

# STATE INCENTIVES, PLEA BARGAINING REGULATION, AND THE FAILED MARKET FOR INDIGENT DEFENSE

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## I INTRODUCTION

The plea bargaining process receives minimal oversight from the courts and contains scarce regulatory protections. In the past few years, however, the Supreme Court has issued three decisions that incrementally expand the requirement of adequate assistance of counsel for criminal defendants. The Court has held that the failure to advise a defendant entering a guilty plea of the collateral immigration consequences of conviction,<sup>1</sup> exceedingly poor advice about rejecting a plea offer,<sup>2</sup> and counsel's failure to even convey the terms of a plea deal all constitute breaches of a defendant's Sixth Amendment right to representation.<sup>3</sup> Although these decisions do not portend significant constitutional regulation of prosecutorial tactics or changes to the terms of plea agreements themselves, they have unexplored potential to affect the failing system of public defense.

The Court's opinions lie at the intersection of two "markets" in the criminal justice system: plea bargaining and the provision of indigent defense. The system of plea bargaining relies on free-market conceptions of private ordering, and the process reflects minimal concern with coercion or fairness. Prosecutors are permitted to threaten any legal sanction to induce a plea, and broad potential charges combined with disproportionate sentencing statutes generate substantial leverage. The courts' longstanding "deregulatory" approach indicates indifference to unequal resources and asymmetrical information. The advice of counsel in theory guarantees a voluntary plea despite the hard bargaining permitted in the process.

The vast majority of defendants engaged in plea bargaining—several million each year—rely on a publicly funded system for the provision of counsel.<sup>4</sup> Thus

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1. *Padilla v. Kentucky*, 559 U.S. 356 (2010).
2. *Lafler v. Cooper*, 132 S. Ct. 1376 (2012).
3. *Missouri v. Frye*, 132 S. Ct. 1399 (2012).
4. U.S. DEP'T OF JUST., BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, STATE PUBLIC

the state not only initiates the criminal process and funds the prosecution but also organizes the market for indigent defense. Staggering caseloads and minimal standards have produced an acute crisis in that system. To date, there has also been limited judicial oversight of the adequacy of defense counsel. Though there is a constitutional entitlement to representation, the Court has resisted any particular guidelines for attorney performance.

But by imposing even modest new requirements in the recent trio of cases, the Court has created a potential conflict between the efficiency of the plea bargaining market and the failing market for the representation of indigent defendants in the states. If certain information must be provided to clients in order for plea agreements to stand, then defense lawyers need enough resources to spend a few minutes more with those clients. Moving that lever—with the external force of court-imposed baselines for plea advice—has the potential to alter the state’s incentives and propel the market toward a new equilibrium. In other words, if the constitutional floor even slightly expands the amount of time counsel must spend with defendants to ensure that pleas will be upheld, then the resources allocated to indigent defense might increase as well.

## II

### MARKET-BASED CONCEPTIONS OF PLEA BARGAINING

Negotiated settlements of criminal prosecutions resolve approximately ninety-seven percent of all cases in the federal system and ninety-four percent of criminal cases in state courts.<sup>5</sup> The Court has recently recognized that it no longer makes sense to conceptualize plea bargaining as a process that occurs in the shadow of a potential trial. Plea bargaining simply “*is the criminal justice system.*”<sup>6</sup>

Plea bargaining is also almost entirely unregulated. A completed plea agreement has the same force and effect as a jury verdict following a trial,<sup>7</sup> yet the judgment issues largely without any public adjudication or concern with public law conceptions of fairness. The Federal Rules of Criminal Procedure set forth some procedural requirements for the entry of guilty pleas,<sup>8</sup> such as informing a defendant of her trial rights and the statutory maximum penalties she

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DEFENDER PROGRAMS, 2007 3 (2010), <https://www.bjs.gov/content/pub/pdf/spdp07.pdf> [<https://perma.cc/R5WT-2RWP>].

5. *Frye*, 132 S. Ct. at 1407. The state misdemeanor plea rate is slightly higher. See Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1064 (2015) (noting that the “ninety-five percent plea rate generates millions of convictions without the kinds of procedural or evidentiary checks on which we typically rely to ensure accuracy and fairness”); see also Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE L. REV. 1049, 1052 (2013) (describing the petty offense system as a “speedy, low-scrutiny process in which outcomes are largely predetermined”).

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

7. See, e.g., *Kercheval v. United States*, 274 U.S. 220, 223 (1927) (stating that completed pleas, like jury verdicts, are “conclusive”).

8. FED. R. CRIM. P. 11.

may face. When it comes to the substance of the bargains, however, the courts have exercised negligible oversight.

Given caseload pressures, courts treat plea bargains as an efficient way to resolve cases and achieve satisfactory outcomes for both sides. Although there is ample debate about whether plea bargaining is indeed efficient, the current state of the process itself is widely regarded as analogous to private ordering. Courts and commentators alike view plea agreements through the lens of market-based rationales and norms.<sup>9</sup> The private law model overrides “competing public interests, such as fairness, accuracy, proportionality or consistency.”<sup>10</sup> In theory, this is because the parties negotiate freely. The government has an interest in securing a conviction and obtaining a waiver of the default trial right. Certainty of outcome, conservation of executive and judicial resources, and potential cooperation from defendants all factor into the value of a defendant’s plea.<sup>11</sup> And plea agreements appear mutually beneficial because they are “desired by defendants”<sup>12</sup> as the only mechanism for significant leniency in sentencing. That each side possesses some assets to exchange going into the negotiation process, however, does not ensure the efficiencies of private ordering. In practice, both the high rate and the harsh terms of plea bargaining arise from an institutional design that strongly favors prosecutorial discretion.<sup>13</sup>

The substantive criminal law offers an expansive menu of charging options and discretionary sentencing factors. Prosecutorial discretion is both horizontal, allowing for multiple counts arising from the same conduct, and vertical, allowing for charges of more or less serious offenses and the addition of sentencing enhancements. Negotiations might occur over offenses, sentencing recommendations, or both. It is hard to overstate the state’s leverage given its control over both the crime charged and the punishment sought.<sup>14</sup> The whole process leaves doubt about “whether bargaining involves a *discount* for pleading guilty or a *penalty* for refusing to do so.”<sup>15</sup>

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

10. *Id.* at 101 (citing Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407 (2008)).

11. See Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1246, 1288 n.223 (2008).

12. *United States v. Ruiz*, 536 U.S. 622, 631 (2002).

13. See Jennifer F. Reinganum, *Plea Bargaining and Prosecutorial Discretion*, 78 AM. ECON. REV. 713, 713 (1988) (emphasizing the role of prosecutorial discretion in government control over pricing in the plea bargaining market). See generally GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003) (explaining how plea bargaining came to dominate criminal process because it enabled prosecutors and courts to control the allocation of resources).

14. See Russell D. Covey, *Plea Bargaining and Price Theory*, 84 GEO. WASH. L. REV. 920, 952 (2016) (“[D]iscretion to charge coupled with constantly inflating guideline-determined sentences provides almost unchecked prosecutorial power over sentencing outcomes.”).

15. BROWN, *supra* note 9, at 93; see also *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (acknowledging that defendants are choosing between exercising trial rights and risking more severe

Despite the imbalance of power, courts persist in treating plea bargaining more or less as a matter of private contract like “any other bargained-for exchange.”<sup>16</sup> They perceive autonomous parties engaged in negotiation and conclude that efficiencies will be served by minimal state regulation.<sup>17</sup> Defendants have the constitutional right to plead not guilty and proceed to trial. Prosecutors have the institutional power to select the most serious charges and seek the maximum sentence. Parties can trade off those rights when they value each other’s entitlements more than their own.

In one canonical defense of plea bargaining as a well-functioning market, Frank Easterbrook describes the market as a “bilateral monopoly.”<sup>18</sup> Defendants, in his view, “shop” when they choose an offense and a jurisdiction.<sup>19</sup> The defendant controls this move *ex ante* but cannot later switch prosecutors, and thus the government exerts leverage *ex post*. Prosecutorial discretion, the negotiation process, and sentencing ranges interact to set the price “in the same way as bargaining in the market for goods and services.”<sup>20</sup> Defendants sell procedural rights that have little value to them at trial but considerable value in trade. The parties save the costs of trial, defendants receive lower sentences, and the government can direct funds to other cases.

The system thus achieves maximum deterrence with its scarce resources. According to Easterbrook’s reasoning, mandatory penalties or significant third-party oversight of negotiations would inhibit freedom to contract and would reduce these efficiencies.<sup>21</sup> Consider the impact of the Federal Sentencing Guidelines, which took effect in 1987.<sup>22</sup> To some extent, the defined sentencing ranges set by the Guidelines operate as a regulatory check on the discount the government can offer to a pleading defendant. But prosecutorial discretion merely shifted to charge bargaining, which gave prosecutors renewed power to set the difference between the sentences.<sup>23</sup> “[D]efendants,” Easterbrook argues, “cannot be made better off by limiting their options.”<sup>24</sup> Although he

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punishment).

16. *Mabry v. Johnson*, 467 U.S. 504, 508 (1984).

17. *See id.*

18. Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 289, 311 (1983); *see also* Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969 (1992).

19. Easterbrook, *Criminal Procedure as a Market System*, *supra* note 18 at 291; *cf.* Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1473–76 (1993) (offering a different description of the market as a “monopsony” with prosecutors as the sole purchasers empowered to offer pleas at subcompetitive prices).

20. Easterbrook, *Criminal Procedure as a Market System*, *supra* note 18, at 308.

21. *Id.* at 298.

22. U.S. SENTENCING COMMISSION 1987, U.S. SENTENCING GUIDELINES MANUAL.

23. *See* FISHER, *supra* note 13, at 212 (noting that “narrowly fixed penalty provisions” lead to prosecutors constraining the judicial sentencing options “by manipulating the slate of charges”); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 129 (2005) (“Changes in federal sentencing practices during the 1980s and 1990s increased the certainty and size of the penalty for going to trial, and mightily influenced the guilty plea and acquittal rates during those times.”).

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

acknowledges the coercive potential of the trial penalty, possible conflicts of interest for defense counsel receiving fixed fees or prosecutors interested in marquee trials, and unequal treatment of defendants, Easterbrook regards all of these objections as trivial when weighed against the deterrence gains of the system.<sup>25</sup>

Other scholars object to the market-based justifications for the plea bargaining process and urge that it be treated as a political system that “lacks the distinctive equilibrium mechanisms that characterize ordinary commercial markets.”<sup>26</sup> According to Stephen Schulhofer, for example, there are agency costs for both the prosecutor acting for the public and the defense lawyer acting for the defendant.<sup>27</sup> The best way to address those costs might be regulation to limit discretion, with features such as fixed discounts in place of case-by-case bargaining.<sup>28</sup> Although the market may be efficient in terms of the volume of completed plea bargains, the lack of regulation also produces unfairness to individual defendants, inaccurate results, coerced dispositions, and compromises based on inadequate information.<sup>29</sup> Even in the case of factually guilty defendants, sentences differ for those similarly situated because they depend on the circumstances of the negotiations rather than the details of the crime.

Critics of the market-based conception have also noted that “the rational actor paradigm in plea bargaining may not capture the reality of the negotiation between prosecutor and defense counsel.”<sup>30</sup> One would expect pricing to emerge from inputs of the probability of conviction, the anticipated sentence upon conviction, and the resources saved by avoiding trial. The price of a plea would then be the size of the discount necessary to induce a defendant to accept a bargain. But rational actors do not prefer pleas to trials in every instance—defendants might disagree about the worth of the case or desire a trial for some reason other than utility maximization. Asymmetrical information, the effects of framing, defendants’ risk preferences, time discounting, and the institutional context arguably have more explanatory power than efficient market bargaining.<sup>31</sup>

In addition, the background touchstone of the likely outcome at trial is more theoretical than real.<sup>32</sup> Defendants cannot calculate the chances of acquittal with

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25. Easterbrook, *Criminal Procedure as a Market System*, *supra* note 18, at 310 (remarking that “some lawyers are just better than others”).

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

27. *Id.* at 49.

28. *Id.* at 52.

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

30. Rebecca Hollander-Blumoff, *Social Psychology, Information Processing, and Plea Bargaining*, 91 MARQ. L. REV. 163, 165 (2007).

31. *Id.* at 165, 169–70.

32. *See* Scott & Stuntz, *supra* note 6, at 1949; *see also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2464 (2004).

any precision because pre-plea discovery is limited when it comes to both exculpatory and inculpatory information.<sup>33</sup> Nor do defendants have sufficient data about likely penalties or the types of bargains typically available for the charged crime. And they frequently must decide in a matter of minutes whether to accept a plea offer.<sup>34</sup> Defendants cannot determine the value of a plea because they can neither estimate the trial outcome nor discount that result by its likelihood. Plea bargaining appears on the surface to function like other markets with pricing mechanisms. But as Russell Covey has recently pointed out, the “primary factors in determining plea prices—expected sentences, probability of conviction, and cost of litigation—all are, and have been, subject to manipulation by the government.”<sup>35</sup>

### III

#### LAISSEZ FAIRE REGULATION OF PLEA BARGAINING

The law of plea bargaining takes almost no account of these objections and relies heavily on rational choice theory. The regulation of plea agreements “through the common-law process is fundamentally no different from the way courts treat other contracts” between civil parties.<sup>36</sup> The Court has adopted wholesale the idea that plea bargaining proceeds from a “mutuality of advantage.”<sup>37</sup> The government saves resources, and defendants receive reduced sentences. The courts’ “market-based rationality is at times almost comically explicit.”<sup>38</sup> In *United States v. Mezzanatto*, for example, the Supreme Court flatly stated that “[a] defendant can ‘maximize’ what he has to ‘sell’ only if he is permitted to offer what the prosecutor is most interested in buying.”<sup>39</sup> Or, as Easterbrook writes, “judges must be careful not to override real people’s actual views about their actual interests in favor of what judges think those views and interests ought to be.”<sup>40</sup>

In accordance with this conception, the plea system is “built around prosecutorial discretion, defense autonomy to trade away procedural

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33. See *United States v. Ruiz*, 536 U.S. 622 (2002); see also Cynthia Alkon, *The Right to Defense Discovery in Plea Bargaining Fifty Years After Brady v. Maryland*, 38 N.Y.U. REV. L. & SOC. CHANGE 407 (2014); Miriam H. Baer, *Timing Brady*, 115 COLUM. L. REV. 1, 22 (2015); Jenia I. Turner & Allison D. Redlich, *Two Models of Pre-Plea Discovery in Criminal Cases: An Empirical Comparison*, 73 WASH. & LEE L. REV. 285 (2016).

34. See Covey, *supra* note 14, at 946.

35. *Id.* at 921, 949 (explaining that the state manipulates the “supply of penal leniency” by increasing maximum sentence exposure and the number of chargeable offenses).

36. Easterbrook, *supra* note 24, at 551.

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

38. Darryl K. Brown, *Judicial Power to Regulate Plea Bargaining*, 57 WM. & MARY L. REV. 1225, 1272 (2016).

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

40. Easterbrook, *supra* note 24, at 551.

entitlements, and a largely passive judiciary.”<sup>41</sup> The passivity of courts in the face of market justifications leads to disregard for fairness, indifference to accuracy, only superficial assessments of potential coercion, and assumptions about the competency of counsel representing defendants in the plea bargaining process.

First, courts assess fairness to the defendant in the sense of due process as more or less coextensive with a conception of fairness in private markets. The parties to plea bargains retain similar “autonomy from state regulation to compete against or negotiate with others and enter into contracts, with few legal standards about fair bargaining practices, conditions, and contract terms.”<sup>42</sup> Plea negotiations tend to be informal and take place in private. The plea bargain itself is announced in open court and becomes a matter of record only after agreement is reached. In that process, the standards for prosecutorial conduct are no higher than those for other private actors competing in a free market. The Court has deemed the prosecutor’s interest in persuading the defendant to forgo trial rights “constitutionally legitimate.”<sup>43</sup> Nor does the good or bad faith of the prosecutor’s negotiation tactics make any difference, as long as there is no evidence of invidious discrimination such as racial bias.<sup>44</sup> Thus, for negotiated pleas, as for private contracts, “the law permits terms and outcomes widely condemned as unfair.”<sup>45</sup>

Second, courts do not account for the factual accuracy of the outcomes that plea bargaining produces. Actually innocent defendants often reach the rational decision to plead guilty.<sup>46</sup> Indeed, innocent defendants may be more likely to plead under imperfect information and may be more risk averse than guilty defendants.<sup>47</sup> Recent studies of DNA exonerations reveal substantial numbers of wrongful convictions obtained by guilty pleas.<sup>48</sup> Plea bargaining masks factual questions about whether a defendant committed the crime and “is perhaps the most prominent example of the criminal justice system operating collateral to a quest for truth.”<sup>49</sup> The ultimate goal is a completed agreement, often at the

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41. BROWN, *supra* note 9, at 117.

42. Brown, *supra* note 38, at 1273.

43. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (accepting “the simple reality that the prosecutor’s interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty”); *see also* *United States v. Batchelder*, 442 U.S. 114, 123–25 (1979) (approving prosecutorial discretion to make charging decisions with varying punishments).

44. *Batchelder*, 442 U.S. at 118.

45. BROWN, *supra* note 9, at 118.

46. *See* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1117–18 (2008); *see also* *Lafler v. Cooper*, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting) (acknowledging the reality of “prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense”).

47. Scott & Stuntz, *supra* note 6, at 1949; *see also* Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143, 171 (“The reasons people plead guilty after plea bargaining are numerous, and actual guilt has little bearing on the calculus.”).

48. *See, e.g.,* BRANDON L. GARRETT, *CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 150–53 (2011).

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

expense of reliable conclusions about the nature or severity of the crime.<sup>50</sup> Courts thus permit defendants to plead guilty even when they persist in professing their legal innocence.<sup>51</sup> In addition, misdemeanor defendants with strong defense claims frequently enter guilty pleas because they are being held without bail or cannot afford bail. The rational choice is a plea to time served despite convincing evidence of innocence because that resolution is clearly preferable to remaining incarcerated for a longer period pending trial.<sup>52</sup>

Although fairness and accuracy do not play a significant role in the regulation of plea bargaining, courts do reference two constitutional limitations when defendants enter pleas: a Fifth Amendment concern with potential coercion and the Sixth Amendment right to counsel. The Constitution itself makes no mention of plea bargaining, but limited constitutional oversight of the process dates to the 1971 decision in *Santobello v. New York*.<sup>53</sup> There, the Court recognized that plea bargaining was “essential” to an efficient system of criminal justice but also subject to some “safeguards to insure the defendant what is reasonably due in the circumstances.”<sup>54</sup> Specifically, the Court held that prosecutors are bound by the promises they make in plea hearings.<sup>55</sup>

The only bargaining tactics constrained by due process, however, are illegal fraud and outright coercion.<sup>56</sup> Prosecutors may constitutionally threaten any punishment that the law allows.<sup>57</sup> So long as the range of potential charges and sentences has legal justification, manipulating offense and punishment to induce a plea is considered an offer rather than a threat.<sup>58</sup> Accordingly, although defendants no doubt face tough choices, the Court still regards them as free ones.<sup>59</sup> If a plea appears “knowing and voluntary,” and the parties articulate some “factual basis” for the agreement,<sup>60</sup> almost anything goes in the negotiation process.<sup>61</sup>

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50. See generally William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004) (describing the marked difference between civil and criminal settlement markets).

51. *North Carolina v. Alford*, 400 U.S. 25, 38 (1970).

52. Natapoff, Gideon *Skepticism*, *supra* note 5, at 1053 (“Because poor defendants often cannot make bail, they may have to sacrifice work or child care in order to contest their cases, and therefore plead guilty in large numbers.”); see also John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157 (2014).

53. 404 U.S. 257 (1971).

54. *Id.* at 261, 262; see also *Bordenkircher v. Hayes*, 434 U.S. 357, 372 (1978) (Powell, J., dissenting) (“The plea-bargaining process . . . is essential to the functioning of the criminal-justice system.”).

55. See *Santobello*, 404 U.S. at 262 (“[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.”).

56. See *Brady v. United States*, 397 U.S. 742, 750 (1970) (prohibiting only “actual or threatened physical harm” or “mental coercion overbearing the will of the defendant”).

57. See *id.* at 751.

58. See, e.g., ALAN WERTHEIMER, *COERCION* 122–43 (1987).

59. See *Bordenkircher*, 434 U.S. at 364.

60. FED. R. CRIM. P. 11(b)(3).

61. See *Santobello v. New York*, 404 U.S. 257 (1971).



## IV

## DEFENSE COUNSEL IN THE PLEA BARGAINING PROCESS

Defense lawyers play a key role in justifying limited judicial scrutiny under this free-market approach. Commitment to the idea of plea bargaining as an efficient negotiation has important implications when it comes to a second market at work: publicly funded counsel. A defendant must be formally “knowing” with respect to the terms of the bargain, the nature of the charges, the rights being waived, and the potential sentence to be imposed. But a represented defendant makes an “intelligent” plea notwithstanding actual ignorance “of the evidence admissible at trial or the likelihood that trial will result in conviction.”<sup>62</sup> Courts assume that having counsel present provides the requisite notice. That further supposes that the defense lawyer in question is a sophisticated player with a good sense for market prices and customary practices.<sup>63</sup>

## A. Market-Justifying Advice Of Counsel

The Court’s conception of “mutuality of advantage” rests heavily on the presence of competent counsel advising the client about whether to enter into a bargain.<sup>64</sup> Although the pleading defendant is not entitled to “fair process” per se,<sup>65</sup> competent representation functions as a sort of consumer protection in the context of hard bargaining. Almost every time the Court has declined to impose regulation in the plea bargaining context, it has referenced the fact that “courts will satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants *with adequate advice of counsel*.”<sup>66</sup> So assisted by a defense lawyer, defendants are “presumptively capable of intelligent choice in response to prosecutorial persuasion.”<sup>67</sup>

The defense counsel to which the Court refers will be a publicly funded lawyer in more than eighty percent of criminal cases.<sup>68</sup> The plea bargaining market thus interacts with the market for indigent criminal defense. And any regulation of

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62. Russell D. Covey, *Plea Bargaining Law After Lafler and Frye*, 51 DUQ. L. REV. 595, 599 (2013); see also *Brady v. United States*, 397 U.S. 742, 757 (2010) (stating that a defendant cannot withdraw a plea because “his calculus misapprehended the quality of the State’s case or the likely penalties attached to alternative courses of action”).

63. See Albert W. Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 YALE L.J. 1179, 1180 (1975) (noting the Court’s “optimistic view of the defense attorney’s role” in plea negotiations).

64. See *Brady*, 397 U.S. at 754–55; see also *id.* at 748 n.6 (“Since an intelligent assessment of the relative advantages of pleading guilty is frequently impossible without the assistance of an attorney, this Court has scrutinized with special care pleas of guilty entered by defendants without the assistance of counsel . . . .”); see also *Santobello*, 404 U.S. at 261 (“The accused pleading guilty must be counseled.”); *McMann v. Richardson*, 397 U.S. 759, 784 (1970) (Brennan, J., dissenting) (“As long as counsel is present when the defendant pleads, the Court is apparently willing to assume that the government may inject virtually any influence into the process of deciding on the plea.”).

65. See *Corbitt v. New Jersey*, 439 U.S. 212, 225 (1978).

66. *Brady*, 397 U.S. at 758 (emphasis added).

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

68. U.S. DEP’T OF JUST., BUREAU OF JUSTICE STATISTICS SELECTED FINDINGS, INDIGENT DEFENSE 1 (1992), <https://www.bjs.gov/content/pub/pdf/id.pdf> [<https://perma.cc/SLV6-XS2H>].

the standards or conditions for plea bargaining has the potential to affect the failing system of public defense as well.

## B. The System Of Publicly Funded Defense

The provision of counsel to indigent criminal defendants is grounded in the “noble ideal” and soaring rhetoric of the Supreme Court’s 1963 *Gideon* decision.<sup>69</sup> Clarence Earl Gideon was arrested and charged with breaking into a Florida pool hall. At the time, Florida only provided court-appointed counsel in capital cases. Gideon’s request for an attorney was denied, and he represented himself at trial. After he was found guilty and sentenced to five years in prison, he filed a now-famous petition detailing his plight.<sup>70</sup> Justice Black’s opinion for the Court cites the “obvious truth” that a fair trial cannot be guaranteed without the assistance of counsel.<sup>71</sup> Every defendant does not stand equal before the law, he wrote, “if the poor man charged with crime has to face his accusers without a lawyer to assist him.”<sup>72</sup>

*Gideon* has a unique status among the Warren Court pronouncements on criminal procedure. It may be the one decision that enjoys near-universal affection and approval. Even at the time, the attorneys general of half of the states signed a brief supporting the petitioner.<sup>73</sup> Yet despite wide regard for the principle as constitutionally necessary and institutionally valuable, “the overwhelming weight of informed opinion[] is that *Gideon* has not succeeded in providing typical indigent defendants with a competent and vigorous defense.”<sup>74</sup> That failure is the result of inadequate funding for defense counsel.<sup>75</sup>

The recent fiftieth anniversary of the *Gideon* decision prompted substantial analysis of the state of indigent defense,<sup>76</sup> and the inescapable conclusion was that “public defender offices and other indigent defense providers are underfunded and understaffed.”<sup>77</sup> Insufficient resources, overwhelming caseloads, and inadequate oversight render the entire system a “national disgrace.”<sup>78</sup> *Gideon*

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

70. See generally ANTHONY LEWIS, *GIDEON’S TRUMPET* (1964).

71. *Gideon*, 372 U.S. at 344.

72. LEWIS, *supra* note 70, at 189.

73. See Bruce A. Green, *Gideon’s Amici: Why Do Prosecutors So Rarely Defend the Rights of the Accused?*, 122 YALE L.J. 2336, 2340 (2013).

74. Donald A. Dripps, *Up From Gideon*, 45 TEX. TECH L. REV. 113, 114 (2012).

75. See DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* 64, 95 (1999).

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

77. Mark Walsh, *Fifty Years After Gideon, Lawyers Still Struggle to Provide Counsel to the Indigent*, A.B.A. J., (Mar. 1, 2013, 11:10 AM CST), [http://www.abajournal.com/magazine/article/fifty\\_years\\_after\\_gideon\\_lawyers\\_still\\_struggle\\_to\\_provide\\_counsel](http://www.abajournal.com/magazine/article/fifty_years_after_gideon_lawyers_still_struggle_to_provide_counsel) [<https://perma.cc/V9EF-7AZR>] (quoting a speech by United States Attorney General Eric Holder).

78. Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869, 894 (2009); see also Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1045 (2006) (“By every measure in every report analyzing the U.S. criminal justice system, the defense function for poor people is drastically underfinanced.”); Richard

recognized that “lawyers in criminal courts are necessities, not luxuries.”<sup>79</sup> But requiring counsel also imposed an unfunded mandate. And financial pressures on the states have been “the single greatest obstacle to delivering ‘competent’ and ‘diligent’ defense representation.”<sup>80</sup>

Approximately ninety percent of all criminal prosecutions take place in states, counties, and municipalities.<sup>81</sup> As in the federal system, the government funds both the prosecution side and most of the defense side of the criminal justice process. In order to comply with the constitutional mandate to provide indigent defense, states have adopted different models, including salaried attorneys in public defender programs, contracts with private attorneys, and panel attorneys who receive case-by-case compensation from the court. Some public defense systems are statewide organizations, but many are divided into counties or even smaller jurisdictions. In over a third of the states, the provision of services is decentralized, with county-level funding and county-based management of the compensation of attorneys and the delivery of services.<sup>82</sup> The result is often that urban counties are overwhelmed by the volume of cases and the need for indigent defense. Those counties must then rely heavily on flat-fee systems or contract attorneys with fee caps, both of which incentivize hasty pleas.

Regardless of the particular structure for funding and services, every state is currently facing an acute shortage of funds for indigent defense.<sup>83</sup> Moreover, state budget shortfalls are expected to increase, at least in the near term, because of health care costs, underfunded pension plans, infrastructure needs, declining revenues, and federal budget cuts.<sup>84</sup> Far too many jurisdictions have turned to criminal defendants themselves to pay fees that fund the system of public defense. The strained public defender program in New Orleans, for example, receives its funding from fines for traffic infractions.<sup>85</sup> In almost half the states, criminal

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Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 627, 657 (1986).

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

80. See NAT’L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 7 (2009).

81. See Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2153 (2013).

82. See INDIGENT DEF. STUDY COMM’N, N.C. OFFICE OF INDIGENT DEF. SERVS., REPORT AND RECOMMENDATIONS 1 (2000), <http://www.ncids.org/home/ids%20study%20commission%20report.pdf>.

83. Bright & Sanneh, *supra* note 81, at 2153. In contrast, public defense in the federal criminal justice system—largely because of the requirements of the 1964 Criminal Justice Act—functions in a way widely regarded as effective. See, e.g., J. Harvie Wilkinson III, *In Defense of American Criminal Justice*, 67 VAND. L. REV. 1099, 1127 (2014).

84. See STATE BUDGET CRISIS TASK FORCE, FULL REPORT 2–4, 6, 50 (July 17, 2012).

85. See Tina Peng, *I’m a Public Defender. It’s Impossible for Me to Do a Good Job Representing My Clients*, WASH. POST (Sept. 3, 2015), [https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken—its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-981292d5948a40f8\\_story.html?utm\\_term=.1e325a67db0d](https://www.washingtonpost.com/opinions/our-public-defender-system-isnt-just-broken—its-unconstitutional/2015/09/03/aadf2b6c-519b-11e5-981292d5948a40f8_story.html?utm_term=.1e325a67db0d) [<https://perma.cc/58RC-36SU>] (noting that Louisiana is “the only state in America that tries to fund most public defense services with fees associated with traffic tickets, parish by parish”); see also Derwyn Bunton, *Public Defense’s Role in Fighting Injustice*, 22 VERDICT 2, 4 (2016) (describing indigent defense in Louisiana as “a system where public defender budgets depend on traffic fines and other fees charged to their poor clients”).

defendants are required to pay application fees for appointed counsel regardless of indigency.

Under these pressures, state public defense systems fail to attract and adequately compensate experienced lawyers.<sup>86</sup> Hourly rates for public defenders and panel attorneys can run as low as \$40 per hour<sup>87</sup> and in some cases have averaged out to \$4 per hour.<sup>88</sup> Many jurisdictions impose per-case caps regardless of the seriousness or complexity of the case. For example, a defense attorney might earn \$600–\$1200 for handling an entire felony trial.<sup>89</sup> Only rarely do public defense budgets include funds for the experts and investigators necessary to challenge the government's case.<sup>90</sup> And at every level of experience, public defenders earn less than their counterparts on the prosecution side.<sup>91</sup>

Public defender caseloads also exceed maximum guidelines by more than 150% in many jurisdictions.<sup>92</sup> The American Bar Association recommends that attorneys serving as public defenders take on no more than 150 felonies or 400 misdemeanors total each year.<sup>93</sup> In Dade County, Florida, some appointed lawyers have represented as many as 700 felony defendants or 2,225 misdemeanor defendants in a single year.<sup>94</sup> One public defense office in New Orleans, Louisiana, handles the equivalent of 19,000 misdemeanor cases per attorney every year, which averages out to about seven available minutes of attorney time for each disposition.<sup>95</sup> For serious felonies proceeding to trial, public defenders in Missouri spend an average of just nine hours preparing their cases even though a 2013 study concluded that at least forty-seven hours were needed per each similar case.<sup>96</sup>

Recall that the free-market logic of plea bargaining depends on a system in which rational choices are made with sufficient information. The “meet ‘em and plead ‘em” model of representation common in jurisdictions across the United States does not fulfill that condition. Many public defenders are juggling more than one hundred active cases at any given time. They cannot interview clients,

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86. See, e.g., JUSTICE DENIED, *supra* note 80, at 52–70.

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

88. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1853 (1994).

89. Brown, *supra* note 87, at 912–13.

90. A.B.A. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 10–11 (2004).

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

92. *GIDEON'S BROKEN PROMISE*, *supra* note 90, at 18; Wright, *supra* note 91, at 230.

93. A.B.A. STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM* 5 n.19 (2002).

94. KAREN HOUPPERT, *CHASING GIDEON: THE ELUSIVE QUEST FOR POOR PEOPLE'S JUSTICE* 91–94 (2013); JUSTICE DENIED, *supra* note 80, at 68.

95. ROBERT C. BORUCHOWITZ, ET AL., NAT'L ASS'N OF CRIM. DEF. LAW., *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS* 21 (2009).

96. Derwyn Bunton, *When the Public Defender Says, "I Can't Help,"* N.Y. TIMES (Feb. 19, 2016), [http://www.nytimes.com/2016/02/19/opinion/when-the-public-defender-says-i-cant-help.html?\\_r=](http://www.nytimes.com/2016/02/19/opinion/when-the-public-defender-says-i-cant-help.html?_r=).

investigate the facts of the case, or file appropriate motions, let alone effectively negotiate plea bargains. In addition, face-to-face meetings with clients often require travel to distant detention facilities. Hurried conversations in the courtroom itself, or perhaps a hallway or holding cell, are the best that most public defenders can do.<sup>97</sup>

As a result, defendants who have waited weeks or months for representation may then have a five-minute meeting with a defense lawyer before entering a guilty plea and facing substantial penalties.<sup>98</sup> In one Mississippi county, almost half of the indigent defense cases are resolved by guilty plea on the same day that the public defender first meets the client.<sup>99</sup> Seventy percent of the clients represented by a California public defender office plead guilty at their first court appearance, in some cases after less than a minute of explanation about the deal being offered.<sup>100</sup> In market terms, clients achieve no sense of the sales value of their trial rights from these brief encounters. They have insufficient information to make the rational choice on which market justifications for plea bargaining depend.

Several jurisdictions have recently confronted this shortfall and barred public defenders already staggering under their caseloads from taking any additional cases. A Louisiana judge began issuing this order after learning that some defense lawyers were handling up to 180 felonies at a time, and the New Orleans public defender program has stopped taking new cases altogether.<sup>101</sup> Public defenders represent eighty-five percent of all criminal defendants in the jurisdiction, and the postponement of cases for which counsel is not available has raised a significant roadblock in the criminal justice system.<sup>102</sup>

### C. Minimally Adequate Provision Of Counsel

Resource and caseload burdens provide only a partial explanation for the failure of indigent defense. They persist because the constitutional adequacy of counsel is measured by a shockingly low standard.<sup>103</sup> Competent assistance within the meaning of the Sixth Amendment has long been required not only at trial but also in the context of plea bargaining.<sup>104</sup> In order to demonstrate that the

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97. See Peng, *supra* note 85.

98. Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769, 1776 (2016).

99. *GIDEON'S BROKEN PROMISE*, *supra* note 90, at 16.

100. Bright & Sanneh, *supra* note 81, at 2165.

101. Buntun, *supra* note 96; see also *id.* (“Louisiana spends nearly \$3.5 billion a year to investigate, arrest, prosecute, adjudicate and incarcerate its citizens. Less than 2 percent of that is spent on legal representation for the poor.”).

102. See Peng, *supra* note 85.

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

104. See *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

provision of counsel falls below the constitutional bar, however, defendants must satisfy the *Strickland v. Washington* test. They must demonstrate both that counsel's performance failed to comply with prevailing professional norms and also that the deficient performance "materially" affected the outcome of the case.<sup>105</sup>

Under *Strickland*, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."<sup>106</sup> Prevailing professional standards change over time, and the practice norms of an underfunded system have actually begun to inform what constitutes minimally effective counsel. As Justice Marshall asked in his *Strickland* dissent: "Is a 'reasonably competent attorney' a reasonably competent adequately paid retained lawyer or a reasonably competent appointed attorney?"<sup>107</sup> Even where counsel's errors at trial likely cost a defendant an acquittal,<sup>108</sup> a reviewing court can apply post hoc rationalizations and conclude that the "overall representation [was] not bad enough to rebut the presumption of reasonableness."<sup>109</sup>

The notorious toothlessness of the *Strickland* standard—under which napping,<sup>110</sup> intoxicated, slothful,<sup>111</sup> and even mentally impaired lawyers<sup>112</sup> have been found constitutionally sufficient—arises from the Court's reluctance to construct any checklists or recognize any concrete requirements for attorney performance. Instead, *Strickland* instructs reviewing courts to accord "a heavy measure of deference to counsel's judgments."<sup>113</sup>

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*But see* Brady v. United States, 397 U.S. 742 (1970) (holding legal advice about a plea competent despite defendant being incorrectly told that he was eligible for the death penalty).

105. *Strickland*, 466 U.S. at 687.

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

107. *Id.* at 708 (Marshall, J., dissenting).

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

109. George C. Thomas III, *History's Lesson for the Right to Counsel*, 2004 U. ILL. L. REV. 543, 553; *see also* Smith, *supra* note 108, at 520–21 (explaining that claims of constitutional ineffectiveness will fail wherever there is "any conceivable basis for rationalizing the attorney's actions").

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

111. *See* Marc L. Miller, *Wise Masters*, 51 STAN. L. REV. 1751, 1786–87 (1999) (citing examples of borderline incompetence).

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

113. 466 U.S. 668, 691 (1994).

## V

## NEWLY IMPOSED CONSTITUTIONAL BASELINES

Three recent plea bargaining cases have adjusted this calculus. The Court has identified at least small categories of constitutionally inadequate assistance that have the potential to set some minimum requirements. Although defendants have no constitutional right to be offered plea deals, they do have a constitutional right to competent assistance in making the decision whether to accept one.<sup>114</sup>

In *Padilla v. Kentucky*, the Court held that a defense attorney who fails to inform a non-citizen client of the prospect of deportation following a guilty plea renders counsel below an objective standard of reasonableness.<sup>115</sup> The case involved a permanent resident from Honduras whose attorney advised him that he did not have to worry about his immigration status because he had “been in the country so long.”<sup>116</sup> Padilla had spent forty years in the United States, had children who were United States citizens, and served in the United States military.<sup>117</sup> Because he was convicted of drug trafficking, which is an aggravated felony, Padilla was subject to automatic deportation.<sup>118</sup> The Court concluded that a defendant who accepts a plea pursuant to such faulty advice about collateral consequences has been deprived of the Sixth Amendment right to counsel at a “critical phase” of criminal proceedings.<sup>119</sup>

Collateral consequences are not limited to deportation. They include “involuntary civil commitment, sex-offender registration, and loss of the right to vote, to obtain professional licenses, and to receive public housing and benefits.”<sup>120</sup> Many defendants will care more about these consequences than about the criminal convictions themselves. Accordingly, *Padilla* represents a potentially important refinement of *Strickland* that could impact the adequacy of counsel even beyond incorrect advice about immigration law.<sup>121</sup>

The 2012 *Lafler* and *Frye* decisions similarly reassess the adequacy of counsel, but with regard to defendants’ decisions to reject plea bargains. The new set of considerations that the cases introduce could also incrementally lower the *Strickland* barrier.<sup>122</sup> Both cases further establish that plea bargaining is a critical

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114. See *Missouri v. Frye*, 132 S. Ct. 1399, 1405 (2012).

115. 559 U.S. 356 (2010).

116. *Id.* at 359.

117. *Id.*

118. *Id.*

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

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

121. See *Padilla*, 559 U.S. at 374 (defense counsel must inform defendants of the risk of immigration consequences because “longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less”).

122. Note that there may be more objective metrics of the impact of bad advice during plea

stage of the criminal justice process and in fact the defining stage for almost all criminal defendants.<sup>123</sup> And the Court's reasoning may require lower courts to oversee conduct that had previously been out of judicial view: consultation between defendant and counsel about plea offers.

The defendant in *Frye* was charged with driving on a revoked license—a Class D felony.<sup>124</sup> The government sent a letter to defense counsel proposing either a misdemeanor plea with a recommendation for a ninety-day term or a felony plea with a ten-day term plus a period of probation.<sup>125</sup> Defense counsel never informed the defendant of the offer, and it expired.<sup>126</sup> When the defendant was later re-arrested for driving without a license, he pled guilty to the felony (with no knowledge of the earlier plea offer) and received a sentence of three years in prison.<sup>127</sup> The Court held that “defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.”<sup>128</sup> There was a “reasonable probability” that the defendant would have accepted the lesser plea because he ultimately entered the plea to a more serious charge, with no promise of a sentencing recommendation from the prosecutor.<sup>129</sup>

In the *Lafler* case,<sup>130</sup> the defendant was made aware of a favorable plea offer but got patently bad counsel about whether to accept it, complete with an incorrect explanation of the burden of proof for intent to murder.<sup>131</sup> The defendant was offered fifty-one to eighty-five months of imprisonment in exchange for his plea to assault with intent to murder. He proceeded to trial based on his attorney's forecast that he would prevail because the victim was shot below the waist.<sup>132</sup> Lafler was convicted and received a substantially harsher sentence than the one offered in the plea: 185 to 360 months.<sup>133</sup>

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bargaining than with regard to poor lawyering at trial, because a defendant will typically receive an empirically higher sentence than was offered in the plea agreement. See Jenny Roberts, *Proving Prejudice, Post-Padilla*, 54 HOW. L.J. 693, 732–38 (2011).

123. *Frye*, 132 S. Ct. at 1407.

124. *Id.* at 1404.

125. *Id.*

126. *Id.*

127. *Id.* at 1404–05.

128. *Id.* at 1408.

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

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

131. *Id.* at 1383.

132. *Id.*

133. *Id.*



The *Lafler* Court held that

[i]f a plea bargain has been offered, a defendant has the right to effective assistance of counsel in *considering* whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.<sup>134</sup>

The correct outcome—that is the guilt or innocence of the defendant—is immaterial to the Court’s reasoning. What matters here is whether a defendant lost benefits that “he would have received in the ordinary course but for counsel’s ineffective assistance.”<sup>135</sup>

Commentary on these cases has ranged from asserting that they are “no big deal”<sup>136</sup> to pronouncing them entirely “new ground” in the regulation of plea agreements.<sup>137</sup> In his dissent in *Lafler*, Justice Scalia objected that the Court has opened “a whole new field of constitutionalized criminal procedure: plea bargaining law.”<sup>138</sup> The mixed reviews relate to a difficult and still pending remedial question in both cases, which is how to restore the prosecution and defense to the positions they would have occupied absent the constitutional violation. Narrowing interpretations of the cases might also respond to Justice Scalia’s suggestion that the application of hindsight standards will benefit defendants who were not disposed to plead guilty. It will only be the rare case in which a plea offer sits idle for a month, or a lawyer clearly neglects to explain the strength of the prosecution’s proof.<sup>139</sup> Yet almost every defendant convicted at trial can claim that she meant to accept a plea offer. Courts are likely to treat many frustrated defendants like they have long treated defendants complaining of constitutionally ineffective assistance by trial counsel. And a deferential stance with regard to bad decisions about plea bargains would have the same effect as *ex post* justifications for poor trial strategy: few successful claims. Requiring effective assistance of counsel at the plea bargaining stage thus looks momentous at first glance but may not break substantial new ground given its uncertain scope and remedy.<sup>140</sup>

Accordingly, *Padilla*, *Frye*, and *Lafler* may change nothing about oversight of prosecutorial tactics or the basic terms of pleas themselves. In fact, as with other

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134. *Id.* at 1387 (emphasis added).

135. *Id.* at 1388.

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

137. Nancy J. King, *Lafler v. Cooper and AEDPA*, 122 YALE L.J. ONLINE 29 (2012); *see also* Adam Liptak, *Justices’ Ruling Expands Rights of Accused in Plea Bargains*, N.Y. TIMES (Mar. 21, 2012), <http://www.nytimes.com/2012/03/22/us/supreme-court-says-defendants-have-right-to-good-lawyers.html> [<https://perma.cc/9PDE-MVKD>] (stating that the decisions “vastly expanded judges’ supervision of the criminal justice system”).

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

139. *See* Jed S. Rakoff, *Frye and Lafler: Bearers of Mixed Messages*, 122 YALE L.J. ONLINE 25, 26 (2012) (calling the cases “rather easy”).

140. Both the question of remedy and the potential for waiver undercut the procedural impact of the decisions. *See, e.g.*, Nancy J. King, *Plea Bargains That Waive Claims of Ineffective Assistance—Waiving Padilla and Frye*, 51 DUQ. L. REV. 647 (2013).

constitutional controls, they may “operate[] principally to facilitate frequent and efficient plea bargaining.”<sup>141</sup> The cases do not require counsel to fashion dispositions that avoid collateral consequences,<sup>142</sup> or to ensure the fairness of the particular offers that defense lawyers are supposed to communicate. Nor do they impose professional standards of adequate advocacy during the negotiations on the legal or factual strength of the government’s case.

These three decisions thus might be oversold when it comes to their significance to the future regulation of plea bargaining. They do not constrain prosecutorial discretion to charge, narrow the range of potential sentences, or demand the provision of more evidentiary information to defendants. They could, however, modestly increase pricing accuracy by requiring defense counsel to devote some resources to each individual case.<sup>143</sup> And the most significant implications of the decisions may arise from this intersection between the efficiencies of the plea bargaining market and the massive (and failing) market for representation of indigent defendants. Rather than regulate the effectiveness of defense lawyers as negotiators, the Court has mandated certain conversations between defendants and their counsel. Simply by insisting on the provision of some information to clients, the decisions could have an impact on the overall quality of publicly funded representation.

## VI

### THE POTENTIAL FOR MARKET EFFECTS

Incrementally improving indigent defense will hardly transform plea bargaining itself. Both the high incidence of pleas and the terms of the bargains arise primarily from systemic pressures rather than the shortcomings of defense counsel.<sup>144</sup> But specific requirements for the advice that counsel provides in the

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

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

143. See Covey, *supra* note 14, at 964 (“The concept of effective assistance of counsel in plea bargaining could easily be expanded to ensuring that the facts of individual cases are sufficiently developed prior to plea negotiation to satisfy minimum standards of pricing accuracy.”).

144. Even those critics of the plea bargaining market who view it as “grossly flawed” do not blame the quality of counsel for those flaws. See Albert W. Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1, 58 (1975); see also MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 199–243 (1979) (explaining that the high volume of misdemeanor pleas stems from factors, such as the bail process, that defense attorneys cannot control); Stuntz, *supra* note 50, at 2558 (“[G]iven the array of weapons the law provides, prosecutors are often in a position to dictate outcomes, and almost always have much more to say about those outcomes than do defense attorneys.”).

plea process could entail adjustments in the market for indigent defense. Ronald Wright, who has written extensively about the structure of indigent defense funding, stated in 2004 that “[t]he power of money, rather than constitutional standards of quality, must drive any large-scale changes for indigent defense in the future.”<sup>145</sup> Wright correctly underscores the central issue of adequate financing. And these recent developments in the case law could forge a new causal link between constitutional standards and a floor below which defense expenditures cannot go.

Constitutionally regulating the role of defense lawyers in plea bargaining alters the cost-benefit calculus when it comes to funding priorities and thus demonstrates a potentially beneficial market effect. Plea bargaining under free-market rules is often described as corrupting “the purposes and principles of criminal justice” and even compromising the professional roles and norms of both prosecutors and judges.<sup>146</sup> Market forces also have the power, however, to focus attention on the funding crisis that public defender programs face. As long as the imperative to prosecute and the systemic reliance on efficient resolution by guilty pleas remain constant, even marginally higher baselines for adequate counsel at plea bargaining could require more resource allocation to criminal defense.

What a defendant most needs in order to assess a plea offer—that is, to meet the minimal standard of what might be considered a rational actor—is accurate counsel about the strength of the case and the range of potential outcomes. *Padilla*, *Lafler*, and *Frye* could expand the standard of representation. They are not just a general application of *Strickland* but a particularized finding that certain shortfalls in the relationship between counsel and defendant always have constitutional significance. Until *Padilla*, the Court operated on the assumption that defense counsel would provide sufficient information about expected outcomes, and it concluded that courts should not second-guess counsel’s predictions or strategic advice.<sup>147</sup> Now, even an error-free trial or a subsequent voluntary plea that follows the ill-informed decision to reject an initial plea offer cannot cure incompetent counsel.<sup>148</sup>

If real consequences flow from even this small category of inadequate lawyering, the incentives to address the caseloads and resource constraints that prevent effective advocacy could change.<sup>149</sup> The same defense lawyers tasked

145. Wright, *supra* note 91, at 221–22.

146. BROWN, *supra* note 9, at 93; *see also id.* at 94 (concluding that market-based rules encourage participants to “view plea negotiations as instrumental practices driven by partisan interests, rather than as public law adjudication committed to public principles (such as punishment in proportion to guilt), public criteria for fair process, and public responsibility for the integrity of criminal court judgments”).

147. *See Premo v. Moore*, 562 U.S. 115, 124 (2011) (“Plea bargains are the result of complex negotiations suffused with uncertainty, and defense attorneys must make careful strategic choices in balancing opportunities and risks.”).

148. *See Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012) (rejecting the argument that “[a] fair trial wipes clean any deficient performance by defense counsel during plea bargaining”).

149. *See* Lauren Sudeall Lucas, *Lawyering to the Lowest Common Denominator: Strickland’s Potential for Incorporating Underfunded Norms Into Legal Doctrine*, 199 FAULKNER L. REV. 199, 199

with ultimately taking cases to trial are the ones who represent the vast majority of defendants who instead enter pleas. There is no *ex ante* distinction drawn within public defender programs between defendants who will and will not enter into plea agreements. Nor can defense lawyers predict which clients will exercise their right to trial. Because defendants who negotiate pleas and defendants who contest their guilt coexist in a single system of both representation and adjudication, movement with regard to one part of the system has spillover effects on the factual and legal integrity of other cases as well. Responding to the hydraulic pressure to bring counsel at plea bargaining up to a level that will maintain the volume of cases resolved by pleas could affect the quality of defense lawyering across the board.

One recent demonstration of the interwoven effects of state enforcement goals and funding requirements arose in New Orleans. In April 2016, a judge ruled that defendants in custody in New Orleans, awaiting trial but unable to access defense counsel, should be released.<sup>150</sup> In a decision addressing the cases of seven defendants accused of violent felonies but unrepresented for more than three months, the court held that the failure of the state to adequately fund indigent defense violated the Louisiana Constitution, the Sixth Amendment right to counsel, and the Fourteenth Amendment right to due process. The order is stayed pending appeal, but the state faces the prospect of the release of hundreds of additional defendants without assigned defense counsel if it is upheld. A mandate to proceed to trial in cases in which defendants received inadequate assistance of counsel in plea bargaining could have similar systemic impact.

As Donald Dripps writes, “[l]egislatures disinclined to fund indigent defense know that the failure to provide effective representation will lead to the reversal of few if any convictions.”<sup>151</sup> But when lawyers negotiating guilty pleas are held to higher standards of representation, and greater resources are required to meet those standards, it follows that funding should increase across the system of public defense. That in turn could increase the availability of counsel to challenge flawed evidence or assert constitutional rights in a way that impacts guilt and innocence determinations at trial.

Indeed, increased resources have already been deployed to respond to the mandate in *Padilla*. Many public defender organizations in large cities have added in-house immigrant service plans that require additional staffing, and they

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(2014) (arguing that the *Strickland* test does not reach issues related to underfunding and should be strengthened by specific substantive guidelines).

150. *Louisiana v. Bernard*, No. 528–021 (La. Crim. Dist. Ct. Apr. 8, 2016).

151. Donald A. Dripps, *Why Gideon Failed: Politics and Feedback Loops in the Reform of Criminal Justice*, 70 WASH. & LEE L. REV. 883, 903 (2013); see also Smith, *supra* note 108, at 544 (“[A] toothless constitutional standard of effective representation . . . virtually invites legislatures to continue underfunding indigent defense”); cf. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 20–21 (1997) (asserting that the *Strickland* standard “leaves no room” for system-wide assessments, and that the case-by-case approach makes it difficult to even separate “low-activity but good representation from laziness or incompetence”); *id.* at 20 (“Defendants tend to win ineffective assistance claims only when their lawyers had a conflict of interest or made some discrete error of great magnitude.”).

have increased operating budgets accordingly.<sup>152</sup> Partnerships have also been established with organizations such as the Immigrant Defense Project, which receives some public funding and offers extensive “*Padilla* compliance” advice. In July 2015, for example, New York State distributed over \$8 million in grants to legal services providers specifically to meet the standards outlined in *Padilla*.<sup>153</sup>

The Supreme Court similarly set a baseline when it translated the general *Strickland* standard into some specific requirements for counsel in death penalty cases in *Wiggins v. Smith*.<sup>154</sup> There, the Court established that to be constitutionally effective, counsel must comply with American Bar Association guidelines mandating investigation into a defendant’s medical, educational, employment, and family history, as well as cultural influences.<sup>155</sup> One result was an increase in public funding for “mitigation specialists” to prepare such reports in death penalty cases.<sup>156</sup>

Put another way, when poor lawyering is no longer cost-free, the investment in slightly better lawyering increases. The exogenous effect of the reinforced constitutional standards can alter the state’s incentives. Advice about accepting or rejecting pleas will now fall below Sixth Amendment minimum standards if untimely, incorrect, or incomplete. Those potential Sixth Amendment violations jeopardize the validity of pleas and the finality of convictions. Imposing a new constitutional floor may lower a trial judge’s inclination to accept a suspect plea bargain. Accordingly, only by observing concrete baselines for representation can the state ensure preservation of the bargained-for exchange.

In a new equilibrium, efficient plea bargains will be those informed by at least minimally adequate advice of counsel. Consumer protection in the form of written explanations, increased communication with defense lawyers, and clearer opportunities to consider offers could result. Public defender programs might be compelled to observe some of the workload limits recommended in almost every report on the failure of indigent defense.<sup>157</sup> Compensation for court-appointed counsel might also move away from the flat rate representation model and toward hourly rates that better incentivize conveying sufficient information to clients.

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152. See PETER L. MARKOWITZ, IMMIGRANT DEF. PROJECT & N.Y. STATE DEFS. ASS’N, PROTOCOL FOR THE DEVELOPMENT OF A PUBLIC DEFENDER IMMIGRATION SERVICE PLAN APP. A (2009) [http://www.brennancenter.org/sites/default/files/legacy/Justice/COD%20Network/Jain%206%20%20Protocol\\_PD\\_Immigration\\_Plan.pdf](http://www.brennancenter.org/sites/default/files/legacy/Justice/COD%20Network/Jain%206%20%20Protocol_PD_Immigration_Plan.pdf) [<https://perma.cc/7F3L-5D7U>] (listing public defender organizations with in-house immigration experts or contracted experts).

153. See Joel Stashenko, *State Distributes \$8.1 Million for Immigrant Legal Centers*, N.Y.L.J. (July 9, 2015), <https://advance.lexis.com/search?crd=6efe1e67-8ba9-4f09-bd820dbd01f2f60c&pdsearchterms=LNSDUID-ALM-NYLAJ-1202731623737&pdmfid=1000516&pdurlapi=true&cbc=0>.

154. 539 U.S. 510 (2003).

155. *Id.* at 524 (citing GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES 11.4.1(C) (A.B.A. 1989)).

156. See *id.* at 546 (Scalia, J., dissenting) (stating that trial counsel now has an “inescapable duty” to seek such reports).

157. See, e.g., JUSTICE DENIED, *supra* note 80.

The Court's recent decisions can be seen as imposing some quality controls. The more time defense counsel has to investigate a case and communicate with a client, the more complete the information a defendant will receive. Of course, the ability to transmit information intersects with discovery rules and practices, and in some jurisdictions defense counsel does not receive sufficient discovery pre-plea to make accurate predictions or give sound advice.<sup>158</sup> An infusion of resources will be especially beneficial in those jurisdictions that provide rules-based discovery of inculpatory and exculpatory evidence or that have prosecutorial offices with a practice of turning over that information. There, money spent on defense will serve as a proxy for the quality of the information a defendant receives. In every jurisdiction, however, this modestly expanded conception of adequate plea bargaining advice will require some expenditure of time. And our legal economy is one in which hours and dollars are largely interchangeable.

Budget shortfalls are an economic reality, but responding to them is also a matter of priorities and political will. Overall, the United States spends .0002% of per capita GDP on the system of public defense, but twice as much on funding for prosecutors, and fourteen times as much on the cost of public corrections.<sup>159</sup> As Justice Sotomayor observed in a recent case concerning a capital defendant's long wait for appointed counsel, "states are always strapped" but they find funds in the criminal justice budgets to "pay the prosecutor."<sup>160</sup> The incentive to pay defense counsel changes along with the slight but significant increase in the information defendants must receive in the plea bargaining process.

## VII

### CONCLUSION

*Padilla*, *Frye*, and *Lafler* do more than identify isolated failures by defense counsel—they impose new substantive preconditions for voluntary pleas.<sup>161</sup> The free-market characteristics of the plea bargaining system itself will almost certainly remain the same.<sup>162</sup> In fact, arguably the decisions now *require* the

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158. See Turner & Redlich, *supra* note 33, at 385 (summarizing an empirical study that indicates that North Carolina's open-file pre-plea discovery generates more efficiencies than Virginia's limited pre-plea disclosures to defendants).

159. JUST. POL'Y INST., SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE 7 (2011). The level of funding contrasts rather starkly with the commitment made in similar adversarial systems. The United Kingdom, for example, spends .2 percent of its per capita GDP on public defense, which is four times more than it spends on the prosecution side. *Id.*

160. Transcript of Oral Argument at 51, *Boyer v. Louisiana*, 133 S. Ct. 1702 (2013) (no. 11-9953).

161. *But see* Cynthia Alkon, *The U.S. Supreme Court's Failure to Fix Plea Bargaining: The Impact of Lafler and Frye*, 41 HASTINGS CONST. L.Q. 561, 562 (2014) (suggesting that the cases concern no more than "single instances of bad lawyering" and do not reach larger systemic issues).

162. See Josh Bowers, *Two Rights to Counsel*, 70 WASH. & LEE L. REV. 1133 (2013) (arguing that even as the Court requires more notice to defendants it grows more willing to tolerate functional coercion in plea bargaining). *But see* Covey, *supra* note 62, at 600 (citing the Court's "increasing abandonment of the concept of plea bargaining as an uninhibited free-for-all in which prosecutors have carte blanche to offer criminal defendants whatever deals they think convenient to dispose of cases").

defense lawyer to engage in bargaining as a market participant. But courts cannot uphold the negotiated “contracts” absent minimally adequate advice of counsel.

The changing constitutional landscape in turn addresses a political process failure. Public interest groups that have attempted to litigate the problem of chronic underfunding have had limited success in bringing about indigent defense reform,<sup>163</sup> and the political economy of funding criminal defense has constrained legislative approaches as well.<sup>164</sup> Nor has it been possible for guidelines set forth by professional organizations to raise the standard of representation without a parallel increase in available resources.<sup>165</sup> But a baseline for constitutional competence that makes minute-long meetings between defendants and lawyers just minutes longer could change that. Applied to millions of cases in a system of public defense that costs over \$4 billion nationwide,<sup>166</sup> it might induce some systemic change.

The market rationale for plea bargaining presumes a competent defense lawyer providing information on case value. The Supreme Court has now suggested a minimum amount of information that clients must receive. Transmitting that information will take time, and time requires more funding for legal representation. Because of the sheer volume of cases in which the market for plea bargaining and the market for publicly funded counsel intersect, even this slight pressure on the regulatory lever could increase the incentive for state investment in indigent defense.

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

164. See LEWIS, *supra* note 70, at 211 (quoting Attorney General Robert Kennedy: “The poor man charged with crime has no lobby.”); Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don’t Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1089–90 (1993). *But see* Wright, *supra* note 91, at 254 (“[L]egislatures sometimes vote for things that benefit the defense even when courts interpreting the Constitution do not demand them.”).

165. See STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY § 14–3.2(b) (A.B.A., 3d ed. 1999) (“Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case have been completed.”); *cf.* Wright, *supra* note 91, at 268 (concluding that “[q]uality standards are possible to formulate, but it is virtually impossible to measure, for an entire system, how close the defense attorneys come to fulfilling their obligations under the standards”).

166. See U.S. DEPT OF JUST., BUREAU OF JUSTICE STATISTICS, STATE GOVERNMENT INDIGENT DEFENSE EXPENDITURES, FY 2008-2012 (2014), <https://www.bjs.gov/content/pub/pdf/suide0812.pdf> [<https://perma.cc/E85H-ZKLOQ>]; NAT’L ASS’N OF CRIM. DEF. LAW., FEDERAL INDIGENT DEFENSE 2015: THE INDEPENDENCE IMPERATIVE 17 (2015), <https://www.nacdl.org/indigentdefense/federalcrisis/> [<https://perma.cc/48QG-6M7H>].