

## THE PROSECUTOR'S TURN

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## INTRODUCTION

In a term that included cases about witness identification testimony,<sup>1</sup> the applicability of the Confrontation Clause to expert testimony,<sup>2</sup> and imposing mandatory life-without-parole sentences on juveniles,<sup>3</sup> many criminal justice advocates heralded *Lafler v. Cooper*<sup>4</sup> and *Missouri v. Frye*<sup>5</sup> as game changers. A policy advisor for the Brennan Center for Justice described *Lafler* and *Frye* as “the term’s decisions with the greatest, everyday impact on the criminal justice system.”<sup>6</sup> Professor Wesley Oliver called the two cases “the single greatest revolution in the criminal process since *Gideon v. Wainwright* provided indigents the right to counsel.”<sup>7</sup> Professor Ronald Wright added, “I can’t think of another decision that’s had any bigger impact than these two are going to have over the next few years.”<sup>8</sup> The press, too, praised the decisions. The *New York Times* applauded the decisions for “vastly expand[ing] judges’ supervision of the criminal justice system.”<sup>9</sup> Even detractors recognized the cases’ impact. Justice Scalia, writing for the dissent in both cases, lamented that the cases would open “a whole new boutique of constitutional jurisprudence (plea-bargaining law).”<sup>10</sup> Given this response, it is not surprising that *Lafler* and *Frye* have generated extensive scholarly consideration. The *Yale Law Journal* devoted a series of essays in its online forum to the impact of the decisions,<sup>11</sup>

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1. See *Perry v. New Hampshire*, 132 S. Ct. 716, 723 (2012).

2. See *Williams v. Illinois*, 132 S. Ct. 2221, 2227 (2012).

3. See *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012).

4. 132 S. Ct. 1376 (2012).

5. 132 S. Ct. 1399 (2012).

6. Sidney S. Rosdeitcher, *Plea Bargaining and Effective Assistance of Counsel After Lafler and Frye*, BRENNAN CTR. FOR JUST. (Aug. 29, 2012), <http://www.brennancenter.org/analysis/plea-bargaining-and-effective-assistance-counsel-after-lafler-and-frye> [https://perma.cc/N55N-GVCV].

7. Adam Liptak, *Justices’ Ruling Expands Rights of Accused in Plea Bargains*, N.Y. TIMES (Mar. 21, 2012), [http://www.nytimes.com/2012/03/22/us/supreme-court-says-defendants-have-right-to-good-lawyers.html?\\_r=0](http://www.nytimes.com/2012/03/22/us/supreme-court-says-defendants-have-right-to-good-lawyers.html?_r=0) [https://perma.cc/CW4V-8ZLN].

8. Erika Goode, *Stronger Hand for Judges in the “Bazaar” of Plea Deals*, N.Y. TIMES (Mar. 22, 2012), [http://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html?\\_r=0](http://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html?_r=0) [https://perma.cc/FN5F-PJ37].

9. Liptak, *supra* note 7.

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

11. See 122 YALE L.J. ONLINE (2012).

and the *Duquesne Law Review* devoted a print issue to the cases.<sup>12</sup> And of course, there is this *William & Mary Law Review* Symposium.

The primary goal of this Article is not to weigh in on the significance of *Lafler* and *Frye*, or to question the attention they have received, although the Article does a little of both. Rather, the primary goal is to shift the focus somewhat. *Lafler* and *Frye* certainly signal increased attention to the regulation of defense counsel in criminal cases, as did an earlier case, *Padilla v. Kentucky*.<sup>13</sup> But what about prosecutors? For the most part, prosecutors remain underexamined and underregulated. Put differently, the problem brought to the fore in *Lafler* and *Frye*—the failure of defense counsel to properly advise their clients of plea offers—is not the only problem in this new, old world of negotiated pleas. With *Lafler* and *Frye*, there will now be more judicial oversight of defense counsel when it comes to plea negotiations. But if judges are watching defense counsel, who is watching prosecutors?

This Article argues for more regulation of prosecutors during the plea bargaining stage. Part I begins by first offering some modest criticisms of *Lafler* and *Frye*, with particular attention paid to possible collateral consequences. Part II turns the attention to prosecutors, who are notoriously underregulated, and to the outsized role they play in plea negotiations. Part III suggests that the next goal of “plea bargaining” law should be to remedy this lack of oversight and offers the Due Process Clause, and to a lesser extent internal and external regulation, as one possible route for getting there.

### I. LAFLER/FRYE

The conventional wisdom is that *Lafler* and *Frye* broke new ground.<sup>14</sup> Of course, the Court had long ago read the Sixth Amend-

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12. See 51 DUQ. L. REV. 533, 533-859 (2013).

13. See 559 U.S. 356, 359 (2010) (holding that failure of counsel to advise client of collateral immigration consequences of plea constituted ineffective assistance).

14. For a rare contrary view, see Albert W. Alschuler, *Lafler and Frye: Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 679-80 (2013) (observing that eleven federal courts of appeals and most states had already reached similar decisions); Gerard E. Lynch, *Frye and Lafler: No Big Deal*, 122 YALE L.J. ONLINE 39, 41 (2012), <http://www.yalelawjournal.org/forum/frye-and-lafler-no-big-deal> [<https://perma.cc/AY8P-EJCQ>].

ment, despite its seeming emphasis on rights at trial, as extending the right to the assistance of counsel beyond trial to plea negotiations. As the Court observed in *United States v. Wade*, the right to assistance of counsel extends to “any stage of the prosecution, formal or informal, in court or out, where counsel’s absence might derogate from the accused’s right to a fair trial.”<sup>15</sup> That assistance has to be effective, the Court made clear in *Strickland v. Washington*,<sup>16</sup> and thus it followed quite naturally that the right to effective assistance would extend to plea negotiations, as the Court held in *Hill v. Lockhart*<sup>17</sup> and *Padilla v. Kentucky*.<sup>18</sup> However, both *Hill* and *Padilla* involved the issue of whether the defendants were denied effective assistance of counsel when counsels’ faulty advice caused them to *accept* a plea. It was held ineffective. The next step of *Lafler* and *Frye* was applying this requirement to situations in which counsels’ advice caused defendants to *reject* a plea. Though this was new ground, the takeaway from *Lafler* and *Frye* is essentially straightforward: effective assistance of counsel during plea negotiations includes timely communicating plea offers to the client and effectively advising the client about the merits *vel non* of accepting the plea offer.

New ground, though not quite *terra firma*. Indeed, much has been made of *Lafler* and *Frye* and the complications that will ensue with respect to proving the making and communication of offers, and with respect to fashioning remedies. The Court essentially punted on these issues, leaving lower courts to figure out fact-finding and to fashion appropriate remedies.<sup>19</sup> But the bigger story, beyond these complications, is the Court’s acknowledgement of the reality that scholars have long observed<sup>20</sup>: given that approximately 97

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15. 388 U.S. 218, 226 (1967).

16. See 466 U.S. 668, 687-88 (1984).

17. See 474 U.S. 52, 58 (1985).

18. See 559 U.S. 356, 373 (2010) (“[T]he negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.”).

19. See *Lafler v. Cooper*, 132 S. Ct. 1376, 1391 (2012) (“Today’s decision leaves open to the trial court how best to exercise that discretion [regarding remedy] in all the circumstances of the case.”).

20. See Lynch, *supra* note 14, at 39-40 (citing Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117 (1998)); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L.J.* 1909, 1912 (1992).

percent of cases are disposed of by plea,<sup>21</sup> the Court acknowledged that plea bargaining “*is* the criminal justice system.”<sup>22</sup> And more significant still by several multiples is this: the Court moved to provide more constitutional oversight to the 97 percent of the criminal justice system that, for the most part, had remained in the shadows.

Perhaps it is too early to know what long-term effect the two decisions will have on the ground and in the trenches. According to at least one practitioner, there has already been an increase in “*Lafler* claims” alleging ineffective assistance during plea negotiations.<sup>23</sup> In some jurisdictions, prosecutors have requested in-court plea colloquies to memorialize the communication of plea offers on the record.<sup>24</sup> Even in the absence of colloquies, some prosecutors are still hoping to make a factual record. At least one District Attorney’s Office has announced that it will make a practice of announcing on the record in the defendant’s presence the making of plea offers and any rejection of the same.<sup>25</sup>

But beyond this, it is too early to know what effects, especially collateral effects, *Lafler* and *Frye* will have. Indeed, precisely because it is early, it is useful to repeat some concerns already raised by other scholars and to surface additional concerns. First, allow me to second the concern Judge Jed Rakoff of the Southern District of New York raised about the likely perverse effect of *Lafler* and *Frye*. Judge Rakoff writes:

*Frye* and *Lafler* could push defense attorneys toward urging their clients to take the first plea offered, even if counsel felt there was a realistic chance that a better deal might later be

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21. Lynch, *supra* note 14, at 39. As an evidence teacher and scholar, I cannot help but wonder if the decline in evidence scholarship—in quantity, not quality—may be attributable to the fact that evidence rules—which are really rules for trial—do not have the same impact on outcomes as they once did.

22. Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012).

23. Timothy E. Warriner, *The Supreme Court’s Decisions in Lafler and Frye*, LAW OFF. TIMOTHY E. WARRINER, <http://www.warrinerlaw.com/articles/the-consequences-of-the-supreme-courts-decisions-in-lafler-and-frye-ineffective-assistance-of-counsel-in-plea-negotiation/> [<https://perma.cc/P9AG-XZHD>] (last visited Mar. 20, 2016).

24. See Maranda E. Fritz & Gabrielle Y. Vazquez, *Effective Assistance of Counsel in Plea Negotiations After Lafler*, N.Y. L.J. (Sept. 29, 2014), <http://www.newyorklawjournal.com/id=1202670910273/Effective-Assistance-of-Counsel-in-Plea-Negotiations-After-Lafler> [<https://perma.cc/RWV7-WH65>]; Warriner, *supra* note 23.

25. See Warriner, *supra* note 23.

obtained; for otherwise, the defense attorney would risk facing a charge of ineffectiveness of counsel if the later plea bargain—or sentence after trial—proved more onerous than the initial offer. But the corollary of this result is that both the prosecutor and the defense counsel will be negotiating their deal at a time when neither fully understands the strengths or weaknesses of the case: a recipe for injustice.<sup>26</sup>

In short, rather than facilitating the “pursuit of perfect justice,”<sup>27</sup> *Lafler* and *Frye* could instead frustrate that pursuit by indirectly encouraging both the making of early pleas on the part of the prosecutor (who will know that the defense lawyer will now be obligated to convey the early offer and even push for it or risk an ineffective assistance of counsel claim), and the acceptance of early pleas by defendants. Indeed, on the defense side, there may be a double-whammy of risk aversion: the defendant who is afraid that the plea offer will be withdrawn, and the defense attorney who is afraid of being hit with an ineffective assistance claim. Again, a recipe for injustice.<sup>28</sup>

My concerns dovetail Judge Rakoff’s and go a step further. The critic in me wonders if *Lafler* and *Frye* are little more than a token gesture, giving the outward appearance of judicial oversight, of checks and balances, of real reform, and indeed of justice, while really maintaining the status quo. The mere fact that I can already imagine prosecutors applauding the decisions gives cause for some concern. Consider the skepticism of Judge Gerald Lynch of the Second Circuit. As Judge Lynch points out, it is unlikely that *Lafler* and *Frye* will result in many findings of ineffective assistance.<sup>29</sup> After all,

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26. Jed S. Rakoff, *Frye and Lafler: Bearers of Mixed Messages*, 122 YALE L.J. ONLINE 25, 26 (2012) <http://www.yalelawjournal.org/forum/frye-and-lafler-bearers-of-mixed-messages> [<https://perma.cc/Q6LH-JBS5>].

27. *Lafler v. Cooper*, 132 S. Ct. 1376, 1391 (2012) (Scalia, J., dissenting).

28. Consider the process instituted in Georgia. There, judges conduct *Lafler/Frye* status hearings in which the judge inquires into whether there has been a plea offer, its terms, and the defendant’s response. If the defendant rejects the offer at the hearing, the prosecution usually immediately revokes the offer. The disadvantage of this process is that it can function as a pressure point for forcing a plea. See Crawford & Boyle, LLC, *Attorney Eric C. Crawford Explains Lafler Frye Status Hearings (Georgia Criminal Law)*, YOUTUBE (July 26, 2013), <https://www.youtube.com/watch?v=-VW4h-5QKuo> [<https://perma.cc/84H5-H5HZ>]; see also *Missouri v. Frye*, 132 S. Ct. 1399, 1409 (2012).

29. See Lynch, *supra* note 14, at 41.

the burden on the defendant claiming ineffective assistance is a substantial one.<sup>30</sup> Albert Alschuler is even more critical, noting the structural barriers that frustrate effective legal representation—barriers that *Lafler* and *Frye* leave untouched.<sup>31</sup> Rare is the type of blatant malfeasance evidence available in *Lafler* and *Frye*; instead, a court deciding a *Lafler/Frye* claim must engage in speculation about would-haves and should-haves. In short, absent the kind of “easy cases”<sup>32</sup> presented by *Lafler* and *Frye*, courts will continue to take “a fairly hard line against after-the-fact criticism of anything that can be characterized as a matter of tactical decision.”<sup>33</sup>

And this is just the beginning of possible shortcomings. *Lafler* and *Frye* will likely do very little to disrupt a system that is now parasitical on plea bargaining. It is beyond dispute that our current system of criminal justice could not survive without pleas.<sup>34</sup> The

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30. See *id.*; see, e.g., *United States v. Frederick*, 526 F. App'x. 91, 93-94 (2d Cir. 2013) (holding that defendant did not provide sufficient evidence that he was prejudiced by his counsel's ineffectiveness despite rejecting a 13.5- to 15-year sentence and receiving a 32-year sentence); cf. *Foster v. United States*, 735 F.3d 561, 566-67 (7th Cir. 2013) (recognizing the circuit rule that a defendant's “single, self-serving statement” is not enough to demonstrate prejudice).

31. See Alschuler, *supra* note 14, at 681-82. Alschuler writes:

First, our plea-dominated system makes the kind of justice that a “defendant receives more dependent on the quality of counsel than any other legal system in the world.” Second, this system “subjects defense attorneys to serious temptations to disregard their clients' interests.” And third, this system “makes it impossible to determine whether defendants have received the effective assistance of counsel.”

*Id.* (quoting Albert W. Alschuler, *Personal Failure, Institutional Failure, and the Sixth Amendment*, 14 N.Y.U. REV. L. & SOC. CHANGE 149, 156 (1986)).

32. *Lynch*, *supra* note 14, at 41; see also *Missouri v. Frye*, 132 S. Ct. 1399, 1412 (2012) (Scalia, J., dissenting) (observing that in other cases, “it will not be so clear that counsel's plea-bargaining skills, which must now meet a constitutional minimum, are adequate”); Rakoff, *supra* note 26, at 26 (describing *Frye* and *Lafler* as “rather easy cases”).

33. *Lynch*, *supra* note 14, at 41; see also Alschuler, *supra* note 14, at 683-84. The rule announced in *Strickland v. Washington* is similar, directing that “scrutiny of counsel's performance must be highly deferential” and that courts must make “every effort ... to eliminate the distorting effects of hindsight ... and to evaluate the conduct from counsel's perspective at the time.” 466 U.S. 668, 689 (1983). For a discussion of how few ineffective assistance claims are even granted review, see Nancy J. King, *Enforcing Effective Assistance After Martinez*, 122 YALE L.J. 2428, 2438-48 (2013).

34. Writing for the majority, Justice Kennedy observed that “[t]o note the prevalence of plea bargaining is not to criticize it.” *Frye*, 132 S. Ct. at 1407. One wishes he had criticized it, or at least engaged in what it ultimately means to say that our criminal justice system “is for the most part a system of pleas, not a system of trials.” *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012).

Court acknowledged as much in *Santobello v. New York*, a 1971 decision.<sup>35</sup> As the Court stated then:

The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called “plea bargaining,” is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.<sup>36</sup>

Of course, the reliance on pleas has only increased since then.

Furthermore, although it may seem a matter of little consequence whether a defendant is convicted by a plea of guilty or by a jury of his peers, it in fact matters a great deal. Evidence suggests that plea bargaining sidesteps, rather than furthers, the truth-seeking function of justice.<sup>37</sup> As Judge Rakoff writes, “[A] criminal justice system operating largely behind closed doors is both inconsistent with the traditions of a free society and an invitation for abuse.”<sup>38</sup>

There are still other shortcomings, especially when one considers the celebratory remarks that greeted the decisions. For instance, the Court’s recent decision in *Burt v. Titlow* would seem to further undermine the impact of *Lafler* and *Frye*, since it would seem to relieve an attorney from advising her client about the merits *vel non* of a plea when the client has always insisted upon his innocence.<sup>39</sup> Second, *Lafler* and *Frye* will do nothing to stem legislatures from passing increasingly stiff maximum penalties. Indeed, the decisions may in fact motivate legislatures to pass harsher statutory penalties because stiffer maximum penalties will discourage defendants from taking a pass on early plea offers and make delaying acceptance of a plea offer that much more frightening.<sup>40</sup> Beyond this,

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35. 404 U.S. 257 (1971).

36. *Id.* at 260.

37. See, e.g., Marc Galanter, *The Hundred-Year Decline of Trial and the Thirty Years War*, 57 STAN. L. REV. 1255, 1272-74 (2005).

38. Rakoff, *supra* note 26, at 26.

39. See 134 S. Ct. 10, 17 (2013).

40. Cf. Alschuler, *supra* note 14, at 703 (observing that “[w]hen Congress creates new crimes and increases sentences, it speaks, not of doing justice, but of giving ‘tools’ to prosecutors”); Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006) (observing that “longer sentences exist on the books largely for bargaining



*Lafler* and *Frye* will certainly do nothing to address the seemingly intractable problem most criminal defendants face: unequal resources. As former Attorney General Eric Holder recently acknowledged, indigent defense systems “are in financial crisis, plagued by crushing caseloads and insufficient resources.”<sup>41</sup> Lastly, *Lafler* and *Frye* will likely do very little to address the *bête noir* of our criminal justice system: over-incarceration.<sup>42</sup> Indeed, it may even have a perverse effect for many of the reasons already stated. To be clear, no one has claimed that *Lafler* and *Frye* will be cure-alls. But the praise the decisions received does seem overblown, premature, and of a piece with “technocratic” thought—the thinking that legal problems are essentially problems of technique.<sup>43</sup> Again, when we can imagine prosecutors applauding decisions that purport to give defendants more rights, we should be concerned. *Lafler* and *Frye* may signal that the Court is headed in the *direction* of real reform of the criminal justice system. But in terms of *distance*, we are still a long way off.

Beyond these shortcomings, there is another problem that is equally weighty and has not received sufficient attention. Indeed, Justice Scalia identified this problem in his dissent, although his take and mine are quite different. In Justice Scalia’s *Lafler* parade of horrors,<sup>44</sup> he wrote:

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purposes”); Stephanos Bibas, *Taming Negotiated Justice*, 122 YALE L.J. ONLINE 35, 36 (2012) <http://www.yalelawjournal.org/forum/taming-negotiated-justice> [<https://perma.cc/LAY9-JARJ>]; Lynch, *supra* note 14, at 41; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 523 (2001).

41. Eric H. Holder Jr., *Defendants’ Legal Rights Undermined by Budget Cuts*, WASH. POST (Aug. 22, 2013), [http://www.washingtonpost.com/opinions/eric-holder-defendants-legal-rights-undermined-by-budget-cuts/2013/08/22/efc8bec8-06bc-11e3-9259-e2aaf5a5f84\\_story.html](http://www.washingtonpost.com/opinions/eric-holder-defendants-legal-rights-undermined-by-budget-cuts/2013/08/22/efc8bec8-06bc-11e3-9259-e2aaf5a5f84_story.html) [<https://perma.cc/N7MS-2DZL>].

42. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 136 (2010).

43. See Donald Black, *The Boundaries of Legal Sociology*, 81 YALE L.J. 1086, 1090-91 (1972). Black writes:

[T]he sociology of law significantly resembles a broader style of thought that has come to be known as *technocratic* thought.... In the technocratic world-view, every problem—factual, moral, political, or legal—reduces to a question of technique. A good technique is one that works, and what works can be learned through science. Any problem that cannot be solved in this way is no problem at all, hardly worthy of our attention. In theory, moreover, every problem can be solved if only the appropriate expertise is applied to it.

*Id.* at 1090 (citation omitted).

44. Justice Scalia so often resorted to the rhetorical strategy of invoking a parade of

[I]t would be foolish to think that “constitutional” rules governing *counsel’s* behavior will not be followed by rules governing the *prosecution’s* behavior in the plea-bargaining process that the Court today announces “*is* the criminal justice system.” Is it constitutional, for example, for the prosecution to withdraw a plea offer that has already been accepted? Or to withdraw an offer before the defense has had adequate time to consider and accept it? Or to make no plea offer at all, even though its case is weak—thereby excluding the defendant from “the criminal justice system”?<sup>45</sup>

Justice Scalia made no bones about his overarching concern. He feared that the majority decisions in *Lafler* and *Frye* signaled a “whole new boutique of constitutional jurisprudence (‘plea-bargaining law’).”<sup>46</sup> Here, Stephanos Bibas’s rejoinder seems apt: “[I]t is about time the Court developed some plea-bargaining law.”<sup>47</sup> But beyond plea-bargaining law in general, Justice Scalia also feared this law would one day apply to prosecutors. Justice Scalia proved prescient with his parade of horrors before, fearing that the Court’s decriminalization of same-sex sex would lead to, horror of all horrors, same-sex marriage.<sup>48</sup> I, for one, am hoping that he proves prescient again.

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horrors, *see, e.g.*, *Padilla v. Kentucky*, 559 U.S. 356, 388 (2010) (Scalia, J., dissenting), and *Lawrence v. Texas*, 539 U.S. 558, 586 (2003) (Scalia, J., dissenting), that it is necessary to specify his *Lafler* parade of horrors. For more on Justice Scalia’s *Lawrence* parade of horrors, *see* Ruth E. Sternglantz, *Raining on the Parade of Horrors: Of Slippery Slopes, Faux Slopes, and Justice Scalia’s Dissent in Lawrence v. Texas*, 153 U. PA. L. REV. 1097 (2005); Michael Dorf, *Justice Scalia Was Lucky He Didn’t Get the Santorum / Google Treatment*, DORF ON L. (Jan. 9, 2012), <http://www.dorfonlaw.org/2012/01/justice-scalia-was-lucky-he-didnt-get.html> [<https://perma.cc/J629-34W7>].

45. *Lafler v. Cooper*, 132 S. Ct. 1376, 1392 (2012) (Scalia, J., dissenting) (citations omitted).

46. *Id.* at 1398.

47. Bibas, *supra* note 40, at 35.

48. *See United States v. Windsor*, 133 S. Ct. 2675, 2709 (2013) (Scalia, J., dissenting); *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting) (fearing decision would result in invalidation of “laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity”); *see also* Robert Barnes, *Scalia Finds His Predictions on Same-Sex-Marriage Ruling Being Borne Out*, WASH. POST (Dec. 29, 2013), [http://www.washingtonpost.com/politics/scalia-finds-his-predictions-on-same-sex-marriage-ruling-being-borne-out/2013/12/29/d2c7b90a-7097-11e3-8def-a33011492df2\\_story.html](http://www.washingtonpost.com/politics/scalia-finds-his-predictions-on-same-sex-marriage-ruling-being-borne-out/2013/12/29/d2c7b90a-7097-11e3-8def-a33011492df2_story.html) [<https://perma.cc/J2B3-E37Z>].

## II. TURNING TO PROSECUTORS

It may seem strange that thinking about plea-bargaining law would lead me to thoughts about male-victim rape, but it does. A few years ago, in an article about male-victim rape, I discussed the related issue of law enforcement officers and prosecutors engaging in what I characterized as “unjust talk.”<sup>49</sup> Using a hypothetical gang-related shooting as an illustration, I noted that interrogations often include language like this: “*Shut up and listen! You got one chance to help yourself and tell us who the shooter is, or you’ll be the one in the big house touching your toes while Bubba and his friends make you their little bitch, you hear me?*”<sup>50</sup>

Although the discussion in my prior article concerned “unjust talk” about male-victim rape during interrogations, such “unjust talk” also occurs during plea negotiations.<sup>51</sup> Such talk is also not limited to hardened criminals or suspects in crimes of violence.<sup>52</sup> As I wrote then:

[P]rosecutors and law enforcement officers raise the specter of male rape in a broad[] range of cases. The specter of male rape is invoked in securities cases as casually as in drug distribution cases, in mail and wire fraud cases as casually as in racketeering cases. The prospect of a date with “Bubba” is leveled at poor defendants and wealthy defendants, minority defendants and nonminority defendants.<sup>53</sup>

In short, the reference to male-victim rape is often part of the unjust talk that accompanies plea negotiations. As I wrote back then,

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49. Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1278 (2011).

50. *Id.* at 1285. Richard Leo has also described a similar threat. See RICHARD A. LEO, POLICE INTERROGATION AND AMERICAN JUSTICE 204-05 (2008) (describing an interview in which detectives told the suspect he would be raped by a big black man if he did not cooperate).

51. See Capers, *supra* note 49, at 1287.

52. See *id.* at 1285-86.

53. *Id.* at 1285 (footnotes omitted).

“[s]uch talk occurs so frequently that it is often taken as a given.”<sup>54</sup>  
Or as a joke.<sup>55</sup>

Bill Stuntz and other scholars have described plea negotiation as contract.<sup>56</sup> The language of contract, to my mind at least, suggests men in suits, speaking at arm’s length. Indeed, Stuntz writes, “The parties to these settlements trade various risks and entitlements: the defendant relinquishes the right to go to trial (along with any chance of acquittal), while the prosecutor gives up the entitlement to seek the highest sentence or pursue the most serious charges possible.”<sup>57</sup> But plea negotiation—in the real world, at least—is also akin to sport.<sup>58</sup> And as in other sports, there is plenty of unjust talk, or what here might be more accurately described as trash talk. What other trash talk is included in plea negotiations? I am tempted to call this “confessions of a former federal prosecutor.” Instead,

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54. *Id.* at 1286. For a rare example of a defendant challenging his confession based on the use of such tactics, see *Tennessee v. Campbell*, No. E2014-00697-CCA-R3-CD (Tenn. Crim. App. Oct. 20, 2015), <https://assets.documentcloud.org/documents/2472080/ruling-on-the-admissibility-of-a-confession.pdf> [<https://perma.cc/R5UH-LFHG>]. During his interrogation, which was recorded, investigators repeatedly told the defendant that he would be sent to prison where he would be repeatedly raped if he did not confess to the crime. *See id.* at 8. For example, an investigator told him: “And brother they gonna rape you, they gonna f--king rape you. You are not a big man; you cannot fend them off. They will f--king rape you daily.” *Id.* at 12. Although the appellate court agreed that such tactics were coercive, the court declined to find that they rendered the defendant’s confession involuntary. *See id.* at 19-20.

55. One recent example is the coverage given to former Subway spokesperson Jared Fogle following his guilty plea to child pornography charges. The headline from the *New York Post* read: “Subway Jared Underage Sex Shock: Enjoy a Foot Long in Jail.” *See* Andres Jauregui, *New York Post to Jared Fogle: ‘Enjoy a Foot Long in Jail’*, HUFFINGTON POST (Aug. 20, 2015, 11:29 AM), [http://www.huffingtonpost.com/entry/jared-fogle-new-york-post\\_55d5dfc9e4b07addeb45a654](http://www.huffingtonpost.com/entry/jared-fogle-new-york-post_55d5dfc9e4b07addeb45a654) [<https://perma.cc/2PHH-HZCG>]. For other examples, see Capers, *supra* note 49, at 1262 n.20.

56. *See* Scott & Stuntz, *supra* note 20, at 1912-13; *cf.* Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 297-98 (1983) (describing plea bargaining as a market system component); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1973 (1992) (describing plea bargaining as compromise). Cases have also emphasized the contractual aspects of plea bargaining. *See, e.g.,* *Santobello v. New York*, 404 U.S. 257, 262 (1971) (analyzing promises of prosecutors as “consideration” for guilty pleas, and, thus, contractually binding).

57. Scott & Stuntz, *supra* note 20, at 1909.

58. Usually such analogies are used to describe trials. *See, e.g.,* *McFarland v. Scott*, 512 U.S. 1256, 1264 (1994) (Blackmun, J., dissenting from denial of certiorari) (“The trial is the main event in this system, where the prosecution and the defense do battle to reach a presumptively reliable result.”). But they can also describe pretrial practice, including plea negotiations.

let us just say that what follows is a sampling of some of the trash talk that I witnessed as a federal prosecutor.

*Look, right now you're the one that's been indicted. But do you know how easy it is to charge someone else with aiding and abetting or to charge them as a co-conspirator? Let me explain how easy it is proving accomplice liability. Right now I'm just looking at you, but obviously if this case doesn't plead out soon, I'll have an incentive to broaden the grand jury's investigation. I mean, how do I know your wife/husband/mom/pops/son/daughter/hood rat girlfriend did not place a phone call for you? You understand what I mean?<sup>59</sup>*

*This offer is like fish. It's only going to last for a little while. And then it changes. It goes bad. It just keeps getting worse and worse. You know how sometimes the smell gets so bad you can't breathe? That's where this offer is going.*

*I'd hate to have to add charges, but obviously if we can't reach some kind of disposition soon, that will be the next step. You see this charging book I have. It's filled with crimes for me to charge people with. I especially like the crimes that come with mandatory minimum sentences.<sup>60</sup>*

*Think about your children. Think about your elderly mother. And whether you want to see them again.*

*Obviously, if we can reach a plea deal early, I will be more open to a bail package to allow your client to remain free pending sentencing, which of course will impact whether the Bureau of*

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59. Gregory Gilchrist, a former public defender, describes a similar story. See Gregory M. Gilchrist, *Counsel's Role in Bargaining for Trials*, 99 IOWA L. REV. 1979, 1986 (2014) (describing a prosecutor's offer to not subpoena the defendant's daughter before the grand jury if he pleaded guilty). Furthermore, at least one court has suggested that it does not violate due process to offer leniency for a defendant's spouse in exchange for the defendant's guilty plea. See *United States v. Pollard*, 959 F.2d 1011, 1021 (D.C. Cir. 1992).

60. As a federal judge in Brooklyn recently observed, "prosecutors routinely threaten ultraharsh, enhanced mandatory sentences that *no one*—not even the prosecutors themselves—thinks are appropriate." Erik Eckholm, *Prosecutors Draw Fire for Sentences Called Harsh*, N.Y. TIMES (Dec. 5, 2013), [http://www.nytimes.com/2013/12/06/us/federal-prosecutors-assailed-in-outcry-over-sentencing.html?\\_r=1](http://www.nytimes.com/2013/12/06/us/federal-prosecutors-assailed-in-outcry-over-sentencing.html?_r=1) [<https://perma.cc/YM97-E6VV>] (quoting the Honorable John Gleeson). The judge added that the prosecution "coerces guilty pleas and produces sentences so excessively severe they take your breath away." *Id.*

*Prisons considers him a low-risk prisoner or a high-risk prisoner and what facility he will be housed in.*

*I'm having a one-week sale. Sign a plea agreement this week and you'll get our deepest discount. But the deal expires this week.*

*You want to plead? You want a plea offer from me? Actually, I think this would be a great case to take to trial.*

Quite simply, it was not uncommon, at least when I was a federal prosecutor, to base plea offers on self-interest; to offer pleas that were meant to be coercive; and, in some cases, not to offer pleas at all (for example, in cases that would make a fun or prestige-enhancing trial).<sup>61</sup> Sometimes prosecutors engaged in these discussions at the initial appearance, capitalizing on the fact that the defense was unlikely, at this juncture, to have had an opportunity to investigate the allegations or have anything more than a cursory interview with his client. Rather than the first substantive meeting between defense counsel and client being one to discuss the charges and perhaps uncover weaknesses in the government's case, in these situations, the first meeting would become one about the offer on the table and when that offer would expire.<sup>62</sup> Other times, offers might

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61. Steven Schulhofer makes a similar point in his discussion of agency costs: The real parties in interest (the public and the defendant) are represented by agents (the prosecutor and the defense attorney) whose goals are far from congruent with those of their principals. There is, accordingly, a potential for conflicts of interest or, in the language of economics, a problem of agency costs. The proposition that a mutually agreed-upon exchange presumptively enhances the welfare of both parties collapses, absent reason to believe that the agents are acting in the interest of their principals.

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... [For example, a trial prosecutor's goal may be to] maximize his own welfare, which is defined by some combination of career advancement job satisfaction, and leisure.

Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1987-88 (1992); see also Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 188 (2007) ("They care not only about how many cases they win, but also *which* cases they win and *how* they are won.").

62. Bill Stuntz made a similar observation:

Most cases are disposed of by means that seem scandalously casual: a quick conversation in a prosecutor's office or a courthouse hallway between attorneys familiar with only the basics of the case, with no witnesses present, leading to

be discussed during initial pretrial appearances. The goal was to move cases along the conveyor belt, to get rid of the “dogs” (typically, the uninteresting or problematic cases) quickly so that more time could be spent on the cases a prosecutor liked and wanted to take to trial.<sup>63</sup> The goal, too, was to try to have particular conversations while the defendant himself was in earshot. The prosecutor would speak to the defense counsel, but the intended audience was the defendant sitting a few feet away so that he would know you meant business. Indeed, for “stubborn” defendants, we would occasionally arrange what we termed “reverse proffers,” where prosecutors would meet with defense counsel and a defendant on a particular case and do a “show and tell,” laying out all the reasons why the defendant should plead. And lay them out we did. And defense counsel, during these “reverse proffers,” were often our willing accomplices, though they might not put it that way.<sup>64</sup> Whether we were playing the good cop or the bad cop—it really did not matter who was playing which role—we had the same objective: plead the case out.

And of course, this is only a sampling of some of the tactics employed by prosecutors to strong arm a plea. Consider the tactics of the District Attorney’s Office in Queens, New York.<sup>65</sup> Starting in 2007, the office began a practice of interviewing arrestees during booking, *before* they were arraigned and received counsel.<sup>66</sup> The Assistant District Attorneys delivered this script at the start of these interviews—in other words, before administering the *Miranda* warning:

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a proposed resolution that is then “sold” to both the defendant and the judge. To a large extent, this kind of horse trading determines who goes to jail and for how long. That is what plea bargaining is.

Scott & Stuntz, *supra* note 20, at 1911-12 (footnote omitted).

63. Cf. Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 CARDOZO L. REV. 2295, 2297-99 (2006) (observing that prosecutors sometimes use pleas to circumvent trying cases when defendants have strong defenses or when the defendant has a reasonably good chance of showing that one of the elements of the offense cannot be proved).

64. Cf. Schulhofer, *supra* note 61, at 1988-89 (discussing the agency cost to defense counsel, which may incentivize an attorney to encourage a plea, even when such a plea is not in her client’s best interest). See generally Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 YALE L.J. 1179, 1180 (1975) (similar); Rachel Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 879-80, 879 n.43 (2009) (similar).

65. See generally *People v. Dunbar*, 24 N.Y.3d 304 (2014).

66. See *id.* at 308.

If you have an alibi, give me as much information as you can, including the names of any people you were with.  
If your version of what happened is different from what we've been told, this is your opportunity to tell us your story.  
If there is something you need us to investigate about this case *you have to tell us now* so we can look into it.  
Even if you have already spoken to someone else you do not have to talk to us.  
This will be *your only opportunity to speak with us* before you go to court on these charges.<sup>67</sup>

Only after this script would the prosecutor advise the defendant of her *Miranda* rights and seek a waiver.<sup>68</sup> The clear, if unstated, goal of the script was to “neutralize[]”<sup>69</sup> *Miranda* and to secure a plea and/or cooperation. The script was such a valuable prosecutorial tool that when a trial judge questioned the ethics of the process, the Queens District Attorney filed a suit to silence the judge.<sup>70</sup> It took an appellate court to bar the practice, though even afterwards the Queen’s District Attorney appealed the decision.<sup>71</sup>

Also consider, more generally, the ability of prosecutors to simply refuse to plead cases to lesser sentences, including death penalty cases in which defendants are willing to plead to life without the possibility of parole. One of the most well-known cases is that of James Holmes, accused of killing twelve people and wounding another fifty-eight at a movie theater in Aurora, Colorado in 2012.<sup>72</sup> Colorado prosecutors rejected his offer to plead guilty to life in prison without the possibility of parole.<sup>73</sup> Another is the case of Dzhokhar Tsarnaev, convicted and sentenced to death in connection

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67. *Id.* at 309 (emphasis added).

68. *See id.* at 310.

69. *Id.* at 316.

70. *See* John Eligon, *Suit Seeks to Silence Queens Judge on Interview Tactic*, N.Y. TIMES (Oct. 31, 2010), [http://www.nytimes.com/2010/11/01/nyregion/01queensda.html?\\_r=0](http://www.nytimes.com/2010/11/01/nyregion/01queensda.html?_r=0) [https://perma.cc/C464-VER3].

71. *See Dunbar*, 24 N.Y.3d at 311 (affirming appellate court’s decision).

72. *See* Carol McKinley & Christina Ng, *Colorado Shooter James Holmes’ Guilty Plea Offer Rejected*, ABC NEWS (Mar. 29, 2013), <http://abcnews.go.com/US/james-holmes-guilty-plea-offer-rejected-aurora-movie/story?id=18839143> [https://perma.cc/H4R8-C5ZM].

73. *Id.*



with the Boston Marathon bombing.<sup>74</sup> Prosecutors in that case also declined to offer a plea to life without parole.<sup>75</sup> But Holmes and Tsarnaev are not alone. In New Hampshire, Michael Addison was sentenced to death after prosecutors rejected his offer to plead guilty to life without parole.<sup>76</sup> Indeed, when I prosecuted capital cases in the Southern District of New York, we also rejected offers to plead to life without parole.

There is at least one more aspect of the prosecutor's role in plea bargaining—and the lack of oversight—that deserves attention: plea bargaining is surely tainted by legally inappropriate considerations. Here, Justice Kennedy's channeling of Stephanos Bibas comes to mind: "The expected post-trial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less as a bargain."<sup>77</sup> This quote suggests two distinct problems: a trial penalty out of sync with just desert or any utilitarian purpose, and characteristics that may disadvantage a defendant's ability to intelligently evaluate a plea offer.

However, a third problem lies just below the surface. Sticking with the car analogy, we know that sellers bargain less with outside groups such as racial minorities, and more with those who they think can afford it.<sup>78</sup> Something very similar happens on the

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74. See Milton J. Valencia, *Dzhokhar Tsarnaev Gets Death Penalty for Placing Marathon Bomb*, BOST. GLOBE (May 15, 2015), <https://www.bostonglobe.com/metro/2015/05/15/dzhokhar-tsarnaev-death-penalty-sentencing-jury-boston-marathon-bombing/canMEfLmeQJxQ4rFUOsERJ/story.html> [<https://perma.cc/D555-WL3E>].

75. See Tovia Smith, *Many Question Lack of Plea Deal in Boston Bombing Case*, NPR (Mar. 5, 2015), <http://www.npr.org/2015/03/05/391041957/many-question-lack-of-plea-deal-in-boston-bombing-case> [<https://perma.cc/T4FU-J5E8>].

76. Lincoln Caplan, *End the Death Penalty in New Hampshire*, N.Y. TIMES: TAKING NOTE (Nov. 14, 2012, 11:54 AM), [http://takingnote.blogs.nytimes.com/2012/11/14/end-the-death-penalty-in-new-hampshire/?\\_r=0](http://takingnote.blogs.nytimes.com/2012/11/14/end-the-death-penalty-in-new-hampshire/?_r=0) [<https://perma.cc/3VBS-SUKT>].

77. *Lafler v. Cooper*, 132 S. Ct. 1376, 1387 (2012) (quoting Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1138 (2011)).

78. See Derek Thompson, *The Price is Racist: When Minorities (and Women) Are Asked to Pay More*, ATLANTIC MONTHLY (June 24, 2013), <http://www.theatlantic.com/business/archive/2013/06/the-price-is-racist-when-minorities-and-women-are-asked-to-pay-more/277174/> [<https://perma.cc/32HL-7H8F>]; see also Stuart Rossman, *The Data Is Clear: Auto Lenders Discriminate*, U.S. NEWS & WORLD REP. (Nov. 17, 2015), <http://www.usnews.com/opinion/economic-intelligence/2015/11/17/dont-let-congress-weaken-oversight-of-discriminatory-auto-financing> [<https://perma.cc/9N9H-H4BD>]. For a seminal article on transaction discrimination, see Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV.

prosecutor's side in the plea negotiation context. In the shadowy bazaar of plea bargaining, negotiations that implicitly take into account race, religion, age, and class occur on a daily basis.<sup>79</sup> To be clear, I am not suggesting that this is done deliberately, but again, we all have these implicit biases of which we are unaware.<sup>80</sup> Prosecutors press tougher pleas on those defendants who they believe "can afford it"—often poor and minority defendants—while offering lighter plea deals to those who they believe cannot—often white, middle-class defendants.<sup>81</sup> Indeed, these prosecutors may even think different plea offers based on the perceived softness of the defendant, which itself may be racially coded, is morally right and even retributively just, given perceptions about how various groups experience prison<sup>82</sup> and the perceived risks of prison victimization.<sup>83</sup>

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L. REV. 817 (1991).

79. See ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF AN AMERICAN PROSECUTOR* (2009) (discussing race and class bias); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 *FORDHAM L. REV.* 13, 15, 41 (1998) (discussing bias based on "race, religion, or some other arbitrary classification").

80. Using implicit association tests (IATs), which measure the speed with which an individual associates a categorical status with a characteristic, social cognition researchers have shown that implicit biases continue to be widespread, even among those who consider themselves to be unbiased. See Nilanjana Dasgupta, *Implicit Ingroup Favoritism, Outgroup Favoritism, and Their Behavioral Manifestations*, 17 *SOC. JUST. RES.* 143, 146 (2004). Such implicit biases inform all of our interactions and have particular implications with respect to criminal justice issues. See Jerry Kang, *Trojan Horses of Race*, 118 *HARV. L. REV.* 1489, 1503-04 (2005); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 *UCLA L. REV.* 1124, 1135-39 (2012); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 *MINN. L. REV.* 2035, 2038-40 (2011); L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 *OHIO ST. J. CRIM. L.* 115, 120-21 (2014).

81. An analysis conducted by the Vera Institute in partnership with the New York County District Attorney's Office pointed to the continued salience of race in plea bargaining. For example, the study found that for misdemeanor drug cases, black defendants were 27 percent, and Latino defendants 18 percent, more likely to receive plea offers that included a custodial sentence than similarly situated white defendants. BESIKI KUTATELADZE ET AL., *VERA INST. OF JUSTICE, RACE AND PROSECUTION IN MANHATTAN* (2014), <http://www.vera.org/sites/default/files/resources/downloads/race-and-prosecution-manhattan-summary.pdf> [https://perma.cc/7M P3-RLEX]; see also James C. McKinley, *Study Finds Race Disparity in Criminal Prosecutions*, *N.Y. TIMES* (July 8, 2014), [http://www.nytimes.com/2014/07/09/nyregion/09race.html?\\_r=0](http://www.nytimes.com/2014/07/09/nyregion/09race.html?_r=0) [https://perma.cc/MRT5-VVZC].

82. See Adam J. Kolber, *The Subjective Experience of Punishment*, 109 *COLUM. L. REV.* 182, 194-95 (2009). In fact, even interviews with judges suggest that many judges assume white-collar defendants experience incarceration differently than other defendants, and the judges take this into account when imposing sentences. See STANTON WHEELER ET AL., *SITTING IN JUDGMENT: THE SENTENCING OF WHITE COLLAR CRIMINALS* 144-51 (1988).

83. See generally Capers, *supra* note 49. Indeed, the Court arguably gave its blessing to

The point here is not to offer an *apologia*. Rather, the point is to bring to light how unregulated prosecutors are when it comes to plea negotiations. And it is to ask whether any value exists in the right to have defense counsel communicate plea offers if the prosecutor need not offer a plea at all. And what value is the right to have defense counsel provide effective advice regarding the merits *vel non* of a plea offer when the prosecution has complete discretion to time such an offer, or condition such an offer, in a way that impedes informed decision making? What value is that right when the prosecution, or its law enforcement proxy, has already tainted the right by speaking to the defendant first, coloring the defendant's perception of his options? While the Court is now giving teeth to the Sixth Amendment's "right to counsel" clause—such that Justice Scalia feared the majority was on the brink of creating "plea-bargaining law"—should not some attention be paid to the counsel on the other side of the table, that quintessential "officer of the court," the counsel for the government?

### III. PROSECUTORS, PLEAS, AND DUE PROCESS

It is difficult to imagine extending plea-bargaining law to prosecutors without addressing the vast power prosecutors wield. As former U.S. Attorney General Robert Jackson once remarked, prosecutors have "more control over life, liberty, and reputation than any other person in America."<sup>84</sup> Donald Dripps, speaking of the imbalance of power in plea negotiations, put it bluntly by comparing plea bargaining to a game of "chicken" with locomotives:

[I]magine that the prosecutor's train has a throttle that goes from 10 to 100 miles per hour, while the defendant's throttle goes only from 10 to 20. Suppose further that the prosecution's train is controlled from the caboose, while the defense train is operated from the locomotive. Recall the formula that kinetic energy is equal to mass multiplied by velocity squared. As the engineers communicate by radio, the prosecutor can credibly and

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such coded thinking in *Koon v. United States*, 518 U.S. 81 (1996), which involved officers in the Rodney King beating. The Court affirmed a sentencing departure based on "susceptibility to abuse in prison." *Id.* at 84.

84. Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3, 3 (1940).

asymmetrically threaten to make the collision catastrophic rather than minor.<sup>85</sup>

Dripps then asks us to consider the effect of this power in just one case, *Graham v. Florida*, in which the Court ruled that a sentence of life without parole for a juvenile offender violated the Eighth Amendment's Cruel and Unusual Punishment Clause.<sup>86</sup> Following Graham's armed burglary with assault, he agreed to plead guilty and receive three years' probation to avoid a threatened life sentence, but Graham then violated the terms of his probation and was resentenced to life.<sup>87</sup> Reviewing the reason for Graham's life sentence, Dripps asks: "Which ... is more Kafkaesque, the legal doctrine that labels [Graham's original] plea voluntary, or the premise that life without parole and three years of probation are *both* outcomes consistent with the interests of justice?"<sup>88</sup>

The prosecutor's outsized power is attributable in part to his almost unfettered discretion, which of course goes beyond the plea bargaining stage.<sup>89</sup> But his power is also attributable to the Court's hands-off approach. Even when confronted with some of the more troubling aspects of prosecutorial discretion—as in *McClesky v. Kemp*, in which there was uncontroverted evidence of widespread

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85. Donald A. Dripps, *Reinventing Plea Bargaining* 56 (Robina Inst. of Criminal Law & Criminal Justice, Working Paper No. 5, 2014), [http://www.robinainstitute.org/wp-content/uploads/5\\_Dripps.pdf](http://www.robinainstitute.org/wp-content/uploads/5_Dripps.pdf) [<https://perma.cc/3E37-NNWH>].

86. *See* 560 U.S. 48, 81-82 (2010).

87. *See id.* at 54-57.

88. Dripps, *supra* note 85, at 58. Of course, there are many stories like this. Consider the facts underlying *Bordenkircher v. Hayes* 434 U.S. 357 (1978). Paul Hayes forged a check in the amount of \$88.30 and was offered a plea that would have capped his sentence at five years. *Id.* at 358. The prosecutor threatened to seek mandatory life under the state's three-strikes law if Hayes declined. *Id.* at 358-59. Hayes rejected the plea offer, and the prosecutor carried through on his threat. *Id.* at 359. The Court upheld the life sentence, finding no due process violation in the actions of the prosecutor. *Id.* at 365.

89. *See* DAVIS, *supra* note 79, at 126-27, 140-41. One of the clearest examples of this discretion arose out of the riots at the Attica Correctional Facility in 1971. As guards were ostensibly taking steps to regain control of the prison, they retaliated by killing several prisoners and continued to assault and beat prisoners after regaining control. When federal and state prosecutors declined to pursue charges against the guards, prisoners and family members sued. The Second Circuit Court of Appeals dismissed the claims, citing the discretionary power of prosecutors. *See Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 376, 379 (2d Cir. 1973). For a historical perspective on this discretionary power, see Carolyn B. Ramsey, *The Discretionary Power of "Public" Prosecutors in Historical Perspective*, 39 AM. CRIM. L. REV. 1309 (2002).

racial discrimination in the selection of capital defendants;<sup>90</sup> in *Ewing v. California*, involving discretion in charging defendants under a three-strikes law;<sup>91</sup> and in *United States v. Armstrong*, involving a question of selective prosecutions<sup>92</sup>—the Court has shrugged, looked the other way, or punted. Never mind that this discretion is on par with the very discretion the Court has frowned upon with respect to police officers.<sup>93</sup>

There is something else to be said about the source of the prosecutor's power: Once upon a time we emphasized the justness of prosecutors. As the Court stated in 1935 in *Berger v. United States*, the interest of the prosecutor “is not that it shall win a case, but that justice shall be done.... It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”<sup>94</sup> Now, we are more likely to insist that prosecutors be zealous advocates in a criminal justice system that is adversarial by design.<sup>95</sup> Perhaps it is no wonder that Paul Butler has asked, “Should good people be prosecutors?”<sup>96</sup> The system has leaned away from doing justice to maximizing convictions.

I do not mean to overstate the problem. Although the Sixth Amendment may have little to say about how prosecutors engage in plea negotiations, the Due Process Clause does provide some limits. But in the modern era, the Court's use of the Due Process Clause to rein in prosecutors has been thin indeed. In *Santobello v. New York*, the Court read the Due Process Clause as barring a prosecutor from tricking a defendant into pleading guilty, and also held that, once a binding plea agreement has been entered into, prosecutors may not renege on their promises.<sup>97</sup> But beyond this limitation, prosecutors

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90. See 481 U.S. 279, 286-87 (1987).

91. See 538 U.S. 11, 17 (2003).

92. See 517 U.S. 456, 461 (1996).

93. The Court has been particularly concerned about police discretion in the context of special needs searches and seizures, such as automobile checkpoints. See, e.g., *Illinois v. Lidster*, 540 U.S. 419, 423-25 (2004); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 451-52 (1990); *Delaware v. Prouse*, 440 U.S. 648, 653-55 (1979).

94. 295 U.S. 78, 88 (1935).

95. See *Herring v. New York*, 422 U.S. 853, 862 (1975) (“The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.”).

96. PAUL BUTLER, *LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE* 101, 261-62 (2009).

97. See 404 U.S. 257 (1971).

are largely unregulated. Certainly this is true regarding the use of threats to bring additional charges in order to induce a plea; that is essentially what the Court held in *Bordenkircher v. Hayes*.<sup>98</sup> Indeed, even prosecutors' *Brady* obligation to disclose "material" exculpatory evidence<sup>99</sup> is only shoddily enforced,<sup>100</sup> and barely enforced at all in connection with plea bargains,<sup>101</sup> some of which require defendants to waive their right to exculpatory material.<sup>102</sup> Although Rule 11 of the Federal Rules of Criminal Procedure and Rule 410 of the Federal Rules of Evidence provide some regulation, the former primarily applies to findings a court must make before accepting a plea as voluntary,<sup>103</sup> and the latter primarily applies to how a prosecutor can use statements made during plea negotiations at trial.<sup>104</sup> Even less effective are professional conduct rules. The American Bar Association (ABA) Standards provide that prosecutors should have a general policy to consult with defense counsel concerning pleas, should not make false statements during plea negotiations, and should comply with any plea agreements entered into.<sup>105</sup> And the ABA Model Rules bar prosecutors from engaging in dishonest conduct or "conduct that is prejudicial to the administration of justice."<sup>106</sup> But these regulations are thin, to put it generously. And they are rarely enforced in the plea negotiation context.<sup>107</sup> As Bibas

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98. See 434 U.S. 357, 364-65 (1978). For a discussion of *Bordenkircher* as a missed opportunity, see William Stuntz, *Bordenkircher v. Hayes: The Rise of Plea Bargaining and the Decline of the Rule of Law* (Harvard Pub. Law, Working Paper No. 120, 2005), <http://papers.ssrn.com/sol3/papers.cfm?abstract-id=854284> [<https://perma.cc/3M9V-APNA>].

99. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

100. See, e.g., *Connick v. Thompston*, 131 S. Ct. 1350 (2011). For an interesting proposal to remedy *Brady's* shortcomings, see Miriam H. Baer, *Timing Brady*, 115 COLUM. L. REV. 1 (2015).

101. See Michael Nasser Petegorsky, Note, *Plea Bargaining in the Dark: The Duty to Disclose Exculpatory Brady Evidence During Plea Negotiations*, 81 FORDHAM L. REV. 3599 (2013); cf. *United States v. Ruiz*, 536 U.S. 622 (2002) (holding that due process does not require prosecutors to disclose impeachment evidence in advance of a guilty plea).

102. See *Ruiz*, 536 U.S. at 633; see also 3 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 586 (4th ed. 2015) ("A term in a plea agreement waiving any right to *Brady* disclosure as part of a plea bargain is enforceable.").

103. FED. R. CRIM. P. 11.

104. FED. R. EVID. 410.

105. See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION §§ 3-4.1 to 3-4.2 (AM. BAR ASS'N 2014).

106. MODEL RULES OF PROF'L CONDUCT r. 8.4(d) (AM. BAR ASS'N 2015).

107. See Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 735 (2001).

has observed, “a \$100 credit-card purchase of a microwave oven is regulated more carefully than a guilty plea that results in years of imprisonment.”<sup>108</sup>

But it does not have to be. Consider again the Due Process Clause. Every student of criminal procedure knows that the Court did not always read the Fourteenth Amendment’s Due Process Clause as merely incorporating the Bill of Rights (and thus turning those rights into a national “code of criminal procedure”<sup>109</sup>). During the 1940s, the Court read the Due Process Clause as having “an independent potency,”<sup>110</sup> as prohibiting government “conduct that shocks the conscience,”<sup>111</sup> and as requiring processes “essential to a fair trial .... [and] fundamental to the American scheme of justice.”<sup>112</sup>

Consider some of the cases decided under the Court’s “fundamental fairness” approach. In *Strauder v. West Virginia*, the Court relied on fundamental fairness to invalidate the conviction of a black defendant when state law limited jury service to “white male persons.”<sup>113</sup> In *Powell v. Alabama*, the Court reached the same conclusion to vacate the conviction of black youths accused of gang-raping two white women and sentenced by an all-white jury to death,<sup>114</sup> when “no lawyer had been named or definitely designated to represent the defendants” until the actual morning of trial.<sup>115</sup> The Court again relied on due process and its requirement of fundamental fairness to intervene in *Norris v. Alabama*, when blacks were systematically excluded from the jury pool.<sup>116</sup> In its first confession case, *Brown v. Mississippi*, the Court held that the conviction and death sentence of three black sharecroppers accused of murdering

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108. Stephanos Bibas, *Regulating the Plea Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1153 (2011).

109. Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 954 (1965).

110. *Adamson v. California*, 332 U.S. 46, 66 (1947) (Frankfurter, J., concurring).

111. *Rochin v. California*, 342 U.S. 165, 172 (1952).

112. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

113. 100 U.S. 303, 305 (1879).

114. *See* 287 U.S. 45, 71 (1932) (“[T]he failure of the trial court to give [the defendants] reasonable time and opportunity to secure counsel was a clear denial of due process.”). This case, perhaps more than any other during the early criminal procedure era, signaled the beginning of the Court’s heightened sensitivity to the treatment of African Americans in the criminal justice system.

115. *Id.* at 56.

116. *See* 294 U.S. 587, 589-90 (1935).

their white landlord based on confessions obtained by torture of-fended due process.<sup>117</sup> And in *Walker v. Johnson*, the Court invoked notions of fundamental fairness to hold that a plea secured by coercion or deceit from the prosecutor violates due process.<sup>118</sup>

Part of what motivated the Court in these early “fundamental fairness” cases was the imbalance of power between prosecutors and defendants.<sup>119</sup> The Court thus read the Due Process Clause as capacious, and as a catch-all right to protect the innocent as well as the guilty, to ensure accuracy, to level the playing field, and even to further the goal of racial equality. To be sure, by the 1960s, the Court had pivoted from this broad reliance on “fundamental fairness” and turned instead to specific provisions of the Bill of Rights to address claims. Much was lost with this change. Tracey Meares reminds us:

Throughout the early due process cases comprising the infancy of constitutional criminal procedure, the Court demonstrated not only an interest in securing accurate determinations of guilt for state criminal defendants, but also an obvious concern about the relationship between the structure of criminal courts and the social and political legitimacy of American democracy.... While such public-regarding aspects of justice have not been disregarded as irrelevant to criminal procedure decisions following *Gideon*, they occupy a much less pronounced role. Instead, the later decisions reflect the impact of a jurisprudence that focuses its attention on the individual offender and his relationship to the Bill of Rights, often to the exclusion of the public’s perception of the fairness of the criminal justice system’s operation.<sup>120</sup>

But just because much was lost, that loss does not have to be irretrievable. This is a push for a revitalization of due process. Is there any reason to doubt that, at a minimum, a baseline of fundamental fairness—if taken seriously—would mean that prosecutors

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117. See 297 U.S. 278, 285-86 (1936). For more on the story behind *Brown v. Mississippi*, see RICHARD C. CORTNER, A “SCOTTSBORO” CASE IN MISSISSIPPI: THE SUPREME COURT AND *BROWN V. MISSISSIPPI* (1986).

118. See 312 U.S. 275, 286 (1941).

119. The Court was also concerned with what Tracey Meares calls a “public-regarding notion of due process,” namely a concern that the public view the criminal justice system as fair. See Tracey L. Meares, *What’s Wrong with Gideon*, 70 U. CHI. L. REV. 215, 219-20 (2003).

120. *Id.* at 215-16.



should not be able to use the threat of additional charges against a defendant or a defendant's family member to induce a plea, at least when the fulfillment of that threat cannot be justified either on retributive or non-perverse utilitarian grounds?<sup>121</sup> Or that prosecutors should not be able to use the specter of prison rape as a negotiating tool?<sup>122</sup> Indeed, that there is something fundamentally unfair, in perhaps all but the most extreme cases, in rejecting an offer to plead to life without parole? In sum, is there any reason to doubt, as we think about "plea-bargaining law," that such law should also include more oversight over prosecutors during the plea-bargaining stage?

Consider two early cases, both decided under the Due Process Clause. In *Rogers v. Richmond*, the defendant agreed to confess to a murder charge only after the police threatened "to bring in his wife for questioning" and have her "taken into custody."<sup>123</sup> For the Court, it was immaterial that the confession may have been truthful.<sup>124</sup> The issue was that the government's threat to investigate his wife for wrongdoing in order to secure a confession could mean that the confession was the result of coercion, violating due process.<sup>125</sup> Certainly the same could be said of the practice, common among prosecutors today, to exact pleas by threatening to investigate suspects' family members.<sup>126</sup>

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121. See Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 104 (2013) <http://columbialawreview.org/wp-content/uploads/2013/07/Reynolds-113-Colum.-L.-Rev.-Sidebar-102.pdf> [<https://perma.cc/G44A-A2QJ>] (observing that "everyone is a criminal if prosecutors look hard enough").

122. Such references would seem to be prohibited, as I have argued previously. See Capers, *supra* note 49, at 1287 (relying on *Arizona v. Fulminante*, 499 U.S. 279 (1991)). And yet such references are so common that they are not even confined to the shadowy corners of the courthouse. These references are made out loud. The statements the former California Attorney General made about Enron CEO Kenneth Lay are but one example. The Attorney General said, "I would love to personally escort [Lay] to an 8-by-10 cell that he could share with a tattooed dude who says, 'Hi, my name is Spike, honey.'" Michael Barone, *Bill Lockyer Is California Dreaming*, WASH. EXAMINER (May 13, 2009, 12:00 AM), <http://www.washingtonexaminer.com/opinion/blogs/beltway-confidential/Bill-Lockyer-is-California-dreaming-135954.html> [<https://perma.cc/Y8L4-BVRY>].

123. 365 U.S. 534, 535 (1961).

124. See *id.* at 540-43.

125. See *id.* at 548-49.

126. The Court, in *Bordenkircher v. Hayes*, seemed open to considering whether this practice violated due process. The Court noted, "This case does not involve the constitutional implications of a prosecutor's offer during plea bargaining of adverse or lenient treatment for some person *other* than the accused[,] ... which might pose a greater danger of inducing a false

*Machibroda v. United States* is another expansive case.<sup>127</sup> In that case, the petitioner alleged that he had pleaded guilty because the prosecutor had made promises about the length of the sentence he would receive and told him “if he ‘insisted in making a scene,’ certain unsettled matters concerning two other robberies would be added to the petitioner’s difficulties.”<sup>128</sup> In remanding the case, the Court made clear that if the petitioner’s allegations were true, he would be entitled to have his sentence vacated.<sup>129</sup> “A ... plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void.”<sup>130</sup> The threat of additional charges, which the Court found potentially troubling in *Machibroda*, is certainly on par with the type of threats prosecutors routinely make today.

Of course, the likely response is that the Warren Court abandoned this “fundamental fairness” approach in favor of selective incorporation of specific provisions of the Bill of Rights and that the Roberts Court is unlikely to revive the more capacious concept of fundamental fairness. I am more sanguine. Although the Court moved toward selective incorporation, it never disavowed fundamental fairness. Indeed, remnants of a fundamental fairness approach to due process can be seen in cases such as *Holmes v. South Carolina*, reading the Due Process Clause as guaranteeing criminal defendants “a meaningful opportunity to present a complete defense.”<sup>131</sup> It can be read in the requirement—even after *Miranda*—that confessions in fact be voluntary.<sup>132</sup> And it can be read in the Court’s acknowledgment, in *Chavez v. Martinez*, that a due process violation can exist independently of any trial right.<sup>133</sup>

Indeed, although the Court has suggested that the Due Process Clause has limited operation beyond specific guarantees in the Bill

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guilty plea by skewing the assessment of the risks a defendant must consider.” 434 U.S. 357, 364 n.8 (1978). Lower courts have been particularly critical of the practice of threatening prosecution absent probable cause. *See, e.g.*, *United States v. Wright*, 43 F.3d 491, 497 (10th Cir. 1994); *United States v. Nuckols*, 606 F.2d 566, 569 (5th Cir. 1979). Whether these courts would be equally critical of threats to investigate is far from certain.

127. *See* 368 U.S. 487 (1962).

128. *Id.* at 490.

129. *See id.* at 493.

130. *Id.*

131. 547 U.S. 319, 324 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)).

132. *See Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

133. *See* 538 U.S. 760 (2003) (essentially finding that a due process claim could be made even when an individual’s wrongfully obtained confession is never used against him at trial).

of Rights, the Court's record on due process suggests an opening that is often overlooked. As Jerold Israel reminds us, though rarely in the foreground, "constitutional regulation through free-standing due process actually extends today to every phase of the process."<sup>134</sup> This is true of the investigatory stage, the pretrial stage, the trial stage, and sentencing.<sup>135</sup> And it is true of the plea-bargaining stage. Indeed, it is at the plea-bargaining stage that "the due process clause is the dominant source of constitutional regulation."<sup>136</sup>

Due process establishes the minimum amount of information that must be given to the defendant prior to accepting his plea, requires that the record provide a factual basis for the plea under certain circumstances, determines what pressures can be imposed upon a defendant without rendering his plea involuntary, determines at what point there exists a plea agreement which can be "broken," and requires relief for a plea bargain that has been breached by the prosecutor or court.<sup>137</sup>

Although this is not much, it is a start. Couple that start with the fact that the Court has been most receptive to due process claims in the criminal arena when no specific Bill of Rights guarantee covers a particular criminal procedure,<sup>138</sup> as is the case with respect to plea bargaining. All of this leaves an opening for pressing due process claims. Even if the Court is not initially receptive to these claims, these arguments should be made. Some years ago, Chief Justice Roberts dismissed legal scholars as essentially irrelevant. He stated, "What the academy is doing, as far as I can tell ... is largely of no use or interest to people who actually practice law."<sup>139</sup> He has also stated that legal scholarship rarely has done anything "particularly helpful for practitioners and judges."<sup>140</sup> Here is something that

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134. Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 389 (2001).

135. *See id.* at 389-95.

136. *Id.* at 393.

137. *Id.*

138. *See, e.g.,* *Cty. of Sacramento v. Lewis*, 523 U.S. 833 (1998); *Albright v. Oliver*, 510 U.S. 266 (1994).

139. Adam Liptak, *Keep the Briefs Brief, Literary Justices Advise*, N.Y. TIMES (May 20, 2011), [http://www.nytimes.com/2011/05/21/us/politics/21court.html?\\_r=0](http://www.nytimes.com/2011/05/21/us/politics/21court.html?_r=0) [https://perma.cc/4UWY-5LLT] (quoting Chief Justice Roberts).

140. Jess Bravin, *Chief Justice Roberts on Obama, Justice Stevens, Law Reviews, More,*

matters and could be helpful: reinvigorate, and take seriously, the Due Process Clause. And as scholars, we should not be afraid to make arguments based on pathos.<sup>141</sup>

And beyond the Due Process Clause—indeed, beyond looking for constitutional jurisprudence to improve the plea bargaining that “is the criminal justice system”<sup>142</sup>—we must ask ourselves what else can be done. What benefits might flow from Judge Rakoff’s proposal that we modify the federal system, which currently bars judges from participating in plea negotiations? Under his proposal, magistrates would make plea recommendations after hearing the evidence prosecutors intended to offer and the defenses from counsel.<sup>143</sup> What benefits might accrue if we take up Rachel Barkow’s suggestion of bifurcating prosecutors’ offices, such that adjudicative decisions, like deciding the terms on which to negotiate a plea, are handled by a separate team of attorneys than those that handle investigations and trials,<sup>144</sup> a variation of which is working with some success in Milwaukee?<sup>145</sup> Or the suggestion made by such scholars as Gregory Gilchrist<sup>146</sup> and John Rappaport<sup>147</sup> that we “unbundle” trial rights, which may have the effect of leveling the plea negotiation field between the government and the citizen? Or Laura Appleman’s suggestion that we create plea juries?<sup>148</sup> The point here is that this liminal moment is a time for generating and discussing ideas, and hopefully this Symposium will spark more.

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WALLST. J. L. BLOG (Apr. 7, 2010, 7:20 PM), <http://blogs.wsj.com/law/2010/04/07/chief-justice-roberts-on-obama-justice-stevens-law-reviews-more> [<https://perma.cc/RBT2-P3CM>].

141. For an important defense of pathetic arguments, see Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389 (2013).

142. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

143. See Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/archives/2014/nov/20/why-innocent-people-plead-guilty/> [<https://perma.cc/GC9D-WP5P>]. Others have made similar proposals. See Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentence Bargaining*, 84 TEX. L. REV. 2023, 2029 (2006); Anne R. Traum, *Using Outcomes to Reframe Guilty Plea Adjudication*, 66 FLA. L. REV. 823, 828 (2014).

144. See Barkow, *supra* note 64, at 897-99.

145. See Jeffrey Toobin, *The Milwaukee Experiment*, NEW YORKER (May 11, 2015), <http://www.newyorker.com/magazine/2015/05/11/the-milwaukee-experiment> [<https://perma.cc/HR49-TEBU>].

146. See Gilchrist, *supra* note 59, at 1981.

147. See John Rappaport, *Unbundling Criminal Trial Rights*, 82 U. CHI. L. REV. 181, 181 (2015).

148. See Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 733 (2010).

Allow me to go a step further. If federal judges can apply a uniform sentencing discount to those who plead guilty and therefore demonstrate an acceptance of responsibility for their conduct—I am thinking here of the uniform three-point plea discount provided under the U.S. Sentencing Guidelines<sup>149</sup>—then is it really too much to demand something similar of prosecutors, who now can threaten a sentence of probation *or* life imprisonment in the same breath?<sup>150</sup> And if a federal judge, when she departs from the heartland of a normal sentence, must articulate her reasons for doing so, and these reasons must be reasonable in light of stated sentencing goals and rationales for punishment,<sup>151</sup> would it really be too much to demand something similar of prosecutors, those other “ministers of justice,”<sup>152</sup> in negotiating pleas?

#### CONCLUSION

Plea bargaining was not always the criminal justice system. Indeed, it is of fairly recent vintage. This begs the question: Can we go back? Here, I agree with Alschuler: “If someone were to propose a Tea Party (or Back to Basics) Movement for Criminal Justice, I might still join, but I would not give the group more than ten dollars. The tide for a crusade to prohibit plea bargaining has passed.”<sup>153</sup>

That said, we can try to make plea bargaining “less awful.”<sup>154</sup> The goal of this Article has been to think of ways to do just that by thinking about the other side of *Lafler* and *Frye*: imposing some oversight on how prosecutors negotiate pleas. Part of my argument is predicated on reinvigorating the Due Process Clause such that we ask what kind of plea offers are fundamentally unfair. It would be

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149. See U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM’N 2014).

150. This is not an extreme example. It was the plea threat that was made in *Graham v. Florida*, 560 U.S. 48 (2010). In *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), it was five years or life imprisonment. As a former federal prosecutor, I can say that such extreme threats are frequently made.

151. See U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (U.S. SENTENCING COMM’N 2014).

152. *E.g.*, MODEL RULES OF PROF’L CONDUCT r. 3.8 (AM. BAR ASS’N 2015) (describing prosecutors as having “the responsibility of a minister of justice”).

153. Alschuler, *supra* note 14, at 706 (citation omitted). I tend to be a little bit more generous, so I would probably give \$100.

154. Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412, 1423 (2003).

foolhardy to hope, at this late point in the game, that the Court would hold that plea bargaining itself violates due process, though a panel of the Fifth Circuit did just that briefly in 1957.<sup>155</sup> Although the rhetoric of that Fifth Circuit case holds appeal—“Justice and liberty are not the subjects of bargaining and barter”<sup>156</sup>—that ship has sailed. Beyond that, it is not plea bargaining that is the problem but the unequal bargaining power between the parties and the absence of meaningful regulation.<sup>157</sup> Hopefully a newly reinvigorated Due Process Clause can provide some of this regulation. If not, maybe changing the culture of prosecutors’ offices can. What is certain is this: For those of us who do not shy away from the “pursuit of perfect justice,”<sup>158</sup> something must be done. When the plea system means that legally innocent defendants are compelled to plead, when the current system forces defendants, both innocent and guilty, to “choose between Satan and Lucifer,”<sup>159</sup> something must be done.

But as we think about making plea bargaining “less awful,” let us not lose sight of other issues. And let us not forget how interconnected, how networked,<sup>160</sup> every aspect of our criminal justice system is. Plea bargaining, let us not forget, is just one aspect of a criminal justice system that, for too many, “has run off the rails.”<sup>161</sup> Let me put this another way: It is important to study and understand trees. But let us not lose sight that there is a forest to contend with.

Just consider the following:

We live in a country that, between 1970 and 2005, increased its prison population by 628%. We live in a country where one in every one hundred persons is behind bars, where our prisons

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155. See *Shelton v. United States*, 242 F.2d 101 (5th Cir. 1957), *judgment set aside en banc*, 246 F.2d 571 (5th Cir. 1957), *rev'd per curiam*, 356 U.S. 26 (1958).

156. *Id.* at 113.

157. See *Scott & Stuntz*, *supra* note 20, at 1964.

158. *Laffer v. Cooper*, 132 S. Ct. 1376, 1391 (2012) (Scalia, J., dissenting).

159. Daniel Beekman, *Judge Jed Rakoff Says Plea-Deal Process Is Broken, Offers Solution*, N.Y. DAILY NEWS (May 27, 2014), <http://www.nydailynews.com/news/crime/judge-plea-deal-process-fixed-article-1.1806358> [<https://perma.cc/VTA2-XTCK>] (quoting Judge Rakoff).

160. For a discussion of network theory, see Bennett Capers, *Crime, Legitimacy, Our Criminal Network, and The Wire*, 8 OHIO ST. J. CRIM. L. 459, 468-69 (2011).

161. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 5 (2011); *cf.* Alschuler, *supra* note 14, at 706 (describing the criminal justice system as having “gone off the tracks, and the rails themselves have disappeared”).

and jails now hold about 2.4 million individuals. This is more than the population of New Hampshire, more than the population of Wyoming, more than the population of Vermont. Part of this increase is attributable to the war on drugs, to be sure, but part is surely attributable to our turn to longer and longer sentences, including life without parole and de facto life. Consider more numbers. Since 1992 and 2009, the number of prisoners serving [life without parole] sentences has risen from about 12,400 to 41,000, an increase of more than 300%. The number of prisoners serving life sentences is more staggering. As of 2009, one in every eleven prisoners was serving a life sentence.<sup>162</sup>

At the same time, we are seeing staggering increases in misdemeanor prosecutions.<sup>163</sup> Indeed, there is evidence to suggest that our current state of mass incarceration is largely attributable to prosecutors.<sup>164</sup>

So maybe, in this time of falling crime rates and of relative repose, as we think about the import of *Lafler* and *Frye*, as we think about next steps, we should also think about how our steps fit in with the larger goal of fixing the system. For some, one way to improve the system would be for public defenders, already overworked and underfunded, to say “no more”—to reject all plea offers and to force the government to meet its burden of proving every material element beyond a reasonable doubt at trial in every case. Michelle Alexander has suggested this solution,<sup>165</sup> as has Jenny Roberts.<sup>166</sup> My concern is that there would be backlash.<sup>167</sup> This is what I mean

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162. I. Bennett Capers, *Defending Life*, in *LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?* 163, 179 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012).

163. See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1315 (2012); Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1090 (2013).

164. See John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1239, 1242, 1245, 1250, 1253 (2012).

165. See Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), <http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html> [<https://perma.cc/2CU7-DDE5>]; see also Albert Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 38 (1979).

166. See Roberts, *supra* note 163, at 1129.

167. It is telling that when Legal Aid in New York attempted to exert some power in the 1990s, then-mayor Rudy Giuliani responded by attempting to defund Legal Aid. See Jane Fritsch & David Rohde, *Legal Aid's Last Challenge from an Old Adversary, Giuliani*, N.Y. TIMES (Sept. 9, 2001), <http://www.nytimes.com/2001/09/09/nyregion/legal-aid-s-last-challenge->

by things being interconnected. If public defenders attempted to crash the system by taking all cases to trial, I do not doubt legislators might respond by making the trial penalty even more draconian than it already is. So how about this as a friendly amendment: instead of crashing the system, maybe a “slow-down” instead. Plea bargaining, after all, “provides a means by which prosecutors can obtain a larger net return from criminal convictions, holding resources constant.”<sup>168</sup> A “slow-down” would reduce the prosecutor’s return while increasing resources. It would shift the balance of power. Imagine what would happen if each year each public defender took two more cases to trial. Maybe the plea rate would drop from 97 percent, to 94 percent, or 91 percent. And then lower still. What would be the collateral consequences of that?<sup>169</sup> If prosecutors had to devote more resources to trials, would they reduce the number of cases they indict? Would they prioritize cases in such a way as to pursue cases for which punishment is really deserved?

What else? Years ago, I publicly debated Paul Butler on the topic of whether good people should be prosecutors. I still believe that prosecutors can do good. So maybe, since it is the prosecutor’s turn, it is time for more prosecutors to do good, and be good. Imagine prosecutorial culture that no longer rewards harsh penalties but instead rewards just penalties. Imagine a prosecutor’s office that says no to strong-arming pleas by threatening to pursue cases against family members. And imagine a prosecutor’s office deciding, in the face of a defense motion based on due process, on fundamental fairness, to decline to oppose the motion. That is what I am hoping for. Ah, hope.

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from-an-old-adversary-giuliani.html [https://perma.cc/Z4V4-T783].

168. Scott & Stuntz, *supra* note 20, at 1915.

169. To be sure, this raises ethical considerations in determining which cases to take to trial. Considering that many defendants may want to go to trial, however, this concern is not insurmountable.