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PLEA BARGAINING REGULATION, INDIGENT DEFENSE, AND THE POTENTIAL FOR MARKET EFFECTS

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ABSTRACT

In three recent decisions about plea bargaining, the Supreme Court has expanded the meaning of constitutionally adequate assistance of counsel for criminal defendants. The failure to advise a defendant entering a guilty plea of the collateral immigration consequences of conviction, exceedingly poor advice about rejecting a plea offer, and counsel's failure to even convey the terms of a plea deal all constitute breaches of a defendant's Sixth Amendment right to representation. Given entrenched free-market conceptions of plea bargaining, however, the decisions do not portend significant constitutional regulation of prosecutorial tactics or the terms of plea agreements themselves. On the other hand, setting a baseline for sufficient legal advice in the context of pleas does have the potential to affect the failed market for indigent defense. Almost every criminal disposition occurs by guilty plea, and the vast majority of defendants are served by publicly funded counsel. Staggering caseloads and minimal oversight have produced an acute crisis in the system of public defense. If this new constitutional floor even modestly enlarges the amount of time counsel must spend with defendants to ensure that pleas will be upheld, then the resources allocated to indigent defense might increase as well.

I. Market-Based Conceptions of Plea Bargaining

Negotiated settlements of criminal prosecutions resolve approximately ninety-seven percent of all cases in the federal system and ninety-four percent of criminal cases in state courts.[1] As the Court has recently recognized, it no longer makes sense to conceptualize plea bargaining as a process that occurs in the "shadow" of a potential trial. Plea bargaining simply "is the criminal justice system."[2]

Plea bargaining is also almost entirely unregulated. A completed plea agreement has the same force and effect as a jury verdict following a trial,[3] yet the judgment issues largely without any public adjudication or concern with public law conceptions of fairness. The Federal Rules of Criminal Procedure set forth some procedural requirements for the entry of guilty pleas,[4] but the courts have exercised negligible oversight when it comes to the substance of the bargains.

Given caseload pressures, courts regard plea bargains as efficient—they comport with market-based rationales and norms.[5] The private law model overrides "competing public interests, such as fairness, accuracy, proportionality or consistency."[6] In theory, this is because the parties negotiate freely. The government has an interest in securing guilty pleas and obtaining a waiver of the default trial right. And plea agreements appear mutually beneficial because they are "desired by defendants."[7] In practice, the rate and terms of plea bargaining are attributable to an institutional design that strongly favors prosecutorial discretion and control.[8]

Prosecutors can exploit limited defense resources to obtain pleas, and the substantive criminal law offers an expansive menu of charging options and discretionary sentencing enhancements. Prosecutorial discretion is both horizontal, allowing for multiple counts arising from the same conduct, and vertical, allowing for charges of more or less serious offenses. Negotiations might occur over charges, sentencing recommendations and factors, or both. The process leaves

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[1] Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012). The misdemeanor plea rate is an even higher 98 percent. *See* Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE L. REV. 1049 (2013) ("The petty offense system generates cases and convictions by the millions in a speedy, low-

[2] *Frye*, 132 S. Ct. at 1407 (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

[3] *See, e.g.*, Kercheval v. United States, 274 U.S. 220, 223 (1927).

[4] FED. R. CRIM. PRO. 11.

[5] DARRYL K. BROWN, FREE MARKET CRIMINAL JUSTICE: HOW DEMOCRACY AND LAISSEZ FAIRE UNDERMINE THE RULE OF LAW 99 (2016) (explaining that the structure of plea bargaining responds to the "justice system's demand for it" and requires "minimal constraints on party interactions that characterize free markets and private contracts").

[6] *Id.* at 102 (citing Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407 (2008)).

[7] United States v. Ruiz, 536 U.S. 622, 631 (2002).

[8] *See generally* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2004).

doubt about "whether bargaining involves a *discount* for pleading guilty or a *penalty* for refusing to do so."[9]

Despite the imbalance of power, courts continue to treat plea bargaining more or less as a matter of private contract like "any other bargained-for exchange." They perceive autonomous parties engaged in negotiation, and efficiencies served by minimal state regulation.[10] Defendants have the constitutional right to plead not guilty and proceed to trial. Prosecutors have the institutional power to select the most serious charges and seek the maximum sentence. Parties can trade off those rights when they value each other's entitlements more than their own.

In one canonical defense of plea bargaining as a well-functioning market,[11] Frank Easterbrook describes the market as a "bilateral monopoly." Defendants, in his view, "shop" when they choose an offense and a jurisdiction.[12] The defendant controls this move *ex ante* but cannot later "switch prosecutors," and thus the government exerts leverage *ex post*. Prosecutorial discretion, the negotiation process, and sentencing ranges interact to set the price "in the same way as bargaining in the market for goods and services."[13] Defendants sell procedural rights that have little value to them at trial but considerable value in trade. The parties save the costs of trial, defendants receive lower sentences, and the government can direct funds to other cases.

The system thus achieves maximum deterrence with its scarce resources. According to Easterbrook's reasoning, mandatory penalties or significant third-party oversight of negotiations would inhibit freedom to contract and would reduce these efficiencies.[14] Consider the impact of the Federal Sentencing Guidelines, which took effect in 1987. To some extent, the defined sentencing ranges the Guidelines impose operate as a regulatory check on the discount the government can offer to a pleading defendant. But prosecutorial discretion merely shifted to charge bargaining, which gave prosecutors renewed power to set the difference between the sentences.[15] "Defendants," Easterbook argues, "cannot be

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[9] BROWN, *supra* note 5, at 92; *see also* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

[10] Mabry v. Johnson, 467 U.S. 504, 508 (1984).

[11] Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 289 (1983); *see also* Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1906 (1992).

[12] Jeffrey Standen offers a different description of the market as a "monopsony" with prosecutors as the sole purchasers empowered to offer pleas at subcompetitive prices. *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1473 (1993).

[13] Easterbook, *Market System*, *supra* note 11, at 308.

[14] *Id.* at 298.

[15] *See* FISHER, *supra* note 8, at 212 (noting that "narrowly fixed penalty provisions" lead to prosecutors constraining the judicial sentencing options "by manipulating the slate of charges"); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 129 (2005) ("Changes in federal sentencing practices during the 1980s and 1990s increased the certainty and size of the penalty for going to trial, and mightily influenced the guilty plea and acquittal rates during those times").

made better off by limiting their options."[16] Although he acknowledges the coercive potential of the trial penalty, possible conflicts of interest for defense counsel receiving fixed fees or prosecutors interested in marquee trials, and unequal treatment of defendants, he regards all of these objections as trivial when weighed against the deterrence gains of the system.[17]

Many scholars object to the market-based conception of plea bargaining and instead consider it a political system that lacks "the distinctive equilibrium mechanism that characterizes ordinary commercial markets."[18] According to Stephen Schulhofer, for example, there are agency costs for both the prosecutor acting for the public and the defense lawyer acting for the defendant. The best way to address those costs might be regulation to limit discretion with features such as fixed discounts in place of case-by-case bargaining. Although the market may be efficient in terms of the volume of completed plea bargains, the lack of regulation also produces unfairness to individual defendants, inaccurate results, coerced dispositions, and compromises based on inadequate information.[19] Even in the case of factually guilty defendants, sentences differ for those similarly situated because they depend on the circumstances of the negotiations rather than the details of the crime.

Other commentators have also noted that "the rational actor paradigm may not capture the reality of the negotiation between prosecutor and defense counsel."[20] You would expect pricing to emerge from inputs of the probability of conviction, the anticipated sentence upon conviction, and the resources saved by avoiding trial. The "price" of a plea would then be the size of the discount necessary to induce a defendant to accept a bargain. But rational actors do not prefer pleas to trials in every instance—defendants might disagree about the worth of the case or desire a trial for some reason other than utility maximization.

Defendants' incomplete information, the effects of framing, risk preferences, time discounting, and the institutional context arguably have more explanatory power than efficient market bargaining.[21] Moreover, the background touchstone of the likely outcome at trial is more theoretical than real.[22] Defendants cannot calculate the chances of acquittal with any precision because

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[16] Frank H. Easterbrook, *Plea Bargaining is a Shadow Market*, 51 DUQ. L. REV. 551, 555 (2013).

[17] Easterbook, *Market System*, *supra* note 11, at 310 (remarking that "some lawyers are just better than others").

[18] Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 44 (1988).

[19] *Id.* at 81–82; *see also* Anne Traum, *Fairly Pricing Guilty Pleas*, 58 HOW. L.J. 437, 443 (2015) (reasoning that plea bargaining contracts are distributively unfair because there is insufficient consideration of equity in pricing, equality in treatment, or special allowance for the disadvantaged).

[20] Rebecca Hollander-Blumhoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163, 165 (2007).

[21] *Id.*

[22] Scott & Stuntz, *supra* note 2, at 1949; *see also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2464 (2004).

pre-plea discovery is limited.[23] Nor do they have sufficient data about likely penalties or the types of bargains typically available for the charged crime.

II. Laissez Faire Regulation of Plea Bargaining

The law of plea bargaining takes almost no account of these objections and relies heavily on rational choice theory. Its "regulation through the common-law process is fundamentally no different from the way courts treat other contracts" between civil parties.[24] The Court has adopted wholesale the idea that plea bargaining proceeds from a "mutuality of advantage."[25] The government saves resources, and defendants receive reduced sentences. The courts' "market-based rationality is at times almost comically explicit."[26] In *United States v. Mezzanatto*, for example, the Supreme Court flatly stated that "[a] defendant can 'maximize' what he has to 'sell' only if he is permitted to offer what the prosecutor is most interested in buying."[27] Or, as Easterbrook writes, "judges must be careful not to override real people's actual views about their actual interests in favor of what judges think those views and interests ought to be."[28]

In accordance with this conception, the plea system is "built around prosecutorial discretion, defense autonomy to trade away procedural entitlements, and a largely passive judiciary."[29] In their passive role, courts have disregarded fairness and accuracy considerations, engaged in only superficial assessments of voluntariness, and assumed the participation of competent counsel in the plea bargaining process.

First, courts assess fairness to the defendant in the sense of due process as more or less coextensive with a conception of fairness in private markets. The parties to plea bargains retain similar "autonomy from state regulation to compete against or negotiate with others and enter into contracts, with few legal standards about fair bargaining practices, conditions, and other contract terms."[30] The standards for prosecutorial conduct are no higher than those for other private actors competing in a free market, and the Court has deemed the prosecutor's interest in persuading the defendant to forgo trial rights "constitutionally

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[23] United States v. Ruiz, 536 U.S. 622 (2002).

[24] Easterbrook, *supra* note 16, at 551.

[25] Brady v. United States, 397 U.S. 742, 752–53 (1970); *see also* Corbitt v. New Jersey, 439 U.S. 212, 222 (1978).

[26] Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 145 (2016).

[27] United States v. Mezzanatto, 513 U.S. 196, 208 (1995); *see also id.* (concluding that courts should not impose "any arbitrary limits on [the parties'] bargaining chips " in order to avoid "stifl[ing] the market for plea bargains").

[28] Easterbrook, *supra* note 16, at 551.

[29] BROWN, *supra* note 5, at 117.

[30] Brown, *supra* note 26, at 145–46.

legitimate."[31] Nor does the good or bad faith of the prosecutor's negotiation tactics make any difference, as long as there is no evidence of invidious discrimination such as racial bias.[32] Thus, for negotiated pleas as for private contracts, "the law permits terms and outcomes widely condemned as unfair."[33]

Second, courts do not account for the factual accuracy of the outcomes that plea bargaining produces. Actually innocent defendants often reach the rational decision to plead guilty.[34] Indeed, innocent defendants may be more likely to plead under imperfect information and more risk averse than guilty ones.[35] Recent studies of DNA exonerations reveal substantial numbers of wrongful convictions obtained by guilty pleas.[36] Plea bargaining masks factual questions about whether a defendant committed the crime and "is perhaps the most prominent example of the criminal justice system operating collateral to a quest for truth."[37] The ultimate goal is a completed agreement, often at the expense of reliable conclusions about the nature or severity of the crime.[38] Courts thus permit defendants to plead guilty even when they persist in professing their legal innocence.[39] In addition, misdemeanor defendants with strong defense claims frequently enter guilty pleas because they are being held without bail or cannot afford bail. The rational choice is a plea to time served despite clear evidence of innocence, because it is preferable to remaining incarcerated for a longer period pending trial.[40]

Although fairness and accuracy do not figure in the regulation of plea bargaining, judicial consideration of pleas does reference two constitutional limitations: a Fifth Amendment concern with potential coercion and the Sixth Amendment right to counsel.

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[31] Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (accepting "the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty"); *see also* United States v. Batchelder, 442 U.S. 114, 123–25 (approving prosecutorial discretion to make charging decisions with varying punishments).

[32] *Batchelder*, 442 U.S. at 114.

[33] BROWN, *supra* note 5, at 118.

[34] *See* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008); *see also* Lafler v. Cooper, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting) (acknowledging the reality of "prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense").

[35] Scott & Stuntz, *supra* note 2, at 1949; *see also* Gregory Gilchrist, *Plea Bargains, Convictions, and Legitimacy*, 48 AM. CRIM. L. REV. 143, 171 (the "reasons people plead guilty after plea bargaining are numerous, and actual guilt has little bearing on the calculus").

[36] *See, e.g.*, BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 205 (2011).

[37] Alison Orr Larsen, *Bargaining Inside the Black Box*, 99 GEO. L.J. 1567, 1611 (2011).

[38] *See generally* William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004).

[39] North Carolina v. Alford, 400 U.S. 25, 38 (1970).

[40] Natapoff, *supra* note 1, at 1049 ("Because poor defendants often cannot make bail, they may have to sacrifice work or child care in order to contest their cases, and therefore plead guilty in large numbers.").

The Constitution itself makes no mention of plea bargaining, but limited constitutional oversight of the process dates to the 1971 decision in *Santobello v. New York*.[41] There, the Court recognized that plea bargaining was "essential" to an efficient system of criminal justice but also subject to some "safeguards to insure the defendant what is reasonably due in the circumstances."[42] Specifically, the Court held that prosecutors are bound by the promises they make in plea hearings.

The only bargaining tactics constrained by due process, however, are illegal fraud and outright coercion.[43] Prosecutors may constitutionally threaten any punishment that the law allows.[44] Although defendants no doubt face tough choices, the Court still regards them as free ones.[45] If a plea appears "knowing and voluntary," and the parties articulate some "factual basis" for the agreement,[46] more or less anything goes in the negotiation process.[47]

III. Market-Justifying Advice of Counsel

Defense lawyers play a key role in justifying limited scrutiny under this free market approach. A defendant must be formally "knowing" when it comes to the terms of the bargain, the nature of the charges, the rights being waived, and the potential sentence to be imposed. But a represented defendant makes an "intelligent" plea notwithstanding actual ignorance of the evidence admissible at trial or the likelihood that trial will result in conviction.[48] Courts assume that counsel provides the requisite notice and further envision a defense lawyer who is a sophisticated player with a good sense for market prices and customary practices.[49]

In other words, the Court's conception of "mutuality of advantage" depends on the presence of competent counsel advising the client about whether

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[41] 404 U.S. 257 (1971).

[42] *Id.* at 262; *see also* Bordenkircher v. Hayes, 434 U.S. 357, 372 (1978) (Powell, J., dissenting) ("The plea-bargaining process . . . is essential to the functioning of the criminal-justice system.").

[43] Brady v. United States, 397 U.S. 742, 750 (1970) (prohibiting only "actual or threatened physical harm" or "mental coercion overbearing the will of the defendant").

[44] *Id.* at 751.

[45] *See Bordenkircher*, 434 U.S. at 364.

[46] FED. R. CRIM. PRO. 11.

[47] *See* Santobello v. New York, 404 U.S. 257 (1971).

[48] Russell D. Covey, *Plea Bargaining Law After* Lafler *and* Frye*,* 51 DUQ. L. REV. 595, 599 (2013); *see also Brady*, 397 U.S. at 751 (stating that a defendant cannot withdraw a plea because "his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action").

[49] *See* Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1180 (1975) (noting the Court's "optimistic view of the defense attorney's role" in plea negotiations).

to enter into a bargain.[50] Although the pleading defendant is not entitled to "fair process" per se,[51] competent representation functions as a sort of consumer protection in the context of hard bargaining. Almost every time the Court has declined to impose regulation in the plea bargaining context, it has done so with reference to the fact that "courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants *with adequate advice of counsel*."[52] So assisted by a defense lawyer, defendants are "presumptively capable of intelligent choice in response to prosecutorial persuasion."[53]

In the vast majority of cases—more than eighty percent—the defense counsel to which the Court refers will be publicly funded. Accordingly, the plea bargaining market interacts with the market for indigent criminal defense. And any regulation of the standards or conditions for plea bargaining has the potential to affect the failing system of public defense.

IV. Publicly Funded Defense

The provision of counsel to indigent criminal defendants is grounded in the "noble ideal" and soaring rhetoric of the Supreme Court's 1963 *Gideon* decision.[54] Clarence Earl Gideon was arrested and charged with breaking into a Florida pool hall. At the time, Florida only provided court-appointed counsel in capital cases. Gideon's request for an attorney was denied, and he represented himself at trial. After he was found guilty and sentenced to five years in prison, he filed a now-famous petition detailing his plight.[55] Justice Black's opinion for the Court cites the "obvious truth" that a fair trial cannot be guaranteed without the assistance of counsel. Every defendant does not stand equal before the law, he wrote, "if the poor man charged with crime has to face his accusers without a lawyer to assist him."[56]

Gideon has a unique status among the Warren Court pronouncements on criminal procedure. It may be the one decision that enjoys near-universal affection and agreement. Even at the time, the attorneys general of half of the states signed a brief supporting the petitioner.[57] Yet despite wide regard for the principal as

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[50] *See Brady*, 397 U.S. at 754–55; *see also id.* at 748 n.6 ("Since an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney, this Court has scrutinized with special care pleas of guilty entered by defendants without the assistance of counsel."); *see also* McMann v. Richardson, 397 U.S. 759, 784 (Brennan, J., dissenting) ("As long as counsel is present when the defendant pleads, the Court is apparently willing to assume that the government may inject virtually any influence into the process of deciding on the plea.").

[51] Corbitt v. New Jersey, 439 U.S. 212, 225 (1978).

[52] *Brady*, 397 U.S. at 758 (emphasis added).

[53] Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978).

[54] Gideon v. Wainwright, 373 U.S. 335, 344 (1963).

[55] *See generally* ANTHONY LEWIS, GIDEON'S TRUMPET (1964).

[56] *Id.*

[57] *See* Bruce A. Green, Gideon's *Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused?*, 122 YALE L.J. 2336, 2342 (2013).

constitutionally necessary and institutionally valuable, "the overwhelming weight of informed opinion[] is that *Gideon* has not succeeded in providing typical indigent defendants with a competent and vigorous defense."[58]

The recent fiftieth anniversary of the *Gideon* decision prompted substantial analysis of the state of indigent defense,[59] and the inescapable conclusion was that "[p]ublic defender offices and other indigent defense providers are underfunded and understaffed."[60] Insufficient resources, overwhelming caseloads, and inadequate oversight render the entire system a "national disgrace."[61] *Gideon*, of course, imposed an unfunded mandate, and financial pressures on the states have been "the single greatest obstacle to delivering 'competent' and 'diligent' defense representation."[62]

Approximately ninety percent of all criminal prosecutions take place in states, counties, and municipalities. Most states have established public defense systems, and some rely as well on private attorneys accepting appointments under contract. But every state is facing an acute shortage of funds for indigent defense.[63] Current state budget shortfalls are expected to increase, at least in the near term, because of health care costs, underfunded pension plans, infrastructure needs, declining revenues, and federal budget cuts.[64] Far too many jurisdictions have turned to the fines and fees that criminal defendants themselves pay to fund the system of public defense.

Under these pressures, state public defense systems fail to attract and adequately compensate experienced lawyers.[65] Compensation for public defenders and panel attorneys can run as low as $40 per hour,[66] and in some cases has averaged out to $4 per hour.[67] Many jurisdictions impose per-case caps. For trials involving mildly serious felonies, an attorney might earn $600 for handling the

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[58] Donald A. Dripps, *Up From* Gideon, 45 TEXAS TECH. L. REV. 113, 114 (2012).

[59] *See, e.g.*, Symposium, *The Failures of* Gideon and *New Paths Forward*, 12 OHIO ST. J. CRIM. L. 307 et seq. (2015).

[60] Mark Walsh, *Fifty Years After* Gideon, *Lawyers Still Struggle to Provide Counsel to the Indigent*, ABA J., Mar. 1, 2013 (quoting a speech by United States Attorney General Eric Holder).

[61] Deborah Rhode, *Whatever Happened to Access to Justice?*, 42 LOYOLA L.A. L. REV. 869, 894 (2009); *see also* Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HAST. CONST. L.Q. 625, 625 (1986).

[62] *See* THE CONSTITUTION PROJECT, NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009).

[63] Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 YALE L.J. 2150, 2153 (2013). In contrast, public defense in the federal criminal justice system—largely because of the requirements of the 1964 Criminal Justice Act—functions in a way widely regarded as effective. *See, e.g.*, J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1127 (2014).

[64] *See* STATE BUDGET CRISIS TASK FORCE, FULL REPORT 6, 50 (July 31, 2012).

[65] *See, e.g.*, JUSTICE DENIED, *supra* note 62, at 52–70.

[66] Darryl K. Brown, *Epiphenomenal Indigent Defense*, 75 MO. L. REV. 907, 912–13 (2010).

[67] Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1870 (1994).

entire case, and no more than $1235 for a complex case.[68] At every level of experience, public defenders earn less than their counterparts on the prosecution side.[69] Moreover, only rarely do public defense budgets include funds for the experts and investigators necessary to challenge the government's case.[70]

Public defender caseloads also exceed maximum guidelines by more than 150% in many jurisdictions.[71] The American Bar Association recommends that attorneys serving as public defenders take on no more than 150 felonies or 400 misdemeanors total each year.[72] In Dade County, Florida, some appointed lawyers have represented as many as 700 felony defendants and 2,225 misdemeanor defendants in a single year.[73] A public defense office in New Orleans, Louisiana handles the equivalent of 19,000 misdemeanor cases per attorney every year, which averages out to about seven available minutes of attorney time per disposition.[74] For serious felonies proceeding to trial, public defenders in Missouri spend an average of just nine hours preparing their cases, while a 2013 study concluded that at least forty-seven hours were needed per each similar case.

Recall that the free market logic of plea bargaining depends on a system in which rational choices are made with sufficient information. The "meet 'em and plead 'em" model of representation common in jurisdictions across the United States does not fulfill that condition. Many public defenders juggle over a hundred active cases at any given time. They obviously cannot interview clients, investigate the facts of the case, or file appropriate motions, let alone effectively negotiate plea bargains. Face-to-face meetings with clients often require travel to distant detention facilities as well. Hurried conversations in the courtroom itself, or perhaps a hallway or holding cell, are the best most public defenders can do.[75]

As a result, defendants who have waited weeks or months for representation may then have a five-minute meeting with a defense lawyer before pleading guilty.[76] In one Mississippi county, almost half of the indigent defense cases are resolved by guilty plea on the same day that the public defender meets the client. Seventy percent of the clients represented by a California public

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[68] Brown, *supra* note 66, at 912–13.

[69] Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 230 (2004).

[70] AM. BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 17–18 (Dec. 2004).

[71] *Id.*

[72] ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 5 n.19 (2002).

[73] KAREN HOUPPERT, CHASING GIDEON: THE ELUSIVE QUEST FOR POOR PEOPLE'S JUSTICE 91–94 (2013); JUSTICE DENIED, *supra* note 62, at 68.

[74] Robert C. Boruchowitz, et al., *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts*, NAT'L ASS'N OF CRIM. DEF. LAW. 21 (2009).

[75] *See* Tina Peng, *I'm a Public Defender. It's Impossible for Me to Do a Good Job Representing My Clients*, WASH. POST, Sept. 3, 2015.

[76] Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. (forthcoming 2016).

defender office plead guilty at their first court appearance, in some cases after less than a minute of explanation about the deal being offered.[77]

Several jurisdictions have recently reached the point of barring public defenders already staggering under their caseloads from taking any additional cases. A Louisiana judge began issuing this order after learning that some defense lawyers were handling up to 180 felonies at a time, and the New Orleans public defender program has stopped taking new cases altogether.[78] Public defenders represent eighty-five percent of all criminal defendants in the jurisdiction, and many of the defendants whose cases have been postponed remain imprisoned while they await further process.[79]

V. The Constitutional Adequacy of Counsel

Resource and caseload burdens provide only a partial explanation for the failure of indigent defense. They persist because the constitutional adequacy of counsel is measured by a shockingly low standard.[80] Competent assistance within the meaning of the Sixth Amendment has long been required not only at trial but also in the context of plea bargaining.[81] In order to demonstrate that the provision of counsel falls below the constitutional bar, however, defendants must satisfy the *Strickland v. Washington* test. First, they must demonstrate that counsel's performance failed to comply with prevailing professional norms and then that the deficient performance "materially" affected the outcome of the case.[82]

Under *Strickland*, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[83] Prevailing professional standards change over time, and the practice norms of an underfunded system have actually begun to inform what constitutes minimally effective counsel. As Justice Marshall asked in his *Strickland* dissent: "Is a

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[77] Bright & Sanneh, *supra* note 63, at 2165.

[78] Derwyn Bunton, *When the Public Defender Says, "I Can't Help,"* N.Y. TIMES, Feb. 19, 2016; *see also id.* ("Louisiana spends nearly $3.5 billion a year to investigate, arrest, prosecute, adjudicate and incarcerate its citizens. Less than 2 percent of that is spent on legal representation for the poor.")

[79] *See* Peng, *supra* note 75.

[80] *See* Lawrence C. Marshall, Gideon's *Paradox*, 73 FORDHAM L. REV. 955, 968 (2004) ("[G]rossly incompetent lawyers whom none of us would trust with traffic offenses are being entrusted with the lives and liberty of indigent defendants."). *See generally* Erwin Chemerinsky, *Lessons from* Gideon, 122 YALE L.J. 2676 (2013) (attributing the failures of the system of public defense in part to the *Strickland* standard).

[81] Strickland v. Washington, 466 U.S. 668, 688 (1994); Hill v. Lockhart, 474 U.S. 52, 59 (1985). *But see* Brady v. United States, 397 U.S. 742 (1970) (defendant incorrectly told that he was eligible for the death penalty, but the advice about the plea was still held competent).

[82] *Strickland*, 466 U.S. at 687.

[83] *Id.* at 689; *see also id.* at 688–89 ("No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.").

'reasonably competent attorney' a reasonably competent adequately paid retained lawyer or a reasonably competent appointed attorney?"[84] Even where counsel's errors at trial likely cost a defendant an acquittal,[85] a reviewing court can apply post hoc rationalizations and conclude that the "overall representation [was] not bad enough to rebut the presumption of reasonableness."[86]

The notorious toothlessness of the *Strickland* standard—which napping,[87] intoxicated, slothful,[88] and even mentally impaired lawyers[89] have bypassed—arises from the Court's reluctance to construct any "checklists" or recognize any concrete requirements. Instead, *Strickland* instructs reviewing courts to accord "a heavy measure of deference to counsel's judgments."[90]

VI. Newly Imposed Baselines

Recent plea bargaining cases, however, identify categories of constitutionally inadequate assistance that have the potential to set some minimum requirements. Half a century after the *Gideon* decision, three defendants caught the Supreme Court's attention because they did not have the counsel they needed to enter or reject plea agreements advisedly. Although defendants have no constitutional right to be offered plea deals, they do have a constitutional right to competent assistance in making the decision whether to accept one.[91]

In *Padilla v. Kentucky*, the Court held that a defense attorney who fails to inform a non-citizen client of the prospect of deportation following a guilty plea has rendered counsel below an objective standard of reasonableness.[92] The case involved a permanent resident from Honduras whose attorney advised him that he did not have to worry about his immigration status because he had "been in the

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[84] *Id.* at 708 (Marshall, J., dissenting).

[85] *See* Frye v. Lee, 235 F.3d 897, 907 (4th Cir. 2000) (a habitually intoxicated lawyer—notorious for drinking during the time period of the trial but not actually in court—was not constitutionally ineffective); Stephen F. Smith, *Taking* Strickland *Claims Seriously*, 93 MARQ. L. REV. 515, 542–43 (2009) (concluding that the *Strickland* standard shields "a wide array of stunningly incompetent and unprofessional representation"). *But cf.* Hill v. Lockhart, 474 U.S. 52, 59 (1985) (counsel's error in failing "to investigate or discover potentially exculpatory evidence" could prejudice defendant by precipitating a guilty plea); Evitts v. Lucey, 469 U.S. 387, 395 (1995) ("[T]he Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits.").

[86] George C. Thomas, III, *History's Lesson for the Right to Counsel*, 2004 U. ILL. L. REV. 543, 553; *see also id.* at 520–21 (explaining that claims of constitutional ineffectiveness will fail wherever there is "any conceivable basis for rationalizing the attorney's actions").

[87] *See* Muniz v. Smith, 647 F.3d 619, 623 (6th Cir. 2011).

[88] *See* Marc L. Miller, *Wise Masters*, 51 STAN. L. REV. 1751, 1786 (1999) (citing examples of borderline incompetence).

[89] *See* Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 NEB. L. REV. 425, 455–63 (1996).

[90] Strickland v. Washington, 466 U.S. 668, 691 (1994).

[91] *See* Missouri v. Frye, 132 S. Ct. 1399, 1403 (2012).

[92] Padilla v. Kentucky, 559 U.S. 356 (2010).

country so long."[93] Padilla had spent forty years in the United States, had children who were United States citizens, and served in the United States military. Because he was convicted of drug trafficking, which is an aggravated felony, Padilla was subject to automatic deportation. The Court concluded that a defendant who accepts a plea pursuant to such faulty advice about collateral consequences has been deprived of the Sixth Amendment right to counsel at a "critical phase" of criminal proceedings.[94]

Collateral consequences are of course not limited to deportation. They include "involuntary civil commitment, sex-offender registration, and loss of the right to vote, to obtain professional licenses, and to receive public housing and benefits."[95] Many defendants will care more about these consequences than about criminal convictions. Accordingly, *Padilla* represents a potentially important refinement of *Strickland* that could have an impact on the adequacy of counsel even beyond incorrect advice about immigration law.

The 2012 *Lafler* and *Frye* decisions similarly reassess the adequacy of counsel, but with regard to the decision to *reject* plea bargains. The new set of considerations that the cases introduce could also incrementally lower the *Strickland* barrier.[96] Both cases further establish that plea bargaining is a critical stage of the criminal justice process, in fact the defining stage for almost all criminal defendants.[97] And the Court's reasoning may require lower courts to oversee conduct that had previously been out of judicial view—consultation between defendant and counsel about plea offers.

The defendant in *Frye* was charged with driving on a revoked license—a Class D felony.[98] The government sent a letter to defense counsel proposing either a misdemeanor plea with a recommendation for a ninety-day term or a felony plea with a ten-day term plus a period of probation. Defense counsel never informed the defendant of the offer, and it expired. When the defendant was later re-arrested for driving without a license, he pled guilty to the felony (again with no knowledge of the earlier plea offer) and received a sentence of three years in prison.[99] The Court held that "defense counsel has the duty to communicate

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[93] *Id.*

[94] *See Frye*, 132 S. Ct. at 1406; *see also* United States v. Wade, 388 U.S. 218, 224 (1967) (holding that the Sixth Amendment right to counsel applies at all "critical phases" of criminal prosecution).

[95] Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 119–20 (2009). *See also generally* MARGARET COLGATE LOVE, JENNY ROBERTS & CECILIA KLINGELE, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY & PRACTICE (2013).

[96] Note that there may be more objective metrics of the impact of bad advice during plea bargaining than with regard to poor lawyering at trial, because a defendant will typically receive an empirically higher sentence than was offered in the plea agreement. *See* Jenny Roberts, *Proving Prejudice, Post*-Padilla, 54 HOW. L.J. 693, 732–38 (2011).

[97] Frye, 132 S. Ct. at 1407.

[98] *Id.* at 1399.

[99] *Id.* at 1404.

formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." There was a "reasonable probability" that the defendant would have accepted the lesser plea because he ultimately entered the plea to a more serious charge, with no promise of a sentencing recommendation from the prosecutor.[100]

In the *Lafler* case,[101] the defendant was made aware of a favorable plea offer but got patently bad counsel about whether to accept it, including an incorrect explanation of the burden of proof for intent to murder.[102] The defendant was offered fifty-one to eighty-five months of imprisonment in exchange for his plea to assault with intent to murder. He proceeded to trial based on his attorney's forecast that he would prevail because the victim as shot below the waist.[103] Lafler was convicted and received a substantially harsher sentence than the one offered in the plea: 185 to 360 months.[104] The Court held that "[i]f a plea bargain has been offered, a defendant has the right to effective assistance of counsel in *considering* whether to accept it. If that right is denied, prejudice can be shown if the loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence."[105] The correct outcome—that is the guilt or innocence of the defendant—is immaterial. What matters is whether the defendant lost benefits "he would have received in the ordinary course but for counsel's ineffective assistance."[106]

Commentary on these cases has ranged from asserting that they are "no big deal"[107] to pronouncing them "new ground" in the regulation of plea agreements.[108] In his dissent in *Lafler*, Justice Scalia objected that the Court has opened "a whole new field of constitutionalized criminal procedure: plea bargaining law."[109] The mixed reviews relate to a difficult and still pending remedial question in both cases, which is how to restore the prosecution and defense to the positions they would have occupied absent the constitutional violation. Narrowing interpretations of the cases might also respond to Justice Scalia's suggestion that the application of hindsight standards will benefit defendants who were not disposed to plead guilty. It will only be the rare case in

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[100] *Id.* at 1404–05. Although the Court found that Frye had established prejudice within the meaning of *Strickland*, it remanded for a determination whether the state court would have accepted his plea to the prosecutor's offer given the intervening arrest. *Id.* at 1411.

[101] Lafler v. Cooper, 132 S. Ct. 1376 (2012).

[102] *Id.* at 1389.

[103] *Id.* at 1383.

[104] *Id.* at 1389.

[105] *Id.* at 1387 (emphasis added).

[106] *Id.*

[107] Gerard E. Lynch, Frye *and* Lafler*: No Big Deal*, 122 YALE L.J. ONLINE 39 (2012).

[108] Nancy King, Lafler v. Cooper *and AEDPA*, 122 YALE L.J. ONLINE 29 (2012); *see also* Adam Liptak, *Justices' Ruling Expands Rights of Accused in Plea Bargains*, N.Y. TIMES, March 21, 2012 (stating that the decisions "vastly expanded judges' supervision of the criminal justice system").

[109] *Lafler*, 132 S. Ct. at 1391 (Scalia, J., dissenting); *see also* Missouri v. Frye, 132 S. Ct. 1399, 1413 (2012) (Scalia, J., dissenting) (noting the "serious difficulties that will be created by constitutionalization of the plea-bargaining process").

which a plea offer sits idle for a month, or a lawyer clearly neglects to explain the strength of the prosecution's proof.[110] Yet almost every defendant convicted at trial can claim that she meant to accept a plea offer. Courts are likely to treat many frustrated defendants as they have long treated defendants complaining of constitutionally ineffective assistance by trial counsel. A deferential stance with regard to bad decisions about plea bargains would have the same effect as *ex post* justifications for poor trial strategy—few successful claims. Requiring effective assistance of counsel at the plea bargaining stage thus looks momentous at first glance but may not break substantial new ground given its uncertain scope and remedy.

Accordingly, *Padilla*, *Frye*, and *Lafler* may change nothing about oversight of prosecutorial tactics or the basic terms of pleas themselves. In fact, as with other constitutional controls they may "operate[] principally to facilitate frequent and efficient plea bargaining."[111] The cases do not require counsel to negotiate for dispositions that *avoid* collateral consequences,[112] or to ensure the *fairness* of the particular offers that defense lawyers are supposed to communicate. Rather than regulate the effectiveness of defense lawyers as negotiators, they mandate certain conversations between defendants and their counsel. Simply by insisting on the provision of some information to clients, however, they have implications for the overall quality of publicly funded representation.

VII. The Potential for Market Effects

Incrementally improving indigent defense will hardly transform plea bargaining itself. Both the high incidence of pleas and the terms of the bargains arise from systemic pressures rather than the shortcomings of defense counsel.[113]

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[110] *See* Jed S. Rakoff, Frye *and* Lafler*: Bearers of Mixed Messages*, 122 YALE L.J. ONLINE 25 (2012) (calling the cases "rather easy").

[111] Josh Bowers, Lafler, Frye, *and the Subtle Art of Winning by Losing*, 25 FED. SENT'G REP. 126, 126 (2012).

[112] *See Frye*, 132 S. Ct. at 1408 ("The alternative courses and tactics in negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process."). *But see* Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2662 (2013) ("[I]f creative bargaining to avoid deportation—or to get a lower sentence, or a deferred prosecution—is the professional standard, then it is necessarily part of the constitutional conversation about plea bargaining."); *id.* at 2668 ("[I]t is difficult to imagine effective representation that does not include affirmatively seeking the best plea bargain possible given the circumstances of the case and defendant.").

[113] Even those critics of the plea bargaining market who view it as "grossly flawed" do not blame the quality of counsel for those flaws. Albert W. Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1, 58 (1975); *see also* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 199–243 (1979) (explaining that the high volume of misdemeanor pleas stems from factors, such as the bail process, that defense attorneys cannot control); Stuntz, *supra* note 38, at 2558 ("[G]iven the

But specific requirements for the advice of counsel in the plea process could entail adjustments in the market for indigent defense.

Constitutionally regulating the role of defense lawyers in plea bargaining alters the cost-benefit calculus when it comes to funding priorities and thus demonstrates a potentially beneficial market effect. Plea bargaining under free market rules is often described as corrupting "the purposes and principles of criminal justice" and even compromising the professional roles and norms of both prosecutors and judges.[114] Market forces also have the power, however, to focus attention on the funding crisis that public defender programs face. As long as the imperative to prosecute and the systemic reliance on efficient resolution by guilty pleas remain constant, even minimally higher baselines for adequate counsel at plea bargaining could require more resource allocation to criminal defense.

What a defendant most needs in order to assess a plea offer—that is, to meet the minimal standard of what might be considered a rational actor—is accurate counsel about the strength of the case and the range of potential outcomes. *Padilla*, *Lafler*, and *Frye* have the potential to expand the standard of representation because they are not just a general application of *Strickland* but a particularized finding that certain shortfalls in the relationship between counsel and defendant always have constitutional significance. Until *Padilla*, the Court operated on the assumption that defense counsel would provide sufficient information about expected outcomes, and it concluded that courts should not second-guess their predictions or strategic advice.[115] Now, even an error-free trial or a subsequent voluntary plea that follows the ill-informed decision to reject a plea offer cannot cure the incompetent counsel.[116]

If real consequences flow from even this small category of inadequate lawyering, the incentives to address the caseloads and resource constraints that prevent effective advocacy could change.[117] The same defense lawyers tasked with ultimately taking cases to trial represent the vast majority of defendants who enter pleas. And there is no *ex ante* distinction between defendants who will and will not enter pleas. Nor can defense lawyers predict which clients will exercise

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array of weapons the law provides, prosecutors are often in a position to dictate outcomes, and almost always have much more to say about those outcomes than do defense attorneys.").

[114] BROWN, *supra* note 5, at 93; *see also id.* at 94 (concluding that market-based rules encourage participants to "view plea negotiations as instrumental practices driven by partisan interests, rather than as public law adjudication committed to public principles (such as punishment in proportion to guilt), public criteria for fair process, and public responsibility for the integrity of criminal court judgments").

[115] Premo v. Moore, 131 S. Ct. 733, 746 (2011) ("Plea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks.").

[116] *See Lafler*, 132 S. Ct. at 1388 (rejecting the argument that "[a] fair trial wipes clean any deficient performance by defense counsel during plea bargaining").

[117] *See* Lauren Sudeall Lucas, *Lawyering to the Lowest Common Denominator:* Strickland*'s Potential for Incorporating Underfunded Norms Into Legal Doctrine*, 199 FAULKNER L. REV. 199, 199 (2014) (arguing that the *Strickland* test does not reach issues related to underfunding and should be strengthened by specific substantive guidelines).

their right to trial. Because defendants who negotiate pleas and defendants who contest their guilt coexist in a single system of both representation and adjudication, movement with regard to one part of the system has spillover effects on the factual and legal integrity of other cases as well. Responding to the hydraulic pressure to bring counsel at plea bargaining up to a level that will maintain the volume of cases resolved by pleas could affect the quality of defense lawyering in general.

One recent demonstration of the interwoven effects of state enforcement goals and funding requirements arose in New Orleans. In April 2016, a judge ruled that defendants in custody in New Orleans, awaiting trial but unable to access defense counsel, should be released.[118] In a decision addressing the cases of seven defendants accused of violent felonies but unrepresented for in excess of three months, the court held that the failure of the state to adequately fund indigent defense violated the Louisiana constitution, the Sixth Amendment right to counsel, and the Fourteenth Amendment right to due process. The order is stayed pending appeal, but the state faces the prospect of the release of hundreds of additional defendants without assigned defense counsel if it is upheld. A mandate to proceed to trial in cases in which defendants received inadequate assistance of counsel in plea bargaining could have similar systemic impact.

As Donald Dripps writes, "[l]egislatures disinclined to fund indigent defense know that the failure to provide effective representation will lead to the reversal of few if any convictions."[119] But when lawyers negotiating guilty pleas are held to higher standards of representation, and greater resources are required to meet those standards, it follows that funding should increase across the system of public defense. That in turn could affect whether counsel is available to challenge flawed evidence or assert constitutional rights that might change guilt and innocence determinations at trial.

Put another way, poor lawyering is no longer cost-free, and that changes the incentives for the states. Advice about accepting or rejecting pleas will now fall below Sixth Amendment minimum standards if untimely, incorrect, or incomplete. Those potential Sixth Amendment violations jeopardize the validity of pleas and the finality of convictions, but observing concrete baselines could preserve the bargained-for exchange. "Consumer protection" in the form of written explanations, increased communication with defense lawyers, and clearer

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[118] Louisiana v. Bernard et al., No. 528-021 (April 8, 2016).

[119] Donald A. Dripps, *Why* Gideon *Failed: Politics and Feedback Loops in the Reform of Criminal Justice*, 70 WASH. & LEE L. REV. 883, 903 (2013); *see also* Stephen F. Smith, *Taking* Strickland *Claims Seriously*, 93 MARQ. L. REV. 515, 544 (2009) (a "toothless constitutional standard of effective representation . . . virtually invites legislatures to continue underfunding indigent defense"). *Cf.* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 20–21 (1997) (asserting that the *Strickland* standard "leaves no room" for system-wide assessments, and that the case-by-case approach makes it difficult to even separate "low-activity but good representation from laziness or incompetence"); *id.* at 20 ("Defendants tend to win ineffective assistance of counsel claims only when their lawyers had a conflict of interest or made some discrete error of great magnitude.").

opportunities to consider offers could result. Public defender programs might be compelled to observe the workload limits recommended in almost every report on the failure of indigent defense. Compensation for court-appointed counsel might also move away from the flat rate representation model and toward hourly rates that better incentivize conveying sufficient information to clients.

A new conception of adequate plea bargaining advice would require the expenditure of time, in a legal economy in which hours and dollars are largely interchangeable. Budget shortfalls are an economic reality, but responding to them is also a matter of priorities and political will. Overall, the United States spends .0002% of per capita GDP on the system of public defense, but twice as much on funding for prosecutors, and fourteen times as much on the cost of public corrections.[120] As Justice Sotomayor observed in a recent case concerning a capital defendant's long wait for appointed counsel, "states are always strapped" but they find funds in the criminal justice budgets to "pay the prosecutor."[121]

The incentive to "pay defense counsel" changes along with the modest increase in the information defendants must receive in the plea bargaining process. *Padilla*, *Frye*, and *Lafler* do more than identify isolated failures by defense counsel—they impose new substantive preconditions for voluntary pleas.[122] The free market characteristics of the plea bargaining system itself will almost certainly remain the same.[123] In fact, arguably the decisions now *require* the defense lawyer to engage in bargaining as a market participant. But courts cannot uphold the negotiated "contracts" absent minimally adequate advice of counsel.

The changing constitutional landscape in turn addresses a political process failure. Public interest groups that have attempted to litigate the problem of chronic underfunding have not succeeded in bringing about indigent defense reform.[124] Nor have guidelines set forth by professional organizations actually raised the standard of representation.[125] But a baseline for constitutional competence that makes minute-long meetings between defendants and lawyers just minutes longer—in millions of cases—could prompt systemic change.

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[120] The level of funding contrasts rather starkly with the commitment made in similar adversarial systems. The U.K., for example, spends .2 percent of its per capita GDP on public defense, which is four times more than it spends on the prosecution side.

[121] Boyer v. Louisiana, 133 S. Ct. 1702 (2013).

[122] Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of* Lafler *and* Frye, 41 HASTINGS CONST. L.Q. 561, 562 (2014) (suggesting that the cases concern more than "single instances of bad lawyering").

[123] *See* Josh Bowers, *Two Rights to Counsel*, 70 WASH. & LEE L. REV. 1133 (2013) (arguing that even as the Court requires more notice to defendants it grows more willing to tolerate functional coercion in plea bargaining). *But see* Covey, *supra* note 48, at 600 (citing the Court's "increasing abandonment of the concept of plea bargaining as an uninhibited free-for-all in which prosecutors have carte blanche to offer criminal defendants whatever deals they think convenient to dispose of cases").

[124] Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 462–63 (2009).

[125] *See* ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY § 14–3.2(b) (3d ed. 1999) ("Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case have been completed.").

Because of the sheer volume of cases in which the market for plea bargaining and the market for publicly-funded counsel intersect, even this slight pressure on the regulatory lever increases the value of an investment in indigent defense.