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PEEKING BEHIND THE PLEA BARGAINING PROCESS: *MISSOURI V. FRYE* & *LAFLER V. COOPER*

*Laurie L. Levenson**

In Missouri v. Frye *and* Lafler v. Cooper, *the Supreme Court affirmed that plea bargaining, although controversial, has become a dominant feature of America's criminal justice system and is here to stay. Both cases establish that a defendant has a Sixth Amendment right to effective assistance of counsel during plea bargaining. But neither delineates the minimum standards of attorney competence that will satisfy this newly identified right. This Article seeks to cure some of the uncertainty left in the opinions' wake by proposing procedures for defense counsel, prosecutors, and courts that will safeguard a defendant's Sixth Amendment rights. After exploring the history of plea bargaining in the United States, this Article turns to the two decisions, noting how the 5–4 split in each reflects the Court's divided attitudes toward plea bargaining. This Article then outlines the basic responsibilities and best practices for defense lawyers, prosecutors, and judges as they relate to plea bargaining under* Frye *and* Lafler. *Finally, the Article concludes by arguing the right to a fair resolution of a case—the principal issue underlying both* Frye *and* Lafler*—must be protected not just by ensuring a fair plea bargaining process, but by reducing the total number of cases prosecuted.*

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I. INTRODUCTION

There may not be a constitutional right to plea bargain, but for the first time the Supreme Court has recognized that there is a constitutional right to have effective assistance of counsel during the plea bargaining process. In *Missouri v. Frye*[1] and *Lafler v. Cooper*,[2] the Court took more than a casual peek at plea bargaining. Writing for the Court, Justice Anthony Kennedy decided to take a long, hard look at the realities of America's plea bargaining process. Undoubtedly, what he saw was not pretty.[3]

In America, "ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."[4] Overwhelmingly, defendants do not have trials by their peers. They plead guilty precisely to evade the vagaries and costs of our trial system. Lawyers and defendants must make snap judgments about whether to accept plea bargains, even those that may involve the defendant's spending significant time in prison.[5] Plea agreements are made without full discovery having been provided[6] and long

1. 132 S. Ct. 1399 (2012).

2. 132 S. Ct. 1376 (2012).

3. Numerous articles have been written criticizing the plea bargaining process. *See, e.g.*, Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652 (1981); Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979) [hereinafter Alschuler, *Plea Bargaining and Its History*]; Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059 (1976); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining,* 84 YALE L.J. 1179 (1975); Albert W. Alschuler, *The Prosecutor's Role In Plea Bargaining,* 36 U. CHI. L. REV. 50 (1968); H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63 (2011); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992).

4. *Frye*, 132 S. Ct. at 1407 (citing DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl.5.22.2009, *available at* http://www.albany.edu/sourcebook/pdf/t5222009.pdf). Black's Law Dictionary defines "plea bargaining" as "[t]he process whereby the accused and the prosecutor in a criminal case work out a mutually satisfactory disposition of the case subject to court approval." BLACK'S LAW DICTIONARY 1152 (6th ed. 1990).

5. A recent example of this dilemma is the case of Brian Banks, a Long Beach, California, football star who, on his lawyer's advice, pleaded no contest to a rape charge rather than face the chance of a 40-years-to-life sentence. Greg Mellen, *Brian Banks' Fight for Innocence*, LONG BEACH PRESS TELEGRAM, June 10, 2012, http://www.presstelegram.com/news/ci_20828491/brian-banks. Despite assertions that he was innocent, Banks agreed to a plea deal that gave him up to six years in prison because a jury was being assembled to decide his case and he had too much to lose. *Id.* After he served his sentence, Banks was ultimately exonerated. *Id.*

6. In *United States v. Ruiz*, 536 U.S. 622 (2002), the Supreme Court held that the prosecution is not required to disclose material impeachment information prior to the entry of a

before counsel has had time to conduct an exhaustive investigation of the case. Many plea bargains are made without the assistance of counsel.[7] In reality, the plea bargaining process is a "best guess" about which resolution of the case will serve both sides' interests. It is a system that is tolerated because, without it, our criminal justice system would be so overwhelmed that it would collapse.[8] Plea bargaining is no longer an adjunct to the criminal justice system. It is the criminal justice system.[9]

Although plea bargains are the lifeblood of the American criminal justice system, courts have been ambivalent toward them. The Federal Rules of Criminal Procedure bar federal judges from participating in plea bargaining.[10] Even in those states where judges are allowed to participate in the plea bargaining process, their role is restricted. Judges must be vigilant not to coerce either side to accept a plea bargain.[11] Generally, judges who do get involved in the plea bargaining process enter relatively late in the negotiations, as the parties seek to hammer out a final agreement. Meanwhile, prosecutors and defense counsel engage in a process that has been described as resembling horse trading.[12] The focus is frequently on expeditiously resolving cases while defendants, especially those least educated and sophisticated, often get left in the fog.[13]

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guilty plea. *Id.* at 629–33. Moreover, it remains an open question whether the prosecution must disclose exculpatory materials prior to a guilty plea. *Compare* United States v. Conroy, 567 F.3d 174, 178–79 (5th Cir. 2009) (guilty plea bars defendant from claiming violation of *Brady* discovery rules), *with* Ferrara v. United States, 456 F.3d 278, 293 (1st Cir. 2006) (government should disclose exculpatory materials prior to guilty plea).

7. *See* Ronald F. Wright, *Guilty Pleas and Submarkets*, 157 U. PA. L. REV. 68 (2008) (noting that a surprisingly large number of defendants waive counsel, especially those charged with misdemeanors).

8. *See generally* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2003) (describing how plea bargaining came to favor in this country). However, there have also been criticisms of the case pressure theory for plea bargaining. *See, e.g.*, Milton Heumann, *A Note on Plea Bargaining and Case Pressure*, 9 LAW & SOC'Y REV. 515 (1975).

9. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992); *see also* Lafler v. Cooper, 132 S. Ct. 1376, 1388 ("[T]he reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials.").

10. FED. R. CRIM. P. 11(c)(1) ("The court must not participate in [plea] discussions.").

11. *See* People v. Jensen, 6 Cal. Rptr. 2d 201, 204–05 (Cal. Ct. App. 1992); *see also* People v. Weaver, 12 Cal. Rptr. 3d 742, 756–57 (Cal. Ct. App. 2004) (holding that pressure from the trial court allowed defendant to withdraw his guilty plea).

12. Scott & Stuntz, *supra* note 9, at 1912.

13. *Id.*

In its 5–4 opinions in *Frye* and *Lafler*, the Court is trying to change that dynamic. Using the minimum standards for effective assistance of counsel set forth in *Strickland v. Washington*,[14] the Justices once again turned to counsel to ensure that the plea bargaining system has some semblance of fairness. This standard, however, is less than a perfect fit for the plea bargaining process.

In many ways, it is not surprising that the Court turned to defense counsel to safeguard the integrity of the criminal justice system. The Court has used this approach to supervise other vulnerable procedures in the criminal justice system that are traditionally conducted outside the presence of a judge.[15] For example, even before *Miranda v. Arizona*,[16] the Court sought to prevent coerced confessions by ensuring that defense counsel would have a crucial role in the process.[17] Likewise, the Court has recognized the right to counsel to ensure that post-indictment lineups are not tainted.[18] Because the Court does not have the power to order the prosecution to offer a plea bargain, the best it can do is ensure that the adversary system is fully engaged.

The Supreme Court in *Frye* and *Lafler* has taken a first step toward addressing problems in the plea bargaining system. However, even this first step may prove to be complicated. What are the minimum standards for defense counsel in the plea bargaining

14. Strickland v. Washington, 466 U.S. 668 (1984).

15. The Supreme Court has stated:

> The Framers of the Bill of Rights envisaged a broader role for counsel than under the practice then prevailing in England of merely advising his client in "matters of law," and eschewing any responsibility for "matters of fact." The constitutions in at least 11 of the 13 States expressly or impliedly abolished this distinction. . . . In recognition of [the] realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings. . . . The plain wording of this guarantee thus encompasses counsel's assistance whenever necessary to assure a meaningful "defence."

United States v. Wade, 388 U.S. 218, 224–25 (1967) (footnotes omitted) (citation omitted).

16. 384 U.S. 436 (1966).

17. Escobedo v. Illinois, 378 U.S. 478 (1964).

18. *Wade*, 388 U.S. 218; Gilbert v. California, 388 U.S. 263 (1967). Defense counsel can play an important role by ensuring that law enforcement officers do not use unduly suggestive lineups for witness identifications or having law enforcement officers suggest during the lineup proceedings, which suspect the witnesses should select. In this regard, the Supreme Court commented in *Wade*, "the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for much more such errors than all other factors combined." *Wade*, 388 U.S. at 228. However, "the presence of counsel itself can avert prejudice and assure a meaningful confrontation at trial . . . ." *Id.* at 236.

process? How much investigation must defense counsel do before recommending a plea? Must they always convey a plea offer to the defendant, even when the defendant has made clear he is not interested in an offer? Most importantly, in evaluating claims of ineffective assistance of counsel in the plea bargaining process, will the courts become enmeshed in the plea bargaining process in a manner that the Federal Rules of Criminal Procedure have resisted?

Frye and *Lafler* establish that a defendant has the right to effective assistance during plea bargaining, but the Court did not firmly establish the minimum standards that will satisfy this right. This Article proposes procedures for defense counsel, prosecutors, and judges that will safeguard a defendant's Sixth Amendment rights.[19] After *Frye* and *Lafler*, there is likely to be a surge in the number of ineffective assistance of counsel petitions filed by defendants claiming that they received inadequate counsel during the plea bargaining process.[20] Setting standards will both help the courts in evaluating these claims and set guidelines for prosecutors and defense counsel participating in the plea bargaining process.

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19. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

20. There is no problem with retroactivity in bringing a *Frye*/*Lafler* claim because the Supreme Court did not recognize a new procedural right, but merely applied the Sixth Amendment right to counsel, as defined in *Strickland v. Washington*, 466 U.S. 668 (1994), to a specific factual context. The Eleventh Circuit has already held that *Frye* and *Lafler* did not announce new rules of constitutional law for purposes of 28 U.S.C. § 2255(h)(2). *See In re* Michael Perez, 682 F.3d 930, 933 (11th Cir. 2012). Moreover, the procedural posture and ruling in both *Lafler* and *Frye* eliminate any debate about whether it established a new constitutional right. *See* Missouri v. Frye, 132 S. Ct. 1399 (2012); Lafler v. Cooper, 132 S. Ct. 1376 (2012). The claims in those cases were raised on collateral attack and the Supreme Court in *Lafler* expressly held that the Michigan Court of Appeals had unreasonably applied the constitutional standards for effective assistance of counsel laid out in *Strickland v. Washington*, *supra*, and *Hill v. Lockhart*, 474 U.S. 52 (1985). *Lafler*, 132 S. Ct. at 1390. Given the procedural posture of *Frye* and *Lafler*, the lower courts can anticipate a flood of petitions by defendants who claim that their Sixth Amendment rights were similarly violated and that they should now gain relief. This does not mean that all of these petitions will be successful. As set forth in detail in those cases, the burden will be on the defendant to show that his counsel performed below professional standards during plea bargaining and that the defendant was actually prejudiced by this conduct. *See Frye*, 132 S. Ct. 1399; *Lafler*, 132 S. Ct. 1376. However, the door will be open for petitioners to make such an attack.

Part II of this Article provides a brief history and overview of plea bargaining in America. Plea bargaining has existed since the 1800s[21] and has had a checkered history. Some states have tried to eliminate it, but it does not die easily. To understand how plea bargaining operates, one must know what its purpose has been and how it has functioned as part of the overall criminal justice system.

Part III provides an overview of the split in the Justices' decisions in *Frye* and *Lafler*. The Court's decisions have rekindled a debate over the status of plea bargaining in our criminal justice system.[22] Justice Kennedy may not be a fan of plea bargaining, but he is a realist. He operates from the premise that it is here to stay. Justice Antonin Scalia warns of the consequences of further legitimizing what he recognizes is, at best, a "necessary evil" of the criminal justice system. Both the majority and dissent recognize the unique challenges of having a court supervise the fluid and often unpredictable process of plea bargaining.

Part IV suggests what basic responsibilities defense lawyers have during plea bargaining and the type of prejudice that is created when lawyers fail at those responsibilities. It also suggests how all the participants in the criminal justice system—prosecutors, defense lawyers, and judges—can create administrative checks to ensure that there is effective assistance of counsel during the plea bargaining process.

Finally, this article discusses more effective solutions to the overcrowding problem within the criminal justice system. The volume of cases going through plea bargaining is just a symptom of a deeper problem. The more significant problem is the trend in the last thirty years to criminalize and incarcerate individuals who could be managed through alternative processes.

21. Mark H. Haller, *Plea Bargaining: The Nineteenth Century Context*, 13 LAW & SOC'Y REV. 273, 273 (1978) ("[P]lea bargaining was probably nonexistent before 1800, began to appear during the early or mid-nineteenth century, and became institutionalized as a standard feature of American urban criminal courts in the last third of the nineteenth century.").

22. *See* Jed S. Rakoff, Frye *and* Lafler*: Bearers of Mixed Messages*, 122 YALE L.J. ONLINE 25 (June 18, 2012), *available at* http://yalelawjournal.org/images/pdfs/1094.pdf; "*Do Prosecutors Have Too Much Power?*" *Room for Debate*, N.Y. TIMES (Aug. 19, 2012), http://www.nytimes.com/roomfordebate/2012/08/19/do-prosecutors-have-too-much-power; Jack Escobar, Lafler v. Cooper, *New Era of Sanity in Criminal Procedure*, LAW J. FOR SOC. JUST. ARIZ. ST. (Mar. 28, 2012), http://ljsj.wordpress.com/2012/03/28/lafler-v-cooper-new-era-of-sanity-in-criminal-procedure/.

Frye and *Lafler* are important cases because they bring the Sixth Amendment into the twenty-first century. In this era of exploding case dockets, plea bargaining will be the resolution method for most cases. Yet, just because plea bargaining does not involve all of the procedures of a criminal trial, that does not mean that it requires less supervision by the courts. Even if there is no right to plea bargaining, there is a right to fair resolution of a case. In the end, the decisions in *Frye* and *Lafler* are as much about due process as they are about the right to counsel.

II. PLEA BARGAINING

"*Necessity never made a good bargain*."[23]

At its essence, plea bargaining is a process of compromise. Both prosecutors and defense counsel make concessions in order to resolve a case. Prosecutors will allow the defendant to plead to lesser charges or face lower penalties so that they can resolve that case and move on to other matters. The defendant will accept the bargain to obtain finality and leniency.

Both sides act out of necessity. Prosecutors realize they do not have the resources to try every case and that there are risks of failure should they try to do so. Moreover, trials are not just financially costly. They exact an emotional toll upon the participants, especially victims and their families. Most significantly, there is no guarantee that prosecutors will win their cases. Plea bargaining provides certainty that the defendant will be convicted of at least some criminal charge.

Defendants act out of necessity because they can rarely take the risk that a jury will acquit them of the charges, even when they have a defense. The resulting penalties may be severe. Defendants rarely can risk facing a lifetime in prison by insisting on having a jury hear their cases. Defendants must also deal with the harsh reality that going to trial imposes enormous financial and emotional costs on them and their families.

The result is a legal compromise. Plea bargaining, at its best, allows the criminal justice system to tailor an appropriate resolution

23. Benjamin Franklin, *The Quotable Franklin*, USHISTORY.ORG, http://www.ushistory.org/franklin/quotable/singlehtml.htm.

to a defendant's case. At its worst, it jams an imperfect resolution down the throats of one or both sides of the agreement.[24]

There are other key differences between the plea bargaining process and the trial process. A trial takes place in the open, is governed by rules of evidence, and is presided over by an impartial decision maker. Generally, there is a right to appeal a verdict from a trial. By contrast, plea bargaining occurs in the shadows of the criminal justice system—in the lockups, on the arraignment benches, over the cell phone. There are no formal rules governing how an offer must be presented or how long it must be held open. Personalities, conveniences, and local practice[25] often drive the results. One of the most important factors is whether the prosecutor believes defense counsel will actually take a case to trial.[26] The court has minimal involvement and, until *Frye* and *Lafler* were decided, there were few avenues for appellate relief.

Over time, this informal resolution system has come to dominate the criminal justice system. It is underground justice that goes on the record once the tug-of-war is completed. To understand the impact of *Frye* and *Lafler*, one must appreciate the origins of plea bargaining in America and why it has become a pillar of our criminal justice system.

A. History of Plea Bargaining in America

Although plea bargaining has dominated America's criminal justice system for decades,[27] it was not always such a dominant feature of the criminal courts.[28] In early America, defendants often

24. Most frequently, the prosecution has the power to dictate the terms of a plea agreement. *See* FISHER, *supra* note 8, at 210.

25. By its nature, plea bargaining is very localized. It is generally more difficult for out-of-town lawyers to be as effective in the plea bargaining process because they do not have the same relationship with prosecutors, nor do they have the same understanding of local practices and resources, including options for probation. *See* Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85 (2007).

26. *See generally* Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 281 (2011) (noting how disposition of cases depends in large extent on whether prosecutor believes she will have to take a case to trial).

27. Alschuler, *Plea Bargaining and Its History*, *supra* note 3, at 19–24 (describing early origins of plea bargaining).

28. *See* Haller, *supra* note 21, at 273 ("[Alschuler and Friedman] agree that plea bargaining was probably nonexistent before 1800, began to appear during the early or mid-nineteenth century, and became institutionalized as a standard feature of American urban criminal courts in the last third of the nineteenth century.").

represented themselves, and there was little occasion for prosecutors and defense lawyers to bargain over the outcome of a case. The victim and the defendant would face each other in court and resolve their case in our formal trial system.

In fact, in the early Anglo-American courts of the eighteenth and nineteenth centuries, judges strongly discouraged plea bargaining and even guilty pleas.[29] Because attorneys in court did not represent the parties, trials tended to end quickly, without messy complications.[30] As a result, a plea bargaining system was not necessary to hasten the process and clear up court calendars. It was not uncommon for judges to discourage defendants from pleading guilty and urge them to proceed to trial instead.[31]

Apart from the lack of necessity for plea bargains, the courts were hesitant to accept them because of moral reasons. Courts were uncomfortable with the idea of an innocent defendant admitting to an offense that he or she did not commit, just for the sake of receiving a lower sentence. In addition, courts were concerned that offenders might be coerced into involuntarily confessing guilt out of fear or false hope.[32]

However, in the mid-nineteenth century, heavier caseloads led prosecutors to institute bargaining systems that would allow them to dispose of their cases without expending the resources necessitated by full trials.[33] Plea bargaining was born of necessity; prosecutors

29. Alschuler, *Plea Bargaining and Its History*, *supra* note 3, at 1, 5. As noted by one author,

> The history of plea bargaining in this country is filled with intellectual dishonesty stemming often from the belief that there was something dirty about allowing those accused of crimes to "cop a plea." Common were the images of back door deals between lawyers and judges in which defendants often charged with horrible crimes pled guilty to far less serious crimes.

Steven P. Grossman, *An Honest Approach to Plea Bargaining*, 29 AM. J. TRIAL ADVOC. 101, 103–04 (2005).

30. Alschuler, *Plea Bargaining and Its History*, *supra* note 3, at 8.

31. *Id.* at 9. For example, in 1804 in Massachusetts, there was a case about a black man who was accused of raping and killing a teenage white girl. After the defendant pleaded guilty, the court strongly advised him to let the government prove his guilt and informed him that he was not required to plead guilty. Despite the court's urging, the defendant did not withdraw his plea and was sent back to prison to rethink his decision. However, when the defendant pleaded guilty again against the court's pressures, he was remanded to prison, and it is only reported that the defendant "has since been executed." *Id.*

32. *Id.* at 11.

33. FISHER, supra note 8, at 210.

could resolve more cases by shortcutting the litigation process. Begrudgingly, courts began to allow the process.

Starting in the late nineteenth and early twentieth centuries, courts largely welcomed plea bargaining as a swift and easy nontrial solution.[34] Judges were particularly eager to use the mechanism to rid themselves of difficult decisions regarding capital punishment or other unpopular topics. Judges faced a boom of new civil cases born of the personal injury litigation that accompanied the Industrial Revolution.[35] As judges became more preoccupied with the growing number of civil suits, they found they could devote less time and fewer court resources to criminal cases.[36] Along with prosecutors, they had a growing need to structure a more efficient system for handling criminal cases. Judges quickly realized that they had more sway in determining the outcome and sentencing of a criminal case than ability to "coerce settlements in civil cases."[37] Judges could resolve their criminal cases with promises of lighter sentences[38] and open up their dockets to civil cases.

Once proposed, plea bargaining was quickly embraced by the courts. The statistics are startling. In 1845, 80 to 100 percent of all pleas from defendants were pleas of not guilty.[39] However, by 1860, 60 percent of all pleas were guilty and by 1879, 70 percent of all pleas were guilty.[40] Courts were already beginning to see a slow decline in the number of jury trials as they were replaced by guilty pleas orchestrated outside of the courtroom and behind closed doors.[41] Evidence of such plea bargaining in the late nineteenth century is very apparent. For example, in Alameda County, California, in 1880, Albert McKenzie was charged with embezzlement for pocketing $52.50, to which he pleaded not guilty.[42] On the date of the trial, McKenzie, his lawyer, and the

34. John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261, 270 (1979).

35. George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 867 (2000).

36. *Id.*

37. *Id.*

38. *Id.*

39. MIKE MCCONVILLE & CHESTER L. MIRSKY, JURY TRIALS AND PLEA BARGAINING: A TRUE HISTORY 200 (2005).

40. *Id.*

41. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 251 (1993).

42. *Id.* at 252.

district attorney met to let McKenzie withdraw his plea and instead plead guilty to a misdemeanor—embezzling an amount less than $50.00. The district attorney voiced his agreement and the deal became official.[43]

There are countless examples of defendants changing their pleas from not guilty to guilty to a lesser charge, an obvious indication of the growing number of plea bargains that occurred during this era. In the same county, fourteen percent of all defendants "between 1880 and 1910 changed their pleas from not guilty to guilty. Half of these pleaded guilty to a lesser charge, or fewer charges—unmistakably the sign of a deal."[44] Then again, this figure is not even wholly representative of the amount of plea bargaining that occurred. There was also a great deal of "implicit" bargaining where defendants pleaded guilty without an actual agreement in place in hopes that the state would "mitigate the penalty" for "saving the trouble and expense of a trial."[45] Overall, as court dockets filled, the court system resorted to a more efficient way of quickly resolving cases while expending minimal resources.[46]

Today, plea bargaining is a well-established feature of the criminal justice system. In 1967, the American Bar Association (ABA) gave its blessing to the practice.[47] In 1970, the Supreme Court rejected challenges to the constitutionality of plea bargaining.[48] Most recently, the Sentencing Guidelines and tougher sentences have provided additional (and sometimes coercive) incentives for defendants to plea bargain.[49]

Despite its problems, the plea bargaining system endures. However, to understand what protections the defendant needs during

43. *Id.*

44. *Id.*

45. *Id.*

46. For a discussion of the relationship between over-criminalization and plea bargaining, see Lucian E. Dervan, *Overcriminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 J.L. ECON. & POL'Y 645 (2011).

47. ABA Project on Standards for Criminal Justice, Pleas of Guilty Part II, at 300 (Approved Draft 1968) ("[A] high proportion of pleas of guilty and *nolo contendere* does benefit the system. Such pleas tend to limit the trial process to deciding real disputes and, consequently, to reduce the need for funds and personnel.").

48. *See* Brady v. United States, 397 U.S. 742, 753 (1970).

49. FISHER, *supra* note 8, at 210 The Sentencing Guidelines invest in prosecutors the power to dictate many sentences through charging and plea bargaining decisions. *Id.*

the process, it is important to address the benefits and detriments of plea bargaining.

B. Pros and Cons of Plea Bargaining

In the abstract, plea bargaining is neither an absolute good nor an absolute evil.[50] In addition to allowing courts to process a high volume of cases, plea bargaining can also help both prosecutors and defense lawyers tailor the result of a case to better fit the actions of the defendant and the defendant's background.[51]

1. Pros

There are advantages to plea agreements from the perspective of all involved parties. From a societal point of view, plea bargaining is advantageous for the sake of sheer efficiency, as it helps alleviate already crowded court dockets.[52] Because court dockets are already flush with cases, a quick and efficient way to resolve cases, such as plea bargaining, has its benefits in the criminal system. Judges no longer need to schedule and hold a trial because the case has already been resolved with a sentence decided for the defendant.

From the view of prosecutors, a plea agreement guarantees a conviction without the risk of spending long hours and countless resources resulting in a loss.[53] In addition, plea agreements lighten the prosecutor's caseload. An enormous percentage of cases are already settled with plea bargaining, yet there are still many cases left to be tried. To imagine a prosecutor's caseload without the tool of plea bargaining would be unfathomable.

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50. This is true despite the fact that the origins of plea bargaining are linked by scholars to "fixers" and others who sought to corrupt the judicial process. *See* Alschuler, *Plea Bargaining and Its History*, *supra* note 3, for a description of how "political corruption apparently contributed to a flourishing practice of plea bargaining." *Id.* at 23.

51. One example of how prosecutors and defense lawyers try to tailor sentences to the individual's actions and background is the continued effort to evade the mandatory minimum sentence. *See* Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-*Mistretta *Period*, 91 NW. U. L. REV. 1284 (1997).

52. Even before *Frye* and *Lafler*, the Supreme Court recognized the critical role of plea bargaining in the criminal justice system. *See* Brady v. United States, 397 U.S. 742, 753 (1970); Santobello v. New York, 404 U.S. 257, 261 (1971) ("Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons.").

53. For a full discussion of incentives for prosecutors to plea bargain, see Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470–76 (2004).

Lastly, the defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial by obtaining a speedy disposition of his case. By plea bargaining, the defendant can quickly come to an agreement with the prosecutors, ensuring a particular result if he or she simply pleads guilty. The defendant is no longer at risk of the maximum sentence, and is instead given a lighter sentence with a less severe charge and the opportunity to quickly move forward with his or her life. And of course, because the case is resolved in such a timely manner, the defendant avoids the costs that come with having expensive legal representation.

2. Cons

The most significant criticism of plea bargaining is that the process can force innocent defendants into pleading guilty.[54] In order to escape the possibility of a harsher sentence, innocent defendants may plead guilty and accept a guaranteed lighter sentence.[55] In this situation, the prosecutor has virtually limitless discretion and immense leverage to convince a defendant to agree to the bargain.[56] As a result, plea bargaining may prompt prosecutors to practice overcharging to intimidate defendants with the strictest sentence.[57]

54. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 58 (2011).

55. *See id.*

56. Prosecutors dominate the current plea bargaining process. They decide which charges will be filed, what deals will be offered, and which defendants will be prosecuted to the full extent of the law. *See* Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L. REV. 165, 165 (2004) (quoting Justice Robert Jackson's famous saying that a federal prosecutor has "more control over life, liberty, and reputation than any other person in America," and Judge Gerald Lynch referring to federal prosecutors performing "the role of god") (citations omitted); *see also* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 20 (1998) (discussing how the decisions and actions of prosecutors have serious consequences and have a great impact on everyone in the criminal justice system).

Many commentators believe "[s]uch unfettered discretion undermines fairness, regardless of whether or not prosecutors abuse this privilege." Brandon J. Lester, Note, *System Failure: The Case for Supplanting Negotiation with Mediation in Plea Bargaining*, 20 OHIO ST. J. ON DISP. RESOL. 563, 572 (2005) (citing Davis, *supra* note 56, at 20–21; Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1477 (1993)). The reality is that

> [i]n plea negotiations, criminal defendants must often choose between persistently asserting their innocence and gambling on the system on the one hand and admitting guilt to a lesser charge, thereby receiving an early release and avoiding the chance of a wrongful conviction to a serious crime or a harsh judicial sentence on the other. Many others suffer unconscionable offers from vengeful prosecutors . . . .

Lester, *supra* note 56, at 564–65.

57. The adoption of the U.S. Sentencing Guidelines added to federal prosecutors' ability to pressure defendants into pleading guilty simply by filing extensive charges and literally daring

Even innocent defendants may be willing to plead guilty if they face the possibility of an unbearably long sentence, or in the worst-case scenario, death.[58]

Another criticism of plea bargaining is that it bypasses the requirements for a thorough investigation and denies the defense any chance to argue its side.[59] In a sense, it allows the prosecutor to become both the judge and jury. As long as the defendant is willing to accept the bargain, his guilt will be determined without full fact-finding that conforms to the "rigorous standards of due process and proof imposed during trials."[60] Therefore, critics argue that plea bargaining undermines the values of the criminal justice system by leaving the fate of the case in the hands of a prosecutor.[61]

The last criticism is that plea bargaining paints a picture to offenders that "the law is like a Turkish bazaar[]" where justice can simply be purchased and sold.[62] Because it sends a message that defendants can evade punishment through negotiation, the biggest concern is that plea bargaining weakens the goal of deterrence in criminal punishment.[63] Furthermore, there are great disparities

defendants to take those charges to trial. Because of the sentencing disparity between those defendants who plead guilty and those convicted after trial, defendants may be pressured by charges alone to agree to a plea bargain. As Chief Judge William G. Young of the U.S. District Court for Massachusetts phrased it, "Evidence of sentencing disparity visited on those who exercise their Sixth Amendment right to trial by jury is today stark, brutal, and incontrovertible. . . . [U]nder the Sentencing Guidelines regime with its vast shift of power to the Executive, that disparity has widened to an incredible 500 percent." Andrew E. Taslitz, *Prosecutorial Preconditions to Plea Negotiations: "Voluntary" Waivers of Constitutional Rights*, CRIM. JUST., Fall 2008, at 14, 20.

58. *See* Abraham S. Goldstein, *Converging Criminal Justice Systems: Guilty Pleas and the Public Interest*, 49 SMU L. REV. 567, 571 (1996) ("Even innocent defendants may be willing to abandon their defenses if the stakes are high enough and the probabilities of conviction are great enough."); C. Ronald Huff, *Wrongful Conviction: Causes and Public Policy Issues*, CRIM. JUST., Spring 2003, at 15, 17 ("[M]any defendants can be enticed to plead guilty, even though they are innocent, in order to avoid even more severe consequences of systematic error.").

59. *See* Stephen J. Schulhofer, *A Wake-Up Call from the Plea-Bargaining Trenches*, 19 LAW & SOC. INQUIRY 135, 137 (1994) ("[P]lea bargains are often struck on the basis of incomplete, highly imperfect information and little more than the attorney's guess about what a trial might reveal if one were held.").

60. Douglas D. Guidorizzi, Comment, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 769 (1998). Although this criticism has some merit, others argue that it is exaggerated. *Id.*

61. *Id.*

62. *Id.* at 770 (quoting John Kaplan, *American Merchandising and the Guilty Plea: Replacing the Bazaar with the Department Store*, 5 AM. J. CRIM. L. 215, 218 (1977)) (internal quotation marks omitted).

63. *Id.* at 771.

between the sentences of those who accept pleas and those who do not, even though they have been charged with similar crimes. Critics worry that this leads offenders to believe that they can "get away" with lenient sentences as long as they engage in bargaining.[64]

C. Approaches of Other Countries

Other countries use plea bargaining, but not necessarily in the same manner as the United States. In fact, the virtues and liabilities of plea bargaining vary greatly depending on its role in the overall justice system. In an accusatory system, such as that in the United States, plea bargaining mostly occurs between the parties; the court enters into the process, if at all, after the bargaining has run its course. The court does not ordinarily have a hand in what is communicated between the parties, nor in what is communicated by defense counsel to the defendant. By contrast, in other judicial systems, the judge may play a more prominent role in plea bargaining and how it will affect the outcome of a case.

For example, in Germany, unlike the United States, plea bargaining involves not only the defense attorney and the prosecutor, but also the judge, who acts as both a party to and a supervisor of plea negotiations; this ensures that plea bargains are fair and consistent with the true facts of the case.[65] The primary duty of a judge in the German judicial system is to uncover the "substantive truth" of the case.[66] Because of this responsibility, judges are included in the plea bargaining process. Their duty is to discover the truth of the case, rather than simply resolving it. In the German system, a judge will refuse to accept a guilty plea from the defendant if the defendant still claims innocence, so it is the duty of the court to discover the facts of the case and determine fault.[67]

The German approach offers certain advantages over the American system. First, in America, if an agreement was made solely between the defense attorney and the prosecutor, then there is no guarantee that the court will accept the agreement and sentence

64. *See* JONATHAN D. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 77–92 (1972).

65. Jenia I. Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 214–15 (2006).

66. *Id.* at 215.

67. JENIA I. TURNER, PLEA BARGAINING ACROSS BORDERS 113 (2009).

the defendant as agreed upon.[68] However, with court involvement, "judges are actively involved, openly discussing the merits of the case and the range of acceptable dispositions."[69] On the other hand, because the German judges are involved in plea negotiations, there is the risk that judges will put too much pressure on defendants to accept deals.[70]

Russia also uses a form of plea bargaining. The Russian Criminal Procedure Code lays out a "special trial procedure" where the defendant makes a motion "to accede to the charges, waive ordinary trial procedures, and accept punishment."[71] Although the Code does not explicitly mention negotiations, they are likely to occur between the prosecution and defense in the form of "a prosecutorial promise to recommend a lenient sentence and the defendant's promise to admit guilt and to cooperate with the prosecution in other cases."[72] However, it is unlikely for "charge bargaining" to occur because of the Russian "principle of mandatory prosecution and the lack of broad prosecutorial charging discretion."[73]

Russian procedures present a form of guilty plea "in which the accused expresses his or her 'agreement with the charges.' If this plea is accepted (the public prosecutor and the victim have a veto, which thus opens the door for plea bargaining), the judge may sentence the accused to no more than two-thirds of the maximum term."[74] In other words, the Russian plea bargaining system is comparable to that of the United States, in that a defendant who agrees to plead guilty and accept a lighter sentence is essentially rewarded with a lighter sentence for saving the court valuable time and resources. Moreover, in the negotiations between prosecutors and defense, both sides clearly make agreements and promises so long as the defendant pleads guilty.

Whereas the Anglo-American system employs a formal plea bargaining system, Japan has adopted informal alternatives in

68. *Id.*
69. *Id.*
70. *Id.* at 117.
71. *Id.* at 143.
72. *Id.*
73. *Id.*
74. Stephen C. Thaman, *Russia*, *in* THE HANDBOOK OF COMPARATIVE CRIMINAL LAW 414, 418 (Kevin Jon Heller & Markus D. Dubber eds., 2011).

response to the need to accelerate criminal proceedings in its justice system.[75] As a nation that culturally values truthful explanations and genuine repentance from defendants, Japan, through its Justice System Reform Council, explicitly rejected the institutionalization of plea bargaining.[76] However, shifting trends called for changes in Japan's policies. Although Japan once was recognized as a country that boasted steadily low crime rates, it experienced a massive upsurge in crime rate at the turn of the twenty-first century.[77] In addition, its "prosecutors' offices remain 'chronically understaffed.'"[78] Because this led to more cases and overcrowded courts, there was a growing use of "tacit" bargaining to alleviate the problem.[79]

There are three main types of "tacit" plea bargaining tactics used in Japan. First is a summary proceeding, which lacks a formal trial and may be requested by the prosecutor for very minor criminal cases.[80] Here, once the defendant confesses, he will be charged with a monetary fine up to approximately ¥500,000 ($4,500.00) instead of a sentence.[81] Second is a discretionary prosecution, in which the prosecutor suspends the prosecution or offers a lower sentence if the defendant "acknowledges guilt, asks for pardon, and appears willing to make some restitution to the victim."[82] Third is unofficial cooperation and exchange with the court.[83] As long as the defendant shows remorse and confesses his crime, the court will most likely give him a lenient sentence for doing so.[84]

One criticism of the Japanese structure is that the current system of plea bargaining is unregulated and can be abused by the prosecution.[85] For example, because there are no formal enforcement mechanisms for these tacit bargains, the prosecutor may change his

75. TURNER, *supra* note 67, at 172.

76. Priyanka Prakash, *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, 608–09 (2011).

77. *Id.* at 612.

78. *Id.* (citation omitted).

79. TURNER, *supra* note 67, at 176.

80. *Id.* at 186.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. Prakash, *supra* note 76, at 618.

or her mind or fail to keep a promise without any consequences.[86] Moreover, Japan's criminal justice system aims to achieve "just results," even at the expense of just procedures.[87] This may lead to coercion, intimidating interrogation methods, and involuntary confessions, ultimately yielding potential abuse of defendants' rights.[88] With these potential abuses in mind, Japan's leaders struggle to find a way to balance efficiency and justice when developing the country's mechanisms for plea bargaining.[89]

Like the United States and Germany, China has widely employed plea bargaining as a response to increasing crime rates and increasing caseloads in the courts.[90] Unlike the United States and Germany, however, China did not discourage or avoid the use of plea bargaining from the early stages of its legal system's development.[91] In fact, plea bargaining is particularly suitable and welcomed in a country that stands by a policy of leniency to those who confess, and harshness to those who resist (*tanbai congkuang kangju congyuan*).[92]

There are two types of plea bargaining in China: one is called the "Summary Procedure," where the punishment is less than or equal to three years, and the other is called the "Simplified Procedure," for sentences of more than three years.[93] Under the Summary Procedure, the defendant, the prosecutor, and the judge must all consent to its use. It is similar to the guilty plea in the United States because it summarily presents the facts of the case.[94] However, it differs from the American system because there is still a trial, and the judge is the principal decision-maker who wields the most power. The Simplified Procedure is similar to the Summary Procedure, but it requires a panel of three judges, and the prosecutor must appear in court.[95] It differs from the American guilty plea

86. TURNER, *supra* note 67, at 192.
87. Prakash, *supra* note 76, at 617 (citation omitted).
88. *Id.* at 616.
89. *Id.* at 615.
90. Elizabeth M. Lynch, *May Be a Plea, But Is It a Bargain?*, HUM. RTS. CHINA (2009), http://www.hrichina.org/hk/node/3703/3703.
91. *Id.*
92. Wei Luo, *China*, *in* THE HANDBOOK OF COMPARATIVE CRIMINAL LAW 137, 161 (Kevin Jon Heller & Markus D. Dubber eds., 2011).
93. TURNER, *supra* note 67, at 199–200.
94. Lynch, *supra* note 90.
95. *Id.*

because the prosecutor and the defense cannot bargain for a specified sentence term, but must instead yield to the discretion of the court.[96]

Some critics of Chinese plea bargaining note that justice and fairness are becoming less relevant, as faster trials and sentences are becoming the primary goals.[97] For instance, defendants are making quick decisions about taking the plea without being properly informed about the repercussions or about their alternatives.[98] In addition, the Chinese government is still in the process of combating rampant corruption, so critics are skeptical as to whether fair trials can be carried out. To develop a system that retains both efficiency and integrity, greater openness and a more detailed explanation of the procedure to the defendant is needed.[99]

D. Rethinking America's Plea Bargaining System

America has also been struggling with how to modify its plea bargaining system to ensure that proceedings are both expeditious and fair. The same concerns that affect other countries, including the accuracy of guilty pleas, have affected the American criminal justice system. Until recently, the Supreme Court left the mechanics of plea bargaining to the parties and the lower courts. However, last year was a turning point. For the first time, the Supreme Court attempted to set constitutional standards for a process that it had previously held was not justified as a constitutional right.

III. 2012: TACKLING PLEA BARGAINING *MISSOURI V. FRYE* & *LAFLER V. COOPER*

In the 2011–2012 term, the Supreme Court jumped into the plea bargaining debate by deciding two cases—*Missouri v. Frye* and *Lafler v. Cooper*. Each case involved the issue of whether there was ineffective assistance of counsel during the plea bargaining process. Each unveiled a troublesome aspect of the plea bargaining process.

96. TURNER, *supra* note 67, at 200.
97. Lynch, *supra* note 90.
98. *Id.*
99. *Id.*

A. Missouri v. Frye*:*
"Thou Shalt Communicate With Your Client!"

In *Missouri v. Frye*,[100] Galin Frye was charged with driving with a revoked license. Because this was his fourth violation, he was charged under Missouri law with a felony that carried a maximum four-year prison term. The prosecutor sent Frye's lawyer a letter offering to reduce the charge to a misdemeanor and to recommend a ninety-day sentence if Frye would plead guilty. Frye's lawyer never conveyed the offer to Frye and the offer expired. Then, right before Frye's preliminary hearing, he was arrested again for the same offense. Frye ended up pleading guilty with no underlying plea agreement and was sentenced to three years in prison.

On petition for habeas corpus, Frye claimed that his Sixth Amendment right to effective assistance of counsel was violated because his counsel failed to inform him of the prosecution's plea offer, which he claimed he would have accepted, had he known about it.[101] The first hurdle Frye had to overcome in making his claim was to convince the Court that he had a right to effective assistance of counsel at the plea bargaining stage—a right the Supreme Court has never recognized. Yet, the majority in *Frye* had little trouble recognizing plea bargaining as a "critical stage" at which the Sixth Amendment guaranteed the defendant the right to counsel.[102]

Extrapolating from the Court's opinion in *Hill v. Lockhart*,[103] and its more recent decision in *Padilla v. Kentucky*,[104] Justice Kennedy wrote that the Sixth Amendment guaranteed Frye the right to effective assistance of counsel during plea bargaining. Neither *Hill* nor *Padilla* was directly on point because each focused more on whether counsel's wrong advice negated the client's guilty pleas than the implications of counsel's failure to inform the client of a plea offer. In *Hill*, the defense counsel misinformed the defendant of the amount of time he would have to serve before he became eligible for parole.[105] In *Padilla*, the Court set aside a plea because the defense

100. 132 S. Ct. 1399, 1404 (2012).
101. *Id.*
102. *See id.* at 1407.
103. 474 U.S. 52 (1985).
104. 130 S. Ct. 1473 (2010).
105. *Hill*, 474 U.S. at 53.

counsel misinformed the defendant of the immigration consequences of the conviction.[106] Yet, the language from these cases became critical to the task of finding a general duty of effective assistance of counsel in plea bargaining. In particular, Justice Kennedy focused on the Court's statement in *Padilla* that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel."[107]

Although Justice Kennedy recognized that there is a difference between invalidating a plea based on counsel's bad advice and the situation in *Frye*, where the challenge was to the defense counsel's conduct during plea bargaining before the plea proceedings, he found that the differences were not constitutionally significant.[108] More importantly, he was persuaded that the "simple reality"[109] of our criminal justice system made it imperative for the Court to include counsel's conduct during plea bargaining within the Sixth Amendment's umbrella. As he noted, 97 percent of federal convictions and 94 percent of state convictions are the result of guilty pleas.[110]

> The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.[111]

Yet, recognizing the right to effective assistance of counsel during plea bargaining was only the first step in the Court's analysis. The more challenging task was to define what standards should be used in measuring whether counsel has met Sixth Amendment requirements. Pursuant to the ineffective assistance of counsel standard set forth in *Strickland*, a defendant must demonstrate that counsel's representation fell below professional standards.[112] While it may not be possible to identify exact standards for how counsel

106. *Padilla*, 130 S. Ct. at 1486–87.
107. *Frye*, 132 S. Ct. at 1407 (*quoting Padilla*, 130 S. Ct. at 1486).
108. *Id.* at 1407.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 1408.

should act during plea bargaining, the minimum requirements are not that difficult to identify.

The most basic requirement is that a lawyer must actually communicate the terms of a formal plea offer to the client. Especially when there is an offer with an expiration date, the defense counsel must let the client consider the offer before it expires. This is not a new concept. The ABA Standards for Criminal Justice and many states' professional standards require counsel to promptly communicate and explain plea offers to a client.[113]

The second step of the *Strickland* analysis, as applied to plea bargaining, is a little more challenging: How does a defendant show that counsel's ineffective assistance during plea bargaining prejudiced the defendant's case?[114] Here, the Court held that in order to establish prejudice, Frye would have to show "a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time."[115] If it is an offer that could be withdrawn by the prosecution or rejected by the court, such as the one in *Frye*, then the defendant must show that the offer would have remained and that he would have received the benefit of the plea bargain.

Despite the many "ifs" in the Court's standard, the majority felt confident that these issues could be resolved on remand. In fact, the Court suggested that Frye might not be able to meet the standard, given that he picked up a new offense for driving without a license shortly before his plea. This quite likely might have led the prosecution to withdraw its offer or led the trial court to reject it.[116] Nonetheless, Frye should have an opportunity to demonstrate whether his case had been prejudiced.

Justice Antonin Scalia wrote for the four dissenters, who objected to the majority's decision on the most basic level. As the dissent states, "The plea-bargaining process is a subject worthy of regulation, since it is the means by which most criminal convictions are obtained. It happens not to be, however, a subject covered by the Sixth Amendment, which is concerned not with the fairness of

113. *See* STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY § 14-3.2(a) (3d ed. 1999).
114. *See Frye*, 132 S. Ct. at 1409.
115. *Id.*
116. *Id.* at 1411.

bargaining but with the fairness of conviction."[117] Frye never argued that he was not guilty of the offense to which he pleaded guilty. His conviction was fair, even though he might have hoped for a more favorable resolution of the case.

B. Lafler v. Cooper*:* *"Thou Shalt Give Your Client Accurate Information in Deciding Whether to Accept a Plea Bargain"*

In the companion case of *Lafler v. Cooper*, Justice Kennedy again wrote for the majority. While this was another case involving plea bargaining, the misstep by the defense counsel was different. Anthony Cooper was charged with assault with the intent to murder, possession of a firearm by a felon, possession of a firearm in commission of a felony, misdemeanor possession of marijuana, and being a habitual offender.[118] Evidently, Cooper, a convicted felon, had pointed a gun and shot at his victim's head.[119] The shot missed and the victim ran.[120] Cooper shot again and hit her in the buttocks, hip, and abdomen.[121] She survived the shots.[122]

Prosecutors twice offered to dismiss two of the charges and recommend a sentence of 51 to 85 months for the other charges.[123] The defendant admitted his guilt in communications with the court and expressed a willingness to accept the offer.[124] However, he changed his mind when his lawyer convinced him that the prosecution would be unable to establish his intent to murder the victim because she had been shot below the waist.[125] Cooper ended up going to trial and rejected yet another plea offer on the first day of trial.[126] The defendant was convicted by a jury and received a mandatory minimum sentence of 185 to 360 months' imprisonment,[127] more than three times what he would have received if he had accepted the prosecution's initial plea offer.

117. *Id.* at 1413–14 (Scalia, J., dissenting).
118. Lafler v. Cooper, 132 S. Ct. 1376, 1383 (2012).
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*

Using the analytic structure established in *Frye* and *Strickland*, the Court held that counsel's advice constituted ineffective assistance of counsel.[128] First, the parties conceded that the counsel's performance was deficient.[129] No competent counsel would have believed that Cooper could not be found to have had the intent to murder simply because his shots had hit the victim below the waist. Second, the Court held that but for the counsel's deficient performance, there was a reasonable probability that Cooper and the trial court would have accepted the guilty plea.[130] Cooper's letters to the court and testimony at a postconviction hearing established that fact.

The real issue was what the remedy should be. How could Cooper be made whole at this point? The Supreme Court held that the proper remedy was to order the State to reoffer the plea agreement.[131]

While raising issues similar to those in *Frye*, *Lafler* added another dimension to the Court's decision to recognize a right to effective assistance of counsel during plea bargaining. Cooper's case was not like *Hill*, in which the Court held that improper advice by counsel could invalidate a guilty plea. Cooper went to trial and did not argue that he received an unfair trial. Rather, he relied on a yet-to-be-recognized right to effective assistance of counsel during plea bargaining.

In the end, the Court found the distinction to be without a difference. The defendant's fair trial did not wipe clean his lawyer's deficiencies. With plea bargaining being such a critical aspect of the criminal justice system, saying that a fair trial makes up for any deficiencies in counsel's conduct during the pretrial process ignores the reality of the substantial effect plea bargaining can have on a defendant's future.

The dissent was even more vociferous in *Cooper* than it had been in *Frye*. Writing for the dissenters, Justice Scalia lamented the creation of a "whole new field of constitutionalized criminal procedure: plea-bargaining law."[132] For the dissenters, a defendant's

128. *Id.* at 1390–91.
129. *Id.* at 1391.
130. *Id.*
131. *Id.*
132. 132 S. Ct. at 1391 (Scalia, J., dissenting).

constitutional rights are about whether he or she received a full and fair trial. Since Cooper received such a trial, he had no constitutional right to a plea bargain. Moreover, the Court's remedy that the prosecution should reoffer its original plea offer constituted undue interference with the criminal justice process. Plea bargaining may be in great use in the United States, but it is at best "a necessary evil" and an "embarrassing adjunct" to our criminal justice system.[133] By recognizing the right to effective assistance of counsel at plea bargaining, the Court had shifted to making plea bargaining "the criminal justice system."[134]

In his trademark style, Justice Scalia wrote:

> The Court today embraces the sporting-chance theory of criminal law, in which the State functions like a conscientious casino-operator, giving each player a fair chance to beat the house, that is, to serve less time than the law says he deserves. And when a player is excluded from the tables, his *constitutional rights* have been violated. I do not subscribe to that theory. No one should, least of all the Justices of the Supreme Court.[135]

The other dissenters did not join in this part of his opinion, but Justice Scalia's point was clear: the Constitution guarantees the right to a fair trial, and nothing that happens in the plea bargaining process undermines that right.

In his solo dissent, Justice Alito focused on an evident weakness in the majority's decision.[136] The majority left implementation of the remedy to the trial court. Is it fair, after the prosecution goes to trial, to require it to vacate some of the convictions? How will courts decide what to do when, years after a conviction, there is an allegation that the defendant received ineffective assistance of counsel during the plea bargaining process? It is well and good for the Court to say that it leaves the issue to the discretion of the trial court, Justice Alito reasoned, but there is very little guidance about how judges should exercise that discretion.[137]

133. *Id.* at 1397.
134. *Id.*
135. *Id.* at 1398.
136. *Id.* at 1398–99 (Alito, J., dissenting).
137. *Id.* at 1391.

IV. AFTERMATH OF *FRYE* AND *LAFLER*: WHAT DO WE DO NOW?

How are *Frye* and *Lafler* likely to change the actions of defense counsel, prosecutors and the courts? The Supreme Court's decisions in these cases are likely to have a significant practical impact on plea bargaining practices across the nation.

A. Defense Counsel's Responsibilities

First, defense lawyers must do what they should have been doing all along; they need to talk to their clients and give them accurate advice.[138] This may sound easy, but in the quick-moving, rough-and-tumble world of plea bargaining, it is not always easy for counsel to have in-depth discussions about all of the prosecution's offers. Often, their clients cannot be reached by simply picking up the phone. Defense lawyers must go through elaborate processes to visit clients in jail and, even then, the conditions are less than optimum for having full conferences regarding plea offers.

As one district judge noted after *Frye* and *Lafler* were decided, nothing about these decisions will magically make defense counsel into competent lawyers.[139] In fact, the decisions have the potential to backfire by pushing defense attorneys to urge their clients to take the first plea offered, even if defense counsel's experience and assessment of the case leads counsel to believe that there might be a better deal down the road.[140] Certainly, defense counsel should communicate all plea offers to defendants,[141] but plea bargaining standards cannot go so far as to second-guess counsel's "best advice" to defendants not to accept the earliest offer.

138. Even the question of what constitutes "accurate" information can be a challenging one. Certainly, defense counsel should be willing to discuss the strengths and weaknesses of the defendant's case. However, there are subtleties in the negotiation process, such as defense counsel's assessment of the prosecution's case and observations about the judgment, personality, and skills of the prosecutor. *Frye* and *Lafler* do not attempt to define whether defense counsel must disclose this type of information to a client when advising the client whether to accept a plea offer.

139. Rakoff, *supra* note 22, at 26.

140. *Id.*

141. Defense counsel has an ethical duty to: (a) "keep the accused advised of developments arising out of plea discussions conducted with the prosecutor" and (b) "promptly communicate and explain to the accused all significant plea proposals by the prosecutor." *See* STANDARDS FOR CRIMINAL JUSTICE: PLEA DISCUSSIONS § 4-6.2 (1993).

If anything, *Frye* and *Lafler* should compel defense counsel to investigate a case at an earlier stage because there may be time pressure when advising a defendant whether to accept a plea bargain.[142] Other decisions by the Supreme Court, including *United States v. Ruiz*,[143] make it difficult for defense counsel to obtain the information to properly advise a defendant. Thus, defense counsel must honestly say when they do not have sufficient information to properly advise the client about accepting a plea. Additionally, some defense lawyers have the added challenge of advising juveniles or defendants with mental impairments. Quick decisions must often be made regarding courses of actions that can have a long-term impact on a defendant, even if the defendant can avoid a custodial sentence.[144]

Second, defense counsel must keep clear records of not only the offers prosecutors present but also their expiration dates, how likely they are to be withdrawn, how and when they were presented to the client, and any changes to them over time. Of course, many lawyers already do this,[145] but the Supreme Court's decisions will make the lawyer's recordkeeping key evidence in any post-plea or posttrial hearings. However, there must also be flexibility in this system to accommodate the current practice of allowing defense lawyers to obtain in advance from a client the authority to reject certain classes of plea offers. A procedure that requires defense counsel to convey every offer—even if it is within a category of offers already rejected

142. *See id.* § 4-6.1(b) ("Defense counsel may engage in plea discussions with the prosecutor. Under no circumstances should defense counsel recommend to a defendant acceptance of a plea *unless appropriate investigation* and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial.") (emphasis added).

143. United States v. Ruiz, 536 U.S. 622 (2002). In *Ruiz*, the defendant was offered a "fast track" plea bargain that required him to agree to a guilty plea even without receiving any impeachment information regarding the government's witnesses. *Id.* at 625. The Supreme Court held that there was no constitutional right to impeachment information before a guilty plea. *Id.* at 629. Imposing a disclosure rule on the government would undermine the efficiency benefits of plea-bargaining and is not required by due process. *Id.* at 630.

144. *See* Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 RUTGERS L. REV. 943, 952 (2010) (discussing susceptibility of juveniles to false guilty pleas); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 297–303 (2011) (discussing the major collateral consequences of minor criminal convictions).

145. Sandi Johnson, *Applying the Standards of Professionalism and Civility to the Practice of Criminal Law*, UTAH BAR J., Nov.–Dec. 2005, at 30–31 (explaining that standard practice is to put plea agreements in writing).

by the defendant—is likely to pose additional obstacles to the plea bargaining process.

Third, defense counsel should probably give every indication to the prosecution that a defendant is likely to accept an offer, even if defense counsel is unsure, so that the record remains strong for subsequent proceedings. Therefore, it might be more difficult for defense counsel to be as candid with prosecutors as to the likelihood of a defendant accepting a plea because telling a prosecutor straight out that a defendant does not seem so inclined may later hurt a defendant's chances at postconviction relief. Defense counsel should not, however, fall into the trap of pushing a defendant toward accepting a plea just to avoid later claims of ineffective assistance of counsel in the plea bargaining process.

Finally, defense counsel must consider every plea bargain to be as important as a trial. This is not necessarily a bad thing. Certainly, for a defendant pleading guilty, he or she would expect such a commitment by defense counsel. Yet, for defense lawyers, pleas have long taken a back seat to trial preparation.[146] Given the Court's decisions, this can no longer be the case.

B. Prosecutor's Responsibilities

Prosecutors will also find themselves with new responsibilities after *Frye* and *Lafler*. Before discussing prosecutors' responsibilities to ensure that plea bargains are made after effective assistance of counsel, it is important to consider what prosecutors' overall responsibilities should be in order to ensure that a climate of fear does not create a caseload crisis that will be used to justify a coercive plea bargaining system.

1. Taming Overcharging

The American prosecutor is sometimes referred to as a "Minister of Justice."[147] "While the criminal defense attorney's role in promoting the administration of justice is through the loyal and zealous representation of the accused, the prosecutor has a broader

146. Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841, 852 (1998).

147. 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, 519 (2012).

obligation to ensure that justice is done."[148] The concept of "justice" is nebulous at best, but it has been traditionally tied to procedural protections that ensure the defendant has a fair opportunity to defend himself against the state's accusations.[149]

Yet, prosecutors have the power to charge so many cases that the traditional tools to protect a defendant's rights and achieve "justice" are stretched beyond their limits. An explosion in state and federal criminal laws has given prosecutors the power to dramatically increase both the number of individuals charged and the number of charges each defendant faces.[150] Moreover, the climate of fear in America increases pressure on prosecutors to be more aggressive in their charging.[151]

From the beginning, prosecutors have controlled plea bargaining because they control the number of cases defense counsel will have to handle and how likely the defense will be able to mount a defense against increasingly tougher charges. While the Supreme Court's focus in *Frye* and *Lafler* is on the failings of defense lawyers to properly investigate their cases and advise their clients, certainly some of the responsibility for creating an environment where this is likely to happen falls on prosecutors.[152] By using all of the firepower they have available and stretching the resources of the defense bar, prosecutors can create an atmosphere where plea bargaining becomes mechanical and defense lawyers sacrifice individualized, zealous attention to cases. Thus, the first step in ensuring a defendant's Sixth Amendment rights are protected in plea bargaining is for prosecutors to take a hard look at their charging decisions. It must become part of

148. *Id.* at 519–20; *see also* Laurie L. Levenson, *Working Outside the Rules: The Undefined Responsibilities of Federal Prosecutors*, 26 FORDHAM URB. L.J. 553, 555 (1999).

149. *See* Bruce Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 608 (1999) ("In the trial context ['doing justice'] . . . had something to do with fidelity to the fairness of the process—the idea that, if the trial was a fair one, then even when the jury acquitted a defendant whom we were convinced was guilty, justice was done.").

150. *See generally* Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005) (detailing the increase in number of crimes and harsher punishments during recent decades).

151. Rapping, *supra* note 147, at 569 ("Across the country prosecutors charge far more cases than the system is resourced to handle and use their power in the plea bargaining arena to coerce the accused into forgoing fundamental rights designed to ensure just outcomes.").

152. Rakoff, *supra* note 22, at 26 ("In reality, . . . most of the unfairness that occurs during the plea-bargaining process is . . . not the result of defense counsel's ineffectiveness. Instead, it is the result of overconfidence on the part of prosecutors, whose evidence and sources, having never been put to the test of a trial, appear much stronger to the prosecutors than is objectively warranted.").

the prosecutorial culture to consider how charging decisions will affect defense counsel's ability to properly advise a defendant during the plea bargaining process.[153]

2. Safeguarding the Plea Bargaining Process

In order to ensure that a defendant will not be able to reverse his conviction years down the line, prosecutors should document all plea offers, their expiration dates, and whether they are binding on the court. Then the prudent prosecutor may ask for written confirmation that the offer has been shared with the client. Undoubtedly, prosecutorial offices will start developing signed notice forms that can be used to document plea offers.

Prosecutors should also ask the court to put on the record, before a trial, whether there were any plea offers and, if so, that the defendant rejected the offers. This is complicated by the policy in federal court that judges should not be involved in plea bargaining.[154] One must be concerned how even this effort might subtly involve the judge in plea discussions. Thus, it may be necessary to have the defendant verify that a plea offer was made, but have the written terms of that plea offer lodged with the court under seal.

Prosecutors might also find themselves in the awkward position of having the court inquire whether defense counsel has not only shared a plea offer, but also adequately answered the defendant's questions regarding the process and applicable law that would affect the defendant's decision whether to accept the offer. It is questionable how candid such colloquies will be. For example, given that many plea agreements are arranged to avoid collateral consequences to the defendant and his family, such as the loss of custody of a child, judges may become far more immersed in the plea bargaining process than the Supreme Court anticipated.

The plea bargaining process, which is intended to make the criminal justice system more expeditious, may need to be slowed down to accommodate the new procedures that will ensure effective assistance of counsel during plea bargaining. It is reckless for prosecutors to push for plea bargains before they have had a full opportunity to evaluate a case. Standards for discovery and

153. Rapping, *supra* note 147, at 569.
154. FED. R. CRIM. P. 11(c)(1).

communications of plea bargains need to be established that will ensure that the bargains offered actually reflect the merits of the case.

C. Judge's Responsibilities

Ultimately, the responsibility will fall on judges to ensure that defense counsel adequately participates in the plea bargaining process. This is true regardless of whether the case ends in a guilty plea or with a trial. A prudent judge will now ask the parties and counsel whether there were any plea offers and if their terms were communicated to the defendant. Moreover, that judge may also ask counsel to put on the record, *in camera* or in open court, why a defendant is declining a plea offer.

The judge must take these steps without coercing a defendant into accepting or rejecting a plea, and without interfering with the attorney–client relationship. Defense counsel may be privy to additional information demonstrating why a defendant should not accept the deal, but the court is not necessarily entitled to have all of this information. Judges must also resist the temptation to second guess defense counsel's strategy in counseling a client to reject a plea offer. *Strickland* requires that great deference be afforded to the decisions of defense counsel. While the court may view a plea offer as too good to refuse, defense counsel may have strategic reasons to suggest that a defendant reject a specific plea offer.

The biggest challenge for the court will be to maintain its role as an impartial decision maker and avoid being drawn into the actual plea negotiations. Pursuant to Federal Rule of Criminal Procedure 11(c)(1), "[t]he court must not participate in [plea agreement] discussions."[155] In order to preserve the court's impartiality and not put undue pressure on a defendant to accept a plea deal, the Rules specifically prohibit judges from participating in plea bargaining.[156] Courts must now walk the fine line between documenting plea offers and unnecessary and unwarranted intrusion into the plea bargaining process. The more the court is charged with keeping track of the plea bargaining process, the more likely the judge will step into an active—even unintentionally coercive role—in plea negotiations.

155. FED. R. CRIM. P. 11(c)(1).
156. *See* United States v. Bradley, 455 F.3d 453 (4th Cir. 2006).

V. CONCLUSION

The lessons of *Missouri v. Frye* and *Lafler v. Cooper* seem simple on their face—defense counsel must convey all plea offers to a client and then provide adequate advice as to whether to accept such offers. However, as the Supreme Court recognized in these recent decisions, this simple rule cannot always be easily enforced.[157] Plea bargaining is more of an art than a science; there is no one way to cut the perfect deal.

While *Frye* and *Lafler* have drawn attention to how defense counsel performs during plea bargaining, the decisions raise greater concerns. As the Supreme Court has finally recognized, the criminal justice system is likely to continue to embrace a compromise system for criminal cases. Plea bargaining will be the rule, not the exception. The quality of case dispositions will depend, therefore, not just on how defense counsel performs, but also on the number and merit of cases brought by prosecutors.

In order to ensure that plea bargaining works fairly and efficiently, efforts must be made to remedy the systemic pressures that have created plea bargaining abuses.[158] Plea bargaining was born of necessity. Since its inception, it has been viewed as a means to process an increasingly higher volume of cases. The experiences of foreign countries have been the same. A simplified, faster procedure meets the number one pressure driving our current criminal justice system—there are too many cases.

While there is no guarantee that a reduction in the number of cases will lead prosecutors and defense counsel to more carefully examine the resolution of individual cases,[159] reducing the number of cases would offer the opportunity to prosecutors, defense counsel, and judges to spend more time evaluating and investigating their cases. Reducing the volume of criminal cases is not an easy task.

157. *See* Missouri v. Frye, 132 S. Ct. 1399 (2012); Lafler v. Cooper, 132 S. Ct. 1376 (2012).

158. Some jurisdictions have tried to deal with the problems with plea bargaining by imposing complete or partial bans on plea negotiations. This approach, however, has been met with mixed results. *See* Guidorizzi, Comment, *supra* note 60, at 773–77 (noting that Alaska's ban was not disastrous for the short period in which it was in effect). Most importantly, eliminating plea bargaining does not deal with the underlying problem that there are too many cases for the criminal justice system to fully adjudicate.

159. *See* Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 117–21 (2005) (noting that guilty plea and acquittal rates do not necessarily correlate to increase in criminal caseloads).

Substantial efforts are in progress, from changing charging guidelines to reevaluating parole revocation procedures.[160] These systemic changes—as well as even bolder initiatives, such as criminal mediation[161]—may disrupt the current syndrome of assembly-line guilty pleas.

As the Supreme Court acknowledged, the plea bargaining process is here to stay. Defense lawyers have a Sixth Amendment duty to professionally advise their clients regarding such negotiations, but everyone in the criminal justice system, including the prosecutor and judge, has a role to play in ensuring that a defendant's constitutional rights are protected. To do this, we must now keep track of what pleas are being made and whether the defendant has been adequately counseled about the advisability of the plea deal. We must also be keenly aware of the impact that the volume of cases has on a defense lawyer's ability to do her job. The plea bargaining process may sometimes be distasteful and a nuisance, but it is also a reality. After *Frye* and *Lafler*, it comes with plenty of strings attached.

160. *See, e.g.*, California Realignment Act, ch. 15 (2011).

161. Brandon Lester, *System Failure: The Case for Supplanting Negotiation with Mediation in Plea Bargaining*, 20 OHIO ST. J. ON DISP. RESOL. 563 (2005).