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Check, Pleas: Toward a Jurisprudence of Defense Ethics in Plea Bargaining

by HADAR AVIRAM, DEANNA DYER and S. C. THOMAS*

Introduction

The prevalence of plea bargaining has become a cliché in literature about the criminal process; almost every law review article addressing plea bargains begins with a paragraph detailing the decline of trial rates and the criminal justice system's increasing reliance on plea bargaining.¹ Moreover, the prevailing attitude is that plea

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1. See Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-based Ceilings*, 82 TUL. L. REV. 1237, 1238 (2008) (recognizing that “[u]pwards of 95% of all state and federal felony convictions are obtained by guilty plea”); Edward L. Wilkinson, *Ethical Plea Bargaining Under the Texas Disciplinary Rules of Professional Conduct*, 39 ST. MARY’S L.J. 717, 718 (2008) (noting that “95% of felony criminal cases nationwide are resolved by plea bargain,” then primarily discussing regulation of prosecutorial conduct); Ellen Yaroshesky, *Ethics and Plea Bargaining: What’s Discovery Got to Do with It?*, CRIM. JUST., Fall 2008, at 28, 29, available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_23_3_yaroshesky.authcheckdam.pdf (finding that “[m]ore than 90 percent of cases nationwide result in guilty pleas.” Yaroshesky discusses *United States v. Ruiz*, 536 U.S. 622 (2002), which held that a defendant does not have the right to disclosure of information regarding either impeachment or an affirmative defense during the pre-guilty plea stage, and argues that “*Brady* disclosures prior to entry of a guilty plea would improve the reliability and accountability of the criminal justice process.” *Id.*).

bargains are a “necessary evil” in the criminal justice system.² Aside from an article published in 1975 based on research “conducted during the 1907-1908 academic year,”³ it is rare for a law review article to negate the realistic necessity of plea bargains in the modern criminal justice system.

That plea bargains are necessary has not made them less evil in the eyes of criminal procedure scholars. Indeed, scholarship often highlights the negative implications of plea bargaining. These implications include the risk of pressuring innocent defendants to plead guilty and the prosecution’s discretion to provide inconsistent offers.⁴ Scholars also criticize the role of plea bargaining in reinforcing bias against defendants and in the declining trial rate.⁵ Scholars lament that overburdened public defenders may feel pressure to dispose of cases quickly through plea bargains, thereby exacerbating the disproportionality of conviction rates between indigent defendants and those that can afford private counsel.⁶ To address many of these systemic flaws would require broad social reforms to balance against the effects of race and class on the justice system.⁷ The administrative structure of criminal justice, too, provides prosecutors with abundant discretion, adding to the power imbalance between prosecution and defense in plea bargaining.⁸ However, one aspect of the practice of plea bargaining that has been relatively amenable to review and change has been the behavior of defense attorneys in the plea-bargaining process.⁹

2. *Lafler v. Cooper*, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting) (“In the United States, we have plea bargaining a-plenty, but until today it has been regarded as a necessary evil.”).

3. Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 YALE L.J. 1179, 1181 (1975) (arguing that the plea-bargaining system is an inherently irrational method of administering justice).

4. See, e.g., Douglas D. Guidorizzi, Comment, *Should We Really “Ban” Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 767–72 (1998).

5. *Id.*

6. *Id.*

7. Bruce A. Green, *Criminal Neglect: Indigent Defense from A Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1192–93 (2003). Green argues that prosecutors have the ethical duty to respond to the systematic neglect of indigent clients by calling public attention to the lack of resources for indigent defense and excessive public defender workloads, and by encouraging the legislature to take steps, including the appropriation of sufficient funds, to address the problem. *Id.*

8. Ronald Wright & Marc Miller, Comment, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1410 (2003).

9. See, e.g., Edward L. Wilkinson, *Ethical Plea Bargaining Under the Texas Disciplinary Rules of Professional Conduct*, 39 ST. MARY’S L.J. 717, 770–779 (2008).

In two recent cases, *Lafler v. Cooper*¹⁰ and *Missouri v. Frye*,¹¹ the Supreme Court assessed the quality of defense counsel in the context of plea bargaining and the implications for the defendants' habeas appeals based on claims of unprofessional conduct by defense counsel. Writing for the dissent in *Lafler*, Justice Antonin Scalia complained:

Today, however, the Supreme Court of the United States elevates plea bargaining from a necessary evil to a constitutional entitlement. . . . 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.¹²

This Article takes a somewhat more pragmatic approach than Justice Scalia's. As we argue here, not only has the "conscientious casino operator" operated freely to the point that "sporting-chance" is the rule rather than the exception, but various institutions, primarily the bar and the courts, have been developing guidelines for defense attorneys in the plea-bargaining context. However, these rules and guidelines can only cover some parts of the practice, and leave much of the details of plea bargaining to defense expertise and to trial and error. Relying on a solid body of research developed by lower-court ethnographers since the 1960s, we map the set of pressures on the defense attorney in a plea-bargaining scenario. We examine which of these pressures the legal profession can overcome, using legislative, judicial, and ethical tools, and which pressures only the use of "best practices" may control, but not eliminate. We also provide advice to defense attorneys about acquiring the appropriate professional expertise to navigate ethically through the uncharted waters of the plea-bargaining ocean.

Part I of this Article provides an introduction to defense practice in the context of plea bargaining. Relying on classic courtroom

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

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

12. *Lafler*, 132 S. Ct. at 1397–98 (2012).

ethnography, we outline the main issues that influence defense choices and practices, as well as the pressures and temptations to push clients toward a guilty plea. Parts II and III examine the ways in which the system oversees and regulates defense performance in plea bargains, addressing the duties toward the client, the prosecution, and the court. Part II addresses how the courts have acted to enforce standards of conduct for defense attorneys at the plea-bargaining stage, via their rulings in ineffective assistance of counsel claims (*Strickland v. Washington* and its progeny). Part III addresses the ways the ABA Rules of Professional Conduct have spoken to this issue. Part IV examines the areas that legal and ethical regulation has not been able to regulate: defense assessment of the “value of the case;” the management of client hopes; and the defense’s role in the procurement of inconsistent pleas. We conclude by making suggestions for “best practices” and training tools in these difficult-to-regulate areas.

I. Defense Attorneys and Plea Bargaining: An Ethnographic Approach

A. The Crime Control Model, Guilty Pleas, and the Marginality of Defense Counsel

In his 1968 book, *The Limits of the Criminal Sanction*, Herbert Packer presented and contrasted two theoretical models of the criminal process: the crime control model, focusing on efficiency and case processing, and the due process model, focusing on avoiding wrongful convictions.¹³ The models, according to Packer, were two ends of a spectrum, along which criminal justice systems could be located and understood.¹⁴ The main assumption behind the crime control model was that the most efficient way to process a large number of cases through the system was to establish, in the early stages of the process, whether the defendant was guilty.¹⁵ The mechanism best suited for such a determination was the police investigation, which was more direct and less cumbersome than the criminal trial.¹⁶ Therefore, once a case passed through the filters of police investigation and the prosecutorial charging decision, the system could presume, statistically, that the defendant was likely

13. HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 163 (1968).

14. *Id.* at 153.

15. *Id.* at 162.

16. *Id.* at 189.

guilty and, therefore, rely on a streamlined and simplified trial process that consisted mostly of pleas.¹⁷ By contrast, the due process model was highly suspicious of the biases inherent to police investigation and, therefore, valued constitutional protections and bright-line rules, which provided useful checks on police and prosecutorial abuse of power.¹⁸

Two ideas are important to note for our purposes. First, while the due process model extols the virtues of the adversarial trial as the ultimate guarantee for truth finding and protection from abuse, the crime control model sees the plea bargain—not the trial—as the quintessential method of disposition of criminal charges.¹⁹ Second, each model highlights the importance of different players. The defense attorney is a key player in the due process model, in that s/he challenges the process to ensure that the actors in that process respect and preserve the defendant's rights.²⁰ However, s/he is less central in Packer's articulation of the crime control model, where swift case processing relies principally on effective and powerful police work and prosecutorial discretion.²¹

Reviewers have described the two models as “ideal types,” presented for their power to explain and to assess the priorities of existing criminal justice systems.²² As we argue elsewhere, Packer was writing to a generation of criminal justice scholars who witnessed the Warren Court's revolutionary incorporation of the Bill of Rights against the states, and tried to theorize this transformation as a shift away from crime control to due process.²³ While doctrinal legal scholars showered the book with praise,²⁴ social scientists and law-and-society types raised concerns in their critiques.²⁵ One social science perspective is particularly pertinent to our inquiry: Malcolm

17. *Id.* at 221–25.

18. *Id.* at 165.

19. *Id.* at 222.

20. *Id.* at 172.

21. *Id.*

22. Stuart MacDonald, *Constructing a Framework for Criminal Justice Research: Learning from Packer's Mistakes*, 11 *NEW CRIM. L. REV.* 257, 289 (2008).

23. Hadar Aviram, *Packer in Context: Formalism and Fairness in the Due Process Model*, 36 *LAW & SOC. INQUIRY* 237, 238 (2011). Packer himself was disillusioned with this idea. *Id.* at 238, 257.

24. See, e.g., Murray L. Schwartz, Book Review, 21 *STAN. L. REV.* 1277 (1969).

25. See, e.g., Keith A. Findley, *Toward A New Paradigm Of Criminal Justice: How The Innocence Movement Merges Crime Control And Due Process*, 41 *TEX. TECH L. REV.* 133 (2009).

Feeley, who at the time was an emerging voice in criminal courtroom research, argued that the models were not made of the same conceptual cloth.²⁶ While Packer presented the two models as “ideal types,” Feeley argued that, actually, Due Process was a constitutional aspiration, an imperative of how things “should” be, whereas crime control was a descriptive model of how things actually were.²⁷ Albert Alschuler’s review also highlighted this perspective: While the Supreme Court spoke of *Miranda*, *Gideon*, *Douglas*, and *Mapp*, in lower courts it was business as usual, with plea bargaining as the rule and trial as the exception.²⁸

This ethnographic bitterness was well-founded. Since the 1960s, political scientists, sociologists, and law-and-society scholars had been studying lower courts and documenting the everyday practices of plea bargaining. Their findings, unfamiliar perhaps to the doctrinal criminal procedure scholars of the time who focused on Supreme Court cases, did not relegate plea bargains to the realm of the obscure and unrecognized. Instead, they looked at plea bargains as the natural consequence of an adversarial system and the main avenue by which courts disposed of cases in the system.²⁹ While Packer’s models regarded the role of defense counsel as important in trial work, and largely ignored defense counsel’s role in a model consisting of plea bargaining, this ethnographic research uncovered the many important ways in which defense practices and ethics influenced the procurement of guilty pleas.³⁰

B. Revealing Defense Counsel’s Function in Plea Bargaining

As we explain below, classic courtroom ethnography revealed that trials were far from the only setting where defense skills and expertise mattered in the criminal process. In fact, the art of procuring a guilty plea required a high degree of experience and skill, and defense attorneys played a pivotal role in bringing about guilty pleas. Procuring a guilty plea required not only acquaintance with the universe of criminal cases and the “going rates,” but also special

26. Malcolm M. Feeley, *Two Models of Criminal Justice System: An Organizational Perspective*, 7 LAW & SOC’Y REV. 407, 414–15 (1973).

27. *Id.* at 409–11, 417–18.

28. See generally Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652 (1981).

29. Feeley, *supra* note 26, at 416–19. See also Malcolm M. Feeley, *Plea Bargaining and the Structure of the Criminal Process*, 7 JUST. SYS. J. 338 (1982).

30. Feeley, *supra* note 26, at 417–19.

communication skills for addressing both the clients and the prosecutors.³¹ The scholarly approach toward these skills was highly cynical in the 1960s. However, scholars gradually gained a more nuanced understanding of the larger systemic and procedural forces that produced plea bargaining.³²

i. 1960s-1970s: "You Get What You Pay For"

The early era of courtroom ethnography laid a great deal of blame for the prevalence of plea bargaining on the shoulders of defense attorneys, particularly public defenders. The main concern presented in this era's literature is that the fee structure of attorneys is largely responsible for the quality of service provided to clients. Critics reasoned that public defenders, who do not receive their pay directly from the clients, typically prioritize the interests of the system that supports their existence, where they repeatedly encounter prosecutors and judges who value efficiency and speedy case processing. Therefore, they are co-opted into the system and collaborate with its objectives by pressuring defendants to plead out quickly. Private defense attorneys, on the other hand, would plot their case strategy based on their fee structure. In either case, the assumption in the literature is that a guilty plea represents a lesser quality of service than a full criminal trial.

David Sudnow's *Normal Crimes*, which highlighted the dramatic difference between the theory and practice of criminal law, was one of the earliest works to expose not only how defense attorneys gauged the value of their case, but also how they presented that case to prosecutors.³³ Sudnow conducted empirical observations of plea negotiations between district attorneys and public defenders, listening closely to the way defense attorneys described the cases to their colleagues. What mattered for plea bargaining negotiations, Sudnow concluded, was not the legal definition of the offense, but rather the

31. See generally David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, 12 SOC. PROBS. 255 (1965).

32. Of course, some of this has to do with the possible objective improvement of defense quality, but that is difficult to measure. Debra Emmelman's writing inspires this analysis. See generally, e.g., Debra S. Emmelman, *Past Present and Future: Research into Advocacy for Criminal Defendants*, Address at the New Directions in Criminal Courtroom Research Conference, Tel Aviv University (May 16–17, 2007), <http://www.tau.ac.il/law/events/16-17-05-07/DebraSEmmelman.doc>; Debra S. Emmelman, *Trial by Plea Bargain: Case Settlement as a Product of Recursive Decisionmaking*, 30 LAW & SOC'Y REV. 335 (1996).

33. See generally Sudnow, *supra* note 31.

real-world pattern according to which it was committed.³⁴ Defense attorneys developed an expertise in classifying and describing their cases according to these patterns, acknowledging similarities between groups of cases and conceptualizing them as “normal crimes” of a particular type.³⁵ For example, a defense attorney negotiating a burglary case would not argue with the prosecutor over whether the client had satisfied the breaking and entering element. Rather, the defense attorney would highlight the features of the burglary that merited leniency, such as the context of the burglary (for example, a drug addict stealing cheap electronics to support his/her habit—similar to many such drug addicts and thus deserving of a similar penalty as the one imposed in a typical case of that category). When the prosecutors shared the expertise of seeing many similar cases, there would also be a shared understanding of the appropriate disposition of the “normal crime,” which would facilitate the bargain.³⁶ Most cases were “normal crimes,” that is, they could be classified according to these repetitive features, and so their disposition became simple, leaving only the abnormal, unusual cases for trials.³⁷ While Sudnow’s writing is objective in tone, the conclusions of the study imply that defense attorneys are more likely to pay attention to the few unique cases, while treating all “normal crimes” in a cursory, abbreviated fashion.³⁸

Even more scathing was Abraham Blumberg’s *The Practice of Law as a Confidence Game*, in which he argued that defense attorneys pressured and deceived clients into pleading guilty.³⁹ Blumberg argued that, in presenting a plea bargain to the client, defense attorneys tended to highlight the bleak chances at trial and the attractiveness of the plea, essentially “selling” a bargain to the

34. *Id.*

35. The practice of superficially classifying criminal cases by type, rather than analyzing case facts in detail, continues today. Recently, in a *New York Times* article about caseloads in public defense, defense attorney Arthur J. Jones “said he wished he had more time to investigate cases and could go to trial more often, rather than accepting the police version of events and then, after a short discussion, helping his clients make a life-altering deal.” Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1, available at <http://www.nytimes.com/2008/11/09/us/09defender.html?pagewanted=all>.

36. See generally Sudnow, *supra* note 31.

37. *Id.*

38. *Id.*

39. Abraham Blumberg, *The Practice of Law as Confidence Game: Organizational Co-optation of a Profession*, 1 LAW & SOC’Y REV. 15, 28–29 (1967).

client against his or her interest.⁴⁰ An important aspect of Blumberg's argument pertained to "fee collection and fixing."⁴¹ Private attorneys, who depend on fees paid by the client, structure their decisions of whether to go to trial or to pressure their clients into a plea based on their estimate of the likelihood and ease of obtaining their fees.⁴² Blumberg's analysis was far from methodical and he based it mostly on his observations as a practitioner.⁴³ However, Alschuler's more rigorous study of defense practices, which was more rigorous, came to a similar conclusion.⁴⁴ Comparing various systems of public and private defense, Alschuler concluded that any type of fee structure had inherent biases that steered attorneys away from trials and toward pressuring their clients to plead guilty.⁴⁵

While these grim assessments of defense quality in plea bargaining targeted private and public defense attorneys alike, some argued that the public defense system was particularly in need of reform. Anthony Platt and Randi Pollack's 1974 study of public defenders' careers, consisting of semi-structured interviews, revealed a great deal of dissatisfaction.⁴⁶ Most of the public defenders they interviewed saw their position as training for private practice, and those who stayed for more than an average of two and one-half years did so out of inertia and lack of drive. The ones who left the system reported feeling "burned out" and embittered.⁴⁷ This notion that public defense is merely a fig leaf, constructed more to protect the system and cover its flaws than to provide indigent clients with quality representation, was repeated in Gregg Barak's *In Defense of the Rich: The Emergence of the Public Defender*.⁴⁸ Barak maintained that the public defender system was a product of market capitalism—it oppresses the poor, and it maintains class interests by providing indigent defendants with flawed representation while allowing the rich to circumvent the low standards of justice in their ability to

40. *Id.* at 29.

41. *Id.* at 24–29.

42. *Id.*

43. *Id.* at 18.

44. See Alschuler, *supra* note 28, at 716–23.

45. *Id.* at 721.

46. Anthony Platt & Randi Pollock, *Channeling Lawyers: The Careers of Public Defenders*, 9 *ISSUES IN CRIMINOLOGY* 1(1974).

47. Debra S. Emmelman, *Past Present and Future: Research into Advocacy for Criminal Defendants*, *supra* note 32, at 2.

48. Gregg Barak, *In Defense of the Rich: The Emergence of the Public Defender*, 3 *CRIME & SOC. JUST.* 2 (1975).

obtain their own attorneys.⁴⁹ The tendency toward mass plea bargaining for indigent defendants, Barak argued, was merely an expression of this design.⁵⁰ This enabled the more affluent clients, represented by private attorneys, to benefit from full adversarial trials.⁵¹

ii. *1970s–1980s: The Process Is the Punishment*

The early studies of lower courts influenced a “golden age” of courtroom ethnography in the 1970s and 1980s, which was less tied to the instrumental Marxist perspectives and less cynical about defense attorneys. What characterizes literature of this era is that it places defense practices in the broader organizational context of the courtroom, and particularly that it considers plea bargaining as the function of an interaction between the various actors in the system.⁵² As opposed to the literature from the 1960s, which saw plea bargains as a travesty perpetuating injustice on a massive scale, this ethnography saw plea bargains as the logical extension and corollary of the adversarial system.⁵³

In their seminal 1977 work *Felony Justice*, James Eisenstein and Herbert Jacob referred to trials as “slow pleas.”⁵⁴ In comparing case disposition in various jurisdictions, they explained that the main factor in determining courts’ handling of cases was the interaction and decisionmaking process of the courtroom workgroup: the judiciary, the prosecution, and the defense.⁵⁵ Any differences in case processing and outcomes resulted from “complex interactions among members of the courtroom workgroup as it operated in a particular organizational environment governed by local and State ordinances, laws, rules, and traditions.”⁵⁶ Among other factors, they focused on the quality of working relationships, the amount of authority and freedom actors had within each part of the workgroup, and the general climate in the city.⁵⁷ Trials were more frequent in cities in

49. *Id.*

50. *Id.*

51. *Id.*

52. See generally MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (Russell Sage Found., 1979).

53. *Id.*

54. JAMES EISENSTEIN & HERBERT JACOB, *FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS*, at v (Univ. Press of Am., 1977).

55. *Id.* at 37, 63.

56. Emmelman, *supra* note 32, at 5.

57. See generally EISENSTEIN & JACOB, *supra* note 54.

which working relationships were less conducive to plea bargaining, and in which the existing culture was less cooperative.⁵⁸

The definitive analysis of the era is Malcolm Feeley's classic work, *The Process Is the Punishment*.⁵⁹ As the title implies, Feeley's study of the New Haven lower courts suggested that defendants plead guilty *en masse*—not out of fear of severe punishment, but because the trial process was so cumbersome, incomprehensible, and time consuming.⁶⁰ In his chapter on defense attorneys, Feeley showed that their frustration in the work resembled more social work than “real lawyering,” i.e., trial work. Rejecting the theory that mass plea bargains stemmed from the need to regulate the pressure valve of heavy caseloads, Feeley argued that the process was designed to make trials less attractive, thus aiding defense attorneys in procuring pleas.

The organizational literature was far more forgiving of plea bargains, and sometimes favored plea-heavy jurisdictions over their more litigious counterparts. Pamela Utz, who compared case disposition in two counties, found that the differences in discretion and negotiation were the product of working relations.⁶¹ One of the counties was more adversarial than the other, which Utz explained as a function of resource availability. Utz concluded that the collaborative county, which yielded more plea bargains, was a better model both in terms of system efficiency and in terms of outcomes for the defendant. That defense attorneys were more willing to negotiate and admit pleas was the product of various factors beyond the quality of representation.

James Eisenstein, Roy Flemming, and Peter Nardulli compared nine criminal court jurisdictions in three states, focusing their explanation of the differences on the distinctions between communities.⁶² They found, again, that the rate and style of plea negotiations had to do with the attitudes of—and relationships between—court actors, the legal culture of different courts, and the broader context of the community and its culture (such as, notably,

58. *Id.* at 239.

59. See generally FEELEY, *supra* note 52.

60. In the 1970s, punishment for misdemeanors in lower courts was fairly lenient and often consisted of fines and/or probation.

61. PAMELA J. UTZ, *SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL COURT* (1978).

62. P. NARDULLI, J. EISENSTEIN & R. FLEMMING, *THE TENOR OF JUSTICE: CRIMINAL COURTS AND THE GUILTY PLEA PROCESS* (1988).

the size of the court community).⁶³ Peter Nardulli's *The Courtroom Elite* also placed defense attorneys in the context of their working environments, analyzing their roles in relation to prosecutors and judges.⁶⁴

iii. *1980s and Onward: Defense and Plea Bargaining in Cultural Perspective*

Many newer studies of defense counsel behavior in the context of plea bargaining tend to continue the trend of empathy and understanding for the bigger context in which defense attorneys operate. These studies tend to be even less critical of defense attorneys' performance, praising their commitment to their clients, empathizing with the serious economic constraints and reputational challenges they face, and approaching plea bargains as acceptable methods of case disposition that highlight and require important professional skills.

Lynn Mather's ethnography of defense attorneys examined how public defenders decide on case disposition strategy.⁶⁵ She found that they primarily weighed two sound and legitimate factors: the evidentiary strength of the prosecution's case and the expected severity of the sentence, which they calculated as a function of the seriousness of the charge and the defendant's criminal record. In comparing how private and public defenders operated, she found comparable quality of decisionmaking. Similarly, Debra Emmelman found that a law firm that provided representation to the indigent under a contract with the county operated similarly, by calculating the "value of the case" based on legitimate factors of severity of the offense and quality of the evidence.⁶⁶

63. *Id.* ch. 10. The "court community" perspective views the court as a social world, consisting of workgroups and regular players that establish routines of social interaction. Factors such as the relationships between courtroom participants (such as prosecutors, defenders, and judges) and local cultural norms can create geographic variations in case outcomes. Xia Wang, *Criminal Justice Sentencing in Context: The Effect of Social Environment on Courtroom Decision-making* (Apr. 1, 2008), at 9 (unpublished Ph.D. dissertation, Florida State University), available at <http://diginole.lib.fsu.edu/etd/1260/>.

64. PETER F. NARDULLI, *THE COURTROOM ELITE: AN ORGANIZATIONAL PERSPECTIVE ON CRIMINAL JUSTICE* (1978).

65. LYNN MATHER, *PLEA BARGAINING OR TRIAL? THE PROCESS OF CRIMINAL CASE DISPOSITION* (1979).

66. Debra S. Emmelman, *Gauging the Strength of Evidence Prior to Plea Bargaining: The Interpretive Procedures of Court-Appointed Defense Attorneys*, 22 *LAW & SOC. INQUIRY* 927 (1997).

Douglas Maynard's linguistic study of plea negotiations provided further confirmation that defense attorneys' approach to plea bargaining consisted of predicting how the default option of a trial would go.⁶⁷ Maynard found that plea negotiations seldom took the form of open-air marketplace haggling, in which parties threw possible sentences at each other. More often, the negotiations consisted of contrasting descriptions of the defendant's character and role in the alleged events, moving toward a shared narrative and a consensus about the case's objective "worth."

In his 1986 ethnography of public defenders, Roy Flemming countered Blumberg's accusation that defense attorneys tended to coerce or "con" their clients into pleading guilty.⁶⁸ Flemming found that, in order to win their clients' confidence and avoid later client bitterness about the process, which could yield accusations of professional incompetence, public defense attorneys played an advisory role rather than a stronger, more insistent, recommendatory role. As a result, rather than feeling powerless and disenfranchised, indigent clients were more involved in making decisions about their own cases.

Another empathetic perspective on defense function was Lisa McIntyre's analysis of interviews with defense attorneys.⁶⁹ McIntyre argued that public defenders were as effective in representing clients as private attorneys, even though they continuously suffered from a "stigma of ineptitude." The court system perpetuated the notion that one "got what one paid for," and placed public defenders in a tough spot: While their actual professional performance placed them in constant need to challenge the system and its legitimacy, this performance was not reflected in their perception by other actors, including their own clients, leaving them in "the shadow of disrepute."

Debra Emmelman's *Justice for the Poor*, published in 2003 but based on fieldwork from the late 1980s, examined a law firm contracting with the county to provide indigent legal defense.⁷⁰

67. DOUGLAS MAYNARD, *INSIDE PLEA BARGAINING: THE LANGUAGE OF NEGOTIATION* (1984). See also Douglas W. Maynard, *Narratives and Narrative Structure in Plea Bargaining*, 22 *LAW & SOC'Y REV.* 449 (1988).

68. Roy B. Flemming, *Client Games: Defense Attorney Perspectives on Their Relations with Criminal Clients*, 1986 *AM. B. FOUND. RES. J.* 253 (1986).

69. LISA MCINTYRE, *THE PUBLIC DEFENDER: THE PRACTICE OF LAW IN THE SHADOWS OF REPUTE* (1987).

70. DEBRA S. EMMELMAN, *JUSTICE FOR THE POOR: A STUDY OF CRIMINAL DEFENSE WORK* (2003).

Emmelman's impressions were that defense attorneys were not the cynical "con men" Blumberg described, but rather idealistic and zealous advocates for their clients. Their advice to clients to plead guilty stemmed not from selfish calculation, but from the fact that the defendants, indigent and disenfranchised, were going to suffer serious disadvantages at trial.

A recent and particularly interesting example of this evolving, and more forgiving, perspective on defense attorneys in procuring guilty pleas is Kuo-Chang Huang, Kong-Pin Chen and Chang-Chin Lin's study of defense practice in Taiwan.⁷¹ Huang, Chen and Lin took advantage of a legal reform in Taiwan, which phased out the respectable and powerful public defender system to one that randomly assigned clients to public defenders or private attorneys under a legal-aid contract.⁷² Using trial data from 2004 to 2007, Huang et al. found that while public defenders and government-contracted legal aid attorneys performed comparably in terms of quality, they tended to adopt different litigation strategies.⁷³ Specifically, the defendants whom public defenders represented tended to have higher conviction rates, but received shorter sentences upon conviction.⁷⁴ In Taiwan, where reliance on plea bargaining is much less than in the U.S., this consisted less of negotiating tactics and more of securing judicial leniency.⁷⁵ One of the notable things about the study is that Huang et al. explained these findings by appealing to different notions of professionalism: Public defenders thought of their role as more holistic, aimed at helping clients sort out their lives and solve their problems beyond the trial.

This benign explanation stands in stark contrast to the literary assumptions of the classic studies of the 1960s and 1970s. Those studies saw plea bargaining as a professionally inferior strategy. This shift indicates the changed perception, not only of plea bargaining, but also of public defender systems and defense functions.

71. Kuo-Chang Huang, Kong-Pin Chen & Chang-Ching Lin, *Does the Type of Criminal Defense Counsel Affect Case Outcomes? A Natural Experiment in Taiwan*, 30 INT'L REV. L. & ECON. 113 (2010). The differences between the Taiwanese and American systems are, of course, not without importance: Taiwan relies much less than the United States on plea bargaining, and guilty pleas are for the most part presented to the judge as part of an overall appeal for leniency in sentencing.

72. *Id.* at 114.

73. *Id.* at 122.

74. *Id.*

75. *Id.* at 122-23.

The empirical literature on defense attorneys, therefore, has gradually moved away from wholesale condemnation of defense attorneys for their tendency to plea bargain, to a more empathetic perspective. Newer approaches tend to be more sympathetic to the organizational and cultural constraints under which defense attorneys operate. These approaches accept plea bargaining as a legitimate litigation strategy, which sometimes serves the client better than going to trial. One could attribute this change to an improvement in the quality of defense in general, and public defense systems in particular, or to a less critical and more nuanced scholarly approach, or to both.⁷⁶ Notably, this research predates the public defense crisis wrought by the financial crisis of 2008, which led to several lawsuits brought by public defense offices arguing that their depleted resources did not allow them to provide personalized quality representation to clients.⁷⁷ These serious constraints raise the question of whether judicial or ethical review of defense performance in plea bargaining is possible.

C. The Legal Context: Charge Bargaining, Opacity, and Truth

One of the main challenges in assessing defense attorney performance in plea bargaining is that plea negotiations, in contrast with trial performance, are often opaque and therefore immune from critique. As Wright and Miller argue, the shift toward determinate sentencing, which resulted in more severe sentencing across the board, divested judges and parole boards of their former broad discretion.⁷⁸ This shift relegated such discretion not only to the creators of the sentencing structure (legislatures and sentencing commissions), but also to prosecutors who, as the charging authority, could almost singlehandedly determine the sentence by their choice of charge.⁷⁹

The result has been to place prosecutors in “the key administrative role, as . . . quasi-judge[s],” and have adapted to determinate sentencing, bypassing the severe limitations that rigid sentences and mandatory minimums create, and bargaining in charges

76. See, e.g., Scott Wallace & David Carroll, *The Implementation and Impact of Indigent Defense Standards*, 31 S.U. L. REV. 245 (2004).

77. See, e.g., Eckholm, *supra* note 35.

78. Wright & Miller, *supra* note 8. For a critique of this sentencing structure from a judicial perspective, see generally Kate Stith & Jose A. Cabranes, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* (1998).

79. See generally Wright & Miller, *supra* note 8.

instead.⁸⁰ For this reason, most plea bargaining has moved away from a model of “sentence bargaining”—agreeing on a mutually acceptable sentence to present to the judge who, in an era of determinate sentencing, has little sentencing discretion anyway—especially with regard to felonies. Instead, plea bargaining has shifted toward “charge bargaining,” which consists of agreeing on a different charge, or fewer charges, carrying a lesser sentence on the rigid sentencing grid. Because of the prevalence of charge bargaining, the map of criminal convictions does not necessarily reflect the initial charges, but rather the compromise obtained through the bargain. An opaque system, impermeable to criticism, produces these convictions.⁸¹ As Wright and Miller explain, “the public cannot tell the difference between reasonable and unreasonable charge bargains. Nobody can know after the fact which bargains are ‘good’ bargains, based on sound reasons, and which ones are ‘bad’ bargains, reflecting overcharging or sloppiness by the prosecutor or undue pressures created by dramatic plea/trial sentencing differentials.”⁸²

The federal appellate system’s difficulty identifying pleas that are the product of “manipulation” or “circumvention” of the federal sentencing guidelines, in violation of the federal sentencing rules, exacerbates the difficulty of *ex post facto* assessment of plea bargaining in general. Early research conducted on the issue “suggested that 20% to 35% of all bargains were the product of ‘circumvention’”⁸³ and found that the primary problem with circumvention of sentencing guidelines is its hidden and unsystematic nature.⁸⁴ While Wright and Miller focus on the difficulties in reviewing prosecutorial behavior, their arguments are relevant to defense attorneys as well. The confusion that charge bargaining and

80. *Id.* at 1417.

81. See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE (2010), tbl. 5.22.2010, available at <http://www.albany.edu/sourcebook/pdf/t5222010.pdf> (indicating that 97.4% of all convictions in U.S. district courts were obtained through guilty pleas). See also SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE (2006), tbl. 5.46.2006, available at <http://www.albany.edu/sourcebook/pdf/t5462006.pdf> (indicating that 94% of all felony convictions in U.S. state courts were obtained through guilty pleas).

82. Wright & Miller, *supra* note 8, at 1411.

83. 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, 1312 (1997).

84. Access to prosecutors’ case files made this research possible. Replicating this study would require the United States State Department’s permission, which the State Department is unlikely to grant, to access to their files to allow further research. Wright & Miller, *supra* note 8, at 1411–12 n.8.

“circumvention” create makes it difficult to trace the considerations on the defense side as well.

Not all criminal justice analysts agree that charge bargaining has been universally bad for the defense. Notably, Judge Gerard Lynch claims that in an administrative system, the best opportunity for the defense to test the prosecutor’s initial impression of a case occurs during the plea process.⁸⁵ Lynch maintains that the defense’s opportunity to present evidence, challenge the prosecutor, and argue defenses and mitigating circumstances remains strongest during plea negotiations.⁸⁶ As a result, Lynch considers charge bargaining a powerful tool for the defense and opposes efforts to diminish its viability.⁸⁷

Wright and Miller respond to Lynch’s opposing view by pointing out that his idealist view of plea negotiations does not resemble reality in most places. “In state systems, and especially in the high-volume systems of urban areas, defense attorneys have far less time and money to devote to each criminal defendant.”⁸⁸ In order to achieve any level of transparency, Wright and Miller argue, the shifting charges resulting from charge bargaining must cease and prosecutors’ decisions to bring particular charges must merit some objective meaning.

The system of plea bargaining requires that a particular charge, against a particular defendant and based on a particular set of facts, be “worth” a specific range of sentence severity. Awarding a “value” to criminal charges places the system of plea bargaining into a kind of marketing system. Just as marketing systems can vary in their operation, so too can the plea bargaining system. For instance, some markets expect people to “haggle,” as in an open-air “bazaar,”⁸⁹ while other markets expect consumers to pay the asking price, as in a supermarket.

85. “Judge Lynch has served on the United States District Court for the Southern District of New York since 2000. He has on several occasions worked as a federal prosecutor in the Southern District, including two years spent as chief of the criminal division on leave from his professorship at Columbia. He has also served as defense counsel in federal and state cases.” Wright & Miller, *supra* note 8, at 1409 n.2.

86. *Id.* at 1409–1414.

87. *Id.* at 1413.

88. *Id.* at 1414.

89. See John Kaplan, *American Merchandising and the Guilty Plea: Replacing the Bazaar with the Department Store*, 5 AM. J. CRIM. L. 215, 218 (1977) (referring to the plea bargaining table as a “bazaar,” to describe the free-form negotiations and the moral neutrality ascribed to the players therein).

Lynch uses this analogy and argues that plea systems motivated by charge bargaining do not reach for unrealistic “values” with the hope of splitting the difference. In other words, Lynch seems to view the current plea bargaining system, which relies heavily on charge bargaining, as a parallel to the supermarket model: A defendant (“consumer”) receives an objective “bang for his buck.” Wright and Miller point out flaws in this analogy and seem to equate the current plea bargaining system with a system of haggling, where “consumers” receive a wide range of offers for the same product. They further distinguish Lynch’s analogy by inferring that, in the current system of plea bargaining, “consumers” have no way to compare the “values” of their cases, because the lack of transparency in the prosecutorial choice of a charge, as well as the intricate defense expertise in navigating the aisles of the “supermarket of charges,” prevent any meaningful review.

Regardless of whether plea bargaining, and charge bargaining in particular, is a necessary evil or an extension of the adversarial process, negotiation requires a different set of skills than litigation. The Supreme Court and many lower courts have addressed specific aspects of defense practice in plea bargaining through the mechanism of ineffective assistance of counsel—a post-conviction assessment of the quality of representation and its impact on the outcome of the case.⁹⁰ Professional associations have also attempted to provide some guidelines for plea bargaining. It is to these regulatory mechanisms that we now turn.

II. Regulating Defense Quality Through Courts: Ineffective Assistance of Counsel

The problems involved in providing counsel during the plea bargaining process remained the provenance of social scientists until the mid-1980s, when the Supreme Court became interested in the quality of defense as a post-conviction argument. Not long after the landmark decision in *Strickland v. Washington*,⁹¹ the Court applied its lessons to plea bargaining. However, twenty-five years would pass before the Court fleshed out its specific expectations from defense attorneys in the negotiation process, as well as its opinion on the

90. See, e.g., *Strickland v. Washington*, 466 U.S. 668 (1984) and the subsequent cases described below that have relied on its holdings.

91. *Strickland*, 466 U.S. 668 (1984).

appropriate remedies for inadequate defense in the context of negotiation.

A. The *Strickland* Standard and Its Progeny

i. *The Performance and Prejudice Prongs*

Since its issuance, the Supreme Court's decision in *Strickland v. Washington* has been the touchstone to determine claims of ineffective assistance of counsel.⁹² The constitutional basis for a petition for a writ of habeas corpus challenging a criminal conviction based on ineffective assistance of counsel, has two elements. The first element is that the defendant's legal representation fell below the minimum standards inherent in the Sixth Amendment right to counsel.⁹³ The second element is that, having no effective assistance of counsel, the trial was therefore fundamentally unfair,⁹⁴ thereby violating the defendant's Fifth Amendment⁹⁵ and Fourteenth Amendment⁹⁶ rights to due process of law.⁹⁷

In *Strickland*, the trial judge sentenced the defendant, David Leroy Washington, to death after Washington pleaded guilty to three

92. "Ineffective assistance of counsel claims are governed by the settled doctrine of *Strickland v. Washington*." 27 MOORE'S FEDERAL PRACTICE – CRIMINAL PROCEDURE § 644.61[1] (2014).

93. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."). An indigent criminal defendant's right to court-appointed legal counsel at trial was established in *Gideon v. Wainwright*, 372 U.S. 335 (1963). The Supreme Court affirmed that the Sixth Amendment guarantees a right to counsel that is not only present, but also competent and effective, in *McMann v. Richardson*, 397 U.S. 759 (1970) (holding that "defendants facing felony charges are entitled to the effective assistance of competent counsel," and that "the right to counsel is the right to the effective assistance of counsel"). *Id.* at 771 n.14.

94. *Strickland*, 466 U.S. at 686 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.").

95. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law.").

96. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law."). *See also* 27 MOORE'S FEDERAL PRACTICE – CRIMINAL PROCEDURE § 644.61[1] ("[D]efendant must demonstrate that the deficient performance was prejudicial to the defense, that counsel's errors were sufficiently serious to deprive the defendant of a fair trial—a trial with reliable results.").

97. The Supreme Court defines "a fair trial" as "one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." *Strickland*, 466 U.S. at 685.

capital murder charges.⁹⁸ Washington's defense neither sought nor presented any psychiatric evidence or character witnesses to support Washington's claims of mitigating circumstances.⁹⁹ The attorney relied instead on Washington's having informally "mention[ed]"¹⁰⁰ the extenuating circumstances surrounding the murders during Washington's plea colloquy with the judge.¹⁰¹ The Supreme Court held that this representation was not deficient, and laid out a two-part test to judge such claims.¹⁰²

First, the Court held that the defendant must prove that his or her attorney's conduct "fell below an objective standard of reasonableness."¹⁰³ Courts determining this standard should be "highly deferential."¹⁰⁴ Prevailing professional norms are useful as guides, but courts must also consider the totality of the circumstances

98. Washington pleaded guilty against his attorney's advice. *Strickland*, 466 U.S. at 672. Although Washington's attorney only represented him at sentencing, not at trial, the Supreme Court, reviewing Washington's habeas corpus petition, considered a capital sentencing hearing to be sufficiently trial-like in its statutory requirements of presentation of aggravating and mitigating factors that the same standards for effective assistance of counsel should apply in the sentencing hearing as at trial. *Id.* at 687.

99. *Id.* at 674.

100. *Id.* at 699.

101. *Id.* at 674. During the sentencing hearing, Washington's attorney relied heavily on Washington's spontaneous guilty plea:

Counsel argued that respondent's remorse and acceptance of responsibility justified sparing him from the death penalty. . . . He further argued that respondent should be spared death because he had surrendered, confessed, and offered to testify against a codefendant and because respondent was fundamentally a good person who had briefly gone badly wrong in extremely stressful circumstances.

Id. at 673-74.

102. Writing for the Court, Justice O'Connor explained,

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687.

103. *Id.* at 688.

104. *Id.* at 689.

“from counsel’s perspective at the time”—rather than reevaluating the facts in hindsight.¹⁰⁵

Second, the Court held that the defendant must demonstrate actual prejudice. Harmless error is not reversible. Therefore, the defendant must show that a reasonable judge or jury—the court assesses such “reasonable fact-finding” by statutory norms, rather than by hypothetical appeals to emotion or by the particular sympathies of any individual judge or jury—would likely have reached a different result if not for the defense lawyer’s errors.¹⁰⁶

The *Strickland* Court carved out two exceptions to the prejudice requirement: “Actual or constructive denial of the assistance of counsel altogether”¹⁰⁷ and defense attorney conflicts of interest.¹⁰⁸ The

105. *Id.* Given the “wide range of reasonable professional assistance[.]” the Court held,

[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. . . . [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.

Id. at 689–91.

106. *Id.* at 694–95. The second prong of the *Strickland* test requires the defendant to prove

[T]hat there is a reasonable probability that, but for counsel’s unprofessional errors, . . . the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence . . . , the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.”

Id. The Court elaborated, “[a] reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, . . . should not be considered in the prejudice determination.” *Id.*

107. *Id.* at 692 (citing *United States v. Cronin*, 466 U.S. 648, 659 (1984), in which the Supreme Court held that where “the accused is denied counsel at a critical stage of his trial[, or] . . . counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing,” the defendant need not prove actual prejudice. The *Cronin* Court added that proof of actual prejudice was unnecessary where, “the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” *Cronin*, 466 U.S. at 659–60.). The *Cronin* court reiterated, nonetheless, that in almost all cases, “because we presume that the lawyer is competent to provide the guiding hand that the defendant needs, . . . the burden rests on the accused to demonstrate a constitutional violation.” *Cronin*, 466 U.S. at 658.

Court added, however, that such cases of actual or constructive denial of counsel would be “easy to identify and . . . prevent,” and therefore exceedingly rare.¹⁰⁹

ii. *The AEDPA Requires Appellants to Show That State Courts Unreasonably Applied Strickland*

The U.S. Congress cemented a draconian rule when it passed the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).¹¹⁰ The AEDPA modified the Federal Habeas Corpus Statutes¹¹¹ to limit post-conviction habeas corpus relief to reversal of final state court rulings that run “contrary to, or . . . unreasonabl[y] appl[y] . . . clearly established Federal law, as determined by the Supreme Court of the United States.”¹¹² This effectively prohibits federal district and circuit courts of appeal from granting habeas petitions that fail to meet the strict Supreme Court standards expressed in *Strickland* and its progeny.¹¹³

In several cases, the Supreme Court has elaborated upon *Strickland*. For example, in *Wiggins v. Smith*,¹¹⁴ the Court referred to the American Bar Association Guidelines¹¹⁵ to determine the minimal

108. The Court cautioned, however, that “[p]rejudice is presumed only if the defendant demonstrates that counsel ‘actively represented conflicting interests’ and that ‘an actual conflict of interest adversely affected his lawyer’s performance.’” *Strickland*, 466 U.S. at 692 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348, 350 (1980)).

109. *Strickland*, 466 U.S. at 692.

110. Pub. L. No., 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 22, 28, 48 U.S.C.) (specifically, “Habeas Corpus Reform,” tit. 1, sec. 104, codified at 28 U.S.C. § 2254(d)-(i)).

111. 28 U.S.C. §§ 2241–66.

112. 28 U.S.C. § 2254(d)(1).

113. See, e.g., *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011); *Wiggins v. Smith*, 539 U.S. 510, 520 (2003) (citing 28 U.S.C. § 2254(d)(1), added by AEDPA); Anthony E. Rufo, *Opportunity Lost?—The Ineffective Assistance Doctrine’s Applicability to Foregone Plea Bargains*, 42 SUFFOLK U. L. REV. 709, 720–21 (2009).

114. *Wiggins*, 539 U.S. 510.

115. The *Wiggins* Court illustrated,

The ABA Guidelines provide that investigations into mitigating evidence “should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.” . . . [These include] medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences. . . . “The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing”

considerations necessary for an attorney's conduct to meet the *Strickland* standard of "reasonableness under prevailing professional norms."¹¹⁶

Retreating from the *Wiggins* expansion of *Strickland* protections, in *Harrington v. Richter*, the Supreme Court raised the *Strickland* bar for actual prejudice (that, absent counsel's unprofessional errors, defendant would have been "reasonably likely"¹¹⁷ to receive a different trial result) nearly to the "preponderance of the evidence"¹¹⁸ level initially rejected in *Strickland*.¹¹⁹ Furthermore, *Harrington* interpreted the AEDPA to prohibit federal courts from applying their own *Strickland* analysis to state supreme court decisions, requiring them instead to consider only "whether the state court's application of the *Strickland* standard was unreasonable."¹²⁰

Furthering the Court's AEDPA deference to state court interpretations of *Strickland*, in *Schiro v. Landrigan*, the Supreme Court denied *Strickland* relief where the defendant had refused to allow his attorney to present mitigating evidence at trial.¹²¹ The

Id. at 524–25 (emphasis omitted) (citing ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES §§ 11.4.1(C), 11.8.6 (1989); 1 ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1, cmt. 4-55 (2d ed.1982)).

116. *Wiggins*, 539 U.S. at 521.

117. *Strickland v. Washington*, 466 U.S. 668, 696 (1984).

118. *Id.* at 694.

119. *Harrington v. Richter*, 131 S. Ct. 770, 792 (2011) ("*Strickland* . . . does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.' . . . The likelihood of a different result must be substantial, not just conceivable.").

120. *Id.* at 785. "For purposes of [28 U.S.C.] § 2254(d)(1) [under the AEDPA], 'an *unreasonable* application of federal law is different from an *incorrect* application of federal law.' A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Id.* (citation omitted). The Court elaborated,

The standards created by *Strickland* and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so The *Strickland* standard is a general one, so the range of reasonable applications is substantial. . . . When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Id. at 788 (internal citations omitted). For a student note analyzing the arguments that the state and the defendant raised, as viewed through the filter of the AEDPA, see generally Kara Duffie, Note, *Harrington v. Richter: AEDPA Deference and the Right to Effective Counsel*, 6 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 54 (2011).

121. *Schiro v. Landrigan*, 550 U.S. 465, 478 (2007) (It was "not objectively unreasonable for [the Arizona State] court to conclude that a defendant who refused to

Schriro Court further barred the defendant from raising arguments in his federal habeas petition that he had not fully developed in state court.¹²²

B. *Hill v. Lockhart* Applies *Strickland* to the Plea-Bargaining Context

i. *Hill* Requires a Defendant to Show That, but for Defense Counsel's Ineffective Assistance, the Defendant Likely Would Have Rejected the Proffered Plea Deal

In *Hill v. Lockhart*, the Supreme Court held that “the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.”¹²³ That is, the defendant must first show that his or her decision to plead guilty was not truly “voluntary and intelligent”¹²⁴ because it was based on counsel’s advice that fell outside “the range of competence demanded of attorneys in criminal cases”¹²⁵ and “fell below an objective standard of reasonableness.”¹²⁶ Second, the *Hill* Court required the defendant to “show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”¹²⁷

Hill holds that, to be relevant to the determination of “prejudice,” a reasonably competent defense attorney’s assessment of the risks and benefits of going to trial must have influenced the defendant’s decision of whether to go to trial when that trial would reasonably result in an acquittal.¹²⁸ The *Hill* Court further considered

allow the presentation of any mitigating evidence could not establish *Strickland* prejudice based on his counsel’s failure to investigate further possible mitigating evidence.”).

122. The *Schriro* Court elaborated that, even if “Landrigan’s decision not to present mitigating evidence [was not] ‘informed and knowing,’ . . . Landrigan failed to develop this claim properly before the Arizona courts, and [28 U.S.C.] § 2254(e)(2) [under the AEDPA] therefore barred the District Court from granting an evidentiary hearing on that basis.” *Id.* at 479 (internal citations omitted).

123. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). The Court reaffirmed this judgment in *Iowa v. Tovar*, 541 U.S. 77, 81 (2004), holding that “[t]he entry of a guilty plea, whether to a misdemeanor or a felony charge, ranks as a ‘critical stage’ at which the [Sixth Amendment] right to counsel adheres.”

124. *Hill*, 474 U.S. at 56.

125. *Id.* (citing *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

126. *Id.* at 57 (citing *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984)).

127. *Id.* at 59.

128. Writing for the Court, Justice Rehnquist explained,

In many guilty plea cases, the “prejudice” inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where

counsel's erroneous advice regarding potential sentencing and parole outcomes to be irrelevant to the "prejudice" inquiry because those sentencing factors did not bear directly on the likelihood of conviction.¹²⁹

ii. *Subsequent Cases Narrow Hill to Preserve State Court Convictions by Plea*

Several Supreme Court cases narrow and clarify *Hill's* application of *Strickland* in plea-bargaining contexts, particularly to avoid "too easily set[ting] aside" a guilty plea, thereby "erod[ing]" the plea's penological purposes of "[a]cknowledging guilt and accepting responsibility."¹³⁰

In *Premo v. Moore*, for example, the Court held that, even though defense counsel failed to move to suppress Randy Moore's inadmissible confession to police before advising him to plead no contest to felony murder,¹³¹ counsel's advice was nonetheless reasonable because the prosecution could still have developed other, admissible evidence against the defendant.¹³² *Premo* affirms the gravity and complexity of plea negotiations that a court must analyze when applying *Strickland*, reiterating that "[t]he art of negotiation is

the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination . . . will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea . . . [based on] whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.

Id.

129. *Id.* at 60.

130. *Premo v. Moore*, 131 S. Ct. 733, 741 (2011). Analyzing results of habeas petitions after pleas accepted or declined based on ineffective assistance of counsel, Anthony Rufo explains, "the relief for a plea bargain accepted due to ineffective assistance is equivalent to the relief generally provided for claims of ineffective assistance at trial—vacating the plea with an opportunity for authorities to pursue a new trial." Rufo, *supra* note 113, at 718 n.75.

131. *Premo*, 131 S. Ct. at 744 ("A defendant who accepts a plea bargain on counsel's advice does not necessarily suffer prejudice when his counsel fails to seek suppression of evidence, even if it would be reversible error for the court to admit that evidence.").

132. *Id.* at 742 ("Moore's prospects at trial were . . . anything but certain." The Court infers that the certainty in a guilty plea is not sufficiently different from the uncertainty of trial to establish prejudice under *Strickland*.)

at least as nuanced as the art of trial advocacy and it presents questions farther removed from immediate judicial supervision.”¹³³

In *Breard v. Greene*, the Supreme Court denied habeas relief under *Hill* to Angel Francisco Breard, a Paraguayan national sentenced to death in Virginia.¹³⁴ Breard claimed that the state should have informed him of his right to consular assistance, pursuant to the Vienna Convention on Consular Relations,¹³⁵ before he made his decision to forgo the state’s offer of a guilty plea.¹³⁶

Another decision, *United States v. Dominguez Benitez*, although not directly referencing *Hill*, does nonetheless significantly limit the *Strickland* analysis in the plea-bargaining context. In *Dominguez Benitez*, the Supreme Court denied habeas relief under *Strickland* to a non-English-speaking defendant;¹³⁷ the federal district court had failed to warn the defendant that he had no right to withdraw the plea if the court did not follow the recommendation or request that the prosecution had made pursuant to his plea agreement.¹³⁸ Reaffirming the requirement of actual prejudice, as expressed in *Hill*, the Court held that despite this violation of the defendant’s rights under Rule 11 of the Federal Rules of Criminal Procedure, the defendant must nonetheless “show a reasonable probability that, but for the error, he would not have entered the plea.”¹³⁹ The Court conceded that the

133. *Id.* at 741. The *Premo* Court explained,

The opportunities . . . include pleading to a lesser charge and obtaining a lesser sentence, as compared with what might be the outcome not only at trial but also from a later plea offer A risk . . . is that an early plea bargain might come before the prosecution finds its case is getting weaker An attorney often has insights borne of past dealings with the same prosecutor or court, and the record at the pretrial stage is never as full as it is after a trial The prospect that a plea deal will afterwards be unraveled when a court second-guesses counsel’s decisions . . . could lead prosecutors to forgo plea bargains that would benefit defendants.

Id. at 741–42.

134. *Breard v. Greene*, 523 U.S. 371, 372 (1998).

135. Vienna Convention on Consular Relations and Optional Protocol on Disputes art. 42, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

136. *Breard v. Greene*, 523 U.S. 371, 377 (1998) (The Court explained that there was no actual prejudice because “Breard decided not to plead guilty and to testify at his own trial contrary to the advice of his attorneys, who were likely far better able to explain the United States legal system to him than any consular official would have been.”).

137. *United States v. Dominguez Benitez*, 542 U.S. 74, 85 (2004).

138. FED. R. CRIM. P. 11(c)(3)(B), located at FED. R. CRIM. P. 11(e)(2) at the time, required the district court to advise the defendant of this risk before allowing him to plead guilty.

139. *Dominguez Benitez*, 542 U.S. at 76.

defendant “was confused about the law that applied to his sentence,” as evidenced by his protestations at his sentencing hearing.¹⁴⁰ However, the Court concluded that it must nonetheless base its decision on the objective facts in the record—which showed the information available to the defendant’s attorney at the time the defendant made his decision—regarding the strength of the defendant’s case, rather than solely on the defendant’s subjective *post hoc* feelings about the value of his plea.¹⁴¹

iii. *Wright v. Patten Bars Federal Courts from Applying Strickland to “Novel Questions”*

In *Wright v. Van Patten*, the Supreme Court denied *Hill* relief to a defendant who had pleaded no contest after a plea hearing in which his attorney had participated only via speakerphone.¹⁴² The Court held that because “[n]o [prior] decision of this Court[] . . . squarely addresses the issue in this case, . . . it cannot be said that the state court unreasonably applied clearly established Federal law. . . . Under the explicit terms of [28 U.S.C.] § 2254(d)(1), therefore, relief is unauthorized.”¹⁴³

The *Wright* Court’s interpretation of the AEDPA¹⁴⁴ presented a Catch-22: It prohibited federal courts (including the Supreme Court) from applying *Strickland* to novel situations, effectively freezing federal *Strickland* jurisprudence at pre-1996 levels. It held that so long as there was no “clearly established”¹⁴⁵ Supreme Court precedent dictating state courts’ application of *Strickland* to “novel questions,”¹⁴⁶ the AEDPA compelled reversal of federal courts’ novel interpretations of *Strickland* granting habeas relief for state court convictions.¹⁴⁷ Furthermore, under *Harrington*, even a federal

140. *Id.* at 85.

141. *Id.* The Court elaborated that, although the case’s strength is relevant to the reviewing court’s assessment of the plea decision’s reasonableness, “[t]he point of the question is not to second-guess a defendant’s actual decision; if it is reasonably probable he would have gone to trial absent the error, it is no matter that the choice may have been foolish.” *Id.*

142. *Wright v. Van Patten*, 552 U.S. 120, 121 (2008).

143. *Id.* at 125–26 (internal citations omitted).

144. 28 U.S.C. § 2254(d)(1) (added in 1996 by AEDPA).

145. *Wright*, 552 U.S. at 126.

146. *Id.* at 122.

147. *Id.* at 126. *See also* Rufo, *supra* note 113, at 721–26 (discussing the circular reasoning and the presumption against retroactivity in the Supreme Court’s application of *Strickland* under the AEDPA).

affirmation of a state court decision would be unlikely to contribute to the development of federal Sixth Amendment jurisprudence because reviewing federal courts could not determine whether a state court's interpretation of *Strickland* was "incorrect"—only whether it was "unreasonable."¹⁴⁸

Because of the AEDPA's stranglehold restricting courts' attempts to apply *Strickland* to novel questions of federal law, defendants' Sixth-Amendment rights in plea-bargaining contexts did not significantly expand until the Supreme Court's recent decisions in *Padilla*, *Lafler*, and *Frye*.¹⁴⁹ These three cases are, therefore, remarkable not only in that they directly address questions pertaining to defense function in plea bargaining, but also in their willingness, in the face of *Strickland* and the AEDPA, to acknowledge deficiencies in defense practice. The Supreme Court's willingness to intervene in these recent cases suggests that the Court has a renewed interest in regulating the quality of defense counsel in the context of plea bargaining. We now turn to these important developments.

C. Collateral Consequences in Plea Bargaining

i. *Padilla and Deportation Consequences*

The first herald of a more exacting Supreme Court policy regarding defense attorney function in plea negotiations arose in a case disputing the collateral consequences of a conviction. One can only fully grasp the full meaning of the ruling in *Padilla* in the context of the Court's consistent reluctance, prior to 2010, to directly address collateral consequences as an issue falling within the responsibilities, not only of defense attorneys, but also of the trial court. For example, in *Brady v. United States*, the Supreme Court created the rule that the Due Process Clause required the trial court to explain only the direct consequences of conviction.¹⁵⁰ This narrow approach to punishment, as Chin and Holmes argue, is immensely problematic in that "collateral consequences can operate as a secret sentence."¹⁵¹ Even if the collateral consequences are

148. *Harrington v. Richter*, 131 S. Ct. 770, 785 (2011).

149. See generally *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *Missouri v. Frye*, 132 S. Ct. 1399 (2012).

150. *Brady v. United States*, 397 U.S. 742, 755 (1970).

151. Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 700 (2002).

[M]uch more severe than the direct consequences, many courts hold that “neither the trial judge nor defense counsel is required to explain the ‘collateral consequences’ of a guilty plea to the defendant,” and therefore “counsel’s failure to advise the defendant of the collateral consequences of a guilty plea cannot rise to the level of constitutionally ineffective assistance.”¹⁵²

Some examples of such severe consequences, which sometimes dwarf the “official” punishment in their severity, include revocation of parole or probation, ineligibility for parole, harsher penalties under repeat offender laws, consecutive rather than concurrent sentencing, civil forfeiture, civil commitment, and sex-offender registration requirements.¹⁵³ Courts routinely deem as “collateral” the effects of convictions on civil status, such as “disenfranchisement, ineligibility to serve on a jury, disqualification from public benefits, and ineligibility to possess firearms. The same is true for deprivations with tremendous practical consequences, such as . . . dishonorable discharge from the armed services and loss of business or professional licenses.”¹⁵⁴ Shockingly, even a defense attorney’s failure to inform a client facing capital charges that a guilty plea to unrelated charges will constitute an aggravating circumstance in the capital case did not rise to the level of unconstitutionally ineffective assistance of counsel.¹⁵⁵ Moreover, the categorical distinction in *Brady* between direct and collateral consequences made it impossible to ask the Court to assess the quality of information provided by the defense attorney regarding collateral consequences on a case-by-case basis, as the *Strickland* standard requires.¹⁵⁶ This meant, practically, that any obligation to explain to the client the collateral consequences of a guilty plea were left to professional ethics standards, unsupported by judicial authority.¹⁵⁷

152. *Id.* (citing *Goodall v. United States*, 759 A.2d 1077, 1081 (D.C. 2000); *United States v. Campbell*, 778 F.2d 764, 768 (11th Cir. 1985)).

153. *Id.* at 705.

154. *Id.* at 705–06.

155. *Id.* at 701 (“The possibility of execution is a mere collateral consequence.”) (noting *King v. Dutton*, 17 F.3d 151, 154 (6th Cir. 1994); *Adkins v. State*, 911 S.W.2d 334, 350 (Tenn. Crim. App. 1994); *Ex parte Morrow*, 952 S.W.2d 530, 536–37 (Tex. Crim. App. 1997)).

156. *Chin & Holmes*, *supra* note 151, at 712.

157. *Id.* The *Strickland* Court explained that “[p]revailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice . . . are guides to determining what is reasonable, but they are only

Indeed, pre-*Padilla* ethical regulation was not blind to the problem of collateral consequences in guilty pleas. As Chin and Holmes state,

The National Prosecution Standards promulgated by the National District Attorneys Association, for example, give ample room for consideration of collateral consequences by prosecutors exercising discretion. The standards note that “[u]ndue hardship caused to the accused,” the “availability of adequate civil remedies,” and the defendant’s waiver of his civil claims “against victims, witnesses, law enforcement agencies and their personnel” may be considered in the decision to charge, to pursue pretrial diversion, or to take a plea.¹⁵⁸

Similarly, the Principles of Federal Prosecution in the *United States Attorney’s Manual* leave ample room to consider collateral consequences. These Principles urge a comprehensive approach to filing charges, including consideration of whether (1) filing the charge would serve the federal interest; (2) the person subject to effective prosecution is in another jurisdiction; and (3) there exists an adequate non-criminal alternative to prosecution.¹⁵⁹ Chin and Holmes argue that “[i]f collateral proceedings are relevant to federal prosecutors, either as add-ons or in lieu of criminal charges, it is hard to see why competent defense lawyers who are negotiating with the government should consider them categorically irrelevant,” as required by the collateral consequences rule established in *Brady*.¹⁶⁰

This approach is consistent with the notion that knowledge of the collateral consequences of a conviction is essential to a competent defense.¹⁶¹ In addition to the obligation to keep one’s client informed

guides.” *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The ABA Standards for Criminal Justice is the only source the Court mentioned by name. *See id.*

158. Chin & Holmes, *supra* note 151, at 720 (citing NATIONAL PROSECUTION STANDARDS, Standards 43.6, 44.4 (Nat’l Dist. Attorneys Ass’n 1991)).

159. U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.220(B) (2d ed. 1997).

160. Chin & Holmes, *supra* note 151, at 721.

161. For example, since *Padilla v. Kentucky*, 559 U.S. 356 (2010), the defense bar and the judiciary have needed to educate themselves rapidly about the complex relationships between the immigration laws and criminal laws. To meet this need, scholars of immigration law, such as U.C. Davis Professor Raha Jorjani, have begun to serve as in-

as to the full implications of a guilty plea, some argue that defense attorneys can use this information as a tool in plea negotiations to influence the court or prosecutor; accordingly, judges and prosecutors have also sought to educate themselves about these potential consequences.¹⁶² Defense counsel can utilize collateral consequences in their effort to persuade the prosecutor to prosecute for a lesser charge or to decline charging altogether by showing “that a conviction would be overly punitive.”¹⁶³

In light of the problematic previous *Brady* rule, however,¹⁶⁴ *Padilla* represented a revolution in Sixth Amendment jurisprudence, particularly with regard to the criminal defense of noncitizens who suffer the disparate impact of ill-advised guilty pleas because of laws requiring automatic deportation pursuant to convictions under a wide swath of otherwise relatively innocuous criminal offenses, such as minor drug charges. Previously, habeas corpus relief for noncitizens facing deportation after having pleaded guilty or no contest to criminal offenses had been limited to those guilty pleas tendered prior to the effective date of the AEDPA.¹⁶⁵ Perhaps because of the obstacles the AEDPA generally poses to the expansion of habeas relief, the *Padilla* Court declined to mention the AEDPA at all.

The case’s sympathetic facts may have influenced the Court’s decision. Jose Padilla, a lawful permanent resident of forty years and an honorably discharged Vietnam veteran, pleaded guilty to distribution of marijuana based on the advice of his defense

house immigration experts to Public Defenders and as trainers for judges in state courts. See *Raha Jorjani*, <http://www.law.ucdavis.edu/Faculty/Jorjani/index.aspx>.

162. For example, a recent course of the National Judicial College, “Sentencing: Issues, Trends and Best Practices” (Reno, Nev., May 8, 2014) taught judges about the potential collateral consequences of convictions and guilty pleas.

163. Judson W. Starr & Valerie K. Mann, *Environmental Crimes: Parallel Proceedings and Beyond*, ALI-ABA Course of Study No. C921, June 20, 1994, available at Westlaw C921 ALI-ABA 1051, 1054. See also Judson W. Starr & Valerie K. Mann, *Beware of the Collateral Consequences of an Environmental Violation*, ALI-ABA Course of Study No. C948, Oct. 27, 1994, available at Westlaw C948 ALI-ABA 753, 755 (“collateral consequences must be included in the calculation of full exposure to liability so the proper level of attention is devoted to the matter because the broad understanding of the consequences collateral to an environmental violation is essential to responsible, effective lawyering” and proposing that “[t]he defending party can affect the likelihood, scope and impact of collateral consequences, and should be proactive in reducing these complicating factors”).

164. *Brady v. United States*, 397 U.S. 742, 755 (1970).

165. See *I.N.S. v. St. Cyr*, 533 U.S. 289, 314–15 (2001) (holding that AEDPA did not retroactively negate noncitizens’ justifiable reliance on their eligibility for a discretionary waiver of deportability, under the former Immigration and Nationality Act sec. 212(c) (1995) (eliminated by AEDPA), when pleading guilty to aggravated felonies).

attorney.¹⁶⁶ Padilla's attorney had advised him that such a criminal conviction would carry no danger of deportation for him, when in fact, it made deportation "virtually mandatory."¹⁶⁷

The Supreme Court held that "constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation," thereby satisfying the first prong of *Strickland*. Under the *Strickland* test's second prong, the Court remanded his case to the state courts to determine whether he suffered actual prejudice in the result of his conviction.¹⁶⁸ The Court reasoned that changes to United States immigration law over the past century had "dramatically raised the stakes of a noncitizen's criminal conviction."¹⁶⁹ The Court held that "as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."¹⁷⁰

This classification of deportation as a "penalty,"¹⁷¹ rather than a mere "collateral consequence"¹⁷² of a guilty plea, is essential. Lower federal courts and state courts have traditionally held that "collateral consequences are outside the scope of representation required by the Sixth Amendment, and, therefore, the failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel."¹⁷³ The *Padilla* Court declines to apply the direct/collateral distinction, however, and considering "[d]eportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence;" the Court applies *Strickland* to Padilla's claim.¹⁷⁴

Despite the extreme deference in determining ineffective assistance of counsel prescribed under the combination of *Strickland* and the AEDPA,¹⁷⁵ the *Padilla* Court nonetheless returned to the

166. *Padilla v. Kentucky*, 559 U.S. 356, 359 (2010).

167. *Id.*

168. *Id.* at 360, 375.

169. *Id.* at 364

170. *Id.*

171. *Id.* at 364–65.

172. *Id.*

173. *Id.* at 365 (internal quotations omitted).

174. *Id.* at 366.

175. *See Harrington v. Richter*, 131 S. Ct. 770, 788 (2011).

more rigorous standard described in *Wiggins*,¹⁷⁶ of “prevailing [professional] norms of practice as reflected in American Bar Association standards” and similar practice guides.¹⁷⁷ The *Padilla* Court established the standard that, where the immigration statutes are clear, “counsel must advise her client regarding the risk of deportation.”¹⁷⁸ The Court qualified this standard by holding that, where the statute is unclear, “a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.”¹⁷⁹

The full extent of *Padilla*’s reach in non-immigration contexts is unknown. Although *Padilla* was a 7-2 decision, the Supreme Court decided the issue of collateral consequences only 5-4.¹⁸⁰ Both Justice Alito’s concurrence¹⁸¹ and Justice Scalia’s dissent¹⁸² strongly criticized the Court’s failure to rule on whether failing to warn criminal defendants of the collateral consequences to guilty pleas may justify overturning convictions based on those pleas. Justice Stevens dismissed those concerns by pointing out that critics raised a similar “floodgates” concern in *Hill*, and that the flood of challenges to guilty pleas had failed to materialize.¹⁸³

176. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003).

177. *Padilla*, 559 U.S. at 377 (Alito, J., concurring) (internal citations omitted).

178. *Id.*

179. *Id.* at 369 (majority opinion).

180. “Stevens, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Breyer, and Sotomayor, JJ., joined. Alito, J., filed an opinion concurring in the judgment, in which Roberts, C.J., joined. Scalia, J., filed a dissenting opinion, in which Thomas, J., joined.” *Id.* at 358.

181. *Id.* at 376 (Alito, J., concurring). Justice Alito pointed out that [C]riminal convictions can carry a wide variety of consequences . . . including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. . . . [T]his Court has never held that a criminal defense attorney’s Sixth Amendment duties extend to providing advice about such matters.

Id.

182. *Id.* at 390 (Scalia, J., dissenting) (arguing that “[a]dding to counsel’s duties an obligation to advise about a conviction’s collateral consequences has no logical stopping-point”).

183. *Id.* at 371–373. Justice Stevens elaborates,

Pleas account for nearly 95% of all criminal convictions. But they account for only approximately 30% of the habeas petitions filed. The nature of relief secured by a successful collateral challenge to a guilty plea—an opportunity to withdraw the plea and proceed to trial—

ii. *Subsequent Cases Limit Padilla's Application in Deportation Challenges*

The *Padilla* holding has met with uneven application in the United States Courts of Appeals, even in the limited immigration contexts addressed in the majority opinion. For example, in *Morris v. Holder*, the Second Circuit held that even though the *Padilla* court classified deportation as a “penalty,” which is “intimately related to the criminal process,”¹⁸⁴ nonetheless “deportation and removal are civil proceedings,” not criminal, and therefore “statutes retroactively setting criteria for deportation do not violate the ex post facto clause” of the United States Constitution.¹⁸⁵ Additionally, because immigration proceedings do not technically carry criminal penalties, the legal right to appointed counsel for indigent defendants that *Gideon v. Wainwright*¹⁸⁶ secured does not apply.¹⁸⁷ Finally, in *Chaidez v. United States*, the Supreme Court recently ruled that the *Padilla* standard is not retroactive and does not afford relief on direct review to defendants whose convictions became final before the *Padilla* ruling.¹⁸⁸

Moreover, because administrative agencies, rather than criminal courts, generally handle immigration claims, procedural obstacles to *Padilla*'s implementation abound. In *Valencia v. Holder*, the Fifth Circuit held that a defendant must first raise a claim of ineffective assistance of counsel under *Padilla* in a motion to the United States Board of Immigration Appeals, before the Circuit Court would have

[causes] . . . those who collaterally attack their guilty pleas [to] lose the benefit of the bargain obtained as a result of the plea.

Id.

184. *Morris v. Holder*, 676 F.3d 309, 317 (2d Cir. 2012) (quoting *Padilla*, 559 U.S. at 365).

185. *Id.* at 316–17.

186. *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963).

187. Ian Urbina and Catherine Rentz, *Immigrant Detainees and the Right to Counsel*, N.Y. TIMES, Mar. 31, 2013, at SR4, available at <http://www.nytimes.com/2013/03/31/sunday-review/immigrant-detainees-and-the-right-to-counsel.html>. To those presenting immigration claims, however, there is very little difference between immigration detention and prison, and many asylum seekers consider deportation a death sentence.

188. *Chaidez v. United States*, 133 S. Ct. 1103, 1113 (2013). See also *Chaidez v. United States*, THE OYEZ PROJECT AT IIT CHICAGO-KENT COLLEGE OF LAW (Aug. 30, 2013, 11:52 PM), http://www.oyez.org/cases/2010-2019/2012/2012_11_820; *Chaidez v. United States*, SCOTUSBLOG (Aug. 30, 2013 11:42 PM), <http://www.scotusblog.com/case-files/cases/chaidez-v-united-states/>; Lyle Denniston, *New look at lawyers' advice*, SCOTUSBLOG (Apr. 30, 2012, 10:45 AM), <http://www.scotusblog.com/2012/04/new-look-at-lawyers-advice/>.

jurisdiction to review the underlying question of deportability.¹⁸⁹ In *Waugh v. Holder*, the Tenth Circuit held that Sixth Amendment claims under *Padilla* notwithstanding, “an alien cannot collaterally attack the legitimacy of a state criminal conviction in a deportation proceeding.”¹⁹⁰ In *United States v. Chang Hong*, the Tenth Circuit also held that “*Padilla* does not apply retroactively to cases on collateral review.”¹⁹¹

The importance of *Padilla* in bringing immigration penalties more closely within the ambit of criminal jurisprudence and the constitutional protections of criminal proceedings remain topics of hot controversy.¹⁹² For our purposes, however, the significant achievement of *Padilla* was in signaling the Supreme Court’s willingness to examine the often-invisible world of plea negotiations and intervene when defense counsel’s function in explaining the plea was deficient. This was a considerable departure from the pre-*Padilla* trend to leave such matters in the hands of ethical regulators, and it heralded further dramatic developments in the judicial establishment of basic standards for effective assistance of counsel in plea bargaining.

D. Quality of Plea Bargaining: *Lafler*, *Frye*, and the “Jurisprudence of Plea Bargaining”

In the aftermath of *Padilla*, the Supreme Court’s willingness to venture into other aspects of the plea-bargaining process and examine defense performance considerably expanded. On March 21, 2012, the Court issued two companion opinions, *Lafler v. Cooper*¹⁹³ and *Missouri v. Frye*,¹⁹⁴ both authored by Justice Kennedy in 5-4 decisions

189. *Valencia v. Holder*, 425 F. App’x 279, 280 (5th Cir. 2011).

190. *Waugh v. Holder*, 642 F.3d 1279, 1282 (10th Cir. 2011) (quoting *Trench v. INS*, 783 F.2d 181, 184 (10th Cir.1986)).

191. *United States v. Chang Hong*, 671 F.3d 1147, 1150 (10th Cir. 2011), as amended Sept. 1, 2011.

192. See, e.g., W. David Ball, *The Civil Case at the Heart of Criminal Procedure: In re Winship, Stigma, and the Civil-Criminal Distinction*, 38 AM. J. CRIM. L. 117 (2011); Rachel A. Cartier, *Padilla’s Collateral Attack Effect on Existing Federal Convictions*, 6 CRIM. L. BRIEF 58 (2010); John E. D. Larkin, *A Proposed Framework for Evaluating Effectiveness of Counsel Under Padilla v. Kentucky*, 34 AM. J. TRIAL ADVOC. 565 (2011); Maryellen Meymarian, *Providing Immigration Advice During Criminal Proceedings: Preempting Ineffective Assistance of Counsel Claims When Non-Citizen Aliens Seek to Withdraw Guilty Pleas to Avoid Adverse Immigration Consequences*, 39 AM. J. CRIM. L. 53 (2011).

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

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

joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.¹⁹⁵ In essence, *Lafler* and *Frye* applied *Hill* in reverse. Whereas *Hill* required defendants to demonstrate that, but for ineffective assistance of counsel at the plea-bargaining stage, they would have insisted on going to trial,¹⁹⁶ *Lafler* and *Frye* required defendants to demonstrate that had their attorneys advised them properly, they would likely have accepted an earlier plea deal.¹⁹⁷ In both cases, the Supreme Court held that the respondents had met the standard for ineffective assistance of counsel and remanded the cases for the state courts for further proceedings.¹⁹⁸

i. Frye and the Failure to Timely Convey a Proffered Plea Deal

In *Missouri v. Frye*, Prosecutors initially charged Galin Frye with driving on a revoked license, a felony with a maximum prison sentence of four years.¹⁹⁹ Although the prosecutor offered plea bargains potentially reducing Frye's sentence to only ten days in jail under a felony conviction, or to ninety days with a misdemeanor conviction, Frye's attorney failed to convey those offers to him before they expired.²⁰⁰ Two days after the expiration date, the police arrested Frye again on the same charge; at his hearing, he pleaded guilty and the trial court sentenced him to three years' imprisonment.²⁰¹ Frye contended that he would have pleaded guilty to the misdemeanor had his attorney informed him of that option.²⁰² The central issue on appeal, therefore, was whether his attorney's failure to do so constituted ineffective assistance of counsel.²⁰³

Like *Padilla*, *Frye* does not mention the AEDPA at all. This is likely because the *Frye* Court was only affirming the Missouri Court of Appeals' determination that the respondent's assistance of counsel had failed the *Strickland* standard, rather than imposing federal

195. Anthony Franze & Jeremy McLaughlin, *Opinion analysis: Expanding the right to effective counsel during the plea-bargaining process*, SCOTUSBLOG (Mar. 23, 2012, 1:30 PM), <http://www.scotusblog.com/2012/03/opinion-analysis-expanding-the-right-to-effective-counsel-during-the-plea-bargaining-process/>.

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

197. *Lafler*, 132 S. Ct. at 1385; *Frye*, 132 S. Ct. at 1410.

198. *Lafler*, 132 S. Ct. at 1391; *Frye*, 132 S. Ct. at 1411.

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

200. *Id.*

201. *Id.* at 1404–05.

202. *Id.* at 1405.

203. *Id.*

habeas relief to overturn a state conviction.²⁰⁴ Without the AEDPA's strictures, the Court was free to expound upon its reasons for affirming the state appellate court ruling and, using dicta, could thereby exercise a long overdue creation of new *Strickland* doctrine.²⁰⁵

A central element of the *Frye* Court's reasoning was its forceful reiteration of *Padilla*'s insistence 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."²⁰⁶ Building on *Hill*, the *Frye* Court held the plea-bargaining phase to be so essential to a just trial result that effective assistance of counsel in plea negotiations required objective standards and guidelines.²⁰⁷

The *Frye* Court, therefore, held 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."²⁰⁸ The Court elaborated that "the fact of a formal offer means that its terms and its processing can be documented" and that "[s]tates may elect to follow rules that all offers must be in writing, again to ensure against later misunderstandings or fabricated charges."²⁰⁹ The Court further advised, "formal offers can be made part of the record . . . to ensure that a defendant has been fully advised."²¹⁰

The *Frye* Court reiterated that although "the standard for counsel's performance is not determined solely by reference to codified standards of professional practice, these standards can be

204. *Id.*

205. *Id.* at 1407–08.

206. *Id.* at 1406 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010)). The Court emphasized the practical reality supporting this conclusion:

Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. . . . [P]lea 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. Because ours is for the most part a system of pleas, not a system of trials, . . . it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.

Id. at 1407 (internal citations omitted).

207. *Id.* at 1408.

208. *Id.*

209. *Id.* at 1409.

210. *Id.*

important guides.”²¹¹ The Court accordingly based its three recommended standards—prompt communication of formal plea offers, that prosecutors make formal plea offers in writing, and that such writings be made part of the trial record—on numerous examples of ABA recommended standards, state rules of court, and state rules of professional conduct.²¹² This may be a signal that the Court is returning from its previous lenient assessments of effectiveness in plea negotiations, as expressed in *Premo*.²¹³ The Court may be shifting toward more rigorous standards, including by reference to state and professional rules dictating appropriate conduct, as expressed in *Wiggins*.²¹⁴

Apart from *Frye*’s proposed minimum standards of professional conduct, however, trial courts’ and prosecutors’ inherent discretion in whether to offer or accept plea deals make it difficult for a reviewing court both to determine actual prejudice under *Strickland*²¹⁵ and to fashion an appropriate remedy that does not intrude on that state court discretion. The *Frye* Court, therefore, added the additional hurdle that “to complete a showing of *Strickland* prejudice, defendants who have shown a reasonable probability they would have accepted the earlier plea offer must also show . . . a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented.”²¹⁶ Because the Supreme Court could not order habeas relief until the defendant had proven those elements, it instead remanded *Frye*’s case back to the Missouri Court of Appeals to determine whether *Frye* suffered prejudice under the second prong of the *Strickland* test.²¹⁷

The principal concern of Justice Scalia’s dissent (joined by Chief Justice Roberts, Justice Alito, and Justice Thomas) was that, despite the disparate sentencing that resulted from *Frye*’s failure to accept the earlier-proffered plea because of his attorney’s failure to convey it to him, *Frye*’s conviction was nonetheless correct, per *Frye*’s own

211. *Id.* at 1408.

212. *Id.* at 1408–09.

213. “In applying and defining this [reasonable competence] standard substantial deference must be accorded to counsel’s judgment.” *Premo v. Moore*, 131 S. Ct. 733, 742 (2011).

214. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003).

215. *Frye*, 132 S. Ct. at 1410 (observing that “a defendant has no right to be offered a plea, . . . nor a federal right that the judge accept it.”).

216. *Id.*

217. *Id.* at 1411.

admission of guilt.²¹⁸ The *Frye* dissent argued that “[t]he plea-bargaining process is . . . not . . . covered by the Sixth Amendment, which is concerned not with the fairness of bargaining but with the fairness of conviction.”²¹⁹

The position of the *Frye* dissent is somewhat reconcilable with *Padilla*’s and *Hill*’s insistence that effective assistance of counsel is crucial to the plea-bargaining stage, because there is some chance that the rejection of a particular guilty plea might nonetheless result in an acquittal. Nonetheless, the emphasis that *Hill* and *Padilla* place on the importance of effective plea negotiations suggests that it is a defense lawyer’s duty, not just to help an innocent defendant achieve an acquittal, but in fact to ensure that all defendants, both innocent and guilty, receive the most favorable outcome possible under the circumstances.

ii. *Lafler and Incorrect Assessments of a Defendant’s Prospects at Trial*

Frye spent much of its discussion establishing minimum standards of performance in the plea-bargaining context and grounding them in current prevailing professional norms, finally remanding the case to the state court of appeals to determine actual prejudice under *Strickland*.²²⁰ In contrast, in *Lafler v. Cooper*, both parties stipulated that defense counsel’s advice was deficient.²²¹ Therefore, the Supreme Court’s main issue on appeal was how to determine actual prejudice; the Court also faced the challenge to fashion appropriate habeas relief where a defendant has relied on the faulty advice of counsel in deciding to forgo a plea deal. In a rare occurrence, the Supreme Court held that the Michigan Court of Appeals’ erroneous interpretation of *Strickland* violated even the minimal “unreasonable application” standard provided by the AEDPA,²²² thereby (as with *Frye*) freeing the Supreme Court to develop new *Strickland* jurisprudence by expounding upon its application to this novel question.

Anthony Cooper received several charges in the Michigan trial court, including assault with intent to murder.²²³ The prosecution

218. *Id.* at 1412.

219. *Id.* at 1413–14.

220. *Id.* at 1411.

221. *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012).

222. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, tit. 1, § 104, 110 Stat. 1214, adding 28 U.S.C. § 2254(d)(1).

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

offered Cooper a plea bargain that involved a guilty plea to two charges with a sentence of fifty-one to eighty-five months; Cooper expressed interest in accepting this deal.²²⁴ However, Cooper's defense attorney convinced him that the prosecution could not prove intent to murder because the victim had been shot below the waist.²²⁵ A jury trial convicted Cooper on all counts and sentenced him to up to thirty years in prison.²²⁶

In rejecting Cooper's claim of ineffective assistance of counsel, the Michigan appellate court held that Cooper's plea decision was valid because he had made it "knowingly and intelligently."²²⁷ When Cooper appealed to the United States District Court for the Eastern District of Michigan, the court held that the appropriate test for ineffective assistance of counsel was not merely whether a plea decision was "knowing and intelligent," but additionally whether, as expressed in *Strickland* and *Hill*, counsel's advice was clearly deficient and whether the defendant was harmed by it.²²⁸ This holding offered the courts of appeal the rare opportunity to review a state court decision that met the AEDPA's high burden of an unreasonable application of the *Strickland* test.²²⁹

The *Lafler* Court established a new rule for defendants who erroneously forgo plea deals, following the holdings of numerous United States Courts of Appeals.²³⁰ The Court departed from *Hill*'s requirement that defendants show "a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial."²³¹ Instead, the *Lafler* Court held that a defendant who forgoes a proffered plea bargain "must show that but for the ineffective advice of counsel there is a reasonable probability . . . the defendant would have accepted the plea and the prosecution would not have withdrawn it . . . , [and] that the court would have accepted its terms."²³² Additionally, in contrast to the *Dominguez Benitez* Court's refusal to "second-guess" a

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 1383-84, 1390.

229. *Id.*

230. *Id.* at 1384-85.

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

232. *Lafler*, 132 S. Ct. at 1384-85. Of course, as in all other "but-for" reversible error analysis scheme, this requires the defense, and therefore the appellate court as well, to engage in considerable speculation.

“foolish” plea decision,²³³ the *Lafler* Court held that to show prejudice, a criminal defendant must show that the “conviction or sentence, or both, under the [plea] offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed.”²³⁴

The *Lafler* Court explained that, although “defendants have no right to be offered a plea[,] . . . nor a federal right that the judge accept it,” even the exercise of discretion must abide by constitutional limits.²³⁵ Squarely addressing the *Frye* dissent’s position that *Strickland* protects not strict procedural fairness, but only just results, Justice Kennedy elaborated that “here the question is not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it.”²³⁶ This holding may express a novel interpretation of *Strickland*, in contrast with the previous lax interpretations that courts have applied in the past to excuse gross procedural irregularities.²³⁷ Perhaps the strides the Court made in *Padilla* emboldened the Court; it is a welcome step forward.²³⁸

In contrast with the *Frye* dissent’s contention that because the end result—a conviction—was the same, a guilty verdict did not indicate any prejudice against a defendant who would have pleaded guilty anyway, the *Lafler* Court opined, “[t]he constitutional rights of criminal defendants . . . are granted to the innocent and the guilty alike.”²³⁹ The Court continued, “we decline to hold . . . that the guarantee of effective assistance of counsel . . . attaches only to matters affecting the determination of actual guilt. . . . The fact that respondent is guilty does not mean . . . that he suffered no prejudice from his attorney’s deficient performance during plea bargaining.”²⁴⁰

Having established that the Sixth Amendment right to effective assistance of counsel attaches in the case of foregone plea bargains, and that a defendant’s erroneous decision to go to trial rather than benefit from the proffered plea bargain was in itself a demonstration of actual prejudice, the remaining question was that of appropriate remedy. Because plea bargains are essentially discretionary benefits

233. *United States v. Dominguez Benitez*, 542 U.S. 74, 85 (2004).

234. *Lafler*, 132 S. Ct. at 1385.

235. *Id.* at 1387.

236. *Id.* at 1388.

237. *See, e.g., Dominguez Benitez*, 542 U.S. at 76.

238. *See generally Padilla v. Kentucky*, 559 U.S. 356 (2010).

239. *Lafler*, 132 S. Ct. at 1388 (internal citations omitted).

240. *Id.*

that are extended based on the trial court's independent judgment of the totality of the circumstances, the *Lafler* Court held that "[t]he correct remedy . . . is to order the State to reoffer the plea agreement. Presuming respondent accepts the offer, the state trial court can then exercise its discretion . . . [under] all the circumstances of the case."²⁴¹ This solution, presumably, eliminates the need for speculation whether respondent would accept the offer, but it does not cover situations such as "exploding offers" that are open only for a given period.²⁴² Nor does it address the fact that, at this later point at the end of the appellate process, the defendant's knowledge of the "road not taken" and potential alternative scenarios is much altered from the defendant's perspective when considering the original offer.²⁴³

In dissent, Justice Scalia called *Lafler's* holding a "judicially invented right to effective plea bargaining"²⁴⁴ that "elevates plea bargaining from a necessary evil to a constitutional entitlement."²⁴⁵ By expanding on the rights previously recognized under *Strickland*, Justice Scalia's dissent contended that the majority violated its responsibility under the AEDPA to preserve all state court decisions not relying on "unreasonable applications of clearly established [federal] law."²⁴⁶ Because the gravity of a constructive denial of the Sixth Amendment right to counsel is potentially so great, Justice Scalia's dissent also took issue with the wide discretion the majority granted to trial courts in fashioning a remedy for such a denial.²⁴⁷

241. *Id.* at 1391.

242. *See, e.g.*, ROBERT A. FERGUSON, *INFERNO* 112 (Harvard Univ. Press, Mar. 3, 2014).

243. Eric R. Breslin, *Ineffective Assistance Claims in Plea Bargains: The Supreme Court Confronts the Road Not Taken*, DUANE MORRIS BLOGS (May 8, 2012, 12:29 PM), http://blogs.duanemorris.com/duanemorriswhitecollarcriminallawblog/entry/ineffective_assistance_claims_in_plea.

244. *Lafler*, 132 S. Ct. at 1393.

245. *Id.* at 1397.

246. *Id.* at 1395–96.

247. *Id.* at 1397. In his dissent, Justice Scalia noted,

I find it extraordinary that [state] "statutes and rules" can specify the remedy for a criminal defendant's unconstitutional conviction. Or that the remedy for an unconstitutional conviction should *ever* be subject *at all* to a trial judge's discretion. Or, finally, that the remedy could *ever* include no remedy at all.

Id.

E. The New Jurisprudence of Plea Bargaining: Ineffective Assistance of Counsel After *Lafler* and *Frye*

As of this writing, several federal district and appellate court decisions had already distinguished *Frye*.²⁴⁸ The difficulty in establishing actual prejudice in a situation so rife with discretion may make it difficult for defense advocates to argue for the application of *Frye*'s broader implications in lower courts. Nonetheless, *Frye*'s narrow holding that defense attorneys are responsible for conveying written plea offers to their clients²⁴⁹ has already allowed the U.S. Supreme Court to vacate a state appellate court decision upholding a criminal conviction and to remand it for further consideration under *Frye*.²⁵⁰

It is a testament to the system's thirst for regulation of defense quality in plea bargaining that federal appellate court decisions and practitioner bulletins have already begun citing *Lafler* regularly.²⁵¹ Courts may find *Lafler* easier to follow because it tackles the second prong of the *Strickland* analysis, as opposed to *Frye*, which limits itself to determinations of inadequacy of representation and offers little guidance as to determinations of prejudice or remedy. As with *Rodriguez v. Oklahoma* under *Frye*, the Supreme Court has vacated

248. See, e.g., *Johnson v. United States*, 860 F. Supp. 2d 663, 744 (N.D. Iowa 2012) (concluding that current ABA guidelines were not binding determinations of minimum professional standards). See also *Villalpando v. United States*, C 10-4051-MWB, 2012 WL 1598293, 13 (N.D. Iowa May 7, 2012) (denying defendant's claim of ineffective assistance of counsel for failure to oppose prosecution's use of defendant's self-incriminating statements, while ordering an evidentiary hearing under *Frye* for counsel's failure to procure a plea agreement).

249. *Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012). Courts' application of *Strickland*'s injunction that "strategic choices" such as those inherent in bargaining, "are virtually unchallengeable," *Strickland*, 466 U.S. at 690-91, and that "evidence about the actual process of decision . . . should not be considered in the prejudice determination," *id.* at 694-95, compounds this difficulty.

250. *Rodriguez v. Oklahoma*, 132 S. Ct. 1792, 1792 (2012).

251. See, e.g., Jay Shapiro, *The Supreme Court Requires Effective Assistance of Counsel in the Plea Bargain Process*, 2012 EMERGING ISSUES 6281, 6281 (Apr. 3, 2012). A key holding of *Lafler* and *Frye* was the Court's

[R]eject[ion of] the argument that a fair trial cleansed the prejudice caused by the ineffective assistance of counsel. [The Court] did not, however, offer only one possible remedy. The Court explained that options involve vacating the trial conviction to allow acceptance of the original plea offer or the imposition of a sentence consistent with the original offer. In either respect, the case would have to be remanded for further proceedings.

Id.

two Circuit Court decisions and remanded them for reconsideration applying *Lafler*.²⁵²

Furthermore, in *In re Williams*, the Court of Appeals for the D.C. Circuit held that *Lafler* did not apply retroactively to those convictions that became final prior to the decision's issuance.²⁵³ In contrast, the Ninth Circuit Court of Appeals applied *Lafler* to overturn a district court denial of habeas relief in a California state conviction resulting from an unfavorable plea deal that the defendant had accepted based on unprofessional and ineffective advice of counsel.²⁵⁴ In *United States v. Soto-Lopez*, the Ninth Circuit held that "the correct remedy . . . is to order the [Government] to reoffer the plea agreement. . . . [T]he [district] court can then exercise its discretion . . . to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions . . . , or to leave the convictions and sentence . . . undisturbed."²⁵⁵ The Fifth Circuit has also approvingly cited *Lafler* in ordering further evidentiary hearings to determine actual prejudice based on ineffective assistance of counsel in the plea-bargaining context.²⁵⁶

Legal commentators have already begun to dissect *Lafler*, for example, to gauge the standards the AEDPA requires reviewing courts to apply when considering federal habeas corpus petitions.²⁵⁷ The gist of these analyses appears to be uncertainty. *Lafler*, *Frye*, and *Padilla* establish a new kind of *Strickland* jurisprudence—one that is based on the practical, everyday realities of the American criminal justice system, rather than on statutorily enforced jurisprudential ossification or on idealistic images of the kind of justice that could be obtained via a "fair trial."²⁵⁸ *Lafler* and *Frye* broke the mold of post-AEDPA rubber-stamping of state court convictions under *Strickland*

252. See generally *Thurmer v. Kerr*, 132 S. Ct. 1791 (2012); *Thaler v. Arnold*, 132 S. Ct. 1790 (2012).

253. *In re Williams*, 2012 U.S. App. LEXIS 8752, at *1–2 (D.C. Cir. Apr. 30, 2012) (holding that "[p]etitioner cannot rely on *Lafler* . . . to challenge his conviction and sentence, because the Supreme Court has not held that *Lafler* applies retroactively to cases on collateral review.").

254. *United States v. Soto-Lopez*, 475 F. App'x 144 (9th Cir. 2012).

255. *Id.* at 147–48 (quoting *Lafler v. Cooper*, 132 S. Ct. 1376, 1391 (2012)).

256. *United States v. Rivas-Lopez*, 678 F.3d 353, 359 (5th Cir. 2012).

257. Donald F. Roeschke, *Historical Aspects and Procedural Limitations of Federal Habeas Corpus*, 39 AM. JUR. TRIALS 157, cum. supp. § 7.5 (updated May 2012, originally published in 1989).

258. "[C]riminal justice today is for the most part a system of pleas, not a system of trials." *Lafler v. Cooper*, 132 S. Ct. 1376, 1381 (2012).

and, as Justice Alito opined in his dissent to *Lafler*, “[t]ime will tell how this works out.”²⁵⁹

A recent Supreme Court decision has demonstrated the limits of *Lafler*’s applicability. In *Burt v. Titlow*, the Supreme Court specifically addressed the potential conflict between *Lafler* and the AEDPA. There, the Court considered the following issues:

1. Whether the Sixth Circuit failed to give appropriate deference to a Michigan state court under AEDPA in holding that defense counsel was constitutionally ineffective for allowing Respondent to maintain his claim of innocence.
2. Whether a convicted defendant’s subjective testimony that he would have accepted a plea but for ineffective assistance, is, standing alone, sufficient to demonstrate a reasonable probability that defendant would have accepted the plea.
3. Whether *Lafler* always requires a state trial court to resentence a defendant who shows a reasonable probability that he would have accepted a plea offer but for ineffective assistance, and to do so in such a way as to “remedy” the violation of the defendant’s constitutional right.²⁶⁰

259. *Lafler*, 132 S. Ct. at 1398 (2012) (Alito, J., dissenting) quoted in Anthony Franze & Jeremy McLaughlin, *Opinion analysis: Expanding the right to effective counsel during the plea-bargaining process*, SCOTUSBLOG (Mar. 23, 2012, 1:30 PM), <http://www.scotusblog.com/2012/03/opinion-analysis-expanding-the-right-to-effective-counsel-during-the-plea-bargaining-process/>. Franze and McLaughlin explain,

The majority and dissenting opinions in *Frye* and *Lafler* are noteworthy because both sides based their opinions largely on practical considerations. The majority, which in both cases cited statistics about the prevalence of plea bargaining in our system, found Sixth Amendment protection necessary because of the “simple reality” that our system is largely not one of trials, but one of pleas. For the dissent, the guiding practical concern was the difficulties that inevitably will arise given that the majority did not flesh out the legal standards to use when applying its decisions. The two cases all but ensure future litigation as lower courts work out the nuances of when plea advice is constitutionally ineffective, the factors and methods by which trial courts determine prejudice, and the scope of the remedy.

Id.

260. *Burt v. Titlow*, 2012 WL 4750282, No. 12–414 (U.S. Oct. 2, 2012), cert. granted, *Burt v. Titlow*, 133 S. Ct. 1457 (Feb. 25, 2013)).

The Supreme Court's final decision in *Burt v. Titlow* marked a retreat from the level of guidance on plea bargaining ethics that the Supreme Court had previously supplied in *Lafler* and *Frye*. In *Burt v. Titlow*, the Supreme Court clarified that the AEDPA requires federal courts to exercise a "doubly deferential" standard of review "that gives both the state court and the defense attorney the benefit of the doubt[.]"²⁶¹ The Court clarified that a petitioner for a writ of habeas corpus must show that the state court's ruling "was so lacking in justification that there was an error . . . beyond any possibility for fairminded disagreement."²⁶² The Court held that the Sixth Circuit below had "failed to apply that doubly deferential standard by refusing to credit a state court's reasonable factual finding and by assuming that counsel was ineffective where the record was silent."²⁶³ As discussed above, the AEDPA requires defendant appellants to rebut the state court factual findings "by clear and convincing evidence," and mandates "a highly deferential standard for reviewing claims of legal error by the state courts: A writ of habeas corpus may issue only if the state court's decision 'was contrary to, or involved an unreasonable application of, clearly established Federal law'["]."²⁶⁴

Burt v. Titlow did offer practical guidance in another common scenario for appellate courts applying *Lafler* and *Frye*. The original plea bargain that the prosecution had offered defendant Vonlee Titlow depended on Titlow's testimony against her codefendant.²⁶⁵ The trial court had acquitted Titlow's codefendant, who had since died, so the prosecution had no incentive to reoffer Titlow her original plea agreement.²⁶⁶ In her concurrence in the judgment, Justice Ginsburg cited this practical consideration as overriding the defendant's concerns over ineffective assistance of counsel at the plea bargaining stage.²⁶⁷ Ginsburg explained that it would be meaningless for a federal court to order the state trial court to allow Titlow

261. *Burt v. Titlow*, 134 S. Ct. 10, 13 (2013) (citing *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011) (slip op., at 17)).

262. *Id.* at 16 (2013) (citing *Harrington v. Richter*, 131 S. Ct. 770, 786-87 (2011)).

263. *Id.* at 13 (2013).

264. *Id.* at 15 (2013) (citing The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 28 U.S.C. §§ 2254(d)(1)–(e)(1)).

265. Rory Little, *Opinion analysis: Court says more about federal habeas review than ineffective assistance in plea bargaining*, SCOTUSBLOG (Nov. 6, 2013, 3:42 PM), <http://www.scotusblog.com/2013/11/opinion-analysis-court-says-more-about-federal-habeas-review-than-ineffective-assistance-in-plea-bargaining/>.

266. *Id.*

267. *Id.*

another opportunity to accept the prosecution's offer, because the benefit of the prosecution's bargain—Titlow's testimony against her codefendant—was already lost.²⁶⁸

Nonetheless, the Court found the conduct of Titlow's defense attorney "troubling," and explained, "a defendant's proclamation of innocence does not relieve counsel of his normal responsibilities under Strickland."²⁶⁹ As Justice Sotomayor's concurrence expanded, "[r]egardless of whether a defendant asserts her innocence (or admits her guilt), her counsel must 'make an independent examination of the facts, circumstances, pleadings and laws involved and then . . . offer his informed opinion as to what pleas should be entered.'"²⁷⁰ Justice Sotomayor explained, "[a] lawyer must 'abide by his client's decision' but 'only after having provided the client with competent and fully informed advice, including an analysis of the risks the client would face in proceeding to trial.'"²⁷¹ This decision offers crucial guidance to lower courts as to how the AEDPA limits their authority to remedy ineffective assistance of counsel in plea bargaining, but also admonishes practitioners to advise their clients effectively.

F. The Promise and Limits of Judicial Review of Defense Quality

The decisions in *Padilla*, *Lafler*, and *Frye* represented a clear departure from the prior Supreme Court trend to leave matters of plea bargaining to ethical regulation and informal mechanisms. While the Court's willingness to "get real" and acknowledge the problem is a welcome change, the extent to which judicial review can actively contribute to an improvement of defense quality in plea bargaining is hotly debated.

Anthony Rufo, for example, has argued that the AEDPA dramatically hinders the Supreme Court's ability to remedy unconstitutional wrongs resulting from ineffective assistance of counsel; his research suggested that this bind may violate the Supremacy Clause.²⁷² Published before *Lafler* and *Frye*, his note surveyed decisions of state supreme courts and of the United States Courts of Appeal, concerning incorrect or inadequate attorney advice leading to disadvantageous decisions to risk trial and forgo potentially

268. *Id.*

269. *Id.* (quoting *Burt v. Titlow*, 134 S. Ct. 10, 17 (2013)).

270. *Id.* (quoting *Burt v. Titlow*, 134 S. Ct. 10, 19 (2013)).

271. *Id.* (quoting *Burt v. Titlow*, 134 S. Ct. 10, 19 (2013)).

272. Anthony E. Rufo, *Opportunity Lost?—The Ineffective Assistance Doctrine's Applicability to Foregone Plea Bargains*, 42 SUFFOLK U. L. REV. 709, 725 (2009).

beneficial plea bargains.²⁷³ He found that, in fact, many circuit courts already applied the *Hill* standard to grant habeas relief when such claims were proven, but that the combination of the AEDPA and *Strickland* prevented the Supreme Court from advancing its jurisprudence in that field to harmonize the circuit split.²⁷⁴

In an American Law Reports Article, Kurtis Kemper further explored the AEDPA's limitations on federal courts' capacity to grant habeas relief based on ineffective assistance of counsel.²⁷⁵ Kemper analyzed several of the Supreme Court decisions discussed in this Article: *Schriro*, *Premo*, and *Cronic*, among others.²⁷⁶ His research showed how the AEDPA's restrictions have limited the Supreme Court's right to grant habeas corpus relief and correct decisions issued by state supreme courts and United States Courts of Appeal that have erroneously interpreted or applied the constitutional standards laid out in *Strickland*.²⁷⁷

Another concern may be that Supreme Court jurisprudence, even when explicitly focusing on the plea bargaining process and proclaiming to defend the defendant's right to be properly informed before trial, cannot appropriately combat other trends in the system that push clients to plead guilty *en masse* and punish them for choosing to go to trial. As Daniel Givelber argues, federal sentencing guidelines explicitly punish those who choose to go to trial by sentencing them more harshly than those who accept guilty pleas.²⁷⁸ Similarly, Margaret Etienne illustrates how federal judges at times use the Federal Sentencing Guidelines to punish the clients of lawyers

273. *Id.* at 722.

274. *Id.* at 721–27.

275. Kurtis A. Kemper, *Construction and Application of Antiterrorism and Effective Death Penalty Act (AEDPA)—U.S. Supreme Court Cases*, 26 A.L.R. F.2d 1 (2008).

276. *Id.* at § 27.

277. *Id.*

278. Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 AM. CRIM. L. REV. 1363 (2000). The article illustrates that the Federal Sentencing Guidelines

[A]uthoriz[e] trial judges to find that a defendant's testimony not credited by the jury constitutes an obstruction of justice. While the trial court is required to find that the elements of perjury are present, the judge is authorized to do so *ex parte* on the basis of the defendant's trial testimony and the jury's disbelief of it.

Id. at 1368. The Guidelines authorize sentence reductions for "acceptance of responsibility" and "substantial assistance" to the judicial process (as exemplified by accepting guilty pleas and testifying against codefendants) and sentence enhancements for "obstruction of justice" (as exemplified by insistence on going to trial despite evidence of guilt). *Id.* at 1371.

whom the judges regard as “overly” zealous.²⁷⁹ For example, if attorneys raise every possible claim whether it is meritorious or not, insist on proceeding to trial despite proof of guilt, or use other adversarial tactics that judges deem unnecessary, judges may extend defendants’ sentences in response.²⁸⁰

Another serious source of concern pertains to the remedy problem briefly pointed out above: How can one cure, at the appellate stage, problems that occurred in the plea bargaining stage, when a (presumably fair) trial has already taken place? This was a thorny issue in scholarship even before it brought Justices Alito and Scalia such despair in *Lafler* and *Frye*.²⁸¹ In a note whose publication preceded *Lafler* and *Frye*, David Perez outlined three different forms of relief that state courts and lower federal courts had traditionally given to those defendants who appeal their convictions: a new trial, reinstatement of the plea bargain, and simple affirmation of the conviction and sentence (finding no actual prejudice, under *Strickland*).²⁸² Perez argued that ineffective assistance of counsel at the plea-bargaining phase is not a procedural trial error, but rather a structural one—similar to the denial of the defendant’s right to represent herself *pro se*—that poisons the entire process from start to finish; the only remedy for such a deep constitutional violation, Perez argued, is a new trial.²⁸³

Although courts may hesitate to address attorney incompetence by reversing convictions, several scholars argue that courts should collaborate more with legislative and regulatory bodies and attorney

279. Margareth Etienne, *Remorse, Responsibility, and Regulating Advocacy: Making Defendants Pay for the Sins of Their Lawyers*, 78 N.Y.U. L. REV. 2103, 2165 (2003). Etienne argues that

The overly broad nature of the “acceptance of responsibility” provision of the Sentencing Guidelines confuses the purpose of the Guidelines. The two most important factors in determining eligibility for the acceptance of responsibility adjustment—remorse and efficiency—are extensively tangled with [judges’] disciplinary concerns [regarding lawyers] regarding [their] advocacy decisions.

Id.

280. *Id.*

281. See, e.g., David A. Perez, Note, *Deal or No Deal? Remediating Ineffective Assistance of Counsel During Plea Bargaining*, 120 YALE L.J. 1532 (2011).

282. *Id.* at 1535.

283. *Id.* at 1566.

associations to set and enforce high standards of professionalism.²⁸⁴ Even before *Lafler* and *Frye*, the Bureau of Justice Assistance was recommending that state courts work with prosecutors and defense attorneys to monitor plea bargaining more closely and standardize case values.²⁸⁵ In his comment on the recent Supreme Court term, Stephanos Bibas predicts that, due to the difficulty in applying judicial assessments of attorney competence to the murky waters of closed-door plea bargaining sessions, lower courts will overturn very few convictions in light of *Lafler* and *Frye*.²⁸⁶ Bibas explains that, as after *Padilla*, the primary effects will be “extrajudicial”: Legislatures and professional associations will establish new standards and codes of conduct to help attorneys meet the competency goals these cases have set.²⁸⁷

The standards by which the Supreme Court judges claims of ineffective assistance of counsel are in a state of flux. Under *Strickland*, a defendant petitioning for a writ of habeas corpus after a final judgment in state courts must prove both that the advice of counsel fell below an objectively reasonable standard for minimal attorney performance, and that, but for the defense counsel’s unprofessional errors, the outcome of the trial would likely have been different.²⁸⁸ The claimed difference in outcome is not limited to the difference between an acquittal and a conviction—it can also be a difference in the harshness of the sentence imposed, a difference in the plea deal accepted, or another significant outcome at a crucial stage of trial.²⁸⁹ *Strickland* itself, for example, addressed defense counsel’s erroneous reliance on the contents of the defendant’s plea colloquy when making his final arguments at the sentencing phase.²⁹⁰

284. For an impassioned argument to establish judicially backed professional norms to ensure effective assistance of defense counsel in plea bargaining, see Jenny Roberts, Symposium, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650 (2013).

285. The Bureau recommends limiting prosecutorial discretion, involving judges further in the plea-bargaining process to ensure fairness, and establishing safeguards to ensure that legal characteristics, such as the severity of the offense, rather than extralegal characteristics, such as sex and race, determine sentencing risks. Lindsey Devers, *Plea and Charge Bargaining*, Bureau of Justice Assistance, U.S. Dep’t of Justice (Jan. 24, 2011) available at <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>.

286. Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 174 (2012).

287. *Id.* at 168–69.

288. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

289. *Id.* at 674.

290. *Id.* at 673.

In *Hill* and its progeny, the Supreme Court held that *Strickland* was satisfied where a defendant could prove that, but for the defense counsel's inadequate representation, the defendant would likely have foregone a plea bargain and risked trial.²⁹¹ The *Hill* line of cases, however, did not consider a defendant's subjective assertions that, in hindsight, he or she regretted a plea deal to be sufficient. Rather, *Hill* and its progeny relied on all the facts in the record that were available to the defendant and counsel at the time they were making their plea decisions.²⁹² After considering the record, however, the Court would only analyze what choice the defendant would likely have made, given the defendant's position at the time of the plea decision, rather than what the defendant would have preferred later, at the post-conviction stage.²⁹³

As expressed in *Harrington v. Richter*, the layering of AEDPA deference upon *Strickland* deference makes it nearly impossible to prove that a state court decision relied on objectively unreasonable applications of federal law and that this reliance caused actual prejudice.²⁹⁴ Nonetheless, where a few novel questions of constitutional law have arisen in *Padilla*, *Lafler*, and *Frye*, the Supreme Court has recently carved out limited exceptions to the AEDPA restrictions.

In *Padilla*, the Supreme Court held that, as a practical matter, defense counsel's failure to warn a noncitizen defendant properly about the immigration consequences of a guilty plea constituted *per se* ineffective assistance of counsel, justifying reversal of the underlying conviction.²⁹⁵ Nonetheless, lower courts have significantly limited *Padilla*'s applicability by distinguishing the facts and limiting its applicability in immigration appeals.²⁹⁶ *Padilla*'s applicability to noncriminal "collateral consequences" outside of the immigration context, as well as what other constitutional protections it might lend to immigration proceedings, are still the subjects of continuing litigation and hot debate.²⁹⁷ The Supreme Court severely curtailed

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

292. *Id.* at 60.

293. *Id.*

294. *Harrington v. Richter*, 131 S. Ct. 770, 790 (2011).

295. "[W]hen the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." *Padilla v. Kentucky*, 559 U.S. 356, 369 (2010).

296. *See, e.g., Morris v. Holder*, 676 F.3d 309, 317 (2d Cir. 2012).

297. *See generally* Joanna Rosenberg, *A Game-Changer? The Impact of Padilla v. Kentucky on the Collateral Consequences Rule and Ineffective Assistance of Counsel Claims*, 82 *FORDHAM L. REV.* 1407 (2013).

Padilla's reach in its recent decision, *Chaidez v. United States*, which held that the *Padilla* standard was nonretroactive.²⁹⁸

In *Lafler* and *Frye*, the Supreme Court expanded the range of plea-bargaining situations that may serve as grounds for reversal due to ineffective assistance of counsel. There may be grounds for reversal where the defendant can show that, but for counsel's failure to represent the defendant properly at the plea-bargaining phase, the defendant would likely have accepted a plea deal that would have been more advantageous than the plea eventually tendered or than the sentence or conviction eventually given at trial.²⁹⁹ Because courts' sentencing decisions based on plea bargaining are so subjective and discretionary, however, and because of *Strickland's* injunction against considering the idiosyncrasies, emotions, and personal values of particular judges or juries when reassessing counsel's performance in hindsight, the question of how to show actual prejudice under *Lafler* or *Frye* is still open to further development through litigation.³⁰⁰ There is a real possibility that appellate courts will abstain from intervening to correct scenarios they may feel they do not fully understand.

Where a defendant has received erroneous legal advice and ineffective assistance of counsel that has influenced him or her to reject an advantageous plea deal, it is difficult to fashion an adequate remedy. If the defendant's conviction came about pursuant to an objectively fair trial, obeying all relevant constitutional protections, the outcome (a criminal conviction) would be the same whether arrived at by trial or by plea. Moreover, where the first trial has resulted in conviction on certain charges and acquittal on others, ordering a new trial on all the original charges might violate the Constitution's protection against double jeopardy.³⁰¹

Courts must wrestle with the question of the appropriate relief to grant pursuant to a plea-bargaining violation under *Lafler* or *Frye*. Possibilities include vacation of the original conviction and a grant of a new trial, a writ of mandamus ordering specific performance of the original plea deal, refusal to grant any relief at all, or some compromise among those options.³⁰² Potential compromise solutions

298. *Chaidez v. United States*, 133 S. Ct. 1103, 1113 (2013).

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

300. *Strickland v. Washington*, 466 U.S. 668, 695 (1984).

301. See generally, e.g., Philip Chinn, Note, *A Deal Is a Deal: Plea Bargains and Double Jeopardy After Ohio v. Johnson*, 37 SEATTLE U. L. REV. 285 (2013).

302. See, e.g., *Lafler v. Cooper*, 132 S. Ct. 1376, 1392 (2012) (Scalia, J., dissenting.)

could include a sentence adjustment or a mitigation of certain relevant collateral consequences such as, for example, vacating a guilty plea to an “aggravated felony” under federal immigration law in exchange for a new guilty plea to a misdemeanor that did not carry the same immigration consequence.³⁰³

The upshot of the Supreme Court’s recent Sixth Amendment jurisprudence is that, like the Constitution and the relevant professional standards themselves, the doctrine is still evolving. Rather than being frozen in time at 1996, as *Harrington*’s analysis of the AEDPA would seem to mandate,³⁰⁴ the federal and state courts still have room to grow, in coordination with the legal societies and state courts that dictate the professional standards of conduct that set the bar for effective assistance of counsel.

III. Regulating Defense Quality Through Ethical Standards

The American Bar Association and other professional organizations have published standards that establish best practices for prosecutors and defense attorneys engaged in plea negotiations.³⁰⁵ On the other hand, the Model Rules of Professional Conduct and the disciplinary rules in effect in most states do not address ethical duties in plea bargaining.³⁰⁶

The pervasiveness of plea bargaining in the criminal justice system, coupled with the Model Rules’ failure to regulate plea negotiations, leaves a massive void in the disciplinary regulation of prosecutors and defense attorneys. This void is particularly peculiar because defense attorneys are responsible for guarding their clients’ constitutional rights. This task warrants clear guidelines and standards that a defense attorney must maintain. To the contrary, ethical duties for defense attorneys in plea bargaining are often difficult to ascertain and courts seem to only further muddy the water because of the lack of transparency, information, and a clear record of occurrences.

303. There is some precedent for judicial intervention to mitigate the adverse immigration consequences of convictions based on disadvantageous plea deals. *See, e.g.*, *I.N.S. v. St. Cyr*, 533 U.S. 289, 315 (2001).

304. *Harrington v. Richter*, 131 S. Ct. 770, 783–84 (2011).

305. *See* Part III, Select ABA Standard Excerpts, *infra*.

306. R. Michael Cassidy, *Some Reflections on Ethics and Plea Bargaining: An Essay in Honor of Fred Zacharias*, 48 SAN DIEGO L. REV. 93, 96 (2011).

A. Efforts to Enforce Defense Attorney Duty to Consider Collateral Consequences

As discussed above, in *Padilla* the Supreme Court recognized that defense attorneys should point out collateral consequences to clients. While the decision was novel in that it changed Supreme Court doctrine, a strong force in the ethical regulation realm preceded it. This force strove, and is still striving, to improve the quality of defense representation in criminal cases, particularly of indigent clients. Many critics and organizations support enforcing an ethical duty that would require defense attorneys consider collateral consequences subject to disciplinary action and/or a claim for ineffective assistance of counsel.

The National Conference of Commissioners on Uniform State Laws are concerned with the absence of ethical duties to inform convicted persons of collateral consequences because of the sheer number of consequences and the vast variation among jurisdictions. The Commissioners noted, “[w]hile some disabilities may be well known, such as disenfranchisement and the firearms prohibition, in most jurisdictions, no judge, prosecutor, defense attorney, legislator, or agency staffer could identify all of the statutes that would be triggered by conviction of the various offenses in the criminal code.”³⁰⁷ As a result, the organization proposes states adopt the following notice for all offenders pleading guilty:

NOTICE OF ADDITIONAL LEGAL CONSEQUENCES

If you plead guilty or are convicted of an offense you may suffer additional legal consequences beyond jail or prison, [probation] [insert jurisdiction’s alternative term for probation], periods of [insert term for post-incarceration supervision], and fines. These consequences may include:

- being unable to get or keep some licenses, permits, or jobs;
- being unable to get or keep benefits such as public housing or education;

307. *Webb v. State*, 334 S.W.3d 126, 138–39 (Mo. 2011) (quoting National Conference of Commissioners on Uniform State Laws, Comment to Section 4, Amendments to Uniform Collateral Consequences of Convictions Act (2010), available at http://www.uniformlaws.org/shared/docs/collateral_consequences/uccca_final_10.pdf, 11–13.

- receiving a harsher sentence if you are convicted of another offense in the future;
- having the government take your property; and
- being unable to vote or possess a firearm.

If you are not a United States citizen, a guilty plea or conviction may also result in your deportation, removal, exclusion from admission to the United States, or denial of citizenship.

The law may provide ways to obtain some relief from these consequences.³⁰⁸

Their website also tracks the states that have adopted or introduced the proposed legislation.³⁰⁹ It notes that North Carolina enacted the Collateral Consequences of Conviction Act in 2011.³¹⁰ A number of states have introduced the bill in either the House or Senate, including Wisconsin, Minnesota, Vermont, New Mexico, Colorado, Nevada, West Virginia, and New York.³¹¹

In May 2005, another effort to reduce the impact of collateral consequences developed and centered on providing defense counsel accessible data for informing their clients of the collateral consequences of their conviction. One of the primary arguments against an affirmative duty to inform defendants of collateral consequences is the complexity of the statutes that impose collateral consequences and the difficulty accessing the massive amount of information. Simply put, it is just too hard to know everything. Chief Judge Judith S. Kaye of the New York State Court of Appeals formed a working group to address this issue.³¹² In partnership with Columbia Law School, the group created a website that collects academic works, court opinions, and professionals' resources in one place.³¹³ The law school recently developed and launched a calculator

308. National Conference of Commissioners on Uniform State Laws, Amendments to Uniform Collateral Consequences of Convictions Act § 5(a) (2010), available at http://www.uniformlaws.org/shared/docs/collateral_consequences/uccca_final_10.pdf, 13–14.

309. See generally Legislation, NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Legislation.aspx>.

310. *Id.*

311. *Id.*

312. Collateral Consequences Calculator—New York State, COLUMBIA LAW SCHOOL, <http://calculator.law.columbia.edu/> (last visited May 5, 2014).

313. *Id.*

for looking up and comparing collateral consequences of criminal charges in New York State.³¹⁴ Although this resource is still limited in its calculations to New York state law and particular subject areas, it is certainly one step closer to making the duty to inform clients of the collateral consequences of their convictions an ethical obligation for defense attorneys.

In a similar effort, the District of Columbia has developed *A Guide for Criminal Defense Lawyers* that details the collateral consequences of criminal charges.³¹⁵

B. Murky Ethical Guidelines for Defense Attorneys

While various institutions providing ethical guidelines have addressed the collateral consequences issue, other professional dilemmas have remained unresolved.

One example is Rule 410 of the Federal Rules of Evidence, which provides that any statement made in the course of an unsuccessful plea negotiation is not admissible in any proceeding against the defendant.³¹⁶ Despite this black letter regulation providing protection to defendants, prosecutors routinely encourage defendants to “waive the protection of Rule 410 by refusing to engage in plea discussions without pre-conditional waivers.”³¹⁷ Jeffrey Standen argues that this departure of clear regulation is a result of growing prosecutorial power from the enactment of mandatory minimums and sentencing guidelines, which collectively shifted much of the power to the prosecutors to rewrite criminal practice.³¹⁸ Not only does the “410 waiver” diminish defendants’ protection that the Rule sought to provide, it also diminishes the role of the defense attorney as an advocate for the defense by awarding so much control to the prosecution. This is one example of how mixed messages can

314. *Id.*

315. Public Defender Service for the District of Columbia, Community Re-entry Program, *Collateral Consequences of Criminal Convictions in the District of Columbia: A Guide for Criminal Defense Lawyers* (Aug. 27, 2004), available at <http://www.txcourts.gov/pdf/ConsequencesToCriminalConvictionsDC.pdf>.

316. FED. R. EVID. 410 (Inadmissibility of Pleas, Plea Discussions, and Related Statements).

317. Jane Campbell Moriarty & Marisa Main, Symposium, “Waiving” Goodbye to Rights: Plea Bargaining and the Defense Dilemma of Competent Representation, 38 HASTINGS CONST. L.Q. 1029, 1034 (2011).

318. See Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1505–06 (1993) (discussing the empowering effect of the sentencing guidelines for prosecutors in the plea-bargaining process and the resulting drastic changes to the nature of plea bargaining, and proposing possible solutions).

complicate defining defense attorneys' duties. The Rule offers defendants protection—but if defendants routinely waive this protection in practice, to what degree should the defense attorney continue to seek the protection?

Moriarty and Main argue that because of the “consistent and widespread use of plea bargaining, pre-conditional waivers, and pressures from guidelines and minimum mandatory sentencing, the role of defense counsel has become both cabined and marginalized.”³¹⁹ For instance, it is well established that defense attorneys have the legal and ethical obligation to ensure the defendant fully understands the conditions of a plea agreement and to offer advice on whether to accept the plea.³²⁰ However, “with the lack of discovery and the pressure to waive rights, knowing how to counsel a client is problematic at best.”³²¹

The *Padilla* Court made another area of defense attorneys' duties murky by failing to make a clear distinction between direct and collateral consequences—confusing the attendant obligations of counsel.³²² The Supreme Court pointed to ABA Standards to measure professional norms, as it also did in *Rompilla v. Beard*, holding that defense counsel has a legal obligation to obtain information that the State has and will use against the defendant.³²³ The criminal justice system would be healthier if courts and attorneys consistently met the ABA Standards; however, these legal and ethical obligations are “difficult to meet in the current climate of limited

319. Moriarty & Main, *supra* note 317, at 1040.

320. See ABA Standards for Criminal Justice: Pleas of Guilty, Standard 14-3.2 (3d ed. 1999). See also *Boria v. Keane*, 99 F.3d 492, 496–97 (2d Cir. 1996) (“The decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in any criminal case . . . [and] counsel may and must give the client the benefit of counsel’s professional advice on this crucial decision.” (quoting ANTHONY G. AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES (1988))); David P. Leonard, *Waiver of Protections Against the Use of Plea Bargains and Plea Bargaining Statements After Mezzanatto*, 23 CRIM. JUST. 8, 13 (2008) (discussing the importance of the role of the defense attorney in ensuring that the defendant understands any plea offers and enters any plea agreements knowingly, and noting that “a criminal defendant will rely heavily on the advice of the defense attorney.”).

321. Moriarty & Main, *supra* note 317, at 1042–43.

322. *Padilla v. Kentucky*, 559 U.S. 356, 366–68 (2010).

323. *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (Citing the ABA Standards for Criminal Justice, the Court remarked: “The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense.” Rather, the Standards are “guides to determining what is reasonable.”).

disclosure and pre-conditional waivers.³²⁴ Moriarty and Main succinctly identify the defense dilemma:

The attorney has little time or ability to investigate or discover what evidence the prosecution has against his client, is entitled to little discovery, knows the client risks decades of prison time if she loses at trial (which, statistically, is overwhelmingly likely to happen), and yet must advise the client on the best strategy, often without a sound, fact-based foundation. The dilemma posed has both constitutional and ethical implications related to competence.³²⁵

These concerns may be particularly pertinent to public defenders who, especially in the current financial climate, experience unprecedented heavy caseloads³²⁶—reestablishing the “you get what your pay for” concerns broached by social scientists in the 1960s and 1970s.

The current climate of plea bargaining has ushered a movement to update the ABA Standards for Criminal Justice. Proponents argue that the system as it stands “is at odds with those ethical and constitutional requirements,”³²⁷ making it necessary to address particular issues causing systematic ethical dilemmas, including the issues of investigation, waivers, and prosecutorial disclosure of evidence pre-plea.

The Proposed Standards require specific proof of knowledge of guilt before accepting pleas, full disclosure of exculpatory information before entering plea discussions, and admonitions against routine waivers of rights and the use of coercive tactics—such as unreasonably short deadlines.³²⁸ The Standards specifically counsel

324. Moriarty & Main, *supra* note 317, at 1046.

325. *Id.*

326. Erik Eckholm, *Public Defenders, Bolstered by a Work Analysis and Rulings, Push Back Against a Tide of Cases*, N.Y. TIMES, Feb. 19, 2014, at A10, available at <http://www.nytimes.com/2014/02/19/us/public-defenders-turn-to-lawmakers-to-try-to-ease-caseloads.html>.

327. Moriarty & Main, *supra* note 317, at 1047.

328. Rory K. Little, *The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111, 1113, (2011) (discussing American Bar Association Proposed Standards for Criminal Justice) [hereinafter Proposed Standards]; *Id.* at 1149 (Standard 3-5.7(c)).

against making false representations,³²⁹ urge prosecutors to remember the importance of actual innocence in their handling of cases,³³⁰ and command prosecutors not to engage in discussions with defendants without either counsel present or counsel's approval to proceed.³³¹ New standards indicated that prosecutors should not condition acceptance of pleas on waiver of all rights, particularly those that would cause a manifest injustice (actual innocence, newly discovered evidence, appeal, habeas corpus, and ineffective assistance³³²).³³³

Rory Little, the reporter on the Proposed Standards, commented that “[w]ith any luck, the current process may end with approving votes in the House of Delegates sometime in 2013. Until then, it must be emphasized that the proposed Standards . . . are simply that—drafts.”³³⁴ The following excerpt is the Proposed Standards for Plea Discussions and Agreements.

Proposed Standards:³³⁵

Standard 3-5.7: Plea Discussions and Agreements

- (a) The prosecutor should remain open to discussions with defense counsel concerning disposition of charges by guilty plea or other negotiated disposition. A prosecutor should not engage in plea discussions directly with a represented defendant, except with defense counsel's approval. Where a defendant has properly waived counsel, the prosecutor may engage in plea discussions with the defendant, and should make and preserve a record of such discussions.
- (b) The prosecutor should not enter into a plea agreement before having information sufficient to assess the defendant's actual culpability. The prosecutor should consider collateral consequences of a conviction before entering into a plea agreement. The prosecutor should not be

329. *Id.* at 3-5.7(d).

330. *Id.* at 3-5.7(f).

331. *Id.* at 3-5.7(a).

332. *Id.* at 1150 (Standard 3-5.9).

333. Moriarty & Main, *supra* note 317, at 1048–49.

334. Proposed Standards, *supra* note 328, at 1113.

335. *Id.* at 1148–49.

influenced in plea discussions by inappropriate factors such as those listed in Standard 3-4.5(b) above.

- (c) The prosecutor should not set unreasonably short deadlines, or conditions for a plea that are so coercive that voluntariness of the plea or effectiveness of defense counsel is put into question. A prosecutor may, however, set a reasonable deadline before trial or hearing for acceptance of a plea offer.
- (d) The prosecutor's duty of candor (Section 3-1.3 above) applies in plea discussions. A prosecutor should not knowingly make false statements or misrepresentations of fact or law in the course of plea discussions.
- (e) Prior to entering into a plea agreement, the prosecutor should disclose to the defense a factual basis sufficient to support the charges in the proposed plea agreement, and information currently known to the prosecutor that tends to negate guilt, mitigates the offense or is likely to reduce punishment.
- (f) A prosecutor should not routinely require waivers of the disclosures in (e) above, but may on an individualized basis seek and accept a knowing and voluntary waiver. Before accepting a guilty plea, however, the prosecutor should always disclose evidence known to the prosecutor that directly suggests the defendant is innocent. A prosecutor may not accept a guilty plea if the prosecutor reasonably believes that sufficient admissible evidence to support conviction beyond reasonable doubt is lacking.

Notably, the quoted standards address prosecutorial duties rather than defense duties. The assumption seems to be that defense attorneys will be disinclined to proffer inconsistent pleas and do not require a special ethical standard to instruct them on that matter.

As this standard and the rest of this chapter demonstrate, while the issue of notification of collateral consequences had been dealt with via ethical rules prior to the *Padilla* decision, other aspects of plea negotiation are not adequately addressed by ethical rules.

Defense attorneys seeking clarity on professionalism will not find it in rules and Supreme Court decisions, but rather in developing professional expertise on their own.

IV. Regulating Nuances: Expertise and Hope

While *Lafler*, *Frye*, and their progeny delved deeper into regulating defense attorney ethics in plea bargaining, various voices, described above, have urged more clarity in such ethical rules. These movements may give rise to changes in ABA rules. However, some gray areas present special difficulties in regulation. Those areas pertain to the major concerns raised by empirical literature with regard to defense attorney function—the way in which defense attorneys develop the necessary expertise to assess the “value of the case,” and the appropriate way to present the plea and trial prognosis to the client—balancing realism and hope. We now turn to address these gaps.

A. Expertise: Training Defense Attorneys in Plea Bargaining

The ABA Standards for Criminal Justice require programs be established to train both beginning and advanced practitioners. It notes that entry-level training programs in public defender offices are particularly important to ensure effective representation.³³⁶ For the purpose of this Article, the authors sought such programs and failed to find them. Moreover, an informal, anecdotal survey of entry-level indigent defense attorneys revealed that such programs were unavailable, and that they tended to gain expertise in assessing the “value of the case” by “learning on the job.” Many young attorneys rely on feedback from more experienced colleagues:

My experience is basically that crimes like DUIs have very set offer ranges based on BAC, but most things are just what DA you get. My offer fielding is just a personal gut check and then panicking and asking my colleagues if I just screwed my client. Literally every attorney in this office is more senior than I am, but I usually ask the most senior one here if I'm really worried. Plea bargaining is all about

336. American Bar Association, Criminal Justice Section Standards, Standard 5-1.5: Training and professional development, http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_blk.html#1.2.

institutionalized knowledge, and there's not much formal training, as far as I can tell.

It is really the position of our office that there is no one right way, just be true to the kind of attorney you are. In keeping with that, part of our training was to follow other attorneys around and watch and get a sense of what would work for you and what wouldn't. That is to learn about every aspect of practice but ends up being a lot about plea bargaining because we do so much of that.

....

We all talk to each about what cases are worth and what we think we should get for them (literally all the time: what is too high so go to trial, what is really low and the person should probably take it and run (unless it's crazy low so maybe something is going on with the case on the DA's side that we don't know about). We do a huge amount of round tabling at lunch and at meetings. The head of branch offices in OC periodically ask what averages are for certain charges to compare with one another, probably in an attempt to promote some kind of continuity.³³⁷

It all seems very second nature at this point, but I do remember being scared and alone and running EVERYTHING by someone who had been here longer before I signed the paperwork. I learned everything by watching and asking, either officially in training or by being in court.³³⁸

I received some in-house training where a senior attorney reviewed standard sentencing guidelines and listed one or two alternative sentences or charge reductions commonly used.

....

In terms of my experience with plea bargaining, I had the guidelines and my notes from the training as a

337. Telephone Interview by Deanna Dyer with Private Indigent Defense Attorney, Alameda County, Calif. (Sept. 3, 2013).

338. Telephone Interview by Deanna Dyer with Assistant Public Defender, Orange County, Calif. (Sept. 2, 2013).

foundation. I was then thrown into the deep end and had to feel things out for myself; I'd randomly ask another PD for their second opinion after I had negotiated an offer, but I was pretty much on my own after the training. I spent a lot of time asking for second opinions, but after a while, the training wheels were expected to come off, and I had to navigate plea bargains on my own.³³⁹

In my limited experience I have never had official trainings for plea bargaining. I simply seek advice from more seasoned attorneys. In Sacramento though we do have "standard offers" sheets. We are discouraged from taking anything worse than a standard offer. If we can't bargain for something better than a standard offer we're encouraged to set for trial.³⁴⁰

In some cases, the prosecutorial offers are inflexible—"supermarket" rather than "bazaar" style—in which case, defense attorneys had little leeway anyway:

Some charges have a universally acknowledged "standard offer." I know what everyone will get on a first DUI without talking to a DA about it because the DA's office has decided what it is and they don't deviate for anything: plead out at arraignments/pretrials/day of trial or your sentence after a conviction at trial; it never changes.³⁴¹

The most important thing is knowing what a case is worth. That comes with experience and doing it and f***ing up. Most of the time, I'm trying to get a case to settle for what it is worth. For example, in our county a second-time drug based DUI will always be

339. Telephone Interview by Deanna Dyer with Assistant Public Defender, San Diego County, Calif. (Sept. 3, 2013).

340. Telephone Interview by Deanna Dyer with Assistant Public Defender, Sacramento County, Calif. (Sept. 3, 2013).

341. Telephone Interview by Deanna Dyer with Assistant Public Defender, Orange County, Calif. (Sept. 3, 2013).

offered formal probation and 45 days. Generally, [the DA's] job is to offer the standard and my job is to determine—by examining the facts—whether I can sweeten the standard, or the standard is a really good deal, or whatever. Sometimes it's worth it to get the judge involved—the judge can make an offer to plead to all charges, and can pressure the DA into making a more reasonable offer, although in this county half the judges were former DAs.³⁴²

Interviewees regarded the continuing legal education programs that the ABA required as scant and unhelpful:

I think I have seen one MCLE class on plea bargaining since I started paying attention to them and it was mixed in with other things as well. The OC PD's Office had a three-week in-house training when I started and it covered various topics; one training was on plea bargaining and it largely centered around the idea that everyone has their own style. And that is routinely what I have been told by other attorneys since I got here.³⁴³

There was/is no “plea bargaining” training and no you don't really go to other attorneys to seek their input on offers The lawyer has to know based on experience, individual personalities and jurisdictional practice how/what to weigh and when.³⁴⁴

As for [continuing legal education] for plea bargains, I think they have them, but they don't teach you much—like most CLEs. You can have one person doing a seminar about how to play tough, and one person doing a seminar about how to be nice, and

342. Telephone Interview by Deanna Dyer with Indigent Defense Attorney, Placer County, Calif. (Sept. 3, 2013).

343. Telephone Interview by Deanna Dyer with Private Indigent Defense Attorney, Alameda County, Calif. (Sept. 3, 2013).

344. Telephone Interview by Deanna Dyer with Assistant Public Defender, Maryland (Sept. 3, 2013).

neither one will be particularly useful—a tough person can't really be nice effectively, and vice versa.³⁴⁵

Given the lack of guidance available to defense attorneys, one way to improve would be to compile information within the public defender's office about "going rates" for different offenses, to give attorneys an indication as to the sentencing ballpark. CLE programs could offer role-playing exercises and mock cases to assess evidence strength, thus complementing the inevitable "learning on the job" by attorneys.

An effort at providing "best practices" should, in our opinion, include the following components:

- (1) An effort by the defense bar to compile "standard offers" for various types of offenses;
- (2) A checklist to help inexperienced defense attorneys assess the value of the case, including:
 - a. the strength of each piece of evidence
 - b. the overall strength of the case
 - c. Predictions and expectations pertaining to the particular county, judge, and jury pool;
- (3) The client's personal situation, relationships, and plans for the future;
- (4) The possible collateral consequences of the plea;
- (5) The possible collateral consequences of conviction that may be avoided with future negotiation; and
- (6) The ability to negotiate with the prosecution and obtain a better plea.

B. Hope: Describing the Trial and Plea Prognosis to the Client

Another gray area that would be nearly impossible to regulate is the way in which the attorney presents the plea offer to the client. Naturally, a preference for trial or for a plea would differ based on the facts of each individual case, and the defense attorney's assessment of the value of the case and desirability of the plea is essential. But to what extent may the lawyer persuade the client to take a plea or go to trial? And where should a defense attorney

345. Telephone Interview by Deanna Dyer with Indigent Defense Attorney, Placer County, Calif. (Sept. 3, 2013).

situate himself on the continuum between loose, passive advising, as found in Flemming's ethnography,³⁴⁶ and the impermissible "conning" identified by Blumberg?³⁴⁷ Part of the answer may lie in sensitivity to the balance between fostering realism and cultivating hope in clients.

In *Law in the Cultivation of Hope*, Kathryn Abrams and Hila Keren argue that the law can empower individuals and institutions through cultivating positive emotions, such as forgiveness or trust.³⁴⁸ The authors identify five stages that an individual goes through before successfully becoming "hopeful." First, the individual must become a "subject of hope": one that may possibly become hopeful.³⁴⁹ Second, the subject must "embrace particular hopes" by perceiving a distant but valuable goal and view the goal as one that she can potentially achieve.³⁵⁰ Third, the subject should "identify a means to an end," which requires the hoper to imagine a range of possibilities and remain open to unfamiliar strategies.³⁵¹ Fourth, the hoper must gain the support of others and draw on their psychological assistance to achieve her objectives.³⁵² Finally, the subject should move on from "particular hopes to hopefulness [A] deep inclination toward aspiration and pragmatic self-assertion that hopefulness entails helps those who acquire it to surmount specific obstacles and recover from unavoidable disappointments."³⁵³ Abrams and Keren then identify five elements that are central to the effort to cultivate hope in others: "communicating recognition and vision; introducing an activity that allows for individuation; providing resources; supporting agency; and fostering solidarity."³⁵⁴

Notably, Abrams and Keren mention two potential perils of cultivated hope: disappointment and reinforcing "otherness." A defense attorney who seeks to "cultivate hope" in a client runs these risks, particularly in the pretrial phase when hope for a positive outcome remains. If a person who at first feels hope experiences an eventual disappointment, her quality of life may *decrease*; her belief

346. Flemming, *supra* note 68.

347. Blumberg, *supra* note 39.

348. Kathryn R. Abrams & Hila Keren, *Law in the Cultivation of Hope*, 95 CALIF. L. REV. 319 (2007).

349. *Id.* at 330.

350. *Id.*

351. *Id.* at 331.

352. *Id.* at 333.

353. *Id.* at 335–36.

354. *Id.* at 323.

that active involvement in an activity or project would provide an opportunity for her to live a better life may exacerbate the despair she feels if this opportunity does not blossom.³⁵⁵

The second potential peril derives from the danger of patronizing the prospective hoppers and enhancing their marginalization or “otherness”:

The same power inequalities that enable the cultivation of hope [the attorney-client relationship within the criminal law context] may also carry detrimental potential—patronizing the prospective hoppers and enhancing their marginalization or otherness. Individuals who foster hope, even with good intentions, may objectify and perpetuate the stigmatization of their beneficiaries.³⁵⁶

In that manner, the manipulation of hope serves the purpose of the cultivator rather than that of the beneficiaries.

When communicating an offer to the client, the defense attorney may need to provide information on which path offers more hope: trial or a plea bargain. In addition to providing a realistic assessment of odds of conviction and information about sentencing, defense attorneys should consider offering the message in a way that opens up a path of hope and redemption for the client after the process is over. This is not always an easy balance to maintain. For example, it is not always possible to offer a detailed prognosis of a client’s likely sentence after a plea deal, versus after trial. If an attorney feels pressure to provide specific risk estimates that later prove false after trial, this could lead to serious disappointment. On the other hand, the tendency, identified in Flemming’s ethnography, to allow defendants to take more responsibility for their decisions, may also lead to disappointment and disillusionment, as well as to a feeling that the attorney “did not do her job” in guiding the client.

Issues to consider when constructing a “best practices” list for defense attorneys communicating with their clients include:

- (1) Making sure that the client—whether guilty or not—finds a guilty plea compatible with his/her sense of justice and with the feeling that he/she has received his/her day in court;

355. *Id.* at 336.

356. *Id.* at 358.

- (2) Emphasizing that the client is the ultimate decider of his/her own fate;
- (3) Ensuring that the client understands not only the realistic implications of the choice, but also that his/her life is not over regardless of what the options are; and
- (4) Beginning to provide information on how to better the client's life post-conviction (planning for rehabilitation and reentry, petitioning for removal of collateral consequences when applicable, discussing the need to mend relationships and obtain support for one's choice).

While the cultivation of hope is not something that Supreme Court cases or ethical standards can regulate, it is imperative to keep in mind that clients are, first and foremost, human beings, with futures ahead of them. Making an informed decision about the future, therefore, also requires thinking about the proactive steps that will follow the conviction. The legal entanglement is only one aspect of a richly lived human life, and while the defense attorney's expertise is mostly in the legal realm, a holistic consideration of the client's options and prospects is invaluable.

Conclusion

The recent Supreme Court decisions on defense counsel duties do not present clear-cut rules for attorneys and courts to follow when fashioning a "jurisprudence of plea bargaining" to reflect the realities of our current plea-dependent justice system. However, the impact of these cases is nonetheless profound. The acknowledgment by the Court's majority that plea bargaining is, in fact, how courts process the vast majority of cases mandates attention to the skills and duties that plea bargaining requires.

Defense attorneys cannot solely rely on the Court to establish clear expectations and ethical boundaries when handling plea bargains, but they can use the Court's recent holdings to advocate for the development of solid plea bargaining ethical standards. *Lafler*, *Padilla*, and *Frye* addressed extreme cases of ineffective assistance of counsel. However, they have also provided the foundation and momentum necessary to shed light on the current void in defense attorney training for plea bargaining ethics and technique.

The emerging jurisprudence of plea bargaining has the promise to create space to develop ethical standards that will have a widespread impact on defense attorneys' everyday practices. To fill this void, regulatory bodies and professional associations should create "best practices" and specific, case-based training to foster sensitivity and sophistication both in assessing the values of plea bargains and in communicating them properly to clients.

Much of the past century's ethnographic research on the criminal justice system has tended to view criminal adjudication as a set of shifting balance points in the interplay between "crime control" and "due process." Sentencing norms seem to arise from social forces that complement each other just as much as they conflict with each other, which reach far beyond the individual facts of cases, or the personal characteristics and desires of defendants and victims. The ratio of caseload to courtrooms; public perceptions of crime, rehabilitation, and punishment; prosecution and defense capacity; courtroom working group cohesion; available correctional funding; and many more interests all push and pull at each other.

The individual defendant may feel like a figure on a wire mobile sculpture, dangling in these shifting winds. A defendant may remain in detention, pending the outcome of a long and confusing trial; public funding may be inadequate for a zealous defense; or a judge may feel pressure to clear the docket by disposing of criminal cases quickly. Faced with these strong incentives to plead guilty, a criminal defendant may feel the system is conspiring to take away his or her choices.

Under these precarious conditions, defense attorneys must remember their clients' autonomy, agency, and long-term needs. Although attorneys must act in what they consider their clients' best interest, the client himself or herself must make the ultimate decision of whether to go to trial. If a client decides to pursue a plea bargain, the defense attorney is responsible to secure the best deal possible. There are many ways to do this, but basic responsibilities should include obtaining information in advance that the prosecutor might use at trial, presenting a frank and accurate assessment of the case—including the potential long-term and collateral consequences of any criminal conviction, regardless of the sentence—and insisting on procedural and substantive fairness from all involved.

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