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STEPHANOS BIBAS

Taming Negotiated Justice

After four decades of neglecting laissez-faire plea bargaining, the Supreme Court got it right. In *Missouri v. Frye*¹ and *Lafler v. Cooper*,² the Court recognized that the Sixth Amendment regulates plea bargaining. Thus, the Court held that criminal defendants can challenge deficient advice that causes them to reject favorable plea bargains and receive heavier sentences after trial. Finally, the Court has brought law to the shadowy plea-bargaining bazaar.

Writing in dissent, Justice Scalia argued that the majority's opinion "opens a whole new boutique of constitutional jurisprudence ('plea-bargaining law')."³ To which I say: it is about time the Court developed some plea-bargaining law. Justice Scalia's objections might have carried more force half a century ago, before the Court itself blessed plea bargaining as a speedy, efficient way to clear congested dockets.⁴ But, having made jury trials too slow and intricate to function in all cases, the Court has long since given up on preserving trials as the norm. In a world where nineteen out of every twenty adjudicated criminal cases ends in a guilty plea,⁵ plea-bargaining law is hardly a "boutique" corner of criminal procedure; it should be central. Since even Justice Scalia countenances plea bargaining as a "necessary evil,"⁶ it behooves us to regulate that evil.

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1. No. 10-444 (U.S. Mar. 21, 2012), <http://www.supremecourt.gov/opinions/11pdf/10-444.pdf> (to be reported at 132 S. Ct. 1399).
 2. No. 10-209 (U.S. Mar. 21, 2012), <http://www.supremecourt.gov/opinions/11pdf/10-209.pdf> (to be reported at 132 S. Ct. 1376).
 3. *Id.*, slip op. at 13 (Scalia, J., dissenting).
 4. See *Santobello v. New York*, 404 U.S. 257, 260-61 (1971); *Brady v. United States*, 397 U.S. 742, 750-53 (1970).
 5. See *Frye*, slip op. at 7 (majority opinion) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").
 6. *Lafler*, slip op. at 12 (Scalia, J., dissenting).

One can understand why the Court was slow to appreciate plea bargaining's central importance. Until now, the Supreme Court's docket and its sense of what is normal have been distorted by the waivers that guilty pleas entail. Guilty pleas themselves waive most rights, and plea bargains often contain additional waivers precluding appeals or collateral attacks on most grounds. Thus, the cases that make it up to the Court disproportionately involve convictions after trial. As I have argued elsewhere, that distorted perspective has sometimes caused the Court to adopt rules for jury trials that have perverse, unintended consequences in the real world of guilty pleas.⁷ *Frye* and *Lafler* may perhaps ameliorate that problem, by opening up claims of gross ineffectiveness in plea bargaining to appellate scrutiny even if the ineffectiveness caused the defendant to reject the bargain. If a defendant rejects a plea bargain and proceeds to trial, there is no waiver to obstruct appellate review. The Court may thus develop a better sense of how modern criminal justice actually works on the ground.

The other flaw in Justice Scalia's dissent is his assumption that nothing matters except for factual guilt, so no defendant can complain if he or she gets a longer sentence anywhere within the broad statutory range. To Justice Scalia, post-trial sentences set the norm of what "the law says [the defendant] deserves," and anything less "embraces the sporting-chance theory of criminal law, in which the State functions like a conscientious casino-operator, giving each player a fair chance to beat the house"⁸ But plea bargaining itself has spread so broadly that it has warped background post-trial sentences, leading legislatures to inflate sentences to give prosecutors extra plea-bargaining chips. Yet even legislatures and prosecutors themselves do not think that these inflated sentences are necessary, so prosecutors stand ready to bargain the sentences down unless a defendant is foolish enough to insist upon a trial. As I have argued and the Court has now agreed: "The expected post-trial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view full prices as the norm and anything less as a bargain."⁹

7. Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097 (2001) (offering this criticism of *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

8. *Lafler*, slip op. at 13 (Scalia, J., dissenting).

9. Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1138 (2011), quoted in *Lafler*, slip op. at 9 (majority opinion).

Nor do juries ensure justice by authorizing the sentences to be imposed, as Justices Scalia¹⁰ and Stevens¹¹ have sometimes implied. At the time of the Founding, jurors had at least an idea of the sentences that their verdicts would authorize, so at one time they did authorize punishments.¹² But today, most states keep jurors ignorant of the sentences for various crimes, so juries do not authorize punishments in any meaningful sense. Thus, the separation of powers on which the Framers relied to do substantive justice has broken down.

Justice Scalia is right that fashioning a remedy for ineffective lawyering in plea-bargaining cases is far from easy. Specific performance is not always possible and may overcompensate defendants who are crying foul only with the benefit of hindsight and regret. Rescission, however, may undercompensate defendants if the plea offer is no longer on the table. For example, cooperating defendants may have risked their lives doing undercover work or testifying at trial, and it is simply impossible to un-ring the bell.

Justice Kennedy's majority opinion forthrightly acknowledges those difficulties and suggests giving trial courts flexibility: "Today's decision leaves open to the trial court how best to exercise that discretion in all the circumstances of the case."¹³ The Court wisely left it to lower courts to experiment with crafting workable remedies. That approach may require ordering prosecutors to reoffer expired plea offers on pain of having sentences overturned, vacating some or all convictions and sentences (particularly when mandatory minimum penalties are in play), or leaving the original conviction and sentence in place.¹⁴

That remedial creativity does trench upon a prosecutor's prerogative to charge and bargain, but that cost is worth bearing. Like judges in the equity courts of old, criminal trial judges must tailor remedies to construct solutions that approximate where the parties would have stood absent constitutionally deficient counsel. That will require a common law process of gradually developing workable standards through precedent. The majority even hints at going further, giving sentencing courts the power to reduce sentences to

10. See *Blakely v. Washington*, 542 U.S. 296, 304-05 (2004).

11. See *Apprendi*, 530 U.S. at 494.

12. See, e.g., Lance Cassak & Milton Heumann, *Old Wine in New Bottles: A Reconsideration of Informing Jurors About Punishment in Determinate- and Mandatory-Sentencing States*, 4 RUTGERS J.L. & PUB. POL'Y 411, 441-42 (2007) (noting that, in the American colonies, as in England, petit jurors could anticipate the sentences that would flow from convictions and "exercise[d] their power to mitigate death sentences that seemed unduly harsh, notably by acquittal").

13. *Lafler*, slip op. at 16 (majority opinion).

14. *Id.* at 12-13, 16.

approximate what the expected postplea sentence would have been, much as civil trial judges have long used remittitur to reduce excessive damage awards.¹⁵ In a case involving the loss of an opportunity to earn a cooperation discount, for example, courts could use that power creatively. They might estimate the sentence reduction that a cooperator would have earned; discount it by the probability that the defendant would not have been awarded the discount; discount it further to reflect the costs that the defendant did not have to incur, such as not risking his life performing dangerous undercover work; and possibly factor in the chance of acquittal that the defendant enjoyed by going to trial (without the benefit of hindsight). Such calculations are necessarily fuzzy, but the alternative to estimating sentence reductions is leaving palpable Sixth Amendment injuries entirely without redress, inflicting years of overincarceration.

The division between the majority and the dissent is not so much a political one as a jurisprudential one rooted in biography and outlook. Justice Scalia approaches matters as an originalist former professor, regulating the eighteenth-century world of the Framers. Justice Kennedy, though an adjunct professor for decades, looks at the world as a seasoned ex-practitioner, responding to the realities facing the bench and bar in the twenty-first century. For the Sixth Amendment to remain meaningful in the real world of guilty pleas, the Court must translate its guarantee of assistance of counsel to apply to plea bargains and the sentences set by those bargains.

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15. See *id.* at 12.