institutional advantages of public defenders who have better information about prosecutors and judges compared to retained counsel).

220. Alschuler, *supra* note 219, at 1206–08.

221. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

222. *See* Barkow, *supra* note 66, at 994.

223. *Id*. *Contra* BIBAS, MACHINERY, *supra* note 23, at 31 ("In practice . . . the public and victims have little role in criminal prosecution and so cannot constrain prosecutors. Prosecutors draw their fixed salaries regardless of how satisfied victims and the public are.").

224. Barkow, *supra* note 66, at 996–97.

sentencing—and thus displace the role of judge and jury.[225] The prosecutor has wide latitude to add, reduce, dismiss, or substitute charges during plea-bargaining with little oversight.[226] The defendant waives his right to trial, pre-guilt legal issues, and, often, appellate review.[227] The entire plea is often structured around the substantive outcome, namely, the charge of conviction and the sentence. The judge's role at sentencing is diminished, as the court may be required by statute to impose a particular sentence based on the charge or it may choose to impose the sentence contemplated by the parties because of its customary, supportive role in the guilty plea system.[228]

Judges and defense counsel reinforce, rather than check, this consolidation of prosecutorial power. Defense lawyers quickly adapt themselves to the plea-bargaining culture in a given court and embrace plea-bargaining's flexibility, expediency, and relative fairness, especially compared to trial.[229] Their detailed knowledge of the system, plea bargains, and trial risks are their stock-in-trade.[230] Professor George Fisher posits that several features of the modern criminal justice system, including public defender offices, either were conceived or evolved to support plea-bargaining as the primary mode of case adjudication.[231]

Judges have adapted to plea-bargaining culture based on their own set of incentives. Historically, judges resisted plea-bargaining and later treated it neutrally at sentencing.[232] Over time, however, judges cooperated in the practice through sentence-bargaining by rewarding defendants who pled guilty with lower sentences than those convicted at trial of the same crimes.[233] Judges came to appreciate the many

225. *Id.* at 994–95 (arguing that the current lack of checks on prosecutorial power in the criminal law is at odds with textual and historical support for separating criminal law functions among the three branches with judges having a strong role in enforcing that separation).

226. *Id.* at 996–97; *see also Bordenkircher*, 434 U.S. at 364–65.

227. Brady v. United States, 397 U.S. 742, 748 (1970).

228. *See* Bierschbach & Bibas, *supra* note 6, at 10 (observing that most judges "rubber-stamp[] the bargain and sentence"). In federal cases, mandatory minimum sentences apply in approximately 27.2% of criminal cases, subject to narrow exceptions. U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM xxvii (2011), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_PDF/Executive_Summary.pdf.

229. MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 90–91 (1978).

230. *Cf.* BIBAS, MACHINERY, *supra* note 23, at 31–32.

231. Fisher, *supra* note 20, at 1063–64.

232. Alschuler, *supra* note 197, at 19–24 (noting that, historically, courts were suspicious of plea-bargaining, in part because of its close connection to forced confessions); Fisher, *supra* note 20, at 984 (noting that judges did not aid plea-bargaining before the last quarter of the nineteenth century).

233. Fisher, *supra* note 20, at 986–87.

advantages of guilty pleas, especially as expanded procedural protections generated more criminal appeals: Guilty pleas were more efficient, posed no risk of trial error or reversal on appeal, and virtually eliminated the risk of a wrongful conviction.[234] Because "plea bargaining by its very nature hides both factual and legal error," it protects the reputation of the system as a whole by affirming that the guilty are convicted without errors.[235] Judges also embrace plea-bargaining to manage a high caseload and curry popularity with local attorneys.[236] In this culture, judges and prosecutors share aligned incentives to ensure that plea-bargaining thrives, and a corollary interest in avoiding jury trials.[237]

Plea-bargaining has displaced and redefined the trial-based institutional roles of judges, prosecutors, and defense attorneys, and collapsed the procedures that operate to check prosecutorial advantage. The guilty plea canvass stands as a moment of essential, direct contact between the court and defendant at the guilty plea hearing, but it does not check, or even record, the plea-bargaining process that preceded it. Thus, an essential challenge of reform is reframing the purpose of guilty plea procedures and the roles of institutional players who perform them. The Supreme Court's recognition in *Lafler* and *Frye* that ours "is for the most part a system of pleas, not a system of trials,"[238] opens the door to tailoring constitutional doctrine, such as *Strickland*, to fit this reality.

B. *Approaches to Reform*

Critics of plea-bargaining share some common concerns but advocate different pathways for reform.[239] Common concerns include:

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234. *Id*. at 1040–43.

235. *Id.* at 1043.

236. *See* Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1102 (1976) (describing judicial plea-bargaining); *id.* at 1081 (noting that a high level of guilty pleas might still be maintained without severely penalizing all defendants who are convicted after trial because defendants value the reduction in uncertainty a plea creates); *id*. at 1087–88 (noting that, in Chicago state courts, judges would state to counsel what the sentence would be if the defendant pled guilty); *id.* at 1089 (noting "the fact that the defendant's sentence would be higher after conviction at trial was implicit, not explicit"); *id.* at 1093 (describing how some judges had a "semi-official 'schedule' of penalties").

237. *Id.* at 1102–03 (noting that plea-bargaining relieves "the administrative pressures that beset the prosecutors as forcefully as they beset the judges themselves").

238. Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012), *quoted in* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012).

239. *See, e.g.*, Alschuler, *supra* note 219, at 1313–14 (arguing that plea-bargaining should be abolished in favor of jury trials); Appleman, *supra* note 46, at 747–50 (arguing that a community jury should preside over pleas); Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 23, at 1151–52 (advocating a consumer protection model of information enhancement in the plea process); Bibas, *Extrajudicial Reforms*, *supra* note 20, at 152 (advocating a range of voluntary and rule-based reforms); Stephen J. Schulhofer, *Plea*

(1) prosecutorial control over plea-bargaining;[240] (2) powerful incentives to plead guilty can result in conviction of the innocent, or negatively impact less culpable defendants;[241] and (3) lack of oversight, transparency, and judicial review of plea-bargaining can make it difficult to assess whether a plea bargain is skewed by prosecutorial overreaching, lack of information, ineffective defense counsel, or other factors.[242] In their approaches to reform, critics tend to fall into two schools: some propose injecting constitutional norms or procedures into the plea-bargaining process, while others propose market-enhancing reforms.

The proposals discussed below come from scholars who view plea-bargaining as an important, though flawed, method of criminal adjudication. At one end of the spectrum are those who would eliminate the practice and at the other are those who champion its virtues. Abolitionists maintain that plea-bargaining cannot be reconciled with fundamental values in criminal adjudication.[243] For example, Professor Stephen J. Schulhofer argues for abolition of plea-bargaining on grounds that a neutral fact finder should determine guilt and punishment, defendants should not be pressured to plead guilty, and defendants should be represented by agents with aligned interests.[244] Champions of plea-bargaining view it as an efficient and cost-effective system that affords defendants an important choice.[245] In this view, trials are costly, time-intensive, and divert scarce judicial, prosecutorial,

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Bargaining as Disaster, 101 YALE L.J. 1979, 1979–80 (1992) (critiquing plea-bargaining and arguing that it should be abolished); Scott & Stuntz, *supra* note 164, at 1950–51 (advocating revision of plea-bargaining doctrine to include contract-based analysis to normalize results and enhance innocence sorting).

240. Barkow, *supra* note 66, at 1044 (arguing that unreviewable prosecutorial discretion at charge bargaining "stands in sharp tension with the separation of powers"); Marc L. Miller, *Domination and Dissatisfaction: Prosecutors as Sentencers*, 56 STAN. L. REV. 1211, 1252 (2004) (arguing that mandatory federal sentencing guidelines gave federal prosecutors "virtually absolute power" over sentencing).

241. *See Frye*, 132 S. Ct. at 1407 (quoting Barkow, *supra* note 66, at 1034); Scott & Stuntz, *supra* note 164, at 1911 (arguing that "impediments to efficient bargain[ing] . . . . lead[ ] predictably to innocent defendants being offered (and taking) the same deals as guilty ones").

242. Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 23, at 1125–27.

243. Alschuler, *supra* note 236, at 1061 ("Although my own view is that the institution of plea-bargaining can and should be abolished, the Article tentatively accepts the opposite view and examines how a system of plea bargaining should be structured."); *id.* at 1119 ("That plea negotiation . . . collapses the adjudicative and sentencing functions into one is simply an unavoidable defect of the process."); *see, e.g.*, Kenneth Kipnis, *Plea Bargaining: A Critic's Rejoinder*, 13 LAW & SOC'Y REV. 555, 557–58 (1979) (arguing that plea-bargaining is counter to the ideals of the Anglo-American justice system).

244. Schulhofer, *supra* note 239, at 2009.

245. Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1976–78 (1992).

and defense resources from other cases.[246] Plea bargains offer defendants autonomy on an important life decision that affects their liberty.[247] Since society protects individuals' ability to make other weighty life choices, defendants must be permitted to determine the outcome of their own case.[248]

Even proponents recognize that plea-bargaining is imperfect and creates incentives that compel innocent defendants to plead guilty.[249] Justice Scalia acknowledged that plea-bargaining "presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty."[250] But, he stated, it is a "necessary evil," without which "our system of criminal justice would grind to a halt."[251] Others argue that the structural "imperfections" in plea-bargaining merely "reflect the imperfections of an anticipated trial."[252] If trials were perfect, the argument goes, guilty defendants would avoid them and innocent defendants would insist on them.[253] Since trials are imperfect and the sentencing consequences after trial can be severe, defendants, even those who may be innocent or have a defense, opt to plead guilty to manage these risks.[254]

The opinions in *Lafler* and *Frye* highlight the debate about whether plea-bargaining should be regulated under the Constitution and, if so, what reforms might be effective. The majority embraced at least a partial constitutional approach, holding defense counsel accountable for prejudicial ineffective assistance during plea-bargaining without dictating specific constitutional reforms.[255] Justice Scalia acknowledged that plea-bargaining is "a subject worthy of regulation," but not protected under the Sixth Amendment.[256] Scholars are also divided on whether to rely on constitutional norms or market-based concepts to reform and regulate plea-bargaining.

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246. Brady v. United States, 397 U.S. 742, 752 (1970).

247. Easterbrook, *supra* note 245, at 1976–77.

248. *Id.*

249. *Id.* at 1971–72, 1975, 1978; Robert E. Scott & William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 YALE L.J. 2011 (1992) (noting that "*both* trials *and* bargains are flawed"); *see also*, *Brady*, 397 U.S. at 758 (stating that guilty plea convictions are "no more foolproof than full trials to the court or to the jury").

250. Lafler v. Cooper, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting).

251. *Id.* (citing Alschuler, *supra* note 197, at 38).

252. Easterbrook, *supra* note 245, at 1978.

253. *Id.* at 1970–72.

254. *Id.* at 1975.

255. Missouri v. Frye, 132 S. Ct. 1399, 1408–11 (2012) (finding counsel deficient under *Strickland* for failure to communicate plea offer and suggesting trial court and legislative reforms).

256. *Id.* at 1413–14 (Scalia, J., dissenting) (suggesting legislators are appropriate bodies to create "sub-constitutional" reforms).

1. Constitutional Reformers

One school of reformers seeks to inject constitutional norms into the guilty plea process. Professors Rachel Barkow and Laura Appleman offer different approaches to address common concerns.[257] Each injects a traditional constitutional check on prosecutorial advantage that is currently missing from the process. Professor Barkow relies on judicial authority, while Professor Appleman proposes a "plea jury" to restore transparency and community involvement to criminal adjudication.

Professor Barkow asserts that structural separation of powers safeguards are absent in criminal law, especially in plea-bargaining.[258] This absence is especially stark in plea-bargaining because prosecutors dictate the charges and often the sentence without a judicial check.[259] Professor Barkow argues, "[J]udges have become desensitized to a criminal justice system in which prosecutors exercise extensive judicial power."[260] Instead of relying on institutional checks, criminal adjudication relies on individual procedural rights as the primary (though inadequate) mechanism to prevent government overreaching,[261] and prosecutors routinely condition guilty pleas on the defendant's waiver of those constitutional rights.[262] Checks on prosecutorial power, such as the right to trial, are thus subsumed in the plea-bargaining process, avoiding judicial oversight.[263]

Professor Barkow suggests that one way to redress this problem is to reframe the court's inquiry at the guilty plea hearing. When defendants plead guilty, the real question should not be whether their plea is knowing and intelligent, "but whether there is a sufficient check on prosecutors' use of the bargaining power."[264] Currently, Professor Barkow answers, there is no such check on the structural relationship between the branches.[265]

Professor Barkow's proposal redresses the problem of collapse and displacement of institutional roles in plea-bargaining. She reimagines the court at the guilty plea hearing as playing a more active role, one that is focused not merely on the individual process choice and related waiver of rights by the individual defendant (the status quo), but on a broader, constitutional concern of checking prosecutorial power. Because courts have become accustomed in the plea context to

257. Barkow, *supra* note 66, at 994–95; Appleman, *supra* note 46, at 747–50.
258. Barkow, *supra* note 66, at 996–97.
259. *Id.*
260. *Id*. at 1038.
261. *Id*. at 1033–34.
262. *Id*. at 1046.
263. *Id*. at 1049.
264. *Id*.
265. *Id*.

prosecutors exercising such broad power, Professor Barkow's proposal would require courts to reassert their institutional role within the guilty plea process.[266] Professor Barkow does not detail whether this judicial check on prosecutorial authority would be primarily procedural in nature or include a substantive review of the charges, bargaining, or the sentence. Her proposal is more conceptual in that it contemplates that courts could more actively monitor guilty plea adjudication in a manner that is consistent with their institutional judicial role of checking executive power and protecting individual rights.

Professor Appleman contemplates the creation of the plea jury as an alternative constitutional check on prosecutorial power. Professor Appleman derives the concept of a "plea jury" from the Sixth Amendment, which, she argues, confers a community right to jury trial.[267]A key feature of this broader community right is that it is not the defendant's right to waive.[268] So, Professor Appleman argues, a defendant's waiver of a jury trial does not sever the community's right to hear his case.[269] Professor Appleman proposes that the defendant would allocute to the plea jury, which, with some judicial oversight, could decide whether to accept the plea.[270] The goal would be to integrate plea-bargaining with "classical criminal-procedure values," including voluntariness, accountability, transparency, and community participation,[271] instead of the backroom and insider-dealing that characterizes plea-bargaining. Compared to current practices, a plea jury could be costly to implement and time-consuming for courts and parties.[272] Defendants, who might not welcome the plea jury's involvement in their case, could challenge the process or demand safeguards that encumber the process. Still, the proposal is valuable in that it seeks to inject community participation and constitutional norms into guilty plea adjudication.

The proposals of Professors Appleman and Barkow share common threads. Both seek to integrate plea-bargaining and constitutional norms so that plea-bargaining better reflects deeply held, constitutional values about governmental power, process, and liberty. Both share the notion that criminal adjudication is not simply a private matter for the defendant and the prosecutor to resolve. Instead, checks on prosecutorial power and individual choice are essential to the constitutional design and the public's broader interest in criminal

266. *Id.* at 1036–38.
267. Appleman, *supra* note 46, at 736–37.
268. *Id.* at 744.
269. *Id.*
270. *Id.* at 734.
271. *Id.* at 768.
272. *Id.* at 769.

enforcement, justice, fairness, and deployment of public resources. Courts have an institutional, constitutional role to play even if the defendant admits guilt (per Professor Barkow), and the community has a stake (per Professor Appleman) in checking prosecutors' power to charge, adjudicate, and sentence individuals.

2. Market-Based Reformers

Other reformers build on the market model. Professor Stephanos Bibas proposes market-based reforms that build on consumer protection concepts, reinforce actors' incentives, and rely on extrajudicial regulatory controls.[273] Professor Robert Scott and the late Professor William Stuntz, in contrast, urged greater reliance on contract law concepts and remedies to increase the efficiency and fairness of plea-bargaining.[274] These proposals share the laudable feature of trying to identify and correct problems within the plea-bargaining market that can skew results, such as the information and power asymmetry between the prosecutor and defendant, and the risk–reward incentives that can cause innocent defendants to plead guilty. They differ significantly, however, in their view of the role that courts should play. Professor Bibas envisions courts on the periphery of plea-bargaining reform.[275] Professors Scott and Stuntz, by contrast, envision courts having a hands-on, substantive role in monitoring outcomes to ensure that plea-bargaining is actually fair and not skewed by prosecutorial advantage or ineffective counsel.[276]

a. Reinforcing Shared Incentives

Professor Bibas emphasizes the need for reforms that will enhance a defendant's capacity to make a better informed decision on whether to accept a plea bargain.[277] Professor Bibas's significant work on plea-bargaining describes a market that is complex,[278] mostly unregulated,[279]

273. *See* Bibas, *Regulating the Plea-Bargaining Market, supra* note 23, at 1117; Bibas, *supra* note 20, at 152–53.

274. Scott & Stuntz, *supra* note 164, at 1950–51.

275. *See* Bibas, *supra* note 20, at 152 (proposing that "nonjudicial actors (especially prosecutors) will do much to solve plea bargaining's problems prospectively").

276. Scott & Stuntz, *supra* note 164, at 1952 (observing that defense counsel is key to checking government overreaching); *id.* at 1931 (discussing fairness).

277. Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 23, at 1145–46.

278. *Id.* at 1120–21 (arguing that plea-bargaining is "far too complicated and opaque" for most defendants to fully understand the choices presented to them).

279. *See id.* at 1120; *see also* BIBAS, MACHINERY, *supra* note 23, at 30–31 (describing how plea-bargaining is run by insiders, professional prosecutors, and defenders, who are repeat players, not traditional adversaries, and their actions are "largely insulated from oversight and supervision" by courts, the public, or the defendants whose cases are at stake); Bibas, *supra* note 14, at 79 (describing the Court's "laissez-faire, hands-off approach" to plea-bargaining); *cf.*

and possibly ill-suited for court-led reforms.[280] Unique aspects of plea-bargaining distinguish it from other legal negotiations (or markets): the amount of prosecutorial control over plea offers (charges and sentencing), the variability of defense counsel, and informational gaps defendants experience in considering a plea offer.[281] Bibas's proposals for reform focus on three themes: (1) defendants need better, clearer information about their options and related consequences;[282] (2) timing is critical because reforms must be designed to improve plea-bargaining when it occurs in the pretrial stage, not after the fact;[283] and (3) reforms should focus on institutional actors' existing incentives in the marketplace.[284]

Consumer protection-inspired reforms, Professor Bibas argues, would enhance a defendant's capacity to assess plea offers.[285] A host of reforms could make the plea-bargaining process more transparent and easier for defendants to comprehend. These include requiring plea offers to be made in writing, making plea and trial consequences (including possible jail or prison time) easier to comprehend, giving defendants more time to consider a plea offer, and improving the quality of defense counsel.[286] Prosecutors could explain the basis for their offers to the defendant and spell out likely sentencing consequences before the plea is accepted.[287] The quality of defense counsel could be improved through training, use of checklists, and internal oversight.[288]

Timing is critical: Reforms need to occur in the pre-plea, pretrial phase so that the problem of incompetent counsel is flagged before the conviction and sentence are final. Professor Bibas predicts that *Lafler*

Bibas, *supra* note 166, at 2469–86 (describing how plea-bargaining outcomes are keyed not to trial-outcome predictions, but a range of "structural distortions" that shape the parties' bargaining incentives).

280. Bibas, *supra* note 20, at 152 ("Courts are poorly equipped to remedy woefully inadequate defense lawyering on their own."); *see also id.* at 174 (stating that nonjudicial actors are "better suited" to implement plea-bargaining reforms).

281. *See id.*; *cf.* Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 23, at 1126–27 (noting "psychological biases and heuristics that color defendants' assessments of their own cases in plea bargaining").

282. Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 23, at 1151–59.

283. Bibas, *supra* note 20, at 152–53.

284. *Id*. at 164–67; Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 23, at 1144–46.

285. Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 23, at 1151–59.

286. *Id.* at 1154–58.

287. Bibas, *supra* note 20, at 167 (citing Bibas, *supra* note 166, at 2525) (describing prosecutor-led "reverse proffer sessions," in which a prosecutor tells the defendant "how the government would convict the defendant," and suggesting that prosecutors might opt to disclose more information in this unofficial setting than is legally required at the plea stage).

288. Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 23, at 1160 (suggesting training and the use of checklists); Bibas, *supra* note 20, at 168 (suggesting internal defender audits could "weed out the weakest lawyers").

and *Frye* will have a limited impact in practice because, as with all *Strickland* claims, defendants face significant barriers when challenging their conviction and sentence collaterally, after the fact.[289] Defendants must satisfy a demanding legal standard, and Professor Bibas suspects that courts may be reluctant to overturn a conviction or grant much relief.[290] Meaningful reforms will need to be "proactive" measures designed to ensure that defendants get competent advice in the first place, that is, during the plea-bargaining stage.[291] Professor Bibas argues that nonjudicial actors, especially prosecutors, are better positioned to implement reforms at the plea-bargaining stage.[292]

Professor Bibas's proposals are prosecution-centric and largely reinforce, rather than check, existing institutional roles in the plea-bargaining marketplace. Observers of plea-bargaining, including Professor Bibas, recognize that prosecutors currently dictate plea-bargaining without any meaningful check on their power.[293] Still, Professor Bibas expresses confidence that prosecutors are appropriate engines of reform because "their interests largely align with those of defendants and the system" in terms of reaching fair deals and ensuring that convictions withstand challenges on appeal and in post-conviction proceedings. Defender organizations and judges share these same incentives, he argues, of needing to move cases quickly and eliminating the risk of post-judgment litigation.[294]

Professor Bibas is correct about shared incentives and wise to contemplate reforms that "can work well because they go with the grain of plea bargaining, not against it."[295] The downside of this approach is that it reflects the status quo instead of altering it. Institutional actors currently share all these same incentives, that is, moving cases and avoiding judicial oversight, and it is precisely these shared incentives that facilitate guilty plea adjudication without meaningful oversight either before or after the fact. True, prosecutors are favorably positioned to affect plea-bargaining, but this is because, as the most powerful players in the process, they control it. Entrusting reform to prosecutors without building in a check on their power may place too much faith in

289. Bibas, *supra* note 20, at 159–63.

290. *Id.* at 161–62.

291. *Id.* at 159.

292. *Id.* at 164–65, 167.

293. Barkow, *supra* note 66, at 996–97; Fisher, *supra* note 20, at 868; *see* Bibas, *supra* note 20, at 150; Schulhofer, *supra* note 239, at 1996–97.

294. Bibas, *supra* note 20, at 165–67 (citing as an example the impact of *Padilla*, which requires defense counsel to advise the defendant of the risk of deportation before pleading guilty). "*Padilla* warnings risk discouraging guilty pleas," Bibas writes, but instead "the desire to do the right thing and to obtain bulletproof convictions has trumped the fear of impeding pleas." *Id.* at 166–67.

295. *Id.* at 170.

the existing market and result in insufficient will to challenge it.

Overall, Professor Bibas's proposal features courts as relatively weak actors in implementing plea-bargaining reform. This extrajudicial approach may reflect two different concerns. The first is a desire to avoid constitutionalizing the plea-bargaining process, which could stifle creativity and flexibility and lead to the kind of rigid procedural regulation that governs trial adjudication.[296] The second is a desire to keep regulation procedural and thus avoid court intervention in the substance of pleas.[297] Professor Bibas suggests that in *Padilla* the Supreme Court for the first time began to "regulate plea bargaining's substantive calculus," referring to the sentencing and "related collateral civil consequences."[298] His proposed reforms would "regulate at least the process if not the substance of plea bargaining."[299] Because "courts can do little on their own," Professor Bibas does not foresee courts assuming a greater, substantive role in regulating plea outcomes.[300] He instead foresees a mixed menu of reforms designed to enhance market functioning.[301]

b. Ensuring Market Prices

Though Professors Scott and Stuntz also fashion reforms on a market model, they envision courts acting as market referees. Professors Scott and Stuntz propose that courts at the plea stage "review not process but outcomes."[302] This concept fits into a broader proposal that courts should use contract-based principles to protect defendants against prosecutorial advantage and defense attorney error—factors that interfere with the parties' ability to negotiate a fair outcome.[303] Here, the Article focuses on their outcomes proposal because it offers a market-based justification for courts to regulate the substance of pleas.

Outcomes provide a good indicator of whether the plea market is working or whether ineffective counsel or prosecutor advantage is skewing results.[304] According to Professors Scott and Stuntz, "Because most attorney error affects the price of the plea rather than its existence,

296. *See id.* at 173 (criticizing the "Warren Court's . . . command-and-control regulation"); Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 23, at 1152 ("[D]eveloping flexible nonconstitutional responses might obviate further constitutional reforms.").

297. *See* Bibas, *supra* note 20, at 171 (discussing concerns of courts becoming involved in the substance of the guilty plea).

298. Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 23, at 1117.

299. *Id.*

300. Bibas, *supra* note 20, at 153.

301. *Id.* at 152–53.

302. Scott & Stuntz, *supra* note 164, at 1959.

303. *Id.* at 1967.

304. *Id.* at 1958–60.

most attorney error does not amount to ineffective assistance."[305] Professors Scott and Stuntz wrote this some twenty years before *Lafler* and *Frye*, when *Hill* provided the only avenue to challenge a guilty plea under *Strickland* and required a defendant to show that with competent counsel he would have refused to plead guilty and insisted on going to trial.[306] This remains true today, even after *Lafler* and *Frye*, because most nonegregious errors by counsel will not satisfy the *Strickland* standard.[307]

Professors Scott and Stuntz argue that outcomes, not procedural analysis, provide a better gauge of whether the parties agreed to a fair "price."[308] They assert that the "difference between a good and bad deal" depends on (1) "knowledge of likely trial outcomes" and resulting sentences, and (2) "a good sense of the going 'market price' of the relevant category of crime—i.e., the sentence usually assigned after a guilty plea in similar cases."[309] One problem is that the repeat players (prosecutors, judges, and defense attorneys) are well positioned to have such knowledge, while defendants, especially inexperienced ones, are not.[310] Defense counsel's knowledge about the marketplace may be the key factor in achieving a fair result and more important than the time the lawyer devoted to the case.[311] In the marketplace, "bargaining skill depends more on knowledge of information about *other* cases than on case-specific preparation."[312]

Because judges know the marketplace, they are well positioned to identify plea outcomes that exceed the going rate.[313] Professors Scott and Stuntz argue that although a "judge is in a poor position to supervise the bargaining process, . . . he is in a very good position to recognize unusually high sentences."[314] In their view, a high sentence should trigger judicial scrutiny—such as requiring an explanation from the parties—and judges might suspect that defense attorney mistake is to blame for the above-norm outcome.[315]

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305. *Id.* at 1958.

306. *Id.* at 1957–58 (citing Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

307. Strickland v. Washington, 466 U.S. 668, 687 (1984) (holding that, to satisfy the *Strickland* test, counsel must make errors so serious so as to no longer function as "counsel" within the meaning of the Sixth Amendment); *see also* Hessick, *supra* note 165, at 147.

308. Scott & Stuntz, *supra* note 164, at 1959.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id*. (suggesting that judges are in a good position to identify unusually high sentences); *accord* Missouri v. Frye, 132 S. Ct. 1399, 1410 (2012) ("It can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences.").

314. Scott & Stuntz, *supra* note 164, at 1959.

315. *Id.* at 1959–60.

The approach of Professors Scott and Stuntz would give judges a powerful, market-based role in regulating plea-bargaining. Judges could use plea outcomes as an indicator for market factors, such as ineffective defense counsel, that negatively impact the parties' ability to negotiate a fair result. Monitoring outcomes would be at once more direct and less intrusive than overseeing plea-bargaining, which is time-consuming and occurs out of court. By monitoring outcomes based on going market prices, courts could correct more subtle differences in attorney error that may separate good and bad deals, even while not rising to the level of ineffective assistance of counsel. Indeed, Professors Scott and Stuntz suggest that in all cases the bargained-for sentence should operate "as a ceiling, but not a floor" and that "downward discretion should be *encouraged* whenever the sentence is substantially above the 'market level' in the relevant jurisdiction."[316]

The proposal of Professors Scott and Stuntz places courts at the center of the plea-bargaining market, with authority to shape the substantive (not merely procedural) outcome of the case. This approach, though market-based, reflects basic separation of powers concerns. It explicitly abandons a process-based measure of fairness and instead relies on "price" as a substantive measure of relative fairness within the marketplace. This approach is imperfect in many ways since market prices can be inflated, the plea-bargain market suffers from structural power imbalances (such as prosecutorial advantage and overburdened defender services) between the parties, and going rates can mask and oversimplify important differences in cases that could or should affect the substantive outcome. Professor Barkow suggests that courts at the plea stage should be assessing "whether there is a sufficient check on prosecutors' use of the bargaining power."[317] The outcomes analysis proposed by Professors Scott and Stuntz is one way for courts to implement that inquiry.

III. MONITORING OUTCOMES IN THE TRIAL COURT

Lafler and *Frye* could usher in a new approach to regulating guilty pleas that is both market-based and anchored by constitutional norms. These cases confirm that courts enjoy robust authority to protect a defendant's Sixth Amendment right to the effective assistance of counsel. This authority, informed by the practical realities of plea-bargaining, could reshape courts' role in guilty plea adjudication. This Part proposes that this shift in authority enables courts to play a more active, hands-on role in ensuring that plea-bargaining results are consistent with constitutional guarantees. It further proposes that courts

316. *Id.*

317. Barkow, *supra* note 66, at 1049.

embrace an outcome-based approach to monitoring plea-bargaining that builds on Professor Scott and Professor Stuntz's proposal. Instead of grounding this approach in contract doctrine, as they did, this Article justifies it on the constitutional grounds of the Sixth Amendment right to the effective assistance of counsel and separation of powers concerns.

The strengths of this model are that it goes "with the grain of plea-bargaining, not against it,"[318] is anchored by constitutional values, and features courts playing a meaningful institutional role in the process. Having courts review the substance of pleas, instead of merely procedural aspects, is a substantial change from current practice. But outcomes monitoring is justified for practical reasons because it builds on courts' market expertise, can be implemented at the trial court level, and dovetails with courts' traditional role of imposing a sentence.

This Part begins by describing the constitutional and theoretical support for monitoring plea outcomes and then details how courts would implement this approach in practice.

A. *Trial Court Authority*

Lafler and *Frye* lay the groundwork for trial courts to monitor plea outcomes based on Sixth Amendment and separation of powers concerns. *Lafler* and *Frye* make clear that the Sixth Amendment right to the effective assistance of counsel in criminal proceedings is a robust one that stands on its own. By delinking Sixth Amendment concerns from due process analysis (in the plea context) and fair trial analysis (in the trial context), the Court has signaled that the right to the effective assistance of counsel is on equal footing with (and no longer dependent on) other constitutional challenges to criminal convictions.[319] Courts are charged with protecting a defendant's Sixth Amendment right to the effective assistance of counsel, and outcomes are a useful proxy for flagging instances of incompetent counsel prejudicing a case result.

Lafler and *Frye* also reframe separation of powers analysis in the plea-bargaining context. As Professor Barkow's work highlights, separation of powers principles have played a weak role in the criminal law, especially in plea-bargaining, with courts relying on individual procedural rights as a check on prosecutorial power.[320] Two complementary assumptions justified the Court's traditional hands-off approach: Defendants with counsel will protect their own interests, and courts must defer to prosecutorial charging decisions (provided those decisions are constitutional and supported by probable cause).[321]

318. Bibas, *supra* note 20, at 170.

319. *See supra* Sections I.C–D (discussing *Frye* and *Lafler*).

320. Barkow, *supra* note 66, at 993, 1038.

321. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (describing how prosecutorial charging decisions are not reviewable provided they are supported by probable

Though courts traditionally exercised considerable power at sentencing, today prosecutors dictate or constrain sentencing options through their charging decisions.[322] The plea bargain powerfully frames the sentencing determination and once the plea is accepted, courts may have very limited sentencing discretion to exercise.[323] Viewing plea-bargaining as primarily about charging and guilt ignores how the practice eclipses judicial sentencing authority, an important institutional check on executive power.

Lafler and *Frye* disrupt these settled assumptions about institutional roles. In *Lafler*, the Court acknowledged that plea-bargaining is not merely about guilt, it is about sentencing.[324] The Court recognized that the plea bargain frames the sentence and deficient counsel during plea-bargaining can prejudice the substantive outcome of the case.[325] The Court also stated that to remedy a Sixth Amendment violation, a court could require a prosecutor to "reoffer" an earlier plea offer.[326] This suggests that prosecutorial discretion must yield to the need to remedy such right to counsel violations.

For reforms to be meaningful and actually prevent prejudicial ineffective assistance claims, they must occur in the trial court and focus on substantive outcomes, not procedural concerns. *Lafler* and *Frye* set the stage for this by using outcomes, not guilt or the reliability of the conviction, to assess prejudice based on *Strickland*.[327] The Court's reliance on this outcomes-based prejudice test sends a strong message to trial courts that outcomes are key, and that normalizing outcomes is a way to eliminate post-conviction challenges based on *Strickland*. This is because a defendant must prove both deficient performance by counsel *and* prejudice to prove an ineffective assistance of counsel claim based on *Strickland*.[328] Regardless of deficient

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cause and do not violate due process or equal protection).

322. Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 23, at 1127–29 (arguing that the Supreme Court traditionally had "neglected the importance of sentencing to plea bargaining"); *cf.* Barkow, *supra* note 66, at 1038.

323. Bierschbach & Bibas, *supra* note 6, at 10–11 (observing that judges routinely rubber-stamp the plea bargain and sentence, and, even if a judge wanted to exercise discretion at sentencing, is limited to "exercising discretion within the sentencing range left open by the bargain").

324. Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012) ("[T]he right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences." (citing Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012))).

325. *Id.* at 1384.

326. *Compare id.* at 1382 (suggesting that the court could require the state prosecutor to reoffer the pre-trial plea offer), *with id.* at 1396 (Scalia, J., dissenting) (objecting that the reoffer was an unprecedented remedy).

327. *See supra* Subsection I.C.2.

328. Strickland v. Washington, 466 U.S. 668, 691 (1984) ("An error by counsel, even if

performance, a *Strickland* claim will fail if the defendant cannot show prejudice, specifically that the defendant likely would have received a shorter sentence or been convicted of a lesser charge.[329] This outcomes-based prejudice analysis should encourage trial courts to normalize outcomes at the trial stage. Professors Scott and Stuntz conceptualize this market-based, outcomes approach based on contract and price principles.[330] *Lafler* and *Frye* incentivize this outcomes-based approach based on Sixth Amendment principles.

In *Lafler* and *Frye*, the Supreme Court provided a green light to trial courts to innovate reforms at the trial level, but it did not dictate a procedural approach.[331] As Professor Bibas suggests, the Court not only encourages creativity but also may seek to avoid the type of rigid constitutionalization of procedures that are a hallmark of trial adjudication.[332] As a practical matter, trial courts are not limited to adopting a procedural approach, and are free to experiment with outcomes monitoring.

Outcomes monitoring also reinforces courts' traditional sentencing authority. As discussed above, plea-bargaining effectively consolidates judicial authority, including sentencing discretion, in the prosecutor. Prosecutors constrain and influence sentencing discretion through charging choices: by charging an offense that carries a statutory mandatory minimum term, by charging more serious offenses to influence the court's assessment of a case, and by agreeing to recommend a specific sentence as a term of the plea bargain.[333] Though courts typically impose the sentence at a separate proceeding, these constraints on sentencing discretion often flow from the charge and sentencing-bargaining that occurs earlier, before guilt adjudication.[334] By the time of the sentencing hearing, it may be too late for courts to consider a range of sentencing options.[335] Monitoring outcomes at the plea stage is one way for courts to assert their sentencing authority when it may count most, before the plea, to maintain a stake in shaping the final sentence.

Monitoring outcomes at the plea stage is consistent with current sentencing practices. At sentencing, courts are expected to impose sentences that are fair and proportionate in light of individualized,

professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.").

329. *Lafler*, 132 S. Ct. at 1384–85.

330. Scott & Stuntz, *supra* note 164, at 1959–60.

331. Missouri v. Frye, 132 S. Ct. 1399, 1408–09 (2012).

332. Bibas, *Regulating the Plea-Bargaining Market*, *supra* note 23, at 1152; Bibas, *supra* note 20, at 173.

333. Bierschbach & Bibas, *supra* note 6, at 11.

334. *See id.*

335. *Id.* at 10–11.

systemic, and comparative factors.[336] A key goal of sentencing reforms over the past several decades has been to ensure proportionality and eliminate gross sentencing disparities from case to case and courtroom to courtroom.[337] Monitoring plea outcomes could foster similar objectives by aligning courts' incentives in accepting plea bargains with sentencing goals. Monitoring plea outcomes resituates this inquiry to an earlier stage or, stated differently, shifts the plea inquiry from process-focused to outcome-focused.

Courts have authority and incentives, especially after *Lafler* and *Frye*, to monitor outcomes. As Professors Scott and Stuntz suggest, monitoring outcomes is one way to gauge whether the plea-bargaining market is functioning efficiently, or whether procedural concerns, such as deficient counsel, are distorting negotiated results.[338] Using outcomes as a proxy for assessing other concerns (such as deficient counsel) probes those issues indirectly. But this does not make the practice improper. To the contrary, monitoring outcomes allows the court to identify cases in which deficient performance may be a factor without formally adjudicating that issue, delving into privileged client communications, or engaging directly in plea-bargaining, which is forbidden in some courts.[339] For courts to implement this modified approach to plea-bargaining, however, they must appreciate all that is at stake—guilt adjudication, sentencing implications, and right to counsel concerns—and have a firm grasp on the plea-bargaining marketplace.

B. *A Blueprint for Monitoring*

In practice, courts should monitor outcomes with three principles in mind and target three categories of outcomes. Trial courts should aim to ensure the Sixth Amendment right to the effective assistance of counsel, check prosecutorial authority, and guard the court's own discretion to impose a just sentence that satisfies traditional sentencing goals. Trial courts should focus their energies on monitoring plea outcomes that are above market rates or contain mandatory minimum sentences. Trial courts should also be alert to similar concerns in cases proceeding to

336. *See, e.g.*, Traum, *supra* note 7, at 453–59 (discussing federal sentencing factors under 18 U.S.S.C. § 3553(a) (2012)).

337. *See, e.g.*, Blakely v. Washington, 542 U.S. 296, 308 (2004) (referring to the "salutary objectives" in Washington's determinate sentencing scheme of ensuring "proportionality to the gravity of the offense and parity among defendants"); 18 U.S.C. § 3553(a)(6) (listing as a factor "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct").

338. Scott & Stuntz, *supra* note 164, at 1959.

339. *See*, *e.g.*, FED. R. CRIM. P. 11(c)(1) (forbidding the court from participating in plea negotiations); United States v. Davila, 133 S. Ct. 2139, 2149–50 (2013) (holding that the magistrate violated FED. R. CRIM. P. 11(c)(1) by advising defendant to accept a plea, and remanding for harmless error analysis).

trial.[340]

A court's inquiry should focus on three questions. First, guided by the Sixth Amendment, a court should ask: Is this outcome distorted by the defense lawyer's incompetence, lack of skill or knowledge, or other failures? Sixth Amendment violations may be especially likely to occur where indigent defense systems are overburdened or quality of counsel is variable.[341] Defense lawyers working in such systems, with minimal resources and high caseloads, face enormous pressure to get their clients to plead guilty without investing much in the case.[342] To guarantee the right to the effective assistance of counsel and prevent unjust outcomes, courts must be alert to how such pressures or related deficiencies (such as a lawyer's failure to communicate, investigate, or research) impact the cases in their courtrooms.

Second, acting on separation of powers concerns, a court should ask: Is this outcome skewed by prosecutorial advantage, vindictiveness, or gamesmanship? It may be clear to the judge, for example, that some prosecutors are especially aggressive or play hardball in negotiations. Prosecutors, like defense counsel, will certainly vary. But as with concerns about defense counsel, courts should aim to minimize the prosecutor's role as a determinative factor in shaping the outcome of the case.

Finally, a court should ask: Will accepting this plea limit the court's discretion to impose a fair sentence that is individually tailored to this defendant based on relevant sentencing factors? As discussed above, this inquiry merely brings sentencing into the plea calculus. Courts should be especially vigilant in monitoring guilty pleas that lead to mandatory minimum sentences, which severely constrain their sentencing discretion.[343] Federal district courts are authorized to defer a plea until the presentence report is available for the court to review.[344]

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340. Post-trial sentences, as in *Lafler*, can be the product of ineffective assistance of counsel in the plea phase, and are beyond the scope of this article. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1387 (2012). For more on the trial penalty, see, for example, Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 84–85 (2005).

341. *See, e.g.*, Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 444–48 (2009) (describing the proliferation of lawsuits alleging that indigent defense providers systematically violate the Sixth Amendment).

342. Drinan, *supra* note 217, at 139.

343. In a 2010 survey, federal district judges attributed mandatory minimum sentence-charging by prosecutors as a leading cause of sentencing disparities. *See* U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 tbls. 1, 16 (2010), *available at* http://www.ussc.gov/Research_and_Statistics/Research_Projects/Surveys/20100608_Judge_Survey.pdf (reporting that 62% of judges view the mandatory minimum sentences as too high and, along with charging decisions, as a cause of sentencing disparities).

344. FED. R. CRIM. P. 11(c)(3)(A) (permitting courts to accept or reject a plea or defer

This allows the court (as well as the defendant) to become fully aware of sentencing options and consequences at the plea stage, before it is too late.

To identify outlier results, courts will need to know "going rates" for pleas in their jurisdiction. In *Frye*, the Court assumed that trial courts are familiar with plea deals in their jurisdictions, and Professors Scott and Stuntz similarly argue that courts are well positioned to know market rates.[345] If so, courts would recognize plea deals that are within the normal range and those that seem too high. The extent to which judges actually possess such knowledge is unclear, and answering this question would require empirical study of what knowledge judges actually have when accepting pleas or imposing sentences. Studies on sentencing disparities within the same courthouse suggest that outcomes vary by courtroom, and sentencing data on codefendants is not readily accessible.[346] Thus, even if judges have acquired expertise in their own courtrooms, they may lack knowledge about market rates more broadly.

A court could begin its outcome monitoring before the plea hearing by seeking two sources of information: the history of plea offers in the case and a range of data on going rates or plea results in similar cases within the jurisdiction. Even the most basic plea history would avoid a *Frye* problem and provide insight into how the prosecutor has valued the case over time. This would help the court analyze whether the contemplated plea bargain and sentence is tailored to the gravity of the defendant's conduct and history. A plea history driven by procedural factors, like delays in responding to a plea offer, might flag problems with defense counsel similar to those that occurred in *Frye*.[347]

Information about similar cases would inform courts on local market rates. Ideally, defense attorneys, prosecutors, or an arm of the court would maintain this data on a local basis.[348] Collecting and maintaining data on going rates for pleas would require considerable work, but could

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acceptance until the court has received the presentence report).

345. Missouri v. Frye, 132 S. Ct. 1399, 1410 (2012); Scott & Stuntz, *supra* note 164, at 1959 (referring to "going market price").

346. *See* United States v. Garrison, 560 F. Supp. 2d 83, 84 (D. Mass. 2008) (describing barriers to obtaining sentencing information on related cases within the same district); Ryan W. Scott, *Inter-Judge Sentencing Disparity After* Booker*: A First Look*, 63 STAN. L. REV. 1, 21–23 (2010) (analyzing inter-judge sentencing disparities from 2001 to 2008, based on sentencing data from the District of Massachusetts).

347. 132 S. Ct. at 1404 (describing problems with defense counsel).

348. *See, e.g.*, Nancy Gertner, *Supporting Advisory Guidelines*, 3 HARV. L. & POL'Y REV. 261, 275–79 (citing Michael A. Wolff, *Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, 83 N.Y.U. L. REV. 1389, 1412–15 (2008) (calling for a "what works" literature and data on sentencing options that reduce recidivism); Wolff, *supra*, at 1412–15 (describing empirical data collected by specialized courts in order to more effectively sentence offenders).

prove extremely useful to courts, defendants, and defense counsel in evaluating cases, plea offers, and plea bargains. Disseminating this information for use in plea-bargaining could foster the core values of due process, transparency, proportionality, and predictability for the parties, the courts, and the broader public.

Going rate data could benefit defendants and defense counsel both inside and outside the courtroom. By sharing this information with the defendant, defense counsel could help his client evaluate the plea offer and informally assess the counsel's performance. Getting defendants to appreciate the plea benefits and trial risks is a major hurdle for defense counsel.[349] Defendants' ability to assess the plea offer is often impaired by lack of trust in defense counsel; underestimation of the likelihood of conviction and related penalties; and other factors, such as stress and mental impairment.[350] Better information about plea bargains in other cases would be a powerful tool for defendants and their counsel to use when evaluating plea offers before they come to court.

In court, a judge might use this wealth of information about the market to assess defense counsel's handling of the case. For example, defense counsel might justify the plea or explain why the prosecutor's plea offer is too high in light of the facts. Either response would likely expose counsel's knowledge of the defendant's case or the plea market generally, both of which are relevant to the quality of representation. In most cases, this interaction with counsel would allow the court to gauge if the plea is within the range of market rates and detect possible issues of ineffective counsel and prosecutorial overreaching. If the plea seems too high, the court could reject the plea, defer the plea hearing (pending further negotiations or preparation of a presentence report), or request more information about the case or the going rate.

Cases proceeding to trial are ripe for outcomes monitoring. Trial cases are so rare, accounting for roughly 5% of convictions, that courts have reason to question in each one of these cases whether prosecutorial overreaching or ineffective assistance of counsel has contributed to the defendant's decision to risk trial and with it the harsher sentence or "trial penalty."[351] This "trial penalty" reflects a mixture of procedural

349. Blume, *supra* note 23, at 123.

350. *Id*. (listing factors that contributed to capital defendants' rejection of plea offers).

351. *See* Jenny M. Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2674 (2013) (citing Richard A. Oppel, Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. TIMES (Sept. 25, 2011), http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html (defining the "trial penalty" as the "fact that the sentences for people who go to trial have grown harsher relative to sentences for those who agree to a plea")); *see also* Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of* Lafler *and* Frye, 41 HASTINGS CONST. L.Q. 561, 603–04 (2014) (citing, inter alia, 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.

and substantive factors that influence the prosecutor to seek and the court to impose a more severe sentence after trial.[352] As *Lafler* makes clear, however, some defendants proceed to trial, risking the trial penalty, because incompetent counsel caused them to reject a plea offer.[353] Trial courts that are alert to this possibility could take steps to guard against it.

To monitor outcomes before trial, courts also should require a pre-trial history, and take additional steps to quantify the trial penalty.[354] As in plea cases, a pre-trial history that includes any plea offers would ensure that earlier offers were communicated to the defendant, and inform the court on how the prosecution valued the case during the plea-bargaining phase. Ahead of a trial, this information would frame the trial penalty, especially if any new charges carry minimum or maximum penalties. Courts could take steps to quantify and cabin the trial penalty, so that the trial risks are clear and not disproportionate.[355] Taking these steps before trial would ensure that the trial penalty is transparent to the court and the defendant, which could temper the severity of the trial penalty.

Though adding a data-driven component to the plea-bargaining process offers much utility, it also presents some risks. For example, the Federal Sentencing Guidelines were developed using prior sentencing data that was analyzed to track and derive relevant sentencing factors based on the defendant's conduct and history.[356] This approach reinforced values of uniformity and predictability, and constrained judicial discretion, especially before 2005, when the guidelines were

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L. REV. 959, 992 (2005) (detailing the wide range of trial penalties)).

352. The prosecutor may charge the case more aggressively, Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 438 (2013) (describing how prosecutors threaten higher charges during plea-bargaining and, if there is no plea, feel compelled to follow through with them at trial); and portray the crime and the defendant in a more negative light than if the defendant had pled guilty, factors that may influence the court's sentencing determination, *see* King et al., *supra* note 351, at 964 (suggesting that one factor in higher sentences after jury trial is judges' exposure to negative information at trial about the defendant that the judge would not have seen or heard had the defendant pled guilty).

353. *Lafler*, 132 S. Ct. at 1390–91.

354. *See* Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1237 (2008) (advocating use of "plea-based ceilings" to limit the severity of the trial penalty).

355. *Id.* at 1237 (arguing that courts should fix the trial penalty using plea-based sentences as the baseline); *see also Lafler*, 132 S. Ct at 1387 (implying that plea-based sentences are the norm and post-trial sentences the exception).

356. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, at 4 (2012), *available at* http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/Chapter_1.pdf (describing how initial guidelines were developed by analyzing "data drawn from 10,000 presentence investigations"). Advocates of evidence-based sentencing instead focus on which kinds of sentences actually impede future criminal behavior. *See* Wolff, *supra* note 348, at 1412–15.

still mandatory.[357] But some have criticized the guidelines for being too "rigid" and impeding the ability of judges to tailor sentences based on individualized factors.[358] In plea-bargaining, going rate information could be used to the same effect, by rigidly defining plea ranges, masking nuances that might justify different bargains for a similar offense, or eliminating judicial oversight for pleas that fall within the going rate.

Relying on going rates to monitor outcomes at the plea stage is not intended to introduce a plea-bargaining version of the sentencing guidelines that displaces, rather than improves, judicial oversight of guilty plea adjudication. To the contrary, monitoring outcomes based on going rates is an informal method that allows courts to engage in the substantive content of pleas with a principled purpose. Some courts may already do this, but most focus, as required, on the procedural aspects of the plea. Outcomes monitoring invites courts to "eyeball" the plea and put their market expertise to work in identifying plea outcomes that might be distorted by ineffective counsel or prosecutorial advantage. Better data on pleas would enhance courts' capacity to understand the plea market and monitor outcomes.

Judicial review of pleas can incorporate baseline assumptions about plea-bargaining and operate as a constitutional and institutional check on the process. Even in a healthy market, outcomes will vary considerably and in ways that should not sound alarms. Each case is different. Well-meaning prosecutors and competent defense counsel reach a range of agreements. The goal is not to destroy the market, but to harness its strengths in order to identify factors, especially ineffective counsel and prosecutorial overreaching, which can impede the parties' ability to negotiate fair results. This goal is both theoretical and practical: to provide courts a meaningful role in regulating plea-bargaining that injects constitutional checks into the plea-bargaining market.

CONCLUSION

Lafler and *Frye* shift the framework for regulation of guilty pleas and, importantly, begin the process of reframing constitutional doctrine to fit our "system of pleas." These cases establish that courts enjoy

357. Erik Luna, *Rage Against the Machine: A Reply to Professors Bierschbach and Bibas*, 97 MINN. L. REV. 2245, 2263 (2013) (critiquing federal sentencing guidelines as "rigid" and "mechanical"); Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 543 (2012) (arguing that federal guidelines continue to be rigidly applied after being made "advisory" in *United States v. Booker*, 543 U.S. 220 (2005)).

358. *See, e.g.*, Smith, *supra* note 357, at 543; Kate Stith, *Principles, Pragmatism, and Politics: The Evolution of Washington State's Sentencing Guidelines*, 76 LAW & CONTEMP. PROBS., no.1, 2013, at 105, 105–07.

robust authority to protect defendants' Sixth Amendment right to the effective assistance of counsel in plea-bargaining and remedy violations. While *Lafler* and *Frye* considered these doctrinal points in the context of post-conviction challenges under *Strickland v. Washington*, their significance is broader. They confirm that substantive outcomes, not just procedural values, are important to assessing and remedying prejudice caused by deficient counsel. These cases also powerfully signal that the locus of plea reform must be in the trial courts, where judges know the market for plea bargains and are best situated to identify and correct ineffective assistance before it prejudices the outcome.

Lafler and *Frye* begin the broader task of reorienting constitutional doctrine to fit guilty plea adjudication in ways that are consistent with core constitutional values and courts' traditional role in checking prosecutorial authority. Judicial monitoring of plea outcomes leverages the courts' constitutional role in the plea-bargaining market, with courts playing a pivotal role in detecting and correcting outcomes that are distorted by prosecutorial advantage or ineffective counsel. This approach also reinforces courts' traditional sentencing authority and properly directs the judicial inquiry to focus on the substantive (not merely the procedural) outcome of the case. The blueprint described here suggests how courts can implement this approach in practical terms. The biggest challenge will be getting courts to embrace an enhanced, substantive role in regulating guilty pleas, which departs from their current procedural approach.