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The Duties of Non-Judicial Actors in Ensuring Competent Negotiation

*Stephanos Bibas**

I am delighted that Professor Wes Oliver and the Duquesne University School of Law are hosting this timely and important symposium on plea-bargaining after *Lafler*¹ and *Frye*² and this panel on what it takes to make defense counsel effective negotiators. Those decisions have provoked a long-overdue conversation about what kind of defense lawyering is effective and constitutionally required in a world of guilty pleas. Though the Court recognized decades ago, in *Hill v. Lockhart*,³ that ineffective assistance could taint guilty pleas, it is only now working through what that principle must mean and how to implement it in practice.

Lafler and *Frye* are gratifying in multiple ways. They are symbolically important and can help to educate the bar and change its culture. The central message is that, *pace* Judge Easterbrook,⁴ one cannot blindly trust that the parties will plea bargain well in the shadow of expected trial outcomes. The market for pleas does not function well enough to ensure that plea-bargained outcomes track closely expected trial outcomes, the need to inflict retribution or deter or incapacitate, or similar merits considerations.⁵ One of the most important contributing factors to poor plea bargaining is that defense attorneys are often inexperienced, inept, underfunded, or overworked.⁶ But another is that the standards for effective assistance of counsel, which are already lax, have been focused almost exclusively on mistakes at trial or in prepar-

* Professor of Law and Criminology, University of Pennsylvania. This is an edited transcript of my remarks to a symposium entitled *Plea Bargaining After Lafler and Frye*, held at the Duquesne University School of Law on March 1, 2013. Thanks to Professor Wesley Oliver for organizing this terrific event.

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

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

3. 474 U.S. 52 (1985).

4. See Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992); Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 309-17 (1983).

5. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

6. *Id.* at 2476-86.

ing for trial. One cannot trust trial-focused ineffective-assistance-of-counsel doctrine to guard against plea-bargaining errors.

I agree with Professor Alschuler's prediction at this symposium that courts are going to overturn few convictions *ex post*.⁷ Courts will not be throwing the jailhouse doors open. But that metric of its impact is going to vastly understate the effect of the decisions. The long-term effect of *Lafler* and *Frye* on the system will be *ex ante*. The situation is analogous to the problem of wrongful convictions. DNA evidence is present in only a sliver of cases, so if one focuses on exonerations *ex post* that implicate false confessions or flawed eyewitness identifications, one misses the bigger picture. Nevertheless, those wrongful convictions shine a spotlight that is starting to fuel innocence commissions and reform movements. These reformers have explored ways to prevent and police the causes of wrongful convictions by making a record up front, by taping the interrogation or the like, to prevent these mistakes from happening in the first place. Similarly, *Lafler* and *Frye* will drive changes in the pre-conviction plea-bargaining process.

Even if one agrees with Professor Alschuler that plea bargaining is regrettable, it is not going away any time soon. So, if we are going to focus on preventing the worst bargaining errors, what can we do (in his words) "to make this less awful?" The ideal approach would be to increase greatly the funding and quality of defense counsel. But that is, unfortunately, not going to occur. Reformers have been calling for increased funding for decades, but no changes in support for those programs have occurred. What can we do in a world of scarce, limited resources within a strapped and strained system? Let us also take off the table wholesale decriminalization of drug cases, for instance, to reduce caseloads. I want to work within the roughly realistic world of changes that are possible right now.

Realistically, ineffective-assistance review by judges *ex post* is no panacea. *Ex post* review based on a scant guilty-plea record is not going to catch many errors. But, there are a lot of things that other actors in the criminal justice system can do to backstop the performance of defense counsel and thus to prevent and catch errors, at least the most obvious of them. Again, *Lafler* and *Frye* cannot give every defendant a great lawyer or compensate fully for gradations in ability among counsel, some of whom will be better

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

bargainers than others. The courts will never overturn convictions or sentences simply because a defendant's bargainer is slightly worse than another. But, in cases like *Frye* where the lawyer entirely fails to pass along a plea offer, or *Lafler*, where the lawyer gave grossly inept advice, I think there are ways to catch the worst of those errors, just as health-care professionals catch medical errors.

One of the themes I want to lay out here is that there is much that lawyers can learn from what transpires in the medical field. Evidence-based medicine is far more advanced than evidence-based law. Managed care in medicine is more developed than managed care in law. The ability of organizations to create quality control and procedures designed to catch the most obvious recurring medical errors is much further advanced in the health-care field than in law. Simply by borrowing some ideas developed in those areas of health care, the legal system can at least rein in some of the worst legal errors. So, let us consider different participants in the legal system apart from judges on habeas review.

First, we need to broaden our understanding of what public defender organizations can do. I have argued elsewhere that with limited defendant resources, governments get the most bang for the buck if they concentrate their funding in public defender organizations, as opposed to ad hoc appointments of people who have not accumulated subject-matter expertise.⁸ Jurisdictions that do not already have them could move towards more use of public defenders. I think that internally, public-defender organizations could do much more supervision and training of attorneys. We never think about offering clients second opinions. Before major surgery, health-care providers will pay for a second opinion. I think that before a defendant takes a major felony plea, it would not cost much to have a brief consultation with a second lawyer just to make sure that it is not just one idiosyncratic viewpoint that is leading the accused to go under the legal knife, so to speak.

I also think that we could learn from the way that doctors treat medical errors and the way that the FAA treats near misses in airline crashes. What role might there be for retrospective review of legal errors? Of complaints? Of problems? What about creating feedback loops, to learn systemically about what is falling through the cracks in a public defender organization, for instance? A lawyer may make a mistake once, but such a system would re-

8. Bibas, *supra* note 5, at 2539-40.

duce the chance of repeating the error if supervisors studied the first error and used a feedback mechanism to catch it. We ought to stop treating this problem primarily as one of bad apples, though there is room to weed out bad apples. Instead, we should approach it more as a systemic design issue, to make sure that the internal guidelines guard against similar mistakes the next time a supervisor has to review and approve this particular kind of plea.

Bar committees and the National Association of Criminal Defense Lawyers can play constructive roles here as well. Those organizations can develop standards of care in the same way that insurers in managed medical care developed standards of care. At this symposium, Professor Ronald Wright talked about numerical standards here that might give one a rough guideline for what kinds of representation prove effective, based on empirical evidence.⁹ Defender organizations can develop manuals and training materials. In the medical field, Dr. Atul Gawande has developed an argument for using checklists.¹⁰ Each doctor, of course, thinks that his own clinical judgment is superior and that he has an intuitive feel for what care is right. But, actuarially, professional doctors do make mistakes when they do not follow protocols. Similarly in the legal field, a simple checklist can help avoid common mistakes.

Software can also help. There is now an iPhone app called CrimQuick that a criminal litigator can take into Pennsylvania state court and use to look up the statutory crime, its gravity score, its statutory class, and its statutory maximum penalty. The user can cross-reference it with a client's criminal-history score and the state sentencing guidelines to derive a guidelines sentencing range along with the amount of variance allowed for aggravation and mitigation. The app will not convey everything about the situation, but it will send up red flags in clear cases and yellow flags in unclear cases. Similar tools could, for example, ensure that lawyers advert to whether their clients are citizens and, if they are not, could flag whether the charge of conviction is an aggravated felony triggering mandatory deportation. In this manner, software could catch some errors, and technology could address much of the routine and most predictable collateral conse-

9. Ronald Wright, Professor at Wake Forest School of Law, Comparatively Evaluating Defense Counsel, Presentation at the Duquesne University School of Law Plea Bargaining After *Lafler* and *Frye* Symposium (Mar. 1, 2013).

10. ATUL GAWANDE, *THE CHECKLIST MANIFESTO: HOW TO GET THINGS RIGHT* (2010).

quences of guilty pleas. Those tools could ensure that defense lawyers explain collateral consequences to their clients.

Legal second opinions could extend beyond lawyers to include federal probation officers, who compute presentence investigation reports. Probation officers must calculate likely sentences and could also summarize the elements required for proof. Judges could even delay acceptance of pleas, at least in the major cases, so that probation officers would first prepare presentence reports in time for pleas. Granted, that is impractical in a high-volume misdemeanor court, but for the most serious crimes one could at least benefit from this modest formal investigation before the plea.

Sentencing judges could contribute significantly as well. As I said, at least in the most serious cases, judges can delay acceptance of the plea until ready to combine it with sentencing, especially if there is going to be a presentence investigation. (That will not always be possible, of course, in high-volume courts.) At the plea hearing, the judge or the prosecutor could place the plea offer terms on the record. And, in that fraction of cases where the defendant is barreling towards trial and has turned down the plea, the judge could hold a pre-trial conference.¹¹ There are some judges who are already starting to put the plea offer, its terms, and the defendant's awareness of the offer on the record, so that defendants cannot later claim regret over their decisions and manufacture belated challenges to their pleas. I do not think in practice many defendants succeed in challenging their pleas, but such a process could guard against that danger.

Also, like Professor Alschuler, I favor loosening the rule that, in most jurisdictions, bans judges from participating in plea negotiations.¹² It is misguided. In a world where prosecutors hold all the cards, the judge is a real potential check on the power of the prosecutor. And in a world in which the defense counsel bears the heavy responsibility of performing effectively, the judge again can be a backstop in making sure that the defendant has heard what the terms are and at least a neutral prediction of the likely outcomes. One could add a further safeguard: a particular defendant would remain free to disregard the judge's advice and have his case reassigned to a different judge for trial. I think that would

11. See Bibas, *supra* note 5, at 2542-43.

12. Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1123-34 (1976); see, e.g., FED. R. CRIM. P. 11(c)(1).

also drive the overoptimistic defendant towards taking neutral advice.

Judges could possibly be prompted by the advisory rules committees to create a record at plea colloquies or pretrial hearings. They could ask defendants whether they had discussed proposed pleas with their lawyers and whether the lawyer had followed a checklist and advised him about the applicable sentencing guidelines. Particularly if the parties put the terms of their agreement, indeed the entire plea agreement, in writing, the judge could ensure that the colloquy was meaningful, the terms were on the record, and the parties could not later dispute what was said or what was conveyed.

We could dream about a fundamentally different system, such as an inquisitorial system. In that scenario, a judge would have a more active role, but that would probably be a bridge too far in America given our adversarial tradition embodied in the Bill of Rights. That might be a shame, especially for misdemeanor cases that otherwise receive very little in the way of procedural safeguards. But a full-blown inquisitorial system is probably impractical in America, at least for criminal cases.

Sentencing commissions could also assist a great deal. Such commissions could provide statistical summaries, tabulating the percentages of cases that result in convictions and the distribution of expected sentences after conviction. Some judges, such as Judge Michael Marcus in Multnomah County, Oregon, have developed software systems to display the range of similar charges that have been brought, the results at trial, the convictions, and the expected sentences post-trial and post-plea.¹³ And one could generate vignettes of what the median case looks like, so that a defendant could compare his case to the typical case. Sentencing commissions could assist in developing the evidence, graphics, visuals, and lay explanations, so that even a relatively uneducated defendant could understand very simply that, for example, a trial probably means seven to ten years in jail afterwards with an 85% probability and that a plea results in four or five years of incarceration. Some defendants will remain overly optimistic or be risk-seeking gamblers, regardless of what lawyers and courts do to educate them. But one can at least reduce the risk and the danger

13. See, e.g., Michael Marcus, *Sentencing for Public Safety and Harm Reduction*, SMART SENTENCING, <http://smartsentencing.com/whatwrks.html> (last updated Jan. 22, 2011).

that a defendant's misunderstanding will exacerbate those problems.

There is much that prosecutors can do, particularly in the *Lafler* and *Frye* scenario where the prosecutor wants to negotiate, the defense lawyer wants to negotiate, and everyone wants to negotiate, and the danger is really that a misunderstanding or miscommunication is impeding the negotiation. It is more difficult to address in the reverse scenario where perhaps the defendant's interests are served by not taking the deal. But in the *Lafler* and *Frye* scenarios, one can have reverse proffers, in which the prosecutor sits down with the defendant and says we have these pieces of evidence, and if the jury sees this material in my experience with a couple of eye witnesses and with this physical evidence, you will be convicted and here is the sentencing guidelines range. It is bizarre, but in my experience clients distrust their appointed defense lawyers (because, in their mind, a free lawyer must be worth what they paid for him) and trust prosecutors more. Sometimes, hearing the plain truth from the prosecutor can leave more of a lasting impression on a defendant.¹⁴

I also think there is room within the prosecutor's office to create a process for a second opinion or an internal appeal to supervisors, as Judge Jerry Lynch has suggested.¹⁵ But that is not going to work in run-of-the-mill, low-level misdemeanor cases. The Second Circuit recognized in the *Pimentel* case that if the defendant has a plea bargain, the defendant at least has some ability to predict the sentence. When the defendant does not have a plea bargain but enters an open or blind plea, however, it is a good practice for prosecutors to send a so-called *Pimentel* letter to lay out an understanding of how the sentencing guidelines would apply to the defendant's case.¹⁶ If a *Pimentel* letter details the likely range of sentences and collateral consequences, then there is less room for the defendant to misunderstand the applicable sentencing guidelines. That approach at least provokes conversation between the defendant and the defense lawyer as to why the defendant would expect to improve upon the prosecutor's prediction by pleading

14. See Bibas, *supra* note 5, at 2525.

15. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2147-49 (1998).

16. *United States v. Pimentel*, 932 F.2d 1029, 1034 (2d Cir. 1991) ("invit[ing] Government attorneys to play a similar role [in explaining the likely Guidelines sentence to defendants before acceptance of their pleas] in helping to ensure that guilty pleas indeed represent intelligent choices by defendants").

guilty without a plea agreement. Such an approach also makes it difficult to claim later that the applicable sentencing guidelines were never even part of negotiations or not a subject of discussion.¹⁷

Prosecutors' offices should also require prosecutors to make pleas offers in writing, in plain English, giving copies to the defendant directly, and putting them into a simple, easily understandable form. If they took such steps, it would be more difficult for defendants to claim later that they never received notice.¹⁸

My final point is that the legal profession can learn from the way that health care law monitors informed consent. The legal system must rely upon attorneys' expert judgment. Health care law has a series of backstops, aids, and information that helps communicate the risks involved in various medical procedures and courses of treatment to the patient. A similar procedure would also effectively contribute to the fairness of plea bargaining. Informed consent will not solve the problems highlighted by the critics of plea bargaining, and it will not eliminate the imbalance of power inherent in the system. It would, however, expose the most egregious misunderstandings. It would further guard against manufactured claims, by establishing a record up front and forestalling any gross misunderstandings.

17. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1156-57 (2011).

18. *Id.* at 1154-55.