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Two Rights to Counsel

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I. Introduction

As *Gideon v. Wainwright*[1] nears the ripe old age of fifty, we gathered at a conference at Washington and Lee University School of Law to reflect upon the meaning of the contemporary right to counsel. To my thinking, there is not one constitutional right to counsel, but two. There is a right to *legal* counsel and a right to *extralegal* counsel. The right to *legal* counsel applies principally to the formal domain of the criminal trial; the right to *extralegal* counsel applies exclusively to the comparatively unstructured domains of the plea-bargain and guilty plea. I acknowledge that the term *extralegal* is loaded and almost certainly too strong. By *extralegal*, I do not intend to signify a

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

practice unrecognized by law. Rather, I mean the aspects of a practice that are informed by influences beyond formal code law.[2]

I recall vividly my first week as a public defender in the Bronx. I came to the job from a prestigious boutique white-collar defense firm that had represented such high-profile clients as Martha Stewart. I had done quite well at a top-ten law school and had completed a prestigious clerkship. But I remained wholly unprepared for practice in the Bronx criminal courts. No amount of training in the science of law could have provided me with the experiential wisdom required to master the art of local practice. Instead, I had to *live* the practice (and not just the law) before I could represent my clients effectively. The tired old adage holds that a good lawyer knows the law; a great lawyer knows the judge. The truth is not so simple. A great defense lawyer knows not only the law and the judge, but also the prosecutor, the court officers, the treatment providers, the social workers, the foreign-language interpreters, the corrections and probation officers, the customs and norms of each and every courthouse subcommunity, the going plea rate, the criminal and so-called collateral consequences of conviction, the quickest path from one courtroom to another, the courthouse elevators that are perennially slow or broken, and, most of all, the client's needs, objectives, and sympathetic characteristics.[3] Most of this wisdom accrues independently of (or, at least, not entirely dependent upon) law.

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2. Of course, some legal realists might counter that the term *legal* is defined necessarily as the *law in practice*. *Cf.* Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 448 (1930) ("'Real rules,' then, if I had my way with words, would by legal scientists be called the practices of the courts, and not 'rules' at all."). I appreciate that perspective, but, for present purposes, I bracket the question of what law does and does not include. That is, I concede that my definition of *extralegal* entails a controversial judgment about the nature of law, and I accept that, by some other measure, it may be the wrong term. But, that caveat aside, I consider the term *extralegal* to be sufficient—or, at least, sufficiently evocative.

Finally, I grant also that *all* practices of criminal law—including trial practice—may be shaped by considerations beyond formal code law. My narrow point is that the Court has seen fit to regulate constitutionally such considerations only in the guilty-plea and plea-bargaining contexts.

3. *See* MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT 3–5 (1979) (describing practice in lower criminal courts); MILTON HEUMANN, PLEA BARGAINING 3–4 (1978) (same).

That is, a great defense lawyer is more than just a legal technician; she is a sociologist, a psychologist, and a humanist.

Of course, most facets of comprehensive defense practice are not the appropriate purview of constitutional constraint. But, until recently, the Supreme Court had turned an unhealthy blind eye to the realities. In essence, the Constitution had utterly failed to accommodate any and all practices beyond law. Most of defense practice was left to the domain of professional ethics or was unregulated altogether.[4] Over the past five years, however, that has begun to change. The Court has adopted the constitutional perspective that it can no longer wholly sidestep messy practice questions. Through a trio of landmark rulings—*Padilla v. Kentucky*,[5] *Lafler v. Cooper*,[6] and *Missouri v. Frye*[7]—the Court has reached the understanding that conventional criminal justice primarily relies neither on trials nor even on law.[8] To the contrary, the criminal-justice system is—as the Court recognized in *Lafler*—a system of pleas and plea-bargains.[9] For a nation committed to the due process ideal, this may constitute an unfortunate reality, but it remains the reality nonetheless. More to the point, the right to effective assistance of counsel would

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4. *See, e.g.*, NAT. LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION § 6.2 (1995) ("[C]ounsel should attempt to become familiar with the practices and policies of the particular jurisdiction, judge and prosecuting authority which may affect the content and likely results of negotiated plea bargains.").

5. Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

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

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

8. *See id*. at 1407 ("The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires . . . ."); *Lafler*, 132 S. Ct. at 1388 ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."); *Padilla*, 130 S. Ct. at 1485 ("Pleas account for nearly 95% of all criminal convictions."); *see also* Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1126 (2011) ("[A] solid majority of the Court at last sees that plea bargaining is the norm; sets the going rate; and needs consumer regulation and competent counsel to make it intelligent, voluntary, and just.").

9. *See Lafler*, 132 S. Ct. at 1388 ("[C]riminal justice today is for the most part a system of pleas, not a system of trials.").

mean very little if these principal practices were walled off from constitutional regulation.

Admittedly, the Court has long recognized that a defendant has a right to effective assistance of counsel at a guilty plea (and even with respect to the negotiations and discussions that led to that guilty plea).[10] But only now has the Court begun to recognize that the right to effective assistance of counsel, itself, actually means something different in the plea-bargaining context, and that, accordingly, constitutional doctrine crafted to promote the trial right to counsel is a poor fit for bargains and pleas. Simply, plea practice responds to different questions. Trials are (and ultimately should be) about guilt accuracy—that is, whether a defendant is legally guilty. A good lawyer may smuggle equitable considerations into her trial arguments to plant seeds of nullification, but the bottom-line question remains relatively scientific: Has the State demonstrated legal guilt beyond a reasonable doubt? Comparatively, plea-bargains are (and ultimately should be) about more than legal guilt. They are about discretion. They are about fairness. They are—from the prosecutor's perspective—about efficiency and optimal crime control. Such considerations invariably may overlap with legal questions, but sometimes they may also run counter to it. Indeed, often plea-bargaining provides a path out from under the unwelcome strictures of legislative commands, like mandatory-minimum sentences and mandatory immigration and other so-called collateral consequences. In this way, plea-bargaining is a tool to circumvent law.[11]

I remember a particular example from my own practice. My client was charged with a violation—harassment in the second degree. A conviction would not have given my client a criminal record, but it potentially would have carried with it serious immigration consequences. To get out from under those consequences, I convinced the prosecutor to file a *misdemeanor* charge of assault in the third degree and to let my client plead

10. *See* Hill v. Lockhart, 474 U.S. 52, 58 (1985) (applying a two-part test applicable "to challenges to guilty pleas based on ineffective assistance of counsel").

11. Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992) ("Plea bargaining is to the sentencing guidelines as black markets are to price controls.").

guilty to attempted reckless assault. The plea gave my client a criminal record, but it left him in a comparatively better immigration position.[12] Here, then, was a defendant who creatively pled *up* to a higher charge.

As the example demonstrates, plea-bargaining has more in common with contracts than conventional criminal procedure.[13] A central contract law precept is that the parties may make their own law.[14] Likewise, prosecutors and defense attorneys use plea-bargaining to "establish the law of the locale rather than apply the law of the state."[15] It is said that "[t]he law of crime is

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12. If memory serves, the defendant was better off for immigration purposes with the criminal conviction because *mens rea* mattered to the immigration inquiry, and the charge of harassment entailed a showing of actual intent, whereas the charge of attempted reckless assault entailed a less culpable mind state (and a fairly nonsensical one at that). *Compare* N.Y. PENAL LAW § 240.26 (McKinney 2013) (providing that a person is guilty of harassment in the second degree when there is "intent to harass, annoy or alarm another person"), *with id.* § 120.00(2) (providing that a person is guilty of assault in the third degree when "[h]e recklessly causes physical injury to another person"). There are myriad other (somewhat more troubling) examples of what Joseph Colquitt has pejoratively termed "ad hoc plea bargaining." *See* Joseph Colquitt, *Ad Hoc Plea Bargaining*, 75 TUL. L. REV. 695, 698–99 (2000) (disapproving of the practice and providing that "[a]d hoc bargaining occurs when the parties suggest unsanctioned punishments or benefits in settling criminal cases"); *see also, e.g.*, Gina Barton, *Mystery Resolved but Not Solved*, MILWAUKEE J. SENTINEL, Aug. 24, 2006, at 1A (detailing defendant's guilty plea to a reduced charge in exchange for submission to a hysterectomy); Jules Wagman, *Vasectomy Plea Deal Represents Wacky Justice in Jacksonville*, ORLANDO SENTINEL, Apr. 13, 1994, at A17 (describing defendants choice between injections of Depo-Provera or a vasectomy as part of a plea deal); *The Sentence is Church, and Defendant Approves*, N.Y. TIMES, Feb. 11, 1994, at B18 ("[A] senior Federal judge here has ordered a woman and her four children to attend church services each Sunday for a year as part of a probation agreement in a drug case against her.").

13. *See* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1910 (1992) ("Properly understood, classical contract theory supports the freedom to bargain over criminal punishment."); *see also, e.g.*, Santobello v. New York, 404 U.S. 257, 262 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.").

14. *See* Harry W. Jones, *The Jurisprudence of Contracts*, 44 U. CIN. L. REV. 43, 50–54 (1975) (discussing the dispersion of power in private contract law).

15. Colquitt, *supra* note 12, at 698.

special"[16]—that "crime belongs wholly to the law, and its treatment is exhaustively based on considerations of legality."[17] Thus, the criminal justice system has rejected ostensibly soft—and comparatively subjective—approaches to rulemaking, like the common-law method of crime creation.[18] Yet the criminal justice system abides by the highly subjective art of making law by agreement. Formal legality is, in this way, more aspiration (or fiction) than reality. And, under prevailing criminal codes, it could not be otherwise, because code law is often too hard and disagreeable. In such circumstances, the stakeholders seek outlets from code law, and plea-bargaining is the prevailing outlet.

In fact, the Court has come not only to tolerate efforts to bargain around code law; it has come to encourage them. The Court has come to recognize prosecutors and defense attorneys as the system's real (and, in the Court's view, appropriate) policy makers. Thus, the Court has concluded that effective assistance of bargaining counsel is and ought to be measured against their conception of the "sound administration of criminal justice."[19] In this way, the Court has constitutionally acknowledged a long-apparent, practical rift between the distinct enterprises of trials by jury and pleas by bargain: whereas the criminal trial is an adjudicative and adversarial device designed to promote legal

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16. Louis Michael Seidman, *Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State*, 7 J. CONTEMP. LEGAL ISSUES 97, 97 (1996).

17. Egon Bittner, *The Police on Skid-Row: A Study of Peace Keeping*, 32 AM. SOCIOLOGICAL R. 699, 700 (1967); *see also* Kenneth I. Winston, *On Treating Like Cases Alike*, 62 CAL. L. REV. 1, 37 (1974) (discussing criminal law's long tradition of "strict adherence to rules"). As Michael Seidman has observed, "although realism's lessons for criminal law seem obvious, formalism continues to dominate criminal jurisprudence." Seidman, *supra* note 16, at 103.

18. Conventionally, the legality principle is taken to require, at a minimum, that legislators codify offenses ex ante, and that police and prosecutors confine their collective attention to this "catalogue of what has already been defined as criminal." HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 88–90 (1968) (observing that the principle of legality is unnecessary to minimize the prospect of arbitrariness and abuse).

19. Lafler v. Cooper, 132 S. Ct. 1376, 1387 (2012); *see generally* Josh Bowers, Lafler*,* Frye*, and the Subtle Art of Winning by Losing*, 25 FED. SENT'G REP. 40, 43 (2012) [hereinafter Bowers, *Winning by Losing*].

accuracy (and, secondarily, to protect against coercion), the plea-bargain is an administrative and collaborative device designed to promote fairness and efficiency (and, secondarily, to protect against deception and surprise).

In this Article, I explore this longstanding practical (and emerging) jurisprudential rift between the meaning of effective assistance of counsel at bargain and trial. In Part II, I describe the Court's methodological approach to plea-bargaining as distinct from its approach to traditional pretrial and trial procedures. Specifically, the Court has emphasized fair notice as opposed to guilt accuracy. In Parts III and IV, I examine the Court's conventional methodological approach, which is comparatively indifferent to unfairness and surprise and comparatively more concerned with adversarial testing, guilt accuracy, and prophylactics against coercion. In Part V, I discuss the Court's particular approach to coercion in the plea-bargaining context. In Parts VI and VII, I focus narrowly on the extralegal right to effective assistance of bargaining counsel in light of recent Court rulings expanding the right. Specifically, I claim that the Court has endorsed a richer conception of notice that obliges defense attorneys to keep defendants apprised of practice beyond law. And, even more than that, the Court may have also obligated defense attorneys to bargain hard. Finally, I briefly raise one of the most fascinating implications of the extralegal right to counsel: that a defense attorney may now be compelled to make extralegal arguments to the bargaining prosecutor that she is forbidden to make to the trial jury—particularly, arguments calculated to shortcut code law.

II. The Constitutional Significance of Surprise

In a separate essay, I argued that the Court has consistently adopted a distinct methodological approach to plea-bargaining—specifically, a methodology informed principally by contract conceptions of fair notice and private ordering as opposed to legalistic conceptions of guilt-accuracy of the kind that tend to frame the rest of constitutional criminal procedure.[20] That is, the

20. *See* Josh Bowers, *Fundamental Fairness and the Path from* Santobello *to* Padilla*: A Response to Professor Bibas*, 2 CAL. L. REV. CIRCUIT 52, 55 (2011)

Court has taken legal accuracy to be somewhat irrelevant—neither here nor there (or, rather, not *here* in the plea-bargaining domain but *there* in traditional criminal procedure domains, like charging and trials).[21]

I have defended the Court's distinct methodological approach.[22] But it is not without shortcomings. Chiefly, it has led the Court to dismiss—in unfounded and almost starry-eyed terms—the prospect of legally erroneous plea convictions.[23] But the Court is not naïve. More likely, it recognizes—practically or cynically—that the criminal justice system would grind to a halt without well-oiled guilty-plea machinery (and a presumption of guilt keeps that machinery well-oiled).[24] Thus, the Court has presumed that a pleading defendant is what he says he is—guilty. Indeed, in *North Carolina v. Alford*,[25] the Court even presumed a defendant guilty, notwithstanding his equivocation:

[hereinafter Bowers, *Fundamental Fairness*] ("When it comes to contemporary constitutional *trial* procedure, accuracy is the prevailing coin of the realm; fundamental fairness is an afterthought . . . . [But] [i]n the plea-bargaining and guilty-plea contexts, the accuracy principle has played a smaller role as compared to fundamental fairness."); *see, e.g.*, Santobello v. New York, 404 U.S. 257, 261 (1971) ("Disposition of charges after plea discussions is . . . highly desirable . . . for many reasons . . . . However, all of these considerations presuppose fairness."). As I previously discussed, cases like *Santobello* "can be re-read as an effort to cement a set of national (and constitutional) contract standards to promote fair and efficient bargaining between the *guilty* defendant and his prosecutor." Bowers, *Fundamental Fairness*, *supra*, at 67 n.35.

21. *See* Bowers, *Fundamental Fairness*, *supra* note 20, at 56 ("In the plea-bargaining and guilty-plea contexts, the accuracy principle has played a smaller role as compared to fundamental fairness."); *see also* Bibas, *supra* note 8, at 1139 (observing that the *Padilla* Court's focus "reaches beyond a defendant's factual guilt").

22. *See* Bowers, *Fundamental Fairness*, *supra* note 20, at 67 (faulting "the Court only for the inadequacy of its constitutional rules and standards, not also for its dominant methodological approach").

23. *See, e.g.*, Brady v. United States, 397 U.S. 742, 758 (1970) (concluding that it did not believe that "the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves").

24. *Cf. Santobello*, 404 U.S. at 260 ("'[P]lea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged.").

25. North Carolina v. Alford, 400 U.S. 25 (1970).

"I'm not guilty but I plead guilty."[26] The irony, then, is that plea-bargains and guilty pleas have very little to do—jurisprudentially or practically—with guilt in the sense that legal guilt is never a litigated or constitutional question. This is not to say that legal guilt is wholly immaterial—just that the matter is settled already by the underlying determination that there is probable cause for the charges to which the defendant knowingly and voluntarily pleads (or away from which he bargains).[27]

My immediate complaint, however, does not concern the innocence problem. My complaint runs the other way: that, by subjecting a prosecutor's charging discretion to only a legalistic probable cause check, the Court has done too little to promote the *substantive* fairness of bargains and pleas. For example, in *Bordenkircher v. Hayes*,[28] the defendant rejected an offer of five years in prison for forging an eighty-eight dollar check.[29] Thereafter, the prosecutor carried out a threat to recharge the defendant as a habitual offender subject to a mandatory conviction sentence of life without parole—a sentence that the defendant in fact received.[30] It did not matter whether life imprisonment was an appropriate punishment for smalltime forgery.[31] "The only question . . . was . . . formal legality."[32] Cases like *Bordenkircher* reveal that, although plea-bargaining and guilty-plea jurisprudence is animated by fairness, the Court traditionally has endorsed only a cramped conception of

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26. *Id.* at 28 n.2. The *Alford* Court observed: "*Whether he realized or disbelieved his guilt*, he insisted on his plea because in his view he had absolutely nothing to gain by a trial and much to gain by pleading." *Id.* at 37 (emphasis added). Significantly, the Court never questioned his guilt or the accuracy of the consequent conviction.

27. *See* Bibas, *supra* note 8, at 1133 (explaining that the Court has "assumed . . . that innocent defendants are very unlikely to plead guilty"); *see also* Bowers, *Fundamental Fairness*, *supra* note 20, at 58 ("[F]undamental fairness is the focus because there is little else on which to concentrate once the Court has deemed the accuracy question beside the point.").

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

29. *Id.* at 358–59.

30. *Id.*

31. *See id.* at 361 (addressing the conduct of the prosecutor).

32. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 258 (2001) ("The fairness of the charge [in *Bordenkircher*] was irrelevant.").

fairness—that is, fair notice and fair dealing (procedural fairness) more than fair deals (substantive fairness).[33] Ultimately, then, a prosecutor may exploit expansive substantive codes and mandatory sentencing laws to compel pleas, as long as she does so "forthrightly."[34]

Moreover, the Court typically has required that the defendant be made "fully aware" only of (i) the legal rights he sacrifices by plea and (ii) the legal consequences of taking the deal.[35] In short, he has to comprehend only the generally applicable law, not also the specific manner by which the law applies to his case. That is, he does not need to know facts external to his legal rights and charges—such as, *evidentiary facts* about his chances of acquittal or *practice facts* about the kinds of plea offers typically available in the local courthouse.[36] But, as I examine in Part VI, the Court has come recently to endorse a richer conception of what constitutes unfair surprise.[37]

III. The Constitutional Significance of Coercion

In any event, even a cramped conception of notice constitutes a methodological approach distinct from conventional criminal

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33. *See* Brady v. United States, 397 U.S. 742, 755 (1970) (indicating that a voluntary plea requires that a defendant is "fully aware" of the consequences of pleading guilty); *cf.* Scott & Stuntz, *supra* note 13, at 1922 (arguing that a plea-bargain should be invalidated on contract-law grounds if the risk of fraudulent concealment is too great).

34. *See* Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978) (emphasizing "forthright[] . . . dealings with the defense" to avoid the kind of "unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows").

35. *See Brady*, 397 U.S. at 755–56 (providing the due process test for what the defendant must be made aware of in order to make an intelligent plea decision); *see also* United States v. Broce, 488 U.S. 563, 569 (1989) ("A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence.").

36. *See* Tollett v. Henderson, 411 U.S. 258, 267 (1973) ("[I]t is not sufficient for the criminal defendant seeking to set aside . . . a plea to show that . . . h[e] may not have correctly appraised . . . certain historical facts."); *see also Broce*, 488 U.S. at 764 (quoting *Tollett*).

37. *Infra* Part VI.

procedure doctrine. In traditional pretrial and trial contexts, the Court has exhibited comparatively more concern about coercion than unfair surprise, emphasizing repeatedly that coercive tactics—like coerced confessions—are constitutionally problematic because they undermine guilt accuracy.[38] The Court's conception of the trial right to counsel fits neatly within this model. It is a prophylactic against coercion intended to promote accurate adjudication thereby. That is, the trial right to counsel provides a buffer against state-sanctioned force in much the same way that other constitutional trial and pretrial protections serve as buffers against state-sanctioned force.[39] All of these rules and standards—the right to trial counsel, the privilege against self-incrimination, the requirement that guilt be proven beyond a reasonable doubt, and rules and standards regulating the admission and exclusion of evidence—are means of "testing the prosecution" and its efforts to act against the liberty of the defendant.[40] And, in order to effectively test the prosecution, a defendant requires the "guiding hand" of competent expert counsel, schooled in the "science of law":

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even

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38. *See* Stein v. New York, 346 U.S. 156, 182 (1956)

> The tendency of the innocent . . . to risk remote results of a false confession rather than suffer immediate pain so strong that judges long ago found it necessary to . . . treat any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt.

See also Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring) ("Of course, no confession that has been obtained by any form of physical violence to the person is reliable and hence no conviction should rest upon one obtained in that manner."); Brown v. Mississippi, 297 U.S. 278, 285–86 (1936) (finding a denial of due process when a confession was obtained by coercion).

39. *Cf.* Colorado v. Connelly, 479 U.S. 157, 164 (1986) (observing that unconstitutional confession cases "all . . . contained a substantial element of coercive police conduct . . . [and] the integral element of police overreaching").

40. John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1048–49 (1994). These procedural rules and standards are not just animated by the same logic. They grew up together in the eighteenth century. *Id.* at 1048. More to the point, Langbein has argued that the right to counsel is an adjunct to or source of all of these other rights. *Id.*

> the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. . . . He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[41]

It is only after a defendant is duly convicted—notwithstanding the efforts of competent counsel—that coercion becomes something other than an arbitrary exercise of force: it becomes a probabilistically accurate exercise of legal justice. As my colleague, Anne Coughlin, once remarked: "The absence of due process is experienced as the presence of force."[42] A good trial lawyer is a guarantor of due process, precisely because she possesses the technical tools to put legal charges to the test. She uses law to oppose legal efforts to use force. The touchstone is technical legal wisdom—the wisdom to navigate law; to find, in the words of the Court, "simple, orderly, and necessary" that which appears to the untrained layman "intricate, complex and mysterious."[43]

IV. Deception and Conventional Criminal Practice

The Court is relatively indifferent to notice, as compared to coercion, in the conventional constitutional criminal procedure contexts. To the extent notice is relevant, it is only as a mechanism to promote accurate adjudication by minimizing confusion over the law's meaning and reach. Consider, for

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41. Powell v. Alabama, 287 U.S. 45, 68–69 (1932); *see* Michael J. Klarman, *Scottsboro*, 93 MARQ. L. REV. 379, 397 (2009) (discussing *Powell* as an accuracy-oriented decision). Anecdotally, the *Gideon* case itself offers a vivid illustration of the critical importance of counsel to an accurate disposition: on retrial, the jury took just one hour to acquit the defendant. *See* A.B.A., *50th Anniversary of Gideon v. Wainwright* (2012), http://www.americanbar.org/publications/project_press/2012/year-end/gideon_50.html (last visited Apr. 2, 2013) ("Mr. Gideon was acquitted after only an hour of jury deliberation.") (on file with the Washington and Lee Law Review).

42. Katherine Calos, *'Rally for Honor' at U.Va.: Pride, Optimism Reign; Lawn Ralliers Hope Pressure Will Force Board to 'Right the Wrong,' Reinstate Sullivan*, RICHMOND TIMES-DISPATCH, June 25, 2012, at A-01 (quoting Coughlin).

43. Johnson v. Zerbst, 304 U.S. 458, 463 (1938).

instance, the one type of deception that the Court consistently has forbidden: state actors are not permitted to make false claims of legal authority. Thus, a police officer cannot order a suspect to submit to a search or seizure that the suspect has a legal right to refuse,[44] and a prosecutor cannot improperly comment on the import of the defendant's exercise of his constitutional rights.[45] These ploys and misstatements are impermissible precisely because they run the risk of reshaping the meaning and reach of law and thereby undermining its accurate administration.

By contrast, the Court generally has tolerated efforts to hide the relevant facts from suspects and defendants. A police officer may conceal his identity to gain access to a suspect's home or to extract his confession, and a prosecutor typically may spring trial surprises and conceal evidence.[46] Here, deception and subterfuge are permissible because the defendant is not fooled about the law but only about the facts. Law and its accurate application are left unaffected. Consider, for instance, *Moran v. Burbine*.[47] In *Moran*, the Court held incriminating statements admissible when the police failed to inform a suspect that his attorney had called the precinct and had attempted to invoke his privilege against self-incrimination and his attendant *Miranda*[48] right to counsel.[49]

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44. *See* Bumper v. North Carolina, 391 U.S. 543, 550 (1968) (holding invalid a consent to search when officers falsely claimed they possessed a warrant); *see also* Kentucky v. King, 131 S. Ct. 1849, 1862 (2011) (holding that officers may create exigent circumstances by knocking loudly on an apartment door as long as they "do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment").

45. *See* Darden v. Wainwright, 477 U.S. 168, 179–82 (1986) (discussing improper comments made by the prosecutor).

46. *See* White v. United States, 401 U.S. 745, 745 (1971) (holding that police may record surreptitiously conversations between informants and suspects without implicating the Fourth Amendment); *see also* Illinois v. Perkins, 496 U.S. 292, 297 (1990) ("*Miranda* forbids coercion, not mere strategic deception by taking advantage of a suspect's misplaced trust in one he supposes to be a fellow prisoner."); Lewis v. United States, 385 U.S. 206, 211 (1966) (holding that police may go undercover without implicating the Fourth Amendment). As is probably familiar to anyone who watches police-procedural television programs, interrogating officers are free to lie about, for example, the strength of the State's evidence or the cooperation of a confederate.

47. Moran v. Burbine, 475 U.S. 412 (1986).

48. Miranda v. Arizona, 384 U.S. 436 (1966).

49. *See Moran*, 475 U.S. at 434 (holding that "the Court of Appeals erred in

According to the Court, the interrogation was constitutional because the police had provided the suspect his *Miranda* warnings, and the suspect had waived his rights and agreed to speak.[50] In short, the Court concluded that the defendant was entitled constitutionally to understand that he had a *legal right* to counsel but not that he had a lawyer in fact. (In any event, *Miranda* is the only conventional criminal procedure context in which the Court has even obliged state actors to make suspects and defendants affirmatively aware of their legal rights.)[51]

And notice what else the Court has deemphasized. Procedural fairness is no central part of the inquiry. That is, the Court has refused to consider whether gamesmanship of the kind found in *Moran* is unfair according to some ontic measure, because the officers' efforts to play with the facts did not impede (and may well have promoted) legally accurate adjudication. In this vein, even the ostensible exceptions prove the rule. Specifically, a prosecutor cannot affirmatively manipulate or misstate the evidence.[52] Additionally, she has an affirmative duty

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finding that the Federal Constitution required the exclusion of the three inculpatory statements"). Indeed, the Court deemed irrelevant the fact that police had falsely assured defense counsel that the suspect would not be interrogated. *Id*. at 419.

50. *See id.* at 421 (finding that the defendant validly waived his *Miranda* rights).

51. *See Miranda*, 384 U.S. at 469 (providing that "[t]he warning to remain silent must be accompanied by the explanation . . . [and] is needed to order to make him aware not only of the privilege, but also of the consequences of forgoing it"). Repeatedly, the Court has refused to extend *Miranda*-type affirmative warnings to other contexts. For instance, police need not warn defendants of their right to refuse to comply with drug interdiction efforts or with a request for consent to search. *See* United States v. Drayton, 535 U.S. 194, 194 (2002) (holding that "[t]he Fourth Amendment does not require police officers to advise bus passengers of their right not to cooperate and refuse to consent to searches"); *see also* Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973) (holding that "when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given").

52. *See* Darden v. Wainwright, 477 U.S. 168, 181 (1986) (providing that "it is not enough that the prosecutors' remarks were undesirable or even universally condemned" but that instead "[t]he relevant question is whether the prosecutors' comments so infected the trial with unfairness to make the

to disclose to the defendant material exculpatory and impeachment evidence.[53] On both scores, a contrary rule would undermine guilt accuracy.[54]

V. Coercion and Plea-Bargaining Practice

In the bargaining context, the Court has not only done more to promote affirmative notice, it has proven more willing to tolerate coercion. Indeed, one legal historian has even cheekily equated the modern practice to the medieval practice of torture[55]—a provocative bit of hyperbole, no doubt, but one that underscores the intense pressure to bargain that the Court has both authorized and encouraged.[56] To be fair, I recognize that the Court has seen fit to forbid plea-bargaining pressure that amounts to "actual or threatened physical harm" or "mental coercion overbearing the will of the defendant."[57] However, it has held expressly that the kind of mental coercion implicit to a charge—even to a capital charge or mandatory charge of life without parole—does not qualify as mental coercion.[58] As long as

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conviction a denial of due process").

53. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good or bad faith of the prosecution"); *see also* United States v. Bagley, 473 U.S. 667, 667 (1985) (holding "that evidence withheld by government is 'material,' as would require reversal of conviction, only if there is reasonable probability that, had evidence been disclosed to defense, result of proceeding would have been different").

54. *See Brady*, 373 U.S. at 87 (providing when suppression of evidence violates due process); *see also* Giglio v. United States, 405 U.S. 150, 153 (1972) ("[The] deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'").

55. *See* John H. Langbein, *Plea Bargaining and Torture*, 46 U. CHI. L. REV. 3, 13 (1978) ("Plea bargaining, like torture, is coercive.").

56. *Supra* note 20 and accompanying text (referencing *Santobello*).

57. Brady v. United States, 397 U.S. 742, 750 (1970).

58. *See id*. at 755 ("[A] plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty."); *see also* Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978) (holding "that the course of conduct engaged in by the prosecutor . . . which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was

any such charge is legally supportable, the attendant pressure amounts to no more than legal justice in action.[59] At that point, the only relevant inquiry is notice. Thus, in *Bordenkircher*, the threatened habitual offender charge was deemed to be constitutional, because the prosecutor had made his intention to add the count clear "at the outset of the plea negotiations."[60] Likewise, in *Mabry v. Johnson*,[61] the defendant's plea conviction was deemed to be constitutional because the Court found that it was "in no sense the product of governmental deception."[62] Particularly, the *Mabry* Court had concluded that "[r]espondent was fully aware of the likely consequences when he pleaded guilty," and, thus, it was "not unfair to expect him to live with those consequences now."[63]

Simply, the Court has taken the position that the pressure to bargain away from a cognizable charge is nothing more than an "inherent" and acceptable part of the process.[64] "[F]orce, threats, or promises" are legally significant only when they are "other than promises in a plea agreement."[65] In this way plea-bargaining is self-actualizing. Consider, for instance, the defendant's involuntariness claim in *Brady v. United States*,[66] which was the Supreme Court's initial decision holding constitutional the practice of plea-bargaining.[67] The defendant

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plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment").

59. *Cf.* Langbein, *supra* note 55, at 13 n.24 ("Coercion authorized by law is different from coercion meant to overcome the guarantees of law.").

60. *Bordenkircher*, 434 U.S. at 360.

61. Mabry v. Johnson, 467 U.S. 504 (1984).

62. *Id.* at 510.

63. *Id.* at 511.

64. *See* Brady v. United States, 397 U.S. 742, 752 (1970) (discussing that the pressure to bargain for a plea deal is often advantageous to both the defendant and to the prosecution).

65. United States v. Frook, 616 F.3d 773, 777 (8th Cir. 2010) (quoting FED. R. CRIM. P. 11(b)).

66. Brady v. United States, 397 U.S. 742 (1970).

67. *See id.* at 758 ("[C]ourts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed crimes with which they are charged.").

faced a capital charge and argued, in essence, that he was scared to death (or to plea) by the prospect of trial conviction and consequent sentence.[68] The defendant took the prosecutor's message to be: "If you don't plead, we may kill you."[69] Yet, the Court rejected the claim that such a convincing message was coercive, concluding simply that there was no evidence that the defendant was "so gripped by the fear of death" that he could not rationally weigh the advantages of pleading guilty.[70] Or, rather, the Court dismissed the claim precisely because the prosecutor's message was so clear. All that mattered was that the charge was valid and that the defendant had his eyes open to it. This is a perspective that sounds squarely in contract theory. Consider the following Commentary to the Uniform Commercial Code: "The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power."[71] In other words, one party's superior ability to turn the bargaining screws is of far less significance than the other party's ability (or inability) to recognize that fact.

In *Brady*, the risk of coercion was of little importance because legal guilt was not an open question. That is, the Court considered the question of legal guilt foreclosed by the defendant's willingness to plead guilty to a legally supported charge. And according to this logic, there is no need to protect against coercion once there is no prosecution case to test.

VI. The Implications of the Changing Face of Bargaining Surprise

To summarize, because conventional constitutional criminal procedure cares comparatively less about autonomy and fairness, and comparatively more about technical guilt accuracy, it puts a

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68. *See id.* at 746 (arguing that a guilty plea is invalid "when the fear of death is shown to have been a factor in the plea").

69. *Cf.* Langbein, *supra* note 55, at 15 ("The tortured confession is, of course, markedly less reliable than the negotiated plea, because the degree of coercion is greater. . . . But the resulting moral quandary is the same."); Scott & Stuntz, *supra* note 13, at 1920 (describing as coercive a prosecutor's "strategic manipulation" of trial and bargaining sentencing differentials).

70. *Brady*, 397 U.S. at 750 (1970).

71. U.C.C. § 2-302 cmt. 1 (2004).

premium on protecting against coercion; because constitutional bargaining and guilty plea procedure cares comparatively more about autonomy and fairness, and comparatively less about the perceived settled question of technical guilt accuracy, it puts a premium on promoting informed choice. Implicit in the notion of the conventional adversarial system is the notion of conflict—of force and the resistance to it.[72] Implicit in private ordering—in contract and compromise—is the notion of fair notice and dealing. Again, this is not to say that an adversarial system is wholly unconcerned with notice or that a cooperative system is wholly unconcerned with coercion. Just that one system will prioritize one value and the other system will prioritize the other. Thus, for instance, the term "voluntariness" has a radically different meaning in contexts of confessions and plea-bargains. For confessions, voluntariness serves to protect against crushing pressure; for plea-bargains, voluntariness serves to guarantee informed choice.[73]

Looking narrowly at the right to counsel, defense lawyers are "necessities, not luxuries" in all critical stages of the criminal process, but for different reasons.[74] The trial—or legal—right to counsel is "implicit in the concept of an ordered liberty" (and therefore constitutionally required) because it forecloses coercion and promotes legally accurate adjudication,[75] whereas the

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72. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, *in* CRIMINAL LAW CONVERSATIONS 11 (Paul H. Robinson, Stephen P. Garvey & Kimberly Kessler Ferzan eds., 2009) (describing the "criminal law's coerciveness" as "a dog of such ferocity" and as a "euphemism for intimidation, brutality, and violence"). These buffers are necessary because, according to Dan-Cohen: "[T]o be ruled also means to be subject to various forms of violence and brutality." *Id*. at 28.

73. *Compare Brady,* 397 U.S. at 749 (distinguishing the contexts of confessions from bargains and pleas), *with* Bram v. United States, 168 U.S. 532, 542 (1897) ("[W]herever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the fifth amendment to the constitution . . . that no person 'shall be compelled in any criminal case to be a witness against himself.'").

74. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

75. *Id*.; *see also* HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 172 (1968) ("If the process is seen as a series of occasions for checking its own operation, the role of counsel is a much more nearly central one . . . . The reason for this is to be found in the assumption . . . that the process is an adversary one.").

bargaining—or extralegal—right to counsel is "implicit in the concept of an ordered liberty" because it forecloses surprise and promotes fair administration.[76] Bargaining counsel serves less as a buffer against state power and more as a lens to draw the state's power into sharp focus. Specifically, the defense attorney ensures that the bargain is struck and the plea is executed with sufficient transparency because a lack of adequate notice may keep her client from appreciating the kind of plea-bargaining pressure that the Court has taken to be part and parcel of the lawful "give and take."[77] Some notion of coercion may still be significant, but, by the Court's reasoning, there is no impermissible coercion to a charge that is supported by probable cause.[78] For the Court, it matters terrifically that prosecutors apply pressure with the law, not with their hands.

It is my position that, in both conventional and bargaining contexts, the Court has paid insufficient attention to one constitutional value or the other. But, for present purposes, I am concerned with plea-bargaining only. I do not believe that it is misguided to adopt a distinct methodological approach in the bargaining context. The Court is right to conclude that pleas and trials are dissimilar enterprises that demand dissimilar treatment. But dissimilar treatment need not translate to disregard for the secondary value. The Court has failed to grasp this even in its recent plea-bargaining decisions. However, the Court has expanded the constitutional scope of fair notice, and, in its own way, that fresh conception may have also served to soften the harshest aspects of coercive contemporary plea practice. The Court first introduced this fresh conception in *Padilla v. Kentucky* when it approved of "creative" bargaining to circumvent mandatory sentencing and so-called collateral consequences that

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76. *Gideon*, 372 U.S. at 342.

77. Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978).

78. Thus, a bargaining prosecutor may keep badgering a defendant to accept a plea offer without undercutting the voluntariness of a consequent knowing and intelligent guilty plea. Comparatively, a police officer can ask for consent to search only so many times before submission is construed as involuntary, a suspect need invoke his *Miranda* rights only once to cut off custodial interrogation, and a trial prosecutor can only address a question to a testifying defendant once before it is asked and answered.

may prove disproportionate or inefficient in application.[79] Again in *Lafler* and in *Frye*, the Court endorsed bargaining as a permissible mechanism to circumvent law. But the Court went further still. It extended the constitutional guarantee of effective assistance of counsel to *rejected* plea offers.[80]

This is a significant development for two underappreciated reasons. First, as Justice Scalia revealed in a pair of characteristically scathing dissents, the Court could not have made this move without concurrently recognizing a constitutional entitlement to plead guilty.[81] As Justice Scalia suggested, it is a practical tautology that counsel can only unconstitutionally fail to exercise duties that she is constitutionally obliged to perform.[82] And, critically, the Court had never held previously that bargaining constituted such a duty. To the contrary, the Court had repeatedly declared (in sum and substance) that "there is no constitutional right to plea bargain,"[83] and that the plea-bargain is, accordingly, of no constitutional import:

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79. Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) (discussing the ability of the parties to bargain "creatively" to avoid mandatory deportation); *see also* Vartelas v. Holder, 132 S. Ct. 1479, 1492 n.10 (2012) ("Armed with the knowledge that a guilty plea would preclude travel abroad, aliens like Vartelas might endeavor to negotiate a plea to a nonexcludable offense . . . .").

80. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012) (applying "*Strickland's* prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial"); Missouri v. Frye, 132 S. Ct. 1399, 1409 (2012) (providing that "[t]o show prejudice from ineffective counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel").

81. *See Lafler*, 132 S. Ct. at 1395 (Scalia, J., dissenting) (questioning the majority's holding in light of the preexisting well-established rule that a defendant has no entitlement to a plea-bargain). However, just because the Court may have now recognized a constitutional entitlement to bargain it does not follow that the defendant has a right to be offered a plea. *See id.* at 1387 (majority opinion) ("[A] defendant has no right to be offered a plea . . . . If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it."); Weatherford v. Bursey, 429 U.S. 545, 561 (1977) ("[T]he prosecutor need not [plea-bargain] if he prefers to go to trial.").

82. *Lafler*, 132 S. Ct. at 1391–98 (Scalia, J., dissenting).

83. *Weatherford*, 429 U.S. at 561.

> A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement, which until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest.[84]

This is not to say that the Court had left plea negotiations wholly unregulated. Because due process requires that the ultimate plea be knowing and voluntary, the Court had long recognized that the defendant enjoys a right to counsel with respect not only to the plea proceeding, but also to the negotiations and discussions *that led to it*.[85] In *Lafler* and *Frye*, however, the Court applied the right to counsel to plea negotiations and discussions even *in the absence of a plea*.[86]

Justice Scalia saw this as an unprecedented expansion of the right to counsel. For him, "bad plea bargaining has nothing to do with ineffective assistance of counsel in the constitutional sense" because a defendant has no right to plea-bargain in the first instance.[87] All that may be said is that the defendant was "denied a right the law simply does not recognize."[88] And, descriptively, Justice Scalia is right. The Court had to have determined that the "bargain standing alone" has some constitutional significance after all:[89]

> [T]he Court today opens a whole new field of constitutionalized criminal procedure: plea-bargaining law. . . . The Court has never held that [constitutional regulation] extends to all

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84. Mabry v. Johnson, 467 U.S. 504, 507 (1984) ("It is [only] the ensuing guilty plea that implicates the Constitution.").

85. *See* Hill v. Lockhart, 474 U.S. 52, 54 (1985) (recognizing a right to effective assistance of counsel at negotiations that lead to guilty pleas); Brady v. United States, 397 U.S. 742, 748 (1970) (noting that guilty pleas "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences").

86. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012) (stating that "the performance of respondent's counsel was deficient when he advised respondent to reject the plea offer"); Missouri v. Frye, 132 S. Ct. 1399, 1406 (2012) ("The challenge is not to the advice pertaining to the plea that was accepted but rather to the course of legal representation that preceded it with respect to other potential pleas and plea offers.").

87. *Lafler*, 132 S. Ct. at 1393 (Scalia, J., dissenting).

88. *Id.* at 1395.

89. *Mabry*, 467 U.S. at 507.

> aspects of plea negotiations, requiring not just advice of competent counsel before the defendant accepts a plea bargain and pleads guilty, but also the advice of competent counsel before the defendant rejects a plea bargain and stands on his constitutional right to a fair trial. The latter is a vast departure from our past cases, protecting . . . a judicially invented right to effective plea bargaining. . . . Today, . . . the Supreme Court of the United States elevates plea bargaining from a necessary evil to a constitutional entitlement.[90]

Second, *Lafler* and *Frye* are significant decisions for what they say about the Court's perspective on plea-bargaining and the place the practice occupies in the criminal justice system. Specifically, the Court signaled that a plea-bargain is the *expected* mode of disposition, announcing that "it is not some adjunct to the criminal justice system; it is the criminal justice system."[91] Simply, a bargain is more than just consistent with law; *it is law*.[92] As I have argued elsewhere, this amounts to an unconventional, expansive, and even dubious conception of what law is. According to this perspective, law is only that which prosecutors and defense attorneys *do*—whether what they do reflects or, conversely, deviates from the dictates of code law.[93] This is a conception of law as *practice*—or "practice law," as I

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90. *Id.* at 1391–97 (discussing "counsel's plea-bargaining skills, which must now meet a constitutional minimum"). Jenny Roberts, one of the contributors to this volume, has expressed a similar view. *See* Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. (forthcoming 2013) (manuscript at 10) ("Surely, if the Court meant to limit the right to effective assistance to informing and counseling defendants about formal plea offers . . . it would not have repeatedly used the words 'plea-bargaining,' 'plea negotiations,' and 'negotiation of a plea bargain.' . . . . [I]t logically follows that there is a right to effective bargaining counsel.") (manuscript on file with the Washington and Lee Law Review).

91. *Frye*, 132 S. Ct. at 1407 (quoting Scott & Stuntz, *supra* note 13, at 1912); *see also id.* (describing plea-bargains as "so central to the administration of the criminal justice system . . . [that] the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant").

92. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1387 (2012) (concluding that plea-bargaining is not "outside the law").

93. *See* Bowers, *Winning by Losing*, *supra* note 19, at 127 ("[T]he legislator is subservient to the prosecutor because the prosecutor largely controls the plea bargaining regime.").

termed it.[94] And, in this way, I share Justice Scalia's skepticism.[95] According to Justice Scalia, "the law is the law" and plea-bargaining is "incompatible" with it (even if it is practically inevitable).[96]

But, though Justice Scalia may have the better end of the argument descriptively, I do not agree that plea-bargaining—by virtue of its extralegal status—ought also to fall beyond constitutional regulation.[97] To the contrary, the Court's decisions reflect a welcome recognition that—whether plea-bargaining is deemed law or, more accurately, practice—it remains at least as "intricate, complex and mysterious"[98] as trial, and, thus, it demands constitutional regulation.[99] Indeed, bargaining may be even more complex and mysterious, because it entails wisdom and craft that transcend law. Thus, the defense lawyer must understand not only the formal substantive and procedural legal rules and standards (and the manner by which these rules and standards intersect with facts), but also the local practice (and the manner by which that practice intersects—or fails to intersect—with law and facts).

Simply, competent plea-bargaining and trial advocacy require a lawyer to rely upon distinct skill sets. First and foremost, effective assistance of counsel at trial demands a sound understanding of the science of law, whereas effective assistance of counsel at bargain demands a sound understanding of the art

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94. *Id.*

95. *See Lafler*, 132 S. Ct. at 1391–98 (Scalia, J., dissenting); Missouri v. Frye, 132 S. Ct. 1399, 1412–14 (2012) (Scalia, J., dissenting).

96. *See Lafler*, 132 S. Ct. at 1397 (Scalia, J., dissenting) ("[T]he law is the law, and those who break it should pay the penalty provided. . . . Today, however, the Supreme Court of the United States elevates plea bargaining from a necessary evil to a constitutional entitlement."); *see also id.* ("[W]e accept plea bargaining because many believe that without it our long and expensive process of criminal trial could not sustain the burden imposed on it, and our system of criminal justice would grind to a halt.").

97. *See* Bowers, *Winning by Losing*, *supra* note 19, at 129 ("[P]lea bargaining may provide an extralegal outlet. But it does not translate that the practice—as the dominant mode of criminal case disposition—is thereby unworthy of constitutional oversight.").

98. Johnson v. Zerbst, 304 U.S. 458, 463 (1938).

99. *Frye*, 132 S. Ct. at 1408 ("The art of negotiation is at least as nuanced as the art of trial advocacy.").

of extralegal persuasion. Of course, trial advocacy is not pure science. To the contrary, a brilliant cross-examination or closing argument involves a nontechnical (and sometimes improvisational) element of performance art.[100] Nevertheless, the bottom-line trial question remains a technical question: whether the admissible evidence is sufficient to prove legal guilt beyond a reasonable doubt. By contrast, the bottom-line bargaining question is informed by the technical legal question only partially (and sometimes not much at all). That is, although bargaining is shaped by the shadow of substantive law, it is shaped also (and often principally) by normative considerations (like blameworthiness and fair sentence), practical considerations (like extant resource constraints), and political considerations (like public safety, crime control, and social control).[101] In short, it is shaped not only by what the law is, but also by what legal professionals do with law in practice—what professionals make of the law.

Even an optimal substantive criminal code will only sometimes reflect and express the (somewhat conflicting) considerations that inform plea-bargaining. Ultimately, it is an empirical question just how often the practice of plea-bargaining traces the shadow of substantive law or, comparatively, how often it blurs or obscures law altogether. In any event, because some degree of mismatch is endemic, the practice of plea-bargaining is inevitably extralegal to some (probably not insignificant) degree.[102] Particularly in the context of enforcement of petty crimes and mandatory sentencing laws, the lawyer's bargaining

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100. *See* Strickland v. Washington, 466 U.S. 668, 681, 693 (1984) ("[A]dvocacy is an art and not a science . . . . [A]n act or omission that is unprofessional in one case may be sound or even brilliant in another.").

101. *See generally* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004).

102. Colquitt, *supra* note 12, at 699 ("When the parties reach ad hoc settlements, they act outside the law."); Langbein, *supra* note 55, at 16–17 ("When people who have murdered are said to be convicted of wounding . . . [t]his willful mislabelling plays havoc with . . . the moral force of the criminal law."); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 38 (2002) ("[T]he compromise outcome allows the prosecutor to respond to the 'equities' in particular cases.").

arguments often become less legal and more normative or policy-driven. That is, the defense attorney may direct her efforts not to the question of *whether* the substantive law technically *applies*, but rather *why* it should not *be applied in this case*. In such circumstances, plea-bargaining reshuffles conventional adversarial roles (and distorts conventional institutional architecture), by pitting collaborative prosecutors and defense attorneys against legislative prescription and command.

If nothing else, almost all plea-bargains demand that the prosecutor disregard a measure of legal guilt in exchange for the defendant's acceptance of some of it. And, by that nature, plea-bargaining describes an extralegal project—at least as compared to trial advocacy. Moreover, the art of practice is not just somewhat extralegal, it is decidedly local—a kind of localism that was once exercised by juries, but that is now the province of professional lawyers.[103]

Until recently, the Court had failed to accommodate these practice realities. As indicated, it constitutionally required that the defendant plead guilty with only his *legal* eye open—that is, with awareness of his legal rights and the legal consequences of the plea.[104] A pleading defendant did not need to also understand *legal facts* about the merits or existence of available defenses, much less *practice facts* about the quality of his plea as measured against the prevailing norms and customs of the local courthouse. That has now changed (albeit to a somewhat uncertain degree). After *Lafler* and *Frye*, a defense attorney apparently must do more than merely provide legal notice of pending and prospective charges, trial rights, and bargaining consequences. A defense attorney also must provide at least some notice in some circumstances of opportunities to circumvent pending and prospective charges.

The question remains open, however, of what notice under which circumstances. Ultimately, *Lafler* and *Frye* are as

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103. *See* Stephanos Bibas, *Transparency & Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 912–14 (2005) (describing the shift from lay and local participation to professionalized criminal justice); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1973–74 (2008) (same); *see also* Colquitt, *supra* note 12, at 698 (describing plea-bargaining as local law).

104. *See supra* notes 3–12 and accompanying text.

noteworthy for what they leave unsaid as what they said. That is, neither case reached both prongs of the constitutional ineffectiveness test, which are deficient performance and consequent prejudice. In *Frye*, the Court held that a defense attorney's wholesale failure to inform her client of a formal offer constitutes categorically deficient performance, but the Court remanded for a prejudice determination.[105] In *Lafler*, the Court addressed prejudice, but the State conceded deficient performance in circumstances where the attorney advised the defendant to reject a plea based upon the profoundly erroneous advice that no jury would convict the defendant of attempted murder for shooting the victim only in the extremities.[106]

Between the two decisions, *Lafler* potentially breaks much more ground. *Frye* would seem to stand only for the hard rule that defense counsel must relay all formal offers to clients. In *Lafler*, the Court also suggested that defense counsel must advise clients of the appropriate course and perhaps even persuade clients to accept manifestly favorable offers.[107] And the measure of whether a particular offer is manifestly favorable is not a purely (or even principally) legalistic determination; it is a probabilistic evaluation. Indeed, it is sometimes even an extralegal evaluation to the extent that the decision is informed by equitable, practical, or instrumental considerations beyond law. Necessarily, such an approach entails richer conceptions of notice and fairness—conceptions intended to help clients appreciate *all* of their options and *all* of the implications of accepting or foregoing bargains. Such an approach demands that counsel give clients the benefit of learned courthouse wisdom.

Of course, a close reader of the cases can discern only so much from decisions that have each left undiscussed one half of the constitutional test. Keeping to *Lafler*, however, the reader may conclude fairly that the Court could not have intended to reform radically constitutional prejudice but not also performance.[108] And the Court did radically reform constitutional

105. Missouri v. Frye, 132 S. Ct. 1399, 1403 (2012).

106. Lafler v. Cooper, 132 S. Ct. 1376, 1383, 1386 (2012).

107. *See infra* Part VII.

108. *See* Bowers, *Winning by Losing*, *supra* note 19, at 127–28 ("[I]t is hard to imagine that the Court intended to reorient the focus of only the prejudice

prejudice. Previously, the Court had held that to demonstrate bargaining prejudice, the defendant had to show a reasonable probability that he would have prevailed at trial.[109] In this way, the Court had pegged effective bargaining to trial practice and its emphasis on guilt accuracy.[110] However, in *Lafler*, the Court acknowledged that a defendant may also be prejudiced if he "lose[s] benefits he would have received *in the ordinary course*"—that is, if he ends up with an atypically bad bargain.[111] Here, the measure of what the defendant "would have received in the ordinary course" depends upon some evaluation of local practice, which, in turn, may operate independently of (or even counter to) code law. And, notably, the Court cautioned that when a lawyer fails to bargain effectively and the case proceeds to trial, the

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prong and not also the performance prong of the ineffectiveness test.").

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

110. *Id.* Previously, I argued:

> [T]he Hill standard is designed to recognize only a certain kind of prejudice—that is, prejudice sufficient to impact the "binary" decision to plead guilty or go to trial. . . . [T]he Court announced a prejudice standard that is unconcerned with the fairness of the deal, and is instead concerned only with the accuracy of the guilt determination. . . . For many defendants, it is the substance of the plea deal that matters much more than the accuracy of the underlying conviction. . . . In this way, the Hill Court evaluated the guilty plea not on its own terms but against the yardstick of trial accuracy.

Bowers, *Fundamental Fairness*, *supra* note 20, at 111–13; *see also* Jenny Roberts, *Proving Prejudice, Post*-Padilla, 54 HOWARD L.J. 693, 696 (2011) (criticizing *Hill* because it "assumes that rejection of a guilty plea has only one outcome—trial"); Scott & Stuntz, *supra* note 13, at 1931 ("The potential unfairness in the typical plea bargain is not that the defendant gives up some legal entitlements, *but that he may not get enough from the government in return*.").

111. *Lafler*, 132 S. Ct. at 1388 (emphasis added); *see also* RONALD J. ALLEN, WILLIAM J. STUNTZ, JOSEPH L. HOFFMAN, DEBRA A. LIVINGSTON & ANDREW D. LEIPOLD, COMPREHENSIVE CRIMINAL PROCEDURE: SUPPLEMENT 25 (2012) ("The favorable sentence that eluded the defendant in the criminal proceeding appears to be the sentence he or others in his position would have received in the ordinary course . . . ."); Roberts, *supra* note 90 (manuscript at 10) (observing that a defendant may now show prejudice by demonstrating that "it was reasonably likely that [a sentencing consequence] could have been avoided through 'creative bargaining'").

convicted defendant is prejudiced by the very trial sentence that the code law prescribed (or even mandated).[112] Thus, the Court concluded, "a reliable trial" is an "insufficient . . . backstop t[o] inoculate[] any errors" of bargaining counsel.[113] The defendant was compelled to risk a trial when an (obviously better) plea course was available, and he thereby missed out—or, to put it in the Court's terms, suffered a "loss of the plea opportunity" to plead guilty on better terms.[114]

Moreover a lost opportunity to plead guilty is not suffered exclusively by the innocent defendant. (Indeed, one would hope that innocent defendants rarely plead guilty, even if that hope is ultimately unrealistic.)[115] Accordingly, the Court observed that the bargaining right to counsel is guaranteed equally to "the innocent and the guilty alike."[116] Significantly, then, the Court's presumption of guilt and its attendant indifference to legal accuracy have served to produce an all-inclusive right to counsel. Comparatively, in *Strickland v. Washington*,[117] the Court provided that "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different."[118] In the trial context, this standard means that the defendant must demonstrate that the absence of competent counsel "undermined confidence" in the guilt accuracy of the jury's verdict.[119] Again, the right to trial counsel remains accuracy-oriented: it is concerned primarily with ensuring that the defendant retains the capacity to exercise legal rights against coercion, at least in advance of an accurate judicial adjudication that the exercise of state power is appropriate. By contrast, the right to bargaining

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

113. *Id.*

114. *Id.* at 1387.

115. *See generally* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008) [hereinafter Bowers, *Punishing the Innocent*].

116. *Lafler*, 132 S. Ct. at 1388 ("[W]e decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt." (internal quotation marks omitted)).

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

118. *Id.* at 694.

119. *Id.*

counsel is fairness-oriented: it is concerned primarily with ensuring that the defendant retains the capacity to succumb to state power on the best available terms. Thus, a manifestly guilty defendant is better protected at bargain than at trial because, to show prejudice, he need establish only a reasonable probability that counsel's errors stood in his way of receiving a better plea. Put differently, only the bargaining right to counsel is designed to accommodate relative differences in sentence length across guilty defendants.

There is nothing all that new to the notion that the Court sometimes has regulated pleas more aggressively (or, at least, more inclusively) than trials. Such a counterintuitive result may be traced to the prevailing methodological divide between fairness and accuracy. Consider, for example, the early plea-bargaining case, *Santobello v. New York*.[120] The Court held that a prosecutor had violated due process by failing to fulfill a plea promise to make no sentencing recommendation.[121] Significantly, the Court assumed that the prosecutor breached the agreement inadvertently and that the judge was unaffected by the prosecutor's recommendation in any event. Nevertheless, the Court provided a constitutional remedy.[122] The touchstone was procedural unfairness, not substantive inaccuracy.

To the contrary, the Court has taken a dimmer view of *trial* unfairness in circumstances in which the procedure in question left guilt accuracy unaffected. So, for instance, in *Darden v. Wainwright*,[123] the Court refused to hold that the prosecutor had violated due process with an inflammatory closing argument that, according to the Court, "should make conscientious prosecutors cringe."[124] Specifically, the prosecutor ranted that the defendant was an "animal" who should be kept on a "leash" with

120. Santobello v. New York, 404 U.S. 257 (1971).

121. *See id.* at 262 ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.").

122. *See id.* at 262–63 ("[W]e conclude that the interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts for further consideration.").

123. Darden v. Wainwright, 477 U.S. 168 (1986).

124. *Id.* at 189 (Blackmun, J., dissenting).

his face "blown . . . off."[125] Nevertheless, because the comments did not affect the outcome of the trial—that is, because they did not implicate guilt accuracy—the Court concluded that they were beyond the reach of constitutional law.[126] Comparing *Santobello* and *Darden*, we learn that the Court may be willing to constitutionally regulate sloppy and unprofessional prosecutorial efforts at plea that it is unwilling to regulate at trial. Likewise, comparing *Lafler* and *Strickland*, we learn that the Court may be willing to constitutionally regulate defense errors at plea that it is unwilling to regulate at trial.

Justice Marshall has earned the posthumous last laugh. In his *Strickland* dissent, Justice Marshall faulted the Court for prioritizing trial *accuracy to fairness*: "[T]he assumption on which the Court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted."[127] Now, Justice Scalia has faulted the Court for prioritizing bargaining *fairness to accuracy*:

> Anthony Cooper received a full and fair trial, was found guilty of all charges by a unanimous jury, and was given the sentence that the law prescribed. . . . [E]ven though there is no doubt that the respondent here is guilty of the offense with which he was charged; even though he has received the exorbitant gold standard of American justice—a full-dress criminal trial[;] . . . the Court says that his conviction is invalid because he was deprived of his *constitutional entitlement* to plea-bargain. I am less saddened by the outcome of this case than I am by what it says about this Court's attitude toward criminal justice.[128]

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125. *Id.* at 192 (quoting prosecutor: "I wish I could see him sitting here with no face, blown away by a shotgun").

126. *Id.*

127. Strickland v. Washington, 466 U.S. 668, 711 (1984) (Marshall, J., dissenting) (arguing that "[e]very defendant"—even the "manifestly" guilty defendant—"is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer").

128. Lafler v. Cooper, 132 S. Ct. 1376, 1392, 1397–98 (2012) (Scalia, J., dissenting); *see also* Stephanos Bibas, *Taming Negotiated Justice*, 122 YALE L.J. ONLINE 35, 36 (2012) ("[The] flaw in Justice Scalia's dissent is his assumption that nothing matters except for factual guilt.").

Justice Scalia is saddened by the Court's recognition that trial and bargaining counsel operate on different planes, and that the measure of effective assistance of bargaining counsel is not reducible to some easy legalistic measure of guilty accuracy. For a proponent of "the rule of law as a law of rules,"[129] this may be a hard pill to swallow, but that makes it no less true.

Finally, by promoting awareness of *all* (or, at least, many) of the relevant external facts—and not just of the relevant procedural and substantive law—the Court also may have indirectly mitigated the harshness of consequent guilty pleas. After all, full information—about, for instance, the availability and merits of an offer—maximizes the defendant's opportunities to shortcut creatively the substantive unfairness of legally supported criminal charges.

It is my position that tools ought to exist to circumvent law. Remarkably, the Court now apparently shares that extralegal position.[130] Thus, it is the local conception of "the sound administration of criminal justice" that matters to the effectiveness inquiry far more than centralized legislative command. And it is the lost opportunity to bargain creatively that matters far more than the "full-dress criminal trial,"[131] for the trial is concerned with the law *as it is*, whereas the bargain—consistent with contract principles—is concerned principally with the law *as the parties make it*.

VII. The Implications of the Emergence of Professional Persuasion

By establishing a constitutional right to bargain, the Court arguably has opened the door to a requirement that a defense

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129. Antonin Scalia, *The Rule as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1175 (1989).

130. Perhaps it is unsurprising that Justice Kennedy wrote *Padilla*, *Lafler*, and *Frye*. Among the Justices, Kennedy has shown himself to be particularly sympathetic to equitable circumvention of substantive law. Anthony M. Kennedy, Keynote Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_08-09-03.html (last visited Apr. 2, 2013) (urging the ABA to "consider a recommendation to reinvigorate the pardon process") (on file with the Washington and Lee Law Review).

131. *Lafler*, 132 S. Ct. at 1398 (Scalia, J., dissenting).

attorney not only inform a client of the law and facts of the case, but also that she exercise legal and extralegal persuasion.[132] Persuasion, in this context, may operate in either of two directions: the defense attorney may be obliged to exercise what Tony Amsterdam has called "considerable persuasion" (1) to convince the prosecutor to offer a defendant-favorable plea, and/or (2) to convince the defendant to accept that offer.[133]

Questions remain about the direction and degree to which the Court has obliged the defense attorney to bargain.[134] Because the *Lafler* Court did not reach the performance prong of the ineffectiveness test, it never determined whether the defense attorney erred constitutionally by misadvising the client to reject the plea. But, again, the Court's willingness to recraft prejudice indicates that it, too, agreed with the parties that the attorney's performance was deficient. However, it still remains unclear whether the mistake at issue amounted to an erroneous reading

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132. *See id.* at 1376, 1384 (majority opinion) ("During plea negotiations defendants are entitled to the effective assistance of competent counsel." (internal quotation marks and citations omitted)); *cf.* Hawkman v. Parratt, 661 F.2d 1161, 1171 (8th Cir. 1981) ("[W]e do not hold that defense counsel always has a duty to initiate plea bargaining negotiations. The legal inquiry into whether counsel rendered ineffective assistance necessarily encompasses consideration of many relevant factors."); Jane Campbell Moriarty & Marisa Main, *"Waiving" Goodbye to Rights: Plea Bargaining and the Defense Dilemma of Competent Representation*, 38 HASTINGS CONST. L.Q. 1029, 1052 (2011) (observing pre-*Cooper* and *Frye* that a "criminal defense attorney. . . may even have a duty to seek out plea negotiations with the prosecution").

133. ANTHONY AMSTERDAM, 1 TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES 5, § 201 (5th ed. 1988) ("[O]ften counsel can protect the client from disaster only by using a considerable amount of persuasion to convince the client."); *see also* AM. BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-5.1 (3d ed. 1993) ("Once the lawyer has concluded that it is in the best interests of the accused to enter a guilty plea, it is proper for the lawyer to use reasonable persuasion to guide the client to a sound decision."); Steve Zeidman, *To Plead or Not to Plead: Effective Assistance & Client-Centered Counseling*, 39 B.C. L. REV. 841, 895–907 (1998) (discussing counsel's emerging obligation—ethically and legally—to engage in reasonable persuasion); Bowers, *Winning by Losing*, *supra* note 19, at 127 (discussing counsel's obligation to exercise "reasonable persuasion").

134. *Cf.* Missouri v. Frye, 132 S. Ct. 1399, 1412–13 (2012) (Scalia, J., dissenting) ("[D]oes a hard-bargaining 'personal-style' now violate the Sixth Amendment? The Court ignores such difficulties. . . . It will not do simply to announce that they will be solved in the sweet by-and-by.").

of the substantive law, an erroneous prediction of juror behavior, an erroneous appraisal of the value of the plea, or an erroneous forecast of the probability of a better plea. Likely, the lawyer made some amalgam of errors. And that is just the point: an attorney's bargaining mistakes do not always segregate cleanly into legal and extralegal categories. And, to the extent the defense attorney's mistakes consisted of a practice error about the wisdom of the plea offer, it may follow that defense attorneys are now obliged to exercise sufficient persuasion to ensure that, in practice, their clients get and take good deals.[135]

Moreover, I am not alone in reading *Lafler* and *Frye* to potentially obligate the defense attorney to exercise some amount of persuasion. According to Jenny Roberts, one of the contributors to this volume:

> The majority could have drawn a constitutional line between the defense counsel–client conversation and the defense counsel–prosecutor conversation, declining to regulate the latter. Instead, the Court's recent plea jurisprudence is firmly grounded in the "reality" of the central role plea bargaining plays in the criminal justice system. . . . [I]f the prosecutor does not, must defense counsel take steps to explore the alternatives? It is difficult to conceive of counsel's role, particularly in a system where so many cases are resolved through bargaining, that does not include such a duty.[136]

The Court's unmistakable tenor is that the defense attorney is now compelled to bargain aggressively, and the Court is committed to aggressively regulating counsel's efforts.

Aggressive constitutional regulation of this kind, however, is not without paradox. First, aggressive regulation fosters a more efficient market, which in turn, may serve to generate still more pleas.[137] The Court has improved not only the quality of defense

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135. Indeed, this is what the Second Circuit previously held in *Boria v. Keane*—a case that, until *Lafler*, had appeared to be little more than an outlier. Boria v. Keane, 99 F.3d 492 (2d Cir. 1996). Specifically, in *Boria*, the court held that the defendant had established ineffective assistance of bargaining counsel when his attorney failed to push him to take a manifestly favorable plea to avoid a "suicidal" trial. *Id.* at 497.

136. Roberts, *supra* note 90 (manuscript at 11).

137. *See* Bowers, *Winning by Losing*, *supra* note 19, at 126 ("[A] constitutionally regulated market is predictable and user-friendly . . . . In this vein, even decisions that have limited prosecutorial bargaining authority . . .

counsel, but also the prosecutor's capacity to send a clear signal that the failure to plead guilty is likely to be "suicidal."[138] That is, the more effective the bargaining defense attorney, the more keenly aware the defendant is made of the coercive power of the State. The defense lawyer may even become something of a conscripted agent, enlisted into the prosecutor's efforts to push the defendant to plea.[139] Indeed, it would seem doubtful that this reality was lost on the Court. Rather, much of the Court's plea-bargaining jurisprudence appears to be animated by the fear that a defendant who considers a plea procedure unfair is likelier to gum up the system by taking his case to trial.[140] By contrast, a defendant who considers trial procedures unfair is likelier to opt for an efficient bargain. The Court's incentive is to regulate the fairness of bargaining and plea procedures more aggressively than trial procedures.

Ultimately, then, there exists a complicated interplay between plea-bargaining and coercion—narrowly, between plea-bargaining and draconian substantive criminal codes. By compelling the defense attorney to bargain hard around unfair code law (and to exercise "considerable persuasion" in her dealings with both the State and her client), the Court has facilitated the substantive circumvention of law in the name of procedural fairness. But substantive and procedural fairness can be achieved only when and if the prosecutor is willing to bargain (and only when and if the defendant is willing to pay for substantive and procedural fairness by sacrificing trial rights).[141] Simply, the defendant still lacks the capacity to challenge constitutionally the substantive fairness of the underlying coercive charge. He possesses only the procedural right to a

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have reinforced the plea bargaining regime and thereby promoted the government's interest in expeditious case processing.").

138. *Boria*, 99 F.3d at 497.

139. *See* Bowers, *Winning by Losing*, *supra* note 19, at 126–27 (discussing the effects of "conscripted counsel").

140. *See, e.g.*, Santobello v. New York, 404 U.S. 257, 261 (1971) (describing the benefits of requiring fair plea procedures because pleas are "highly desirable . . . for many reasons").

141. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1385, 1387 (2012) (observing that "[i]f no plea offer is made, . . . the issue [of bargaining ineffectiveness] . . . simply does not arise").

competent lawyer who is compelled to do what she can do to get the defendant out from under that unfair charge.

Second, the Court has not only subjected professional practice to constitutional oversight, it has entrenched more deeply the *professionalization of practice*. That is, only professionals may take account of extralegal fairness considerations, notwithstanding the fact that, as I have argued many times before, laypeople are probably better equipped to reach some kinds of normative judgments.[142] Of course, professionals are experts in the art of practice, but laypeople are experts in the art of moral reasoning, and both skills are relevant to the question of what constitutes a fair and appropriate plea deal. Yet, *Padilla*, *Lafler*, and *Frye* have served to marginalize further from the criminal justice system the already quite-marginal layperson because, ultimately, such decisions make the measure of fairness not a moral measure but a measure of prevailing courthouse practice. Extralegal business is a professional business that remains none of a layperson's business.[143]

Notwithstanding the differences between trial and bargaining practice, the two are similar in one significant way: each fails to take full or effective advantage of lay participation. That is, in both contexts, laypeople are prohibited de jure from doing what they do best—practicing equitable discretion. A trial juror retains only the power to nullify, but not the right (meaning that an exercise of nullification is impermissible but that there is

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142. *See* Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319, 332 (2012) ("[M]oral questions are eminently accessible to the layperson and distinctly within her capacity."); Josh Bowers, *Mandatory Life and the Death of Equitable Discretion* 20 (Va. Law Public Law and Legal Theory Research Paper Series No. 2011-12) ("There are plausible reasons to believe that lay bodies contextualize the retributive inquiry better than legal technicians."); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1723 (2010) ("Law enforcement and adjudication are intended to be equitably individualized, but . . . professional functionaries . . . act according to idiosyncratic rules, norms, preferences, and biases.").

143. *Cf.* Bibas, *Taming Negotiated Justice*, *supra* note 128, at 37 (discussing the anemic moral roles of jurors in contemporary plea-bargaining and the criminal justice system, more generally).

no remedy for it).[144] More to the point, a defense attorney is prohibited from urging a trial jury to nullify.[145] Ironically, however, post-*Lafler*, a defense attorney is not just permitted but perhaps obligated to make these very same extralegal arguments to the prosecutor at the bargaining stage. That is, the defense attorney may be compelled to press for an equitable (and extralegal) exception from otherwise applicable code law.

To a degree, this is as it should be. Trials are (and should be) comparatively more structured than the less formal and more discretionary domains of charging, bargaining, and sentencing. The domain of trial is—and ought to remain—a domain of predefined law. At the trial, legal accuracy is the appropriate and central question, and, therefore, it ought to play a more significant role than extralegal persuasion. Nevertheless, I am on record in support of reforms intended to involve lay decision-makers (at least somewhat) in the extralegal—or discretionary—domains of criminal procedure (like charging and potentially also bargaining and sentencing).[146] Of course, a layperson lacks the practice wisdom to comprehend effectively the intricacies, norms, and customs of the local courthouse, but she has practical wisdom. By contrast, the professional is likelier to lack the will or capacity to consistently act upon practical wisdom, because she operates under institutional and cognitive biases distinct to her role.[147] An optimal institutional design would incorporate both lay

144. *See* Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 283 (1996) ("The Supreme Court has also been surprisingly quiet about the right to nullify, but when it did speak, it severely undercut the claim that the doctrine is constitutionally protected.").

145. *See* Sparf v. United States, 156 U.S. 51, 102 (1895) ("[I]t cannot be regarded as the right of counsel to dispute before the jury the law as declared by the court."); Scarpa v. Dubois, 38 F.3d 1, 11 (1st Cir. 1994) ("[D]efense counsel may not press arguments for jury nullification in criminal cases."); United States v. Sepulveda, 15 F.3d 1161, 1189–90 (1st Cir. 1993) (observing that the trial judge "may block defense attorneys' attempts to serenade a jury with the siren song of nullification").

146. *See supra* note 142 (citing sources).

147. *See* Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, *supra* note 142, at 1690 ("Legal proficiency, therefore, comes at a cost of some loss of practical wisdom, or, at least, some loss of capacity to freely exercise it. Conversely, a one-off lay perspective entails a 'simple ordinariness' that may prove superior to professional perspective in

and professional insights. It would ensure that laypeople and professionals work together—sharing power—in order to tap effectively the respective wisdom of each. In the right-to-counsel context, such power sharing may be of particular value: a criminal defendant needs more than the practical and legal expertise of the professional; he needs also the moral reasoning of the layperson.

Ironically, the practice of nullification was borne of a deep lay "distrust of legal professionals" and a corresponding preference for "natural justice" over "black-letter law."[148] In the contemporary criminal justice system, however, substantive equitable discretion is the dominion of these very same professionals who control the practice of plea-bargaining (which is the prevailing outlet for equitable expression in contemporary criminal justice). Decisions like *Padilla*, *Lafler*, and *Frye*—and, for that matter, *Santobello*, *Bordenkircher*, and *Brady*—do little more than ensure that such professional practice is constitutionally well-regulated. Nevertheless, an efficient and professional circumvention market may be a passable alternative to better options that the Court may be wholly unwilling to pursue: aggressive substantive constitutional regulation or meaningful lay involvement in equitable decision-making. That is, the Court's approach may constitute the pragmatic (and even normatively compelled) best course for a pathological system of criminal justice that depends not only on procedural horse trading, but also substantive mandatory sentencing statutes that ill serve any sound conception of proportionality or crime control. If we lack the political or judicial will to reign in runaway substantive criminal codes, we may depend upon second-order tools to mitigate some of the most deleterious effects. One such tool is the provision of a defense lawyer who is sometimes obliged constitutionally to push hard to convince prosecutors not to follow the law.

Prosecutors rely on tough statutes for plea-bargaining leverage. (Indeed, the *Frye* Court acknowledged that many "longer sentences exist on the books largely for bargaining

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equitable contexts.").

148. Steven M. Warshawsky, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy*, 85 GEO. L.J. 191, 199 (1996).

purposes.")[149] And, thus, tough statutes promote plea-bargaining. At the same time, bargaining also often provides the only way out. In this way, cases like *Padilla*, *Lafler*, and *Frye* reflect concurrently the triumph of plea-bargaining and the frank understanding that what lawyers do without law is sometimes more important than what they do within it.

VIII. Conclusion

The practice of plea-bargaining and the constitutional right (or rights) to counsel always have had a complicated relationship. On the one hand, *Gideon* and its progeny have made criminal process more costly and thereby have compelled greater reliance on plea-bargains and guilty pleas. The Court even has used the presence of counsel as a ground to legitimate constitutionally the practice of plea-bargaining. Consider, for instance, the *Brady* Court's efforts to distinguish permissible bargaining pressure from the involuntary confession "obtained by any direct or implied promises, however slight."[150] For the Court, the presence of counsel was key:

> [W]ith a confession given by a defendant in custody, alone and unrepresented by counsel . . . , even a mild promise of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess. . . . [The confession] situation bears no resemblance to [plea-bargaining] . . . . [The pleading defendant] had competent counsel and full opportunity to assess the advantages and disadvantages of a trial as compared with those attending a plea of guilty; there was no hazard of an impulsive and improvident response to a seeming but unreal advantage.[151]

Finally, the presence of counsel may generate more guilty pleas, precisely because defense lawyers *are* persuasive. Bad agents

149. Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012).

150. Brady v. United States, 397 U.S. 742, 753 (1970) (quoting Bram v. United States, 168 U.S. 532, 542–43 (1897)).

151. *Id.* at 754.

may push clients to plead guilty to minimize workload.[152] Good agents may push clients to plead guilty to avoid trial disasters.[153]

On the other hand, the practice of plea-bargaining has compelled the Court to take a hard and clear-eyed constitutional look at real-world practice. The Court has come to understand that competent counsel demands more than just attention to law and that the judiciary, in turn, cannot regulate adequately defense lawyers without also regulating the extralegal aspects of their practice.

Consider how far the system has come. At common law, the defense attorney was limited typically to legal arguments. As one eighteenth century trial judge explained the rule to a defendant at the Old Bailey: "Your counsel is not at liberty to state any matter of fact . . . . [T]hey are here to speak to any matters of law that may arise; but if your defense arises out of a matter of fact, you must yourself state it to me and the jury."[154] It is now well established that defense counsel is equipped to do much more than speak to matters of law. They may speak to facts that support legal defenses at trial and also to facts that support legal and extralegal mitigation at bargain and plea.

By now, the Court has progressed far along the path toward finishing what it started in *Brady* and *Santobello*. The Court has made one domain beyond formal law—that is, plea-bargaining—a domain of unique constitutional control. This is a right and proper approach, because plea-bargaining, ultimately, is a domain that is unique. It is a domain that has less to do with legal guilt and "testing the prosecution's case." It is a domain that has much more to do with understanding comparative costs. It is a domain where the good lawyer strikes favorable deals and the bad lawyer pushes her clients in the direction of disadvantageous

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152. Bowers, *Punishing the Innocent*, *supra* note 115, at 1151 ("[T]he lazy lawyer has an increased incentive to diligently pursue plea negotiations, because . . . [it] maximizes chances that the lawyer will not have to invest heavily in repeat appearances, or, worse still, trial work.").

153. *See* Bowers, *Winning by Losing*, *supra* note 19, at 126 ("[I]f a prosecutor makes an offer that is too good to refuse, the defense attorney must not only inform the defendant of the offer but perhaps also take steps to persuade the defendant to accept.").

154. Langbein, *supra* note 40, at 1054 (quoting Russen, OBSP (Oct. 1777), at 374).

deals or, worse, procedurally fair but eminently bleak trials. It is a domain where the right to extralegal counsel may cash out as little more than a substantive transfer of bargaining power from the prosecutor to the defendant. But, within that domain, the ability to extract cheaper pleas amounts to a constructive reform. It serves as a welcome counterweight to prosecutors' almost unfettered charging discretion to set starting prices so very high.