

2013

The Indirect Potential of Lafler and Frye

Wesley MacNeil Oliver

Follow this and additional works at: <https://dsc.duq.edu/dlr>



Part of the [Criminal Law Commons](#)

Recommended Citation

Wesley M. Oliver, *The Indirect Potential of Lafler and Frye*, 51 Duq. L. Rev. 633 (2013).

Available at: <https://dsc.duq.edu/dlr/vol51/iss3/8>

This Symposium Article is brought to you for free and open access by the School of Law at Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

The Indirect Potential of *Lafler* and *Frye*

Wesley MacNeil Oliver*

There are a range of opinions about the potential impact of the Supreme Court's latest opinions. My view of the potential of these cases to create some meaningful limit on the presently unregulated world of plea bargaining is probably the most optimistic, or radical, of anyone who participated in this conference. *Missouri v. Frye* and *Lafler v. Cooper*, in my view, hold the potential to improve the quality of representation defendants receive in the negotiation process and may lead judges to create a set of advisory guidelines for the exercise of prosecutorial discretion. The direct impact of these opinions is not, however, likely to be dramatic. It is improbable that any large number of convictions will be overturned as a result of these decisions, just as few convictions are reversed for ineffective assistance of counsel at trial or on appeal. The indirect effects of these opinions could, however, fundamentally change plea bargaining. Defense lawyers may come to value their skills as negotiators just as they currently evaluate themselves on the basis of their trial and appellate abilities. And in crafting remedies for violations of ineffective assistance of counsel during the plea bargaining phase, judges will have an opportunity to explain the appropriate exercise of prosecutorial discretion. The impact of these decisions could therefore be enormous.

Contrary to the view of Professor Al Alschuler, the opinions surely changed the legal landscape.¹ The Supreme Court's two previous forays into this area recognized the right to the effective assistance of counsel during plea bargaining but did not recognize the right to an effective negotiator. In *Hill v. Lockhart*, the Court concluded that the defendant had not suffered prejudice because the defendant had not contended that if counsel had performed adequately he would have rejected a guilty plea, gone to trial, and presumably had a reasonable chance of acquittal.² This prejudice standard limited the Sixth Amendment obligation of defense

* Associate Professor and Director of the Criminal Justice Program at Duquesne University School of Law.

1. See Albert W. Alschuler, *Lafler and Frye: Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 678-81 (2013).

2. 474 U.S. 52, 60 (1985).

counsel in the plea bargaining process to deciding whether a defendant has a sufficiently good defense that he should exercise his constitutional right to a trial. A defendant was not prejudiced, under *Hill*, if his lawyer unreasonably failed to present facts, or arguments, to a prosecutor that might have produced a more generous offer. *Hill*'s prejudice standard is one that views plea offers as prosecutorial largesse. Defense counsel's role, under *Hill*, was limited to deciding whether his client would be better served by rejecting this largesse and going to trial.

Padilla v. Kentucky strongly suggested that defense counsel had a larger duty during the plea bargaining process, but did not address the question of prejudice as it had not been considered by the lower courts.³ In *Padilla*, a 40-year non-citizen resident of the United States, who served his country with honor in the Vietnam War, was charged with possession of 400 pounds of marijuana with the intent to distribute.⁴ His lawyer worked out a plea agreement with the prosecutor, but Padilla, concerned about his immigration status, asked his attorney if pleading guilty would cause him to be deported. His attorney informed him that because Padilla had been in the country so long, this would not be a concern. This advice was entirely incorrect. The drug crimes to which Padilla pled made him eligible for deportation.⁵

The sole issue presented to the Supreme Court in Padilla's case was whether his lawyer's performance in providing this incorrect information amounted to performance below that of a reasonable lawyer.⁶ The lower courts had held that the deportation consequences of a conviction were a collateral matter and defense counsel was not required to make his client aware of such consequences of a conviction.⁷ The U.S. Supreme Court disagreed, finding deportation to often be a greater punishment than those directly imposed by the criminal justice system.⁸ Interestingly, the Court observed that had defense counsel been aware of the immigration consequences of a conviction, he could have suggested a resolution of the case that would have satisfied the prosecutor's interests and not rendered Padilla subject to deportation.⁹

3. 130 S. Ct. 1473 (2010).

4. *Id.* at 1477.

5. *Id.* at 1478.

6. *Id.* at 1482.

7. *Id.* at 1481.

8. *Id.* at 1482.

9. *Id.* at 1483.

To understand how differently the Court in *Padilla* viewed the world, it is important to consider the facts of *Hill v. Lockhart*.¹⁰ In *Hill*, the defendant was charged with first-degree murder and theft. Under Arkansas law, first degree murder, at that time, was punishable by a life sentence or, remarkably by modern standards, 5- to 50-years incarceration.¹¹ The prosecution and defense counsel agreed to a sentence of 35 years, to be served concurrently with a 10-year sentence for the theft.¹² The prosecutor and defense counsel both assumed that the defendant would be eligible for release after he served one-third of the sentence as neither realized that the defendant had a prior felony.

The Court in *Hill* did not consider whether defense counsel had performed inadequately in failing to learn about the prior felony. Even if he had, under *Hill's* reasoning, the defendant would have suffered no prejudice because defense counsel had not misapprehended the strength of the prosecution's case against him before recommending a guilty plea. *Hill's* prejudice standard failed to require defense counsel to engage in the most-frequently useful type of advocacy performed at the plea bargaining stage—making arguments for a more lenient sentence. If the prosecution in *Hill* was satisfied with the defendant being eligible for release after serving one-third of a 35-year sentence, it *may* have been satisfied with him being eligible for release after serving one-half of a somewhat lesser sentence. On the contrary, the prior felony may have made the prosecution disinclined to grant further, or even this much, leniency. But without knowing the actual consequences of his client's sentence, defense counsel in *Hill* was unable to consider whether to approach the prosecution with a counter-offer. Because counsel's lack of knowledge had nothing to do with assessing the likelihood of acquittal at trial, however, the Court reasoned that there was no remedy, even if the failure to learn this information was defense counsel's fault.

Padilla v. Kentucky therefore offered a very different perspective on the role of defense counsel. Counsel's misapprehension about the immigration consequences of the plea said nothing about counsel's understanding of the strength of the prosecution's

10. 474 U.S. 52 (1985).

11. *Id.* at 53; see also ARKANSAS SENTENCING STANDARDS GRID § 16-90-803 (Arkansas Sentencing Commission 2003), available at <http://www.arkansas.gov/asc/pdfs/2003benchbook.pdf> (containing Arkansas' sentencing guidelines for first-degree and capital murders).

12. *Hill*, 474 U.S. at 54.

case. Had Padilla's lawyer known that his client's plea to a drug offense made him eligible for deportation, however, it would have radically changed the nature of the negotiation. Still, *Padilla* did not recognize the Sixth Amendment right to an effective criminal negotiator as its musings about how the knowledge of immigration consequences would have changed the results in this case were entirely *dicta*. The only issue before the Court was whether the lower courts had correctly concluded that the *performance* of Padilla's counsel had been constitutionally deficient.¹³ The Court concluded that it had been but remanded the case to the Kentucky Supreme Court to determine whether Padilla had suffered prejudice.¹⁴

Lafler and *Frye* therefore, for the first time, gave the Court an opportunity to change the *Hill* prejudice standard. In both of these cases, the Court concluded that if defense counsel's failures caused the defendant to reject a plea that he would have accepted, that the prosecution would not have revoked, and that the trial court would have entered, then his client has suffered prejudice.¹⁵ In *Frye*, defense counsel failed to communicate the plea offer to his client before the offer expired.¹⁶ In *Lafler*, defense counsel misadvised his client that as a matter of law he could not be convicted of the most serious crimes he was facing.¹⁷ These errors—blatant errors—occurred during the negotiation process. The defendants in neither *Lafler* nor *Frye* were asserting that their lawyers improperly caused them to waive their right to a trial. In *Lafler*, the defendant argued that his lawyer improperly caused him to *exercise it*. In *Frye*, the Court held that defense counsel is required to perform effectively in the process of negotiation and in *Lafler*, defense counsel is required to consider whether waiving constitutional rights is in his client's interest.

Padilla's dicta now becomes relevant. Now that errors in the negotiation process can prejudice a defendant, defense counsel's failure to learn information that might well change the nature of the negotiation would seem to provide a basis for relief. Prosecu-

13. See *Padilla*, 130 S. Ct. at 1478, 1487.

14. *Id.* at 1487.

15. *Missouri v. Frye*, 132 S. Ct. 1399, 1409-11 (2012); *Lafler v. Cooper*, 132 S. Ct. 1376, 1390-91 (2012).

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

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

torial discretion is practically boundless.¹⁸ Prosecutors can, and do, consider all sorts of reasons for offering leniency in plea offers, including the risk of acquittal, conservation of resources, cooperation, and equitable considerations.¹⁹ The closest analog to the range of consideration for prosecutors is the power of juries in capital cases to consider anything in mitigation; prosecutors can consider even more than capital sentencing juries.²⁰ Capital juries can only look to anything about the defendant that makes a defendant sympathetic—prosecutors can also consider their institutional interests in obtaining cooperation or resolving cases without a trial.²¹ In the capital context, the most frequent basis for a finding of ineffective assistance of counsel is a claim that mitigating evidence was not discovered.²² *Padilla's* dicta suggests that defendants will be able to bring just these sorts of claims.

While these decisions do change the legal landscape, many have reasonably concluded that they are unlikely to produce a large number of reversed convictions.²³ Even in the capital sentencing context, there are few convictions overturned for attorney error, though there are more reversals in this context than in the guilt phase of all trials—a somewhat remarkable statistic given the comparatively small percentage of death penalty cases.²⁴ The actual number of convictions reversed because of ineffective negotiation may therefore be greater than commentators have anticipated, but the indirect impact of these cases on the criminal justice system may well be considerably more substantial than the impact felt from the reversal of convictions.

These decisions could improve the quality of negotiations by criminal lawyers by changing what they consider to be their primary role to be in the criminal justice system. Ironically, criminal

18. Stephanos Bibas, *Regulating the Plea Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1128, 1144-46 (2011).

19. *Id.* at 1145.

20. See Scott E. Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1156-61 (1991) (describing ability of juries to consider any mitigating factor in capital sentencing).

21. *Id.* See generally Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717 (1996).

22. As an example, see *Rompilla v. Beard*, 545 U.S. 374 (2005).

23. See, e.g., Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 159 (2012); Bruce Green, *The Right to Plea Bargain with Competent Counsel After Cooper and Frye: Is the Court Making the Ordinary Criminal Process "Too Long, Too Expensive, and Unpredictable . . . In Pursuit of Perfect Justice"?*, 51 DUQ. L. REV. 735, 757 (2013).

24. See e.g., Kyle Graham, *Tactical Ineffective Assistance in Capital Trials*, 57 AM. U. L. REV. 1645, 1656-61 (2008) (describing "heightened scrutiny of mitigation investigations").

defense lawyers do not view themselves as negotiators, despite the fact that 94 percent of all state criminal convictions and 97 percent of all federal criminal convictions result from guilty pleas. A quick look at the continuing legal education courses for defense lawyers illustrates this point. At national and local conferences, defense lawyers take courses on jury selection, cross-examination, opening and closing statements, appellate advocacy and suppression of illegally obtained evidence. One is hard pressed to find a CLE on plea bargaining. Compare this to civil lawyers. Just to offer one example, the Harvard Program on Negotiation runs seminars throughout the year teaching civil lawyers how to better negotiate.²⁵ Civil lawyers see no distinction between negotiating a favorable settlement and achieving a similar verdict after a jury trial. Criminal lawyers certainly negotiate—the numbers don't lie—but the negotiation is still very much underground in criminal bar circles.

A look at the way lawyers compare their abilities also demonstrates the different views that criminal and civil lawyers have toward negotiation. Civil lawyers make no distinction between victories won in trial or settlements for their clients. The Million Dollar Club lists attorneys who have obtained judgments for their clients of a million dollars or more, regardless of whether they were obtained through a trial or negotiation. By contrast, when O.J. Simpson was charged with murder—and the State of California had an extraordinarily compelling case against him—his first lead counsel, Robert Shapiro, was criticized for having experience primarily as negotiating pleas for his clients. Despite the not guilty verdict in that case, given the evidence, it seems that a lawyer with excellent negotiation skills would have been an ideal choice for O.J. Simpson, but this skill set of Mr. Shapiro's was offered almost derisively by those commenting on the case.

The new prejudice standard, previewed in *Padilla*, may change the way defense lawyers view their jobs. It may seem odd to suggest that requiring defense counsel to meet a very low threshold of effectiveness in negotiation will cause them to improve their skills. The *Strickland* standard, after all, provides relief only when a lawyer performs worse than any reasonable lawyer would have performed in this situation—and grants extraordinary deference

25. See HARVARD LAW SCHOOL, *Program on Negotiation*, <http://www.pon.harvard.edu/> (last visited May 6, 2013).

to an attorney's tactical decisions.²⁶ And negotiation seems especially subject to judicial deference. As the Court observed in *Lafler*, there are a number of styles of negotiation.²⁷

The Supreme Court, however, has a unique bully pulpit to influence a lawyer's conduct, partially because of its visibility. While a number of lower courts prior to *Lafler* and *Frye* had recognized that a defendant could suffer prejudice from a lawyer's ineffective performance during the negotiation process, there were few cases filed claiming attorney error during this phase.²⁸ In the year since these cases were decided, hundreds of reported decision address these claims. If the threat of an ineffective assistance claim has any effect on an attorney's attention to his client, then the risk of a client *filing* a claim for ineffective assistance during this phase went up exponentially after these cases.

The symbolic effect of these high profile opinions, however, is likely to have a greater impact. Prior to the Supreme Court's recognition in the 1970 case of *Brady v. United States* that a defendant could legitimately enter a plea induced by a promise of leniency, plea bargaining was frequently described as occurring underground.²⁹ While agreements after *Brady* were made more openly, plea bargaining is still very much underground in the culture of the defense bar. Defense lawyers are a very collegial group as a whole and readily share the tactics they have developed in jury selection, cross examination, and opening and closing statements. Discussions of the tactics of negotiation, and certainly the results obtained from negotiation, have been taboo in defense lawyer conferences, despite the fact that the entire criminal justice system is driven by guilty pleas.³⁰ Some high-profile defense lawyers even refuse to represent clients who are accepting guilty pleas, particularly if those clients are cooperating with the government, though they typically hand their clients off to other counsel to enter the plea they would not sully their reputations by entering.³¹

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

27. *Id.* at 1391.

28. See e.g., David A. Perez, Note, *Deal or No Deal? Remedying Ineffective Assistance of Counsel During Plea Bargaining*, 120 YALE L. J. 1532 (2011) (describing cases to consider this issue).

29. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1044 (2006).

30. See NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, <http://nacdl.org/meetings/> (last visited April 17, 2013).

31. See Daniel C. Richman, *Cooperating Clients*, OHIO ST. L. J. 69, 111-26 (1995).

The Supreme Court's assertion that defense counsel's Sixth Amendment duty to his client includes effective *negotiation* has the potential to change the culture of the defense bar as it undermines the caste of illegitimacy plea bargaining has had in the defense bar culture. And if defense lawyers begin to talk openly about the tactics of negotiation, and the substance of the deals they are obtaining, the entire defense bar will be better equipped to represent clients at this phase. Those who believe they are uniquely able to obtain deals with prosecutors because of their personal relationships may still be unwilling to participate in this sharing of information, but there are plenty of reasons for defense lawyers to relate the results they are obtaining. Pleas are entered in open court, so defense counsel is hardly burning a bridge with a prosecutor by adding a single publicly-announced data point. Further, by participating in such information sharing, the defense lawyer is able to obtain information about deals with prosecutors other than those with whom he regularly deals. Such changes in the culture of the defense bar, which *Lafler* and *Frye* may facilitate, will improve the quality of representation for defendants and increase the transparency in the process.

The decisions also hold the potential to increase judicial oversight over both the charging and plea bargaining process. The Court in *Lafler v. Cooper* left trial courts with extraordinary discretion to fashion a remedy when they find defense counsel performed inadequately during the plea phase to his client's detriment.³² Lower courts were instructed to use their equitable discretion to provide a remedy that does not grant a defendant a windfall.³³ In fashioning this remedy in cases like *Lafler*, courts will seemingly have to look at why a reasonable prosecutor would have made the offer that the defendant did not accept because of counsel's failures. In reasoning toward the remedy they grant, courts will essentially be providing guidelines for the exercise of prosecutorial discretion.

In *Lafler*, the Court concluded that a defendant was prejudiced by his attorney's advice to go to trial based on legally incorrect advice that he could not be convicted of assault with intent to kill.³⁴ The defendant went to trial, was convicted, and received a sentence considerably greater than the one offered by the prosecu-

32. 132 S. Ct. 1376, 1389 (2012).

33. *Id.* at 1388.

34. *Id.* at 1390.

tor that was rejected because of the defense lawyer's egregiously incorrect legal advice.³⁵ The Supreme Court held that if a defendant can show that but for his counsel's errors, he would have agreed to take an offer, that the prosecutor would not have revoked the offer before it was accepted, and that the trial court would have accepted it, then a habeas petition has made out a successful claim for ineffective assistance of counsel.³⁶ The Court did not, however, say what the remedy should be. In fact, it refused to announce either the appropriate remedy in *Lafler*, or a test to determine the appropriate remedy. The Court left to the lower courts the task of determining the appropriate remedy.

While the Court's guidance to lower courts was vague, it was not non-existent. Lower courts were instructed that they were not to grant defendants windfalls.³⁷ This is consistent with the Court's admonition in *Strickland v. Washington* and *Lockhart v. Fretwell* that habeas petitioners' claims of ineffective assistance of counsel are only entitled to outcomes that reflect fundamental fairness.³⁸

In Judge Easterbrook's introduction to this conference, he suggested that granting a habeas petitioner any remedy once he has rejected a plea and gone to trial provides a windfall.³⁹ Starting with Easterbrook's premise, this true. He suggests that prosecutors only agree to grant leniency in the plea process when there is some risk that they will lose if they go to trial.⁴⁰ It is certainly true that if the defendant has been convicted, it grants the defendant a windfall to allow him to exchange a now-non-existent risk of acquittal for leniency. But this is just another way of saying that prosecutors are engaging in *quid pro quo* exchanges when granting defendants leniency in exchange for the certainty of a conviction. *Quid pro quo* exchanges are actually a windfall to the defendant before, as well as after, the trial. Difficulties in proving the prosecution's case have nothing to do with how a defendant ought to be punished. It is mere happenstance there are complications in proving one particular defendant's case, but not in another.

35. *Id.*

36. *Id.* at 1388.

37. *Id.*

38. *Lockhart v. Fretwell*, 506 U.S. 364 (1993); *Strickland v. Washington*, 466 U.S. 668, 696 (1984).

39. Frank H. Easterbrook, *Plea Bargaining is a Shadow Market*, 51 DUQ. L. REV. 551, 556 (2013).

40. *Id.*

er. In the plea process, they will be offered very different deals for reasons utterly unrelated to their culpability.

In some ways, Judge Easterbrook's concerns about windfalls are even greater than he recognizes. *Quid pro quo* exchanges in plea bargaining are not limited to offers motivated by a prosecutor's concerns about losing a case. Prosecutors also offer leniency in the plea bargaining process to conserve judicial and prosecutorial resources, to allow victims to avoid the emotional toll of testifying, and to obtain cooperation from defendants.⁴¹ As with a plea in which the prosecution exchanges of a risk of acquittal for leniency, a defendant does not obtain a lighter sentence because he is deserving of less punishment. When leniency is offered to obtain cooperation, the opposite is in fact most often true. It is frequently noted that the *Federal Sentencing Guidelines*, which allow substantial reductions for cooperation, allow more culpable defendants to obtain lighter sentences than less culpable ones.⁴² Drug kingpins have more information than the mules they employ and are ironically rewarded at sentencing for the amount of assistance they were able to provide.

Whenever a defendant uses a possibility of acquittal, inconvenience to the prosecutor, or an offer of cooperation as a bargaining chip, he is engaging in a *quid pro quo* exchange. Judge Easterbrook is surely correct to conclude that a plea offer, lost because of counsel's ineffectiveness, should not be restored in any manner, when it was motivated by a *quid pro quo* exchange unrelated to a defendant's culpability.

Not all plea bargains, however, are driven by *quid pro quo* exchanges. Prosecutors often make offers that are driven by their sense that the offer represents an appropriate sentence.⁴³ The case of *Bordenkircher v. Hayes* is an excellent example of this fact.⁴⁴ Paul Hayes was charged with forging and uttering a check for \$88.30. Under Kentucky law at the time, this was a felony punishable by two to ten years at hard labor, but a judge would have had the authority to grant probation for the entire term. Be-

41. Bibas, *supra* note 18, at 1141.

42. See Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 212-213 (1993) (describing the "cooperation paradox"); Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105, 138 (1994) (same).

43. Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 54 (1968)

44. 434 U.S. 357 (1978).

cause of Hayes' past and Kentucky's three-strikes law, Hayes was eligible for a life sentence. The prosecutor offered Hayes a deal: five years at hard labor, or he would seek to have his sentence enhanced under the three-strikes provision.⁴⁵

As severe as five years sounds for forging and uttering a check for \$88.30,⁴⁶ the prosecutor in Hayes' case appears to have been driven by his sense that this was the equitably appropriate sentence. It would have taken no time to try this case and there was virtually no risk of an acquittal.⁴⁷ There was a single witness to the theft who was certain about the identification.⁴⁸ Hayes was not asked to cooperate in exchange for the deal and, as he acted alone, cooperation would not have been a real possibility—at least not for this particular crime. The check was taken from a convenience store, so there would have been almost no emotional toll on the witness to describe what he saw. The prosecutor appears to have concluded that five years for this crime, combined with Hayes' prior crimes of detaining a female (a lesser included offense of rape) and armed robbery (for which he was on probation at the time of the forgery and uttering) was an appropriate sentence.⁴⁹ There are certainly design flaws in a system which allows a prosecutor to determine what he alone believes to be a just sentence and obtain the defendant's agreement as to its fairness by threatening a much graver consequence.⁵⁰ This is nevertheless the American criminal justice system. In any given case, broad statutes permit prosecutors to bring charges far in excess of anything that they (or anyone) would regard to be a reasonable result.⁵¹

45. *Id.* at 358.

46. *Id.* at 369 (Powell, J., dissenting) ("During the course of plea bargaining, the prosecutor offered respondent a sentence of five years in consideration of a guilty plea. I observe, at this point, that five years in prison for the offense charged hardly could be characterized as a generous offer.")

47. See William J. Stuntz, *Bordenkircher v. Hayes: The Rise of Plea Bargaining and the Decline of the Rule of Law*, at 5 (November 2005). Harvard Public Law Working Paper No. 120, available at SSRN: <http://ssrn.com/abstract=854284> or <http://dx.doi.org/10.2139/ssrn.854284>.

48. *Id.*

49. *Bordenkircher*, 434 U.S. at 367 (Blackmun, J., dissenting); see also Stuntz, *supra* note 47, at 2.

50. As Al Alschuler beautifully describes it, when facing a gunman who says, "your money or your life," the victim is taking the better possibility to surrender whatever cash in his possession, but that does not make armed robbery somehow an appropriate act. See Alschuler, *supra* note 1, at 686, 698.

51. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 598 (2001); see also HARVEY SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2011).

In some cases, as it seems to have been so in *Bordenkircher*, prosecutors are motivated by equitable considerations to grant leniency. In most cases, however, leniency in plea offers is likely driven by a combination of *quid pro quo* and equitable considerations.⁵² If lower courts are to carry out the Supreme Court's mandate of granting a remedy to defendants without a windfall, they will have to determine what amount of the offer that counsel's ineffectiveness prevented the defendant from accepting, was attributable to equitable considerations. This analysis will provide courts an obligation—but more importantly, an opportunity—to describe how reasonable prosecutors go about granting leniency in light of various considerations.

These discussions will provide much needed guidance to the most important, and most powerful actors in the criminal justice system: prosecutors. Sentencing guidelines were developed at the federal and state levels to even out inconsistencies between judges.⁵³ The potential for inconsistent treatment at the hands of a sentencing judge, even before the guidelines, however, is dwarfed by the potential for inconsistent treatment by prosecutors. Sentencing hearings have always occurred in public, on the record, and been subject to some sort of appellate review. Judges have long felt an obligation to explain the reasons for their sentences both to the defendant standing before them and to the public at large. There is no mechanism for even determining the rationale for prosecutorial charging decisions and plea offers. Some prosecutors, like some judges, are more lenient than others. As the reasoning of prosecutors is never disclosed, there is no opportunity to even consider the validity of their decisions or the consistency in their exercise of judgment. Whatever inconsistency exists, be it driven by legitimate difference in philosophy, or illegitimate considerations such as the relationship between the defense lawyer and prosecutor, is very difficult to discover when the prosecutors have to explain nothing about their decisions.

Judges have long avoided second-guessing prosecutorial charging decisions—and by extension the appropriateness of the amount of leniency offered in a plea—because of separation of powers considerations.⁵⁴ In crafting remedies for situations like

52. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 55 (1968).

53. Lee, *supra* note 42, at 115-16.

54. See *United States v. Batchelder*, 442 U.S. 114 (1979); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375 (2d Cir. 1973).

the one before the Court in *Lafler*, the Court will thus be identifying the type of considerations a reasonable prosecutor would take into account in making charging and bargaining decisions.⁵⁵ Fidelity to the Supreme Court's opinion will not necessarily require lower courts to identify the portions of the plea attributable to each of the possible *quid pro quo* exchanges that could have animated the plea offer. Lower courts will merely be required to make an assessment of the extent of the leniency attributable to equitable consideration, as opposed to the portion of the plea attributable solely to a *quid pro quo* exchange.

Evaluating how a prosecutor should have viewed the equities in a particular case, however, will start a conversation about the appropriate use of prosecutorial discretion. This is not say that judges—or certainly any one judge considering a habeas petition—will have a lock on the appropriate use of prosecutorial power. Decisions offering a judge's view of how a reasonable prosecutor would have viewed the facts of a particular case, however, begin a conversation about the exercise of this power. Prosecutors, and judges reviewing subsequent habeas petitions, are certainly capable of disagreeing with any one judge's assessment of how a reasonable prosecutor would have, or should have, accounted for the particular attributes of a case. This, however, is the genius of the common law. It is a forum for discussion and even public comment.

The vaguely articulated remedy in *Lafler* appears to require and enable lower courts to make the appropriate exercise of prosecutorial discretion a matter of public consideration. Certainly, prosecutors would not be bound by judicial considerations, but these considerations would provide a starting point from which prosecutors would feel pressure to justify departures.

Lafler and *Frye* recognized the reality that modern criminal practice is the negotiation process and encouraged the development of a better process of plea bargaining in a way that did not intrude on the long-recognized prosecutorial prerogative. The cas-

55. In cases like *Padilla*, this sort of remedy is, of course, not possible. In *Padilla*, defense counsel's lack of knowledge prevented an informed negotiation that could have produced a better outcome for the defendant. There was no lost opportunity as there was in *Lafler v. Frye*. For *Padilla*-type errors, the remedy David Perez has suggested as the appropriate remedy for all claims of ineffective assistance of counsel in plea bargaining appears to be the only possible remedy: forcing the parties to bargain with the court. David A. Perez, Attorney at Perkins Coie, Structuring Remedies in the Wake of *Lafler* and *Frye*, Presentation at the Duquesne University School of Law Plea Bargaining After *Lafler* and *Frye* Symposium (March 1, 2013).

es therefore create circumstances permitting the development of an advisory common law of plea bargaining and motivate defense counsel to perfect their skills in this forum, just as they have long honed their talents in the traditional adversarial forums. *Lafler* and *Frye* thus may indeed be viewed as landmark decisions through the lens of history for their indirect impact on the criminal justice system.