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Recommended Citation

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 (2014).

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The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of *Lafler* and *Frye*

by CYNTHIA ALKON*

Introduction

In the 2012 companion cases of *Lafler v. Cooper* and *Missouri v. Frye*, the United States Supreme Court held that there is a right to effective assistance of counsel during plea bargaining, even when a defendant later loses at trial.¹ Legal commentators suggested the cases were “the single greatest revolution in the criminal justice process since *Gideon v. Wainwright*,”² that the cases will have a “significant effect,”³ and that they were “the term’s decisions with the greatest everyday impact on the criminal justice system.”⁴ But, will

* Associate Professor of Law, Texas A&M University School of Law. Thank you to Professors Rishi Batra, Catherine Hancock, Art Hinshaw, Jon Marshall, Peter Reilly, Lisa Rich, Andrea Kupfer Schneider, and Jean Sternlight for their valuable suggestions. Thank you to my Research Assistant, Matthew Jackson. Thank you to participants at AALS Dispute Resolution Works in Progress Conference at the Ohio State University Moritz School of Law for their useful feedback. Thank you to the Texas A&M University School of Law faculty members for their advice during presentations of this article when it was a work in progress. Thank you also to Texas A&M University School of Law for providing financial support towards the completion of this article.

1. *Lafler v. Cooper*, 132 S. Ct. 1376, 1391 (2012); *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012).

2. Adam Liptak, *Justices Expand Right of Accused in Plea Bargains*, N.Y. TIMES, Mar. 21, 2012, at A1 (quoting Professor Wesley M. Oliver), available at http://www.nytimes.com/2012/03/22/us/supreme-court-says-defendants-have-right-to-good-lawyers.html?_r=0.

3. Erwin Chemerinsky, *Effective Assistance of Counsel Now a Right in Plea Bargaining*, ABA JOURNAL (June 4, 2012, 7:45 AM), http://www.abajournal.com/news/article/chemerinsky_effective_assistance_of_counsel_now_a_right_in_plea_bargaining/.

4. Sidney S. Rosdeitcher, *Plea Bargaining and Effective Assistance of Counsel After Lafler and Frye*, BRENNAN CENTER FOR JUSTICE, <http://www.brennancenter.org/analysis/plea-bargaining-and-effective-assistance-counsel-after-lafler-and-frye>. See also Justin F. Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U. PA. J. CONST. L. 1161, 1161 (2012) (“The explicit recognition that the right to counsel is not only, or even

things really change for defendants in the wake of *Lafler* and *Frye*? Is it realistic to expect these two decisions to mark the beginning of serious or fundamental changes in plea bargaining? This Article will explain why these cases are unlikely to create meaningful change in how plea bargaining works because they focus on one narrow issue in the context of plea bargaining: single instances of bad lawyering. These cases do not address the larger systemic issues that create serious concerns for defendants in plea bargaining. This Article concludes that *Lafler* and *Frye* will have a limited impact because they fail to address these larger issues.

Plea bargaining is deeply entrenched in the U.S. criminal justice system. Overall, ninety-four percent to ninety-seven percent of criminal cases are resolved by guilty pleas and not through trials.⁵ Plea bargaining in the United States began in the late eighteenth century and became the “dominant means of resolving criminal cases” by the nineteenth century.⁶ By the mid-twentieth century, the U.S. criminal justice system relied on plea bargaining to resolve the vast majority of criminal cases.⁷ The use of plea bargaining steadily continued to increase and has now, in the early twenty-first century, reached a point where there are jurisdictions with few, if any, criminal trials.⁸ Cases that tend to go to trial are for more serious offenses and those are only a small percentage.⁹ This means that if a person is arrested in the United States, they will most likely resolve the case through plea bargaining. However, this reliance on plea bargaining

primarily a trial or truth protecting right promises to be a staggeringly important constitutional event.”).

5. See, e.g., *Frye*, 132 S. Ct. at 1407.

6. See, e.g., GEORGE FISHER, PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 9–10 (2003). See also John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC’Y REV. 261 (1979).

7. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. OF EMPIRICAL LEGAL STUD. 459, 495 (2004) (“From 1962 to 1991, the percentage of trials in criminal cases remained steady between approximately 13 percent to 15 percent. However, since 1991, the percentage of trials in criminal cases has steadily decreased (with the exception of one slight increase of 0.06 percent in 2001): from 12.6 percent in 1991 to less than 4.7 percent in 2002.”).

8. Marisa Gerber, *No Criminal Trials Held in Santa Cruz Since 2010*, NOGALES INTERNATIONAL (Feb. 8, 2012, 7:25 AM), http://www.nogalesinternational.com/scv_sun/news/no-criminal-trials-held-in-santa-cruz-county-since/article_2651fbde-5269-11e1-b903-0019bb2963f4.html.

9. For example, twenty-five percent of trials in Texas were capital murder cases and a further twenty-one percent were non-capital murder cases. OFFICE OF COURT ADMINISTRATION, ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY 35 (2006), available at <http://www.txcourts.gov/pubs/AR2006/AR06.pdf>.

has not been without serious criticism, which has gone largely unaddressed by the courts, including the Supreme Court in *Lafler* and *Frye*. The criticism includes that plea bargaining fails to protect defendants' rights,¹⁰ is a form of torture,¹¹ is overly coercive,¹² leads defendants to "game" the system,¹³ fails to take victims into account,¹⁴ reinforces inequality (particularly towards ethnic minorities),¹⁵ leads to disparate sentencing,¹⁶ gives defendants better deals than they deserve,¹⁷ and undermines our system of justice due to its overuse at the expense of jury trials.¹⁸ Critics of plea bargaining express concern both about specific aspects of plea bargaining¹⁹ and about the system as a whole.²⁰

10. See, e.g., H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 75–78 (2011) (criticizing coercive prosecutorial tactics in plea bargaining).

11. John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12 (1978) ("We coerce the accused against whom we find probable cause to confess his guilt. To be sure, our means are much politer; we use no rack, no thumbscrew, no Spanish boot to mash his legs. But like the Europeans of distant centuries who did employ these machines, we make it terribly costly for an accused to claim his right to the constitutional safeguard of trial.").

12. See, e.g., Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2042–50 (2006) (recommending, in part, improved disclosures to help decrease the coercive atmosphere for defendants).

13. See, e.g., ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 85 (2001) (arguing that plea bargaining "transforms the act of confession from a ritual of moral and social healing into a cynical game, reinforcing the criminal's alienated view of society").

14. See, e.g., STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 26 (2012) [hereinafter *MACHINERY OF CRIMINAL JUSTICE*] (discussing the historical transition from trials where victims could watch, to a system that "retreated behind prison walls"). Bibas also recommends more victim involvement. *Id.* at 150–53.

15. See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 87–89 (2012) (specifically discussing plea bargaining and generally explaining how the criminal justice system in the United States disproportionately impacts African Americans).

16. See, e.g., Laurie L. Levenson, *Peeking Behind the Plea Bargaining Process: Missouri v. Frye & Lafler v. Cooper*, 46 LOY. L.A. L. REV. 457, 471 (2013).

17. See, e.g., *id.* at 472; Douglas D. Guidorizzi, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 770 (1998).

18. William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 80–82 (2006) ("The results of our own indifference toward jury trials are already sadly apparent. Because we no longer seem very interested in using our courtrooms, we are losing them.") *Id.* at 81.

19. See, e.g., Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 32 (2002) (arguing that prosecutorial "screening" could be an alternative to plea bargains making for "a far more structured and reasoned charge selection process."); Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-*

How defendants are treated in the plea bargaining process affects how people view our legal system.²¹ Unfortunately, an ever-increasing percentage of the United States population has had first-hand experience with the criminal justice system. For example, one study reports that thirty percent of Americans have been arrested by the age of twenty-three for a crime other than a minor traffic offense.²² The United States has the largest number of people in prison and the highest incarceration rate in the world.²³ Incarceration rates are highest for African Americans and Latinos.²⁴ These numbers illustrate that the criminal justice system does not operate separate from daily life in the United States—particularly in communities with higher rates of incarceration. In addition to the defendant, crime victims, and the friends, families, colleagues, and employers of both defendants and victims also see how the criminal justice system operates through the prism of these individual cases. These views of the criminal justice system ultimately influence

Based Ceilings, 82 TUL. L. REV. 1237, 1237 (2008) (To prevent the trial penalty, Covey recommends sentencing rules to “prevent trial courts from imposing overly harsh trial sentences.”) *Id.* at 1237.; Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 426–31 (2008) (recommends changes in plea bargaining by prosecutors to bring more procedural justice into the process).

20. One critic who argues for the abolition of plea bargaining because of “structural flaws that impair both due process and crime control values” is Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1979 (1992). *See also*, Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213, 247 (2007) (“what is needed is not piecemeal reform, but system-wide transformation”).

21. Wright & Miller, *supra* note 19, at 33 (“The public in general, and victims in particular, lose faith in a system where the primary goal is processing and the secondary goal is justice.”).

22. Robert Brame, et al., *Cumulative Prevalence of Arrest From Ages 8 to 23 in a National Sample*, PEDIATRICS (2011), <http://pediatrics.aappublications.org/content/129/1/21.full.pdf>.

23. THE INT’L CTR. FOR PRISON STUDIES, *World Prison Brief*, <http://www.prisonstudies.org/world-prison-brief> (last visited Mar. 7, 2014). *See also* THE SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=107> (last visited Mar. 7, 2014).

24. The incarceration rate for Whites is 380/100,000, for African Americans is 2,207/100,000, and for Latinos is 966/100,000. PRISON POLICY INITIATIVE, *Incarceration Rates by Race/Ethnicity* (2010) [hereinafter *Incarceration Rates by Race/Ethnicity*], available at <http://www.prisonpolicy.org/graphs/raceinc.html> (figures drawn from Lauren E. Glaze & Erika Parks, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, *Correctional Populations in the United States, 2011* (Nov. 2012)).

attitudes about the legitimacy of our legal system.²⁵ As stated above, only a small percentage of criminal cases are resolved through jury trials, while the rest are resolved through plea bargaining.²⁶ Therefore, whether the plea bargaining process is fair has implications far beyond the single defendant in each case.

Lafler and *Frye* do not address the larger systemic problems in plea bargaining. Three broad systemic categories together define how plea bargaining works in the United States for the average defendant. The first category is Indigent Defense Structures. This category includes how lawyers are appointed for indigent defendants and how these appointment and institutional structures determine what kind of work a defense lawyer can do for a particular client, including how much time they can spend preparing and handling each case. The second category is Prosecutorial Power Structures under which prosecutors wield far greater power than mere discretion. In large part, this is due to the fact that legislatures have given prosecutors power to charge a wide variety of offenses for substantially similar acts. This power combines with a virtually unchecked authority to add or dismiss charges or enhancements to charges during the plea bargaining process. This frequently leaves defendants with few options but to accept whatever plea bargain the prosecutor offers with no leverage to negotiate a different or better deal. The third category is the Legal Framework Structures which, for purposes of this Article, are limited to the legal framework surrounding plea bargaining and its impact on defendants. This includes the right to discovery or delineation of the obligations of individual defense lawyers in the negotiation process. Arguably, this is the only category that will change due to *Lafler* and *Frye*. However, as this Article will explain, addressing Legal Framework Structures will not make plea bargaining substantially different and, if prior experience is a guide, will instead help to further entrench already existing practices at the expense of both defendants and fundamental fairness.

25. A Gallup poll found that only 29 percent of Americans “have a ‘great deal’ or ‘quite a lot’ of confidence in the criminal justice system.” Ron Faucheux, *By the Numbers: American Lack Confidence in the Legal System*, THE ATLANTIC (July 6, 2012, 7:24 AM), <http://www.theatlantic.com/national/archive/2012/07/by-the-numbers-americans-lack-confidence-in-the-legal-system/259458/>. See also Cynthia Alkon, *Plea Bargaining as Legal Transplant: A Good Idea for Troubled Criminal Justice Systems?*, 19 TRANSNAT’L L. & CONTEMP. PROBS. 355, 379–80 (2010).

26. Ninety-four percent to ninety-seven percent of criminal convictions are due to plea bargaining. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

Section I of this Article discusses the basic legal framework for plea bargaining in the United States, arguing that the Supreme Court has not touched basic issues that have serious implications for fairness to defendants in plea bargaining. Section II discusses the *Lafler* and *Frye* decisions and the criticism that they will fail to bring far-reaching change due to the Court's limited focus on competent assistance of counsel.²⁷ Section III examines the Indigent Defense Structures and Prosecutorial Power Structures left untouched by *Lafler* and *Frye*, which continue to create serious problems for defendants caught in the criminal justice system. Section IV explores the reasons for plea bargaining in the criminal justice system to understand why it may be so difficult for the Court to address larger, structural problems. Section V analyzes plea bargaining as a form of negotiation. This section considers the negotiation environment, and explains why defendants experience problems in plea bargaining due to its often highly adversarial nature, the serious power imbalances, the problem of innocent defendants pleading guilty, and the trial penalty. As this section discusses, plea bargaining is an informal dispute resolution process that can, at best, reflect the larger system within which it operates.²⁸ Finally, Section VI concludes that *Lafler* and *Frye* are unlikely to lead to meaningful change in the Indigent Defense Structures or Prosecutorial Power Structures, but will possibly make some limited changes within the Legal Framework Structures due to their focus on competent assistance of counsel issues. Although *Lafler* and *Frye* may help bring some definition to the most extreme bad conduct of lawyers, these cases, and the cases that are most likely to reach the Court in their wake, are not positioned to make systemic changes in the key areas of Indigent Defense Structures and Prosecutorial Power Structures. Instead, they will continue to focus on plea bargaining in the context of individualized cases, but not address the larger structural problems.

27. Darryl K. Brown, *Lafler, Frye and Our Still Un-Regulated Plea Bargaining System*, 25 FED. SENT'G REP. 131, 132 (2012) ("Understood merely as examples of new occasions for *Strickland* claims, *Frye* and *Lafler* are likely of little practical importance in the daily, ubiquitous practice of plea bargaining. Only a small number of defense attorneys, presumably, will commit the obvious lapses that the lawyers for *Frye* and *Cooper* did."). However, some have argued that the natural progression of Supreme Court jurisprudence following these cases will be to address issues of fairness in plea bargaining. See, e.g., Russell D. Covey, *Plea-Bargaining Law after Lafler and Frye*, 51 DUQ. L. REV. 595, 605-13 (2013) [hereinafter *Plea-Bargaining Law*] (focusing on discovery issues following *Lafler* and *Frye*).

28. Some argue that *Lafler* and *Frye* indicate the beginning of a new era for issues beyond assistance of counsel. See, e.g., *Plea-Bargaining Law*, *supra* note 27, at 623.

I. Plea Bargaining's Legal Framework

Plea bargaining is “a form of negotiation by which the prosecutor and defense counsel enter into an agreement resolving one or more criminal charges against the defendant without a trial.”²⁹ In the United States, three basic types of plea bargaining exist: charge bargaining, sentence bargaining, and sentence recommendation agreements.³⁰ In charge bargaining, the prosecutor may agree to not charge particular offenses, or to dismiss one or more of the charges.³¹ Sentence bargaining occurs when the prosecution and defense negotiate the sentence or punishment, while agreeing to the charges as filed.³² Plea negotiations often include both sentence and charge bargaining.³³ The third type of plea bargaining is sentencing recommendation agreements where the prosecutor agrees to recommend a particular sentence to the judge; this is more common in the federal system.³⁴ Depending on the seriousness and complexity of the case, plea negotiations can be fast and simple, or drawn out and complex.³⁵

The legal framework, or the basic rules for plea bargaining, do not distinguish between a sentence bargain, charge bargain, or both. Overall, there are few formal rules for plea bargaining,³⁶ making it a “free market that sometimes resembled a Turkish Bazaar.”³⁷ There is no right to a plea bargain, thus it is entirely within the discretion of

29. NICHOLAS G. HERMAN, PLEA BARGAINING 1 (2004).

30. *See, e.g., id.* at 1–2, 90–100.

31. For a more extensive list of possible plea bargaining outcomes, *see id.* at 90–92.

32. *See id.*

33. *See id.*

34. U.S. SENTENCING COMM'N, 2012 GUIDELINES MANUAL [USSG] § 6B1.2(b) (Nov. 2012), available at <http://www.ussc.gov/Guidelines/>.

35. *See, e.g.,* HERMAN, *supra* note 29, at 65–76, 77–96. In simple cases—such as driving under the influence of alcohol or drug cases—prosecutors and defense lawyers know the “standard deal” in the individual court or jurisdiction. The “negotiation,” thus, often simply consists of the prosecutor stating the offer and the defense lawyer confirming that her client accepts the deal. One scholar refers to these types of plea negotiations as “routine processing.” DOUGLAS W. MAYNARD, *INSIDE PLEA BARGAINING: THE LANGUAGE OF NEGOTIATION* 78 (1984).

36. Ninety-four percent to ninety-seven percent of criminal convictions are due to plea bargaining. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). The Supreme Court has been more interested in regulating trials and has had, historically, less interest in plea bargaining. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1119 (2011) [hereinafter *Regulating the Plea-Bargaining Market*].

37. *Regulating the Plea-Bargaining Market*, *supra* note 36, at 1119.

the prosecutor to decide whether to offer a deal.³⁸ This does not, however, mean that defendants must always proceed to trial since the defendant may have the option to “plead open” to the court, leaving it to the judge to decide the sentence, with or without the benefit of a pre-arranged plea deal.³⁹ However, if the defendant pleads open to the court, he is “pleading to the sheet”; this means he will have to plead to all charges, as filed, because the judge will not be able to dismiss any charges or enhancements on her own motion.⁴⁰ If the prosecutor does offer a plea deal, it is not final until the judge agrees to accept it.⁴¹

Despite its widespread use, it was not until 1970 that the Supreme Court specifically recognized the constitutionality of plea bargaining in *Brady v. United States*.⁴² Before *Lafler* and *Frye*, the Court placed few limits on what it would accept in plea bargaining. Generally, a guilty plea must be voluntary and intelligent.⁴³ That is, a defendant should understand what he is doing, act freely and knowingly, and accept (or decline) a plea bargain without physical coercion.⁴⁴ Prosecutors should also not breach previous agreements.⁴⁵

38. *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977). With more serious cases, such as homicide, prosecutors may not make any offer. In addition, sometimes prosecutors will decide that, for whatever reason, they cannot evaluate a case. For example, the prosecution in Tarrant County, Texas, refused to make an offer in a case where a teacher was accused of sixteen felony counts of improper relationship between an educator and a student arising from allegations that the teacher had sex with five male students. The students were all legal adults. The prosecution did not make an offer because “we wanted a Tarrant County jury to evaluate and as the moral conscience of the community say this is what we think of this kind of behavior and we got a very clear message from the jury.” The jury sentenced the teacher to five years, concurrent, on each count, out of a potential maximum of twenty years on each count, consecutive. Deanna Boyd, *Ex-Kennedale Teacher Guilty of Sex with Students; Mom Asks Jury for ‘Mercy,’* FORT WORTH STAR TELEGRAM (Aug. 18, 2012), reprinted at http://sentencing.typepad.com/sentencing_law_and_policy/2012/08/intriguing-jury-sentence-in-texas-for-female-teacher-having-group-sex-with-adult-students.html.

39. See Eric M. Matheny, *The Risks of Pleading Open to the Court*, ERIC MATHENY LAW BLOG (Mar. 3, 2012, 12:55 PM), <http://www.ericmathenylaw.com/Criminal-Defense-Blog/2012/March/The-Risks-Of-Pleading-Open-To-The-Court.aspx>.

40. There are exceptions to this. For example, under the three-strikes law in California, a defendant could move to have a judge “strike a strike” “in the interests of justice.” *People v. Superior Court (Romero)*, 13 Cal. 4th 497, 508–12 (1996).

41. See, e.g., FED. R. CRIM. P. 11(c).

42. *Brady v. United States*, 397 U.S. 742, 751–52 (1970) (“guilty pleas are not constitutionally forbidden”).

43. *Id.* at 748.

44. *Id.* at 748–50.

45. *Santobello v. New York*, 404 U.S. 257, 265 (1971) (The fact that the prosecutor who made the agreement is no longer handling the case does not change this as “[t]he staff

For example, the Court remanded a case when the prosecutor failed to stick to the original plea agreement after the defendant entered his plea of guilty,⁴⁶ to do otherwise would be an “unfulfilled promise” or governmental deception.⁴⁷ In *Brady*, the Court decided that the fact that a defendant took a deal to avoid the death penalty was not a problem.⁴⁸ The Court held that the defendant accepted the deal knowingly and voluntarily, and that a prosecutor’s threat to seek the death penalty if the deal was not accepted was not coercive because the death penalty could be lawfully imposed.⁴⁹ The Court has also held that it is not a violation of due process if a prosecutor threatens to reindict the defendant with more serious charges if he refuses the plea deal.⁵⁰

The Court considers plea deals “intelligent” even if the defendant lacks information about the evidence that will be admitted at trial against him or how that may impact his chances of conviction.⁵¹ In general, under *Brady v. Maryland*, the prosecutor must disclose “evidence favorable to the accused . . . where the evidence is material either to guilt or to punishment.”⁵² *Brady*, however, did not involve a plea bargain, and the Court has not specified what evidence must be disclosed before a plea deal.

In 2002, in *United States v. Ruiz*, the Supreme Court decided, in part, that a defendant did not have a constitutional right to impeachment information before entering a plea agreement.⁵³ In *Ruiz*, pursuant to a “fast track” plea agreement, the defendant would

lawyers in a prosecutor’s office have the burden of ‘letting the left hand know what the right hand is doing’ or has done. That the breach of agreement was inadvertent does not lessen its impact.”) *Id.* at 262.

46. *Id.* at 262 (“[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.” Additionally, “appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case.”).

47. *Mabry v. Johnson*, 467 U.S. 504, 505 (1984) (distinguishing the facts from *Santobello*).

48. *Brady*, 397 U.S. at 755.

49. *Id.* at 751.

50. *Bordenkircher v. Hayes*, 434 U.S. 357, 364–65 (1978). William Stuntz stated, “In retrospect, *Bordenkircher* appears to be one of the great missed opportunities of American constitutional law.” William Stuntz, *Bordenkircher v. Hayes: The Rise of Plea Bargaining and the Decline of the Rule of Law* (Harv. Pub. L., Working Paper No. 120, 2005), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract-id=854284>.

51. *Brady*, 397 U.S. at 757. See also *United States v. Ruiz*, 536 U.S. 622, 629–30 (2002).

52. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

53. *Ruiz*, 536 U.S. at 633.

have the right to receive any information relating to her “factual innocence,” but would be required to waive the right to impeachment information about any witnesses and any information that might support an affirmative defense at trial.⁵⁴ The defendant turned down the deal as she was unwilling to waive the right to impeachment information.⁵⁵ The Court was concerned that requiring disclosure of impeachment information would “seriously interfere with the Government’s interest in securing those guilty pleas that are factually justified, desired by defendants, and help to secure the efficient administration of justice.”⁵⁶ The Court further stated that, “[i]t is particularly difficult to characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant.”⁵⁷ This means that defendants do not have the right to impeachment information. This is problematic because it may limit the defendant’s leverage in plea negotiations since impeachment evidence may help secure a better and ultimately more fair deal. It also means that defendants may be accepting plea deals without ever knowing that they have this possible leverage and could have potentially gotten a better deal.

It was not until 2010 that the Supreme Court, in *Padilla v. Kentucky*, started to look more critically at plea bargaining.⁵⁸ In *Padilla*, the Court held that the defendant had the right to be advised by his lawyer about the immigration consequences of his guilty plea and that defense counsel’s failure to advise is a violation of the Sixth Amendment right to counsel.⁵⁹ *Lafler* and *Frye* continue this approach, holding that the defendant has a right to competent assistance of counsel in the plea bargaining process, but in both

54. *Id.* at 631, 633. Under a “fast track” plea agreement, the defendant waives “indictment, trial, and an appeal in exchange for a reduced sentence recommendation.” *Id.* at 622. The defendant must agree to the plea deal under a deadline, currently thirty days from the date the defendant is taken into custody on federal charges, to take advantage of the offered reduced sentence. *See, e.g.*, Memorandum from James M. Cole, Deputy Attorney General on Department Policy on Early Disposition or “Fast Track” Programs, 3 (Jan. 31, 2012), available at <http://www.justice.gov/dag/fast-track-program.pdf>.

55. *Ruiz*, 536 U.S. at 625.

56. *Id.* at 631.

57. *Id.* at 630.

58. *Padilla v. Kentucky*, 559 U.S. 356 (2010).

59. *See id.* at 374; *Regulating the Plea-Bargaining Market*, *supra* note 36, at 1120 (“With *Padilla*, the Court has now begun to interpret due process and the Sixth Amendment right to counsel to impose meaningful safeguards on the plea process.”).

instances the Court remained silent on prosecutorial behavior, such as the use of hard-bargaining tactics. In general, the Court has been reluctant to find ineffective assistance of counsel at the trial level.⁶⁰ And, despite *Lafler*, *Frye*, and *Padilla*, it is likely that ineffective assistance of counsel claims will remain difficult cases for a defendant to bring and win.⁶¹

The Court has hesitated to find due process violations in the plea bargaining process itself, and the cases criticizing plea bargaining have been limited to assistance-of-counsel claims or claims with a narrow due process focus on what constitutes “knowing and intelligent.”⁶² The problem with this approach is that the Court has tended to limit scrutiny to one side of the plea bargaining process: the defense. Thus far, the Court has tended not to object to what prosecutors do during plea bargaining as long as they do not back out of a previously agreed deal or trick the defendant.⁶³ For example, the Court has not objected to prosecutors using hard-bargaining tactics such as threatening more serious charges if the defendant does not accept an offered deal.⁶⁴ Also, as discussed above, the Court has

60. See, e.g., Nancy J. King, *Enforcing Effective Assistance After Martinez*, 122 YALE L.J. 2428, 2438–48 (2013) (explaining how few cases are granted review in ineffective assistance of counsel claims, both federally and locally, and how of those few cases that are granted review, even fewer win their cases).

61. See, e.g., *id.* For an analysis pre-*Padilla*, *Lafler* and *Frye*, see THE CONSTITUTION PROJECT, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* 39–43 (2009), available at <http://www.constitutionproject.org/pdf/139.pdf>.

62. See, e.g., *Henderson v. Morgan*, 426 U.S. 637, 637 (1976) (narrowly held that when defendant did not understand a critical element of the charge—in this case, intent to kill—the defendant’s guilty plea was invalid because due process requires the defendant to receive “real notice of the true nature of the charge against him”) (citing *Smith v. O’Grady*, 312 U.S. 329, 334 (1941)). See also *Regulating the Plea-Bargaining Market*, *supra* note 36, at 1124.

63. See, e.g., *Santobello v. New York*, 404 U.S. 257, 265 (1971). For a discussion about the *Brady* Trilogy and how the Court decided to handle questions of coercion in plea bargaining, see ARTHUR ROSETT & DONALD CRESSEY, *JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE* 61 (1976) (“Each of these cases presented a situation in which the law was structured to place the most extraordinary pressures on a defendant to plead guilty and not to challenge by trial the charges against him. Each was an instance in which it was most questionable whether the law complied with the standard that a guilty plea must be a free and voluntary act. The Court was faced with the choice of abandoning the voluntariness standard, stretching its meaning beyond the range of common usage, or declaring invalid many thousands of the guilty plea convictions for serious state crimes, and releasing or retrying large portions of the prison population.”).

64. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364–65 (1978). For a discussion of how the Court in *Bordenkircher* “authorized” hard bargaining tactics, see Josh Bowers, *Fundamental Fairness and the Path from Santobello to Padilla: A Response to Professor Bibas*, 2 CALIF. L. REV. CIRCUI 52, 59 (2011). The concern is not that hard bargaining is

declined to require prosecutors to turn over discovery, such as impeachment evidence, pre-plea.⁶⁵

Beyond the constitutional requirements, there are statutory requirements. However, many of these rules simply reflect the constitutional minimums that the Court has established and, therefore, concentrate on procedural issues.⁶⁶ The rules surrounding plea bargaining do not focus on the negotiation process itself, but rather on the formal process of the court's acceptance of a defendant's guilty plea after the prosecution and defense have agreed on a deal.⁶⁷ For example, Rule 11 of the Federal Rules of Criminal Procedure enumerates specific rights, waived by a defendant during a plea deal, about which the judge must notify the defendant. Rule 11 also requires that the judge get the factual basis for the plea.⁶⁸ Rule 11 further specifies that the defendant should be advised about the charges, and the maximum and minimum penalties.⁶⁹ There are also rules concerning what judges can and cannot do. For example, under the Federal Rules of Criminal Procedure, judges cannot "participate" in plea negotiation discussions.⁷⁰ The rules in state criminal procedure codes regarding plea bargaining also tend to focus more on the form of the guilty plea and procedures of accepting the plea in court.⁷¹ As Stefanos Bibas observed, "a \$100 credit-card purchase of a microwave oven is regulated more carefully than a guilty plea that results in years of imprisonment."⁷²

in and of itself an ethical violation, but rather that hard bargaining in the context of a plea bargaining raises serious concerns about the fundamental fairness of the process. For a discussion about how hard bargaining is supported by structural inequalities, see the discussion on Prosecutorial Power Structures, *infra* Section III.B, and the discussion of power imbalances in plea bargaining, *infra* Section IV.B.

65. See *United States v. Ruiz*, 536 U.S. 622, 633 (2002); *Plea-Bargaining Law*, *supra* note 27, at 600 ("the Court should reassess prior plea-bargaining precedents and seek to place meaningful boundaries on prosecutorial coercion").

66. *Regulating the Plea-Bargaining Market*, *supra* note 36, at 1124.

67. See, e.g., *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) (holding that there needs to be a record to establish that the defendant voluntarily and knowingly entered his plea); *Regulating the Plea-Bargaining Market*, *supra* note 36, at 1124.

68. FED. R. CRIM. P. 11(b)(1), (b)(3).

69. *Id.*

70. FED. R. CRIM. P. 11(c)(1). See also *United States v. Davila*, 133 S. Ct. 2139, 2147–48 (2013).

71. See, e.g., TEX. CODE PROC. CODE ANN. art. 26.13 (2011).

72. *Regulating the Plea-Bargaining Market*, *supra* note 36, at 1153.

II. *Lafler and Frye*

In 2012, in *Lafler v. Cooper* and *Missouri v. Frye*, the Supreme Court held that there is a right to effective assistance of counsel during plea bargaining even if a defendant later goes to trial and loses the trial.⁷³ In *Frye*, the defendant's lawyer failed to convey a plea offer before it expired.⁷⁴ As a result, instead of taking the original misdemeanor offer, the defendant pled guilty to a felony of driving with a revoked license and was sentenced to three years.⁷⁵

In *Lafler*, the defendant was charged with four counts, including assault with intent to commit murder.⁷⁶ The victim was shot a total of four times in the hip, buttock, and abdomen.⁷⁷ The defendant's lawyer conveyed the offer, but did so with advice that any first-year law student should have known not to give. He told his client that the prosecution "would be unable to establish intent to murder" because the victim was shot below the waist.⁷⁸ This was such clearly bad advice that, on appeal, the parties stipulated the advice was wrong as a matter of law.⁷⁹ Based on this poor advice, the defendant turned down a plea deal that was over one third less than his eventual sentence. He rejected an offer of 51 to 85 months in prison (4.25 to 7.08 years) and was sentenced to 185 to 360 months in prison (15.4 to 30 years) after the jury convicted him at trial.⁸⁰ While there were no errors in the trial itself, the Court found that the trial did not cure whatever problems may have occurred during the plea bargaining process, stating that "[e]ven if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence."⁸¹

These cases are both textbook examples of bad lawyering, and as such, the Court did not articulate a new standard for competence or effective assistance of counsel. It simply acknowledged that the

73. *Lafler v. Cooper*, 132 S. Ct. 1376, 1391 (2012); *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012).

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

75. *Id.* at 1404–05 (although the facts are complicated by the defendant picking up a new case after the offer expired and before he ultimately plead guilty).

76. *Lafler*, 132 S. Ct. at 1383.

77. *Id.*

78. *Id.*

79. *Id.* at 1384.

80. *Id.* at 1383–84.

81. *Id.* at 1386.

already existing professional standard should apply during the plea bargaining stage.⁸² Beyond stating that these cases do not meet basic competency requirements, the Court did not address what competent negotiation skills would be in the plea bargaining stage of a criminal case.⁸³ As Justice Anthony Kennedy explained:

Bargaining is, by its nature, defined to a substantial degree by personal style. The alternative courses and tactics in negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process.⁸⁴

Justice Kennedy illustrates how far the Court still has to go in terms of understanding the basics of how negotiation works in the context of plea bargaining.⁸⁵

The Court recognized, however, the importance of plea bargaining and explicitly stated what every lawyer and judge working in the criminal justice system in the United States already knew: "criminal justice today is for the most part a system of pleas, not a system of trials."⁸⁶ This marks the beginning of a noteworthy shift as the Court is moving beyond viewing trials as the "touchstone" in criminal cases.⁸⁷ The Court is also moving beyond viewing trials as the cure to any problems arising from the plea-bargaining process, stating that it is "insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pre-trial process."⁸⁸

82. See, e.g., *Plea-Bargaining Law*, *supra* note 27, at 610–13.

83. Some have argued that developing basic competency standards for negotiating plea bargains is the logical conclusion of *Lafler* and *Frye*. See Rishi Batra, Lafler and Frye: A New Constitutional Standard for Negotiation, 14 CARDOZO J. CONFLICT RESOL. 309 (2013).

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

85. The year before this decision, Justice Kennedy also wrote for the majority that, "[p]lea bargains are the result of complex negotiations suffused with uncertainty" *Premo v. Moore*, 131 S. Ct. 733, 741 (2011). This statement, although accurate in the context of *Premo v. Moore*, indicates that the Court does not understand how most plea bargaining occurs, as many cases are not factually or legally complex. Therefore, these plea negotiations are straightforward without much complexity, at least on the face of it.

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

87. *Regulating the Plea-Bargaining Market*, *supra* note 36, at 1122.

88. *Frye*, 132 S. Ct. at 1407.

The Court went on to state that “the negotiation of a plea bargain . . . is almost always the critical point for a defendant.”⁸⁹

In his dissent, Justice Antonin Scalia lamented that the Court was heralding a “new boutique of constitutional jurisprudence” in holding that defendants have a right to effective assistance of counsel in the plea-bargaining process.⁹⁰ Justice Scalia criticizes this move, as it “elevates plea bargaining from a necessary evil to a constitutional entitlement.”⁹¹ There was no real problem in *Lafler*, according to Justice Scalia, as the defendant had a “full and fair trial, was found guilty of all charges by a unanimous jury, and was given the sentence the law prescribed.”⁹² He went on to predict that “there will be cases galore” due to the rulings in *Lafler* and *Frye*.⁹³ Some commentators agree on this point, as Russell Covey observed, “these cases potentially foretell a transformational evolution of criminal procedure.”⁹⁴

Others disagree that *Lafler* and *Frye* are groundbreaking. Practitioners question whether these cases add anything since competent defense lawyers already reach the minimal standards set by the Court.⁹⁵ Albert Alschuler considers the cases to be nothing more than “small band-aids for a festering wound.”⁹⁶ Alschuler maintains that these cases will simply make sure that the “river of guilty pleas [keeps] flowing.”⁹⁷ Gerald Lynch states that the “only surprise about the Supreme Court’s decisions . . . is that there were four dissents.”⁹⁸ Lynch goes on to say that *Lafler* and *Frye* “do not represent a novelty in the law, but rather continue the longstanding recognition by the courts that ‘plea bargaining’ is an integral part of

89. *Id.*

90. *Lafler*, 132 S. Ct. at 1391.

91. *Id.* at 1397.

92. *Id.* at 1392.

93. *Frye*, 132 S. Ct. at 1413.

94. *Plea-Bargaining Law*, *supra* note 27, at 608.

95. See, e.g., Cynthia Alkon, *Plea Bargaining: Just as it Ever Was*, 10 MAYHEW-HITE REP. ON DISP. RESOL. & THE COURTS (2012) (on file with author), also available at <http://moritzlaw.osu.edu/epub/mayhew-hite/2012/05/plea-bargaining-just-as-it-ever-was/>.

96. See Albert W. Alschuler, *Lafler and Frye: Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673 (2013).

97. *Id.* at 681.

98. Gerald E. Lynch, *Frye and Lafler: No Big Deal*, 122 YALE L.J. ONLINE 39 (2012), <http://yalelawjournal.org/the-yale-law-journal-pocket-part/supreme-court/frye-and-lafler:-no-big-deal/>.

our criminal justice system.”⁹⁹ Some have expressed concern about the harm that these cases could do, such as “pushing” defense lawyers to encourage their clients to take the first deal offered rather than face allegations of ineffective assistance.¹⁰⁰

III. The Three Structures and Plea Bargaining

To understand why the skeptics are right in expressing doubts about *Lafler* and *Frye*'s impact, it is important to examine the three structures underlying how plea bargaining works—indigent defense, prosecutorial power, and legal framework—to illustrate the limitations of the *Lafler* and *Frye* decisions, as well as the challenges for reforming plea bargaining more broadly. To make meaningful changes in plea bargaining, the criminal justice system must address the systemic problems that go beyond the idea that plea bargaining reform should focus simply on making sure defendants are better informed.¹⁰¹

A. Indigent Defense Structures

Indigent defense structures refer to the way in which indigent legal services are provided. This includes both the services of a lawyer, and the resources a defense lawyer needs in order to provide competent representation, such as investigative and expert witness services. The vast majority of criminal defendants in the United States rely on appointed counsel,¹⁰² which has a substantial impact on how the criminal justice system, including plea bargaining, works. For indigent defendants, access to legal counsel is still a serious challenge despite the Supreme Court's decision over fifty years ago in *Gideon v. Wainwright* that indigent defendants have a right to state-

99. *Id.*

100. See, e.g., Jed. S. Rakoff, *Frye and Lafler: Bearers of Mixed Messages*, 122 YALE L.J. ONLINE 25 (2012), <http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/supreme-court/frye-and-lafler-bearers-of-mixed-messages/>.

101. *Regulating the Plea-Bargaining Market*, *supra* note 36, at 1154 (“The most basic and important reforms focus on ensuring that defendants know what they are doing.”). Although, in the same article, Bibas clearly recognizes the importance of other factors and the limitations of the singular focus on effective assistance of counsel. See *id.* at 1153–59 (recommending rules to help regulate plea bargaining using a consumer-protection model).

102. Over eighty percent of all felony defendants cannot pay for a lawyer on their own. U.S. DEPT OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, *Defense Counsel in Criminal Cases 1* (2000), available at <http://www.bjs.gov/content/pub/pdf/dccc.pdf>.

appointed counsel.¹⁰³ In reality, defendants may wait months before a lawyer is appointed.¹⁰⁴

In misdemeanor cases, defendants are more likely to go unrepresented and waive their right to a lawyer under questionable circumstances.¹⁰⁵ Misdemeanor defendants overwhelmingly enter guilty pleas, often without knowing the serious collateral consequences of the conviction.¹⁰⁶ Defendants facing both misdemeanor and felony charges often do not meet their lawyer until their first court date—which for many defendants may be their last court date because they plead guilty at arraignment to get out of jail.¹⁰⁷

Defendants suffering from mental illness, developmental disabilities, or substance abuse—a significant percentage of all criminal defendants¹⁰⁸—often have cognitive limitations that may make it difficult for them to quickly understand what is happening with their cases and what their options are. The fact that a client may need more time to talk with their lawyer and to understand what is being explained is rarely an acceptable reason to give these clients more time with their appointed lawyer because appointed lawyers work under a system that constrains the amount of time they can spend with each client.¹⁰⁹ The end result is that appointed lawyers

103. *Gideon v. Wainwright*, 372 U.S. 335, 342–43 (1963).

104. Due to lack of funding, there have been examples of defendants waiting months in custody before a lawyer is appointed. For example, a man in Georgia charged with murder waited eight months for a lawyer. Deborah Hastings, *Nationwide, Public Defender Offices are in Crisis*, THE SEATTLE TIMES (June 3, 2009, 6:49 PM), http://seattletimes.com/html/nationworld/2009296598_apusnodefense.html.

105. THE CONSTITUTION PROJECT, *supra* note 61, at 8.

106. *Id.* See also Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 297–303 (2011) (explaining the variety of possible serious collateral consequences to misdemeanor convictions).

107. Nancy Albert-Goldberg, *Los Angeles County Public Defender Office in Perspective*, 45 CAL. W. L. REV. 445, 461 (2009). See also Roberts, *supra* note 106, at 297–303 (explaining the variety of possible serious collateral consequences to misdemeanor convictions).

108. “[I]f all mental disorders—including substance abuse disorders—are included, the prevalence of mental disorder in incarcerated populations is over 70 [percent].” John P. Petrila and Allison D. Redlich, *Mental Illness and the Courts: Some Reflections on Judges as Innovators*, 43 CT. REV.: THE J. OF THE AM. JUDGES ASSOC. 164, 164 (2007), available at <http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1237&context=ajacourtreview>.

109. See, e.g., ALEXANDER, *supra* note 15, at 86.

often do not have enough time for meaningful communications with their clients, particularly in less serious cases.¹¹⁰

As will be discussed, money can have a significant impact on how well lawyers can do their jobs. Budget limitations can mean that lawyers have less time to talk to their clients, limited ability to investigate cases, and fewer experts to aid in case preparation. So far, the Court has not directly confronted these systemic problems in examining claims of effective assistance of counsel. However, to understand how plea bargaining works, it is important to first understand the variety of ways in which indigent defendants get a lawyer and what this may mean for the quality of their defense. This section will then discuss how budgetary problems can influence effective assistance of counsel.

1. *Appointment of Lawyers*

There is no uniform approach to appointing indigent defense lawyers as each jurisdiction uses different systems, including public defenders and publicly appointed private counsel.¹¹¹ Most large counties rely on public defender offices.¹¹² There are continuing questions about whether the way in which a lawyer is appointed to handle an indigent defendant's case impacts the quality of his representation. In comparing public defenders, publicly appointed private counsel, contract lawyers, and privately retained lawyers, studies vary on which type of counsel results in better outcomes for the client.¹¹³ Overall, however, researchers have found that publicly

110. *See id.*

111. For a good description of the various approaches, *see generally* Robert L. Spangenberg and Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 *LAW & CONTEMP. PROBS.* 31 (1995).

112. Only eight of the hundred largest counties in the United States did not have public defender programs in 2000. U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, *National Survey of Indigent Defense Systems, 1999, Indigent Defense Services in Large Counties, 1999* (2000), available at <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=996>.

113. Some studies have found that public defenders get better outcomes. *See generally* James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 *YALE L.J.* 154 (2012); Thomas H. Cohen, *Who's Better at Defending Criminals? Does type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes?* (July 1, 2011) (unpublished manuscript), <https://ssrn.com/abstract=1876474> (finding that publicly retained private lawyers get worse outcomes for their clients than public defenders, although public defenders and privately retained counsel get similar outcomes); Michael Roach, *Explaining the Outcome Gap Between Different Types of Indigent Defense Counsel: Adverse Selection and Moral Hazard Effects* (Apr. 2011) (unpublished

appointed private counsel are less effective than public defenders.¹¹⁴ All things being equal, publicly appointed private counsel tend to perform worse than professional public defenders in both federal and state courts.¹¹⁵ So far, the Supreme Court has not examined how the right to a lawyer may be affected by the way that a lawyer is hired and paid, which are factors that these studies indicate may have a significant impact on whether an indigent defendant receives adequate assistance of counsel.

Indigent defendants who rely on appointed counsel commonly face the problem of lacking access to a lawyer or having access only to an overextended lawyer. These problems are due to the indigent defendant's inability to pay for a private lawyer's time and attention. Due to caseload pressures and pay structures, most appointed lawyers cannot take most cases to trial.¹¹⁶ However, as discussed above, most cases likely do not need to go to trial.¹¹⁷ Thus, for defendants who rely on appointed counsel, the more pressing issue is their lawyer's limited time to conduct basic interviews and counseling, and to prepare the case for a better plea deal.

2. *Limited Indigent Defense Budgets*

Regardless of how lawyers are appointed, due to budgetary constraints they tend to carry high caseloads and have limited time

manuscript), <http://ssrn.com/abstract=1839651> (found public defenders did better than publicly appointed private counsel); Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel* (Nat'l Bureau of Econ. Research, Working Paper No. 13187, 2007), <https://www.nber.org/papers/w13187> (comparing appointed counsel to public defenders in the federal system and concluding that public defenders do better in terms of lower conviction rates and lower sentences). Other studies have found that privately retained lawyers do better for their clients by, for example, negotiating deals for a reduced time in custody. See, e.g., Morris B. Hoffman, Paul H. Rubin & Joanna M. Shepherd, *An Empirical Study of Public Defender Effectiveness: Self-Selection by the "Marginally Indigent,"* 3 OHIO ST. J. CRIM. L. 223 (2005) (concluding that private counsel did better by an average of three years less time in custody for their clients compared to public defenders).

114. See generally Iyengar, *supra* note 113, at 2–5; Cohen, *supra* note 113.

115. See *id.*

116. This can be an acute problem in counties that pay only “flat fees” for each case a lawyer handles. Such pay structures discourage trials and encourage early pleas. John P. Gross, *Part I: Rationing Justice: The Underfunding of Assigned Counsel Systems—a 50-State Survey of Trial Court Assigned Counsel Rates*, NAT'L ASS'N OF CRIM. DEF. LAW. 8–10 (2013) (reporting that “at least 20 states” use flat fee contracts or pay a flat rate per case), available at <http://www.nacdl.org/reports/gideonat50/rationingjustice>.

117. See *supra* Section III.B.

for each individual client.¹¹⁸ In 1973, the National Advisory Commission on Criminal Justice Standards and Goals recommended that criminal defense lawyers carry no more than 150 felonies or 400 misdemeanor cases in any given year.¹¹⁹ However, most public defender offices are unable to enforce these caseload limits.¹²⁰ For example, the Department of Justice reported in 2007 that seventy-three percent of “county-based public defender offices” nationwide exceeded this limit.¹²¹ Contributing to the higher caseloads is the lack of formal caseload limits, with the Department of Justice reporting that only fifteen percent of surveyed public defender offices had such formal limits and only thirty-six percent had the authority to refuse cases due to high caseloads.¹²²

The constraints on lawyers typically increase as budgets decrease. One example is the effect of federal sequestration on the Office of the Federal Public Defender.¹²³ Due to the sequestration, the Office lost nine percent of its budget and planned to close offices in over twenty states.¹²⁴ Key staff have retired or been laid off, including investigators.¹²⁵ Because it is an agency that operates with little overhead, the main area where budgets can be cut is staff

118. See, e.g., John Rudolf, *Pennsylvania Public Defenders Rebel Against Crushing Caseloads*, THE HUFFINGTON POST (June 16, 2012, 11:18 AM), http://www.huffingtonpost.com/2012/05/30/pennsylvania-public-defenders_n_1556192.html.

119. U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, *Census of Public Defender Offices, County Based and Local Public Defender Office*, 2007, at 8 (2010) [hereinafter *2007 Census*], <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=2211>.

120. Hastings, *supra* note 104.

121. Based on data from 530 public defender offices in twenty-seven states and the District of Columbia. *2007 Census*, *supra* note 119, at 1, 3, and 8–10.

122. *2007 Census*, *supra* note 119, at 8. The Los Angeles County Public Defender is one office that has this option. Under California law, public defender agencies can declare that they are “unavailable” to handle new cases due to high caseloads. Albert-Goldberg, *supra* note 107, at 463–64 (citing CAL. PENAL CODE § 987.2(e) (2008)), although there are some limits to when a public defender can declare themselves “unavailable” in practice.

123. Sam Stein & Ryan J. Reilly, *Sequestration's Biggest Victim: The Public Defender System*, THE HUFFINGTON POST (July 22, 2013, 12:15 PM) [hereinafter *Sequestration's Biggest Victim*], http://www.huffingtonpost.com/2013/07/22/sequestration-public-defender_n_3624111.html.

124. *Id.* By contrast, the Department of Justice is not discussing closing offices or laying off workers. Attorney General Holder instead made “extensive cuts to travel, training, contracts, and other areas of spending.” Memorandum from Eric Holder, Attorney Gen., U.S. Dep't of Justice, *Sequestration and Safety Actions Regarding the Bureau of Prisons Inst.*, at 2 (Mar. 22, 2013), *available at* <http://www.justice.gov/oip/docs/sequestration-safety-actions.pdf>.

125. Stein & Reilly, *supra* note 123.

salaries. As a result, it is expected that the Office will lose 2,700 jobs within the next two years.¹²⁶ In the short term, there are stories of individual public defenders paying out of their own pockets for traveling costs to see imprisoned clients.¹²⁷ Notwithstanding assurances that these cuts have not impacted the quality of representation, it is clear that the cuts are affecting how federal public defenders do their jobs.¹²⁸ In some offices, the most experienced lawyers have resigned to save other staff jobs.¹²⁹ Additionally, investigators needed to fully prepare the lawyers' cases have resigned, taken early retirement, or been laid off.¹³⁰ Despite their devotion to their clients, lawyers need basic resources and adequate compensation to do a minimally competent job. In the short term, individual federal public defenders are undoubtedly making do with less while attempting to provide the same level of legal services; this situation, however, is hard to sustain in the long run.

In addition, related rights, beyond the right to counsel, are likely to suffer with continued cutbacks. In response to the sequestration and furlough days, some federal courts are reducing the number of days that they hear criminal cases.¹³¹ This ultimately delays cases or, at the very least, makes court days more hectic and pressure filled, as the same number of cases will need to be called more quickly.¹³² Ironically, the decrease in staffing in the Office of the Federal Public Defender is unlikely to save money as there are additional costs, such as defendants spending additional days in custody due to court delays.¹³³ The potentially bigger financial cost is that, as the sequestration continues, the Office of the Federal Public Defender is declining cases, meaning that private lawyers will have to be

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *See, e.g.,* UNITED STATES DISTRICT COURT, DISTRICT OF COLORADO, Order Limiting the Scheduling of Criminal Trials and Hearings Due to Budgetary Constraints and Furloughs (Mar. 25, 2013), available at <https://www.cod.uscourts.gov/Documents/Orders/13-GeneralOrder-1.pdf>.

132. Lisa Rein, *Public Defenders Say Sequester is Hurting Poor Clients*, WASH. POST (July 24, 2013, 6:00 AM), <http://www.washingtonpost.com/blogs/federal-eye/wp/2013/07/24/public-defenders-say-sequester-is-hurting-poor-clients/>.

133. Dorothy J. Samuels, *So, About Your Right to an Attorney*, N.Y. TIMES (July 25, 2013, 9:37 AM), http://takingnote.blogs.nytimes.com/2013/07/25/so-about-your-right-to-an-attorney/?_php=true&_type=blogs&_r=0.

appointed—and paid—to handle these cases.¹³⁴ Publicly appointed private lawyers cost more, and, as discussed above, whether they provide the same level of service is questionable.¹³⁵

Indigent defense lawyers may have limited, or no, resources to investigate a case or appoint an expert. In the context of plea bargaining, these limitations create a perfect storm that encourages high plea rates, discourages negotiation, and contributes to many defendants feeling that they are simply getting processed through the system, but are not receiving individualized attention or justice.¹³⁶ These combined realities are serious structural problems facing the criminal defense bar that make it difficult to reform plea bargaining without providing more resources. Simply mandating that defense lawyers do better without increased resources is unlikely to have much impact.

B. Prosecutorial Power Structures

Prosecutorial Power Structures refer to the extraordinary powers that prosecutors enjoy. These play a significant role in plea bargaining by putting pressure on defendants to accept plea deals. The Prosecutorial Power Structure is due, in large part, to the punitive laws and practices built into our legal system.¹³⁷ Prosecutors have virtually unchecked discretion to charge more- or less-serious penalties for the same act.¹³⁸ They can also penalize defendants who refuse plea offers by adding enhancements or charges—potentially adding significant amounts of time that a defendant will spend in custody if convicted.¹³⁹ Furthermore, because prosecutors are rarely

134. Denny Welsh, *Federal Public Defender in Sacramento Decries Budget Cuts*, SACRAMENTO BEE (July 26, 2013) (quoting figures that the cost per case is eleven percent lower if the Federal Public Defender handles a case than if a private lawyer is appointed), <http://www.sacbee.com/2013/07/26/5597549/federal-public-defender-in-sacramento.html>; Stein & Reilly, *supra* note 123.

135. See *supra* Section II.A.1 and accompanying notes.

136. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 251–74 (2011) (discussing the development of punitive laws and practices and how plea bargaining contributed to high incarceration rates); see also Albert-Goldberg, *supra* note 107, at 466–68 (examples from misdemeanor cases in Los Angeles County).

137. KAGAN, *supra* note 13, at 65–66.

138. See, e.g., ALEXANDER, *supra* note 15, at 87 (“After the police arrest someone, the prosecutor is in charge. Few rules constrain the exercise of his or her discretion.”); see also Section V.B and accompanying notes (discussion on power imbalances in plea bargaining).

139. This unchecked power creates serious power imbalances in the negotiation process. See *infra* Section V.B. and discussion *supra* Section II regarding the lack of limits

hesitant to wield this power, they contribute to the United States' high incarceration rates and to the reality that first-time offenders are regularly sentenced to time in custody even for nonviolent, nonserious offenses.¹⁴⁰

The punitive nature of our criminal justice system results in the incarceration of more people—both in raw numbers and in overall incarceration rates—than in any other country. In 2011, the United States incarcerated 2.2 million people.¹⁴¹ By comparison, China incarcerates a total of 1.64 million people.¹⁴² Our closest neighbors, Canada¹⁴³ and Mexico,¹⁴⁴ have substantially lower incarceration rates than the United States. Even Russia's incarceration rate is one third lower than ours.¹⁴⁵ In a speech to the American Bar Association, U.S. Attorney General Eric Holder outlined the Department of Justice's new "Smart on Crime" approach, stating that "widespread incarceration at the federal, state, and local levels is both ineffective and unsustainable."¹⁴⁶ Incarceration rates are not spread evenly between communities or groups in the United States. African Americans and Latinos have significantly higher incarceration rates.

that the Supreme Court has placed on prosecutors who threaten to add charges or enhancements onto sentences in the plea bargaining process.

140. Of all federal offenders convicted of a felony or class A misdemeanor, 89.8% were sentenced to prison time. U.S. SENTENCING COMM'N, *Overview of Federal Criminal Cases: Fiscal year 2011* 3 (2012) http://www.ussc.gov/Research_and_Statistics/Research_Publications/2012/FY11_Overview_Federal_Criminal_Cases.pdf.

141. THE INT'L CTR. FOR PRISON STUDIES, *World Prison Brief*, available at http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_poptotal (last visited Mar. 7, 2014) [hereinafter *World Prison Brief*]; see also THE SENTENCING PROJECT, <http://www.sentencingproject.org/template/page.cfm?id=107> (last visited Mar. 7, 2014). The incarceration rate in the United States is 716/100,000 people. *Id.*

142. *World Prison Brief*, *supra* note 141. There are concerns that the raw numbers might be higher in China and that these numbers do not include all prisoners. *Id.* ("The Deputy Procurator-General of the Supreme People's Procuratorate reported in 2009 that, in addition to the sentenced prisoners, more than 650,000 were held in detention centres in China. If this is still correct in April 2012 the total prison population in China is more than 2,300,000.").

143. 114/100,000. *Id.*

144. 209/100,000. *Id.*

145. 487/100,000. *Id.* These numbers represent a decrease in recent years. In 2007, the rate was 613/100,000; and in 2010, the rate was 609/100,000. *Id.*

146. Attorney General Eric Holder, Remarks to the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html> [hereinafter Holder's Speech to the ABA].

¹⁴⁷ Attorney General Holder acknowledged this fact when he observed that “[w]e also must confront the reality that . . . people of color often face harsher punishments than their peers This isn’t just unacceptable—it is shameful.”¹⁴⁸

Due to concerns about incarceration rates, the Department of Justice is rethinking its approach with respect to federal prosecutions, and specifically recommends prosecutors file fewer cases¹⁴⁹ and seek out non-incarceration sentences, with the specific goal of reducing incarceration rates.¹⁵⁰ In reaching these conclusions, the Department of Justice is clearly learning from developments at the state level. The combined approach in many states of using alternatives to imprisonment, such as drug courts, and changing how parole and probation violations are handled, has directly contributed to the decline of incarceration rates nationwide.¹⁵¹ But, the decline is still small compared to our overall incarceration rate and, so far, is not enough to stop the United States from keeping its status as the stand-out leader in world incarceration rates.¹⁵² In the context of plea bargaining, the high incarceration rates nationwide mean that criminal defendants must be aware that it is very possible they will end up in prison if convicted, even on a first offense, unless they fall

147. The incarceration rate for Whites is 380/100,000, for African Americans is 2,207/100,000, and for Latinos is 966/100,000. *Incarceration Rates by Race/Ethnicity*, *supra* note 24.

148. Holder’s Speech to the ABA, *supra* note 146.

149. U.S. DEP’T OF JUSTICE, *Smart on Crime: Reforming the Criminal Justice System for the 21st Century 2* (Aug. 2013) (“This necessarily will mean focusing resources on fewer but the most significant cases, as opposed to fixating on the sheer volume of cases.”), available at <http://www.justice.gov/ag/smart-on-crime.pdf> [hereinafter *Smart on Crime*].

150. *Id.* at 3–4.

151. Much of the decline in 2010 was due to California reducing the number of parole violators it sent to prison. Paul Guerino et al., *Prisoners in 2010*, DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS 6, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf>. The U.S. prison population declined by 0.3% in 2010; however, during that same period the federal prison population increased by 0.8%. *Id.* at 1. The year 2011 was the third consecutive year with a decrease in prison population in the U.S. Lauren E. Glaze & Erika Parks, *Correctional Populations in the United States, 2011*, DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS 1 (2012). Texas has also seen a decrease in incarceration rates that is attributed, in part, to the increased use of problem-solving courts, such as drug courts. Thomas Betar, *Texas, California Among States Seeing a Reduction in Incarceration Rates*, DESERET NEWS (Aug. 20, 2012, 4:52 PM), <http://www.deseretnews.com/article/865560966/Texas-California-among-states-seeing-a-reduction-in-incarceration-rates.html?pg=all>.

152. As Attorney General Holder observed, “Even though this country comprises just 5 percent of the world’s population, we incarcerate almost a quarter of the world’s prisoners.” Holder’s Speech to the ABA, *supra* note 146.

into a category of crime where there is a concentrated effort to use non-incarceration sentences.¹⁵³ High incarceration rates can mean that defendants who are offered a plea deal that does not include prison time find it difficult to consider the risk of prison time by fighting their case and going to trial.¹⁵⁴ Defendants should also be aware of the high imprisonment rate for parole and probation violations, and should exercise caution when accepting long probationary terms, although they are often left with few options.

The United States has not always had such a high incarceration rate.¹⁵⁵ The incarceration rate began to increase in the late 1970s, and soared in the 1980s with the start of the War on Drugs and the War on Crime.¹⁵⁶ The War on Drugs increased arrests, and, more importantly, increased penalties,¹⁵⁷ marking the beginning of a full range of changes in the structure of penal codes around the nation.¹⁵⁸ Laws changed to allow higher sentences for already existing crimes.¹⁵⁹ Legislatures passed mandatory minimum sentences for a full range of offenses.¹⁶⁰ This era marked the beginning of repeat offender

153. In the federal system, 34.4% of those in prison are first-time offenders sentenced to time for nonviolent offenses, and 72.1% are serving for a nonviolent offense with no history of a violent offense. THE SENTENCING PROJECT, *The Federal Prison Population: A Statistical Analysis*, 1, available at http://www.sentencingproject.org/doc/publications/inc_federalprisonpop.pdf. As stated above, these numbers may change as the Department of Justice implements new rules and policies to support its “Smart on Crime” approach. See *supra* notes 147–153 and accompanying text.

154. See *infra* Section V.C. for a discussion regarding the trial penalty and its impact on plea bargaining.

155. See, e.g., THE JFA INSTITUTE, *Unlocking America: Why and How to Reduce America’s Prison Population*, at 4 (2007), available at <http://www.jfa-associates.com/publications/srs/UnlockingAmerica.pdf> [hereinafter *Unlocking America*].

156. For historical perspective on the increasing incarceration rates, see ALEXANDER, *supra* note 15, at 40–58; see also Steven B. Duke, *Mass Imprisonment, Crime Rates, and the Drug War: A Penological and Humanitarian Disgrace*, 9 CONN. PUB. INT. L.J. 17 (2009); KAGAN, *supra* note 13, at 68–70. The War on Drugs hit African-American communities particularly hard causing even higher incarceration rates for this population. See, e.g., *Incarceration Rates by Race/Ethnicity*, *supra* note 24. For a scathing critique of the War on Drugs and the disproportionate impact of increased incarceration rates on African Americans, see generally ALEXANDER, *supra* note 15. As William Stuntz observed, “African American imprisonment rates came to exceed the rate at which Stalin’s Soviet Union incarcerated its citizens.” STUNTZ, *supra* note 136, at 253.

157. See, e.g., *Unlocking America*, *supra* note 155, at 4.

158. See, e.g., KAGAN, *supra* note 13, at 70.

159. These changes went beyond increasing penalties in drug offenses. See, e.g., *id.* at 69–70.

160. See, e.g., *id.*

enhancements, such as “three-strikes” laws.¹⁶¹ Zero-tolerance policies such as “use a gun, go to prison” were also put into place.¹⁶² Congress and many state legislatures also adopted sentencing guidelines that regulated and regularized sentences for defendants.¹⁶³ In addition to changing the penalties on existing laws, legislatures around the country added more crimes into their penal codes.¹⁶⁴ The federal government also substantially increased the number of federal offenses, including a significant number of strict liability offenses, which are even easier to prosecute.¹⁶⁵

The increase in penalties and enhancements, zero-tolerance policies, and sentencing guidelines gave prosecutors tools, embedded within the structure of the criminal justice system, to pressure defendants to plead guilty during plea bargaining.¹⁶⁶ For example,

161. Under California’s three-strikes law, which passed in 1994, a defendant convicted of a new felony charge with two prior serious or violent felony convictions was sentenced to twenty-five years to life in prison. CAL. PENAL CODE § 667(e)(2)(A) (1999). In 2012, Proposition 36 amended the law to make the twenty-five-to-life provision applicable only if the new felony is serious or violent. For a description of the law’s passage, see Emily Bazelon, *How California’s Three-Strikes Law Struck Out*, SLATE (Nov. 13, 2012, 2:43 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/11/california_three_strikes_law_voters_wanted_to_reform_the_state_s_harsh_law.html.

162. For an example of the impact of the 1999 mandatory gun enhancement on Marissa Alexander, a defendant in Florida, see Mitch Stacy, *Marissa Alexander Gets 20 Years For Firing Warning Shot*, THE HUFFINGTON POST (May 19, 2012, 1:07 PM), http://www.huffingtonpost.com/2012/05/19/marissa-alexander-gets-20_n_1530035.html.

163. Twenty-one states have sentencing guidelines, see NAT’L CTR. FOR STATE COURTS, *State Sentencing Guidelines: Profiles and Continuum*, 4 (July 2008), http://www.ncsc.org/~media/Microsites/Files/CSI/State_Sentencing_Guidelines.ashx. In *U.S. v. Booker*, the Supreme Court held that the Federal Sentencing Guidelines were not mandatory. 543 U.S. 220, 226 (2005). However, post-*Booker*, empirical studies report that the Federal Sentencing Guidelines are still important with certain cases sentenced within the guideline ranges. See U.S. SENTENCING COMM’N, *Report on the Continuing Impact of the United States v. Booker on Federal Sentencing*, 5–6 (2012) (“The guidelines have remained the essential starting point for all federal sentences and have continued to influence sentences significantly.” However, there are variations depending on the offense—drug cases continue to be sentenced pursuant to the guidelines, while judges more frequently sentence child pornography and fraud cases below the guideline range.). For a discussion of uniformity in the context of the system post-*Booker*, see generally Michael M. O’Hear, *The Myth of Uniformity*, 17 FED. SENT’G REP. 249 (2005).

164. For a discussion of the larger political context and how race influenced these changes to penal codes around the country, see ALEXANDER, *supra* note 15, at 40–58.

165. See, e.g., Gary Fields & John R. Emshwiller, *As Criminal Laws Proliferate, More are Ensnared*, WALL ST. J. (July 24, 2011), <http://online.wsj.com/article/SB10001424052748703749504576172714184601654.html> (quoting an ABA study reporting that “the amount of individual citizen behavior now potentially subject to federal criminal control has increased in astonishing proportions in the last few decades.” This includes an increase in strict liability offenses.).

166. STUNTZ, *supra* note 136, at 259.

stiffer penalties pressured defendants to plead guilty because “the punishment for the minor, nonviolent offense . . . is so unbelievably severe.”¹⁶⁷ Structural changes in penal codes around the country gave prosecutors more choices when deciding how to charge an offense and what offers to make; these legislative changes have often been made precisely to give prosecutors more “bargaining chips.”¹⁶⁸ A prosecutor can now routinely decide whether to charge the same act as a misdemeanor or a felony; whether to add an enhancement (e.g., use of a firearm in the commission of the offense); whether to add a prior conviction; or whether to allege the offense happened “in a school zone” or another location that will increase the potential punishment.¹⁶⁹ Adding charges, enhancements, or prior convictions can substantially increase the severity of a sentence.¹⁷⁰ In the course of plea negotiations, a prosecutor can agree to drop each time-adding allegation or threaten to add more serious charges if the defendant refuses to “take the deal.”¹⁷¹ Thus far, the Supreme Court has consistently sanctioned these kind of hard-bargaining tactics as long as the threatened penalty is one that could be exerted under the law.¹⁷² The Court has not yet considered whether some of the extraordinarily high sentences possible under enhanced penalty schemes are a cause for concern, nor has it found such sentences to violate the constitutional prohibition against cruel and unusual punishment.¹⁷³

167. ALEXANDER, *supra* note 15, at 87.

168. *Regulating the Plea-Bargaining Market*, *supra* note 36, at 1128.

169. For a discussion of prosecutorial power and its impact on plea bargaining, see Klein, *supra* note 12, at 2037–38.

170. See, e.g., ALEXANDER, *supra* note 15, at 88 (discussing how prosecutors use their discretionary power to “load up defendants with charges that carry extremely harsh sentences in order to force them to plead guilty to lesser offenses . . .”).

171. See, e.g., *id.* Pressuring defendants to take deals is only one type of pressure. Prosecutors also use their discretionary charging power to encourage defendants to testify as cooperating witnesses. *Id.*

172. See, e.g., *Brady v. United States*, 397 U.S. 742 (1970); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

173. See generally Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111 (2007) (criticizing the U.S. Supreme Court’s failure to expand its Eighth Amendment jurisprudence to look more critically at both the longer possible sentences and the conditions of imprisonment).

C. Legal Framework Structures

The Legal Framework Structures, for purposes of this discussion, are limited to those surrounding plea bargaining as they impact defendants, such as the right to discovery or the delineation of the obligations of individual defense lawyers in the negotiation process.¹⁷⁴ The Supreme Court has taken a narrow approach and has focused on a few requirements, such as the guilty plea being “voluntary and intelligent” and the defendant obtaining a competent lawyer. Thus far, the Court has not taken an expansive view in defining “intelligent”; in addition, the Court is only at the early stages of defining “competent assistance of counsel” in the context of plea bargaining. For purposes of this discussion, Legal Framework Structures are those that the Court has recognized, or is likely to recognize. As discussed below, it is likely within this category that *Lafler* and *Frye* will have the largest impact.¹⁷⁵

IV. Reasons for Plea Bargaining

There are four basic reasons plea bargaining exists: (1) it resolves cases when there are no issues in dispute; (2) it is an efficient way to handle cases; (3) it gives an incentive for cooperating witnesses; and (4) it allows for more creativity in resolving criminal cases.¹⁷⁶ The first reason—that there are no issues in dispute—means that the defendant did what he is accused of and there are no legal issues to litigate.¹⁷⁷ These cases are often factually fairly simple, making

174. See *supra* Section II.

175. See discussion *infra* Section VII.

176. Although not all four reasons are acknowledged in conversations regarding plea bargaining, all are important because they impact how easily changes can be made to plea bargaining or what type of changes might make sense to consider. For an example of a fairly typical description of the pros and cons of plea bargaining that fails to acknowledge at least one advantage the flexibility that plea bargaining provides, see *e.g.*, Levenson, *supra* note 16, at 16–21.

177. See, *e.g.*, KAGAN, *supra* note 13, at 84 (observing that “guilty pleas often reflect straightforward confessions by defendants caught dead to rights, and the ensuing sentence reflects a ‘going rate’ well understood by the courthouse community”); see also Jerold H. Israel, *Excessive Criminal Justice Caseloads: Challenging the Conventional Wisdom*, 48 FLA. L. REV. 761, 774 (1996) (“[M]any defendants may desire to enter a guilty plea, rather than contest the charge, and would do so without regard to any extra incentives offered by a prosecutor or court”); CANDICE MCCOY, POLITICS AND PLEA BARGAINING: VICTIM’S RIGHTS IN CALIFORNIA 50–69 (1993); Andrea Kupfer Schneider, *Cooperating or Caving In: Are Defense Attorneys Shrewd or Exploited in Plea Bargaining Negotiations?*, 91 MARQ. L. REV. 145, 158 (2007) (“Prosecutors and defenders are negotiating over relatively few contentious issues and are negotiating over the sentence at the margins.”) [hereinafter *Cooperating or Caving In*].

scientific evidence and extensive investigation unnecessary.¹⁷⁸ If there are no issues to litigate, the extended process of a trial is unnecessary. On a practical level, the question in most criminal cases is not whether the defendant committed the crime, but what is the fairest way to handle the particular offense.¹⁷⁹ Because the parties within the criminal justice system recognize that this is the issue to be resolved in most cases, they tend to resist efforts to force more “unnecessary” trials, as attempts to ban plea bargaining have illustrated.¹⁸⁰

The second and most often cited reason for plea bargaining is the efficient handling of cases.¹⁸¹ Jury trials in the United States can take considerable time and resources.¹⁸² Increasing the number of jury trials by even twenty percent would carry significant costs, due to the need for more courts, judges, and lawyers.¹⁸³ Although some jurisdictions have experimented with abolishing plea bargaining, the prevailing wisdom is that most busy jurisdictions do not have sufficient resources or staffing to ban plea bargaining or even significantly reduce its use.¹⁸⁴ Judges, prosecutors, and defense

178. For a list of the types of questions a defense attorney should ask in preparing for plea bargaining, *see generally* HERMAN, *supra* note 29, at 1.

179. Plea bargaining arguably “protects” the system from the possibility of issuing a “wrong verdict.” FISHER, *supra* note 6, at 178. It also removes from the system those cases where “the defendant faces the clearest evidence of guilt.” *Id.* at 179. Albert Alschuler argued that “[t]his approach to plea bargaining plainly regards the process primarily as a form of dispute resolution rather than as a sentencing device.” Albert Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 684 (1981). Alschuler maintains that plea bargaining is “designed to compromise an unresolved dispute between the defendant and the state,” not that plea bargaining arises out of the lack of a factual dispute, and is often reduced to a discussion (or dispute) about the sentence. *Id.* Alschuler is concerned about innocent defendants and when the state does not have enough evidence to support a conviction. *Id.* at 684–87. For more discussion of “the innocence problem” *see infra* Section IV.C. and accompanying notes.

180. *See, e.g.*, Guidorizzi, *supra* note 17, at 772–79 (describing various examples of partial and complete plea bargaining bans); Wright & Miller, *supra* note 19, at 43–48 (describing plea bargaining bans in Alaska, and other jurisdictions, such as El Paso, Texas).

181. *See, e.g.*, Brady v. United States, 397 U.S. 742, 752 (1970); Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 33–35 (1979). George Fisher argues that “caseload pressure” is not the only reason for the rise of plea bargaining in the United States. *See generally* FISHER, *supra* note 6, at 6–11 (2003).

182. For an argument about the importance of jury trials and criticizing their disappearance, *see generally* Young, *supra* note 18.

183. *See, e.g.*, Santobello v. New York, 404 U.S. 257, 260 (1971); John Kaplan, *American Merchandising and the Guilty Plea: Replacing the Bazaar with the Department Store*, 5 AM. J. CRIM. L. 215, 220 (1977).

184. *See, e.g.*, Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 609–15 (2005); Douglas D. Guidorizzi, *Should We Really “Ban” Plea Bargaining?: The*

attorneys all rely on plea bargaining to manage their caseloads. These “insiders”¹⁸⁵ consider plea bargaining to be an indispensable part of how they do their jobs and manage work-life balance. As such, they would strongly resist plea bargaining reform if it were to slow down or reduce plea bargaining (and thereby interfere with caseload management). Prosecutors, in particular, would resist plea bargaining reform if such changes were thought to undermine their power in the system which, in part, enables them to exercise control over their caseloads.¹⁸⁶ The Supreme Court also recognizes that our criminal justice system depends on plea bargaining to function.¹⁸⁷ This may be one reason why the Court has, for the most part, allowed “business as usual” and has not yet required a major overhaul of plea bargaining.¹⁸⁸

The third reason for plea bargaining, usually offered by prosecutors and law enforcement, is that offering plea deals to cooperating witnesses is an important tool in complex prosecutions.¹⁸⁹ For example, the Federal Sentencing Guidelines allow for a “sentence departure” for cooperating witnesses, and a significant number of

Core Concerns of Plea Bargaining Critics, 47 EMORY L.J. 753, 774–79 (1998). For a more detailed discussion of one example, see generally Roland Acevedo, *Is a Ban on Plea Bargaining an Ethical Abuse of Discretion? A Bronx County, New York Case Study*, 64 FORDHAM L. REV. 987 (1995). One study concluded that the trial rate is not related to the caseload, but to other factors; local legal culture influences the rate of guilty pleas. See generally THOMAS W. CHURCH, JR., U.S. DEPT. OF JUSTICE, EXAMINING LOCAL LEGAL CULTURE: PRACTITIONER ATTITUDES IN FOUR CRIMINAL COURTS (1982) (based on a study of the Bronx, Miami, Pittsburgh, and Detroit). Some have concluded that banning plea bargaining would not stop the practice of guilty pleas and that defendants would simply negotiate directly with the judge, thereby creating a system that is even more secretive. See, e.g., Kaplan, *supra* note 183, at 219–20.

185. For a discussion of who are the insiders and outsiders, and how the insiders are able to “work the system,” see MACHINERY OF CRIMINAL JUSTICE, *supra* note 14, at 29–58.

186. See *infra* Section V.B. for a discussion of power imbalances in plea bargaining. Historically, plea bargaining rose to prominence due to insider support. FISHER, *supra* note 6, at 11 (“Any institution that holds the affection of both of the system’s major players will amass a staying power of its own. Hence plea bargaining has not merely endured, but has grown to be the dominant institution of American criminal justice.”).

187. *Blackledge v. Allison*, 431 U.S. 63, 71 (1977) (“Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country’s criminal justice system.”).

188. See discussion *supra* Section II.

189. See, e.g., Benjamin B. Wagoner & Leslie Gielow Jacobs, *Retooling Law Enforcement to Investigate and Prosecute Entrenched Corruption: Key Criminal Procedure Reforms for Indonesia and Other Nations*, 30 U. PA. J. INT’L L. 183, 217 (2008) (“[T]he standard approach is to start near the bottom of the organization and work up the chain of command . . . lower level participants are ‘flipped’ or ‘rolled’ to provide evidence against higher level participants in the scheme.”).

defendants in the federal system take advantage of this.¹⁹⁰ Organized crime prosecutions often depend on arresting and “flipping” lower-level players to prosecute the leaders.¹⁹¹ Prosecutors also regularly use cooperating witnesses to build corruption and drug trafficking cases.¹⁹² Federal prosecutors tend to see this kind of deal-making as a necessary crime-fighting tool.¹⁹³ Critics dismiss the use of informants as “notoriously unreliable,” especially when done in exchange for a better deal.¹⁹⁴ However, for many prosecutors, not having this option would impact their ability (or at least their perceived ability) to put together the more difficult cases.¹⁹⁵

The fourth reason for plea bargaining is rarely stated, but is perhaps the most valuable: It allows for flexibility and creativity in a system that rarely fosters either.¹⁹⁶ Thanks to plea bargaining, the criminal justice system can experiment, innovate, and take alternative approaches. This means that practices in the criminal justice system

190. U.S. Sentencing Guidelines § 5K1.1 (2012). One third of plea agreements in the federal system of the District of Columbia include an agreement to cooperate. Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 AM. CRIM. L. REV. 1063, 1072 (2006).

191. See, e.g., Brown & Bunnell, *supra* note 190, at 1073 (“Cooperation agreements are critically important to law enforcement.”).

192. See, e.g., Wagoner & Jacobs, *supra* note 189, at 217.

193. See, e.g., JENIA I. TURNER, PLEA BARGAINING ACROSS BORDERS 34 (2009). Scholars and practitioners recognize the value of this tool in the fight against serious crime in post-conflict environments. COMBATING SERIOUS CRIMES IN POST CONFLICT SOCIETIES: A HANDBOOK FOR POLICYMAKERS AND PRACTITIONERS 61–63 (Colette Rausch ed., 2006) (noting that “[i]mmunity from prosecution and mitigation of sentences have become useful tools in the fight against serious crimes”).

194. ALEXANDER, *supra* note 15, at 88.

195. The recent Department of Justice Memorandum calling for changes in how low-level, non-violent drug offenses are handled still clings to the importance of getting information from defendants and states, “[i]n determining the appropriate sentence to recommend to the Court, prosecutors should consider whether the defendant truthfully and in a timely way provided to the Government all information the defendant has concerning the offense, or offenses, that were part of the same court of conduct, common scheme, or plan.” Memorandum from Eric Holder, Att’y Gen., U.S. Dep’t of Justice, Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases 3 (Aug. 12, 2013), available at <http://www.justice.gov/oip/docs/ag-memo-department-policy-on-charging-mandatory-minimum-sentences-recidivist-enhancements-in-certain-drugcases.pdf> [hereinafter Memorandum on Charging in Drug Cases].

196. The federal system is arguably the least creative or flexible, and still does not use much in the way of creative sentencing. For example, 89.8% of all federal offenders convicted of a felony or class A misdemeanor were sentenced to prison time. U.S. SENTENCING COMM’N, *Overview of Federal Criminal Cases Fiscal year 2011*, at 3 (2012), available at http://www.uscc.gov/Research_and_Statistics/Research_Publications/2012/FY11_Overview_Federal_Criminal_Cases.pdf.

can change without having to draft and enact legislation. To try a new approach within the criminal justice system, all that is needed is for the professionals in the system to agree. The best example is the development of problem-solving courts, such as drug courts, veterans courts, and mental health courts.¹⁹⁷ These courts started because professionals in the system, often judges, pushed to try new approaches due to their concern that the existing system was inadequate.¹⁹⁸

Problem-solving courts are a combination of counseling and punishment.¹⁹⁹ The first drug court was established in Dade County, Florida, in 1998; it arose out of frustration with the traditional criminal justice system's response to widespread drug addiction, expressed by several judges, prosecutors, and the public defender.²⁰⁰ Drug courts are probably the fastest-growing alternative form of dispute resolution within the criminal justice system.²⁰¹ Some states passed legislation for the creation and use of drug courts after such courts had already been in use.²⁰² For example, in 2001, Texas required drug courts for all jurisdictions with a population over 550,000.²⁰³ That requirement was expanded in 2007, and Texas currently requires any county with a population over 200,000 to have

197. Drug courts, however, are criticized. *See, e.g.*, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *America's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform* (Sept. 2009), <http://www.nacdl.org/drugcourts/> (criticizing the approach of drug courts in continuing the criminalization of drug addiction rather than treating addiction as a public health problem).

198. JAMES L. NOLAN JR., *REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT* 39 (2001) [hereinafter *REINVENTING JUSTICE*].

199. For a description of these various courts, *see, e.g.*, JAMES L. NOLAN JR., *LEGAL ACCENTS, LEGAL BORROWING: THE INTERNATIONAL PROBLEM-SOLVING COURT MOVEMENT* 7-22 (2009) [hereinafter *LEGAL ACCENTS, LEGAL BORROWING*].

200. *REINVENTING JUSTICE*, *supra* note 198, at 39. For a discussion of how judges' job dissatisfaction has influenced the creation of these courts, *see* *LEGAL ACCENTS, LEGAL BORROWING*, *supra* note 199, at 8-9.

201. As of 2011, there were at least 2,600 drug courts nationwide. *See* NAT'L INST. OF JUSTICE, *Drug Courts*, <http://www.nij.gov/topics/courts/drug-courts/Pages/welcome.aspx> (last visited Mar. 31, 2014).

202. After drug courts are established, state legislation helps to institutionalize drug courts into the overall criminal justice system by, for example, securing reliable state funding. For examples of states that have taken this approach, *see, e.g.*, Dennis A. Reilly & Atoundra Pierre-Lawson, *Ensuring Sustainability for Drug Courts: An Overview of Funding Strategies*, NATIONAL DRUG COURT INSTITUTE, Monograph Series 8 at 5-8 (Apr. 2008), available at <http://www.ndci.org/sites/default/files/ndci/Mono8.Sustainability.pdf>.

203. H.B. 1287, 77th Leg. (Tex. 2001).

a drug court.²⁰⁴ These types of laws, however, are not necessary to establish drug courts or other problem-solving courts. Due to the flexibility in plea bargaining, all that is required to impose a punishment other than jail, imprisonment, or a fine is for a judge, prosecutor, and defendant to agree—through a plea bargain—to resolve the case through an alternative process.²⁰⁵ This may be more complicated in systems with sentencing guidelines or with charges that carry mandatory minimums; this may explain, in part, why there is relatively little creative sentencing in the federal system and more innovative plea bargains at the local level.²⁰⁶

The flexibility that plea bargaining allows is perhaps even more important when considering the circumstances of many, if not most, defendants. Drug use is the norm, not the exception, for defendants.²⁰⁷ Mental illness is also common and often untreated.²⁰⁸ The use of problem-solving courts may contribute to decreasing imprisonment rates.²⁰⁹ High imprisonment rates, as the next section explains, are one of the basic realities defendants confront in making decisions about plea deals.²¹⁰ The flexibility of plea bargaining allows

204. H.B. 530, 80th Leg. (Tex. 2007) (this requirement is contingent on the availability of state or federal funding).

205. For a description of why many professionals within the criminal justice system were ready to try a new approach, see REINVENTING JUSTICE, *supra* note 198, at 44–46.

206. The federal system is starting to change. See *supra* Section IV.B., notes 150–155 and accompanying text. For an example of a newer problem-solving court at the federal level, see Jill Cowan, *Alternative Program Gives Federal Defendants a Second Chance*, L.A. TIMES (Oct. 22, 2013), <http://articles.latimes.com/2013/oct/22/local/la-me-casa-20131022>.

207. Steven Belenko, *The Challenges of Integrating Drug Treatment into the Criminal Justice Process*, 63 ALB. L. REV. 833, 835 (2000). For example, in one New York study, seventy-seven percent of men arrested and eighty-two percent of women tested positive for illegal drug use at the time of their arrest. *Id.*

208. Up to one-third of prison and jail inmates in a recent study reported that they have received counseling or therapy for “manic depression, bipolar disorder, or other depressive disorder, schizophrenia or another psychotic disorder, post-traumatic stress disorder, or an anxiety or other personality disorder.” Allen J. Beck & Christopher Krebs, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12*, U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS 24 (2013), available at <http://www.bjs.gov/content/pub/pdf/svpjri1112.pdf>.

209. Decreased incarceration rates may be due both to sending fewer people to prison who are convicted and to reduced recidivism rates among those who get drug treatment. See, e.g., JUSTICE POLICY INSTITUTE, *Substance Abuse Treatment and Public Safety*, at 6–10 (Jan. 2008), available at http://www.justicepolicy.org/images/upload/08_01_rep_drugtx_ac-ps.pdf.

210. This is not to suggest that these courts are above criticism. For one interesting critical analysis, see NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *America’s Problem Solving Courts: The Criminal Costs of Treatment and the Case for Reform* (2009), <http://www.nacdl.org/drugcourts/> (expressing concern, in part, that the most seriously

system insiders to change how individual cases or categories of cases are handled without having to wait for a shift in public opinion or the legislative process. As the drug court example illustrates, this flexibility often allows for experimentation—which may demonstrate why a different approach might make sense—which in turn leads to legislative changes that formalize the new approach within the legal system. Innovative programs may also lead to intra- and extra-jurisdictional changes in prosecutorial policies. For example, in August 2013 Attorney General Holder announced an intention to substantially move away from incarceration and look towards alternatives.²¹¹ In announcing this change, Attorney General Holder specifically pointed to the experience of individual states, including Texas, which have “successfully implemented drug treatment programs” and to a few limited treatment programs that already exist in the federal system.²¹²

V. The Negotiation Atmosphere for Plea Bargaining

The Supreme Court has not yet recognized the serious impact that the realities discussed above regularly have on the fundamental fairness of the plea bargaining negotiation atmosphere. The Court has also failed to analyze the negotiation process itself and the factors in individual negotiations that may impact the fairness of the process. Instead, the Court’s statements indicate the limits of what it sees in terms of how plea bargaining works. For example, in an earlier era, the Court expressed that the defense and prosecution “arguably possess relatively equal bargaining power.”²¹³ Eight years later, the Court, in *Bordenkircher v. Hayes*, stated that “[d]efendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation.”²¹⁴ The Court’s view, so far, seems to be that sufficient procedural protections and competent defense lawyers are all that is needed to protect the fairness of the plea bargaining

addicted people are not getting into these courts, but are instead being used by first-time offenders or those who do not have the most serious addiction problems).

211. Holder’s Speech to the ABA, *supra* note 146.

212. *Id.* at 4.

213. *Parker v. North Carolina*, 397 U.S. 790, 809 (1970). This opinion predates the changes in legislation giving prosecutors more power in charging and plea bargaining, and predates the dramatic increase in incarceration rates nationwide.

214. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

process. In contrast to the Court's almost idyllic view of how the criminal justice system operates, the popular view of the criminal justice system is that it is an emotion-filled battleground where prosecutors and defense lawyers hate each other and fight passionately to win their cases, often at any cost and regardless of the rules.²¹⁵ The reality is far less dramatic, and, in most cases, far less adversarial.²¹⁶

As has been discussed, the criminal justice system relies on plea bargaining, and plea bargaining often relies on solid working relationships—often mutually beneficial and interdependent—between the professionals in the system.²¹⁷ However, this does not mean that it is a relationship between equals. The only power the defendant has in a plea negotiation is the threat to go forward with a trial, which often works to the defendant's own disadvantage.²¹⁸ The prosecutor has far greater power in the plea negotiation.²¹⁹

As this section will discuss, there are six basic factors in the negotiation process itself that should be considered in analyzing the plea bargaining atmosphere. These factors are important in determining whether the process meets a basic level of fundamental fairness. The first factor is whether plea bargaining can be categorized as highly cooperative or adversarial. The second is how the serious power imbalances influence plea bargaining. The third factor is that innocent defendants plead guilty. The fourth is the trial penalty, which virtually every defendant faces. The fifth is whether, in negotiation terms, there is a best alternative to a negotiated agreement (“BATNA”) in the context of plea bargaining. The sixth is how the interests of the players in plea bargaining impact the negotiation atmosphere.

A. Cooperative or Adversarial?

The main players in plea bargaining—the prosecutor and defense lawyer—often have longstanding working relationships. They often

215. See, e.g., Richard Birke, *The Role of Trial in Promoting Cooperative Negotiation in Criminal Practice*, 91 MARQ. L. REV. 39, 67 (2007).

216. See, e.g., Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150 (2012) [hereinafter *Incompetent Plea Bargaining*].

217. *Id.* at 164.

218. See discussion *infra* Section V.C.

219. Critics of the U.S. Sentencing Guidelines argue that the Guidelines give prosecutors disproportionate power due to the critical nature of the charging decisions. See, e.g., Joseph S. Hall, *Rule 11(E)(1)(C) and the Sentencing Guidelines: Bargaining Outside the Heartland?*, 87 IOWA L. REV. 587, 590 (2002).

work with each other in the same courtrooms for years. The working atmosphere is generally one of mutual dependency where each depends on the other to move the cases along and keep the workload manageable. But, does this mutual dependency mean that plea bargaining is a cooperative form of negotiation?

Andrea Kupfer Schneider studied lawyer negotiating styles across seven different practice groups and found that criminal practitioners had the highest rate of true “problem solvers” (49.2%).²²⁰ Interestingly, in Schneider’s study, 68.2% of defense attorneys were rated as true problem solvers, compared to 38.2% for prosecutors.²²¹ A problem-solving lawyer is one who works with counterparts to try to satisfy the client’s interests, and tends to be more collaborative and less adversarial because of the tendency to see the possibility of “expanding the pie” and having “win-win” solutions.²²² In contrast, an adversarial negotiator is one who sees negotiation as a zero-sum game and thinks that gains by one side must be at the expense of the other.²²³ Since criminal lawyers tend to work so closely together, are mutually dependent, and tend to have a high number of repeat players, it is not surprising that there are high levels of cooperation and “problem solving” embedded into the average criminal court.²²⁴ The relatively high rates of problem solvers among criminal practitioners may also explain the quick growth of problem-solving courts, as this alternative approach seems to fit the already existing attitudes of practitioners in the criminal justice system.

However, this does not mean that plea bargaining can be easily defined as a cooperative form of negotiation.²²⁵ Plea bargaining is

220. *Cooperating or Caving In*, *supra* note 177, at 151. The seven practice groups were corporate, criminal, property, civil, commercial, family, and other. *Id.* at 151–52. For more information on the original study, see generally Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143 (2002).

221. *Cooperating or Caving In*, *supra* note 177, at 155. However, “the numbers in this part of the study were very limited” Thus, it would be interesting for another study to focus on this distinction between defense lawyers’ and prosecutors’ problem-solving styles to see if the results hold true with a larger sample size. *Id.* at 156.

222. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 794–801 (1984).

223. *Id.* at 764–65, 783–89 (“It is assumed the parties must be in conflict and since they are presumed to be bargaining for the same ‘scarce’ items, negotiators assume that any solution is predicated upon division of the goods.”).

224. *Cooperating or Caving In*, *supra* note 177, at 156–58.

225. HERMAN, *supra* note 29, at 1–4.

often viewed by the parties as a zero-sum game with a focus exclusively on the length of the sentence a defendant will receive, particularly in more serious cases.²²⁶ Hard-bargaining tactics are common in plea negotiations. Prosecutors regularly state that an offer is a “take it or leave it” offer and that “it won’t get any better.”²²⁷ It is also common to put time limits on an offer²²⁸—such was the case in *Frye*—so that if the offer is not accepted in a time period, it will expire.²²⁹ “Exploding offers” are also common, as prosecutors will regularly say, “If your client doesn’t take this deal today, I will add that prior and he will be looking at double the time.”²³⁰ These are not idle threats. They are effective high-pressure tactics that prosecutors regularly employ to coerce defendants to plead guilty.²³¹ Defense lawyers know, and regularly explain to their clients, that these threats are not considered to be coercion and that if they plead guilty in response to such a threat, the courts will view the guilty plea as voluntary.²³² As Russell Covey observed, “[t]he routine use of high pressure bargaining tactics and exploding offers . . . places added psychological stress on criminal defendants.”²³³ Because prosecutors regularly use such threats, it is difficult to define plea bargaining as cooperative. Plea bargaining may sometimes be a cooperative negotiation; at other times, it may be highly adversarial.

226. And, at times even more extreme punishments, such as the death penalty, are used to pressure defendants to accept life sentences. As William Stuntz observed, “[c]apital punishment’s largest consequence is not the few dozen executions that happen each year in the United States but the many life sentences imposed after plea bargains designed to avoid death sentences.” STUNTZ, *supra* note 136, at 260.

227. This can be even more pronounced in more serious cases. In one study of plea bargaining in death penalty cases, prosecutors reported that “there was no negotiation over a plea in death-eligible cases; a plea bargain, if offered, was presented as ‘take it or leave it.’” Susan Ehrhard, *Plea Bargaining and the Death Penalty: An Exploratory Study*, 29 JUST. SYS. J. 313, 320 (2008).

228. See, e.g., HERMAN, *supra* note 29, at 66.

229. See *Missouri v. Frye*, 132 S. Ct. 1399, 1404–05 (2012).

230. The threats are not limited to the defendant themselves. Defendants are told that if they do not take the deal their spouses or their parents or other family members will be threatened with prosecution. An example was when prosecutors threatened Jonathan Pollard—who was convicted of spying for Israel—that if he did not plead guilty his wife would face charges. STUNTZ, *supra* note 136, at 260.

231. *Plea-Bargaining Law*, *supra* note 27, at 242 (2007).

232. See, e.g., *Brady v. United States*, 397 U.S. 742, 755 (1970). “Every defense attorney (and prosecutor) can tell stories of defendants forced to decide virtually on the spot, or within absurdly short time limits, whether to accept or reject a plea offer with consequences measured in years or decades.” *Plea-Bargaining Law*, *supra* note 27, at 242.

233. *Id.* at 243.

Unfortunately, the Supreme Court has, so far, failed to examine how these differences might impact the fundamental fairness of the process.

B. Power Imbalances

A regular concern in analyzing dispute resolution processes is to examine whether there is a power imbalance, and if so, how serious that imbalance might be.²³⁴ If there is a serious power imbalance, it could be inappropriate to use an informal dispute resolution process because the less powerful party may feel pressured into accepting a deal that is not in his interest.²³⁵ In the context of plea bargaining, power imbalances are built into the structure of the system.²³⁶ Prosecutors decide what charges to file. As discussed above, given the current structure of penal codes, this is no small exercise of discretion and one that has a defining impact on each case.²³⁷ In addition, prosecutors can decide, almost without limit, to add additional charges or enhancements after the case has been filed, as long as the additions are at least arguably supported by the evidence.²³⁸ Moreover, the more mandatory minimums or sentencing enhancements built into the structure of the code, the more power the

234. See, e.g., Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1 (2000); Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139 (2005).

235. There is extensive debate in dispute resolution scholarship on power imbalances and whether informal processes such as negotiation and mediation are appropriate, particularly when dealing with gender-based discrimination, racial discrimination and crimes of violence against women. See generally Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467 (1991).

236. See, e.g., O'Hear, *supra* note 19, at 425.

237. See *supra* Section III.B and accompanying notes. Prosecutorial discretion is built into our system. See, e.g., KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969). This Article does not advocate ending prosecutorial discretion. As Davis observed, "to fix as the goal the elimination of all discretion on all subjects would be utter insanity." *Id.* at 43. Discretion has its place and when exercised properly can lead to a better justice system. But, as Davis also said, the goal should be "to eliminate unnecessary discretionary power, not to eliminate all discretionary power." *Id.* at 217.

238. Overcharging is not necessarily a violation and is routine in many jurisdictions. It is a practice that has been criticized by many. For example, Wright & Miller commented that "[a] particularly noxious form of dishonesty is overcharging by prosecutors—the filing of charges with the expectation that defendants will trade excess charges for a guilty plea." Wright & Miller, *supra* note 19, at 33.

prosecutor holds.²³⁹ Prosecutors also have the power to decide not to make a plea offer. In effect, the prosecutors hold all the cards; defendants only have the power to throw a monkey wrench into the system by demanding a jury trial.

In 2013, the Supreme Court decided the case of *United States v. Davila*.²⁴⁰ As stated earlier, Rule 11 of the Federal Rules of Criminal Procedure states that judges cannot “participate” in plea negotiation discussions.²⁴¹ The Court in *Davila* held that there was a Rule 11 violation because the judge (here, a United States magistrate judge) directly addressed the defendant about the plea bargain; the violation, however, was not enough to vacate the guilty plea.²⁴² For this discussion, the magistrate’s statement is relevant because it nicely sums up the situation that so many defendants find themselves in when deciding whether to accept a plea deal. The magistrate recommended that the defendant plead guilty rather than “wasting the Court’s time, [and] causing the Government to have to spend a bunch of money empanelling a jury to try an open and shut case.”²⁴³ The magistrate went on to tell Mr. Davila that:

[T]he Government, they have all of the marbles in this situation That means you’ve got to go to the cross. You’ve got to tell the probation officer everything you did in this case regardless of how bad it makes you appear to be because that is the way you get that three-level reduction for acceptance, and believe me, Mr. Davila, someone with your criminal history needs a three-level reduction for acceptance.²⁴⁴

This is the situation for most defendants: the government has “all of the marbles” and the only defense option is “to go to the cross” and accept the plea deal, or proceed to trial at their peril.

239. Ronald F. Wright & Rodney L. Engen, *The Effects of Depth and Distance in a Criminal Code on Charging, Sentencing, and Prosecutor Power*, 84 N.C. L. REV. 1935, 1943 (2006).

240. *United States v. Davila*, 133 S. Ct. 2139 (2013).

241. FED. R. CRIM. P. 11(c)(1). This is not the rule in every state. See, e.g., Cynthia Alkon, *Plea Bargaining Harmless Error*, ADR PROF BLOG (June 16, 2013), www.indisputably.org/?p=4735.

242. *Davila*, 133 S. Ct. at 2150.

243. *Id.* at 2144.

244. *Id.*

A defendant's custody status is another aspect of the power imbalance present in many plea negotiations. This is more of an issue in felony cases, where up to two-thirds or more of felony defendants are held in pretrial custody.²⁴⁵ Psychologically, a guilty plea by an in-custody defendant is fundamentally different than a guilty plea by an out-of-custody defendant.²⁴⁶ When a defendant is out of custody, he can suffer loss aversion²⁴⁷ when contemplating a plea that will involve giving up his freedom and going to jail or prison.²⁴⁸ By contrast, when a defendant is in custody, and particularly if the offer is "time served," taking the deal may seem like a "win."²⁴⁹

The process costs to defendants—both in and out of custody—of coming to court is another aspect of the power imbalance. For the prosecutor and probably for the defense lawyer, being in court is their job. For the defendant, it can be a miserable experience. If the defendant is in custody, as Covey described:

[D]efendants are roused from their cells before sunrise and transported to the 'bullpens'—crowded, dirty, and dangerous holding cells adjoining the courthouse—where they spend entire days waiting for a visit with a lawyer that may last as little as a few seconds, and an equally short—or shorter—appearance before a judge that inevitably ends with the grant of yet another continuance . . . Following their court appearance, defendants then return to the bullpens only to spend several more hours subjected to the same miserable conditions before finally being returned to their cells, hungry and often too late for dinner.²⁵⁰

The conditions on court days for in-custody defendants are such that it "reframes the decision to plead guilty" because it allows

245. *Plea-Bargaining Law*, *supra* note 27, at 239.

246. *Id.* at 239–40.

247. Under loss aversion theory, people tend to try to avoid doing anything that will result in a loss. If a defendant is out of custody, any sentence that includes going into custody may feel like a loss (as it is a loss of freedom). For additional discussion of loss aversion in the context of plea bargaining, *see, e.g., Cooperating or Caving In*, *supra* note 177, at 160.

248. *Plea-Bargaining Law*, *supra* note 27, at 239.

249. *Id.* at 239–40.

250. *Id.* at 241.

defendants to “end an interminable . . . process.”²⁵¹ And, a day in court is not fun for the out-of-custody defendant either as they must face “[t]edious lines to get through courthouse security, interminable waiting for cases to be called, strict limitations on what can be brought into the courtroom (e.g., no food, no reading materials) and seemingly endless continuances” that require days off from work, arranging childcare, and transportation to the courthouse.²⁵² Misdemeanor defendants also face high process costs if they do not take the plea offer. In his study of cases in lower-level criminal courts, Malcolm Feeley observed, “[i]ronically, the cost of *invoking* one’s rights is frequently greater than the loss of the rights themselves, which is why so many defendants accept a guilty plea without a battle.”²⁵³ In addition, when considering the “loss” of a guilty plea, Feeley points out that “fear of arrest and conviction does not loom as large in the eyes of many people brought into court as it does in the eyes of middle-class researchers.”²⁵⁴ Pleading guilty is often “the best way to minimize punishment”²⁵⁵ in those circumstances.

C. The Innocent Defendant

Reflecting the overall negotiation atmosphere is the reality that innocent people have pled guilty to offenses they did not commit. Of the 311 DNA exonerations in the United States, twenty-nine plead guilty.²⁵⁶ The National Registry of Exonerations, which includes both DNA and non-DNA exonerations, calculated that eight percent of exonerated defendants pled guilty.²⁵⁷ However, as the report states, this figure is probably low as there are so few exonerations and many are for more serious crimes. There are procedural hurdles to exonerations, including appeal waivers and the lack of a trial record.²⁵⁸

251. *Id.* at 242.

252. *Id.* at 240–41.

253. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 277 (1992).

254. *Id.* at 200.

255. *Plea-Bargaining Law*, *supra* note 27, at 241.

256. INNOCENCE PROJECT, *When the Innocent Plead Guilty*, http://www.innocenceproject.org/Content/When_the_Innocent_Plead_Guilty.php (last visited Mar. 7, 2014).

257. Samuel R. Gross & Michael Shaffer, *Exonerations in the United States, 1989–2012*, NAT’L REGISTRY OF EXONERATIONS 16 (June 2012), available at http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf.

258. *Id.* at 16–17.

Together, this makes it difficult to calculate how commonly innocent defendants plead guilty to less-serious offenses.²⁵⁹ Russell Covey's research on group exonerations from the Rampart and Tulia scandals found considerably higher guilty plea rates: eighty-one percent of defendants later exonerated in those scandals entered guilty pleas.²⁶⁰ Covey concludes that police misconduct, the primary cause of wrongful convictions in these cases, is a "major source of wrongful convictions."²⁶¹ Covey suggests that the high guilty plea rates in these larger scandals indicate that the "potential magnitude of the wrongful conviction problem is many times greater" than the earlier DNA exoneration cases suggested with their lower conviction rates due to guilty pleas.²⁶²

In addition to the statistics regarding the percentage of exonerated who plead guilty, there is also an interesting empirical study suggesting that it might be common for an innocent person to decide to plead guilty, due to fear of the consequences.²⁶³ In this study, college students were put into different groups and accused of cheating.²⁶⁴ In this controlled experiment, some had "cheated" and some were "innocent."²⁶⁵ The "innocent" students took the

259. *Id.*

260. Russell Covey, *Police Misconduct as Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133, 1163 (2013). The Rampart scandal happened in Los Angeles in the late 1990s. The misconduct of police officers out of the Rampart division of the Los Angeles Police Department was "police corruption on an unimagined scale implicating police officers in wrongful killings, indiscriminate beatings and violence, theft, and drug dealing." *Id.* at 1138. In total, 156 felony convictions were overturned or dismissed. *Id.* The scandal in Tulia, Texas, also in the late 1990s, was due to the testimony of one "freelance agent" who accused forty-seven people of selling cocaine. *Id.* at 1139. Forty-seven people were charged in these cases, with twenty-five convictions and number of the rest receiving deferred adjudication. *Id.* at 1140. The convictions, some through trial and the rest through plea bargaining, were later vacated and the state agreed to a settlement of \$250,000 to be divided among the defendants. *Id.*

261. *Id.* at 1185.

262. *Id.* at 1162.

263. Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 3-4 (2013).

264. *Id.* at 28-29.

265. The study participants thought they were participating in an experiment in completing logic problems. They were given problems to answer and were instructed to not help any other test taker. In one group, fellow "participants," who were actually just posing as participants and actually part of the experiment, asked the participants questions about the problems. In this group, virtually all of the students answered or responded in some way, which was a clear violation of the rules. These were the "guilty" students. In the other group, everyone remained silent and there was no violation of the rules. This was the "innocent" group. *Id.* at 29-36.

equivalent of the “deal” to avoid more serious disciplinary proceedings that could have had lasting consequences on their college careers.²⁶⁶ The clear implication is that innocent people will fear the consequences and be as likely (if not more likely) to take deals.²⁶⁷ As will be discussed below, there are serious consequences in terms of trial penalties for defendants who do not accept plea deals.²⁶⁸ This may make it more likely that innocent defendants will feel the pressure and decide to plead guilty. This may be more likely when they are charged with offenses that carry serious potential penalties, making the pressure to accept a deal even more attractive.

In examining the cases of the exonerated who plead guilty, Covey suggests that there are three “important reasons” that innocent defendants plead guilty: (1) “because the evidence they expect the state to offer at trial . . . would likely be compelling to neutral jurors and judges;”²⁶⁹ (2) “the offer is too good to refuse[,]” which is closely tied to the high potential penalties in cases;²⁷⁰ and (3) defendants “perceive, often correctly, that they will not receive a fair and unbiased hearing.”²⁷¹ All of these reasons reflect deeply embedded realities of the criminal justice system, and are not easily fixed by simply having competent assistance of counsel at the plea bargaining stage. Rather, these realities require, for example, changes to the heavy potential trial penalties and more complete discovery.²⁷²

D. Trial Penalty

A defendant who does not take a plea deal and decides to go to trial will, on average, receive a sentence that is substantially higher

266. *Id.*

267. *Id.*

268. *See infra* Section V.C.

269. *Plea-Bargaining Law*, *supra* note 27, at 616. The main evidence against defendants in both the Rampart and Tulia scandals was police officer testimony, which, in the absence of impeachment or other information, is difficult for defendants to counter at trial.

270. *Id.* at 617.

271. *Id.*

272. Covey argues that better discovery rules could prevent some of these cases. *Id.* at 617–18. For a discussion of the discovery in the context of plea bargaining, *see generally* Cynthia Alkon, *Guaranteeing the Right to Defense Discovery in Plea Bargaining Fifty Years after Brady v. Maryland*, 38 N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2014). For a more extensive discussion of the trial penalty, *see infra* Section V.C.

than a defendant who accepts a plea deal.²⁷³ Researchers report that defendants who go to trial and are found guilty can receive prison sentences that are over four times higher than those who plead guilty.²⁷⁴ Virtually every defense lawyer has had the experience of seeing a defendant “slammed” after trial when the judge sentenced him to a much longer sentence than that offered before trial.²⁷⁵ This experience can impact how lawyers talk to their clients as they will understand that a much heavier sentence is very possible, if not probable.²⁷⁶ The trial penalty also influences whether plea bargaining is an adversarial or problem-solving negotiation. As Carrie Menkel-Meadow observed when discussing adversarial negotiation, “[n]egotiators too often conclude that they are limited to what would be available if the court entered a judgment.”²⁷⁷ Criminal codes are clear on the possible maximum sentences on conviction, contributing to an atmosphere of “bargaining in the shadow of the law.”²⁷⁸ The trial penalty casts a very real “shadow” over plea negotiations, and the threat of a substantially harsher sentence is part of the atmosphere of every plea bargain, even if it is not explicitly discussed

273. For a scathing report on how the trial penalty impacts plea bargaining in felony drug cases in the United States, see generally HUMAN RIGHTS WATCH, *An Offer You Can't Refuse: How U.S. Federal Prosecutors Force Drug Defendants to Plead Guilty* (Dec. 2013), available at http://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0_0_0.pdf.

274. See Nancy J. King et al., *When Process Affects Punishment: Differences in Sentences After Guilty Plea, Bench Trial, and Jury Trial in Five Guidelines States*, 105 COLUM. L. REV. 959, 992 (2005) (reporting trial penalties ranging from thirteen percent to four hundred sixty-one percent, depending on the state and the offense); *Plea-Bargaining Law*, *supra* note 27, at 224–30 (stating that the actual trial penalty could be substantially higher due to the fact that most statistics compare the sentence for similar charges and do not consider the fact that plea bargains often include pleading guilty to a lesser offense than the one originally charged); see also *Berthoff v. United States*, 140 F. Supp. 2d 50, 67–68 (D. Mass. 2001).

275. For an article describing dilemmas many defense lawyers and their clients face due to the trial penalty, see 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?pagewanted=all>.

276. For a view that defense lawyers may distort expected outcomes at trial, thereby influencing client decisions to accept deals and plead guilty, see Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205, 247–49 (1999). This is an example of the availability bias where a person thinks something is likely to happen because it the person has seen it or experienced it before, thereby making it seem available. See, e.g., Joseph W. Rand, *Understanding Why Good Lawyers Go Bad: Using Case Studies in Teaching Cognitive Bias in Legal Decision-Making*, 9 CLINICAL L. REV. 731, 745–46 (2003).

277. Menkel-Meadow, *supra* note 222, at 789.

278. Robert H. Mnookin & Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968–69 (1979).

by the prosecutor and the defense lawyer in the plea negotiation itself.²⁷⁹

E. Is there a BATNA?

In recent years scholars have begun analyzing plea bargaining as a form of negotiation.²⁸⁰ Interest-based negotiation theory holds that individual parties should consider their “best alternative to a negotiated agreement” (“BATNA”) as part of their basic preparation for negotiation as they evaluate what deals to accept.²⁸¹ But, is this basic tenet of interest-based negotiation theory applicable in plea bargaining?²⁸² For most criminal defense lawyers, the concept of a BATNA, although a standard part of negotiation theory, is often not a helpful aid in their analysis of the case and the issues confronting the typical client during plea bargaining. Roger Fisher, William Ury, and Bruce Patton state in *Getting to Yes* that “[t]he reason you negotiate is to produce something better than the results you can obtain without negotiating.”²⁸³ They go on to advise that the BATNA is “the standard against which any proposed agreement should be measured.”²⁸⁴ The concern is that without analyzing their BATNA,

279. See *supra* note 275 and accompanying text; but see Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2466–67 (2004) [hereinafter *Plea Bargaining Outside the Shadow of Trial*] (positing that the shadow of trial argument is oversimplified in the context of plea bargaining because “the classical model supposes that trials set normatively desirable benchmarks and cast strong shadows.” *Id.* at 2466. As there are so many possible other factors that can account for plea bargain results apart from the “strength of the evidence and expected punishment after trial.”) *Id.* at 2467.

280. See generally Rebecca Hollander-Blumoff, *Getting to “Guilty”: Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115 (1997) (concluding that negotiation theory is applicable to plea bargaining); Michael M. O’Hear & Andrea Kupfer Schneider, *Dispute Resolution in Criminal Law*, 91 MARQ. L. REV. 1 (2007); *Plea Bargaining Outside the Shadow of Trial*, *supra* note 279; Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911 (2006). For an earlier analysis studying how lawyers discuss plea bargaining, see generally DOUGLAS W. MAYNARD, *INSIDE PLEA BARGAINING: THE LANGUAGE OF NEGOTIATION* (1984).

281. See ROGER FISHER ET AL., *GETTING TO YES* 97–106 (1991).

282. For an analysis that uses BATNA in discussing plea bargaining, see Hollander-Blumoff, *supra* note 280, at 116, n.5 (described by the author as a sample “too small to offer anything other than anecdotal data.”). This analysis, however, seems to assume that there is more room for movement; it also seems as if it is based, in part, on interviews with a small group of lawyers. This may, therefore, reflect the particular realities of that jurisdiction or the individual experiences of those lawyers, and not be more widely applicable.

283. FISHER ET AL., *supra* note 281, at 100.

284. *Id.*

people may see options that do not exist; they may be too optimistic, or too committed to reaching agreement since they see no other option.²⁸⁵ *Getting to Yes* recommends that determining a BATNA involves “(1) inventing a list of actions you might conceivably take if no agreement is reached; (2) improving some of the more promising ideas and converting them into practical alternatives; and (3) selecting, tentatively, the one alternative that seems best.”²⁸⁶ It is hard to see how working through this approach will be helpful to the typical criminal defendant who has no real defense and no leverage except for the threat of forcing the case to trial. For example, the “list of actions” is usually limited to two: take the deal or go to trial.²⁸⁷ There is no option of not proceeding with the case, as there might be in many other types of conflicts or contract negotiations because once charges are filed the prosecutor rarely dismisses.²⁸⁸ Moreover, in the absence of a dismissal, the defendant is locked into proceeding forward with the case.²⁸⁹

It is hard to “improve on the promising ideas” in, for example, a case of driving under the influence of alcohol where the defendant was driving and his blood alcohol level tested well above the legal limit. There are no motions to run, no option of getting the case dismissed through some procedural maneuvering, and no leverage to convince the prosecutor that he should give a different deal from every other driving under the influence of alcohol case passing through that jurisdiction.²⁹⁰ The defendant’s options are simply to take the deal, or go to trial and get a worse result.²⁹¹

285. *Id.* at 100–01.

286. *Id.* at 101.

287. There are conceivably a number of issues that could be open for negotiation. However, in cases where there are standard offers—such as drug and driving under the influence of alcohol cases—there are few opportunities for negotiation on a variety of issues. For a list of possible negotiation points during plea bargaining, see HERMAN, *supra* note 29, at 90–92.

288. Hollander-Blumoff, *supra* note 280, at 121.

289. *Id.*

290. Motions may not help to get better deals and, therefore, may also not be a BATNA. See, e.g., Hoffman et al., *supra* note 113, at 230 (An empirical study in Denver looking in part at whether public defenders run fewer motions, and if that is why they might get worse deals in felony cases. The study concluded that public defenders run as many motions, but their clients are “self-selected for guilt” meaning that those who are “more guilty” are more likely to use a public defender and less likely to hire private counsel.).

291. First-time misdemeanor offenders may not, in fact, get penalized for going to trial. For example, when I was a public defender in Los Angeles, I took a number of driving under the influence of alcohol cases to trial with clients who had no previous

Another example, this time in a less typical case, may help to illustrate how, even in the face of a defense, most defendants do not have much of a BATNA. Louise is charged with first degree murder. She killed Bill, her common law husband. Bill had a history, documented with police reports and convictions, of beating her. One day, Bill beat her in front of multiple witnesses. She managed to get away, but later, as she was walking home, with no witnesses around, Bill approached her and said, "I'm gonna kill you." When he got close enough to start beating her, she stabbed him with a small knife. She stabbed him once, and that stab went directly to Bill's heart. Louise thought she had managed to get Bill to stop his attack and she didn't look back as she ran away (the fight happened outside). However, hours later, when the police came to arrest her, Louise learned that she had killed Bill with that one stab. Louise was charged with first-degree murder, an offense which carries a sentence of life in prison. As most readers will recognize, Louise has a strong self-defense argument. But, if she goes to trial and loses on the first-degree murder charge, she will be sentenced to life in prison.

Louise's lawyer finds the old police reports detailing previous beatings, finds witnesses to testify to the beating on the night of Bill's death, gets medical reports, and prepares the case as it should be prepared. After several plea negotiation meetings between the defense lawyer and the prosecution, the prosecutor offers Louise a deal: time served, three years of probation, and a guilty plea to a voluntary manslaughter charge. After much agonizing, Louise takes the deal. She does not want to risk going to trial and being found guilty. In this case, did Louise have a BATNA? Louise had a defense, and her defense lawyer used that information in the plea negotiation process. In that sense, this case is different from the standard DUI or drug possession case. But, after the prosecutor makes his final offer, Louise has two options: take the deal or go to trial. If she goes to trial and wins, she will walk away a free woman. And, this seems a strong case on the facts. But, if Louise goes to trial and loses, she will spend the rest of her life in prison (as parole is not an option in this jurisdiction for first-degree murder convictions).

Can going to trial, which means leaving the decision in the hands of the jurors, be considered a BATNA in the true sense of the word? *Getting to Yes* suggests that a BATNA should be realistic; it should be

record and, if they were convicted, judges frequently sentenced my clients to essentially the same standard deal that was offered before trial.

something that a person can count on as an option.²⁹² Acquittal at trial does not comfortably fit into this category.²⁹³ For Louise, the stakes of going to trial and losing are too high to risk, even with a good defense. If she were going to trial on the voluntary manslaughter charge, it might be worth the risk because the potential penalty for that offense is substantially lower, but the prosecutor will not dismiss the more serious charge. This makes the plea negotiation a zero-sum game and one in which Louise is risking a life of freedom versus a life spent behind bars. Faced with this “sure thing” of getting out immediately or risking a life in prison, most defendants will take the “sure thing.”²⁹⁴

Even in less extreme examples where a defendant is offered some years in prison, but has a potential maximum of many more, it is hard to see trial as a BATNA—particularly in those cases where the defendant committed the offense and where there is no defense. In cases without a defense, the defendant is left with the option of accepting the deal the prosecutor offers or going to trial and getting a worse result. In these circumstances, trial is a “worst alternative to a negotiated agreement (“WATNA”) at best. For most defendants, the concept of a BATNA is neither applicable nor useful. The lack of a meaningful BATNA is one reason, if not the fundamental reason, that many plea negotiations include hard-bargaining tactics: prosecutors recognize that they can get away with it as they recognize that the defendant has two choices: take the offer or get a worse sentence after trial. Plea bargaining is all too often not much of a negotiation, but rather a take-it-or-leave-it conversation where the prosecutor holds all the cards, and the defendant can either decide to cut his losses, or compound them.²⁹⁵

292. FISHER ET AL., *supra* note 281, at 100–01.

293. For example, from 1989-2002, the federal jury trial conviction rate was eighty-four percent. Andrew D. Leipold, *Why are Federal Judges so Acquittal Prone?*, 3 WASH. U. L.Q. 151, 152 (2005).

294. Some might refer to this as making a rational choice under a market theory of plea bargaining, see Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 308 (1983); Richard P. Adelstein, *The Negotiated Guilty Plea: A Framework for Analysis*, 53 N.Y.U. L. REV. 783, 809 (1978); H. Richard Uviller, *Pleading Guilty: A Critique of Four Models*, 41 LAW & CONTEMP. PROBS. 102, 102–03 (1977).

295. FEELEY, *supra* note 253, at 187 (“To the extent that there is any negotiation at all, it is a debate over the nature of the case, and hinges largely on establishing the relevant ‘facts’ which flow from various interpretations of the police report.”).

F. What Are the Interests?

In analyzing any negotiation, a classic starting point is to determine the interests of the various parties.²⁹⁶ In contrast to the discussion on whether the concept of a BATNA contributes much to an analysis of plea bargaining, interests are highly relevant to understanding how plea bargaining works both in the aggregate and within each individual case. In each plea negotiation, no matter how simple it may seem on its face, there are multiple interests at play. Understanding the interests of the various parties is key to understanding how—or if—to address plea bargaining reform.

It is important to understand that plea bargaining with a represented client involves a variety of players: the prosecutor, the prosecutor's boss, the defense attorney, the defendant, and the judge. Most plea bargains require all parties to agree, although it is possible that a defendant would plead against the advice of counsel.

The insiders understand that there are several key shared interests in plea negotiations. Foremost in the minds of every prosecutor, judge, and defense lawyer is the need to manage their caseloads and “move the cases” through the court.²⁹⁷ This necessity acts as one of the few checks on prosecutorial power, as defense lawyers would likely advise their clients to go to trial and reject plea offers that are outside the norm and higher than the sentence a judge would be expected to give. All of the professionals in the system also have an interest in maintaining or establishing their professional reputation.²⁹⁸ How this plays out may be different depending on the party. For prosecutors, being “tough” and getting convictions may be the primary concern, both for their reputation in the larger legal community and for promotion purposes.²⁹⁹ Local politics can also be a factor. The district attorney is usually elected and some of the policies surrounding how particular kinds of cases are handled and

296. FISHER ET AL., *supra* note 281, at 40–55.

297. *See, e.g.*, BIBAS, MACHINERY OF CRIMINAL JUSTICE, *supra* note 14, at 41–54; FISHER, *supra* note 6, at 8–10.

298. One study found that federal prosecutors working in parts of the country with higher salaries for lawyers in the private sector went to trial more often, thereby positioning themselves to increase their marketability and salaries if they moved into private practice. Higher trial rates led to higher sentences post-trial. Richard T. Boylan et al., *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J.L. & ECON. 627, 632–42 (2005).

299. For a description of the variety of interests that may motivate a prosecutor beyond a desire to win, *see* Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 187–89 (2007).

what kind of plea deals are possible, or not, may be closely linked to electoral politics.³⁰⁰ For defense lawyers, it may matter to not be seen as a “dump truck”—a lawyer who is afraid of trial and pleads their clients guilty, regardless of whether the deal is good or not.³⁰¹ In many public defender offices, promotions are based, in part, on the number of jury trials; so, defense lawyers in those offices are conscious of the need to do trials for career advancement.³⁰² Many judges are concerned both that they do not have too many of their cases overturned on appeal and, perhaps more importantly, that they do not get bad publicity in the local media.³⁰³ This can make judges look more favorably at plea deals because guilty pleas are rarely appealed. It may mean, however, that judges will be more hesitant to accept a plea bargain that is out of the ordinary, including a deal that might make a judge look like she is being “soft on crime.” At the local and state levels, judges are regularly elected into their positions and, as with district attorneys, reelection is an underlying interest.³⁰⁴ It is also likely that most judges, prosecutors, and defense lawyers will state that an underlying interest is making sure the cases are handled fairly and with justice, although the prosecutorial or defense view of what is fair and just will not agree in each case.

In addition to the shared interests, each of the professionals in the system has different interests. Prosecutors and judges share an

300. See generally Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581 (2009).

301. When I worked in the Los Angeles County Public Defender’s office in the 1990s, I understood that this was not the reputation I wanted to build. The term was also regularly thrown around by clients who often complained that their lawyers “just want to dump me” or that they had a “dump truck” for a lawyer.

302. As a newer public defender, I was repeatedly told that the fastest road to promotion was through establishing that I was not “afraid” to go to trial. Public defenders who worked in courts with lower trial rates and/or who were master negotiators were not rewarded for their good negotiating skills. The idea that public defenders are first and foremost “trial lawyers” seems alive and well in more recent times, see Albert-Goldberg, *supra* note 107, at 457.

303. In Los Angeles, we referred to this as the “metro section test”—as that was the section in the *Los Angeles Times* that would report on crime and courts, and no judge wanted to find themselves featured in this section, particularly with any story that might make them look “soft on crime.”

304. Whether a judge has a higher chance of losing her seat in an election seems to be influenced by the type of judicial election it is; whether voters are simply indicating “yes or no;” or whether there is a contested election. For a study that indicates judges have a lesser chance of winning reelection in a contested election, see generally Claire S. H. Lim, *Preferences and Incentives of Appointed and Elected Public Officials*, 103 AM. ECON. REV. 1360 (2013).

interest in protecting the public.³⁰⁵ Prosecutors want high conviction rates.³⁰⁶ Prosecutors often have to follow office-wide policies regarding what charges to file or drop or how to approach plea bargaining.³⁰⁷ An example of this is the Department of Justice (“DOJ”) which has policies regarding charging and plea bargaining including requiring federal prosecutors to “charge the most serious offense that is consistent with the nature of the defendant’s conduct, and that is likely to result in a sustainable conviction.”³⁰⁸ The DOJ requires supervisors to review all charging decisions and plea agreements.³⁰⁹ The DOJ also specifies that “[a]ll prosecutorial requests for departures or variances—upward or downward—must be based upon specific and articulable factors, and require supervisory approval.”³¹⁰ The DOJ’s underlying interest in this hierarchical approach seems to be uniformity in treatment, as the stated policy is that “[p]ersons who commit similar crimes and have similar culpability should, to the extent possible, be treated similarly.”³¹¹

In August of 2013, Attorney General Holder issued a new Memorandum specifically regarding charging decisions for “certain”

305. Defense lawyers may share this interest as citizens, but in their professional role, their duty is to zealously represent their clients, not protect the public at large. *See, e.g.*, MODEL CODE OF PROF’L RESPONSIBILITY Canon 7–1 (1981); *see also* MODEL RULES OF PROF’L CONDUCT Preamble (1983).

306. For an extreme example of this, *see* Jessica Fender, *DA Chambers Offers Bonuses for Prosecutors who Hit Conviction Targets*, THE DENVER POST (Mar. 23, 2011), http://www.deverpost.com/ci_17686874#.

307. In the federal system, the U.S. Department of Justice has guidelines that were issued to all federal prosecutors. *See, e.g.*, Memorandum on Charging in Drug Cases, *supra* note 195, at 2.

308. *Id.*

309. *See, e.g.*, Memorandum from Eric Holder, Att’y Gen., U.S. Dep’t of Justice, Department Policy on Charging and Sentencing 2 (May 19, 2010), *available at* <http://www.justice.gov/oip/holder-memo-charging-sentencing.pdf> (“All charging decisions must be reviewed by a supervising attorney.”) [hereinafter Memorandum on Charging and Sentencing]. In plea bargaining, “prosecutors should seek a plea to the most serious offense that is consistent with the nature of the defendant’s conduct and likely to result in a sustainable conviction. . . .” Memorandum on Charging in Drug Cases, *supra* note 195, at 2. The policy goes on to state that “[c]harges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned to arrive at a plea bargain that does not reflect the seriousness of the defendant’s conduct.” *Id.*

310. *Id.* at 3. The memo allows some discretion, but clearly requires supervisory review at each stage of the process limiting the discretion of individual federal prosecutors.

311. *Id.* at 1. This drive for uniformity may be changing. In August 2013, the Department of Justice Released “Smart on Crime,” which outlines changes to some key policies, including a call for “the development of district-specific guidelines for determining when federal prosecutions should be brought.” *Smart on Crime*, *supra* note 149, at 2.

drug cases.³¹² This Memorandum is in addition to—and not a substitute for—the May 2010 Memorandum on Charging and Sentencing. Among the most significant changes for the purposes of this discussion, federal prosecutors are instructed to “ensure that our most severe mandatory minimum penalties are reserved for serious, high-level, or violent drug traffickers.”³¹³ Specifically, the memo instructs that “prosecutors should decline to charge the quantity necessary to trigger a mandatory minimum sentence if the defendant meets” certain criteria.³¹⁴ While this change in approach may mean far fewer defendants are sentenced to long terms on drug offenses in the federal system, it does not change the basic structure, which requires prosecutors to seek higher level approval before declining to file certain charges or declining to file certain enhancements.³¹⁵

Defense lawyers have an interest in maintaining, or building, a good relationship with their clients, which can be seriously impacted by how lawyers are paid or the organizational structure within which they work.³¹⁶ For example, lawyers may want to handle the case quickly if they are paid a flat fee regardless of how many court appearances they make before trial, or they may string the case along if they are paid by the court appearance (i.e., the more court appearances, the more money). The connection between money and quality of representation can be even more direct when the defendant is indigent and relies on appointed counsel.³¹⁷ How lawyers are paid can have a serious impact on whether they are providing adequate assistance or assistance in name only.³¹⁸ When lawyers are paid a

312. See generally Memorandum on Charging in Drug Cases, *supra* note 195.

313. *Id.*

314. *Id.* The criteria is focused on whether the defendant used violence, was a leader in a gang or other criminal organization, has ties to serious drug trafficking organizations, and the defendant’s criminal history. *Id.*

315. *Id.* at 3 (“In keeping with current policy, prosecutors are reminded that all charging decisions must be reviewed by a supervisory attorney to ensure adherence to the Principles of Federal Prosecution, the guidance provided . . . [in the] May 19, 2010 memorandum, and the policy outlined in this memorandum.”).

316. For felony cases, the Los Angeles County Public Defender’s Office strives to provide vertical representation—the same lawyer representing the same defendant at each stage of the case—in part to aid relations with clients. Albert-Goldberg, *supra* note 107, at 458.

317. How lawyers are paid makes a difference in the type of representation and the quality of the plea bargains. See generally Iyengar, *supra* note 113. See also *supra* Section IV.A.

318. See, e.g., Andrew Cohen, *How Americans Lost the Right to Counsel, 50 Years After Gideon*, THE ATLANTIC (Mar. 13, 2013, 11:09 AM), <http://www.theatlantic.com/>

small amount that is substantially below the rate they would be paid to handle other cases, it is no surprise that the representation suffers. Moreover, lawyers may not have resources to do things like investigate a case before pleading it out.³¹⁹

In addition to the professional players in plea bargaining, there are also defendants and victims. Defendants' interests include the obvious: They want to get the best deal they can, preferably getting the case dismissed. For defendants that are innocent, or feel that they were wronged in the process by, for example, police misconduct, they may want to be vindicated or to get the opportunity to tell their story.³²⁰ Victims often share an interest in wanting to have their story heard.³²¹ Victims may also want restitution or payment for the harm they suffered.³²² Often, both victims and defendants would rather the case just be over as quickly as possible as they do not want to come to court. Victims may also want a sense of closure from the offense.³²³ Plea bargaining often fails to meet many of these interests for both victims and defendants. In most jurisdictions the victim will be notified, often well after the fact, that the defendant has pled guilty.³²⁴ This means that even if they wanted to, they often have no opportunity to confront the defendant in open court.

Despite their very different positions in the criminal justice system, both defendants and victims usually share an interest in wanting to leave feeling that the process was fair. This interest is supported by studies on procedural justice finding that the process is

national/archive/2013/03/how-americans-lost-the-right-to-counsel-50-years-after-gideon/273433/.

319. This can be an issue if lawyers need a court order to authorize hiring an outside expert. See, e.g., Albert-Goldberg, *supra* note 107, at 455.

320. See, e.g., O'Hear, *supra* note 19, at 416–17.

321. The traditional criminal justice system's failure to respond to victims' needs is one of the reasons restorative justice proponents offer for the value of using restorative justice processes. See, e.g., Mark S. Umbreit et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 260, 273–75 (2005).

322. States commonly have restitution funds and order defendants to pay restitution as part of their sentence. For a brief description intended to describe to victims how restitution works, see NATIONAL CENTER FOR VICTIMS OF CRIME, *Restitution*, <http://www.victimsofcrime.org/help-for-crime-victims/get-help-bulletins-for-crime-victims/restitution>. For an example from the federal system, see 18 U.S.C. § 3663.

323. See, e.g., Maureen E. Laflin, *Criminal Mediation Has Taken Root in Idaho's Courts*, 56 ADVOC. 37, 38 (2013).

324. For a general description, see generally U.S. DEPT OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, *Victim Input Into Plea Agreements* (Nov. 2002), available at https://www.ncjrs.gov/ovc_archives/bulletins/legalseries/bulletin7/ncj189188.pdf.

more important to people than the outcome.³²⁵ If people find that the process was fair or just, then they are more satisfied with the system.³²⁶ Procedural justice scholarship examines underlying attitudes and views about the legal process, looking at “four critical factors” that lead people to perceive a process as fair. These factors include: (1) people being able to “state their case” to legal authorities; (2) people being treated with dignity; (3) neutral authorities; and (4) authorities with good or “benevolent” intentions.³²⁷ Michael O’Hear recommends adopting “procedural justice process norms” to change how prosecutors conduct plea bargaining.³²⁸ He recommends that the plea bargaining process should allow defendants to tell their story (to be heard); that there should be objective (or fair) standards for the negotiations; that the reasons for a position in negotiation should be explained; and that prosecutors should avoid “pressure tactics like exploding offers and charging threats.”³²⁹ These kinds of procedural justice processes for both defendants and victims are generally absent in the way plea bargaining is conducted.

Overall, plea bargaining meets the underlying interests of most of the insiders within the process. For defense attorneys and prosecutors, plea bargaining does efficiently manage caseloads and workloads, even if defense attorneys often do not like the outcome for their clients. Prosecutors may, at times, share that frustration. Defendants and victims—the parties most directly affected—often find that their interests are not met in the plea bargaining process. Nonetheless, as long as the basic interests of judges, prosecutors, and, to an extent, defense attorneys are met by the current system, making any substantial changes will likely be met with resistance and may reflect, in part, why the Supreme Court has not yet made any decisions that would require substantial change in how plea bargaining is conducted in the United States.

325. See, e.g., TOM R. TYLER, WHY PEOPLE OBEY THE LAW 163 (1990); TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 196 (2002) [hereinafter TRUST IN THE LAW]; Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 286 (2003) [hereinafter *Procedural Justice, Legitimacy*].

326. See, e.g., TRUST IN THE LAW, *supra* note 325, at 49–75. *Procedural Justice, Legitimacy*, *supra* note 325, at 286; O’Hear, *supra* note 19, at 420–21.

327. See, e.g., Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 664 (2007).

328. See generally O’Hear, *supra* note 19, at 425.

329. *Id.* at 426–32.

VI. Immediate Impact of *Lafler* and *Frye*

The problems with plea bargaining reach far beyond the single issue of incompetent assistance of counsel that the Supreme Court addressed in *Lafler* and *Frye*. While these decisions will not address the more serious structural problems discussed above, they will have an immediate impact.³³⁰ The impact of *Lafler* and *Frye* will be limited to addressing single instances of bad lawyering and some changes in the Legal Framework Structures for defendants. It is unlikely that these Court decisions will have an impact on either Indigent Defense Structures or Prosecutorial Power Structures.³³¹

The Indigent Defense Structures that impede plea bargaining are primarily resource issues and are closely related to how much money is available for the defense to do its job. *Lafler* and *Frye* did not address resource issues as those questions were not before the Court in those cases. However, meaningful plea bargaining reform must address resource issues as these issues are fundamentally embedded into how defense lawyers can do their jobs.³³² Lawyers need reasonable caseloads to have adequate time to interview and counsel their clients and to do the work required to prepare their cases. Lawyers should also have ready access to assistance by investigators and experts to aid in the preparation of their cases during plea bargaining.³³³

Legislatures have spent decades carefully building Prosecutorial Power Structures into penal codes around the country. When the law allows a variety of ways to charge the same offense, with wildly different possible punishments, the legislature has built into the structure of the law extraordinary powers for prosecutors. As was discussed above, this means that the decision of what to charge is often the most important decision in a case and this single charging decision can determine the range of possible outcomes. This is even truer in jurisdictions with mandatory (or quasi-mandatory) sentencing guidelines because they include mandatory minimums and mandatory sentencing enhancements; this can prevent judges from exercising discretion to neutralize harsh prosecutorial charging decisions.

330. *Incompetent Plea Bargaining*, *supra* note 216, at 159 (“Though [*Lafler* and *Frye*] reflect a significant jurisprudential debate, in practice their holdings are unlikely to upset many convictions or disrupt other aspects of judges’ day-to-day work . . .”).

331. As this article discusses, these three structures are impediments to improving plea bargaining for defendants.

332. See discussion *supra* Section III.A.

333. See discussion *supra* Section III.A.2.

It is unlikely that “there will be cases galore”³³⁴ arising from *Lafler* and *Frye*, as there are many hurdles to appealing a case after a plea bargain has been concluded (or a trial has been conducted).³³⁵ One reason that it is unlikely there will be a huge influx of new appellate cases, as Bibas points out, is that the standard applied in *Lafler* and *Frye* is not new and is already the applicable standard in many state jurisdictions and federal districts.³³⁶ Even when cases alleging ineffective assistance of counsel reach an appellate level, judges are much more likely to deny the claims, regularly finding such claims “unsupported, implausible, and insubstantial.”³³⁷ One reality that Justice Scalia did not mention is that an explicit agreement to waive appellate rights is now a standard part of many plea deals.³³⁸ One study of federal appeal waivers found that over two-thirds of plea bargains in the federal system include an appeal waiver.³³⁹ Thus far, judges are finding that these appeal waivers block later claims of ineffective assistance of counsel.³⁴⁰

However, several state bars consider some appellate waivers to be ethical violations. For example, the Florida Bar released an ethics opinion stating that it is an ethical violation for a plea bargain to include a requirement that the defendant waive any later claims of ineffective assistance of counsel or prosecutorial misconduct during the plea bargain.³⁴¹ In deciding these waivers were unethical, Florida looked to similar decisions by the state bars in Missouri,³⁴² Vermont,³⁴³

334. *Missouri v. Frye*, 132 S. Ct. 1399, 1413 (2012).

335. See, e.g., King, *supra* note 60, at 2438–56; Bibas, *Incompetent Plea Bargaining*, *supra* note 216, at 152; Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2673 (2013).

336. *Incompetent Plea Bargaining*, *supra* note 216, at 161.

337. King, *supra* note 60, at 2435; see also *Incompetent Plea Bargaining*, *supra* note 216, at 162 (2012) (observing that “judges are naturally skeptical and loath to overturn convictions and sentences” and due to the large number of claims already going into the appellate courts, judges “risk disregarding the valid ones as well”).

338. Nancy J. King & Michael E. O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 212 (2005).

339. *Id.*

340. King, *supra* note 60, at 2436.

341. PROF. ETHICS OF THE FLA. BAR, Op. 12–1 (June 2011).

342. ADVISORY COMM. OF SUPREME COURT OF MO., Formal Op. 126 (2009) (stating that it is a conflict of interest for a lawyer to ask a client to waive ineffective assistance of counsel claims, and prejudicial to the administration of justice for a prosecutor to ask for a waiver of prosecutorial misconduct).

343. VT. BAR ASS’N, Advisory Ethics Op. 95–04 (finding it unethical because “a lawyer should not attempt to exonerate himself from or limit his liability to his client for personal malpractice”).

and North Carolina.³⁴⁴ As the Florida opinion states, “a criminal defense lawyer has a personal conflict of interest when advising a client regarding waiving the right to later collateral proceedings regarding ineffective assistance of counsel.”³⁴⁵ The opinion also considered it “prejudicial to the administration of justice for a prosecutor to require the criminal defendant to waive claims of prosecutorial misconduct when the prosecutor is in the best position, and indeed may be the only person, to be aware that misconduct has taken place.”³⁴⁶ These opinions do not go so far as to prohibit all appellate waivers in plea bargaining, just waivers of ineffective of counsel and prosecutorial misconduct. These ethical opinions, however, provide important leverage for defense lawyers to not have their clients agree to these provisions as part of a plea deal. As the Federal Public Defender for the Southern District of Florida observed, “[p]lea bargaining is not give and take. The government has tremendous leverage over the defense bar and clients. It’s more a take-it-or-leave-it situation, and more often than not with certain prosecutors it will be leave it unless your client waives all of his collateral rights.”³⁴⁷

Defense lawyers who practice in the few states with state bars that have issued such ethics opinions will probably be able to effectively negotiate so that these provisions are not part of the plea deal, as to do otherwise would put their bar license at risk. In the absence of such an ethics opinion, or eventual court opinion, appellate waivers are likely to continue to be a routine part of plea bargaining, particularly in federal cases, and will make it unlikely that many of these cases will be appealed.

In addition to appellate waivers, there are clear indications that, after *Lafler* and *Frye*, judges and prosecutors are taking steps to create better records so that plea bargains are not overturned on appeal. For example, not long after the *Lafler* and *Frye* decisions were issued, an Assistant U.S. Attorney in the Western District of Tennessee filed a motion requesting not only that the plea offer be clearly stated on the record, but also that the defense state the

344. N.C. STATE BAR, Ethics Op. 129 (1993) (discussing the personal conflict of interest for the defense lawyer and comparing it to malpractice claims).

345. PROF. ETHICS OF THE FLA BAR, Op. 12-1 (June 2011). The opinion also looked at the issue in terms of whether it was an impermissible limiting of liability for malpractice (which is prohibited under Fla. R. Prof. Cond. § 4-1.8(h)). *Id.*

346. *Id.*

347. Gary Blankenship, *Board Adopts Hotly Debated Plea Bargain Ethics Opinion*, THE FLA. BAR NEWS (Jan. 1, 2013), <https://www.floridabar.org/DIVCOM/JN/JNnews01.nsf>.

content of “any plea related discussions” including the “attorneys’ advice to their clients.”³⁴⁸ The motion recognized that these discussions could be privileged and concedes that they should be sealed and not shown to the prosecution, but the motion failed to recognize the clear problems with requiring defense attorneys to divulge contents of conversations with their clients.³⁴⁹ At the state level, the Nashville and Davidson County District Attorney’s Office in Tennessee reported that it has a new form for defense lawyers to sign, stating the plea offer terms and that the lawyer conveyed the offer to the client.³⁵⁰ Defense lawyers must agree to complete this form before prosecutors make an offer.³⁵¹ Additionally, if the case is set for trial, the defendant has to sign a form stating that he “has been advised of the State’s offer(s) and the benefits and disadvantages of proceeding to trial.”³⁵² Some prosecutors also request defendants sign a “statement of satisfaction” with their lawyers, or require all offers and replies to be in writing.³⁵³ The changes that prosecutors, judges, and defense lawyers are likely to make will not address the systemic problems; rather, they will focus on making guilty pleas “bullet proof.”³⁵⁴

These additions are simply extensions of the Court’s recommendations in *Frye* that courts, when taking the guilty plea, should “establish . . . that the defendant has been given proper advice.”³⁵⁵ Nancy King suggests that due to *Lafler* and *Frye*, judges will make sure to “secure on-the-record statements” about the plea deals—that they were communicated to their clients and that the defendant was “satisfied with his counsel’s advice.”³⁵⁶

348. Lawrence S. Goldman, *DOJ’s Lafler/Frye Motion Goes Too Far*, WHITE COLLAR CRIME PROF BLOG, (Apr. 5, 2012), http://lawprofessors.typepad.com/whitecollarcrime_blog/2012/04/dojs-laflerfrye-motion-goes-too-far.html. For the motion itself, see <http://lawprofessors.typepad.com/files/motion-pursuant-to-lafler-and-frye-1.pdf> at 1 [hereinafter Tennessee Motion].

349. Tennessee Motion, *supra* note 348.

350. King, *supra* note 60, at 2437.

351. *Id.*

352. *Id.*

353. *Id.*

354. *Incompetent Plea Bargaining*, *supra* note 216, at 165. Taken together, these are examples of what Bibas predicted would happen after *Lafler* and *Frye* as “[p]lea bargaining’s semiprivatized justice is best suited to semiprivatized remedies and reforms, backstopped by judges but driven by other actors.” *Id.*

355. *Missouri v. Frye*, 132 S. Ct. 1399, 1406–07 (2012).

356. King, *supra* note 60, at 2436–37.

Taken together, these steps of requiring routine appellate waivers in plea bargains, and requiring specific statements on the record of plea offers, performance of counsel, and advice to clients will make ineffective assistance of counsel claims in the context of plea bargaining tough to bring and tougher still to win.³⁵⁷ Through these efforts, courts and prosecutors continue to focus on the formalistic requirements of plea bargaining without addressing the deeper (and more difficult) systemic problems that cause serious concerns about the overall fairness of plea bargaining. This approach is similar to those following other Supreme Court rulings of what is necessary to render a plea “knowing and voluntary”: simply add some statements to the in-court colloquy where the defendant agrees that he is “knowingly and voluntarily waiving his right” to a jury trial and that he has not been “threatened by anyone.”³⁵⁸ These declarations are routinely made without any inquiry into whether they are true, and once the defendant agrees that they are true, these statements present a hurdle to overturning the guilty plea on appeal.

The Court is likely to provide a better definition of what is required for a lawyer to be “competent” in defined parts of the plea bargaining process.³⁵⁹ There are a number of cases on appeal at the state supreme court and federal appellate court level that could improve the definition of “competence.” These cases primarily fall under the category of client counseling during plea bargaining; examples include failure to advise about direct consequences of the plea, such as how much time a defendant will actually serve in prison;³⁶⁰ failure to advise about possible determinative motions, such as a motion to dismiss due to a violation of a speedy indictment rule;³⁶¹ failure to accurately advise about the law, such as whether the facts support a specific degree of a crime;³⁶² failure to advise about

357. *Id.*

358. These are standard parts of a guilty plea delivered in court. For an example of the “cheat sheet” that judges use when taking a guilty plea, see Judges’ Bench Book, *Taking Pleas of Guilty or nolo contendere*, available at http://www.almd.uscourts.gov/rulesproc/docs/guilty_plea_colloquy.pdf.

359. For an article explaining some of the possible standards for effective negotiation by lawyers in plea bargaining, see generally Batra, *supra* note 83.

360. See, e.g., *Manley v. Belleque*, 366 Fed. App’x 734, 735–36 (9th Cir. 2010) (holding that the defense lawyer’s failure to advise the defendant that the state would seek a hearing in aggregation after pleading guilty was not inadequate assistance).

361. See, e.g., *State v. Utter*, 803 N.W.2d 647 (Iowa 2011); *Ennenga v. State*, 812 N.W.2d 696 (Iowa 2012).

362. See, e.g., *Garcia v. State of N.M.*, 237 P.3d 716 (N.M. 2010).

why a “fast track” plea should have been accepted;³⁶³ failure to calculate sentencing guideline range correctly;³⁶⁴ and failure to adequately investigate the case.³⁶⁵ It is also likely that the Court will need to revisit the issue of remedies when there has been ineffective assistance of counsel in plea bargaining.³⁶⁶ As is clear from this list, the issues arising on appeal are not issues pertaining to the more serious structural problems discussed in this article. Instead, the cases focus on defined problems with counsel performance that are specific to the case itself; therefore, holding for the defendant in any of these cases would not require larger structural changes to plea bargaining, but would just add to the list of things that individual lawyers should do and which, in fairness, most are probably already doing or striving to do.

Conclusion

Lafler and *Frye* represent a step forward in that the Supreme Court is no longer in denial about the importance of plea bargaining in our criminal justice system. However, this recognition seems unlikely, in the near term, to cause the Court to look at the serious structural issues that call into question the fundamental fairness of plea bargaining. The Court has not shown a willingness to question hard-bargaining tactics by prosecutors, inordinately high sentences passed by legislatures, or the trial penalty that defendants suffer when they exercise their constitutional right to a trial. Since *Lafler* and *Frye* were decided, criminal defendants have continued to enter guilty pleas with lawyers who often have little time to truly advise them, without full prosecutorial discovery, with threats of more serious charges and added enhancements, and often under time pressures to make quick and potentially life-altering decisions. In the immediate

363. See, e.g., *United States v. Soto-Lopez*, 475 Fed. App'x 144 (9th Cir. 2012).

364. See, e.g., *Garcia v. United States*, 679 F.3d 1013 (8th Cir. 2012).

365. See, e.g., *Henley v. Bell*, 487 F.3d 379 (6th Cir. 2007); *Ex Parte Harrington*, 310 S.W.3d 452 (Tex. Crim. App. 2010); *Johnson v. Uribe*, 700 F.3d 413 (9th Cir. 2012).

366. For an excellent analysis of how *Lafler* and *Frye* approached the question of remedies and a recommendation of how to proceed with remedies post-*Lafler* and *Frye*, see generally Jenia Iontcheva Turner, *Effective Remedies for Ineffective Assistance*, 48 WAKE FOREST L. REV. 949 (2013). For an optimistic view of where the remedies issue could lead, see generally Wesley MacNeil Oliver, *Toward a Common Law of Plea Bargaining*, 102 KY. L.J. 1, 5–6 (2013–2014) (arguing that through the remedies issue the Court has assumed some judicial oversight of prosecutorial discretion whereby “the Supreme Court has invited lower courts to indirectly develop a set of best practices for the exercise of prosecutorial discretion”).

aftermath of the decisions, *Lafler* and *Frye* seem to have simply added a few more formalistic requirements into the standard guilty plea colloquy. Until the Court is ready to grapple with the structural issues preventing fairness in plea bargaining for defendants, criminal courts around the country will continue business as usual, and defendants will continue to accept plea bargains that may not be a good choice but may be their only choice under the circumstances.

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