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The Right to Plea Bargain with Competent Counsel after Cooper and Frye: Is the Supreme Court Making the Ordinary Criminal Process Too Long, Too Expensive, and Unpredictable in Pursuit of Perfect Justice

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The Right to Plea Bargain With Competent Counsel After *Cooper* and *Frye*: Is the Supreme Court Making the Ordinary Criminal Process "Too Long, Too Expensive, and Unpredictable . . . in Pursuit of Perfect Justice"?

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INTRODUCTION

> *The ordinary criminal process has become too long, too expensive, and unpredictable, in no small part as a consequence of an intricate federal Code of Criminal Procedure imposed on the States by the Supreme Court in pursuit of perfect justice. See Henry J. Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 CALIF. L. REV. 929 (1965). The Court now moves to bring perfection to the alternative in which prosecutors and defendants have sought relief. Today's opinions deal with only two aspects of counsel's plea-bargaining inadequacy, and leave other aspects (who knows what they might be?) to be worked out in further constitutional litigation that will burden the criminal process.*[1]

"[T]oo long, too expensive, and unpredictable."[2] That is how Justice Scalia described "the ordinary criminal process"[3] in a dissenting opinion joined by Chief Justice Roberts and Justice Thomas. Justice Scalia blamed the length, cost, and unpredictability of criminal proceedings not on the intrinsic nature of adjudication but on the constitutional jurisprudence underlying the criminal process, which he depicted as unnecessarily intricate and unduly burdensome. One might infer, given their understanding, that these Justices will not only interpret constitutional provisions

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1. Lafler v. Cooper, 132 S. Ct. 1376, 1391-98 (2012) (Scalia, J., dissenting).
2. *Id.* at 1391 (emphasis added).
3. *Id.*

narrowly in criminal cases but, given the chance, will trim back constitutional protections that they believe earlier decisions benightedly "imposed on the States . . . in pursuit of perfect justice."[4]

Justice Scalia's criticism of modern constitutional criminal procedure came in 2012 in one of two companion cases involving criminal defendants' Sixth Amendment right to competent counsel. By a 5-4 margin in both *Lafler v. Cooper*[5] and *Missouri v. Frye*,[6] the Court held in favor of a criminal defendant who was deprived of a favorable plea offer because of his lawyer's professional lapse. The cases occasioned doctrinal disagreement about whether the Sixth Amendment offers a cure when a defendant misses out on a favorable plea bargain because his lawyer failed to meet professional standards. But beneath this question, for Justice Scalia, was a more fundamental one: whether constitutional decisions, including these two, place excessive demands on the criminal process.

Justice Scalia's prefatory observations should not be dismissed as mere hyperbole in a single dissent. They appear quite literally to be the starting point for how three conservative Justices approach criminal procedure adjudication generally. If these Justices' fundamental assumptions about the criminal process are wrong or exaggerated, then the legitimacy of their basic approach to decision-making in this important area of law is suspect.

This essay unpacks and analyzes Justice Scalia's observations and ultimately takes issue with them in various respects. First, the essay challenges Justice Scalia's assumption that defendants take refuge in plea bargaining as an alternative to criminal trials because of the intricacies of constitutional procedures. On the contrary, guilty pleas have become the ordinary means of resolving criminal cases, and defendants' waivers of other constitutional rights have also become commonplace, not because the Court is procedurally too demanding but because it has been underprotective; its decisions have constructed a system of waivers in which prosecutors use harsh punishment as leverage to compel

4. *Id.* In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), which held that defense counsel's erroneous advice about the deportation consequences of the defendant's guilty plea violated the right to competent representation, Justice Scalia opened his dissent with similar concern about the Court's pursuit of perfection. *Id.* at 1494 (Scalia, J., dissenting) ("In the best of all possible worlds, criminal defendants contemplating a guilty plea ought to be advised of all serious collateral consequences of conviction, and surely ought not to be misadvised. The Constitution, however, is not an all-purpose tool for judicial construction of a perfect world. . . .").

5. 132 S. Ct. 1376 (2012).

6. 132 S. Ct. 1399 (2012).

defendants to forgo procedural protections. Second, this essay raises doubts as to whether the two decisions to which Justice Scalia dissented either impose or invite new procedural burdens. Finally, this essay questions Justice Scalia's premise that constitutional decisions in general burden the criminal process, and also questions the Justice's reliance on Judge Henry Friendly's 1965 article to support this premise.[7] The great twentieth century jurist, for whom Chief Justice Roberts clerked, did not disparage procedural protections in criminal cases, as does Justice Scalia, but simply called attention to the need for constitutional decision-making to leave room for state legislative innovation in this field.

I. THE CONTEMPORARY CRIMINAL PROCESS: TOWARD A SYSTEM OF WAIVERS

> *The ordinary criminal process has become too long, too expensive, and unpredictable, in no small part as a consequence of an intricate federal Code of Criminal Procedure imposed on the States by this Court. . . . [Plea bargaining is] the alternative in which . . . defendants have sought relief.*[8]

One tends to think of the criminal process as dominated by trials and of criminal defense lawyers as the quintessential trial lawyers, which is how they are portrayed on television. But more of a criminal defense lawyer's time is spent in what is loosely described as the plea bargaining process than in the trial process. That is because most criminal cases culminate in a guilty plea rather than a trial, and most guilty pleas are the product of an agreement in which the defendant receives something in exchange—for example, the prosecutor drops or reduces some of the charges or makes a favorable sentencing recommendation. As Justice Kennedy observed in his opinion for the Court in *Cooper*, "the reality [is] that criminal justice today is for the most part a system of pleas, not a system of trials."[9] In many cases, no real bargaining occurs because prosecutors have enough leverage to make a "take it or leave it" plea offer. Defendants, including some who are innocent, ordinarily take the offer, because the stakes are so high: the risk of a conviction after trial is unacceptable given

7. Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

8. *Cooper*, 132 S. Ct. at 1391-92 (Scalia, J., dissenting).

9. *Id.* at 1388.

the relative harshness of the prison sentence that would follow.[10] The academic literature on this process is extensive, if by no means exhaustive.[11] Commentators overwhelmingly agree that the law governing plea bargaining is insufficiently developed to protect against coercion, conviction of the innocent, and other unfairness to the accused.[12]

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10. *See, e.g.*, Morris B. Hoffman, *The Myth of Factual Innocence*, 82 CHI.-KENT L. REV. 663 (2007); Brandon J. Lester, *System Failure: The Case for Supplanting Negotiation with Mediation in Plea Bargaining*, 20 OHIO ST. J. ON DISP. RESOL. 563 (2005); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005); *see also* ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE (2009).

11. *See, e.g.*, GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2003); MILTON HEUMANN, PLEA BARGAINING (1978); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004); Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 13 LAW & SOC'Y REV. 247 (1979); Douglas G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37; Gene M. Grossman & Michael L. Katz, *Plea Bargaining and Social Welfare*, 73 AM. ECON. REV. 749 (1983); Kenneth Kipnis, *Plea Bargaining: A Critic's Rejoinder*, 13 LAW & SOC'Y REV. 555 (1979); John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261 (1979); Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43 (1988); Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733 (1980); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1475-76 (1993). Albert Alschuler has been the leading contributor to this literature. *See, e.g.*, Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931 (1983); Albert W. Alschuler, *Plea Bargaining and its History*, 79 COLUM. L. REV. 1 (1979); Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059 (1976); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968).

12. *See, e.g.*, R. Michael Cassidy, *Plea Bargaining, Discovery, and the Intractable Problem of Impeachment Disclosures*, 64 VAND. L. REV. 1429 (2011); Russell D. Covey, *Plea Bargaining Law After* Lafler and Frye, 51 DUQ. L. REV.595 (2013) (advocating pre-plea *Brady* disclosure); John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 488 (2001); Gifford, *supra* note 11, at 96 (proposing "an administrative model for determining guilty plea concessions"); Susan R. Klein, *Monitoring the Plea Process*, 51 DUQ. L. REV. 559 (2013) (proposing procedural rules and internal prosecutorial guidelines to regulate plea bargaining); Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223 (2006) (proposing procedural reforms to make plea bargaining fairer); Thomas R. McCoy & Michael J. Mirra, *Plea Bargaining as Due Process in Determining Guilt*, 32 STAN. L. REV. 887 (1980); Kevin C. McMunigal, *Disclosure and Accuracy in the Guilty Plea Process*, 40 HASTINGS L.J. 957 (1989); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 2009 (1992) ("With trials in open court and deserved sentences imposed by a neutral factfinder, we protect the due process right to an adversarial trial, minimize the risk of unjust conviction of the innocent, and at the same time further the public interest in effective law enforcement and adequate punishment of the guilty. But plea negotiation simultaneously undercuts all of these interests. The affected parties are represented by agents who have inadequate incentives for proper performance; prospects for effective monitoring are limited or nonexistent; and the dynamics of negotiation can create irresistible pressure for defendants falsely to condemn themselves."); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909,

Supreme Court decisions deserve much of the blame for turning criminal justice into a process dominated not by trials following the blueprint of the Sixth Amendment,[13] but by guilty pleas, most of which are the product of a plea agreement, if not a meaningful plea negotiation.[14] For prosecutors, a plea bargain may provide escape from the length, expense or unpredictability of criminal trials occasioned in part by constitutional protections,[15] but for defendants it is primarily an escape from more severe, and arguably excessive, punishment.[16] The Court has said that there is almost no limit to how long an adult defendant may be imprisoned for any particular crime, even a comparatively trivial one.[17] Further, the Court has said that there is essentially no constraint on a prosecutor's power to induce a defendant to plead guilty by first

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1950 (1992) (the law governing plea bargaining "might be adjusted in ways that (if only at the margin) facilitate the separation of innocent defendants from guilty ones at the bargaining stage"). *But see* Frank H. Easterbrook, Plea *Bargaining is a Shadow Market*, 51 DUQ. L. REV. 551 (2013).

13. The Sixth Amendment elaborates trial rights and does not explicitly contemplate the alternative of a guilty plea much less plea bargaining. *See* Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652 (1983); McCoy & Mirra, *supra* note 12; *see also* Brady v. United States, 397 U.S. 742 (1970) (approving plea bargaining).

14. Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1107 (1984) ("The Supreme Court has chosen to tolerate, to legitimate, and finally to encourage the plea bargaining system.").

15. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 20 (2012). For example, trial by hearsay would be quicker, cheaper, and perhaps more predictable, but even Justice Scalia does not appear to favor this alternative. *See, e.g.*, Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).

16. *See* Gifford, *supra* note 11, at 70 ("The combination of a determination sentencing structure and unregulated plea bargaining makes it more likely that a defendant will be psychologically coerced into an inaccurate or involuntary plea."); Standen, *supra* note 11; William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2560 (2004) ("[P]lea bargains outside the law's shadow depend on prosecutors' ability to make credible threats of severe post-trial sentences. Sentencing guidelines make it easy to issue those threats."). *But see* Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1977 (1992) ("[T]he federal sentencing guidelines serve a valuable function by establishing benchmark sentences, derived from normal judicial practices in the years before 1987. A 'price' so established, known to any defendant who elects trial, squelches one of the perennial attacks on plea bargaining: that the bargain sentence is the norm, and the higher sentence imposed after trial a penalty heaped on persons who dare to exercise their constitutional rights."); Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 623 (2005) ("Arguments that post-trial sentences reflect trial penalties have not confronted the overriding point that post-trial sentences mete out appropriate retribution. Critics note that bargained discounts are often not themselves based on deserts, and, as a result, there is inequality, according to a desert measure, in the distribution of punishment. While accurate, this conclusion does not subvert the view that post-trial sentences mete out deserved punishments for crime. A deserved punishment does not become undeserved merely because other defendants deserving the same punishment receive a lesser sanction.").

17. Solem v. Helm, 463 U.S. 277, 287 (1983).

filing or threatening to file charges that carry a high risk or certainty of harsh punishment if the defendant is convicted and then offering substantial leniency in exchange for a guilty plea.[18] These decisions invite Congress and state legislatures to authorize undeservedly high sentences, including mandatory sentences that remove discretion from the sentencing judge, with the expectation that lower sentences will be imposed on the overwhelming majority of defendants, who will plead guilty in the plea bargaining process. Legislatures understand that prosecutors will charge defendants severely to gain leverage and offer them leniency to secure guilty pleas. In this process, the measure of fair punishment has ceased to be the excessive sentences that criminal statutes authorize and trial judges impose on defendants convicted at trial; rather, the baseline has become the lower (but often still harsh) sentences that defendants receive after pleading guilty. Defendants pay a stiff penalty for exercising their trial rights. And a plea bargain often is still no bargain.

For some, guilty pleas may also be a means of escape from pretrial detention.[19] Defendants accused of low-level offenses who are incarcerated pending criminal proceedings may be allowed to plead guilty in exchange for a non-custodial sentence or time served. It may appear reasonable to defendants in this situation to accept the consequences of a conviction in order to secure their liberty.[20] Although the Eighth Amendment forbids "[e]xcessive bail,"[21] the Court's decisions do not effectively restrict pretrial detention of individuals accused of misdemeanors and low-level felo-

18. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

19. *See* Bibas, *supra* note 11, at 2493 (2004) (noting that "pretrial detention places a high premium on quick plea bargains in small cases, even if the defendant would probably win acquittal at an eventual trial"); Jenny M. Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 308 (2011) ("Perhaps the most coercive aspect of plea-bargaining in the lower criminal courts is pretrial detention for individuals held on bail that they cannot pay. In such cases, defendants must generally choose between remaining in jail to fight the case or taking an early plea with a sentence of time served or probation."); *see also* Blackledge v. Allison, 431 U.S. 63, 71 (1977) ("[T]he guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned. The defendant avoids extended pretrial incarceration. . . .").

20. There is a growing scholarly literature on the collateral consequences of criminal convictions. *See, e.g.*, Gabriel J. Chin, *Race, The War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER RACE & JUST. 253 (2002); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010); Jenny Roberts, *Ignorance is Effectively Bliss: Collateral Consequences of Criminal Convictions, Silence and Misinformation in the Guilty Plea Process*, 95 IOWA L. REV. 119 (2009).

21. U.S. CONST. amend. VIII.

nies.[22] Finally, while it is true that defendants who are at liberty while awaiting trial on minor charges often plead guilty to avoid the disruption of returning repeatedly to court—for these defendants, "the process is the punishment"[23]—there is little to suggest that protracted criminal proceedings for violations and misdemeanors are attributable to liberal judicial interpretations of procedural rights.[24]

While it seems fair to characterize the criminal process as "a system of pleas,"[25] one might observe more broadly that ours is a system of waivers. A guilty plea, by its nature, waives trial rights, including the right to a jury trial, to cross-examine witnesses and to compel their testimony. To the extent of admitting guilt, the defendant who pleads guilty also waives the right against self-incrimination. The same leverage that prosecutors employ to extract guilty pleas is used to extract waivers of rights other than the trial rights that a guilty plea necessarily waives. The waiver paradigm—in which prosecutors extract procedural concessions in exchange for leniency—has come to dominate the criminal justice landscape.[26] The following examples should suffice to make the point.[27]

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22. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979).

23. *See* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (2d ed. 1992).

24. Likewise, insofar as criminal defendants plead guilty to escape uncertain outcomes of a trial, there is no reason to assume that the problem is created by over-developed procedural rights rather than by under-developed rights leading to the risk of erroneous convictions. Fred C. Zacharias & Bruce A. Green, *The Duty to Avoid Wrongful Convictions: A Thought Experiment in the Regulation of Prosecutors*, 89 B.U. L. REV. 1, 8 (2009) ("Some counter-factual pleas simply hedge the risk of trial error - i.e., the possibility of conviction despite the defendant's innocence.").

25. *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012).

26. *See* Loftus E. Becker, Jr., *Plea Bargaining and the Supreme Court*, 21 LOY. L.A. L. REV. 757 (1988); Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment, and Alienation*, 68 FORDHAM L. REV. 2011 (2000); George E. Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193 (1977); Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 831-33 (2003); McMunigal, *supra* note 12; Stephen A. Saltzburg, *Pleas of Guilty and the Loss of Constitutional Rights: The Current Price of Pleading Guilty*, 76 MICH. L. REV. 1265 (1978); Nirej Sekhon, *Willing Suspects and Docile Defendants: The Contradictory Role of Consent in Criminal Procedure*, 46 HARV. C.R.-C.L. L. REV. 103 (2011); William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 762 (1989); Michael E. Tigar, *Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1 (1970).

27. In addition to the examples that follow in the text below, two other examples of the dominance of waivers in the criminal process are the following. First, as a condition of leniency provided to one defendant or potential defendant, prosecutors sometimes require one or more *other* defendants to waive their trial rights and plead guilty. This agreement, in which, for example, a wife may be given leniency if her husband pleads guilty, is sometimes known as a "package" or "wired" plea agreement. *See, e.g.*, United States v. Robin-

First, prosecutors often require defendants to waive criminal procedure rights other than trial rights in exchange for a lenient plea deal. For example, some prosecutors require defendants to waive the right to appeal and to seek other post-conviction relief,[28] including the right to redress sentencing errors that have not yet occurred.[29] The prosecutor's asserted objective is to conserve administrative and judicial resources and achieve finality by assuring that no more proceedings ensue. This means, however, that even past, unidentified errors and future, unanticipated ones cannot be corrected—for example, legal and factual errors that will later occur in sentencing. One might argue that these waivers reflect an abuse of prosecutorial power, given the public interest in ensuring that criminal proceedings are fair and that significant procedural errors are corrected. Prosecutors routinely seek to vindicate this fair-process interest when they appeal to correct

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son, 587 F.3d 1122, 1124-25 (D.C. Cir. 2009); United States v. Vest, 125 F.3d 676, 679 (8th Cir. 1997); *see generally* Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy,* 48 AM. CRIM. L. REV. 143, 156-57 (2011); Bruce A. Green, *"Package" Plea Bargaining and the Prosecutor's Duty of Good Faith,* 25 CRIM. L. BULL. 507 (1989); Dan Markel et al., *Criminal Justice and the Challenge of Family Ties,* 2007 U. ILL. L. REV. 1147, 1166 (2007). Second, as a condition of dismissing charges for crimes of which the defendant may be guilty, the prosecution sometimes allows the defendant to plead guilty to a less serious charge of which the prosecutor (and judge) know the defendant is innocent – in effect, requiring the defendant to waive the right not to be convicted of a crime he or she did not commit. *See generally* Mari Byrne, *Note, Baseless Pleas: A Mockery of Justice,* 78 FORDHAM L. REV. 2961 (2010).

28. Robert K. Calhoun, *Waiver of the Right to Appeal,* 23 HAST. CONST. L.Q. 127 (1995). The right to challenge a denial of competent representation is among the post-conviction rights that prosecutors have required defendants to bargain away in exchange for leniency. In general, the bar's position is that, under the ethics codes, this is a right that a defendant cannot be asked to waive. *See* Fla. Proposed Adv. Op. 12-1 (June 22, 2012) (citing, inter alia, Az. Ethics Op. 95-08; Mo. Formal Ethics Op. 126 (2009); N.C. Ethics Op. 129 (1993); Oh. Ethics Op. 2001-6; Tenn. Informal Op. 94-A-549; Vt. Ethics Op. 95-04); *see also* R. Michael Cassidy, *Some Reflections on Ethics and Plea Bargaining: An Essay in Honor of Fred Zacharias,* 48 SAN DIEGO L. REV. 93, 108 (2011) ("Insisting on so-called ineffective counsel waivers impresses me as overreaching of the worst sort and fundamentally inconsistent with a prosecutor's obligation as a minister of justice."). *But see* Texas Ethics Op. 571 (2006). But courts have held that a waiver of this right of post-conviction review is effective as long as the guilty plea is knowing and voluntary, see, e.g., *Cooper v. State,* 356 S.W.3d 149 (Mo. 2011), and disciplinary authorities have not sanctioned prosecutors who include such waivers in their plea agreements or defense lawyers who advise their clients to accept these agreements. *See, e.g., id.* at 156-57. Consequently, if a prosecutor were worried that a defendant who accepted a plea offer might later complain that defense counsel was inadequate in failing to obtain a *better* one, the prosecutor could require the defendant to waive the right to make this claim. Insofar as courts accepted and enforced these waivers, they afford prosecutors a procedure by which to circumvent the decisions in *Cooper* and *Frye. See* Nancy J. King, *Plea Bargains that Waive Claims of Ineffective Assistance–Waiving* Padilla *and* Frye, 51 DUQ. L. REV. 647 (2013).

29. *See, e.g.*, United States v. Morales Lopez, 2012 U.S. App. LEXIS 9607 (4th Cir. May 10, 2012); United States v. Benitez-Zapata, 131 F.3d 1444, 1446-47 (11th Cir. 1997).

purportedly illegal sentences that they believe to be too low. If the public interest in correcting procedural errors outweighs the countervailing public interests when sentences are too low, then one would think that the same interest in correcting errors would be paramount when sentences are too high, particularly given the liberty interest that is also implicated.

Prosecutors also extract waivers of rights designed not simply to promote procedural fairness but to rectify convictions of the innocent. In particular, prosecutors have sometimes required defendants to waive the right to DNA testing to attempt to establish their innocence.[30] The Supreme Court has allowed the prosecution also to use its leverage to extract waivers of civil rights. For example, the Court has held that it is constitutional to condition the dismissal of criminal charges on the defendant's waiver of the right to bring a civil rights claim to redress abuses by law enforcement officers.[31] Prosecutors have also conditioned leniency on non-citizens' consent to deportation,[32] on professionals' relinquishment of licenses,[33] or on the relinquishment of other rights unrelated to the criminal proceedings.

It is interesting to contemplate whether there are *any* rights that the Supreme Court would not permit criminal defendants to waive, or that prosecutors as a matter of ethics or self-restraint would never compel defendants to waive, in exchange for leniency. The Court has left open the question of whether prosecutors can negotiate for defendants to waive the due process right to receive pre-trial disclosures of exculpatory evidence.[34] Although the American Bar Association has concluded that prosecutors have a non-negotiable ethical duty to disclose favorable evidence to the defense,[35] prosecutors do not necessarily accept the bar association's assessment. Perhaps the most fundamental procedural right, and one not waived by a guilty plea, is the right to counsel.

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30. Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV. 952 (2012).

31. Newton v. Rumery, 480 U.S. 386 (1987). In some jurisdictions, however, release-dismissal agreements violate state law or are regarded as unethical. *See, e.g.*, Cowles v. Brownell, 538 N.E.2d 325 (N.Y. 1989); Indiana Op. 2005-2 (2005). *See generally* Andrew B. Coan, *The Legal Ethics of Release-Dismissal Agreements: Theory and Practice*, 1 STAN. J. C.R. & C.L. 371 (2005).

32. *See, e.g.*, United States v. Cardosa-Rodriguez, 241 F.3d 613, 614 (8th Cir. 2001).

33. *See, e.g.*, Grayboyes v. General Am. Life Ins. Co., 1995 U.S. Dist. LEXIS 4233, *4 (E.D. Pa. Apr. 4, 1995).

34. United States v. Ruiz, 536 U.S. 622 (2002).

35. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 09-454 (2009). For a discussion of this opinion, see Bruce A. Green, *Prosecutors' Ethical Duty of Disclosure In Memory of Fred Zacharias*, 48 SAN DIEGO L. REV. 57 (2011).

Suppose the prosecutor, to conserve state resources, required the defendant to forgo appointed counsel and proceed *pro se*, on the theory that if a defendant can waive the right to counsel,[36] the defendant can accept an inducement to do so. One would hope that the Court would regard such a waiver as involuntary or otherwise unacceptable, and that prosecutors would consider it an abuse of power to secure waivers of counsel in any event, but the extant opinions and practices do not guarantee such outcomes.

Second, waivers of rights may be extracted not only in exchange for actual leniency but in exchange merely for the opportunity to be considered for lenient treatment that may never materialize.[37] For example, although the evidence rules protect against the admission of statements made in plea negotiations, the Supreme Court has held that this protection may be waived.[38] Some prosecutors exploit this opportunity by requiring defendants who wish to be *considered* for a favorable plea offer to submit to questioning and to agree that, at least in certain circumstances, the prosecution may offer the defendants' statements in evidence if no plea bargain is concluded.[39] One might question whether this practice accords with prosecutors' duty to ascertain all the relevant facts in order to exercise charging discretion fairly. The traditional proffer agreement (sometimes known as a "queen for a day agreement") protected the prosecution from being disadvantaged by the defendant's proffer. It authorized the prosecution to use the defendant's statements for investigative leads, thereby foreclosing future suppression motions. But the agreement did not allow prosecutors to offer the defendant's statements in evidence, as contemporary agreements sometimes do. It is hard to justify prosecutors' unwill-

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36. *See* Faretta v. California, 422 U.S. 806 (1975).

37. United States v. Duffy, 133 F. Supp. 2d 213, 217 (E.D.N.Y. 2001) ("After signing the standard proffer agreement, the terms of which are dictated by the government, the only thing that a defendant is guaranteed is the chance to convince the prosecutor to enter a deal."), *overruled in part by* United States v. Velez, 354 F.3d 190, 195 (2d Cir. 2004); *see* Jane Campbell Moriarty & Marisa Main, *"Waiving" Goodbye: Plea Bargaining and the Defense Dilemma of Competent Representation*, 38 HASTINGS CONST. L.Q. 1029 (2011).

38. United States v. Mezzanatto, 513 U.S. 196 (1995). *See generally* Montre D. Carodine, *Keeping It Real: Reforming the "Untried Conviction" Impeachment Rule*, 69 MD. L. REV. 501 (2010); Michael S. Gershowitz, *Waiver of the Plea-Statement Rules*, 86 J. CRIM. L. & CRIMINOLOGY 1439 (1996); Benjamin Naftalis, *"Queen for a Day" Agreements and the Proper Scope of Permissible Waiver of the Federal Plea-Statement Rules*, 37 COLUM. J.L. & SOC. PROBS. 1 (2003); Eric Rasmusen, Mezzanatto *and the Economics of Self-Incrimination*, 19 CARDOZO L. REV. 1541 (1998).

39. *See, e.g.*, United States v. Hardwick, 544 F.3d 565, 568-69 (3d Cir. 2008); United States v. Barrow, 400 F.3d 109, 113 (2d Cir. 2005); United States v. Rebbe, 314 F.3d 402, 407 (9th Cir. 2002); United States v. Burch, 156 F.3d 1315, 1321-22 (D.C. Cir. 1998).

ingness to listen to a defendant's account, which might justify lenient treatment, unless the prosecutor is given this procedural advantage. Prosecutors should not ignore information relevant to their charging and plea-bargaining decisions.[40] But they effectively do so when they refuse to listen to a defendant who does not waive the protection of the evidentiary rule.

A controversial example of the pressure to waive procedural rights simply in exchange for the possibility of escaping harsh outcomes occurs in the context of corporate criminal investigations and prosecutions. A so-called "culture of waiver"[41] of the corporate attorney-client privilege has arisen in response to federal policy governing corporate prosecutions. Corporations are easy to prosecute under statutes providing for vicarious corporate criminal liability for criminal wrongdoing by corporate representatives. [42] Under federal policy, companies can typically avoid prosecution if they cooperate with criminal investigators. Knowing this, companies whose representatives are suspected of wrongdoing routinely hire lawyers to conduct expensive internal investigations and provide the results to the prosecution in exchange for leniency.[43] Exploiting the leverage afforded by corporate criminal statutes, prosecutors have transformed the investigation and prosecution of corporate crime in a manner that, from the prosecution's perspective, is undoubtedly cheaper, quicker, more effective, and unrestrained by procedural restrictions on investigative methods.

Finally, waivers of rights may be extracted in exchange for benefits other than lenient charging and sentencing.[44] For example, low-level defendants may be required to waive their rights as a condition of diversion to problem-solving and specialized courts. Mental health courts, drug courts, veterans courts and other specialized courts are praiseworthy in many respects, including in their recognition of low-level offenses as symptomatic of broader

40. *See, e.g.*, Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1997).

41. *See, e.g.*, Preet Bharara, *Corporations Cry Uncle And Their Employees Cry Foul: Rethinking Prosecutorial Pressure On Corporate Defendants*, 44 AM. CRIM. L. REV. 53, 92 (2007).

42. *See generally* Bruce A. Green & Ellen S. Podgor, *Unregulated Internal Investigations: Achieving Fairness for Corporate Constituents*, 54 B.C. L. REV. 73 (2013).

43. *See id.* at 75.

44. For example, prosecutors have sometimes required waivers as a condition of an arrested defendant's pre-trial release. *See, e.g.*, United States v. Scott, 450 F.3d 863 (9th Cir. 2005) (waiver of Fourth Amendment right held unenforceable). *See generally* Melanie D. Wilson, *The Price of Pretrial Release: Can We Afford to Keep Our Fourth Amendment Rights?*, 92 Iowa L. Rev. 159 (2006).

individual problems, such as addiction or mental illness, and in offering alternatives to incarceration, including treatment. But, in some jurisdictions, defendants who seek to have their cases diverted to these alternative courts are required to relinquish procedural rights in exchange, and some defendants ultimately end up worse off for having done so. For example, defendants in some drug courts are required to plead guilty and face harsher punishment if they are unsuccessful in their drug treatment program than if they had simply gone to criminal court and participated in the traditional plea bargaining process.[45] As a condition of obtaining treatment in lieu of incarceration, defendants in some problem-solving courts also tacitly forgo the right to counsel, who will function as a zealous advocate, because defense counsel is expected to join the therapeutic team.[46]

It is fatuous to suggest that defendants waiving rights in the contemporary criminal process are seeking relief from a rights-driven trial process rather than from harsh outcomes. One might even question whether prosecutors are sacrificing anything meaningful in this system of waivers in order to obtain relief from the length, expense and unpredictability of the trial process occasioned by overly protective judicial decisions. Criminal defendants are sacrificing procedural protections, but prosecutors give up little. Rather, prosecutors use their leverage, in a manner legitimized by judicial decisions, to achieve results they generally regard as just. Although the system promotes prosecutors' administrative interests, they are impelled to give up little in exchange.

45. *See, e.g.*, Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 792-94 (2008).

46. *See, e.g.*, Mae C. Quinn, *Whose Team am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 46-47 (2001). In Wisconsin, the problem-solving model contemplates that the defendant will forgo counsel altogether, and that the lawyer on the therapeutic team assigned to represent the defense perspective owes no duties to the defendant whatsoever. *See* Ben Kempinen, *Problem-Solving Courts and the Defense Function: The Wisconsin Experience*, 62 HASTINGS L.J. 1349, 1362-63 (2011).

II. EFFECTIVE REPRESENTATION IN THE PLEA/WAIVER PROCESS: A LARGELY SYMBOLIC RIGHT

Today's opinions deal with only two aspects of counsel's plea-bargaining inadequacy and leave other aspects (who knows what they might be?) to be worked out in further constitutional litigation that will burden the criminal process.[47]

One might suppose that decisions upholding criminal defendants' constitutional rights and providing remedies for violating those rights necessarily impose burdens on the criminal process, so that it would be axiomatic that, as Justice Scalia complains, a robust criminal procedure jurisprudence will "burden the criminal process." But that is not necessarily so, and it is particularly untrue of the ineffective assistance of counsel jurisprudence that Justice Scalia targets. The principal contribution of the two recent decisions in particular is largely symbolic.

Fundamentally, *Cooper* and *Frye* address the constitutional obligations of criminal defense lawyers, not judges, prosecutors or investigators. What is expected of a criminal defense lawyer for constitutional purposes, however, is determined by prevailing professional norms. Under the leading case, *Strickland v. Washington*,[48] a defendant must show two things to establish a denial of the right to competent representation, the first being that the defense lawyer's performance "fell below an objective standard of reasonableness."[49] Courts determine what conduct is reasonable based on ordinary practices in the professional community,[50] which may be codified by standards for criminal defense practice such as those of the American Bar Association.[51] Therefore, by

47. Lafler v. Cooper, 132 S. Ct. 1376, 1392 (Scalia, J., dissenting).

48. 466 U.S. 668 (1984). In the intervening decades, the Supreme Court has decided many cases applying and interpreting *Strickland*. *See, e.g.*, Padilla v. Kentucky, 130 S. Ct. 1473 (2010); Hill v. Lockhart, 474 U.S. 52 (1985).

49. *Strickland*, 466 U.S. at 688.

50. *Id.*

51. *Id.* ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable."); *see, e.g.*, *Padilla*, 130 S. Ct. at 1488 ("The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation."); *see also* Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323, 377-78 ("[I]ncorporating into *Strickland* the principles articulated in the ABA Guidelines (and reflected in the practice of seasoned capital defense attorneys) is a necessary step towards providing effective representation in capital cases."). *But see* Bobby v. Van Hook, 558 U.S. 4, 20 (2009) (Alito, J., concurring) (questioning special relevance of ABA Standards). For a discussion of the role of the Standards in the development of case law under *Strickland*, see Martin Marcus, *The Making of the ABA Criminal Justice Stand-*

definition, ineffective assistance of counsel decisions add nothing to defense lawyers' preexisting professional obligations.

Justice Scalia's dissent suggests the possibility, however, that *Cooper* and *Frye* will burden both courts administratively and the criminal process generally by inviting new claims that will require resources to resolve, and in some cases opening the door to needless trials of guilty defendants. But this seems doubtful. Although decisions finding ineffective assistance of counsel do leave open the possibility of a constitutional remedy for serious departures from the professional norms, the *Strickland* requirements raise substantial hurdles. Besides showing that defense counsel significantly erred, the defendant must show that he was prejudiced by defense counsel's errors—that is, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[52] Many convicted defendants complain about their lawyers, but most find one or both requirements to be insurmountable.[53] Death row defendants historically have a fighting chance of overturning their sentences or convictions for ineffective assistance of counsel, whether because death penalty defenders are particularly unqualified, death penalty cases are particularly complicated and expensive to defend competently, courts are particularly solicitous of defendants' rights in capital cases, or some combination of the three.[54] The success rate for other defendants in establishing ineffective assistance of counsel is exceedingly low. There is an abundance of academic writing on the Sixth Amendment right, to

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ards: Forty Years of Excellence, 23 CRIM. JUST.at 4, 10 (2009). The Standards are periodically subject to a process of review and revision, including, at present, by representatives of the defense bar, prosecution and judiciary. *See* Bruce A. Green, *Developing Standards of Conduct for Prosecutors and Criminal Defense Lawyers*, 62 HASTINGS L.J. 1093 (2011); Rory K. Little, *The ABA's Project to Revise the Criminal Justice Standards for the Prosecution and Defense Functions*, 62 HASTINGS L.J. 1111 (2011).

52. *Strickland*, 466 U.S. at 694.

53. Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 683-84 (2007) ("Many scholars and judges recognize that the number of criminal convictions that courts reverse due to ineffective assistance of trial counsel is strikingly low when compared to the frequency of ineffective assistance in practice."). For a discussion of the obstacles to proving that a defendant pleaded guilty based on erroneous advice, see Bruce A. Green, *Judicial Rationalizations for Rationing Justice: How Sixth Amendment Doctrine Undermines Reform*, 70 FORDHAM L. REV. 1729 (2002) [hereinafter *Judicial Rationalizations*].

54. On the right to effective representation in capital cases, see, e.g., Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433 (1993) [hereinafter *Lethal Fiction*]; Helen Gredd, *Comment*, Washington v. Strickland: *Defining Effective Assistance of Counsel at Capital Sentencing*, 83 COLUM. L. REV. 1544 (1983).

which I have contributed,[55] and the dominant theme is that the *Strickland* test is too demanding.[56] Some judges have agreed.[57] Among the reasons are that courts strongly presume that a lawyer's questionable conduct is reasonable and tend to assume that, unless the evidence against the defendant was extremely weak, the attorney's errors made no difference either to the jury's verdict or the defendant's decision to plead guilty.

In the plea bargaining process, the professional norms governing defense lawyers are fairly well-established,[58] and although lapses may occur regularly, it is by no means clear how often lapses occur that would realistically justify a *Strickland* claim. The lawyer's principal task is to assist the defendant in deciding whether to plead guilty or stand trial.[59] The lawyer is expected to solicit as favorable a plea offer as possible, which may require attempting to establish a credible defense or making mitigating arguments to the prosecutor.[60] The lawyer must convey any plea offer to the client[61] and then advise the client whether to accept it,

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55. *See* Bruce A. Green, *A Functional Analysis of the Effective Assistance of Counsel*, 80 COLUM. L. REV. 1053 (1980) [hereinafter *A Functional Analysis*]; Bruce A. Green, *Criminal Neglect: Indigent Defense from an Ethics Perspective*, 52 EMORY L.J. 1169 (2003) [hereinafter *Criminal Neglect*]; *Judicial Rationalizations*, *supra* note 53; *Lethal Fiction*, *supra* note 54.

56. *See, e.g.*, Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths - A Dead End?*, 86 COLUM. L. REV. 9 (1986); Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293 (2002); Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1 (2004); Sanjay K. Chhablani, *Disentangling the Right to Effective Assistance of Counsel*, 60 SYRACUSE L. REV. 1 (2009); Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242 (1997); Monroe H. Freedman, *Lecture, An Ethical Manifesto for Public Defenders*, 39 VAL. U. L. REV. 911 (2005); William S. Geimer, *A Decade of* Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91 (1995); Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59 (1986); Primus, *supra* note 53; William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 20 (1997); Russell L. Weaver, *The Perils of Being Poor: Indigent Defense and Effective Assistance*, 42 BRANDEIS L.J. 435 (2003).

57. *See, e.g.*, McFarland v. Scott, 512 U.S. 1256, 1259 (1994) (Blackmun, J., dissenting from denial of certiorari) (referring to "[t]he impotence of the *Strickland* standard").

58. *See, e.g.*, *Criminal Neglect*, *supra* note 55.

59. MODEL RULES OF PROF'L CONDUCT R. 1.2, 1.4 (2012) [hereinafter MODEL RULES]; ABA STANDARDS FOR CRIMINAL JUSTICE 4-5.1, 4-6.1, 4-6.2 (3d ed. 1993) [hereinafter ABA STANDARDS, *Defense Function Standards*]; ABA STANDARDS FOR CRIMINAL JUSTICE 14-3.2 (3d ed. 1997).

60. *See, e.g.*, Lynch, *supra* note 40; ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 59.

61. *See, e.g.*, ABA STANDARDS, *Defense Function Standards*, *supra* note 59, 4-6.2(b) (A defense lawyer should "promptly communicate and explain to the accused all significant

which means giving accurate advice about the likely consequences if the defendant either accepts the plea offer or goes to trial.[62] To give accurate advice, the lawyer will ordinarily have to interview the client, review discovery and conduct an investigation as necessary to learn the relevant facts, and to conduct legal research as necessary to learn the relevant law.[63]

Cooper and *Frye*, decided in Spring 2012,[64] may have been among the rare cases in which defense counsel demonstrably failed to meet professional expectations and the defendant received a significantly harsher outcome as a consequence, and one that was harsh enough to justify post-conviction proceedings. This engendered the question of whether the defendants had a constitutional remedy and, if so, what it would be. In other words, how, if at all, does the Sixth Amendment right apply when lawyers allegedly provide inadequate representation in the plea bargaining process?

The debate over whether the constitutional right to counsel has implications for a defense lawyer's role in plea bargaining originated as early as the 1970s, well before *Strickland* confirmed that the right to competent representation derives from the Sixth Amendment. Courts recognized the defense lawyer's obligation to advise the defendant about whether to plead guilty.[65] But although some courts were of the view that the lawyer's con-

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plea proposals made by the prosecutor."); *see also* MODEL RULES, *supra* note 59, R. 1.2(a) ("[T]he lawyer shall abide by the client's decision, after consultation with the lawyer, as to the plea to be entered."); *id.* at R. 1.4(a)(1) (A lawyer must "promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required by these Rules.").

62. ABA STANDARDS, *Defense Function Standards*, *supra* note 59, 4-5.1(a); MODEL RULES, *supra* note 59, R. 1.4(b) (A lawyer must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions.").

63. MODEL RULES, *supra* note 59, R. 1.1; ABA STANDARDS, *Defense Function Standards*, *supra* note 59, 4-5.1(a).

64. For academic writing, predating these decisions, on the right to competent representation in plea bargaining, *see, e.g.*, David A. Perez, *Deal or No Deal? Remedying Ineffective Assistance of Counsel During Plea Bargaining*, 120 YALE L.J. 1532 (2011); Jenny Roberts, *Proving Prejudice, Post-*Padilla, 54 HOW. L.J. 693 (2011); Emily Rubin, *Ineffective Assistance of Counsel and Guilty Pleas: Toward a Paradigm of Informed Consent*, 80 VA. L. REV. 1699 (1994).

65. *See, e.g.*, Caruso v. Zelinsky, 515 F. Supp. 676, 680 (D.N.J. 1981) ("The obligation of counsel to permit the client to make final determinations concerning a plea, and consequently to inform the client fully on the available alternatives, is set forth in the various codes of conduct with which all attorneys are expected to comply."); United States *ex rel.* Simon v. Murphy, 349 F.Supp. 818, 823-24 (E.D. Pa.1972). Courts continued to so recognize after *Strickland*. *See, e.g.*, People v. Perry, 68 P.3d 472, 477 (Colo. Ct. App. 2002); Davie v. State, 675 S.E.2d 416, 420 (S.C. 2009); State v. James, 739 P.2d 1161,1166-67 (Wash. Ct. App. 1987).

stitutional obligation was to assist the defendant in making "a well-advised choice,"[66] others "suggested that the function of counsel as an advisor is limited, at least for constitutional purposes, to ensuring that a client's waiver of [trial rights] is a knowing and voluntary act" as required by the Due Process Clause.[67]

Even before the Court decided *Strickland*, Supreme Court jurisprudence favored the broader view of defense counsel's constitutional role. The Court had recognized that "[a] counseled defendant's decision to plead guilty. . . . must rest upon his attorney's judgment regarding the weight of the state's case; how the facts, as he understands them, would be viewed by a jury; the likelihood that those facts would establish guilt; and the admissibility of seized evidence or incriminating statements that contribute to the state's showing of culpability."[68] This meant that the defense lawyer's constitutional function was not just to assure the defendant a fair process by explaining the trial rights—a function duplicating that of the trial judge. The lawyer was also required to protect against guilty pleas that were "poorly considered" where, for example, the defendant was unaware that he would likely be acquitted at trial or that a guilty plea would relinquish important collateral rights.[69] *Strickland* might have been read to resolve the question in favor of the broader constitutional role insofar as it held that the reasonableness of a defense lawyer's performance is established by prevailing professional norms, which demanded considerably more than safeguarding constitutional rights. Subsequent Supreme Court decisions bolstered that perception.[70] Lower courts got the message,[71] although some outliers clung to the view

66. *A Functional Analysis*, *supra* note 55, at 1085 n.203.

67. *Id.* at 1084.

68. *Id.* at 1084-85 n.205 (citing Tollett v. Henderson, 411 U.S. 258, 266-67 (1973); McMann v. Richardson, 397 U.S. 759, 769-70 (1970)).

69. *Id.* at 1085-86.

70. *See, e.g.*, Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) (recognizing "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."); Hill v. Lockhart, 474 U.S. 52, 57 (1985) (*Strickland*'s "two-part standard seems to us applicable to ineffective-assistance claims arising out of the plea process.").

71. The majority rule at the time the Court decided *Cooper* and *Frye* was that ineffectiveness leading to loss of a favorable plea offer is remediable. *See, e.g.*, Hoffman v. Arave, 455 F.3d 926 (9th Cir. 2006); Magana v. Hofbauer, 263 F.3d 542, 553 (6th Cir. 2001); United States v. Blaylock, 20 F.3d 1458, 1469 (9th Cir. 1994); People v. Gandiaga, 70 P.3d 523, 527 (Colo. App., 2002); Jiminez v. State, 144 P.3d 903, 907 (Okla. Crim. App. 2006); State v. Garrison, 40 S.W.3d 426, 431 (Tenn. 2000); Becton v. Hun, 205 W. Va. 139 (W. Va. 1999); *see also* State v. Greuber, 165 P.3d 1185, 1189 n.4 (Utah 2007) (citing examples); Albert W.

that ineffectiveness in plea bargaining is irremediable because a defendant is not "prejudiced" by losing a favorable plea opportunity.[72] *Cooper and Frye* presented a chance definitively to resolve the question that technically remained open.[73]

A basic understanding of the *Cooper* and *Frye* decisions, beginning with their underlying facts, is useful in considering the decisions' legal significance. Cooper's lawyer gave legally incorrect advice. Cooper fired a gun at the victim's head but missed, and then fired at her again, wounding her three times. The prosecutor charged Cooper with several crimes, including assault with intent to murder, but offered to dismiss half the charges and to recommend a sentence of fifty-one to eighty-five months imprisonment if Cooper pled guilty. Cooper's lawyer inaccurately advised him that he could not be found to have had the intent to murder because the shots struck below the victim's waist. Having been led to expect an acquittal on the most serious charge, Cooper rejected the favorable plea offer, was convicted at trial on all the charges, and received a mandatory minimum sentence of 185 to 360 months imprisonment. That is to say, he was sentenced to spend around *eleven to thirty-five years longer* in prison because he followed his lawyer's erroneous advice.[74]

Frye's lawyer failed to convey the prosecutor's written plea offer as he was ethically obligated to do. Having been charged with driving with a revoked license, Frye faced up to four years' imprisonment. The prosecutor wrote to Frye's lawyer offering two possible plea bargains, one of which would have carried a recommendation of ninety days' imprisonment, but the lawyer failed to tell Frye about the offer before it expired. Before this matter was resolved, Frye was arrested again for driving with a revoked license. Having lost the benefit of the plea offer, he pled guilty to the original charges and received a three-year prison sentence. There is no guarantee that, if Frye had known of the original offer and tried to accept it, the prosecutor would have kept the offer on the table despite Frye's re-arrest or that the trial judge would have

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Alschuler, Lafler *and* Frye*: Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 608 n.32-33 (2013).

72. See, e.g., Williams v. Jones, 571 F.3d 1086, 1101-02 (10th Cir. 2009) (Gorsuch, J., dissenting) ("In the terms of Strickland's prejudice prong, the loss of a plea bargain does not 'undermine confidence' in the outcome of a subsequent fair trial."); United States v. Springs, 988 F.2d 746, 749 (7th Cir. 1993); State v. Greuber, 165 P.3d 1185 (Utah 2007).

73. *See generally* Roberts, *supra* note 64.

74. Lafler v. Cooper, 132 S. Ct. 1376, 1383 (2012).

accepted Frye's guilty plea and imposed the recommended sentence. But if so, the defense lawyer's lapse meant the difference between a three-month sentence and a three-year sentence.[75]

In pursuing relief based on the Sixth Amendment right to effective assistance of counsel, neither Cooper nor Frye had much difficulty proving the inadequacy of his respective lawyer's performance. At least in Cooper's case, prejudice seemed obvious. Cooper would have accepted the plea bargain if he had not been advised incorrectly that, as a matter of law, he was innocent of the most serious charge. He would have received a much lower sentence by pleading guilty. That sounds like serious prejudice, if prejudice means an adverse outcome, which is how the Court's majority saw it.[76] Frye's case was harder, however. Even if Frye had tried to plead guilty, he might have lost the benefit of the proposed deal because of his subsequent arrest. The Court remanded for consideration of whether or not Frye was prejudiced in light of this possibility.[77]

"Not so fast," said the dissenting Justices. They believed Cooper was not prejudiced by the loss of a lenient plea offer because he received a fair trial.[78] Frye even more certainly was not prejudiced, they maintained, because he not only received a fair process—that is, a fair guilty plea proceeding—but admitted his own guilt.[79] In their view, the defense lawyer's role, as far as the Constitution is concerned, is not to try to mitigate the harshness of the criminal charges, but simply to stand guard to assure that the defendant's procedural rights are protected. They reasoned that the right to competent representation is intended to assure the defendant a fair process; that the right is therefore not violated "unless counsel's mistakes call into question the basic justice of a defendant's conviction or sentence;" and that defense counsel's mistakes in the plea bargaining context do not call the fairness of a conviction into question because "a criminal defendant has no right to plea bargain."[80]

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75. Missouri v. Frye, 132 S. Ct. 1399, 1404-05 (2012).

76. *Cooper*, 132 S. Ct. at 1384.

77. *Frye*, 132 S. Ct. at 1411.

78. *Cooper*, 132 S. Ct. at 1392 (Scalia, J., dissenting).

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

80. *Cooper*, 132 S. Ct. at 1395 (Scalia, J., dissenting). The constitutional role envisioned by the dissenting Justices may be even narrower than first appears, given the view expressed at the outset of Justice Scalia's dissent that constitutional rights in state criminal proceedings are generally too protective. In the dissenters' ideal world, defense counsel might have little to do, because the constitutional rights to be protected would be minimal.

Having found a violation of the constitutional right to competent representation, the Court faced the tricky question of what the remedy should be when a defendant such as Cooper or Frye proves that he missed out on a favorable plea bargain because his defense lawyer performed unreasonably poorly.[81] In other contexts, the remedy for a violation of this right is obvious. If a lawyer's mistakes at trial contribute to the jury's guilty verdict, a court vacates the conviction and gives the defendant a new trial.[82] Likewise, if a lawyer's bad advice leads a defendant to plead guilty, a court vacates the conviction.[83] The Court addressed that situation two years earlier in *Padilla v. Kentucky*,[84] in which the immigrant defendant pleaded guilty to drug charges after his lawyer wrongly assured him that deportation would not follow his conviction.

It is less clear, however, how a court should remedy the situation when a defendant misses out on a favorable plea offer. Simply vacating the conviction, while restoring the opportunity to plea bargain, might be unfair to the defendant, because the prosecution might not re-extend the original offer. Ordering specific performance of the original plea agreement might be unfair to the state, however, if the trial judge would not originally have accepted a guilty plea pursuant to the terms of that agreement or if changed circumstances make the original plea offer inappropriate. The Court concluded that trial courts have authority to reach an equitable resolution depending on the facts of the particular case.[85] It held that the prosecution should be ordered to reoffer the original plea agreement, and if the defendant accepts the offer, the court would then decide whether, as a matter of discretion, to vacate the

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81. *See, e.g.*, *A Functional Analysis*, *supra* note 55, at 1090-91 ("The problem of selecting an appropriate remedy after finding a denial of sixth amendment rights further complicates review of ineffectiveness [in cases involving inadequate advice]. . . . The defendant who is denied effective assistance in plea bargaining and receives a severe sentence after conviction at trial poses a more acute problem. The only meaningful relief for such a defendant would be the unusual step of reversing his conviction, thus returning the accused the bargaining leverage he lost through his counsel's ineffectiveness.") (citing Cole v. Slayton, 378 F. Supp. 364 (W.D. Va. 1974)); Perez, *supra* note 64.

82. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984) (setting forth required components of a "convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction"); *see also* Kimmelman v. Morrison, 477 U.S. 365 (1986). Likewise, if the lawyer's errors affected the sentencing proceeding, the remedy is resentencing. *See, e.g.*, Porter v. McCollum, 558 U.S. 30 (2009); Rompilla v. Beard, 545 U.S. 374 (2005); Wiggins v. Smith, 539 U.S. 510 (2003); Williams v. Taylor, 529 U.S. 362 (2000).

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

84. 130 S. Ct. 1473 (2010).

85. *Cooper*, 132 S. Ct. at 1389.

conviction and resentence the defendant under the agreement.[86] In *Cooper*, Justice Scalia's dissent criticized the remedy for its "incoherence,"[87] Justice Alito's separate dissent criticized the remedy for being "opaque,"[88] and both suggested that the deficiency of the remedy demonstrates that incompetence in connection with plea bargaining does not violate the Sixth Amendment right to competent representation in the first place.[89]

The inevitable question is, what is the legal significance of the Court's opinions in *Cooper* and *Frye*?[90] One way to approach the question is to ask whether the decisions will burden courts with more meritorious ineffective assistance of counsel claims; another is to ask whether the decisions will open the door to the expansion of constitutional rights or restrictions relating to other aspects of plea bargaining, such as restrictions on prosecutors' ability to bring extremely harsh charges to employ bargaining chips. These approaches were Justice Scalia's preoccupations. He predicted that the Court's decisions would burden courts by inviting additional constitutional challenges to the conduct of plea bargaining, leading to a new constitutional jurisprudence on the duties of defense lawyers and prosecutors alike.[91]

Justice Scalia has previously exaggerated the administrative burden that upholding constitutional rights imposes on the judiciary,[92] and his dissent in *Cooper* was no exception.[93] Cases in which

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86. *Id.*

87. *Id.* at 1397 (Scalia, J., dissenting).

88. *Id.* at 1398 (Alito, J., dissenting).

89. *Id.* at 1394-95 (Scalia, J., dissenting) ("I suspect that the Court's squeamishness in fashioning a remedy, and the incoherence of what it comes up with, is attributable to its realization, deep down, that there is no real constitutional violation here anyway."); *id.* at 1398 (Alito, J., dissenting) ("The weakness in the Court's analysis is highlighted by its opaque discussion of the remedy that is appropriate when a plea offer is rejected due to defective legal representation.").

90. *See, e.g.*, Steven Zeidman, Padilla v. Kentucky*: Sound and Fury, or Transformative Impact*, 39 FORDHAM URB. L.J. 203 (2011).

91. *Cooper*, 132 S. Ct. at 1392 (Scalia, J., dissenting) (emphasis in original) ("And it would be foolish to think that 'constitutional' rules governing *counsel's* behavior will not be followed by rules governing the *prosecution's* behavior in the plea-bargaining process").

92. *See, e.g.*, Bruce A. Green, *Fear of the Unknown: Judicial Ethics After* Caperton, 60 SYRACUSE L. REV. 229, 236 (2010) (maintaining that Justice Scalia exaggerated the likelihood that elected state-court judges would be burdened with judicial recusal motions for accepting campaign contributions from lawyers and parties).

93. *See* Alschuler, *supra* note 71, at 681 ("*Lafler* and *Frye* gave defendants nothing they did not already have."); Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 Harv. L. Rev. 150, 159 (2012) ("In the short term, Lafler and Frye will matter less to the court system than one might expect. . . . [I]n practice their holdings are unlikely to upset many convictions or disrupt other aspects of judges' day-to-day work, pace Justice Scalia. . . . [M]ost circuits had already been applying the basic approach that the Court

defendants convincingly assert that they missed out on favorable plea bargains because of defense counsel's mistakes have not come before courts very often, and there is no reason to think that will change. To be sure, maladroit representation in plea bargaining may be prevalent,[94] and more skillful plea bargaining will make a difference to the outcome.[95] But it does not follow that many defendants will have an ability to make the requisite showing to gain relief under *Strickland*, or even have a realistic incentive to try.

Other than in rare cases such as *Cooper* and *Frye* where egregious and potentially fatal errors demonstrably were made, most such claims will be dismissed quickly based on the reasonableness of counsel's performance, lack of prejudice to the defendant, or both. For example, questionable strategy in plea negotiations will not be remediable because *Strickland*'s reasonableness standard for assessing the defense lawyer's performance is highly deferen-

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adopted in Lafler and Frye with few problems, few defendants will muster the necessary proof to demonstrate ineffective plea-bargaining assistance, judges are naturally disinclined to overturn convictions, and judges are unlikely to dispense overly generous remedies."); Gerard E. Lynch, Frye *and* Lafler*: No Big Deal*, 122 YALE L.J. ONLINE 39 (2012), *available at* http://yalelawjournal.org/2012/06/21/lynch.html ("The only surprise about the Supreme Court's recent decisions in *Missouri v. Frye* and *Lafler v. Cooper* is that there were four dissents. The decisions are straightforward recognitions that the defendants in those cases received unquestionably derelict representation, to their considerable prejudice."); Richard E. Myers II, *Rereading* Cronic *and* Strickland *in Light of* Padilla, Frye, *and* Lafler, 45 TEX. TECH L. REV. 229, 246 (2012) ("The ultimate impact of the new line of effective assistance of counsel cases remains to be seen, but it is unlikely that they were intended to open the floodgates for successful challenges."); *cf.* Wesley MacNeil Oliver, *The Indirect Potential of* Lafler *and* Frye, 51 DUQ. L. REV. 633, 633[(2013) (acknowledging that "[t]he direct impact of these opinions is not likely to be dramatic," but maintaining that the decisions " hold the potential to improve the quality of representation defendants receive in the negotiation process and may lead judges to create a set of advisory guidelines for the exercise of prosecutorial discretion."). *But see* Justin F. Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U. Pa. J. Const. L. 1161 (2012) (maintaining that the decisions may lead to a more liberal reading of the right to effective assistance of counsel in other contexts).

94. *See, e.g.*, Andrew Hessick III & Reshma Saujani, *Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 219 (2002) ("The very nature of the plea bargain system invites inadequate representation and underscores the need for refining the system. Defense attorneys often have little time to devote to their cases and often can manage only quick and cursory interactions with their clients and prosecutors. . . . [I]ndividual cases fail to receive the attention they deserve as the bargaining process becomes more and more habitual for defense attorneys and prosecutors.").

95. *See, e.g.*, Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41 (1985); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 78-81 (1995); Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841 (1998).

tial. [96] Likewise, it will be nearly impossible to prove prejudice other than where the prosecutor put an explicit plea offer on the table, because the mere possibility that more effective advocacy would have led to a favorable offer, and that the defendant would have accepted the offer, will typically be dismissed as speculative. The proof that *Cooper* and *Frye* do not open the floodgates to winning ineffective assistance of counsel claims is that, in jurisdictions where courts anticipated the *Cooper* and *Frye* decisions by recognizing the possibility of a remedy when a defendant misses out on a favorable plea offer because of defense counsel's error,[97] few convictions have been reversed on this basis.[98]

One might also be skeptical of whether *Cooper* and *Frye* will open the door to the development of a new, expansive and burdensome constitutional jurisprudence regulating plea bargaining in general. Some envision a new and salutary jurisprudence to address some of the perceived unfairness of the process.[99] But there is reason for skepticism: courts in jurisdictions that anticipated *Cooper* and *Frye* did not couple the right to effective assistance with a more protective jurisprudence of plea bargaining generally. In any event, a constitutional jurisprudence on defense and prosecution plea bargaining duties will not blossom without the Court's acquiescence. If the day ever comes that the law begins to develop too far too fast—if lower courts begin recognizing new federal constitutional rights and restrictions relating to plea bargaining, such as a prosecutorial duty to refrain from overcharging—the Court can halt its development.[100]

That *Cooper* and *Frye* carry a modest cost to the criminal process does not mean that they are insignificant. Decisions on the right to competent counsel have a signaling or symbolic significance; they may influence criminal defense lawyers indirectly by

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96. *See, e.g.*, Premo v. Moore, 131 S. Ct. 733, 741 (2011).

97. Prior to the Supreme Court decisions, lower federal courts of different circuits and various state courts had recognized the availability of relief under *Strickland* when ineffective representation leads to loss of a favorable plea agreement. *See supra* note 71.

98. Notably, although more than half the state Attorneys General joined an amicus brief opposing the defendant's claim in *Cooper*, they made no argument that applying *Strickland* to defense errors in plea bargaining would lead to judicial or administrative burden or had done so to date. Brief for Connecticut and Twenty-six Other States as Amicus Curiae Supporting Petitioner, Lafler v. Cooper, 132 S. Ct. 1376 (2012).

99. *See, e.g.*, Justin F. Marceau, *supra* note 93, at 1216 ("The practical consequences of a broad construction of Strickland in the pretrial context may prove to be one of the most significant criminal procedure developments in decades.").

100. Indeed, the Court has an opportunity to restrict the reach of *Cooper* and *Frye*. *See* Titlow v. Burt, 680 F.3d 577 (6th Cir. 2012), *cert. granted*, 81 U.S.L.W. 3470 (Feb. 25, 2013).

encouraging or discouraging particular professional conduct by defense lawyers.[101] The jurisprudence is a mixed blessing. On one hand, it implicitly encourages defense lawyers to aim low by denying a constitutional remedy based on lack of prejudice in many cases where the defense lawyer's conduct was ethically and professionally improper, such as where lawyers conducted inadequate investigations.[102] The problem is compounded by the lack of serious disciplinary enforcement and the absence of a meaningful civil remedy when criminal defense lawyers perform incompetently.[103] On the other hand, inadequate remedy aside, the decisions express the importance of competence in various aspects of criminal defense representation, some of which might otherwise be invisible. That is especially true of decisions addressing defense lawyers' advice regarding guilty pleas. Simply by addressing and leaving open some slim possibility of a remedy for incompetent representation in the plea bargaining process, the decisions in *Cooper* and *Frye* signal to the defense bar that the quality of their professional conduct matters.

The two decisions also have a practical significance in that they discourage states from circumscribing defense lawyers' roles. Imagine that the dissenting Justices had carried the day. At least initially, defense lawyers would remain professionally obligated to provide competent representation in the plea bargaining process consistent with the professional norms. Although the lawyers' lapses would not be remediable, the lawyers would at least in theory remain subject to discipline for egregious professional misconduct. But suppose a state decided to limit funding for indigent defense by refusing to pay for work that went beyond the lawyer's constricted constitutional function, as defined by the dissenters. A state might say, for example,

> Lawyers will no longer be compensated for hours spent investigating and researching the possible defenses before advising the defendant whether to accept a plea offer. Once a prosecutor puts a plea offer on the table, and unless the offer is rejected, the lawyer will be compensated only for time spent telling the defendant what he needs to know to make any guilty plea constitutional—for example, that he has a right to

101. *Criminal Neglect, supra* note 55.
102. *See id.* at 1191.
103. *See id.* at 1195-97.

trial that he will be giving up by pleading guilty and the range of punishment that the trial court may impose.

Frye and *Cooper* discourage redefining counsel's role in this manner. They presuppose that a lawyer will fulfill the ethical duty to provide information that would be important for the defendant to know before deciding whether to plead guilty.[104] Of course, it might seem unimaginable that a state would attempt to cut back on indigent defense in this manner, precisely because, as the Court recognized, plea bargaining has become such a critical stage of the criminal process. Nonetheless, Justice Scalia's dissent dares one to imagine this possibility.

III. IS CONSTITUTIONAL CRIMINAL PROCEDURE TOO CLOSE TO PERFECTION?

The ordinary criminal process has become too long, too expensive, and unpredictable, in no small part as a consequence of an intricate federal Code of Criminal Procedure imposed on the States by this Court in pursuit of perfect justice.[105]

Justice Scalia did not claim to base his critique on a fact finding like that which a legislature might undertake, on studies conducted by others, or on his own personal experience,[106] but credited Judge Friendly's 1965 article with the perception that the ordinary criminal process is presently "too long, too expensive, and

104. Arguably, States achieve essentially the same result in jurisdictions in which prosecutors make "fast track" plea offers. Even if the defense lawyers would be compensated for conducting investigation and research, the quick expiration of the offer may, as a practical matter, deprive the lawyers of the time such work requires. *See generally* Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117 (2011); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010); Jane L. McClellan & Jon M. Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on "Fast-Track" Sentences*, 38 ARIZ. ST. L.J. 517 (2006); Kevin C. McMunigal, *Guilty Pleas, Brady Disclosure, and Wrongful Convictions*, 57 CASE W. RES. L. Rev. 651 (2007); Ellen S. Podgor, *Pleading Blindly*, 80 MISS. L.J. 1633 (2011).

105. Lafler v. Cooper, 132 S. Ct. 1376, 1391 (Scalia, J., dissenting).

106. Justice Scalia's past experience did not include work as a lawyer or trial judge in criminal cases. The only recent Justice with a substantial criminal defense background was Thurgood Marshall. The one current Justice with substantial criminal justice experience is Justice Alito, who served as a federal prosecutor. It is noteworthy that Justice Alito authored a separate dissent in Cooper endorsing the reasoning in the first two Parts of Justice Scalia's opinion, *Cooper*, 132 S. Ct. at 1398 (Alito, J., dissenting), rather than joining those portions of the opinion. Perhaps Justice Alito was deterred, if not offended, by the introductory observations of Justice Scalia's dissent, broadly criticizing the criminal justice process, with which Justice Alito had been associated for a significant period.

unpredictable."[107] Justice Scalia's idea of a preferable—and less perfect—process is evidently a shorter, cheaper and more predictable one in which no one, least of all the Supreme Court, tells states how to adjudicate guilt and innocence except perhaps to establish minimal, basic procedural protections as a matter of due process.

It may seem odd that Justice Scalia would attribute his vision of the "ordinary" criminal process to an article published almost a half century ago, notwithstanding the author's eminence.[108] Such reliance might be particularly surprising because decades have passed since the Warren Court, in decisions such as *Gideon v. Wainwright*,[109] *Miranda v. Arizona*,[110] and *Brady v. Maryland*,[111] arguably pursued anything approximating perfection, as opposed to minimal constitutional fairness, in the criminal context.[112] Given the Court's conservative approach to criminal procedural rights since at least the 1980s, one's first impression must be that Justice Scalia is living in the past.

A visit with Judge Friendly's article suggests a further and more significant reason to be quizzical. Although Judge Friendly did imagine a procedural landscape resulting from the adoption of procedural rights in pursuit of justice, it was not the dystopian landscape that Justice Scalia depicts.

Judge Friendly's article was published during the Warren Court era, when, as he described, a great debate on criminal procedure was underway, and various groups were proposing legislation meant to "strike a fair balance between society's need for protection against crime and the interests of suspected and accused persons."[113] His article cautioned the Supreme Court not to move too far too fast in setting down constitutional rules of criminal proce-

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107. *Id.* at 1391 (Scalia, J., dissenting).

108. *See generally* DAVID M. DORSEN, HENRY FRIENDLY, GREATEST JUDGE OF HIS ERA (2012).

109. 372 U.S. 335 (1963).

110. 384 U.S. 436 (1966).

111. 373 U.S. 83 (1963).

112. *See* Rachel E. Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043 (2006); Louis D. Bilionis, *Conservative Reformation, Popularization, and the Lessons of Reading Criminal Justice As Constitutional Law*, 52 UCLA L. REV. 979 (2005); Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361 (2004); Anthony O'Rourke, *The Political Economy of Criminal Procedure Litigation*, 45 GA. L. REV. 721 (2011); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996).

113. Friendly, *supra* note 7, at 929.

dure that would restrict state legislative efforts to achieve essentially the same ends in other ways.[114] He never suggested that Supreme Court decisions had made state criminal processes too long, expensive or unpredictable in a quest for the procedural ideal. He thought the criminal process was not yet sufficiently fair and he praised the Court's constitutional decisions for making it fairer, declaring "that there are few brighter pages in the history of the Supreme Court than its efforts over the past forty years to improve the administration of justice."[115]

Judge Friendly's concern was about how to accomplish necessary reform. His conclusion was that additional procedural protections, while necessary, should in many cases be enacted by state legislatures.[116] He made a number of observations. First, the procedural provisions of the Bill of Rights did not necessarily have to be applied in precisely the same way in state as in federal criminal proceedings.[117] Second, if the Court starts with the view that these constitutional provisions apply identically in state and federal cases, then when the Court establishes procedural protections, it should carefully analyze its basis for doing so. Judge Friendly noted that the Court has sources of authority available to it in federal cases, including "its general supervisory power over the administration of federal justice," that are unavailable in state criminal cases.[118] Third, in some areas, such as police interrogation, while there is a demonstrated "need for reform," "the problem is too complex for [a] sound solution by a constitutional absolute."[119] Therefore, "in applying the Bill of Rights to the states, the Supreme Court should not regard these declarations of fundamental principles as if they were a detailed code of criminal procedure, allowing no room whatever for reasonable difference of judgment

114. *Id.* at 929-31, 953-56.

115. *Id.* at 930; *see also id.* at 930-31 (asking, "How can any lawyer not be proud of the decisions condemning convictions obtained by mob rule, testimony known to the prosecutor to be perjured, coerced confessions, or trial by magazine?") (internal citations omitted); *id.* at 931 (observing, "There is nigh unanimous applause for the insistence that persons charged with serious crime shall receive the assistance of counsel at their pleas and trials." (citing, inter alia, Gideon v. Wainwright, 372 U.S. 335 (1963))).

116. *Id.* at 956 (the Court "should welcome the aid that legislatures may now be ready to offer in discharging the grave responsibilities of the due administration of criminal justice."); *see also id.* at 942 (maintaining that reform of police interrogation "is too complex for sound solution by a constitutional absolute").

117. *Id.* at 936-38.

118. *Id.* at 938.

119. *Id.* at 941-42.

or play in the joints."[120] He concluded: The Supreme Court "happily does not stand alone. It should welcome the aid that legislatures may now be ready to offer in discharging the grave responsibilities of the due administration of criminal justice."[121]

Against this background, Justice Scalia's invocation of Judge Friendly's writing seems unjustified on several levels. Judge Friendly did not criticize ordinary criminal processes for being overly solicitous of defendants' rights, as Justice Scalia suggested, but for being insufficiently protective. Nor did Judge Friendly suggest that additional procedural protections, in the quest for greater fairness, would create uncertainty or unjustified delay, expense or other administrative burdens. He did not advocate for more efficiency and less fairness, as Justice Scalia does. Rather, Judge Friendly welcomed additional reform. He simply saw legislatures as the right institution to enact reform as opposed to a Supreme Court interpreting constitutional provisions that did not lend themselves to the necessary nuance (if not complexity) of criminal procedure. On the whole, Judge Friendly was proceeding in a very different spirit from Justice Scalia, who seems to assume that procedural protections impede and complicate the criminal justice process. Instead, Judge Friendly welcomed new procedural protections and restrictions to promote fairness (if not perfection), some to be established by constitutional interpretation (and, in federal cases, via other legal sources of authority), and others to be reserved for legislation.

The overall premise of Judge Friendly's article—namely, that the Court should not impede state legislative innovation aimed at making the criminal process more fair—does not argue for a restrictive reading of the right to competent representation in cases such as *Cooper* and *Frye*. First, the issue in these cases is not whether to place new procedural demands on states but whether to reinforce existing state procedural requirements. That is because, under *Strickland*, as previously noted, the expectations for criminal defense representation in the states are set largely by the

120. *Id.* at 953-54 (internal citation omitted); *see also id.* at 954 ("Alternative modes of arriving at truth are not—they must not be—forever frozen. There is room for growth and vitality, for adaptation to shifting necessities, for wide differences of reasonable convenience in method.") (internal citation omitted).

121. *Id.* at 956.

prevailing norms.[122] For example, state court professional standards required the lawyers in *Cooper* and *Frye* to give accurate legal advice and to convey the prosecution's plea offers to the client. The questions for the Court were whether and, if so, how the Constitution provides a remedy for the lawyers' departure from the state standards.

Further, there is nothing to suggest that these decisions on the ineffective assistance of counsel impede state legislative reform. Remember: Judge Friendly was not worried about all protective Supreme Court decisions, but only decisions that foreclose alternative legislative means to the same end. *Cooper* and *Frye*—and the *Strickland* line of cases generally—do not impede legislative innovation and therefore do not represent the kinds of constitutional decisions about which Judge Friendly worried. Indeed, it is hard to envision what alternatives legislatures might pursue but cannot.

Finally, to the extent that one shares the concerns actually expressed by Judge Friendly, there is little evidence to suggest that constitutional decisions presently impede states from making criminal justice fairer. Nor is it the case today, as Judge Friendly believed it was when he was writing, that there is a great legislative movement to improve the administration of justice with which constitutional case law might interfere. If anything, the contemporary movement on the part of governmental entities is to "innovate" in a manner that erodes procedural protections by exploiting the leverage afforded by draconian sentences.[123]

The misapplication of Judge Friendly's article aside, there are various reasons to question Justice Scalia's vision of a constitutionally overburdened criminal justice system. First, Justice Scalia's criticism seems particularly unwarranted in the context on which he focuses—namely, plea bargaining.[124] Even those who

122. Strickland v. Washington, 466 U.S. 668, 688 (1984) ("Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable.")

123. *See supra* Part I.

124. Lafler v. Cooper, 132 S. Ct. 1376, 1393-95 (Scalia, J., dissenting). Justice Scalia characterized *Cooper* and *Frye* as cases involving "bad plea bargaining" and depicted them as raising the question of whether there is a "constitutional right to effective plea-bargainers." *Id.* at 1393. (Scalia, J., dissenting). This description is questionable, however. Neither case involved inadequacies in plea bargaining. As discussed earlier, *Cooper* involved erroneous legal advice, while *Frye* involved the failure to inform the client of information - a plea offer - that was important for the defendant to know. Neither involved, for example, a failure to attempt to plea bargain or a failure to make a persuasive argument to the prosecutor for leniency. The latter claims, which would involve allegations of "bad plea

concur that constitutional decisions have made the criminal *trial* process overly complicated[125] would not make the same argument about the *plea bargaining* process.[126] The problem is just the opposite.[127] Particularly in misdemeanor cases, which dominate state criminal dockets especially in urban settings, the problem is not that there are too many procedural protections, but rather too few. As discussed earlier, defendants are pressured to accept dispositions offered by the prosecution not only by the harsh possible outcomes for unsuccessfully asserting trial rights, but by the possibility of pretrial incarceration and other costs imposed by the process.[128] The lack of adequate defense representation is among the actual procedural deficiencies. Underfunded criminal defense lawyers are said to have made a practice of "'meet[ing] 'em and plead[ing] 'em'"—that is, meeting their clients for the first time at arraignment, receiving and communicating the prosecution's plea offer at that time, advising the client to accept the offer, standing beside the client when a guilty plea is entered, and often, hearing the sentence imposed on the spot.[129] One aspect of the ineffectiveness of the *Strickland* jurisprudence is its inability to address this practice.[130] But even factoring in felony cases that extend beyond the arraignment, it is hard to understand why Justice Scalia would regard a criminal process dominated by guilty pleas as being too long, expensive or unpredictable.

Further, to the extent that the trial process has become more complicated and less efficient, these changes cannot fairly be blamed on the constitutional jurisprudence. In the federal criminal context, the more significant source of expense and delay has

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bargaining," would probably be readily dismissed in most cases. Decisions about when and how to conduct plea negotiations will ordinarily be viewed as strategic decisions within a defense lawyer's discretion. An argument that the defendant was prejudiced because more effective representation would have resulted in a lenient plea offer would ordinarily be rejected as unduly speculative.

125. It seems hard to argue that state criminal prosecutions are impeded in general, given the commonly perceived problem of over-incarceration. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

126. *See* Scott & Stuntz, *supra* note 12.

127. *See supra* notes 11-12 and accompanying text.

128. *See supra* Part I.

129. *See, e.g.*, Stephen B. Bright, *The Right to Counsel in Death Penalty and Other Criminal Cases: Neglect of the Most Fundamental Right and What We Should Do About It*, 11 J.L. SOC'Y 1, 16-17 (2010).

130. Since misdemeanor defendants are not sentenced to significant imprisonment, they have little incentive to challenge their convictions, no matter how deficient their lawyers may have been.

been Congress's adoption of sentencing guidelines that often necessitate extensive pre-sentence fact-finding efforts.[131] In any event, expense and delay are inherent in the judicial resolution of disputes in the modern era, as the civil justice process amply demonstrates. One could more legitimately describe the ordinary *civil* process as too long, too expensive and unpredictable, causing parties to seek relief in the settlement process or alternative dispute mechanisms.[132] The problem is undeniably worse in civil than criminal cases. But the problem in civil litigation owes not a whit to the Court's development of an intricate constitutional procedure code in pursuit of perfect justice.

The following thought experiment raises further doubts about Justice Scalia's assertions: Suppose Justice Scalia sincerely believes that the ordinary criminal process is too long, expensive and unpredictable because of the Court's constitutional jurisprudence, and that it is because of the Court's constitutional decisions that prosecutors and defense lawyers engage in plea bargaining as an alternative to trials. Ask yourself, which past decisions expanding constitutional rights, if overturned, does Justice Scalia believe would lead to an increase in trials and decrease in plea bargaining? Among the most procedurally burdensome constitutional decisions are two decided under the Confrontation Clause for which Justice Scalia wrote the majority opinions: *Crawford v. Washington*[133] and *Melendez-Diaz v. Massachusetts*.[134] But no one has shown an uptick in plea bargaining resulting from these opinions. As long as defendants can obtain less harsh results by pleading guilty and prosecutors can bring harsher charges in order to induce guilty pleas, no judicial curtailment of constitutional protections will reduce the dominance of plea bargaining.

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131. *See, e.g.*, Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 310 (1992); Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299, 364 (1994).

132. *See generally* BROOKINGS INSTITUTION, JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION (1989); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

133. 541 U.S. 36 (2004).

134. 557 U.S. 305 (2009).

CONCLUSION

The Court's decisions in *Cooper* and *Frye* did little more than preserve and reinforce the status quo. The majority opinions hold that defendants may have a remedy when they lose out on favorable plea offers because of their lawyers' substantial departures from established professional standards. The more significant opinion is Justice Scalia's dissent, which imagines a plea bargaining process in which defense lawyers would have a more constricted constitutional role. If in 1965 one might have worried about the Supreme Court's over-eagerness to reform the criminal process to make it fairer, Justice Scalia's dissent suggests cause for greater alarm today: a bloc of Justices seeks to curtail procedural protections motivated by the spurious premise that criminal justice is already too close to perfect for its own good.