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Creating Constitutional Procedure: Frye, Lafler, and Plea Bargaining Reform

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CREATING CONSTITUTIONAL PROCEDURE: *FRYE*, *LAFLER*, AND PLEA BARGAINING REFORM

Mike Work*

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INTRODUCTION

Plea bargaining, an element of the criminal justice system since the 1800s, has become increasingly central to criminal proceedings over the past forty years. In *Argersinger v. Hamlin*, the Supreme Court recognized

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the problems associated with the mass volume of cases in the legal system.¹ The Court noted the resulting effects on overworked attorneys and judges, as well as the pressure those case volumes put on attorneys to clear cases from a docket without giving adequate attention to the defendant standing before the court.² These challenges have only increased in the years since, and the practice of plea bargaining has become increasingly prevalent as an effort to administer justice more fairly and efficiently.³ Nearly 95% of all criminal cases in state court systems are resolved without going to trial, and the percentage of pleas defendants enter in federal court is even higher.⁴ In the majority opinion of *Missouri v. Frye*, Justice Anthony Kennedy approvingly quoted two scholars who remarked that plea bargaining “is not some adjunct to the criminal justice system; it *is* the criminal justice system.”⁵ Many commentators have criticized plea bargaining, with some calling for its abolition.⁶ Irrespective of their concerns, plea bargaining has become entrenched in the criminal justice system, which depends on plea bargaining at both the state and federal levels.⁷ Plea bargaining’s place in the criminal justice system can be explained by its effectiveness in efficiently resolving cases: it allows for cases to be resolved promptly, which is all the more important when both prosecutors and defense attorneys are assigned a significantly greater volume of cases than any one attorney can competently manage. The Supreme Court has recognized plea bargaining’s importance, enshrining its place in the system by denoting it as

¹ 407 U.S. 25, 34–36 (1972).

² *Id.*

³ *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012); *see also* Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 37; Ana Maria Gutiérrez, Note, *The Sixth Amendment: The Operation of Plea Bargaining in Contemporary Criminal Procedure*, 87 DENV. U. L. REV. 695, 713 (2010).

⁴ *Frye*, 132 S. Ct. at 1407 (tracing 94% of state court convictions and 97% of federal court convictions back to guilty pleas).

⁵ *Id.* at 1407 (citing Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

⁶ *See* Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2299 (2006); John H. Langbein, *Land Without Plea Bargaining. How the Germans Do It*, 78 MICH. L. REV. 204, 205 (1979) (arguing that the procedural safeguards built into the German system effectively rendered plea bargains unnecessary in pre-unification West Germany, demonstrating that plea bargaining is not inexorable); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1980 (1992) (arguing that plea agreements undercut the interests of all parties involved, that incremental reforms are inadequate, and that plea bargaining should be abolished completely).

⁷ Jane Campbell Moriarty & Marisa Main, “Waiving” Goodbye to Rights: *Plea Bargaining and the Defense Dilemma of Competent Representation*, 38 HASTINGS CONST. L.Q. 1029, 1030 n.6 (2011); *see also* Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 717 (2006).

a stage where a violation of the defendant's Sixth Amendment right to effective counsel can result in habeas relief on the grounds of ineffective counsel.⁸

The Supreme Court's recent holdings in *Missouri v. Frye* and *Lafler v. Cooper* clarify the specific nature of the relief available when a defense attorney fails to communicate a plea bargain or gives defective legal advice, encouraging a trial that results in a conviction and a significantly more severe sentence than offered in a plea.⁹ In *Frye* and *Lafler*, the Supreme Court reinstated plea offers after the defendants successfully claimed ineffective assistance of counsel. The dissents in both cases predict that the Court's chosen remedy could result in further constitutional litigation with respect to plea bargaining, and that rather than solving a problem, the Court created a new field of litigation.¹⁰

This Comment explores the ripple effects that *Frye* and *Lafler* will have on both prosecutors and defense attorneys, and the possibility that reinstating plea offers will result in increased constitutional litigation. This Comment argues that the holdings in *Frye* and *Lafler* supply a means for encouraging prosecution-focused reform efforts and for curtailing practices of overcharging defendants and using so-called exploding offers. Legislative remedies should address the underfunding of both public defender organizations and prosecutors.¹¹ Future litigation should focus on guaranteeing that plea offers remain available after first appearances. Together, these efforts will ensure that defendants are able to exercise their right to effective assistance of counsel.

Part I provides background information on the extension of the right to counsel from the trial to other critical stages of criminal proceedings. Specifically, it focuses on cases involving plea bargaining, as well as seminal cases addressing ineffective assistance of counsel. After introducing these concepts, the Comment looks more carefully at *Missouri v. Frye* and *Lafler v. Cooper*, in which the Supreme Court clarified the remedy available to defendants granted habeas relief because of counsel ineffectiveness during plea bargaining.

Part II focuses on several of the root causes of ineffective counsel, namely overcriminalization, excessive caseloads, and the institutional cultures of prosecutorial teams and public defender offices. These issues

⁸ Hill v. Lockhart, 474 U.S. 52, 58 (1985).

⁹ *Frye*, 132 S. Ct. at 1399; *Lafler v. Cooper*, 132 S. Ct. 1376, 1376 (2012).

¹⁰ See *Frye*, 132 S. Ct. at 1413 (Scalia, J., dissenting); *Lafler*, 132 S. Ct. at 1392 (Scalia, J., dissenting).

¹¹ Adam M. Gershowitz & Laura R. Killinger, Essay, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 299–300 (2011).

help explain the practices of overcharging defendants and extending exploding offers, and the effects they have on agents within the emerging plea bargaining market.

Part III charts several possible paths that litigation challenging these practices could take, with an eye towards eventual reforms.¹² Further, it suggests the potential implications *Frye* and *Lafler* could have upon the plea bargaining process. It looks first at how *Frye* and *Lafler* could directly affect defense attorneys and prosecutors, and then it forecasts possible litigation that could bring about specific reforms within the plea bargaining process, such as some of the challenges mentioned in Part II.

I. BACKGROUND

A. THE RIGHT TO COUNSEL AT CRITICAL STAGES OF CRIMINAL PROCEEDINGS

The Sixth Amendment guarantees assistance of counsel for those accused of criminal offenses.¹³ Since the Amendment's passage in the eighteenth century, the doctrine of assistance of counsel has evolved to accommodate developments within the criminal justice system¹⁴ and the establishment of new forms of police procedure. As part of the development of this area of law, the Supreme Court in *Powell v. Alabama* recognized that the rights of those accused of criminal offenses do not attach only at trial and that deprivation of the right to counsel constitutes a due process violation under the Fourteenth Amendment.¹⁵ Indeed, there are earlier, critical stages of criminal proceedings during which the absence of counsel could cause substantial prejudice to the accused, who thus has a constitutional right to counsel at these stages.¹⁶

In *Massiah v. United States*, the Court held that when an indicted defendant had retained counsel, government agents could not elicit statements outside of counsel's presence.¹⁷ The Court reversed *Massiah's* conviction on the grounds that the government improperly arranged a meeting between the indicted defendant and a cooperative codefendant

¹² The possibility of judicial reform follows from the Supreme Court's recognition that plea bargaining is central to the criminal justice system, as evidenced by its approving quote of scholarly claims that plea bargaining, in fact, "is the criminal justice system." *Frye*, 132 S. Ct. at 1407 (citing Scott & Stuntz, *supra* note 5, at 1912).

¹³ U.S. CONST. amend. VI.

¹⁴ See Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: A National Crisis*, 57 HASTINGS L.J. 1031, 1041-42 (2006).

¹⁵ 287 U.S. 45, 70-71 (1932).

¹⁶ *Id.* at 57.

¹⁷ 377 U.S. 201, 202-03, 206 (1964).

during which the defendant made incriminating statements outside the presence of counsel.¹⁸ Citing *Powell v. Alabama*, the Court noted that the interval between arraignment and trial was “perhaps the most critical period of the proceedings” and that the defendant had the right to assistance of counsel in investigating the charged offense and preparing for trial.¹⁹ When the government covertly elicited incriminating statements from an indicted defendant who had obtained counsel, it violated this right.²⁰

In *United States v. Wade*, the Court recognized the post-indictment lineup as another such “critical” stage at which the accused required counsel on account of the potential for police suggestivity.²¹ Such suggestivity, the Court opined, could substantially damage the accused’s chance of a fair trial, as an untrained citizen would be unable to detect suggestivity without the assistance of counsel.²²

In addition to guaranteeing defendants the right to counsel at certain stages of criminal proceedings, the Court made clear in *Gideon v. Wainwright* that the right to counsel applies in all criminal proceedings; the Court held that the right to counsel, “fundamental and essential to a fair trial,” applied in all courts, federal and state.²³ The Court extended *Gideon* in *Argersinger v. Hamlin*, emphasizing the necessity of counsel in all cases where a guilty plea could result in imprisonment, including misdemeanor cases with sentences under six months.²⁴

B. PLEA BARGAINING AS A CRITICAL STAGE IN CRIMINAL LITIGATION

Plea bargaining involves a trade-off between defendants and prosecutors, in which defendants agree to forego their constitutional right to a jury trial and enter a guilty plea in exchange for more lenient sentencing recommendations than would have been entered at trial.²⁵ Research indicates that these sentencing differentials play a significant role in motivating the accused to plead guilty, particularly when they face the prospect of mandatory minimum sentences after trial.²⁶ In turn, prosecutors

¹⁸ *Id.*

¹⁹ *Id.* at 205.

²⁰ *Id.* at 206.

²¹ 388 U.S. 218, 223–24, 228 (1967).

²² *Id.* at 230, 236–37.

²³ 372 U.S. 335, 342 (1963).

²⁴ 407 U.S. 25, 34 (1972).

²⁵ ANGELA DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 44 (2007).

²⁶ MICHELLE ALEXANDER, *THE NEW JIM CROW* 88 (2010) (noting how prosecutors stated that mandatory minimums were valuable, not in and of themselves, but rather as bargaining chips that enabled them to dispose of cases through plea agreements); *see also* Gifford,

obtain convictions, are able to promptly impose punishment, and spare the state the expenditure of resources involved in taking cases to trial.²⁷ Prosecutors have discretion to bring whatever charges they can support with probable cause, irrespective of whether these charges can all be proven at trial beyond a reasonable doubt.²⁸ When a case is overcharged, the accused faces duplicate charges for single acts or crimes charged at higher degrees than the evidence can reasonably support.²⁹ Without ready access to police reports, witnesses, and other evidence in the possession of the government, the accused first learns of the charges, which carry significant potential penalties, and any evidence the government chooses to disclose. Even though *Brady v. Maryland* requires the prosecution to disclose any favorable material information to the defendant,³⁰ the Supreme Court has not secured the defendant's right to *Brady* material during plea bargaining.³¹ Given many defendants' inexperience in evaluating plea offers and charges brought against them, the need for defense counsel to provide accurate and noncoercive advice is imperative.³² The importance of counsel at this stage is evident when a plea-offer sentence is compared to a mandatory minimum sentence for a series of charges that may be duplicative or overcharged. Defense counsel is responsible for advising the client as to the value of the offer and the strength of the prosecution's evidence, as well as providing information that will allow the client to make an informed and voluntary decision as to whether to ultimately accept the offer.³³

supra note 3, at 46. Gifford based his conclusion on an analysis of plea bargaining practices in New York City, where those convicted after trial received sentences that were, on average, twice as long as those who entered guilty pleas. *Id.*; see also DAVIS, *supra* note 25, at 57; Moriarty & Main, *supra* note 7, at 1030. These more recent authors call attention to the role that mandatory minimum sentences play in convincing the accused to forego trial.

²⁷ See, e.g., *Brady v. United States*, 397 U.S. 742, 752 (1970).

²⁸ See *Bordenkircher v. Hayes*, 434 U.S. 357, 368 n.2 (1978); see also DAVIS, *supra* note 25, at 147; Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 *FORDHAM L. REV.* 851, 862 (1995).

²⁹ Albert Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 *U. CHI. L. REV.* 50-85-86 (1968).

³⁰ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

³¹ See generally Michael Nasser Petegorsky, Note, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Bargaining*, 81 *FORDHAM L. REV.* 3599, 3614-29 (2013) (describing the circuit splits before and after *United States v. Ruiz* as to the duty to disclose exculpatory and impeachment evidence during the plea bargaining process).

³² Moriarty & Main, *supra* note 7, at 1045-46.

³³ *Id.*; see also *McCarthy v. United States*, 394 U.S. 459, 469-70 (1969); Steven Zeidman, *To Plead or Not To Plead: Effective Assistance and Client-Centered Counseling*, 39 *B.C. L. REV.* 841, 852 (1998).

C. INEFFECTIVENESS OF COUNSEL CLAIMS RELATED TO PLEA
BARGAINING

Strickland v. Washington established a two-part test for habeas claims based on ineffective assistance of counsel.³⁴ *Strickland*'s two-part test requires (1) a showing that counsel's performance was deficient, and (2) a showing that counsel's deficient performance prejudiced the defense.³⁵ Shortly after *Strickland*, the Supreme Court soon heard its first habeas petition claiming ineffective assistance in the plea-bargaining process. In *Hill v. Lockhart*, the Supreme Court held that the two-part test could be applied to habeas petitions arising out of attorney error during the plea process.³⁶ The Court found that the defendant in that case was not unduly prejudiced by his counsel's advice concerning his eligibility for parole.³⁷ The *Hill* majority applied *Strickland*'s two-part test to "challenges to guilty pleas based on ineffective assistance of counsel," opening the door for habeas relief after negotiated guilty pleas.³⁸

Since *Hill*, *Strickland* claims have been upheld in cases where counsel encouraged a defendant to plead guilty without any investigation into the defendant's possible innocence or alibi,³⁹ where an attorney failed to inform

³⁴ 466 U.S. 668, 687 (1984).

³⁵ *Id.* The *Strickland* Court emphasized that "[j]udicial scrutiny of counsel's performance must be highly deferential," and that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," setting a high bar for habeas complainants to overcome. *Id.* at 689. The *Padilla* Court recognized that "[s]urmounting *Strickland*'s high bar is never an easy task," *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485 (2010), and empirical studies generally support this claim. Amicus briefs filed in *Frye* and *Lafler* on behalf of both the petitioners and the respondents, for example, cited to a study of habeas litigation in which a sample of 2,384 randomly selected non-capital cases that contained 768 specific claims of ineffective assistance of counsel had only one meritorious claim of ineffective assistance of counsel. See, e.g., Brief of National Ass'n of Criminal Defense Lawyers et al. as Amici Curiae in Support of Respondents at 19, *Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *Missouri v. Frye*, 132 S. Ct. 1399 (2012) (Nos. 10-209 & 10-444) (citing NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, at 28, 52 (2007)).

³⁶ 474 U.S. 52, 58 (1985).

³⁷ *Id.* at 60. Justice Byron White's concurrence suggests that counsel gave this advice based on misinformation the defendant had provided concerning previous convictions. *Id.* at 61.

³⁸ *Id.* at 58.

³⁹ *United States v. Rogers*, 289 F. Supp. 726, 728–29 (D. Conn. 1968). Defense counsel had strongly recommended a guilty plea after discounting the credibility of potential alibi witnesses without attempting to contact them, and failed to qualify his recommendation by stating that a guilty plea was only in the defendant's best interests if the defendant was, in fact, guilty. *Id.*

a defendant of a plea offer,⁴⁰ and where a conflict of interest prevented an attorney from negotiating a favorable deal.⁴¹

In *Padilla v. Kentucky*, decided in 2010, the Supreme Court granted relief on the grounds of ineffective assistance of counsel when a defense attorney gave a noncitizen defendant incorrect advice about the collateral consequences of pleading guilty, resulting in the defendant's deportation.⁴² *Padilla* expanded the scope of an attorney's duties in advising a client from explaining only the sentence imposed by the trial court to include other consequences of a guilty plea.⁴³ *Padilla* has informed state court determinations of exactly what this duty entails. For example, a Georgia court held defense attorneys responsible for their failure to inform clients that guilty pleas would subject them to sex offender registration requirements.⁴⁴ An Alabama court recognized a violation of the right to effective counsel when counsel's incorrect advice concerning the availability of credit for time served resulted in the defendant taking a plea that added five years to the time he believed he would serve.⁴⁵ In *Bauder v. Florida Department of Corrections*, the Eleventh Circuit affirmed the grant of habeas relief after counsel mistakenly advised a defendant that he would not be subject to civil commitment proceedings when he pleaded no contest to a charge of aggravated stalking of a minor.⁴⁶ These cases indicate an increasing awareness of the importance of correctly advising defendants about the collateral consequences of conviction, whether they result from a trial or a plea. Professor Stephanos Bibas explains that with *Padilla*:

⁴⁰ *Cottle v. State*, 733 So. 2d 963, 964, 969 (Fla. 1999) (failing to communicate a plea offer that could have resulted in parole or early release); *People v. Whitfield*, 239 N.E.2d 850, 851 (Ill. 1968) (failing to communicate an offer to reduce charges from murder to manslaughter until after bench trial conviction); Ross, *supra* note 7, at 721 (citing *Cottle*).

⁴¹ *Ruffin v. Kemp*, 767 F.2d 748, 749 (11th Cir. 1985); *see also* Ross, *supra* note 7, at 721 (discussing counsel's attempt to work out a plea agreement in which one of his clients would testify against the other).

⁴² 130 S. Ct. 1473, 1478 (2010). *Padilla*, a permanent U.S. resident, pleaded guilty to three drug-related charges in exchange for a ten-year sentence and was advised not to worry about immigration-related consequences, even though he pleaded guilty to deportable offenses. *Id.*

⁴³ *See* Gabriel J. Chin, *Making Padilla Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOWARD L.J. 675, 675–76 (2011).

⁴⁴ *Taylor v. State*, 698 S.E.2d 384, 388 (Ga. Ct. App. 2010) (discussing how an individual eventually won ineffective counsel relief after he was not advised that he would be required to register as a sex offender when he pleaded guilty to two counts of child molestation and only learned of this when he met his probation officer two years later).

⁴⁵ *Stith v. State*, 76 So. 3d 286, 293 (Ala. Crim. App. 2011).

⁴⁶ 619 F.3d 1272, 1275 (11th Cir. 2010).

[T]he Court began to move beyond its fixation upon the handful of cases that go to jury trials. It recognized that the other 95 percent of adjudicated cases resolved by guilty pleas matter greatly, and began in earnest to regulate plea bargains the way it has long regulated jury trials.⁴⁷

D. REMEDYING INEFFECTIVE COUNSEL IN PLEA BARGAINING CASES

Up until the decisions in *Lafler v. Cooper* and *Missouri v. Frye*, the circuit courts split over the question of whether plea bargaining was a critical stage, as well as the appropriate remedy for successful ineffective assistance of counsel claims based on deficient plea-bargaining performances. For instance, in *Williams v. Jones*, the Tenth Circuit held that plea bargaining was a critical stage and that counsel was ineffective when he dissuaded a defendant from accepting a plea offer when the defendant was willing to accept a ten-year sentence for second-degree murder.⁴⁸ Williams's attorney believed Williams was innocent and threatened to withdraw if he accepted the offer, which would have left Williams without counsel.⁴⁹ At trial, the jury found Williams guilty of first-degree murder, and the court sentenced him to life without parole.⁵⁰ On appeal, the Tenth Circuit upheld Williams's claim of ineffective assistance of counsel and held that even though Williams received a fair trial, deficient counsel substantially prejudiced him.⁵¹ The Tenth Circuit declined to decide whether to reinstate the plea offer or to offer Williams a new trial and instructed the district court to exercise discretion on remand.⁵²

By contrast, the Seventh Circuit in *United States v. Springs* held that subpar assistance in plea bargaining could not establish prejudice under *Strickland* and that a defendant was entitled to a fair trial under the law, but not to a discounted sentence secured through plea bargaining.⁵³ Thus, as of 2011, defendants could receive three possible remedies when courts granted their habeas petitions alleging ineffective assistance of counsel during the plea-bargaining process: no remedy, specific performance of the offered

⁴⁷ Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1118–19 (2011).

⁴⁸ 571 F.3d 1086, 1088 (10th Cir. 2009).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 1091.

⁵² *Id.* at 1094. On remand, the district court granted the habeas petition and released Williams from custody, giving him credit for time served while leaving the first-degree murder conviction intact. *Williams v. Jones*, No. CIV 03-201-RAW-KEW, 2010 WL 3834584, at *2 (E.D. Okla. Sept. 29, 2010), *report and recommendation adopted by* 2010 WL 3834580, at *1 (E.D. Okla. Sept. 29, 2010).

⁵³ 988 F.2d 746, 749 (7th Cir. 1993).

plea bargain, and retrial.⁵⁴

In 2011, *Lafler* and *Frye* came before the Supreme Court, raising additional issues about ineffectiveness claims with respect to plea bargaining. The Court's holdings in these cases make clear that prejudice arising from counsel's deficient performance extends beyond acceptance of a guilty plea based on misinformation concerning the consequences of a plea.⁵⁵ As *Frye* indicates, prejudice can exist when a defense attorney fails to communicate a favorable plea offer to a client who later pleads guilty to a more serious offense.⁵⁶ Alternatively, as *Lafler* indicates, prejudice can arise when counsel's erroneous beliefs about the State's ability to establish elements of a crime results in rejecting a plea in favor of a trial, after which a convicted defendant receives a harsher sentence than the rejected plea offer, even if the trial was free of constitutional error.⁵⁷ In *Frye*, the Supreme Court took upon itself the challenge of determining the duties of defense counsel,⁵⁸ and in *Lafler* the Court prescribed appropriate remedies when counsel fails to perform said duties in the course of plea negotiations.⁵⁹ The following Sections address each case in turn.

E. *LAFLER V. COOPER*

After shooting a woman in the hip, abdomen, and buttock, Anthony Cooper was charged with assault with intent to murder, along with three other charges.⁶⁰ The prosecution offered to dismiss two of the charges, recommending a fifty-one- to eighty-five-month sentence in exchange for a guilty plea.⁶¹ Cooper, who had been charged as a habitual offender, admitted guilt and expressed his willingness to accept the plea.⁶² Counsel dissuaded him from doing so, believing that the government could not establish intent to murder.⁶³ The case went to trial, and Cooper was convicted and sentenced to the mandatory minimum of 185 to 360 months'

⁵⁴ David A. Perez, Note, *Deal or No Deal? Remedying Ineffective Assistance of Counsel During Plea Bargaining*, 120 YALE L.J. 1532, 1535 (2011).

⁵⁵ See generally *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010); *Hill v. Lockhart*, 474 U.S. 52 (1985).

⁵⁶ *Missouri v. Frye*, 132 S. Ct. 1399, 1411 (2012). In *Frye*'s case, prosecutors offered to reduce a felony charge to a misdemeanor. *Id.* at 1404.

⁵⁷ *Lafler v. Cooper*, 132 S. Ct. 1376, 1390 (2012).

⁵⁸ *Frye*, 132 S. Ct. at 1408.

⁵⁹ *Lafler*, 132 S. Ct. at 1391.

⁶⁰ *Id.* at 1383.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

imprisonment.⁶⁴

The state court denied Cooper's appeal, but the district court granted a writ for habeas corpus relief, which the Sixth Circuit later affirmed.⁶⁵ The Supreme Court granted certiorari.⁶⁶

In his majority opinion, Justice Kennedy held that when ineffective assistance results in a rejected plea offer and conviction at trial, the appropriate remedy is not the fair trial that the defendant subsequently received, but instead, a hearing to determine whether the defendant would have accepted the plea if not for ineffective counsel.⁶⁷ After such a hearing, the trial court's options include resentencing based on the conviction at trial or reopening the plea offer, depending on the circumstances of the case.⁶⁸ Rather than the district court's chosen remedy of specific performance, the Court ordered the State to reoffer the plea, leaving the questions of appropriate sentencing and convictions to the trial court.⁶⁹ The Court noted that sentences after trial tend to be more severe than those pursuant to plea bargains, as was the case in *Lafler*.⁷⁰ Unlike instances where a subsequent fair trial cured any defects resulting from defective performance of defense counsel, the injury to the defendant resulted from taking the case to trial.⁷¹

During oral argument, the Justices disagreed as to the nature of the prejudice that Cooper suffered as a result of his attorney's deficient performance.⁷² In support of his prejudice claim, Cooper argued that his sentence was three times as long as the sentence that he would have received had he entered the offered guilty plea.⁷³ He did receive a trial by jury after invoking his constitutional right to a trial, however, and the trial itself was not tainted by constitutional error.⁷⁴

In his dissenting opinion, Justice Antonin Scalia, joined by Chief Justice John Roberts and Justice Clarence Thomas, revived this point and

⁶⁴ *Id.*

⁶⁵ *Id.* at 1383–84.

⁶⁶ *Id.* at 1384, 1376.

⁶⁷ *Id.* at 1389 (“In this situation [when charges that would have been admitted as part of a plea bargain are the same charges the defendant is convicted of at trial] the court may conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel's errors he would have accepted the plea.”).

⁶⁸ *Id.*

⁶⁹ *Id.* at 1391.

⁷⁰ *Id.* at 1387 (“The expected post-trial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less a bargain.” (quoting *Bibas*, *supra* note 47, at 1138)).

⁷¹ *Id.* at 1386.

⁷² Transcript of Oral Argument at 7, 22, 23, *Lafler*, 132 S. Ct. 1376 (No. 10-209).

⁷³ *Id.* at 7–8.

⁷⁴ *Id.* at 13–14.

criticized the majority for bringing plea-bargaining law under the banner of criminal procedure, thereby extending constitutional protections beyond the scope of the Sixth Amendment and “elevat[ing] plea bargaining from a necessary evil to a constitutional entitlement.”⁷⁵ In keeping with his commitment to originalism, Justice Scalia emphasized the trial by jury as the “gold standard of American justice.”⁷⁶ Justice Scalia suggested that the majority’s holding would open a new realm of constitutional law.⁷⁷ This new “boutique of constitutional jurisprudence” would, in turn, result in further constitutional litigation, including litigation about the constitutionality of prosecutorial decisions.⁷⁸

However, the majority’s position was much closer to Justice Elena Kagan’s position during oral argument. Justice Kagan pointed out that the Court has recognized plea bargaining as a critical stage “because about 98 percent of the action of the criminal justice system occurs in plea bargaining.”⁷⁹ Thus, depriving a defendant of effective assistance of counsel at that stage, where the vast majority of the action takes place, would be incompatible with the Sixth Amendment.⁸⁰

F. *MISSOURI V. FRYE*

On the same day that it issued *Lafler*, the Supreme Court also ruled on *Missouri v. Frye*, another plea-bargaining case. Galin Frye was charged with driving with a revoked license. He had been convicted of the same crime three times before.⁸¹ On account of these previous convictions, Frye’s charge amounted to a Class D felony, with a maximum penalty of four years in prison.⁸² Prosecutors presented two offers to Frye’s attorney. The first offer involved a guilty plea to the felony charge and a recommended sentence of three years, while the second offer reduced the charge to a misdemeanor and recommended a ninety-day sentence.⁸³ Frye’s attorney communicated neither offer to him, and Frye was again arrested for driving with a suspended license before his preliminary hearing, two days

⁷⁵ *Lafler*, 132 S. Ct. at 1397 (Scalia, J., dissenting).

⁷⁶ *Id.* at 1398.

⁷⁷ *Id.*; see also *Padilla v. Kentucky*, 130 S. Ct. 1473, 1496 (2010) (Scalia, J., dissenting) (“Adding to counsel’s duties an obligation to advise about a conviction’s collateral consequences has no logical stopping point.”).

⁷⁸ *Lafler*, 132 S. Ct. at 1392.

⁷⁹ Transcript of Oral Argument, *supra* note 72, at 25.

⁸⁰ *Id.*

⁸¹ *Missouri v. Frye*, 132 S. Ct. 1399, 1404 (2012).

⁸² *Id.*

⁸³ *Id.*

after the offers expired.⁸⁴ Frye later pleaded guilty, without any agreement, and was sentenced to three years in prison.⁸⁵ In his appeal for postconviction relief, Frye alleged that his attorney's failure to inform him of the misdemeanor plea offer, which he would have accepted, amounted to ineffective assistance of counsel.⁸⁶ Frye's claim, denied in state court, was reversed on appeal, and the Supreme Court granted certiorari to determine an appropriate remedy.⁸⁷

Again writing for the majority, Justice Kennedy explained that, "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."⁸⁸ Such terms and conditions "may result in a lesser sentence, a conviction on lesser charges, or both."⁸⁹ Frye's counsel's failure to do so fell below *Strickland's* objective standard and caused substantial prejudice to the defendant, who showed a reasonable probability that he would have accepted the offer on the basis of his guilty plea to the felony charge.⁹⁰ The Supreme Court then remanded the case to the Missouri Court of Appeals to determine whether the prosecution would have adhered to the offer, with resentencing to possibly follow.⁹¹ In *Frye*, as in *Lafler*, the Court recognized that without extending Sixth Amendment protection to the plea-bargaining process, "[c]riminal procedure thus becomes a binary on/off switch, fully enforced at jury trials but simply inapplicable in plea bargaining."⁹²

Again, Justice Scalia dissented, making the point that although Lafler's conviction resulted from a jury trial, Frye's conviction was based on his plea and the admission of guilt that accompanied it.⁹³ Justice Scalia again raised concerns about applying Sixth Amendment protections to the plea-bargaining process. While the ineffectiveness in Frye's case was clear, he commented, it would not be so clear in other cases, especially given that negotiation is often a matter of an attorney's personal style.⁹⁴ In addition, Justice Samuel Alito raised the concern that the sort of prejudice resulting in *Frye*, where failure to communicate a misdemeanor plea offer resulted in

⁸⁴ *Id.*

⁸⁵ *Id.* at 1405.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 1408.

⁸⁹ *Id.*

⁹⁰ *Id.* at 1410–11.

⁹¹ *Id.*

⁹² Bibas, *supra* note 47, at 1122.

⁹³ *Frye*, 132 S. Ct. at 1412 (Scalia, J., dissenting).

⁹⁴ *Id.*

a guilty plea to a felony, would always exist when defendants rejected favorable deals and judges imposed much harsher sentences after trial.⁹⁵ If prejudice would not be difficult to show, something more than a reasonable probability would be required to maintain *Strickland*'s high bar.⁹⁶

II. DISCUSSION

The dissents in *Frye* and *Lafler* raised the question as to whether these cases opened the door for a slew of new habeas petitions, filed by defendants who argue that they would have accepted favorable plea offers had their attorneys not persuaded them to take their cases to trial. While insufficient time has elapsed to provide the requisite empirical data to determine whether such a result has materialized, the Court confronted a similar question in *Padilla*; it determined that lower courts had not been overburdened by habeas filings from defendants who pleaded guilty since *Hill* endorsed such petitions.⁹⁷ The Court in *Padilla* noted that as of 2003, pleas accounted for 95% of all convictions⁹⁸ and 30% of all habeas petitions, with the other 70% of habeas petitions filed by those 5% of defendants who took their cases to trial and were convicted.⁹⁹ Nonetheless, Justice Scalia's *Lafler* dissent raised a more significant concern. Justice Scalia noted that the *Lafler* and *Frye* majorities only touched upon two possible forms of counsels' incompetence in plea bargaining and warned that additional litigation would follow, potentially encompassing the constitutionality of prosecutorial practices.¹⁰⁰

Supreme Court jurisprudence to date has provided remedies intended to safeguard the rights of the criminal defendant who has been prejudiced by ineffective counsel, indirectly regulating defense attorneys' practices.¹⁰¹

⁹⁵ Transcript of Oral Argument at 39, *Frye*, 132 S. Ct. 1399 (No. 10-444).

⁹⁶ *Id.* at 40.

⁹⁷ See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1485 (2010).

⁹⁸ *Id.* (citing U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2003, at 418 tbl.5.17, 450 tbl.5.46 (Ann L. Pastore & Kathleen Maguire eds., 2005) [hereinafter SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS]).

⁹⁹ *Id.* (citing VICTOR E. FLANGO ET AL., HABEAS CORPUS IN STATE AND FEDERAL COURTS 36–38 (1994)). The Court noted that Flango demonstrated how “5% of defendants whose conviction was the result of a trial account for approximately 70% of the habeas petitions filed.” *Id.* at 1485 n.14.

¹⁰⁰ *Lafler v. Cooper*, 132 S. Ct. 1376, 1392 (2012) (Scalia, J., dissenting). For arguments supporting Justice Scalia's claim, see, for example, Aaron K. Friess, Note, *Soothsaying With a Foggy Crystal Ball: A Critique of the U.S. Supreme Court's Remedy for Ineffective Assistance of Counsel When a Criminal Defendant Rejects a Plea Bargain*, 52 WASHBURN L.J. 147, 168–69 n.173–74 (2012).

¹⁰¹ See *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012); *Lafler*, 132 S. Ct. at 1391; *Padilla*, 130 S. Ct. at 1486; *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). Similarly, plea-bargaining literature focuses on the role of defense attorneys in the bargaining process. See

In its review of guilty pleas, the Supreme Court has focused attention on the information available to defendants so as to ensure that enough was present for them to knowingly and voluntarily waive their procedural rights.¹⁰² Competent defense counsel has been the one substantial safeguard that has undergirded the Court's decisionmaking, and plea-bargaining jurisprudence has focused on ensuring that defense attorneys provide advice that meets this standard.¹⁰³ However, if Justice Scalia's prediction is credible, the Court is likely to broaden its scope of inquiry in plea-bargaining cases. One reason comes from the systemic impediments to effective counsel, which reinforce plea bargaining as a standard practice, while shifting negotiations from a defendant's guilt or innocence to the most acceptable sentence for disposing his case.

A. CASELOADS AS A SYSTEMIC IMPEDIMENT TO EFFECTIVE COUNSEL

Both prosecutors and public defenders currently face caseloads far beyond any attorney's ability to competently manage.¹⁰⁴ The National Advisory Commission on Criminal Justice Standards and Goals set a guideline of no more than 150 felonies, 400 misdemeanors, 200 juvenile cases, 200 mental health cases, or 25 appeals in a year.¹⁰⁵ However, public defender caseloads rarely abide by these guidelines.¹⁰⁶ Few offices have "enforceable, maximum caseload standards," and those that do often exceed them.¹⁰⁷

The Knox County Public Defender's Community Law Office in Tennessee, for instance, recently sought judicial relief by having a court suspend its appointment to cases in misdemeanor court, when four attorneys were responsible for 3,500 cases in a year.¹⁰⁸ As the Public Defender testified, initial thirty-minute interviews with clients alone consumed an

generally Albert Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975); Moriarty & Main, *supra* note 7.

¹⁰² See *Bradshaw v. Stumpf*, 545 U.S. 175, 186 (2005); *United States v. Ruiz*, 536 U.S. 622, 629–30 (2002); *Bousley v. United States*, 523 U.S. 614, 626 (1998); *Boykin v. Alabama*, 395 U.S. 238, 242–44 (1969); *McCarthy v. United States*, 394 U.S. 459, 466–67 (1969).

¹⁰³ Bibas, *supra* note 47, at 1126.

¹⁰⁴ See Jonathan A. Rapping, *Who's Guarding the Henhouse? How the American Prosecutor Came to Devour Those He Is Sworn to Protect*, 51 WASHBURN L.J. 513, 538 (2012).

¹⁰⁵ AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 5 n.19 (2002).

¹⁰⁶ See NORMAN LEFSTEIN & ROBERT L. SPANGENBERG, NAT'L RIGHT TO COUNSEL COMM., CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 65–70 (2009).

¹⁰⁷ *Id.* at 67.

¹⁰⁸ Transcript of Proceedings at 5, 21, *In re* Petition of Knox Cnty. Pub. Defender (June 10, 2008), available at <http://goo.gl/EE2MKB>.

entire week of their attorneys' time, leaving no time to investigate, contact officers, or interview witnesses in advance of trials.¹⁰⁹ Even with attorneys arriving at the office early, working weekends and holidays, and not taking their annual leave, these caseloads were compromising their abilities to provide effective representation.¹¹⁰ Felony attorneys also took on misdemeanor cases, with one public defender stating through an affidavit that she represented clients in approximately 297 cases, including 101 felonies, 186 misdemeanors, and 10 probation violations.¹¹¹ Eight months after the hearing, the Tennessee General Sessions Court denied relief, finding that while such caseloads "exceed[ed] national criminal justice standards and goals," they were not at "such a level as to violate the right to competent counsel under either the United States Constitution or the Constitution of Tennessee."¹¹²

Knox County's public defenders are not alone. Public defenders in Minnesota averaged 900 cases a year in 2003,¹¹³ and the two attorneys assigned to the juvenile division in Clark County, Nevada, had caseloads of nearly 1,500 clients.¹¹⁴ When public defenders in a Louisiana parish, with caseloads of 472 clients apiece, began refusing to take on new clients on account of their existing caseloads, a judge turned to the phone book, calling attorneys and appointing them as counsel for indigent defendants.¹¹⁵ Forty years after *Gideon v. Wainwright*,¹¹⁶ which guaranteed the right to counsel,¹¹⁷ an American Bar Association (ABA) report recognized the widespread inadequacy of representation for indigent defendants, and among other measures, recommended that indigent defense programs cease taking new cases when their attorneys' caseloads precluded them from providing quality representation.¹¹⁸ Minnesota's chief public defender went so far as to file suit in state court, arguing that the systems in place deprived clients of effective assistance of counsel by underfunding public defense

¹⁰⁹ *Id.* at 28–29.

¹¹⁰ *Id.* at 31–32, 44.

¹¹¹ NORMAN LEFSTEIN, AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 170 (2011).

¹¹² *Id.* at 171 (citation omitted).

¹¹³ Backus & Marcus, *supra* note 14, at 1055–56.

¹¹⁴ *Id.* at 1055.

¹¹⁵ *Id.*

¹¹⁶ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹¹⁷ *Id.* at 344.

¹¹⁸ AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* (2004) [hereinafter *GIDEON'S BROKEN PROMISE*], available at <http://goo.gl/tsjHAO>.

systems and failing to enforce recommended caseload limits.¹¹⁹ This and other similar suits filed by public defenders in state courts have been largely unsuccessful to date, however, with federal courts either denying or declining to hear them on appeal.¹²⁰ While litigation has yet to successfully limit the caseloads of defense counsel for the indigent, these lawsuits have raised awareness through media coverage, and some offices have been able to present empirical data concerning their needs when arguing for increased funding.¹²¹

Like public defenders, prosecutors are just as overburdened by their caseloads. For instance, junior prosecutors in Houston have approximately 500 open cases at any time during a year, during which time each attorney is responsible for handling 1,500.¹²² The average felony prosecutor in Chicago handles fewer cases than do these prosecutors, but her caseload still amounts to 300 open cases at once and 800 to 1,000 cases per year.¹²³ While Las Vegas had 90 prosecutors in 2009, each prosecutor was still responsible for nearly 800 cases.¹²⁴ If prosecutorial caseloads were measured by standards similar to those recommended for public defenders, many prosecutors would well exceed those standards.¹²⁵

¹¹⁹ Kennedy v. Carlson, 544 N.W.2d 1, 3 (Minn. 1996).

¹²⁰ See Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE, 427, 440, 470–71 (2009). The Florida Supreme Court recently held that the Miami-Dade County Public Defender could move to withdraw from cases en masse. *Pub. Defender v. Florida*, 115 So.3d 261, 274 (Fla. 2013). The Public Defender had implemented a number of measures to reduce excessive caseloads, but an office-wide problem remained as to effective representation. *Id.* The Florida Supreme Court then remanded the case to the trial court to determine whether such circumstances still existed five years after the trial court's initial ruling. *Id.* at 279.

¹²¹ Gershowitz & Killinger, *supra* note 11, at 277; see also LEFSTEIN & SPANGENBERG, *supra* note 106, at 67. The Spangenberg Group has conducted several studies of state and county defense systems with the goal of providing recommendations to ensure effective defense of the indigent. See *Indigent Defense Studies*, SPANGENBERG GRP., <http://goo.gl/9BrQiP> (last visited Apr. 19, 2014). When Minnesota created a state board to oversee and fund its public defender system, the state legislature commissioned a Spangenberg study to analyze caseloads and make recommendations. *Kennedy*, 544 N.W.2d at 4. When the Louisiana Supreme Court created a committee to study the state's indigent defense system and make recommendations, it commissioned a Spangenberg report. See *State v. Peart*, 621 So.2d 780, 789 n.8 (1993).

¹²² Rapping, *supra* note 104, at 538–39.

¹²³ *Id.* at 539.

¹²⁴ Gershowitz & Killinger, *supra* note 11, at 272; Rapping, *supra* note 104, at 539.

¹²⁵ Gershowitz & Killinger, *supra* note 11, at 266–67. In response to Gershowitz and Killinger's research, Josh Bowers challenges the empirical data they rely upon and questions the propriety of applying an identical caseload benchmark to both public defenders and prosecutors. Josh Bowers, *Physician, Heal Thyself: Discretion and the Problem of Excessive Prosecutorial Caseloads, A Response to Adam Gershowitz and Laura Killinger*, 106 NW. U. L. REV. COLLOQUY 143, 145 (2011). With those caveats in mind, Bowers notes

Overburdened prosecutors, relying heavily upon plea bargaining, may benefit defendants, who are offered more favorable sentences than might be awarded at trial.¹²⁶ However, this arguable benefit is accompanied by a number of harmful effects on defendants, victims, and the public at large. The public can be particularly impacted when the factually guilty receive excessive lenience because of prosecutors' excessive caseloads.¹²⁷ In particular, when prosecutors lack the time and resources to properly investigate cases and interview witnesses, their sentencing recommendations could be based on preliminary scans of the police reports and the criminal records of the accused, without consideration of potentially exculpatory evidence, defenses, and mitigating factors. Plea offers attached to deadlines that preclude investigation are transparent in their purpose to alleviate attorneys' caseloads, rather than address the specific facts of a particular charged offense.

In their study on the impact of excessive prosecutorial caseloads, Adam Gershowitz and Laura Killinger recommend increased funding for both prosecutors and attorneys for indigent defendants¹²⁸ (whose chronic underfunding is well-documented).¹²⁹ Allocating additional funds that provide sufficient time and resources for investigation would allow prosecutors to make clearer distinctions within the defendant pool and to make offers on this basis, which would address some of the specific effects of excessive caseloads mentioned above. While additional financial resources could aid in resolving some of the problems associated with caseload management, simply increasing the resources available to prosecutors and defense attorneys does not address the asymmetry of the plea-bargaining process. This asymmetry follows from the additional tools that prosecutors have to handle their caseload; specifically, prosecutorial discretion allows the State to pursue or dismiss charges, irrespective of the defense's posture. For this reason, further litigation focused on reviewing

that the counties mentioned above, as well as those encompassing Miami, Dallas, and Fort Lauderdale, exceed the suggested measure of excessiveness, which allows for the inference that Gershowitz and Killinger "have identified a genuine problem that, at a minimum, affects hundreds of thousands of criminal cases each year." *Id.*

¹²⁶ Gershowitz & Killinger, *supra* note 11, at 279–80.

¹²⁷ *Id.* at 295.

¹²⁸ *Id.* at 265.

¹²⁹ See generally, e.g., GIDEON'S BROKEN PROMISE, *supra* note 118; Backus & Marcus, *supra* note 14; Stephen B. Bright, *Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 N.Y.U. ANN. SURV. AM. L. 783; Drinan, *supra* note 120; Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 377–94 (1995); Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1734–35 (2005).

prosecutorial practices will be a necessary complement to legislative reforms geared at providing additional financial resources to attorneys in the criminal legal system.

B. PROSECUTORIAL DISCRETION AND THE FORCES THAT SUBVERT IT

Some scholars have argued that plea bargaining is best explained by a contractual metaphor insofar as it involves a bargained-for exchange with both parties trading risk for something of value.¹³⁰ However, because prosecutors have both significant duties to the public and the ability to exercise wide-ranging discretion, the metaphor cannot hold, for the plea agreements are not at all like the bilateral agreements between two parties negotiating a business deal.¹³¹ Namely, the defendant faces a potential loss of liberty, while the government has a responsibility to victims and to the public that is very different from a private attorney's duty to corporate clients and, by proxy, their shareholders.¹³² As agents of the U.S. government, prosecutors have a duty not to earn a profit for their clients but instead to ensure that justice be done and "that guilt shall not escape or innocence suffer."¹³³ In achieving this goal, the prosecutor "may strike hard blows, [but] he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."¹³⁴ The seminal case *Brady v. Maryland* also calls attention to the importance of prosecutors ensuring due process, stating that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."¹³⁵ *Brady* even cites an inscription within the Department of Justice that reads, "'The United States wins its point whenever justice is done its citizens in the courts.'"¹³⁶ In the context of plea bargaining, *Brady* can be considered an obligation to do justice by disclosing information favorable to the defense prior to presenting a plea offer, which would help the accused

¹³⁰ See generally Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992) (evaluating arguments against plea bargaining through the lenses of classical contract and bargain theory, and arguing that contract reasoning is better suited than constitutional analysis for solving problems associated with plea bargaining).

¹³¹ See Bibas, *supra* note 47, at 1159; Schulhofer, *supra* note 6, at 1985.

¹³² See Rebecca Hollander-Blumoff, *Getting to "Guilty": Plea Bargaining as Negotiation*, 2 HARV. NEGOT. L. REV. 115, 119 (1997); Schulhofer, *supra* note 6, at 1987–91.

¹³³ *Berger v. United States*, 295 U.S. 78, 88 (1935).

¹³⁴ *Id.*

¹³⁵ *Brady v. Maryland*, 373 U.S. 83, 88 (1963).

¹³⁶ *Id.*

evaluate the proposed offer.¹³⁷ Such a scenario is not as far-fetched as it might sound, for the Supreme Court has recognized that *Brady* “represents a limited departure from a pure adversary model” by “requiring the prosecutor to assist the defense in making its case.”¹³⁸

1. *External Institutional Pressures*

However, these ideals about justice can be subverted by systemic pressures and by external forces that have left prosecutors with both more cases than they can effectively handle and an expanded set of tools for obtaining convictions. For instance, from the 1970s to the 1990s, politicians from both parties made promises to be tough on crime, with media portrayals propelling crime to the top of the domestic agenda in the 1980s and 1990s.¹³⁹

The 1980s and 1990s were marked by what scholars have termed overcriminalization, which created an additional class of criminal offenses with significant consequences for the accused.¹⁴⁰ In the wake of the so-called War on Drugs, a more punitive criminal justice system emerged, as evidenced by life sentences for recidivism and mandatory minimum sentences that eliminated judicial discretion and transferred it to prosecutors.¹⁴¹ The oft-criticized Federal Sentencing Guidelines were also issued in this era.¹⁴²

The resulting dilemma facing prosecutors in this context could be summarized as follows:

The prosecutor in this new era thus has a difficult choice: to refuse to prosecute more cases than the system can handle justly in the face of pressure to do otherwise or to bring cases without regard for resources in order to satisfy society’s increasingly punitive appetite, regardless of the fact that it will jeopardize the protections that define justice.¹⁴³

This is a particularly significant challenge for those prosecutors who seek reelection or aspire to higher offices within the political system and do not

¹³⁷ See Petegorsky, *supra* note 30, at 3641.

¹³⁸ *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985).

¹³⁹ ALEXANDER, *supra* note 26, at 45–56.

¹⁴⁰ See generally Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005) (describing overcriminalization and offering an account of its growth, causes, and costs before proposing a libertarian response that might have been added to then-pending legislation); Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537 (2012) (noting the rapid growth of the federal criminal code since 1970).

¹⁴¹ ALEXANDER, *supra* note 26, at 48–56, 86; see also Luna, *supra* note 140.

¹⁴² DAVIS, *supra* note 25, at 103.

¹⁴³ Rapping, *supra* note 104, at 537.

want to be perceived or portrayed as soft on crime.¹⁴⁴

2. Institutional Pressures

In addition to these external pressures, prosecutors also face internal institutional pressures related to the organizational culture of their offices. Ronald Wright and Kay Levine point to the ways in which the “unwritten social rules, norms and language” of a prosecutorial office, communicated informally to newer attorneys, “do more than simply define how a prosecutor *acts*; they define who a prosecutor *is*.”¹⁴⁵

Also within the prosecutorial context, John Rapping identifies four values that contribute to an organizational culture that breeds injustice, compromises the ethical obligations of even the most well-intentioned prosecutors and leads them to use the tools at their disposal to force plea bargains.¹⁴⁶ These four values are: (1) prioritizing convictions, (2) dehumanizing the accused, (3) disregarding procedural protections that stand in the way of securing convictions, and (4) viewing defense attorneys as obstacles to justice.¹⁴⁷ When incentives for prosecuting attorneys’ career advancement are tied to conviction rates and the vast majority of convictions come from pleas, prosecutors’ reasons for tailoring plea offers to generate convictions become more readily understood.¹⁴⁸

It is within these contexts that one can understand how practices of overcharging and extending exploding offers have developed, as they have become effective ways for prosecutors to meet both internal and external expectations and more effectively manage their caseloads.¹⁴⁹ The plea offer has become a powerful means to effectively transfer discretion to defense attorneys, who have significant immediate incentives for convincing indigent clients to waive their Sixth Amendment rights and truncate due process.¹⁵⁰ Private defense attorneys who receive flat fees or set hourly rates have an incentive to spend as little time as possible on a given case, while public defenders have a limited amount of time to divide among their

¹⁴⁴ See Catherine Ferguson-Gilbert, Comment, *It Is Not Whether You Win or Lose, It Is How You Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 295–96 (2001).

¹⁴⁵ Kay L. Levine & Ronald Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119, 1119 (2012).

¹⁴⁶ Rapping, *supra* note 104, at 558–59.

¹⁴⁷ *Id.* at 559.

¹⁴⁸ See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470–71 (2004); Ferguson-Gilbert, *supra* note 144, at 293–95.

¹⁴⁹ See Bibas, *supra* note 147, at 2471–73 (calling attention to the personal incentives that prosecutors have to make plea deals).

¹⁵⁰ Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205, 239.

many clients.¹⁵¹ The following Section addresses overcharging in greater detail.

C. OVERCHARGING AND COERCIVE PLEA BARGAINING

Overcharging, one practice that prosecutors can employ, takes two primary forms. Vertical overcharging involves charging defendants with a stronger variation of a form of conduct, along with a lesser version, for the same offense.¹⁵² For instance, prosecutors can charge felonies in both the first and the second degree, or pair felony and misdemeanor charges. As long as both counts can be supported by the equivalent of probable cause, which occasioned the arrest, multiple counts can stand until trial, encompassing the bulk of the plea-bargaining process. Multiple counts thus impact plea bargaining by encouraging defendants “to plead guilty to a lesser offense—often to the charge that absent strategic considerations would have been selected initially—simply to avoid risking conviction on the higher charge.”¹⁵³

The second practice, horizontal charging, involves charging defendants with multiple distinct crimes resulting from the same conduct.¹⁵⁴ For instance, a prosecutor can charge “street terrorism” alongside robbery, or charge simple battery alongside disorderly conduct.¹⁵⁵ Overbroad criminal statutes also make it possible to charge one act as multiple counts. Thus, a prosecutor may charge a defendant with eight criminal counts for one action and present the defendant with a plea offer that appears generous when the defendant compares it to a maximum sentence that incorporates punishment for all eight counts, which thereby exploits informational asymmetries in the bargaining process.¹⁵⁶ Tacking on additional counts provides prosecutors with leverage in the plea-bargaining process and also affords a backup at trial if the jury opts to acquit on the main charge.¹⁵⁷ While the ABA standard for prosecution is not to press charges that cannot be proven beyond a reasonable doubt, and Rule 3.8 of the Model Rules of Professional Conduct requires that every charge be supported by probable cause, no

¹⁵¹ *Id.* at 239–41.

¹⁵² Albert Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 86 (1968).

¹⁵³ Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1255 (2008); *see also* Gutiérrez, *supra* note 3, at 717 (quoting Covey, *supra*).

¹⁵⁴ Alschuler, *supra* note 152, at 85.

¹⁵⁵ H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 85 (2011).

¹⁵⁶ Scott & Stuntz, *supra* note 130, at 1964.

¹⁵⁷ DAVIS, *supra* note 25, at 31.

external check generally prevents prosecutors from charging offenses at a disproportionately high level with respect to the conduct at issue.¹⁵⁸ While prosecutorial discretion as to what charges to file does provide law enforcement personnel with additional time to investigate, it also allows prosecutors to begin the plea-negotiating process from a stronger position than they would do otherwise.¹⁵⁹

Although ethical codes discourage prosecutors from overcharging, it is unclear how the existence of the codes affects prosecutorial discretion without additional checks, such as internal review boards and external audits of charging decisions, apart from those that take place in grand jury proceedings.¹⁶⁰ Overcharging sets parameters for negotiation that favor the prosecution, giving the prosecution the additional leverage to threaten harsher sentences than the offenses warrant at trial. The grand jury, intended to be a “protector of citizens against arbitrary and oppressive government action,” also strongly favors the prosecution.¹⁶¹ The Supreme Court has held that there is no requirement to disclose exculpatory evidence to grand juries, while state courts are split on the question.¹⁶² In addition, a suspect called before the grand jury for questioning cannot insist that counsel be present in the grand jury room.¹⁶³ With defense counsel absent from the proceedings, the prosecution controls the information presented to the grand jury and may obtain indictments on the basis of hearsay evidence that will be inadmissible at trial.¹⁶⁴

Within these parameters, prosecutors have ample incentive to overcharge when trial would be inefficient and when they believe the defendants are guilty of one of the charged offenses.¹⁶⁵ Prosecutors can obtain leverage by overcharging, which opens the door for coercive

¹⁵⁸ See MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2012) (requiring a prosecutor to “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause”). This is a minimal standard that permits an individual prosecutor to file charges when she has enough evidence (such as an arrest) to form a subjective belief about the accused's guilt. See Meares, *supra* note 28, at 864; Daniel S. Medwed, *Emotionally Charged: The Prosecutorial Charging Decision and the Innocence Revolution*, 31 CARDOZO L. REV. 2187, 2188–89 (2010).

¹⁵⁹ See Meares, *supra* note 28, at 866.

¹⁶⁰ Medwed, *supra* note 158, at 2188–90.

¹⁶¹ *United States v. Calandra*, 414 U.S. 338, 343 (1974).

¹⁶² *United States v. Williams*, 504 U.S. 36, 47 (1992). For a review of the states that give prosecutors broad, limited, or no duty to present exculpatory evidence to grand juries, see generally Sharon N. Humble, Annotation, *Duty of Prosecutor to Present Exculpatory Evidence to State Grand Jury*, 49 A.L.R. 639 (1997) (analyzing and categorizing state cases directly addressing the prosecutor's duty to present exculpatory evidence to the grand jury).

¹⁶³ FED. R. CRIM. P. 6(d); *United States v. Mandujano*, 425 U.S. 564, 581 (1976).

¹⁶⁴ See generally *Costello v. United States*, 350 U.S. 359 (1956).

¹⁶⁵ Caldwell, *supra* note 155, at 72; see Meares, *supra* note 28, at 863–67.

pleas.¹⁶⁶ Threats of additional charges based on habitual offender laws weaken defense counsels' negotiating position,¹⁶⁷ particularly when these charges carry mandatory minimum sentences that minimize judicial discretion in sentencing. In such circumstances, even defendants with counsel are more likely to accept guilty pleas, in light of the risks of conviction at trial and the resultant sentencing penalties.¹⁶⁸

D. DEFENSE RESPONSES TO THE EVOLVING PLEA MARKET

Professor Stephanos Bibas alludes to the role that charging decisions and information asymmetries play in setting the parameters of plea negotiations, as well as to the defendants' need for information in evaluating plea offers.¹⁶⁹ The *Frye* and *Lafler* opinions echo Bibas's statement:

Plea bargaining is thus not an esoteric corner of the market reserved for indisputably guilty defendants who should be happy to receive any lower sentences as a matter of grace. It *is* the market, and defendants need competent advice about the facets and consequences of the transaction before they agree to a deal.¹⁷⁰

In a separate piece, Bibas explains the fallacies of considering trials to be the norm and of basing sentencing assessments upon this mistaken assumption.¹⁷¹ A charging standard of probable cause, overbroad and overlapping criminal statutes, and mandatory minimum sentences work in combination to inflate the potential sentence so much that the baseline sentence after a plea appears to be a discount.¹⁷² In this situation, "[w]hen prosecutors threaten inflated post-trial sentences to induce pleas, defendants are less free to test their guilt at trial. Defendants may be better off if they play the game well but much worse off if they do not."¹⁷³

Given the prevalence of plea bargaining, the presence of overcharging, and the sentence penalties incurred after trial, it can plausibly be argued that, to provide effective assistance, defense attorneys must be familiar with a given prosecutorial office's charging patterns and be able to discern the distinctions between the sticker price and the going rate.¹⁷⁴ Effective

¹⁶⁶ Caldwell, *supra* note 155, at 84.

¹⁶⁷ See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 358–60 (1978).

¹⁶⁸ DAVIS, *supra* note 25, at 56–57; see also Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 653 (1981).

¹⁶⁹ Stephanos Bibas, *The Myth of the Fully Informed Rational Actor*, 31 ST. LOUIS U. PUB. L. REV. 79, 80 (2011).

¹⁷⁰ *Id.* at 83.

¹⁷¹ See Bibas, *supra* note 47, at 1127–28.

¹⁷² *Id.*

¹⁷³ *Id.* at 1128.

¹⁷⁴ Rishi Batra, *Lafler and Frye: A New Constitutional Standard for Negotiation*, 14

advocates will not just prevent convictions of the innocent, but they will also mitigate punitive damages imposed against the guilty through charge enhancement and sentencing.¹⁷⁵

In addition to becoming attuned to the plea-deal market, defense counsel must fulfill their baseline responsibilities of assessing the facts of cases, clients' individualized life circumstances, and the likelihood of convictions at trial to provide the accused with enough information to make informed decisions about the offered pleas. While the sheer volume of cases that attorneys for indigent defendants handle weighs against their ability to provide effective counsel, the problem is compounded by another tool at prosecutors' disposal: exploding offers. Exploding offers combine guilty pleas to lesser charges with narrow windows of time before the offers expire. Those windows can be as short as the several hours between the beginning and end of an arraignment calendar.¹⁷⁶ These offers put defense attorneys, who have a minimal amount of time to investigate cases, in the position of preparing *Strickland* claims against themselves while advising defendants on the merits of the pleas.¹⁷⁷ Even in misdemeanor cases, this practice pervades.¹⁷⁸ As Margaret Colgate Love, liaison to the ABA Standards Committee from the National Legal Aid and Defender Organization, comments:

The facts of life in busy misdemeanor courts make a mockery of the current ABA Standard warning that defense counsel should "under no circumstances . . . recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed." At the same time, the severity of the penalties to which even misdemeanants are now exposed lends constitutional force to policy arguments that clients charged with minor crimes should not be compelled to plead as a condition of release. If "prevailing professional norms" forbid a lawyer to advise a client to plead at first appearance before adequate investigation and counseling can take place, any such plea would be entered in the absence of genuine defense representation, and would thus be vulnerable to constitutional challenge. It is safe to predict that an insistence on a genuine opportunity for counseling in light of the

CARDOZO J. CONFLICT RESOL. 309, 326–27 (2013). In his analysis of the implications of *Lafler* and *Frye*, Batra argues that the Supreme Court has effectively created a negotiation competency bar for criminal defense attorneys, and he makes recommendations for increasing bargaining transparency by, for example, creating sentencing databases for comparing plea offers within trial courts. *Id.* at 310–11, 326–27.

¹⁷⁵ Bibas, *supra* note 47, at 1141.

¹⁷⁶ DAVIS, *supra* note 25, at 57; *see also* Caldwell, *supra* note 155, at 64; Rapping, *supra* note 104, at 517.

¹⁷⁷ *See* Rapping, *supra* note 104, at 517.

¹⁷⁸ NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S MISDEMEANOR COURTS 33, 37 (2009), *available at* <http://goo.gl/TeML8N>.

severity of potential collateral consequences will result either in fewer pleas or, in time, fewer consequences.¹⁷⁹

Courts have long recognized that criminal defendants face pressure to plead guilty even when they are innocent and have focused their attention on preventing prosecutors from both overtly coercing defendants into making pleas and convicting the factually innocent.¹⁸⁰ At the federal level, courts have taken initial steps to minimize the dangers of coercing guilty pleas from innocent defendants by requiring judicial determinations that the pleas rest upon factual bases.¹⁸¹ Overcharging has primarily been evaluated within the academy, however, and not in the court system. A number of potential solutions have been suggested and are summarized below.¹⁸²

E. POTENTIAL PLEA-BARGAINING REFORMS

In light of the structural imbalances within the criminal legal system and the prevalence of plea bargaining, a number of scholars have presented proposals to reform the process. At one end of the spectrum, scholars have called for the abolition of plea bargaining, which is not permitted in Japan and is not relied upon in much of continental Europe.¹⁸³ Such a radical change does not appear likely to happen any time soon.¹⁸⁴ Less radical reform proposals call for changing the structure of the plea bargaining system and encouraging sentence bargaining, where bargaining is reserved for the sentence, not the charge.¹⁸⁵ Professor Oren Gazal-Ayal has

¹⁷⁹ Margaret Colgate Love, *Evolving Standards of Reasonableness: The ABA Standards and the Right to Counsel in Plea Negotiations*, 39 *FORDHAM URB. L.J.* 147, 166–67 (2012).

¹⁸⁰ See *Brady v. United States*, 397 U.S. 742, 750 (1970); *Machibroda v. United States*, 368 U.S. 487, 493 (1962); John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas But Innocent Defendants?*, 126 *U. PA. L. REV.* 88, 89 & nn.5–6 (1977).

¹⁸¹ *FED. R. CRIM. P.* 11.

¹⁸² See Caldwell, *supra* note 155, at 86 (providing an overview of proposed solutions as well as assessments of their strengths and weaknesses).

¹⁸³ Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargain System*, 50 *U. CHI. L. REV.* 931, 977 (1983). See generally Priyanka Prakash, Comment, *To Plea or Not to Plea: The Benefits of Establishing an Institutionalized Plea Bargaining System in Japan*, 20 *PAC. RIM L. & POL'Y J.* 607 (2011) (describing cultural aversion to an institutional plea bargaining system in Japan and arguing that an institutionalized plea bargaining system would better serve the interests of justice than existing practices of tacit bargaining).

¹⁸⁴ *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (citing Scott & Stuntz, *supra* note 130, at 1912). See generally Ross, *supra* note 7 (discussing plea bargaining's entrenchment in the United States).

¹⁸⁵ Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 *COLUM. L. REV.* 1059, 1136 (1976). But see Caldwell, *supra* note 155, at 86 (critiquing Alschuler's approach).

proposed a partial ban on plea bargaining.¹⁸⁶ In a system with such a ban, judges could identify weaker cases because of the significant concessions prosecutors offered in exchange for guilty pleas and could prohibit plea bargains in those cases.¹⁸⁷ This would effectively force the state to drop charges and allocate its trial resources to stronger cases.¹⁸⁸

Bibas attempts to minimize information asymmetry by insisting on open discovery during plea negotiations so that defense counsel can better evaluate the government's case and recognize overcharging.¹⁸⁹ Pleas would still predominate, but defense counsel would begin in relatively stronger positions to negotiate and could more effectively advise their clients earlier in the process. Furthermore, the government's interest in securing pleas from factually guilty defendants would not be compromised if prosecutors had to disclose exculpatory evidence earlier in the process.¹⁹⁰ However, as mentioned above, issues of funding and workload would need to be addressed so as to ensure that prosecutors actually review such evidence and that inadvertent *Brady* violations, in which prosecutors withhold potentially exculpatory evidence, would not occur.¹⁹¹

In contrast to Bibas's proposal to open discovery and rely upon defense counsel's instincts to recognize overcharged cases, Professor Daniel Medwed suggests that a higher charging standard would force prosecutors to charge cases accordingly.¹⁹² Such a change would need to be accompanied by a mechanism for oversight, like an internal charging review board that would encourage critical reflection about the cases.¹⁹³ Medwed recognizes the practical problems with establishing such an oversight team, given the proliferation of cases that many prosecutorial offices face.¹⁹⁴ He suggests that the board would not review all cases but would focus upon those with the most significant risks of wrongful convictions.¹⁹⁵ Common characteristics associated with wrongful

¹⁸⁶ See generally Gazal-Ayal, *supra* note 6 (arguing that the prevalence of plea bargaining enables prosecutors to forego screening procedures for weak cases and obtain convictions from innocent defendants, and describing how a partial ban would reconfigure incentives and force the government to more carefully screen cases).

¹⁸⁷ *Id.* at 2313–14.

¹⁸⁸ *Id.*

¹⁸⁹ Bibas, *supra* note 47, at 1133–35. This idea has found support with Justice Stephen Breyer and among some academic scholars. See Transcript of Oral Argument at 17–18, *United States v. Ruiz*, 536 U.S. 622 (2002) (No. 01-595); see also DAVIS, *supra* note 25, at 58.

¹⁹⁰ Bibas, *supra* note 47, at 1135.

¹⁹¹ Gershowitz & Killinger, *supra* note 11, at 282–84.

¹⁹² Medwed, *supra* note 158, at 2197–98.

¹⁹³ *Id.* at 2208.

¹⁹⁴ *Id.* at 2210.

¹⁹⁵ *Id.*

convictions include “eyewitness misidentifications, false confessions, jailhouse informants, police and prosecutorial misconduct, use of dubious forensic science, and ineffective assistance of defense counsel.”¹⁹⁶ While Medwed’s concern is with wrongfully convicting the innocent, scholars who have raised questions about coercive pleas in general echo his cry for prosecutorial oversight.¹⁹⁷ Such oversight could take the form of an oversight body reviewing notations in prosecutors’ files made when they dropped original charges after accepting pleas, requiring written plea offers subject to supervisory review and approval, employing internal regulation through multiple-source feedback loops that control the reward and promotion systems, or using systematic audits from internal oversight teams.¹⁹⁸ As H. Mitchell Caldwell observes, these approaches all raise questions about how they could induce voluntary compliance, absent increased funding and some form of external oversight, which Caldwell supports.¹⁹⁹

Each of these reform schemes has its merits, and a comprehensive approach that brings together their collective strengths would begin to address overcharging. Without judicial prompting and an effective means of ensuring compliance, however, it is unlikely that any substantial reforms to the plea process will be implemented.

By examining the plea-bargaining process in both *Frye* and *Lafler* and bringing it under the critical stage doctrine, the Supreme Court has cleared a pathway for courts to evaluate practices associated with plea bargaining. The remainder of this Comment examines the potential direct effects of these holdings on defense attorneys and prosecutors and predicts how future litigation could result in specific reforms within the plea-bargaining process.

III. THE AFTERMATH OF *FRYE* AND *LAFLER*

The holdings in *Frye* and *Lafler* reiterate defense attorneys’ existing ethical responsibilities to communicate to clients the existence of plea offers and assess the offers’ relative merits so that the clients’ decisions to accept or to decline pleas are informed and voluntary. After *Frye* and *Lafler*,

¹⁹⁶ *Id.* Eyewitness identification is the most common variable in wrongful convictions, according to data from the Innocence Project. Misidentification accounted for 76% of the Innocence Project’s first 250 exonerations, 53% of which were crossracial. *Id.* at 2210–11 (citing INNOCENCE PROJECT, 250 EXONERATED: TOO MANY WRONGLY CONVICTED 22–23, available at <http://goo.gl/Qyg6Pv>). Further, 19% of the wrongful convictions in this project involved prosecutorial misconduct, while 52% involved dubious forensic science. *Id.*

¹⁹⁷ See Caldwell, *supra* note 155, at 88–89.

¹⁹⁸ *Id.* at 88–91.

¹⁹⁹ *Id.* at 88–95.

defense attorneys could become more fastidious in advising clients of plea offers in a timely fashion and in encouraging them to take those offers that appear favorable. This result is particularly likely for attorneys mindful of the possibility that the failure to persuade clients to plead guilty could result in ineffectiveness claims on appeal. On the contrary, defense attorneys who are relatively unconcerned with the possibility of *Strickland* claims or who have come to accept those claims as inevitable consequences of their field of practice could become more cavalier in their approaches to the question of trial. Such attorneys might then advise clients to take cases to trial when they face plea offers that are acceptable but not ideal. Under *Frye* and *Lafler*, the remedy for heightened sentences following post-trial convictions would be the sentences offered during plea bargaining, while the potential rewards for taking the cases to trial would be acquittals.

As for prosecutors, *Frye* and *Lafler*'s remedy for successful *Strickland* claims could result in them only making offers that they are willing to live with. As they decide what offers to make, they will bear in mind that successful *Strickland* claims based on bargains that are not communicated to the accused could result in reopened plea offers, rather than new trials. This remedy could lead prosecutors to make offers that are less favorable for defendants and could lead to a harsher sentencing climate in general.

If the root causes of our overcrowded criminal justice system are not addressed, such as the funding issues that plague both district attorneys and public defenders, then defendants and defense counsel could effectively strike by refusing to accept plea offers on those terms.²⁰⁰ Such actions would force prosecutors to either issue more lenient offers or take additional cases to trial. The practice of overcharging, as well as the purposes it serves in expediently disposing of cases through pleas, could then come into the Supreme Court's purview. The Court has not yet directly confronted overcharging, but the holdings in *Padilla*, *Frye*, and *Lafler* make it more likely that it will do so in the future.²⁰¹

Prosecutorial discretion is unlikely to be successfully challenged, particularly with respect to the specific charges that prosecutors bring against defendants, as that practice is a recognized characteristic of prosecution. However, prosecutors' practice of extending exploding offers could be curtailed by future litigants, whose appointed counsel may be

²⁰⁰ Similar proposals focused on public order misdemeanor charges are detailed in Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1106 (2013); Michelle Alexander, Op-Ed., *Go to Trial, Crash the Justice System*, N.Y. TIMES (Mar. 11, 2012), at SR5.

²⁰¹ See also Gutiérrez, *supra* note 3, at 717–18 (discussing effects of overcharging on plea bargaining and sentencing and the Supreme Court's recognition that risking more severe punishment by proceeding to trial is inevitable in a system where pleas are encouraged).

unable to investigate the charges and provide effective representation in the span of a few hours. If such short-term offers were ruled unconstitutional in certain types of cases—such as those involving mandatory minimum sentences, because they necessarily involve ineffective assistance of counsel—the plea-bargaining landscape would be altered. Such a change would most closely resemble scholarly proposals that suggest forbidding plea agreements at first appearances for serious felonies.²⁰² Defendants' first appearances would be followed by a mandatory cooling-off period, which would allow defendants to rationally consider plea offers and would serve as a hedge against inevitable *Strickland* claims.²⁰³ Some public defender offices even now refuse to plead clients out at first appearances, whether for felonies or misdemeanors, because they recognize the pressure to plead and the prevalence of plea agreements at first appearances.²⁰⁴ By providing constitutional support for these practices and affirmatively stating that a contrary rule forces ineffective representation of counsel, judges could begin to further regulate plea bargaining without making wholesale changes that curtail prosecutorial discretion.

CONCLUSION

The Supreme Court's acknowledgement in *Frye* and *Lafler* that plea bargaining is the primary way that the criminal justice system functions leaves room for additional constitutional litigation concerning plea-bargaining practices. While the dissents raised the specter of litigation that would challenge prosecutorial practices and discretion, a wholesale challenge to prosecutorial discretion is unlikely to succeed; as a recognized characteristic of prosecution, prosecutorial discretion is even more entrenched in the legal system than plea bargaining. However, one possible plea-bargaining reform could result through *Strickland* challenges and would be consistent with scholarly recommendations and the practices of defense attorneys who find it impossible to provide effective counsel when plea offers have short expiration dates. A strategically filed *Strickland* petition in a case in which a plea agreement was only available to the defendant for hours at the first appearance could turn the court's eyes to a practice that does more to clear cases from the docket than to secure justice.

²⁰² See Bibas, *supra* note 47, at 1155.

²⁰³ *Id.*

²⁰⁴ Backus & Marcus, *supra* note 14, at 1082. See generally Brandon Buskey, *When Public Defenders Strike: Exploring How Public Defenders Can Utilize the Lessons of Public Choice Theory to Become Effective Political Actors*, 1 HARV. L. & POL'Y REV. 533 (2007) (discussing a public defender strike in St. Louis, Missouri, which the chief public defender described as an attempt to end practices of meeting and pleading).

In light of the Supreme Court's recent holdings, if such a case reached the Court, it would be an easy case, along the lines of *Frye* and *Lafler*. As in those cases, the Court could issue a ruling reinstating the plea offered at first appearance, along with a broader holding that such offers, attached to same-day deadlines, are unconstitutional. If the Court altered the plea-bargaining landscape and required a minimum period of time for initial offers to remain open, two possible outcomes emerge. First, prosecutors could be forced to extend the deadlines for initial offers to allow for proper investigation and effective counsel. Another possibility is that prosecutors could no longer offer pleas at first appearances. Attorneys on both sides could then have additional time to investigate their cases and come to the negotiating table with a better understanding of the facts at issue. Either one of these outcomes would increase the likelihood that the plea-bargaining process would result in resolutions that do justice for all parties involved and ensure that the promises of *Brady* are kept.

